



VOICES AND VIEWS

(Report of the Fiscal Governance Tribunals)



CENTRE FOR SOCIAL JUSTICE (CSJ)
(Mainstreaming Social Justice In Public Life)

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Centre for Social Justice (CSJ)

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Acronyms

ACP	Annual Cash Plan
AMCON	Asset Management Company of Nigeria
BDS	Budget Disbursement Schedule
BIR	Budget Implementation Reports
BOF	Budget Office of the Federation
CBN	Central Bank of Nigeria
CSJ	Centre for Social Justice
DMO	Debt Management Office
DSA	Debt Sustainability Analysis
ECA	Excess Crude Account
FEC	Federal Executive Council
FGN	Federal Government of Nigeria
FRC	Fiscal Responsibility Commission
FSP	Fiscal Strategy Paper
GDP	Gross Domestic Product
IPPIS	Integrated Personnel and Payroll Information System
LNG	Liquefied Natural Gas
M&E	Monitoring and Evaluation
MDA	Ministries, Departments and Agencies of Government
MNCH	Maternal, New Born and Child Health
MTEF	Medium Term Expenditure Framework

MTSS	Medium Term Sector Strategies
NASS	National Assembly
NBS	National Bureau of Statistics
NEEDS	National Economic Empowerment and Development Strategy
NIP	National Implementation Plan
NPA	Nigeria Ports Authority
NPC	National Planning Commission
PIB	Petroleum Industry Bill
PPA	Public Procurement Act
PPP	Public Private Partnerships
RMAFC	Revenue Mobilisation Allocation and Fiscal Commission
SEEDS	State Economic Empowerment and Development Strategy
SME	Small and Medium Enterprises
TA	Transformation Agenda
VAT	Valued Added Tax

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Introduction

“Voices and Views” is a report of the Fiscal Governance Tribunals organised by Centre for Social Justice in late 2014. The Fiscal Governance Tribunals were held across the country to give Nigerians of all classes the opportunity to reveal their experiences with the fiscal system and to proffer solutions to its myriads of challenges. The Tribunals were designed against the background that different stakeholders have different experiences with the fiscal system. These experiences are shaped by power relations and what the stakeholders demand from the system.

The Tribunals provided opportunities for testimonies from stakeholders including contractors and service providers, communities where projects are located, community based organisations, women’s groups, youth associations, various shades of civil society groups, the academia, fiscal governance experts and professional groups, organised labour, private sector and government agencies. The testimonies dwelt on who or which government agencies were involved in the experience and the subject matter of the testimony. It answered questions including; what was the issue at stake? Where is the project located? Where did the encounter with fiscal governance operatives take place? It also sought to unravel why the particular experience happened and how to replicate pleasant experiences and best practices while putting an end to violations of the law and impunity for fiscal malfeasance.

Fiscal governance experts presided over the Tribunals and the proceedings were recorded by rapporteurs. At the end of the day, the challenges were distilled as well as the recommendations for improvement of the system. All these

were done within the context of extant laws such as the Constitution of the Federal Republic of Nigeria 1999, Fiscal Responsibility Act, Public Procurement Act, Financial Regulations, Treasury Circulars, Code of Conduct for Public Officers and various standards on international good practices in fiscal management. The overall purpose was to give citizens a voice in public finance and fiscal management and to provide evidence for the executive and legislature to reform fiscal management.

The report is divided into 5 Parts covering the following: Part 1 deals with Plans and Policies; Part 2 is on Medium Term Expenditure Frameworks and Budget Initiation; Part 3 is on Budget Implementation; Part 4 deals with Institutional Issues, Budget Reporting and Audits; while Part 5 is on Borrowing and Debt Management. Fiscal governance experts gave testimonies about the plan, policy budget continuum and the absence of a convergence between the three. Contractors and service providers testified about the problems associated with capital budget implementation and the public procurement system. Communities and their groups gave their experience about project location, contract implementation, environmental and community issues. The Tribunals had the privilege of hearing from distinguished private sector operatives, economists, lawyers and other professionals who also recounted the experience of their interactions with the system.

Challenges were identified and followed by recommendations and these were supplemented by desk research. The key recommendations dwelt on administrative issues that were needed to improve the implementation of existing laws; enforcement of laws; new proposals for laws to plug existing gaps and leakages; specific actions to be taken by the executive, legislature and the whole gamut of civil society, etc. The outcome of the Tribunals also contributed to our efforts in designing the Fiscal

Responsibility Index (FRI) to gauge the performance of various government agencies in the implementation of good and fit fiscal practices.

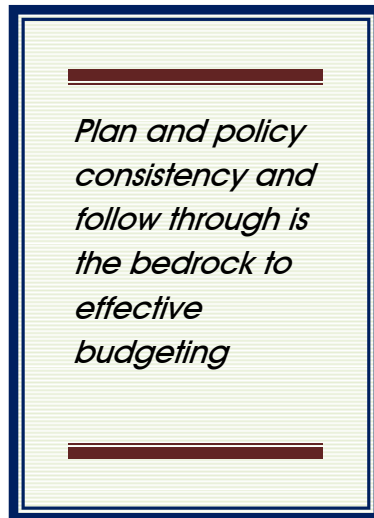
Centre for Social Justice is presenting this report in the firm belief that its recommendations (if implemented) will contribute to improvements in fiscal governance in Nigeria.

PART I

PLANS AND POLICIES

1.1 Policy Reversals, Constant Change of Plans and Policy Direction by Governments and Lack of Follow Through

High level plans and policies form the bedrock for effective budgeting and fiscal interventions. There is a plan, policy continuum which facilitates effective



Plan and policy consistency and follow through is the bedrock to effective budgeting

budgeting. However, one of the key challenges to fiscal governance and indeed, development in Nigeria is the arbitrary and constant policy reversals and change of plans and policies immediately a new government assumes power. This is also reflected in lack of follow through in policy directives. A brief review of this phenomenon since the

return to civil rule in 1999, shows the trajectory. The Obasanjo administration produced and implemented the National Economic Empowerment and Development Strategy (NEEDS) between 2003 and 2007. NEEDS was discarded by Obasanjo's hand-picked successor President Yar'Adua in 2007 when he initiated the Seven Point Agenda. Yar'Adua's Seven Point Agenda was discarded by President Goodluck Jonathan who initiated the Transformation Agenda. The interesting part of this development is that all the three Presidents came from the same political party. If the political party had a clear manifesto and development agenda, there would have been no need for change of focus as soon as a new President was elected from the party.

Some of the reforms under NEEDS, for instance, the preparation of state level development and policy document known as State Economic Empowerment and Development Strategy (SEEDS) ended with the Obasanjo administration; the SEEDS benchmarking exercise which sought to encourage attainment of good and fit practices by state governments was also discontinued by the successor government. The Local Economic Empowerment and Development Strategy for local governments also fizzled out. The privatisation of petroleum refineries under the Obasanjo administration, which was bound to have significant impact on budgeting, was reversed by President Yar'Adua while projects under the power sector reforms were stagnated. This led to cost overruns in the medium term with significant demand for more revenue from the federal budget.

Discussions for Vision 20:2020 had started in the late days of the Obasanjo administration and the Vision was finally prepared in 2009. The Vision was scheduled to be implemented over three phases; the First National Implementation Plan 2010-2013 (NIP); the Second National Implementation Plan 2014-2017 and the Third National Implementation Plan 2018-2020. After the preparation of the First National Implementation Plan 2010-2013, the Second National Implementation Plan was never prepared and no one is thinking of the Third National Implementation Plan. Gradually, government budgeting and programming fails to make reference to the goals, objectives and targets of Vision 20:2020 and there are no lessons drawn from the implementation of the First NIP to improve the plan, policy and budget continuum. Even the implementation of the First NIP was competing with President Jonathan's Transformation Agenda (TA) as the TA was not prepared as a subset of the Vision.

Vision 20:2020 had anticipated this lack of follow through and policy reversal when it proposed the deployment of

legislative instruments to ensure adherence to the Vision and institutionalise specific recommended reforms. Key pieces of legislation such as the Nigerian National Plan Development Act, Project Implementation and Continuity Act recommended by the Vision have not been enacted. The Land Use Act which the Vision specifically slated for removal from the 1999 Constitution and subsequent amendment to facilitate affordability of housing, securitisation of land for credit transactions, and mechanised agriculture, etc still sits in the Constitution.

Recommendations: Use the legal framework to institutionalise generally agreed fiscal policy positions so as to make them difficult to change unless there are clear and urgent circumstances that make continuity unreasonable. The National Planning Commission and the legislature should identify the bills to be enacted into law for the realisation of the Vision and other strategic plans and ensure their enactment. The bills should command priority attention in the legislature.

1.2 Poor Policy Buy In by Critical Stakeholders

Across the Federation, critical stakeholders such as legislators, sector operatives and civil society remain uninformed about key policy positions. The process of preparing many high level policy documents remains technocratic and very few stakeholders are called on board the formulation process. The result is lack of popular ownership of reform processes considering that critical stakeholders are not on board. There are hardly opportunities for explanation and getting the buy-in of the ordinary citizen who is the supposed beneficiary of plans and policies. And these are the policy documents expected to drive the budgetary process for the improvement of the human condition. On the other hand, many MDAs cannot easily grant access to high level policy documents; only a

few printed copies are available. Most times, the policy documents are also not available on the website of the agencies.

For legislators exercising oversight over MDAs, the result is that the right questions are not asked and there is poor understanding of expected outcomes from the budgetary process. For sectoral operatives that are not properly informed on plan and policy directives, they may be working at cross purposes with the national development agenda whilst citizens who should provide the critical mass support do not know what is expected of them.

***Every stakeholder should
be on board the plan,
policy and budgeting
process***

Recommendations: Policy formulation should be a popular process that gets all critical stakeholders on board. Plans and policies should be available in hard and electronic copies and be easily retrievable by the public without the delay of making an official request on paper to a public officer. There is need for sensitisation and capacity building on new development plans and frameworks to get all stakeholders on board.

1.3 Disconnect Between Approved Plans, Policies and Budgets

Planning, policy and the budget form one continuum for the development of a nation. Sectoral budgets are hardly linked with the overall high level policy documents. In evaluating the provisions of the 2010 federal capital budget, the House of Representatives Committee on Public Procurement stated that the link between Medium Term Fiscal Strategy, high

level development plans of government and actual capital spending priorities as spelt out in the annual budget is academic.

The budget most times is merely incremental and focuses on projects and activities as against results. Projects are inserted into the budget without a review of how it fits into the realisation of national goals and policies. For instance, a good number of projects recommended by legislators as constituency projects do not fit into the plan, policy and budget continuum. Pray, what is the targeted policy goal when the Federal Government is committed to build a town hall in one remote community under the guise of constituency project?

Plans, policies and the budget must connect and interrelate for effectiveness of spending

Recommendations: There is the need to re-start the practice of developing Medium Term Sector Strategies (MTSS) by Ministries, Departments and Agencies of Government (MDAs). The MTSS sessions will involve all relevant stakeholders including MDA officials, legislative committee with oversight functions, organised labour and private sector, professionals and civil society. The MTSS reviews ongoing and new project proposals against the background of high level policy documents, prioritises them to fit into available resource envelope and readies them for the annual budget. It is also imperative that the National Planning Commission (NPC) plays a major role in the selection of capital projects going into the budget. The NPC should also publish sectoral key performance indicators and make them available to policy makers and the public. This will be strengthened by timely and regular information collection and data processing and dissemination by

agencies such as the National Bureau of Statistics and the National Population Commission.

1.4 The Monitoring and Evaluation Framework (M&E)

Monitoring and evaluation is an intrinsic component of any successful development initiative. The M&E framework facilitates the measurement of performance to determine whether budgetary expenditures are achieving the desired results. Vision 20:2020 had recommended a functional M&E framework for the realisation of sectoral and high level national goals. With key objectives, strategic outcomes, operational outcomes and key performance indicators attached to MDAs and states of the Federation, the measurement of performance and learning from experience becomes a feasible exercise. Learning could be inter and intra sectoral and among states and this could lead to benchmarking exercises which will ultimately improve performance. However, all the foregoing have been left on the shelves as the score card and other monitoring systems introduced by the former Minister of National Planning Shamsudeen Usman were abandoned after he left office.

Monitoring and evaluation is an intrinsic component of any successful development initiative.

Recommendations: There is the need to mainstream the M&E framework in the design and implementation of any subsequent national development strategy and plan. Extant plans and policies that do not have functional M&E frameworks should be re-designed and re-modeled to include a functional M&E framework. The M&E framework should be linked to the budget so that it will facilitate the

constant fine-tuning of expenditure priorities for the achievement of strategic goals.

1.5 Review and Course Correction

Most of the previous national plans and policies seem not to be living and iterative documents with provisions for timely review and course correction. This has led to the abandonment of plans at the earliest opportunity or once there is little revenue shortfall to finance the plan. Indeed, some of the earlier plans were not properly costed and appear to be a wish or shopping list of projects without alternative scenarios. The implementation risks and challenges are poorly evaluated. All the foregoing makes it difficult to translate plans through the budget into actionable programmes of fiscal intervention. Thus, according to Vision 20:2020, the greatest challenge for most plans is the ability and capacity to translate national strategic intent into action and results by developing evidence based decision-making in Nigeria's public policy space.

Plans and policies need to be living and iterative documents with provisions for timely review and course correction

Recommendations: National Development Plans should be designed with self activating mechanisms which enables citizens to intervene on behalf of the popular will for their implementation. They should be properly costed and have clear monitoring and evaluation mechanisms and provisions for constant review in the face of changing circumstances and conditions. The plans should have alternative funding and implementation scenarios which takes cognisance of the likely changing conditions within the implementation period.

PART 2

THE MEDIUM TERM EXPENDITURE FRAMEWORK (MTEF) AND BUDGET INITIATION

2.1 Medium Term Sector Strategies (MTSS)

The MTEF is designed to be supported by the MTSS of different MDAs. Essentially, MDAs meet with their critical stakeholders to review the state of projects and activities in the MDA, set overall goals for the medium term, review available resource envelope, ongoing and new projects and prioritise them. All these will be done against the background of high level national policy documents in the sector. Thereafter, the MDA is ready to participate actively in an evidence based budgeting process that will likely yield the best value for money.

The practice of preparing MTSS has been stopped in the last four years and the MTEFs prepared during the period look like they are hanging on nothing. By the failure to prepare MTSS, the contributions of critical stakeholders are not harnessed for budgetary improvement. It was even the position of the Budget Office of the Federation that MTSS has been overtaken by the Transformation Agenda of the previous administration. Due to the absence of MTSS, the MTEF has no sectoral envelopes. Rather, vague and nebulous statements about the prioritisation of certain sectors have become the norm.

*Medium Term Sector Strategies (MTSS) feed
into the Medium Term Expenditure Framework
(MTEF)*

Recommendations: The Ministry of Finance should instruct MDAs to revert to the preparation of MTSS which will dovetail into the MTEF process. The indicative sectoral envelopes should be available to MDAs at the time of the

preparation of MTSS. Organised civil society, labour, the private sector and other stakeholders should engage the Presidency and the Ministry of Finance on this issue.

2.2 Time for Preparing the MTEF

The MTEF is to be prepared by the Minister of Finance and readied for the endorsement of the Executive Council of the Federation before the end of the Second quarter in each year being the month of June. However, since the coming into force of the FRA in 2007, the MTEF has never been ready for the endorsement of the Executive Council of the Federation by the end of the second quarter. It has always been late and this contributes to late budget preparation and approval because the MTEF guides the budget.

*Timely
preparation of
the MTEF is
important*

Recommendations: Stakeholders should put pressure on the Ministry of Finance to start the preparation of the MTEF on time, preferably in the middle of the first quarter of the year. This will provide enough time for consulting relevant stakeholders and reviewing earlier macroeconomic projections and their performance. Organised Civil Society, labour, the private sector and other stakeholders should engage the Presidency and the Ministry of Finance on this issue.

2.3 The Preparation Process of the MTEF

The FRA requires the Minister of Finance in preparing the MTEF to hold consultations with states on macroeconomic indicators like the benchmark price of crude oil, interest, inflation and exchange rates. These issues impact on the budget of states that depend on revenues from the Federation Account. The Minister is also enjoined by the

FRA to seek inputs from the National Planning Commission, Joint Planning Board, National Bureau of Statistics, Revenue Mobilisation Allocation and Fiscal Commission and other relevant bodies. But in the body of MTEFs to date, nothing has been stated to indicate that the input of these stakeholders have been sought and obtained.

The Minister is also enjoined to hold public consultations on the Macroeconomic Framework, the Fiscal Strategy Paper, the Revenue and Expenditure Framework, the strategic economic, social and development priorities of government and such other matters as s/he deems necessary. Since 2007, only a few perfunctory consultations have been held.

It is the recommendation that the MTEF be prepared by a team including the National Planning Commission (NPC), Central Bank of Nigeria (CBN), Debt Management Office (DMO), the Fiscal Responsibility Commission (FRC) and the National Bureau of Statistics with the Ministry of Finance/Budget Office of the Federation as the lead agency.

Recommendations: The Minister of Finance is enjoined to revert to the practice of consulting all stakeholders and capturing their input as a basis for the preparation of this foundational document. The process of this consultation and input garnering should also be stated in the MTEF. It is the recommendation that the MTEF be prepared by a team including the National Planning Commission (NPC), Central Bank of Nigeria (CBN), Debt Management Office (DMO), the Fiscal Responsibility Commission (FRC) and the National Bureau of Statistics with the Ministry of Finance/Budget Office of the Federation as the lead agency. The CBN will bring clear perspectives on monetary policy while the Debt Management Office will ensure that debt related provisions are in accordance with the extant Debt Sustainability Analysis. The Bureau of Statistics provides data necessary

for planning whilst the National Planning Commission provides the anchor for medium term development planning. The Fiscal Responsibility Commission brings in best practices in MTEFs to the team. States should also be represented in the team.

2.4 The Macroeconomic Framework

The MTEF is to contain a Macroeconomic Framework setting out the macro-economic projections, for the next three financial years, the underlying assumptions for those projections and an evaluation and analysis of the macroeconomic projections for the preceding three financial years. Thus, the two key components are:

- Macroeconomic projections for the next three financial years and their underlying assumptions;
- Evaluation and analysis of the macroeconomic projections for the preceding three financial years.

However, the macroeconomic frameworks prepared since 2007 contained only projections on fiscal policy and had little or nothing on monetary policy which is a fundamental part of the framework. Many of the projections around fiscal policy do not contain a basis or underlying assumptions justifying them. Thus, there are no indications of how the projections came about. The evaluation and analysis of the macroeconomic framework for the preceding 3 financial years has been lacking. What the Ministers of Finance have repeatedly done is to review the revenue and expenditure outturns for the preceding financial year and the first two quarters of the extant MTEF base year.

The Macroeconomic Framework of all MTEFs since 2007 provide the perfect examples of lack of follow through, abandonment of high level policy directions and refusal to

converge monetary and fiscal policy directions. Vision 20:2020 had directed that¹:

Dealing with the excess liquidity challenge requires innovative approaches, in view of the sources of the problem. One potentially enduring solution, which would avoid the creation of new money and boost the value of the Naira in the foreign exchange market relates to the allocation of foreign exchange earned from oil to the three tiers of government rather than monetizing it. But this may lead to capital flight. Therefore, the Central Bank would need to develop capacity for liquidity forecasting and programming”

The authors of the MTEF have pretended that this policy directive did not exist and have continued the excess liquidity and inflation inducing creation of new money, which puts pressure on the value of the naira and leads to high interest rates. The macroeconomic frameworks also failed to provide a counter narrative as to the reason(s) informing the abandonment of the policy position whilst the scourge of excess liquidity, inflation, continued devaluation of the naira, high interest rates continue to bedevil the nation. The only attempt to adopt this recommendation was initiated by the CBN in 2007 and stopped by the high wire politics of the Yar’Adua administration.

Meticulously follow the FRA in the preparation of the macroeconomic framework and tame excess liquidity, inflation, high interest rates with the adoption of Vision 20:2020’s position on allocation of foreign exchange earnings through certificates directly to the three tiers of government rather than monetizing it

¹ See pages 23 to 24 of the Vision.

Recommendations: The Minister of Finance is enjoined to do a thorough work that meets the demand of the FRA. The Minister may consider recruiting more experts and consultants for the preparation of the MTEF. By the time the multi-disciplinary team from the CBN, NPC, DMO, NBS and FRC join the MTEF preparation team, the macroeconomic framework will be richer. Specifically, we recommend the adoption of Vision 20:2020's position on allocation of foreign exchange earnings through certificates directly to the three tiers of government, rather than monetising the earnings and creating new money.

2.5 The Fiscal Strategy Paper

In accordance with the FRA, the Fiscal Strategy Paper (FSP) is supposed to contain the Federal Government's medium-term financial objectives; the policies for the medium-term relating to taxation, recurrent (non-debt) expenditure, debt expenditure, capital expenditure, borrowings and other liabilities, lending and investment. It should also contain the strategic, economic, social and developmental priorities of the Federal Government for the next three financial years and an explanation of how the financial objectives, strategic, economic, social and developmental priorities and fiscal measures relate to the economic objectives set out in section 16 of the Constitution.

But no attempt has been made in all previous FSPs to link the FSP with the economic objectives in section 16 of the 1999 Constitution. This leaves the fiscal objectives hanging without any anchor. For instance, there are no links between the FSPs and job creation, access to housing, healthcare, portable water, etc. But there can be a convergence for instance between new revenue sources in the housing sector and reforms to the National Housing Fund, the Federal Mortgage Bank of Nigeria Act, Investment and Securities Act, Social Insurance Trust Fund and the Land

Use Act. There can also be a convergence between universal access to basic health care and new laws and policies on compulsory health insurance for all.

The Fiscal Strategy Paper should be linked with the constitutional economic objectives of state

Recommendations: The preparation process of the FSP should be more rigorous and fiscal strategies should be tied to the improvement of the human condition through social impact analysis. It should also involve sectoral experts and rights based policy analysts who will design fiscal policies to match the broad goals of the strategic, economic, social and developmental priorities of FGN and relate them to the economic objectives of state.

2.6 The Revenue and Expenditure Framework

A Revenue and Expenditure Framework is part of the MTEF and it is supposed to be based on reliable and consistent data and targeted at achieving the macroeconomic projections in the macroeconomic framework and consistent with the policy objectives in the FSP. However, projected fiscal reforms are not tied to reduced or increased revenue projections hence, the lack of synergy between the FSP and the Revenue and Expenditure Framework. The policy mantra of diversification of the economy and making the private sector the engine of growth do not reflect as increased revenues from Company Income Tax, VAT and others. Import bans on key commodities that contribute a lot to custom duties do not necessarily reflect reduced revenue projections from that source. Also, fiscal policy statements such as the policy of fiscal consolidation and increased capital budget spending are not reflected in the Revenue and Expenditure Framework.

The MTEF is a composite document and should be harmonised so that all aspects of the MTEF are in consonance with one another. Policy statements and directions in the FSP should not be stated for the fun of it but should find expression in reduced or increased sources of revenue for the government.

Constant and institutionalised revenue leakages and corruption have ensured that not all government revenues are brought into the Revenue and Expenditure Framework picture. For instance, there is clear evidence emanating from various committees that probed the management of the oil sector that officials of the Ministry of Petroleum Resources and the Nigerian National Petroleum Corporation have withheld monies due to the Federation Account from the sale and management of oil and gas resources.

Recommendations: All revenue leakages should be plugged and corrupt officials defrauding the treasury should be prosecuted while there should be a vigorous attempt to synergise the projections in the FSP with the Revenue and Expenditure Framework. The MTEF is a composite document and should be harmonised so that all aspects of the MTEF are in consonance with one another. Policy statements and directions in the FSP should not be stated for the fun of it but should find expression in reduced or increased sources of revenue for the government.

2.7 Consolidated Debt Statement

The MTEF is also to include a Consolidated Debt Statement setting out and describing the fiscal significance of the debt liability of the Federal Government and measures to reduce any such liability. But the MTEF has consistently only shown the Consolidated Debt Statement without any description of the fiscal significance and implications of the debt liability.

No MTEF has stated any measures to reduce debt liability; they have rather been affirming the debts as sustainable and creating excuses for more borrowing. Even though the Debt Sustainability Analysis undertaken yearly by the Debt Management Office proffers stress tests which include scenarios of steep declines in the price of crude oil, no such consideration is given in the MTEF but only a reaffirmation of the mantra of a sustainable debt profile.

However, recent developments in the 2015 budget where Nigeria will use up to 26 percent of retained revenue to service debts calls for great caution. The touted best practice of calculating debt as a percentage of the GDP bears little relevance to Nigeria where the oil sector generates over 85% of foreign exchange and about 70 percent of government revenues (ability to repay) whilst contributing less than 15 percent to the GDP. The other 85 percent of the GDP are virtually dead as sources of foreign currency and government revenue.

Recommendations: Future MTEFs should contain the description of the fiscal significance and implications of the debt liability and measures to reduce the liability and if it must be increased, there must be strict justifications because the spirit of the FRA is for a reduction as against perpetual increase. The Debt Management Office is invited to consider the part of the GDP that produces the bulk of government revenue and foreign exchange as the relevant part for the Debt/GDP computation or in the alternative, some weighing framework to reduce the weight of the component of the “dead GDP” should be devised for use in MTEFs and DSAs.

2.8 Contingent Liabilities and Quasi Fiscal Activities

The MTEF is to contain a Statement describing the nature and fiscal significance of contingent liabilities and quasi-

fiscal activities and measures to offset the crystallization of such liabilities. Contingent liabilities are potential obligations that may crystallise at a future date at the happening of definite event i.e. this could arise where guarantees of debt have been made by FGN with regard to contract agreements for capital projects, aid, or unplanned provisions to cover unpredictable expenses from disaster or sudden obliged development needs. Contractor arrears are never quantified for mentioning in the MTEF.

The MTEF should contain the full details of the contingent liabilities and state the measures to proactively prevent their crystallization and if they do crystallize, to take care of such liabilities.

Quasi Fiscal Activities of FGN include the fiscal activities of government agencies that add to the attainment of the broad macroeconomic goals of the economy. Some of the developmental functions of the CBN are quasi fiscal in nature and should have been captured in the MTEFs. They include: the Agricultural Credit Guarantee Scheme that guarantees agricultural loans; the SME/Manufacturing Refinancing and Restructuring Fund, the Small and Medium Enterprises Credit Guarantee Scheme, the Power and Airline Intervention Funds, Developmental Funds Disbursed to Universities and Research Institutes by the CBN.

In previous years, MTEFs have been silent on the above two but in the year when AMCON CBN funds and banking sector liabilities were mentioned, the MTEF was silent on the quantum, timing, redemption and fiscal significance of AMCON bonds and the outstanding contractor arrears. There was no presentation on measures to prevent the liabilities from crystallising and to offset any liabilities if they crystallise. However, these liabilities are in trillions of naira.

The last Debt Sustainability Analysis which documented the quantum of contingent liabilities and did a projection in the medium term was the DSA 2011. The documented liabilities include pension arrears, contractors' liabilities, pending litigations, and AMCON guarantee. It states as follows²:

The estimate of the Federal Government's contingent liability as at the end of 2010 was N2.589trillion, while the projection for 2011 is N4.47trillion. The ratio of outstanding contingent liability to GDP was 8.86% in 2010, while the projection for 2011 is 9.16%. This is expected to peak at 10.6 percent, as investment in infrastructure reaches its highest point in 2019 and thereafter declines steadily up to 2030. The ratio of contingent liability to total revenue also exhibits a similar upward sloping trend from 2010 to 2019, where it reaches its peak of 122%, meaning that contingent liabilities would be more than the projected revenue of FGN in the medium to long term. Thereafter, it dropped consistently up to 2030. Contingent liability risk is high in the medium term, and could lead to debt sustainability challenges if not proactively mitigated to avoid crystallisation.

Recommendations: The MTEF should contain the full details of the contingent liabilities and state the measures to proactively prevent their crystallisation and if they do crystallise, to take care of such liabilities. Further, the quasi fiscal activities of government in the economy should be fully quantified and stated. This should be the task of an expanded team working on the MTEF.

2.9 Preparation and Presentation of the Budget

The President is permitted under section 81 of the 1999 Constitution to lay the budget before the National Assembly at any time before the end of the financial year. Taking this

² DSA 2011 at pages 28 to 29.

liberty, budgets are prepared and presented late in the year to the National Assembly. Also, section 82 of the 1999 Constitution authorises expenditure in default of appropriation up to a maximum period of 6 months. This also encourages the President to delay the presentation of the annual budget to the legislature considering that he has 6 months of grace period to spend without appropriation and thereby avoiding shutting down government.

Amend sections 81 and 82 of the 1999 Constitution to regulate the timing for budget presentation and passage.

The late presentation usually leads to late consideration and passage. The timing of budget presentation and approval in the last couple of years speaks to the fact³.

Table 1: Timeliness of Budget Preparation and Approval, 2007 – 2013

Budget for Fiscal year:	Presentation of Appropriation Bill to NASS	Passage of Appropriation Bill passed by NASS	Time Lag between presentation of Appropriation Bill to NASS & its passage	Presidential signing of Appropriation Bill into Law	Time Lag between passage of Appropriation Bill by NASS & Presidential (Assent)	Cumulative time lag (between Presentation of Appropriation Bill to NASS & Presidential Assent)
2007	Oct. 6, 2006	Dec. 19, 2006	2 Months	Dec. 22, 2006	3 Days	3 months
2008	Nov. 8, 2007	Feb. 14, 2008	3 Months	April 14, 2008	2 Months	5 months
2009	Dec. 2, 2008	Dec. 18, 2008	16 Days	March 10, 2009	3 Months	3 months
2010	Nov. 23, 2009	March. 24, 2010	4 Months	April 22, 2010	1 Month	5 months
2011	Dec. 15, 2010	March 16, 2011	3 Months	May 26, 2011	2 Months	5 months
2012	Dec. 13,	March. 9,	3 Months	April 13,	1 Month	4 months

³ Annual Report of the Fiscal Responsibility Commission, 2013.

	2011	2012 and Amended Aug. 15, 2012 (Amended Appropriation Bill)		2012		
2013	Oct. 10, 2012	Dec. 20, 2012 and Amended July 25, 2013 (Amended Appropriation Bill)	2 Months	Feb. 26, 2013	2 Months	5 months
2014	Dec. 19, 2013	April. 10, 2014	4 Months	May 21, 2014	1 Month	5 months

The implication of the foregoing is that budget implementation begins after the end of the first quarter of the budget year and this usually leads to poor capital budget implementation and other execution challenges.

Recommendations: NASS should amend section 81 of the 1999 Constitution to fix a definite time frame which should be “not later than the first week of September” of the preceding financial year. On the other hand, the Minister of Finance and NASS may work out an administrative timetable for budget presentation which ensures that it is brought early. Also, the constitutional amendment should include a deadline for NASS to approve the budget “not later than the first week in December”. This will make the budget ready for implementation on the first day of the New Year. NASS should also amend section 82 of the Constitution to reduce the grace period of spending in default of appropriation to 3 months.

2.10 Relevant Documents that should Accompany the Budget to the Legislature

There are detailed provisions regarding the need for the executive to brief the legislature about the parameters of revenue forecasting. It is expected that 30 days before the

deadline for presentation of the Annual Budget of the Federal Government, members of the National Assembly are furnished with estimated revenues for the following year, as well as the current revenue and the respective memorandum items; the revenue estimates are to be disaggregated into monthly collection targets.

The budget is also to be accompanied by measures on cost control and evaluation of results of programmes financed with budgetary resources. Also, a Fiscal Risk Appendix should accompany the budget. The Fiscal Risk Appendix which is an explanatory attachment that provides a set of indicators that can be used to measure domestic fiscal risks. It evaluates the fiscal and other related risks to the annual budget and specifies measures to be taken to offset the occurrence of such risks.

However, at no time has the budget sent to NASS been accompanied by measures on cost control or the evaluation of results of programmes financed with budgetary resources. Measures on cost control will increase the economy and efficiency of budgetary operations whilst the evaluation of results will contribute to effectiveness of public spending and the two will contribute to greater value for money. The Fiscal Risk Appendix has also not been prepared and sent to NASS.

instance, Fiscal Appendix part of the budget, it have

The annual budget should be sent to NASS with the full complement of the documents prescribed by

For the Risk had been 2015 would specified

measures to be taken to mitigate the continued fall in the price of crude oil.

Recommendations: It seems the Ministry of Finance and Budget Office of the Federation lack the requisite capacity to

prepare these documents and should therefore undergo capacity building on the subjects or outsource their preparation to other relevant agencies such as the National Planning Commission. Legislative oversight and civil society pressure is also required to ensure that the provisions of the FRA are implemented to the letter.

2.11 Budget Comprehensiveness

The budget of many MDAs is not comprehensive and fails to cover all revenue and expenditure sources. For instance, many MDAs that receive a lot of donor and aid funds such as health, education and water resources hardly reflect the aid as a source of revenue. Rather, it is only when a provision for counterpart funding is required that the expenditure demand is reflected in the budget. The implication of the foregoing is that double counting is possible, where the treasury provides funding for an activity which is also funded by aid funds. Thus, the room for fraud and mismanagement of public resources is created. It also fails to provide the opportunity for a holistic evaluation of value for money in terms of actual resources expended and results achieved.

If should be made a matter of law and policy that all sources of revenue and expenditure should be reflected and accounted for in the budget.

Recommendations: It should be made a matter of law and policy that all sources of revenue and expenditure should be reflected and accounted for in the budget. The clause inserted by the National Assembly in previous Appropriation Acts requiring all accounting officers to report any income, grants or aid in any form and from any source whatsoever to the legislature should be continued and implemented to the letter. Further, at the time of budget preparation, all such

income and the activities and projects supported by the funds should be sent as an appendix by the executive to the NASS.

2.12 Budget and Performance Indicators

Performance indicators are linked to budget effectiveness

Budgets are crafted in such a way that suggests that all that matters is the expenditure of public resources simply because they have been appropriated. They are not tied to results and key sectoral performance indicators. For instance, in Maternal, New Born and Child Health, there are no targets for the reduction of infant, child and maternal mortality and morbidity tied to budgetary provisions of key agencies in the health sector. Neither is the provision for vaccines, health education and awareness creation tied to any specific indicators that need to be improved. The result is that expenditure seems to be done for the sake of satisfying all righteousness instead of reducing the disease burden or improving the human condition. Despite increased yearly budgets and donor funding, the MNCH indicators continue to deteriorate and stagnate. Thus, fiscal investments are not producing the expected results and spending is not tied to effectiveness.

Recommendations: The budget should be crafted with key performance indicators which will show evidence of improvements and results based on the expenditure of public resources. It will no longer be enough to spend money simply because it has been appropriated but to tie it to results that improve the human condition. These key performance indicators will be drawn from high level policy documents including the constitution, national development plans, sectoral policies, regional and international standards.

2.13 Annual Cash Plan

Before the commencement of each financial year, the Accountant-General of the Federation is expected to prepare an Annual Cash Plan (ACP) setting out the projected monthly cash flows for each month, which would be reviewed in the course of the year to show the actual cash-flow achieved each month.

The Annual Cash Plan (ACP) is a vital and compulsory component of budget planning and implementation

However, the ACP has never been prepared by the Accountant-General of the Federation and a CSJ suit seeking to compel the AGF to do his job is stalled in court⁴. Repeated requests by the Fiscal Responsibility Commission to the Accountant-General of the Federation to prepare this document have been rebuffed. Thus, the benefits accruing from the planning process of the ACP has been defeated by failure of implementation.

Recommendations: Capacity building is required for the office of the Accountant-General of the Federation because it appears the office does not understand how to prepare an ACP. Legislative oversight is needed to ensure that the provisions of the law are not obeyed in the breach whilst civil society and media pressure is required to guarantee the full implementation of the ACP.

2.14 Budget Disbursement Schedule

By the FRA, Budget Disbursement Schedule (BDS) facilitates budget implementation

⁴ FHC/ABJ/CS/251/2013

For ease of implementing the annual budget, the Act requires the Minister of Finance to draw up a Budget Disbursement Schedule. The Schedule is to be derived from the Annual Cash Plan. It is to be prepared and published by the Minister within thirty days of the coming into force of the Appropriation Act for each year .

Also, the Minister of Finance has failed, refused and neglected to prepare the yearly Budget Disbursement Schedule. A suit by CSJ to compel the performance of this duty through a Freedom of Information request is also stalled in court⁵. Repeated requests by the Fiscal Responsibility Commission for the Minister of Finance to prepare this document have been rebuffed. Thus, the planning component of the BDS has been defeated by failure of implementation.

Recommendations: Capacity building is required for the office of the Minister of Finance and the Budget Office of the Federation. Legislative oversight is needed to ensure that the provisions of the law are not obeyed in the breach whilst civil society and media pressure is required to guarantee the full implementation of the Budget Disbursement Schedule.

⁵ Suit No FHC/ABJ/CS/263/2013

PART 3

BUDGET IMPLEMENTATION

3.1 Abandonment of Projects, Time and Cost Overruns

The Nigerian landscape is littered with abandoned projects which the Bunu Presidential Committee put at over N8trillion. On the other hand, annual budgets are suffused with so many projects that cannot be successfully funded and implemented with available finances. The result is that MDA resources are so thinly spread out and managerial capacity to supervise the projects is stretched. A perfect example is the Ministry of Works where the annual federal budget contains over 200 roads while available resources can only fund less than ten of the roads. Year after year, such projects continue to appear in the budget. They will neither be completed nor dropped from the budget. Thus, the projects cannot strictly speaking be said to have been abandoned but they may never get completed. This leads to waste of resources and lack of value for money. Also, MDAs seem not to have a comprehensive list of ongoing and abandoned projects in their Ministry.

NASS should take steps to enact the Project Continuity & Implementation Bill envisaged by Vision 20:2020 into law. It is also imperative for NASS to pass the Capital Budget (Roll Over) Bill so that funds voted for a particular capital project if not utilised within the year, can be carried over to the next succeeding year.

Recommendations: MDAs should ensure strict adherence to the provisions of the Public Procurement Act and the Fiscal Responsibility Act. This will imply that new projects cannot be started until their funding is secured. It will also

imply that project funding has been tied down within the medium term through the Medium Term Expenditure Framework. Further, the MTEF/MTSS prioritisation process guarantees that projects will fit into the available resource envelope and as such, will be properly funded. There should be a moratorium on new capital projects except key and extra important new ones. This will guarantee that resources are not thinly spread.

On the part of the President of the Federal Republic of Nigeria, there is the urgent need to constitute the National Council on Public Procurement to provide policy oversight for procurements at the federal level. The President is also enjoined to constitute the Fiscal Responsibility Commission by appointing new commissioners who are not politicians but seasoned technocrats. State governments that have passed the Public Procurement law are enjoined to inaugurate their Councils or Boards whilst the states that are yet to pass same are enjoined to do so. State level Fiscal Responsibility Commissions should also be activated. The Alhaji Bunu Presidential Committee Report on abandoned projects should be made available to all MDAs and the public.

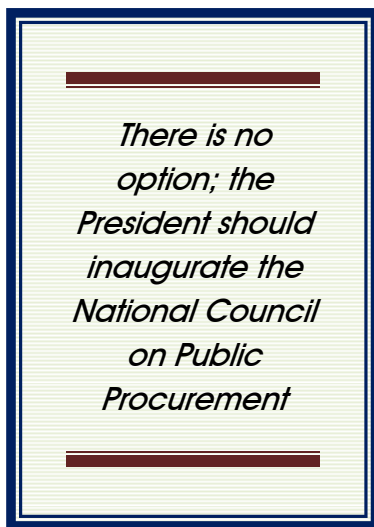
The legislature should take steps to enact the Project Continuity and Implementation Bill envisaged by Vision 20:2020 into law. The key features of the law is to make participatory development planning compulsory across the three tiers of government so as to have harmonious economic and developmental efforts across the Federation; the establishment of a register of ongoing, completed and abandoned projects at each tier of government and guaranteeing funding for the completion of ongoing projects before commencement of new ones.

It is also imperative for the legislature to pass the Capital Budget (Roll Over) Bill so that funds voted for a particular capital project, if not utilised within the year, can be carried

over to the next succeeding year. The possibility of two to three year tied down funds in the budget for specific capital projects can also be explored so that planning and project implementation can proceed over a much wider horizon than the 12 months limit of the fiscal year.

3.2 Inauguration of the National Council on Public Procurement

The provisions of the Public Procurement Act are more observed in the breach than in compliance. First, successive Presidents set the wrong tone by failing to constitute the National Council on Public Procurement. The implication is



There is no option; the President should inaugurate the National Council on Public Procurement

that the powers of the Council have been usurped by a number of agencies including the Bureau of Public Procurement which should serve as secretariat to the Council; the Secretary to the Government of the Federation who issues circulars detailing procurement thresholds, etc. A suit by Centre for Social Justice seeking to compel the President to constitute and inaugurate the

Council is pending at the Court of Appeal.

Also, there is an attempt to politicise the procurement process through a Bill which is pending at the National Assembly. The Bill seeks to amend the PPA by removing representatives of Civil Society and the Nigerian Society of Engineers as members of the Council. It also seeks to make the Federal Executive Council the approving authority for large scale procurements contrary to best practices that removed the hand of elected public officers from the day to day procurement function. However, the part of the

amendment seeking the removal of the Minister of Finance as the chair of the Council is a step in the right direction considering that the Ministry of Finance is a procuring entity.

Recommendations: For the inauguration of the National Council on Public Procurement, pressure should be brought on the President by stakeholders including labour, private sector, civil society organisations and the media to appreciate the risks and danger to public procurement posed by the continued refusal to inaugurate the Council. The National Assembly should use its powers of oversight to compel the inauguration of the Council. Civil society and the media in concert with NASS should ensure that proposed Council members from civil society and the Nigerian Society of Engineers are not removed from the Act. However, they should support the amendment to remove the Minister of Finance as the chairperson of the Council.

3.3 Poor Capital Budget Implementation

The capital budget is poorly implemented and budgeted resources are not fully released even in times of high oil prices. On the other hand, released and available resources are not fully utilised by MDAs for investment. Between the years 2010 - 2012, the percentage of approved capital budget utilised has never exceeded 60 percent while the percentage of cash backed sums utilised approximates 80 percent.

Capital budget implementation is at the heart of budget implementation and should be meticulously handled. The BPP should consider administrative sanctions against the Accounting Officers of derelict agencies or the temporary transfer of the procurement function to another government agency with capacity to implement same.

Table 2 tells the story.

Table 2: Capital Budget Allocation versus Actual Expenditure 2010-2012

Year	Capital Allocation (N'bn)	Actual Expenditure (N'bm)	Variance	Percentage Variance
2010	1,764.69	883.87	-880.82	-49.91
2011	1,146.75	713.3	-433.45	-37.80
2012	1,339.99	744.42	-595.57	-44.45

Source: Consolidated Budget Implementation Reports

Several reasons have been posited for the poor performance of MDAs. These include:

- Poor project conceptualisation, design and planning practices by MDAs thereby limiting the beneficial impact of capital votes released.
- The introduction of projects without feasibility studies, engineering designs or appropriate costing.
- Series of poorly implemented projects being redesigned, having their scope amended, having their implementation stalled or requiring cost variation approvals.
- Stalled projects arising from project site compensation issues.
- Projects sited on difficult terrain and often requiring additional work outside the contract scope resulting in cost variations, stalling of project implementation or the extension of completion periods.
- Poor project monitoring by MDAs and MDAs project data inconsistencies; and
- Lack of ownership by local communities, which leads to the neglect of the completed projects and hostile attitude towards the contractor.
- Late and poor release of appropriated funds.
- Tardiness on the part of MDAs.

Recommendations: Procurement awards should no longer be based on preliminary engineering designs but the final designs. Proper feasibility studies, costing, environmental impact assessment, land acquisition and settlement of community and all preliminary issues should precede the award of contract. Project identification and planning should be participatory to secure the buy-in of the communities where projects are situated. Sound needs assessment and procurement planning should be the basis for the inclusion of projects in the budget and their eventual implementation. The costing exercise should not be perfunctory or made to satisfy all righteousness so that the contract can be awarded. It should be thoroughly and meticulously prepared taking cognisance of all foreseeable issues that may arise in the period of implementation. And where the delays are due to tardiness on the part of MDAs, the BPP should consider administrative sanctions against the Accounting Officer or the temporary transfer of the procurement function to another government agency with the capacity to expeditiously implement same.

The National Assembly should use its powers of oversight and resolutions to ensure that subject to the availability of resources, appropriated funds are released by the Ministry of Finance on time to MDAs. The replication and enforcement of Clause 7 of the 2013 Appropriation Act in future Appropriation Acts is recommended. The clause reads:

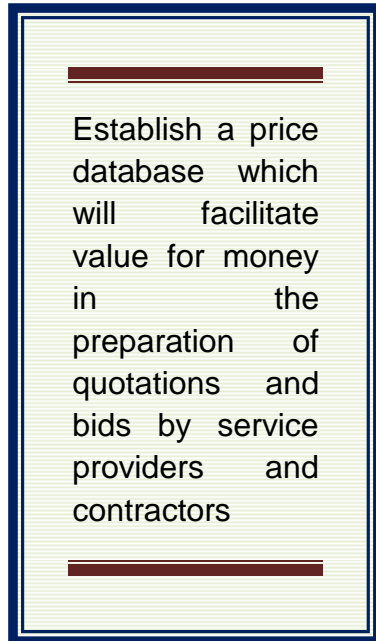
The Minister of Finance shall ensure that funds appropriated under this Act are released to the appropriate agencies/and or organs of government as and when due, provided that no funds from any quarter of the fiscal year shall be differed without prior waiver from the National Assembly.

The President should ensure that Performance Contracts with ministers and leaders of MDAs include key performance

indicators on capital budget implementation. It should have components on target setting; performance monitoring and the Performance Contracts should be available to the public at the website of the MDAs.

3.4 High Cost of Government Contracts

It is reported that the cost of public works and procurements in Nigeria is among the highest in the world. During the



legislative hearings on the Abuja Airport Runway scandal, it turned out that the proposed cost of the runway could build a medium sized airport in some other countries. The contract for the runway was initially put at N64bn, later reduced to N49.6bn. However, similar runways in Djibouti cost N6.99bn; in India and Helsinki N2.14bn; and N7.5bn in Gombe State. For the Abuja Airport Road Contract Scam; in Lot One, the contractor quoted N58.6bn but the contract was

awarded to him at N59.2bn; in Lot Two, the contractor quoted N48bn but the award was at N49bn; the Abuja Northern Expressway quote was at N64.9bn but it was awarded at N66.8bn.

At the federal and state levels, there is no standard and regularly updated price data base for contractors and service providers to fall back upon in preparing bids and quotations. Indeed, the Nigeria Country Procurement Assessment Report 2000 stated that Nigeria lost 60k out of every N1 public investment. Not much has changed between then and

now except the enactment of the PPA which has been observed more in the breach.

Recommendations: There is the need for the establishment of a price database which will facilitate value for money in the preparation of quotations and bids by service providers and contractors. The price database when established should be updated at regular intervals. Sanctions should follow violations of the PPA to ensure the activation of its punishment mechanisms.

3.5 Violations of the Public Procurement Act with Impunity

To reduce impunity in public procurements; energise the punishment and enforcement provisions of the PPA

Open competitive bidding still takes a back seat to the special and restricted methods of tendering to the extent that between the years 2012 and 2013, special and restricted tendering accounted for over 70 percent of federal procurements. Bid rigging, inflation of contracts, etc is still the norm and the result is that Nigeria is yet to reap the promise of value for money mainstreamed in the PPA. Some of the scandals emanating from violations of the PPA include the Abuja Airport Runway inflation which was done by selective tender instead of open competitive bidding; the armoured cars scandal from the Aviation Ministry, inflation of the Abuja Airport Expressway, etc.

In the National Poverty Eradication Programme scandal, the coordinator Magnus Kpakol failed to explain the utilisation of N2.4bn on the purchase of 500 tricycles on behalf of the FGN. He was unable to produce contract documents worth N2.4bn. The audit reports suggested shoddy contract execution, non compliance with due process and paying 100

percent of the contract sum upfront as against 15 percent mobilisation permitted by the PPA.

In all these scandals, hardly has there been any prosecution based on the provisions of the PPA which prescribes stiff penalties for offenders including imprisonment for not less than 5 calendar years, dismissal from service for public officers, debarment from public procurements for a period not less than 5 years for contractors and service providers and a fine equivalent to 25% of the value of the contract in question.

Recommendations: The Bureau of Public Procurement should step up efforts at enforcing discipline and the clear provisions of the PPA against persons who conspire to violate provisions of the Act. This will include the use of administrative sanctions and activating the approved Debarment Proceedings. Procurement audits of MDAs by the Bureau should also become more regular and the results of such audit used to strengthen the procurement system. BPP should also consider the option of a yearly procurement benchmarking exercise among federal MDAs. Lessons will be learnt as it will provide government wide learning from the best in class.

The Bureau should also facilitate capacity building in the anti-corruption agencies – Economic and Financial Crimes Commission and the Independent Corrupt Practices and other Related Offences Commission. This is with a view to equipping them with the requisite capacity to bring charges in court based on the provisions of the PPA.

Civil Society should consider naming and shaming violators of the Act and continued publication of annual reports on the implementation of the PPA. Continued capacity building in all facets of society on the provisions of the PPA is imperative.

PART 4

INSTITUTIONAL ISSUES, BUDGET REPORTING, AND AUDITS

4.1 The Fiscal Responsibility Commission (FRC)

The FRC is established *inter alia* to monitor and enforce the provisions of the FRA and by so doing, promote the economic objectives contained in section 16 of the 1999 Constitution; disseminate and promote international best practices resulting in greater efficiency in the allocation and management of public expenditure, revenue collection, debt control and transparency in fiscal matters.

Strengthen, rather than scrap the Fiscal Responsibility Commission

The tenure of the first set of commissioners who served on the FRC has expired and there are plans contained in the Oronsaye Committee Report on the Restructuring and Rationalisation of Federal Government MDAs and Parastatals to transfer the functions of the FRC to the Revenue Mobilisation Allocation and Fiscal Commission. However, the competencies required to operationalise the FRA are not available in the RMAFC.

Implementation of the FRA is bogged down by a number of challenges which includes the FRC's lack of power to sanction erring MDAs and to enforce the provisions of the Act; the absence of penal provisions in the FRA which has led to a situation where some acts are stated to be offences without a requisite penal sanction; the provisions for the membership of the Commission which gave the leeway for the appointment of more politicians than technocrats into the

Commission; the unwieldy structure of the Commission and its poor funding.

Recommendations: Instead of scrapping the FRC, it should be strengthened by amendments to the FRA. The amendments should restructure the Commission to be led by a Director-General or equivalent and the reduction in the number of commissioners; redefining the qualification of commissioners to exclude core politicians who have no experience in fiscal governance; provide penalties for violations of the law like the practice in other jurisdictions; provide procedures for administrative sanctions and increased funding and independence of the Commission.

Prosecute the officials who put the names of ghost workers on the payroll to serve as deterrent; and recover all moneys due to the treasury

4.2 Ghost Workers and Fiscal Responsibility

The use of ghost workers to defraud the treasury has assumed alarming dimensions in recent years. Following the geometric growth of the wage bill, FGN embarked on biometric verification of workers and their capture in the Integrated Personnel and Payroll Information System. This IPPIS enrolment has been ongoing

since 2006 and has not been completed by the middle of 2015 as less than half of the MDAs were captured in 9 years.

However, the evidence from agencies so far captured on IPPIS showed that the work force was over-bloated cumulatively in excess of 25 percent by ghost workers. For

instance, the Ministry of Finance had 2000 workers pre IPPIS and it came down by 68.35 percent post IPPIS to 633 workers. But the fiscal authorities have refused to prosecute and bring to account the persons responsible for this scam which cost the treasury over N100bn. A suit by CSJ to reveal the identities of the fraudsters has been aggressively defended by the Ministry of Finance.

Recommendations: The enrolment into the IPPIS platform should be extended to all MDAs and this should be done within a deadline of 1 year. All persons who were in charge of MDAs (where ghost workers were discovered) as permanent secretaries or their equivalent, directors of personnel and accounts must be made to answer charges in law because the variations pre and post IPPIS enrolment cannot be justified as simple mistakes. They were clear and cold calculated stealing and criminal breach of trust.

4.3 Template for Calculating Operating Surplus and Remittances to the Treasury

Operating surplus must be recovered and remitted to treasury and a uniform accounting system used across all MDAs to facilitate the process.

The FRA provides that each scheduled corporation shall establish a General Reserve Fund and shall allocate to the fund at the end of each financial year one-fifth of its operating surplus, whilst the balance of four-fifths shall be paid over to the Consolidated Revenue Fund of the Federation. However, there is no clear template for the calculation of operating surplus. The template should have been designed through collaboration between the office of the Accountant-General of the Federation and the Fiscal Responsibility Commission. This is in consideration of the fact that the Accountant-General is the officer charged with

the design and stipulation of accounting methods and systems for the federal government and its MDAs whilst the FRC is in charge of overseeing the implementation of the FRA. Thus, the lack of a clear template is evidence of tardiness on the part of the two agencies considering that the FRA has been in operation since 2007. Whilst some scheduled corporations are using cash accounting, others deployed accrual accounting and this ensures that their operating surpluses are calculated from different parameters and assumptions.

Also, information available from the Fiscal Responsibility Commission indicates that many scheduled corporations are resisting the remittance of their operating surplus to the treasury. This denies the treasury of due revenues⁶.

Recommendations: The FRC and the Accountant-General's office should design a template and the draft should be sent to all MDAs liable to remit the surplus for their input and validation. Thereafter, the final template will be developed after considering the inputs and deployed for use across all MDAs. The Accountant-General of the Federation should also ensure the use of a uniform accounting system across all MDAs to facilitate the process. For agencies refusing to remit their operating surplus, the FRC should collaborate with the appropriate committees of the National Assembly and anti-graft agencies to recover the due sums.

⁶ See Annual Reports of the Commission for the years 2009, 2010, 2011, 2012 and 2013.

4.4 The Oil Price Based Fiscal Rule

The Oil Price Based Fiscal Rule which is tied to the establishment of the Excess Crude Account (ECA) and the later Sovereign Wealth Fund has not been followed through. ECA is premised on the volatility of oil prices, hence the need to ensure stability in public expenditure. While the ECA served as the buffer rainy day account purpose until 2009, thereafter, the demands of governors and the politicisation of the process depleted the ECA to the extent that Nigeria had very little to fall back upon by the middle of 2014 when the price of crude oil collapsed again. Proceeds of ECA have been drawn down to augment shortfalls in revenue due to oil theft, disruptions of oil production and pipeline vandalism. This is against the clear words of the FRA which permits augmentation only when the price of oil falls below the benchmark price for a consistent period of three months.

The argument was that the rain was already falling on the finances of states; so, why wait in disbursing the proceeds of a rainy day account when the rain was already falling? This is a false argument. The governors claim that FGN had not been transparent in the management of ECA and the inflow and outflow of funds had not been computed to the satisfaction of states and local governments. A suit was filed at the Supreme Court by states to declare both the ECA and the Sovereign Wealth Fund illegal and unconstitutional claiming that the two funds contravene the provisions of sections 80 and 162 of the 1999 Constitution. Section 80 established the Consolidated Revenue Fund of the Federation which should house all revenues received by the Federation and not payable into any other fund

Do not scrap the Excess Crude Account or the Sovereign Wealth Fund but make their management more transparent and accountable to stakeholders.

established by law. Section 162 establishes the Federation Account which is a distributable pool account.

Recommendations: No nation operates without some savings that should act as a stabiliser in lean financial times especially if the main source of income is a commodity whose price is subject to the cyclical boom burst fluctuations. If it is true that the ECA has not been properly managed, the response should not be a call for its scrapping rather, it should be to take steps to guarantee prudent and transparent management that will satisfy all stakeholders to the fund. In this direction, the appointment of an Accountant-General of the Federation as distinct from the Accountant-General of the Federal Government is imperative.

The Accountant-General of the Federation will be in charge of the Federation Account, the Consolidated Revenue Fund of the Federation, ECA and other such funds owned by the three tiers of government. This will involve the amendment of the 1999 Constitution to create the office, provide for its funding and modus operandi.

4.5 Reduced Inflows into the Federation Account and the Petroleum Industry Bill (PIB)

NASS should review and pass a PIB that takes account of the legitimate interests of all stakeholders

With the declining price of crude oil and the depletion of funds in the ECA, it is evident all tiers of government will struggle to meet their obligations and implement budgets that meet developmental goals. However, new investments in the oil and gas sector have been delayed *inter alia* by the failure of the National Assembly to pass the Petroleum Industry Bill into law. Indeed, there have been recent

divestments by the major international oil companies operating in Nigeria.

The Final Investment Decisions in Olokola and Brass Liquefied Natural Gas Projects and Train 7 of the Bonny LNG Project have been unduly delayed in part to policy uncertainty, especially the uncertainty about the fiscal regime to guide the investments. Also, Nigeria has not been able to meet Joint Venture Partnership Obligations in Cash Calls which has complicated the accounting framework of oil revenue and delayed new investments in the sector.

It is estimated that not less than N3trillion yearly revenue accruable to the Federation Account is tied down with the politics of the PIB.

Recommendations: The PIB will liberalise the oil and gas sector and positively affect the fiscal regime by increasing oil sector transparency and accountability and providing more financial resources to fund budgets across the Federation. The National Assembly should therefore prioritise and expedite the passage of the PIB into law. The executive, the media and other components of civil society should bring pressure to bear on NASS.

4.6 Management of the Federation Account

All funds due to the Federation Account should be paid into the account and the appointment of an Accountant-General for the Federation is imperative.

The management of the Federation Account has come under serious scrutiny in recent times. There have been allegations of mismanagement from very highly placed persons including the governor of the Central Bank of

Nigeria who alleged that over \$20bn was missing from the Account. Several panels and audits have been set up to unravel the exact amount that was missing (if any). But these seem to be tied down by high wire politics. Clearly, the management of the proceeds of oil and gas sales has not been transparent.

Recommendations: All revenues accruing from oil and gas activities and other sources of revenue should be paid directly into the Federation Account. This is anchored on the fact that section 80 of the 1999 Constitution establishing the Consolidated Revenue Fund of the Federation prevails over any other law that authorises agencies to keep their funds, appropriate and manage same, deduct the cost of operations and later pay a part to the treasury. The Nigerian National Petroleum Corporation should be properly funded through appropriation from a number of sources including borrowing and a contingency fund to cater for emergencies such as oil spills, pipeline vandalisation, etc. Other agencies who in the course of their business generate revenues should also pay same into the treasury and be properly funded through the appropriation process. The amendment of the Constitution to provide for an Accountant-General of the Federation is also imperative.

4.7 Subsidy on Petroleum Products

Petroleum subsidy should be removed but if it must be retained; it should be converted into a subsidy on production rather than consumption. Between 2008 - 2013, subsidy payment as a percent of actual capital expenditure amounted to 109.8 percent.

The subsidy on petroleum products gulps an average of one-third of the budget on a yearly basis. In its current import dependent form and structure, it fuels corruption, exports jobs to other countries, puts pressure on the foreign reserves

and the value of the naira and deprives government of budgetary funds needed to fund infrastructure and vital social sectors.

The subsidy covers items such as product cost, freight, lightering expenses, Nigeria Port Authority (NPA) Charge, financing and jetty depot through put. Others include storage charge and distribution margins. But FGN restrains itself from charging taxes such as import and highway maintenance to maintain the price at reasonable levels. However, in many instances, petroleum products are only available at the official price in a few major cities whilst the majority of Nigerians buy products above the official price.

A comparison of the subsidy and capital expenditure over 6 years (2008-2013) tells the story.

Table 3: Fuel Subsidy and Capital Budget 2008-2013

Year	Subsidy Cost on Petrol/Subsidy Payment (N'bn)	% of Subsidy Payment to Total Budget	Actual Capital Expenditure (N'bn)	% Actual Capital Expenditure to Total Budget	Subsidy payment as a Percentage of Actual Capital Expenditure %
2008	439.4	13.53	711.63	37.57	61.75
2009	421.5	11.85	562.37	15.81	74.95
2010	673	15.2	883.70	19.96	76.16
2011	2,190.00	48.83	918.55	20.48	238.42
2012	832.06	17.9	744.42	16.01	111.77
2013	862.06	17.5	900.64	18.29	95.72

Source: Appropriation Acts and Budget Implementation Reports 2008-2013

Over the six year period, subsidy payment as a percent of actual capital expenditure amounted to 109.8percent. Thus, we are spending more on subsidising consumption than on capital expenditure.

Recommendations: The subsidy should be reviewed. Two options are in the horizon. The first is to scrap the subsidy whilst the second is to retain same and change the focus of the subsidy. If it must be maintained, it should be a subsidy on production of petroleum products in local refineries in Nigeria. Thus, we will be subsidising production which will create jobs, improve value added, yield company income tax to the treasury, reduce the pressure on the naira and our foreign reserves, etc.

4.8 Preparation of Budget Implementation Reports (BIR)

The Minister of Finance through the Budget Office of the Federation is expected to prepare and submit Quarterly Budget Implementation Reports to the Joint Finance Committee of the National Assembly and the Fiscal Responsibility Commission not later than one month after the end of each quarter and ensure that same is published in the news media and the official website of the Ministry. Again, this is not done on time. BIRs have never been prepared on time and they are usually released at a time they have no value to add to the budgeting and planning process. For instance, in the middle of November 2014, the only BIR available for 2014 is the first quarter BIR. How will this be relevant to the consideration of the 2015 appropriation Bill? As at the third quarter of 2015, the latest published BIR is the second quarter of 2014; the last two quarters of 2014 and the first and second quarters of 2015 have not been published.

Budget Implementation Reports should be timely

The following data shows the respective times frames for publication of the BIR between 2011 and 2013⁷.

Table 4: Timeliness of Submission of Budget Implementation Reports by the Budget Office of the Federation from 2011-2013

Fiscal Year	Budget Implementation Report (BIR)	Due Date	Date Submitted	Behind Schedule
2011	1 st Quarter	30 th Apr, 2011	27 th Oct, 2011	6 months
	2 nd Quarter	31 st Jul, 2011	27 th Oct, 2011	3 months
	3 rd Quarter	31 st Oct, 2011	4 th Mar, 2012	3 months
	4 th Quarter	31 st Jan, 2012	3 rd Aug, 2012	5 months
	Consolidated	30 th Jun, 2012	3 rd Aug, 2012	1 month
2012	1 st Quarter	30 th Apr, 2012	Not Submitted	-
	2 nd Quarter	31 st Jul, 2012	29 th Oct, 2012	3 months
	3 rd Quarter	31 st Oct, 2012	17 th Jan, 2013	2months
	4 th Quarter	31 st Jan, 2013	22 nd Mar, 2013	2 months
	Consolidated	30 th Jun, 2013	Not Submitted	-
	1 st Quarter	30 th Apr, 2013	28 th June, 2013	2 months
	2 nd Quarter	31 st Jul, 2013	2013	2 months
	3 rd Quarter	31 st Oct, 2013	4 th October, 2013	8 months
	4 th Quarter	31 st Jan, 2014	2013	5 months
	Consolidated	30 th Jun, 2014	Not Submitted Not Submitted Not Submitted	-

Also, there is an obligation to publish, not later than 6 months after the end of each financial year, a consolidated budget execution report showing implementation against physical and financial performance targets. This report shall be submitted to the National Assembly and disseminated to the public. The consolidated budget report in some years met the timeline but in some others such as in 2014, the BOF was unable to meet the timeline.

Recommendations: The Ministry of Finance/BOF should commit to timely preparation and publication of the BIR. If

⁷ Annual Report of the Fiscal Responsibility Commission 2013.

they are weighed down by capacity deficits, they should consider outsourcing same to other relevant agencies or get those agencies to develop the respective chapters of the BIR. For instance, the Bureau of Public Procurement and National Planning Commission can do the chapter of capital budget monitoring; the Central Bank of Nigeria provides the materials for the monetary policy section and Debt Management Office updates on level of borrowings and indebtedness, etc. The legislature and civil society should send constant reminders on the performance of this duty to the Ministry of Finance/Budget Office of the Federation.

4.9 Audit of Public Accounts

The FRA requires the Federal Government to publish its audited accounts not later than 6 months after the end of the financial year. However, FGN's audited accounts are in arrears. The last prepared federal audited account by mid 2015 is that of 2013 and this is not even available to the public.

***The audit process should be result oriented.
Audit is not an end in itself.***

The current audit function is perfunctory as it repeatedly documents fiscal felonies and misdemeanours without follow up corrective action. Mismanaged monies are hardly returned to treasury; violators of the financial rules do not admit guilt and there is no compensation or guarantees of non-repetition to the society. Audit thus becomes one frustrating exercise in report writing; the Auditor-General of the Federation finishes his report and hands over to the Public Accounts Committee which also produces another report. The two reports end up gathering dust on the shelves without effective remedial action. The Audit Reform Bill has

been stalled in the National Assembly in the Sixth and Seventh Sessions.

Recommendations:

The enactment of a new Audit Bill into law is long overdue and the National Assembly should take this up. The contours of the new law should guarantee functional and operative independence for the office of the Auditor-General and his staff; establish the Audit Service Commission; give powers to conduct value for money and forensic audits; to recover public property in specie, make surcharges and get guarantees of non repetition in a timely and speedy manner, etc.

*Abolish the State
Joint Local
Government
Account and
directly allocate
funds to LGAs from
the Federation
Account*

4.10 Management of Local Government Funds

Under the guise of the State Joint Local Government Account, state governments have been abusing and mismanaging local government funds as the funds never get to the local governments. The result is that local governments are underdeveloped and their resources are diverted. Considering that this is the tier of government closest to the grassroots, the withholding of their funds manifest in the lack of basic amenities needed for improved living. States also fail to remit a portion of their internally generated revenue to local governments as prescribed by law.

Recommendation: The 1999 Constitution should be amended to provide for direct allocation of funds from the Federation Account to local governments.

4.11 Public Private Partnership as a Funding Option

Funding constraints remain a major challenge for infrastructure provisioning in Nigeria. Public Private Partnerships (PPPs) have been touted as the rescue and magic wand. The Infrastructure Concession Regulatory Commission Act provides the framework for PPPs.

The Act permits federal MDAs and corporations to decide infrastructure projects fit for PPPs and to present details of such projects to the Federal Executive Council for approval of the concession proposal. The Commission will publish a list of projects eligible for concession as approved by FEC and the MDA shall invite open competitive bidding for the projects by publication in at least 3 national newspapers and other media. The project proponent is expected to possess the relevant financial, technical and managerial capacity to undertake the magnitude of the infrastructure development or maintenance.

*Since public funding is limited, let us explore
Public Private Partnerships*

Existing federal PPP arrangements are few and some of them have run into stormy waters. The major limitation of this law is that the Commission with such technical expertise is not the one to initiate the PPPs and the power of initiation is only domiciled with MDAs. And MDAs seem to be more interested in fighting for budget resources.

Recommendation: Amend the Act to give the Commission the power to initiate PPP projects in collaboration with the relevant MDAs and corporations.

4.12 Enforcement of the Fiscal Responsibility Act

The Fiscal Responsibility Act should be fully enforced. Why not try the judicial process? S.51 of the FRA to the rescue

Section 51 of the FRA remains a watershed in the legal history of this country. It liberalises the approach to standing to sue (*locus standi*) by its provision that a person shall have legal capacity to enforce the provisions of the Act by obtaining prerogative orders or other remedies at the Federal High Court, without having to show any special or particular interest. Regrettably, individuals and civil society groups have not been taking advantage of section 51.

Recommendations: Section 51 of the FRA provides opportunities to challenge violations of fiscal responsibility in court. The Fiscal Responsibility Commission and civil society groups specialising in fiscal governance should build capacity to use the provisions to challenge fiscal mismanagement.

PART 5

BORROWING AND DEBT MANAGEMENT

The Fiscal Responsibility Act makes detailed provisions for incurring debt, debt management, reporting and general accountability for borrowing and indebtedness. The FRA commenced after the Debt Relief Programme when our debts were virtually relieved and written off on a premium and today, Nigeria owes about \$70billion and this is more than the \$36b we owed during the time of Debt Relief. Borrowing and Debt Management will be reviewed in this section and forward looking recommendations made for reforms based on the discussions and recommendations of the Fiscal Governance Tribunals.

5.1 Concessional Terms, Low Interest Rate and Long Amortisation Period

The FRA subjects all borrowing to the sustainable debt management framework which includes that borrowing should be on concessional terms, with low interest rate and long amortisation period. Concessional term is defined in the interpretative section of the FRA to mean a borrowing at not more than 3 percent interest per annum. Long amortisation period as the name implies excludes debts that become due and repayable in the next 12 to 24 months and will only permit borrowing from the international development agencies which do not necessarily have interest rates and their service rates is less than 3 percent per annum while the amortisation period could extend up to ten years.

Borrowing should be on concessional terms, with low interest rate and long amortisation period

Therefore, domestic bank loans and Stock Exchange Bonds which attract double digit interest rates do not qualify as funding sources for government projects under the FRA. They are clearly illegal and do not come within the contemplation of the FRA. However, the Federal Government and States have consistently used these sources to fund their expenditure.

Recommendations: The Fiscal Responsibility Commission should take up this challenge through capacity building, special directives and law suits against violations of the law. State governments, the Securities and Exchange Commission, etc should be engaged by the FRC. This is also the terrain of civil society to use the power of the ultimate sovereign, being the power of citizenship to stop violations of the FRA. This is imperative considering the collaboration between the legislature and the executive in the violation of these provisions. Naming and shaming and constant reminders and media exposure will facilitate the resolution of this challenge. Also, the use of the courts in seeking enforcement under section 51 of the FRA will in no small measure contribute to the resolution of this challenge.

5.2 Prior Legislative Approval and Citizens Participation

The FRA demands prior legislative approval before debts can be incurred on behalf of any tier of government. This includes authorisation in the Appropriation Act or in any other law. It needs to be stressed that by virtue of items 7 and 50 of the Exclusive Legislative List of the 1999 Constitution, debt procuring and management are matters within the Exclusive Legislative competence of the Federal Government and can only be legislated upon by NASS.

However, what happens is that the executive and legislature especially at the state level collaborate to prevent the proper

scrutiny of executive requests for borrowing and as such, there are no public hearings and opportunities for Nigerians to make inputs into the legislative approval process. Thus, the legislature as the parliament of the people short circuits the loan approval process leading to approvals that fall short of the law.

Prior legislative approval and citizens participation is imperative

Recommendations: Prior legislative approval demands public hearings with all the facts in the public domain considering that the decision to borrow is an inter-generational commitment that binds not just the present but future generations and as such, should be subject to robust discussions and public debates. The legislature should stop the practice of considering executive borrowing request without public inputs. This presents an opportunity for civil society advocacy. This position is supported by section 48(1) of the FRA which states:

The Federal Government shall ensure that its fiscal and financial affairs are conducted in a transparent manner and accordingly ensure full and timely disclosure and wide publication of all transactions and decisions involving public revenues and expenditures and their implications for its finances.

5.3 Borrowing Restricted to Funding for Capital Expenditure and Human Development

The FRA restricts the purpose of borrowing to capital expenditure and human development. Indeed, the FRA states that the proceeds of such borrowing shall solely be applied towards long-term capital expenditures. The FRA defines capital expenditure as spending on an asset that

lasts for more than one financial year and expenses associated with the acquisition of such assets. It however failed to define human capital development. But the contours of what constitutes human capital development are fairly well known and we should not search far and wide to excuse all frivolities into its definition. Thus, borrowing for all shades of recurrent expenditure and consumption is outlawed by the FRA.

Borrowing is only permitted for capital expenditure or human capital development

However, borrowing to fund consumption and recurrent expenditure has become the norm in the budgeting process. Also, in many cases, there is a clear mismatch between the purpose of borrowing and the source of funds. Short term bank loans are being used to finance long capital expenditure in roads, schools and hospitals. The result is a mismatch and a subtle debt crisis that restricts the ability of states to function properly due to Irrevocable Standing Payment Orders lodged with the CBN and the Accountant-General of the Federation. At the federal level, the statistics on actual yearly borrowing and capital expenditure shows clearly that most of the borrowing have been used to fund recurrent expenditure. Borrowing for consumption will not provide the enabling environment for debt repayment when the debts are due.

Recommendations: The Debt Management Office and the Fiscal Responsibility Commission should ensure that borrowing is restricted to the purposes mentioned in the FRA. They should take steps to remind the various tiers of government about the unambiguous provisions of the law. The FRC and citizens should explore enforcement actions in court.

5.4 Cost Benefit Analysis

The FRA demands that any Government in the Federation or its agencies and corporations desirous of borrowing shall, specify the purpose for which the borrowing is intended and present a cost-benefit analysis, detailing the economic and social benefits of the purpose to which the intended borrowing is to be applied. Cost benefit analysis is defined as an analysis that compares the cost of undertaking a service, project or programme with the benefits the citizens are likely to derive from it. In clear breach of the law, at no time has the executive prepared a cost benefit analysis for borrowing, lay same before the legislature or made it available to the public.

A cost benefit analysis is a mandatory requirement for public borrowing

Recommendations: The Legislature should demand and insist on borrowing requests being accompanied by a cost benefit analysis. The Fiscal Responsibility Commission should also intervene through reminders to the Ministry of Finance and Budget Office of the Federation in this matter. Enforcement action in court by the FRC and citizens can be explored.

5.5 Consolidated Debt Limits

The President within 90 days of the commencement of the FRA, on the advice of the Minister of Finance and subject to the approval of the National Assembly is to set the overall limits of the consolidated debts of the three tiers of government and this limits should be consistent with the fiscal policy objectives in the Medium Term Expenditure Framework.

Over 7 years of the implementation of the FRA, the President and Minister of Finance have failed and neglected

to activate the procedure through sending a request for the setting of debt limits to the National Assembly. The executive is even defending a suit brought against the President by CSJ trying to compel the setting of the debt limit⁸. The suit is stalled in the slow judicial system.

Debt limitation is an integral part of good fiscal governance

Recommendations: The legislature should use its oversight powers to demand that the debt limits be sent by the President. The Fiscal Responsibility Commission could do a study and detail the parameters for the debt limitation exercise as this will help the Minister of Finance to arrive at a sound advice to the President on debt limits. Litigation by citizens to enforce this provision should be explored.

5.6 Verification of Compliance with Consolidated Debt Limits

At the end of each quarter, the FRC is to determine the amount of the consolidated debt of each tier of government and publish on quarterly basis a list of governments in the Federation that have exceeded the limits of consolidated debt, indicating the amount by which it was exceeded. However, since the limits of consolidated debt have not been set, the FRC may not be able to activate this mechanism. But the Debt Management Office (DMO) is expected to maintain comprehensive, reliable and current electronic database of internal and external public debts, guaranteeing public access to the information.

Recommendations: Pending when debt limits are set, the FRC could do a quarterly verification of compliance with other conditions for borrowing and publish same. It will use the publication as a basis of calling the respective tiers of

⁸ FHC/ABJ/CS/302/2013

government or agencies of government to make amends and follow the law in subsequent borrowings.

5.7 Compliance by Financial Institutions to the FRA

Money market operators, such as banks and other financial institutions, are enjoined to request and obtain proof of compliance with the provisions of the FRA, before lending to any Government in the Federation. Any transaction entered without proof of compliance with the Act is unlawful. It must, however, be noted that the principal distinction between the terms “lawful” and “legal” is that the former contemplates the substance of law, the latter the form. To say of an act that it is lawful implies that it is authorised, sanctioned, or at any rate, not forbidden by law. To say that it is legal implies that it is done or performed in accordance with the forms and usages of law. In the law of contract the result of both illegality and unlawfulness would seem to be the same.

For lending to be legal, banks and financial institutions need to comply with the FRA

Professor I.E. Sagay (Nigerian Law of Contract (1993) pp.300-316) has argued that where a statute prohibits or bans the making of certain types of contracts, such contracts when made are illegal and void at law. He cited the case of *Sodipo v. Lemminkainen* [1986] 1 NWLR (Part 15) 220 at 228, where the Supreme Court held that a contract that is expressly or implicitly prohibited by statute is illegal. In that case, the plaintiff brought a claim against the repayment of loans in foreign currency, but there was no indication that the Minister had authorised these payments in foreign currency, nor were they carried out through any authorised dealer. In the circumstances, it was held that the transaction was illegal and unenforceable in any court because it was in breach of the Exchange Control Act.

However, it would seem that by virtue of Section 51 of the FRA, any person may seek a declaration that a loan transaction was unlawful and order of court prohibiting a State and/or a bank from consummating such a transaction. However, in Brazil the position is different. Article 33 of their own Fiscal Responsibility Act provides that any financial institution which contracts a credit operation with a member of the Federation must request proof that the operation complies with the established conditions and limits. It goes further to provide that “operations contracted in disagreement with provisions of this law will be considered null and void, and must be cancelled through refund of the principal without payment of interest and other financial charges”.

Recommendations: The Fiscal Responsibility Commission and the Debt Management Office should build capacity and sensitise banks and other financial institutions on the borrowing and debt management provisions of the FRA. An enforcement action by a citizen on public borrowing that fails to comply with the provisions of the FRA will be apposite to determine the attitude of the courts to these provisions.