

Williams C. Iheme*

THE DEFECTS OF NIGERIA'S SECURED TRANSACTIONS IN MOVABLE ASSETS ACT 2017 AND THEIR POTENTIAL REPERCUSSIONS ON ACCESS TO CREDIT: A COMPARATIVE ANALYSIS AND LESSONS FROM THE ANGLO-AMERICAN LAW

Abstract

It has been sufficiently established in law and finance literature that an effective legal framework that governs non-possessory security transactions is a key component in the realization of financial inclusion and affordable access to credit in market economies. Recently, the Nigerian lawmakers enacted the Secured Transactions in Movable Assets Act 2017 (STMA), which was modelled after the United States' Article 9 of the Uniform Commercial Code (UCC Article 9) and its unitary-functional approach to security interests. Arguably, some of the STMA's provisions are defective: they do not reflect the local conditions in Nigeria and are likely to frustrate its section 1 aim of broadening access to credit for individuals and small businesses. The STMA recognizes registration as the main method of perfection: yet there are multiple but unlinked movable collateral registries in Nigeria which ultimately constitute a breeding ground for secret liens. This article argues that the relegation of other perfection methods, such as 'possession' and 'control', will diminish the economic success of the reformed law. It calls for a reconside-

* Williams C. Iheme, LLB, LLM, SJD. Associate Professor of Law, O.P Jindal Global University, <https://orcid.org/0000-0002-9762-5984>, e-mail: wciheme@jgu.edu.in; wiliamsiheme@gmail.com. I am grateful to the two anonymous referees for their helpful and inspiring comments on earlier versions of this paper. I am also grateful to Mr. Benjamin Iheme and Sir Oliver Iheme for providing me with the financial resources that enabled me to conduct this research. However, responsibility for any errors is solely mine.

ration of the rules governing publicity and the perfection of security interests under the STMA with insights and lessons from the UCC Article 9 and its underlying case law.

Keywords

secured transactions – movable assets – access to credit in Nigeria – MSMEs – unitary-functional approach – UCC Article 9 – National Collateral Registry

INTRODUCTION

In 2017, Nigeria reformed its secured transactions law that governs the use of movable assets to secure transactions, by enacting the Secured Transactions in Movable Assets Act 2017 (“STMA”). This paper exposes the inherent defects in the STMA. The defects reflect the contradictions embodied in some of its provisions that are in direct conflict with Nigeria’s local conditions as well as the STMA’s section 1 ultimate aim of increasing access to credit to individuals and micro, small, and medium-sized enterprises (MSMEs). The STMA was arguably transplanted from the United States’ Article 9 of the Uniform Commercial Code (UCC Article 9), yet it failed to incorporate some of the latter’s fundamental elements: in disregard of other established methods of perfection under the UCC Article 9, such as ‘possession’ and ‘control’, the STMA’s main method of perfection of security interests in movable collateral (i.e., its section 23 notice filing/registration), is realized via the Central Bank of Nigeria (CBN)’s electronic Collateral Registry Regulations.¹

Yet, owing to inadequate know-how and the supply of electricity and Internet, electronic registration at the CBN National Collateral Registry is unlikely to be accessible to many Nigerians especially those living in rural areas, thus defeating the STMA section 1 purpose of financial inclusion and expansion of access to credit.² Additionally, the

¹ The CBN Collateral Registry Regulations draw life from section 10 of the STMA which empowers the CBN to make regulations to institute and operate the National Collateral Registry.

² For a survey on the positive impact of credit, see S. Djankova, C. McLiesha, A. Shleifer, “Private Credit in 129 Countries”, *Journal of Financial Economics*, 2007, pp. 299–300.

multiple, but unlinked collateral registries in movable assets in Nigeria continue to pose difficulties to affordable access to credit owing to the existence of secret liens and the so-called ostensible ownership problem. Although there is currently no official impact assessment report on the STMA regarding its effectiveness in the lending industry, this paper comparatively examines its doctrinal framework and is of the view that it lacks an accurate reflection of Nigeria's local conditions, and is thus in need of amendment: certain essential ingredients of the unitary-functional approach had avoidably escaped the attention of the reformers, ostensibly owing to an insufficient appreciation of the source law – the UCC Article 9.

The aim of this paper is therefore to critique the STMA, which is the comprehensive reform on Nigeria's secured credit law to accommodate the use of movable assets as collateral in securing credit transactions. The paper analytically examines the provisions of the STMA in line with its section 1 purpose. Based on the forgoing, it proceeds to answer one broad question: i.e., whether the STMA's provisions embody some material defects that will likely debilitate a sufficient realization of its ultimate aim of financial inclusion, expansion of access to affordable credit to individuals and MSMEs in Nigeria, and facilitation of perfection of security interests in movable assets. It will achieve this through a doctrinal analysis of the STMA framework and also through a comparative reflection of the UCC Article 9 which is arguably the source of inspiration to the drafters of the STMA.

This paper has three other parts that follow this introduction. In part one, the paper examines the rationale behind the secured transactions law reform in Nigeria as well as the concerns underlying legal transplants. In part two, the paper doctrinally examines some key provisions of the STMA which it argues are defective and thus incompatible with the legislation's main purpose. Solutions are simultaneously offered alongside the diagnosed defects of the STMA before the paper comes to a conclusion in part three.

I. THE RATIONALE BEHIND NIGERIA'S MOTIVATION TO REFORM ITS SECURED CREDIT LAW IN 2017

Nearly 200 years ago, Henry Macleod restated the ancient wisdom that credit is the lifeblood of market economies.³ An economy is bound to grow significantly if those with 'idle capital' can lend to those willing to use such capital to produce goods and services in exchange for some return on investments.⁴ The outcome of such an arrangement where credit accessibility is affordable and used in doing business, is the sufficient creation of jobs, reduction of the poverty rate, and realization of the associated benefits such as lower crime rates and a general increase in the standard of living.⁵ Yet the quest for sufficient economic growth will remain only at the level of wishful thinking in the absence of a suitable and functional legal framework⁶ that accepts the use of all types of assets – especially the movable assets of a borrower – including their present and after-acquired property as security for credit.⁷

³ H.D. Macleod, *Principles of Economical Philosophy*, Longmans, Green, Reader & Dyer, 1876, p. 481.

⁴ I.O. Smith, *Nigerian Law of Secured Credit*, Ecowatch Publications, 2nd ed., 2015, p. 1; G. McCormack, *Secured Credit Under English and American Law*, Cambridge University Press, 2004, ch. 1; K.W. Dam, *The Law-Growth Nexus – The Rule of Law and Economic Development*, Washington D.C.: Brookings Institution Press, 2006, p. 36; R. Goode, "Security in Cross-Border Transactions", *Texas International Law Journal*, 1998, p. 47; T. Tajti, *Comparative Secured Transactions*, Akademia Kiado, 2002.

⁵ UN General Assembly, 56th session, supp no 17 (A/56/17) para 351; B. Kozolchyk, "Secured Lending and its Poverty Reduction Effect", *Texas International Law Journal*, 2007, pp. 727-728.

⁶ R. Haselmann, K. Pistor, V. Vig, "How Law Affects Lending", *Review of Financial Studies*, 2010, Issue 2, pp. 549-580; R. Michaels, "The Functional Method of Comparative Law" in R. Zimmermann, M. Reimann (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2008, pp. 376-378.

⁷ The challenges faced by MSMEs in developing countries have been captured by leading scholars in this area, such as: L. Gullifer, I. Tirado, "Financing Micro-businesses and the UNCITRAL Model Law on Secured Transactions", *Oxford Legal Studies Research Papers*, 2017, p. 1.

Gilmore,⁸ and other scholars⁹ of modern secured transactions law agree that a reformed legal framework that accommodates the use of movable assets for security is directly related to economic efficiency and growth.¹⁰ Before the mid-twentieth century, the United States (“US”) secured transactions legal framework – like its English counterpart¹¹ today – was compartmentalized and thus posed significant complexities vis-a-vis access to credit: different rules of creation and perfection governed the various security and title-based financing devices.¹² The resulting information asymmetry generally discouraged lenders from lending at affordable rates owing to the frequent losses on the technical grounds of perfection of security, arising mainly from the complex legal framework and the numerous, but unlinked registries for security registration.¹³ In the US, a sustainable solution of the complexity was offered by Gilmore and his team of law reformers who drafted the UCC Article 9 to usher in the unitary-functional approach to secured transactions in movable assets.¹⁴

⁸ G. Gilmore, “The Secured Transactions Article of the Commercial Code”, *Law & Contemporary Problems*, 1951, pp. 27–29.

⁹ G.G. Castellano, “Reforming Non-Possessory Secured Transactions Laws: A New Strategy?” *Modern Law Review*, 2015, pp. 612–615; A.A. de la Campa, “Increasing Access to Credit Through Reforming Secured Transactions in the MENA Region” *World Bank Policy Research Working Paper no 5613*, 2011.

¹⁰ E. Benmelech, N.K. Bergman, “Collateral Pricing”, *Journal of Financial Economics*, 2009, p. 339; J.R. Booth, L.C. Booth, “Loan Collateral Decisions and Corporate Borrowing Costs”, *Journal of Money, Credit and Banking*, 2006, p. 67.

¹¹ Diamond Report, *A Review of Security Interests in Property*, London: HMSO, 1989, paras 10.5.1–10.5.4.

¹² For a penetrating treatment of the creation of security interests under the English common law, see W. Moojen, M. Truiden (eds.), *Bank Securities and Other Credit Enhancement Methods*, Kluwer Law International, 1995, p. 131.

¹³ G.A. Akerlof, “The Market for Lemons: Quality Uncertainty and the Market Mechanism”, *Quarterly Journal of Economics*, 1970, p. 488; J. Stiglitz, A. Weiss, “Credit Rationing in Markets with Imperfect Information”, *American Economic Review*, 1981, p. 393; H.C. Sigman, “Some Thoughts about Registration with Respect to Security Rights in Movable”, *Uniform Law Review*, 2010, p. 507.

¹⁴ Article 9-102(1)(a); 1-201(37) UCC. See R. E. Scott, “The Politics of Article 9”, *Virginia Law Review*, 1994, p. 1783. G. Gilmore, “The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman”, *Georgia Law Review*, 1981, pp. 605, 625.

The unitary-functional approach subsumed the four known security devices at common law (mortgage, charge, pledge, and consensual lien) as well as retention of title (ROT) transactions into a single security interest: it offers a unitary legal framework that caters for all secured transactions whereby a creditor lends money to a borrower in exchange for an *in rem* security interest in the latter's movable asset, such that, irrespective of what name the transaction was given, the UCC Article 9 applied.¹⁵ With the unitary-functional approach, an otherwise 'dead capital',¹⁶ i.e., movable assets in the hands of human borrowers, was unlocked, and deemed capable of securing a consumer or business loan.¹⁷ The solution of UCC Article 9 (i.e., the unitary-functional approach), soon became the ubiquitous groundwork for many other common law and civil law jurisdictions in reforming their own legal frameworks for secured transactions,¹⁸ including model laws that may be (and have been) adopted by various jurisdictions.¹⁹ These models include the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions,²⁰ the Institute for Unification of Private International Law (UNIDROIT) Model Law in the General Field

¹⁵ The functional approach is enshrined in Article 9-109 (a)(1) UCC, and its Official Comment 2. Also see M.G. Bridge, R.A. Macdonald, R.L. Simmonds, C. Walsh, "Formalism, Functionalism, and Understanding the Law of Secured Transactions", *McGill Law Journal*, 1999, pp. 572-575; J.J. White, R.S. Summers, *Uniform Commercial Code*, St Paul, MN: West Publishing, 2000, p. 710.

¹⁶ See generally, H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Ealing: Bantam Press, 3rd ed., 2000.

¹⁷ M. Safavian, H. Fleisig, J. Steinbuks, "Unlocking Dead Capital", *World Bank Viewpoint*, 2006, p. 307.

¹⁸ Australia, Canada, Hungary, Liberia, Malawi, New Zealand, Romania, etc., are the countries that reformed their secured transactions law from the lens of the UCC Article 9. See generally, R.C.C. Cuming, R.J. Wood, C.A. Walsh, *Personal Property Security Law*, Toronto: Irwin, 2nd ed., 2012; L. Gullifer, V. Barns-Graham, "The Australian PPS Reforms: What Will the New System Look Like?", *Law and Financial Market Review*, 2010, p. 394; T. Tajti, "Testing the equivalence of the new comprehensive Australian Personal Properties Securities Act, its segmented European equivalents and the draft common frame of reference", *Bond Law Review*, 2013, Issue 1, p. 85.

¹⁹ For example, the following African countries reformed their secured transactions law based on the UNCITRAL model: Liberia (2010), Malawi (2013), Sierra Leone (2014), and Zimbabwe (2017).

²⁰ UNCITRAL Legislative Guide on Secured Transactions Law (New York, 2010).

of Secured Transactions,²¹ the European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions,²² BOOK IX of the Draft Common Frame of Reference (DCFR),²³ etc.

Lastly, before the STMA was enacted, Nigeria's formalized secured transactions legal framework suffered severely from fragmentation: different rules and definitions regarding the creation, perfection, and priority applied to the different security devices, and there was no movable collateral registry where security interests in borrowers' movable collateral could be registered.²⁴ Before the STMA, there was an attempt in 2015 to reform the secured transactions law through the Central Bank of Nigeria (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) Regulations, No 1, 2015. The major defect of this Regulation stemmed from the established hierarchy of laws in Nigeria. Unlike in the European Union law where the term 'regulation' is used to describe a primary legislation; in Nigeria, a regulation is a secondary legislation and ranks below a statute, and as such, Nigeria's Central Bank Regulations in this regard could not override the pre-reform legal framework that had its foundations in various statutes and Supreme Court decisions.²⁵ Naturally, in the pre-reform era, the ensuing outcome of complexity caused confusion in the lending industry regarding the applicable law and the system of per-

²¹ The UNIDROIT's Official Homepage, available at: <https://www.unidroit.org/about-unidroit/overview> [last accessed 15.5.2021]. See G. McCormack, "American Private Law Writ Large? The UNCITRAL Secured Transactions Guide", *International & Comparative Law Quarterly*, 2011, Issue 3, pp. 597, 625.

²² EBRD, *Model Law on Secured Transactions*, London, 1994; O. Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments*, Abingdon: Routledge, 2011; S.V. Bazinas, "The Work of UNCITRAL on Security Interests: An Overview", *Uniform Law Review*, 2010, p. 315.

²³ The DCFR is a model law, being a codification of the common core of European Private Law. Its Book IX deals with security rights in movable assets and was arguably modelled after the UCC Article 9. A copy is freely downloadable at: http://ec.europa.eu/justice/policies/civil/docs/dcf_r_outline_edition_en.pdf [last accessed 15.5.2021].

²⁴ For a fuller discussion, see G. G. Castellano, "Towards a General Framework for a Common Definition of "Securities": Financial Markets Regulation in Multilingual Contexts" *Uniform Law Review*, 2012, pp. 449, 458.

²⁵ For a critique of the pre-reform law in Nigeria, see W.C. Iheme, S.U. Mba, "Towards Reforming Nigeria's Secured Transactions Law: The Central Bank of Nigeria's Attempt through the Back Door", *Journal of African Law*, 2017, Issue 1, pp. 131-153.

fection of security interests in [movable] collateral, thus necessitating lenders to frequently demand immovable asset collateral as security for credit²⁶ owing to the more established legal framework for immovable assets as well as an organized system of perfection in land registries.²⁷ This further meant that individuals and businesses, especially MSMEs who could not generally afford immovable assets or highly rich guarantors were consequently deemed unattractive to the financial institutions in Nigeria:²⁸ this negatively impacted on the ease of getting credit and doing business.²⁹ The sustained low scores of Nigeria in the World Bank Ease of Doing Business reports constituted the probative evidence regarding the economic impact of the unreformed secured transactions law and the need for the 2017 reform.³⁰ By the wording of its sec-

²⁶ International Finance Corporation (IFC), *Secured Transactions Systems and Collateral Registries*, Washington: IFC Publishing, 2010, pp. 6-7; H. Fleisig, "The Power of Collateral: How Problems in Securing Transactions Limit Credit for Movable Property", *World Bank Viewpoint*, 2006, p. 43, available at: <https://openknowledge.worldbank.org/handle/10986/11674> [last accessed 17.5.2021].

²⁷ R. Kohn, D. Morse, "UNCITRAL: The UNCITRAL Model Law on Secured Transactions", *The Secured Lender*, 2016, Issue 9, p. 48.

²⁸ T. Steijvers, W. Voordeckers, "Collateral and Credit Rationing: A Review of Recent Empirical Studies as a Guide for Future Research", *Journal of Economic Surveys*, 2009, Issue 5, pp. 924, 926. Also see G. McCormack, "UNCITRAL, Security Rights and the Globalisation of the US Article 9", *Northern Ireland Legal Quarterly*, 2011, pp. 485, 488.

²⁹ H. Fleisig, M. Safavian, N. de la Peña, *Reforming Collateral Laws to Expand Access to Finance*, World Bank/International Finance Corporation, 2006, p. 7 (pointing out that about 99% of items of movable assets accepted as security in the US would not be acceptable to creditors in Nigeria). Also see S. Stacy, "Follow the Leader? The Utility of UNCITRAL's Legislative Guide on Secured Transactions for Developing Countries (and its call for harmonization)", *Texas International Law Journal*, 2014, pp. 47-52 (stating that "a common trend among firms in the developing world is that credit applications are rejected owing to insufficient collateral. Often, business owners refrain from applying for loans because they are confident that they cannot meet the collateral requirements requested by banks. According to the World Bank and IFC, unavailability of collateral is not always the problem; rather, the problem may be the inability of debtors to utilize valuable assets as collateral. For example, laws may exclude goods not yet acquired by a debtor (e.g., the future crops of a farmer), a debtor's rights to payment (e.g., a business's accounts receivable), other intangible property rights (e.g., copyright), and sometimes even immovable goods (e.g., large equipment or machinery)").

³⁰ B. Igbinosun, "Security Interests in Personal Property and the Nigerian Secured Transactions in Movable Assets Act 2017: An Appraisal", *Journal of African Law*, 2020, Issue 3, pp. 357-371.

tion 63,³¹ the STMA is purportedly a comprehensive reform that adopts the unitary-functional approach to secured transactions, and which subsumes the security devices and retention of title (ROT)³² devices into a single security interest. However, it failed to expressly repeal the Hire Purchase Act 1968 and Equipment Leasing Act 2015, which are ROT statutes.³³ ROT transactions do not require any public registration because legal title in the collateral resides with the creditor – the seller or lessor.³⁴ Thus, provided that no court decision has yet reconciled this duality, the parallel existence of the functional approach and the ROT statutes in one legal system creates dually inconsistent frameworks that will have repercussions on access to credit.

1. SCEPTICISMS SURROUNDING LEGAL TRANSPLANTS

Influenced largely by the World Bank, the secured transactions law from the perspective of UCC Article 9 has diffused across many legal systems of the world, not discriminating over whether a country has a common law or civil law system.³⁵ The World Bank Ease of Doing Business reports³⁶ as well as other objectively conducted research,³⁷

³¹ “A security interest means a property right in collateral that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest but it does not include a personal right against a guarantor or other person liable for the performance of the secured obligation”.

³² This ROT device was established in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

³³ In the US functional approach regime, ROT transactions are governed by the UCC Article 9. See P.W. Schroth, “Financial Leasing of Equipment in the Law of the United States”, *American Journal of Comparative Law*, 2010, p. 323. For the European perspective on ROT, see R. Pennington, “Retention of Title of the Sale of Goods Under European Law” *International & Comparative Law Quarterly*, 1978, p. 277.

³⁴ *Armour v Thyssen* [1991] 2 AC 339.

³⁵ A.A. Gikay, “Rethinking Ethiopian Secured Transactions Law Through Comparative Perspective: Lessons from the Uniform Commercial Code of the US”, *Mizan Law Review*, 2017, Issue 1, pp. 153–197.

³⁶ The World Bank Ease of Doing Business Rankings, available at: <https://www.doingbusiness.org/en/rankings> [last accessed 17.5.2021].

³⁷ V. Vig, “Access to Collateral and Corporate Debt Structure: Evidence from a Natural Experiment”, *Journal of Finance*, 2013, p. 881.

show that countries that have reformed their secured transactions law have witnessed some economic improvement compared to their economic situation prior to the reform.³⁸ As Kenneth Dam opined, “in most countries, even in the US, which is usually thought of as a country with the most pronounced equity culture, more financing is raised in credit markets than in equity markets”:³⁹ the positive testimonials of access to credit and secured transactions law reform have diffused positively across developing countries. In Africa for instance, most of the 54 countries have already reformed their secured transactions legal frameworks.⁴⁰ Although Nigeria more comprehensively reformed its secured transactions law in 2017 through the lens of UCC Article 9, in practice, the impact of the law is arguably yet to be meaningfully visible in the economic wellbeing of individuals and MSMEs. Functionally, irrespective of the STMA, the economic laws and practice in Nigeria still largely resemble the pre-reform regime which was inexorably compartmentalized and complex. There could be many reasons why the STMA is yet to be appealing to legal practitioners and the business community in Nigeria, and those reasons may well be owing to the radical departure from what was previously familiar and mainstream among these key players. Thus while it is understandable that four years since the STMA’s enactment in 2017 is not enough time to pronounce it a failure, this paper notes that law reform ought to be a work-in-progress and none of the provisions of the STMA should be taken to have been cast in stone as to eschew further amendments.⁴¹

In deference to legal realism and the connected view that law ought to be organic and constantly assessing its suitability to the realities of the time, this paper has spotted some major defects which self-evidently escaped the attention of the lawmakers during the enactment of the

³⁸ Tajti, *supra* note 18, pp. 86–90.

³⁹ K.W. Dam, “Credit Markets, Creditors’ Rights and Economic Development”, *John M. Olin Law & Economics, Working paper number 28, 2nd Series*, 2006, p. 1.

⁴⁰ See generally, M. Dubovec, L. Gullifer, *Secured Transactions Law Reform in Africa*, Hart Publishing, 2019.

⁴¹ G. Esangbedo, “Secured Transactions in Moveable Assets Act, Company Charges and Funding Micro, Small and Medium Enterprises under Nigerian Law”, *Journal of African Law*, 2020, Issue 1, pp. 81–105.

STMA.⁴² Irrefutably, law reforms that benefit substantially from legal transplants such as the STMA are bound to be afflicted with oversights and mistakes that will ultimately whittle away its effectiveness. Often, the possibility of mistakes, owing to legal transplantations and their grave repercussions on the recipient country, endorses the view that legal transplants do not work.⁴³ And the over-dependence on comparative legal scholarship which tends to exaggerate the existence of problems or benefits of certain legal concepts are machinations of politics from countries or organizations that profit largely from the diffusion of economic laws.⁴⁴ As Pierre Legrand observed,⁴⁵ the cultural and social-economic underpinnings in laws may prove incompatible or even calamitous when they are eventually transplanted into the recipient country's legal system.⁴⁶

Dahan and Simpson⁴⁷ similarly argued that irrespective of the advertised benefits of a particular legal concept, law reformers ought to ascertain in what ways a proposed concept for transplantation agrees with the local conditions of the intended recipient country. Therefore,

⁴² This seems to be a frequent problem in legal transplantation whereby foreign law is forced to adapt to a different legal system. See generally, G. Teubner, "Legal Irritants: Good Faith in British Law or Unifying Law Ends Up in New Divergences", *Modern Law Review*, 1998, p. 11; K. Pistor, "The Standardization of Law and Its Effect on Developing Economies", *American Journal of Comparative Law*, 2002, p. 97; R.C. Means, *Underdevelopment and the Development of Law*, University of North Carolina Press, 1980; O. Kahn-Freund, "On Uses and Misuses of Comparative Law", *Modern Law Review*, 1974, p.1.

⁴³ P. Legrand, "The Impossibility of "Legal Transplants"", *Maastricht Journal of European and Comparative Law*, 1997, Issue 2, pp. 111-124. For a contrary perspective, see A. Watson, "Legal Transplants and Law Reform", *Law Quarterly Review*, 1976, p. 81, (arguing that in the context of a legal transplantation, the recipient legal system 'does not require any real knowledge of the social, economic, geographical, and political context of the origin and growth of the original rule').

⁴⁴ I. Davies, "The Reform of Personal Property Security Law: Can Article 9 of the US Uniform Commercial Code be a Precedent?", *International & Comparative Law Quarterly*, 1988, p. 475.

⁴⁵ Legrand, *supra* note 43, pp. 115-118; P. Legrand, "What 'Legal Transplants?'," in D. Neken, J. Feest (eds.), *Adapting Legal Cultures*, Hart Publishing, 2001.

⁴⁶ A.A Gikay, *supra* note 35, pp. 157-160.

⁴⁷ F. Dahan, J. Simpson, "Legal Efficiency for Secured Transactions Reform: Bridging the Gap between Economic Analysis and Legal Reasoning", in F. Dahan, J. Simpson (eds.), *Secured Transactions Reform and Access to Credit*, Edward Elgar Publishing, 2008, p. 125.

being cognizant of the potential damaging effects of an incompatible legal concept should elicit a sufficient measure of scepticism that success of a transplanted legal concept may work or not work, and in the case of the latter, could become a phenomenon that gradually poisons the overall economic wellbeing of the recipient country. Alternatively, lawmakers ought to ensure against falling asleep after a law reform that was basically a legal transplantation: they must constantly monitor the growth and compatibility or otherwise of the law instead of simply assuming its wellbeing and efficacy.⁴⁸

The essence of the forgoing caveat is to show that viable solutions to legal problems do not simply lie in the importation of the unaltered legal concepts from the UCC Article 9 into Nigeria via the STMA. Instead, Nigerian lawmakers have to constantly assess whether the current law as is, is effective; whether the problems that were in existence in the pre-reform era (e.g., the general apathy of lenders to accept movable assets as collateral and the problem of 'ostensible ownership'⁴⁹ due to lack of a collateral registry) are still visible or existing at the same scale after four years of enacting the STMA. So far (as earlier stated), there is no official impact assessment report of the STMA to ascertain its level of success or any compilation of views from the legal practitioners and the various industry stakeholders that are economically impacted by the STMA. While we await any empirical assessments, part two of this paper conducts a doctrinal assessment of the STMA, inquiring to what extent its provisions are practicably compatible with Nigeria's local conditions, and in what ways the STMA accords with the deeper insights that are available in the case law and general experience of the UCC Article 9 and United States, the country where the STMA type of law was

⁴⁸ *Ibid.*

⁴⁹ For instance, see the Fraudulent Conveyance Act of 1571, which is also a statute of general application in Nigeria since January 1 1900. Ostensible ownership was the major preoccupation of the court in the *Twyne's Case* [1601] 76 ER 809. Also see *Polsky v. S & A Services* [1951] 1 All ER 185; R. M. Goode, *Commercial Law*, London: Penguin, 4th ed, 2010, pp. 643–645.

first born. The forgoing underpins the rationale for Nigeria's reform of its secured transactions law in 2017 which is subsumed under section 1 of the STMA.⁵⁰

2. THE DEFECTS OF THE SECURED TRANSACTIONS IN MOVABLE ASSETS ACT 2017 AND THE POTENTIAL REPERCUSSIONS ON ACCESS TO CREDIT

2.1. THE UNDERLYING CONFLICT OF SECTION 2(3) WITH SECTION 23 OF THE STMA VIS-À-VIS PRIORITY OF SECURITY RIGHTS

In 2008, the Nigerian Court of Appeal in *Ajayi v Osunuku and Others*, restated the common law position that "the basic rule of temporal order of priority is modified by the maxims in stating that where equities are equal, the first in time ought to prevail; where however there exist both legal and equitable interests, in property, the former would supersede and take over priority over the latter".⁵¹ Thus, a notable feature of the English common law (which is similar to Nigerian law) is its categorization of rights into legal rights and equitable rights: the former category is deemed generally superior to its equitable counterpart.⁵² The STMA reform was arguably influenced by the UCC Article 9 and its philosophical underpinnings in respect of the unitary-functional approach to security interest rights. In the circumstance, the STMA has subsumed legal and equitable rights into a single 'security interest', thus deviating from the English dual categorization of rights. Under section 63(1) STMA and in deference to the UCC Article 9, there is no natural hierarchy of rights except on the basis of perfection: any type of right irrespective of whether it is equitable or legal in nature can sustain the creation of a valid security agreement provided that the borrower has a 'proper-

⁵⁰ Section 1 of STMA states that "the objectives of this Act are to – (a) enhance financial inclusion in Nigeria; (b) stimulate responsible lending to micro, small and medium enterprises; (c) facilitate access to credit secured with movable assets; (d) facilitate perfection of security interests in movable assets; (e) facilitate realization of security interests in movable assets; and (f) establish a collateral registry and provide for its operations."

⁵¹ (2008) LPELR-8332 (CA), 35–36, paras D–F.

⁵² *Ibid.*

ty right' in the collateral and the secured creditor consequently advances credit in exchange for an *in rem* security interest in the borrower's collateral which will be perfected by registration.⁵³

Under section 23 of the STMA, the perfection and priority of a security interest in a borrower's asset is determinable based on the time of registration of the security interest at the National Collateral Registry,⁵⁴ instead of the time of creation. This mode of perfection and priority was imported from a strand of UCC Article 9's publicity rules.⁵⁵ In this regard, McCormack, Tajti, and other secured transactions scholars have explained the main difference between a reformed and an unreformed secured transactions law: while in the latter regime, priority is normally based upon the time of creation of the security; in regimes that have reformed their legal frameworks through the lens of UCC Article 9, perfection and priority of security interests in a borrower's collateral will be determined by the order in which the concerned security interests were registered or perfected, irrespective of any debilitating conditions such as lack of access to electricity or internet that prevented a fast registration or perfection of a security interest.⁵⁶ STMA's section 63 definition of 'security interest' is substantially in accordance with section 23 STMA in respect of registration and priority, allowing a prior registered security interest in a collateral to trump over one that was created first, but registered later in time. Yet notwithstanding the forgoing which was part of the transplanted elements of the UCC Article 9, arguably, however, section 2(3) STMA stands in direct opposition to this central philosophy of the reformed law. Section 2(3) STMA retains the opera-

⁵³ See section 63(1) STMA, which defines a 'security interest' as "a property right in collateral that is created by agreement and secures the payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest".

⁵⁴ Section 23 STMA: "The priority between perfected Security Interests in the same Collateral shall be determined by the order of registration."

⁵⁵ See J.J. White, R.S. Summers, *Uniform Commercial Code*, West, 6th ed., 2010, ch. 25, entitled 'Priority conflicts'; H. Kanda, S. Levmore, "Symposium on the Revision of Article 9 of the Uniform Commercial Code: Explaining Creditor Priorities", *Virginia Law Review*, 1994, pp. 2108-2151.

⁵⁶ See generally, G. McCormack, "Rewriting the English Law of Personal Property Securities and Article 9 of the US Uniform Commercial Code", *Company Lawyer*, 2003, p. 68; T. Tajti, *Comparative Secured Transactions*, Akademia Kiado, 2002.

tion of floating charges in the Companies and Allied Matters Act 2020 ("CAMA" or "CAMA 2020").⁵⁷ According to section 203 of the CAMA 2020, a floating charge is an equitable security device that converts into a fixed charge upon its crystallization occasioned by a borrower's insolvency or their default in repayment of debt.⁵⁸

Thus, while on the one hand, the CAMA 2020 retains the original classificatory idea of legal and equitable rights, with the former being deemed superior,⁵⁹ the STMA under its sections 63 and 23 on the other hand generally abolished the categorization of security rights by conflating both types of right (legal and equitable) into a single 'security interest'. Invariably, the ability of companies under section 2(3) STMA to continue the creation of floating charges significantly undermines the STMA's perfection and priority regime that depends largely on the time of registration.⁶⁰ In the event, there exists an obvious conflict between a CAMA floating charge and the after-acquired floating security right of section 6(1)(b) STMA. While the CAMA-floating charge is of English origin, the latter (the after-acquired security right under section 6(1)(b) STMA) has a close kinship with the US floating lien concept under UCC Article 9-324.⁶¹ The functional equivalence of UCC Article 9-324 with section 6(1)(b) STMA is perfectly underscored⁶² in the first to file (register) or perfect rule which governs the STMA in this respect with the exception of purchase money security interest (PMSI) transactions un-

⁵⁷ See section 203 Companies and Allied Matters Act (CAMA) 2020.

⁵⁸ Sections 203 and 204 CAMA 2020. Also see Esangbedo, *supra* note 41, pp. 84–85; G.L. Gretton, "Reception without Integration? Floating Charges and Mixed Legal Systems", *Tulane Law Review*, 2003, pp. 313–14; P. Davies (ed.), *Gower's Principles of Modern Company Law*, Sweet & Maxwell, 2008, p. 1055ff.

⁵⁹ See sections 202–205 CAMA 2020.

⁶⁰ L. Gullifer, "The Reforms of the Enterprise Act 2002 and the Floating Charge as a Security Device", *Canadian Business Law Journal*, 2008, p. 399. The typical features of a proper law reform on movable assets have been highlighted by H. Beale, "An Outline of a Typical PPSA Scheme" in L. Gullifer, O. Akseli (eds.), *Secured Transactions Law Reform: Principles, Policies and Practice*, 2016, Hart Publishing, p. 7.

⁶¹ See D.W. Carroll, "The Floating Lien and the Preference Challenge: Some Guidance from the English Floating Charge", *Boston College Law Review*, 1967, p. 243.

⁶² See V.M. Ngo, "Getting the Question Right on Floating Liens and Securitized Assets", *Yale Journal on Regulation*, 2002, p. 85.

der section 27, and the perfection of documents of title and negotiable instruments under section 31 STMA.⁶³

Accordingly, one of the STMA's defects which this paper alleges, resides in the contradiction between its section 2(3)⁶⁴ and section 23⁶⁵ provisions: from the perspective of sections 203 and 204 of the CAMA 2020 and the extensive body of case law,⁶⁶ a floating charge (as was established in *Re Panama, New Zealand and Australian Royal Mail Co*)⁶⁷ only confers an equitable interest on a borrower's present and future assets until its crystallization which converts it into a fixed charge,⁶⁸ while the overarching position of the STMA promotes an ability to race with agility to the collateral registry under the first to register, first to perfect rule of section 23 which states that "the priority between perfected Security Interests in the same Collateral shall be determined by the order

⁶³ The UCC Article 9-324 deals with the priority of purchase money security interests (PMSI). see generally P. Shupack, "Defining Purchase Money Collateral", *Idaho Law Review*, 1992, p. 767; K. Meyer, "A Primer on Purchase Money Security Interests under Revised Article 9", *University of Kansas Law Review*, 2001, p. 143. The super-priority of PMSI will likely be limited to a borrower's inventories: A. Schwartz, "A Theory of Loan Priorities", *Journal of Legal Studies*, 1989, pp. 250-254.

⁶⁴ Section 2(3) STMA provides that "nothing in this Act shall prevent the creation of a security interest in the form of charges by companies registered under the Companies and Allied Matters Act".

⁶⁵ Section 23 STMA: "The priority between perfected Security Interests in the same Collateral shall be determined by the order of registration."

⁶⁶ For example, see *Illington v. Houldsworth* [1904] AC 355; *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710; *Re Spectrum Plus Ltd* [2005] UKHL 41, p. 106.

⁶⁷ [1870] 5 Ch App 318. Moreover, a floating charge confers a receivership right that enables a holder to oust his debtor from management. The Cork Committee in the United Kingdom reasonably established that the receivership system was abused: K Cork, *Insolvency Law Practice: Report of the Review Committee* (Cmnd 8558, 1982) para 233. The Enterprise Act 2002, amended the power a floating charge confers from being able to appoint a receiver to only being able to appoint an administrator. In that sense, the STMA's section 1 purpose of enhancing financial inclusion and access to credit to MSMEs may stand partially defeated in the hands of receivership under the CAMA 2020. For the defects of the receivership system, see R.J. Mokal, "Liquidation Expenses and Floating Charges - The Separate Funds Fallacy", *Lloyd's Maritime and Commercial Law Quarterly*, 2004, p. 401.

⁶⁸ Sections 203 and 204 CAMA 2020. See W.J. Gough, *Company Charges*, Butterworths, 2nd ed., 1996, p. 135. For a thorough account of the crystallization process, see L. Gullifer, *Goode on Legal Problems of Credit and Security*, Sweet & Maxwell, 5th ed., 2013, p. 153.

of registration.”⁶⁹ A plethora of English and Nigerian case law has explained that the primary essence of a floating charge resides in its ability to allow the corporate borrower to use and dispose encumbered assets in the ordinary course of business transactions.⁷⁰ In any case, while under the STMA, attachment of a security interest on a borrower's collateral must occur in the beginning under its section 6 as a precondition for validity; in a CAMA-floating charge, specific attachment to assets occurs only in the future when the floating charge has crystallized owing to a default or insolvency of the corporate borrower.⁷¹

Yet, while from the perspective of sections 202-205 of the CAMA 2020, a registered floating charge remains equitable and does not normally have a priority position over a fixed charge until crystallization; the STMA will however ascertain the priority of such a registered floating charge based on the time of registration as opposed to the time of attachment (crystallization), an outcome that self-evidently conflicts with the CAMA 2020.⁷² The conflict between these two pieces of legislation is bound to arise in litigation and perhaps thwart settled rights in the context of corporate insolvency. A temporary solution may be found in

⁶⁹ However, if there is a constructive notice of an existing encumbrance, the court may take such fact into account. For this perspective, see generally, J. de Lacy, “Constructive Notice and Company Charge Registration”, *Conveyancer and Property Lawyer*, 2001, p. 122.

⁷⁰ *Agnew v. Commissioner of Inland Revenue* [2001] UKPC 28; [2001] 2 A.C. 710. For a penetrating analysis on floating charge, see R.R. Pennington, “The Genesis of the Floating Charge”, *Modern Law Review*, 1960, p. 23; E. Ferran, “Floating Charges – The Nature of Security”, *Cambridge Law Journal*, 1988, p. 213; *Illington v. Houldsworth*, *supra* note 66. The Nigerian case law – like its English counterpart – has explained floating charge and its various implications based on the erstwhile CAMA 1990, which should however retain their relevance in CAMA 2020 considering that no material alteration was made in respect of floating charge: *Intercontractors Nigeria Ltd v. UAC* [1988] 2 NWLR (Pt. 76), 303; *Intercontractors Nigeria Ltd v. N.P.F.M.B* [1988] 3 NWLR (Pt. 76), 280 (SC); *Uwakwe & Ors v. Odogwu & Ors* [1989] LPELR-3446 (SC); *Fadeyibi v. IH (Beverages) Ltd* [2009] 5 NWLR (Pt. 1135), 446 (CA).

⁷¹ See sections 202-205 CAMA 2020. For a discussion of how the floating charge was transformed into the US-oriented ‘floating lien’ in the Australian PPSA, see P. Quirk, “Whether Australian Secured Transactions Laws will transition from the English system to the Personal Property Securities Act?”, *Thomas Jefferson Law Review*, 2009, pp. 252-256.

⁷² For a critique of the UK equivalent, see L. Gullifer, “Personal Property Security Law: Where Next? (Part 1)”, *Butterworths Journal of International Banking and Financial Law*, 2012, p. 465.

the ancient wisdom in statutory interpretation to the effect that where a general statute (STMA) and a special statute (CAMA 2020) are in conflict in respect of a particular subject-matter (floating security against a corporate borrower's assets), the special statute will generally be considered preeminent.⁷³

2.2. BANKER'S SUPERIOR RIGHT OF SET-OFF

Under the US regime of UCC Article 9, a 'deposit account' is acceptable as a collateral for which 'control' is its recognized method of perfection.⁷⁴ Control as a method of perfection in respect of intangible collateral is the equivalent of 'possession' for the perfection of tangible collateral in the US. In Nigeria however, section 23 registration is the main method of perfection of security interests in a borrower's movable collateral: possession is used only in a few permissible instances for tangible collateral such as documents of title and negotiable instruments.⁷⁵

Critically examined, section 29(1) of the STMA (even though not textually), does functionally recognize 'control' as a perfection method by prioritizing a banker's right to set off in a deposit account over the right of a secured creditor who has perfected a security interest in the borrower's account via registration.⁷⁶ Similarly, a judgment creditor whose judgment has attached to the judgment debtor's movable assets including money in a bank account will generally rank lower than the [debtor's] banker's right of set off in that same money in a bank account.⁷⁷

⁷³ S.R. Johnson, "When General Statutes and Specific Statutes Conflict", *State Tax Notes*, 2010, pp. 599–602.

⁷⁴ See Article 9-104 UCC; C. Walsh, "Justifications for UCC Article 9's Treatment of Deposit Accounts: A Comparative Note", *Penn State Journal of Law & International Affairs*, 2015, p. 350; S. Weise, "U.C.C. Article 9: Personal Property Secured Transactions", *The Business Lawyer*, 2007, Issue 4, pp. 1633–1646.

⁷⁵ See section 31 STMA.

⁷⁶ Section 29 (1) STMA: "a financial institution's right of set off shall have priority over a perfected security interest that extends to a deposit account." To understand the rationale of section 29(1), see T. Japelli, M. Pagano, "Information Sharing, Lending and Defaults: Cross-Country Evidence", *Journal of Banking & Finance*, 2002, pp. 2017–2045; J. Houston, C. Lin, P. Lin, Y. Ma, "Creditor Rights, Information Sharing, and Bank Risk Taking", *Journal of Financial Economics*, 2010, Issue 3, pp. 485–512.

⁷⁷ Section 34, STMA.

Thus, even though the bank did not register its security interest in the borrower's/judgment debtor's bank account at the Collateral Registry, section 29(1) will allow the bank's interest to supersede.

A modern secured transactions law such as the UCC Article 9 would normally and explicitly recognize 'control' as a perfection method that is equivalent to filing (registration). In the case of the STMA however, one of the defects relates to the impression that section 23's registration is the only method of perfection of security interests in collateral when it says that "the priority between perfected Security Interests in the same Collateral shall be determined by the order of registration." Yet section 29(1) operates as another perfection method that ranks above the section 23 registration when a security interest perfected by both methods is in conflict. Nigeria is currently besieged with endemic corruption, ranking 149th out of 180 countries according to 2020 data by Transparency International.⁷⁸ In the circumstance, bankers are likely to protect their customers, especially the highly affluent ones: they may strive to prevent any outcome that might take their customers' deposits out of the bank. It will hardly be surprising if section 29(1) is frequently manipulated against secured creditors whose borrowers might enter into an executed but undated loan agreement with their bankers, with the effect of triggering the set off priority under section 29(1) in a future event when a secured creditor seeks to access the deposit account in satisfaction of debts.

The lesson therefore is that secured creditors should in addition to registering their security interest at the National Collateral Registry, also request their borrower to execute a tripartite agreement involving the borrower, the secured creditor, and the borrower's banker to the effect that any default in repayment requiring satisfaction from the borrower's bank account will not be inhibited by section 29(1): in the event, the secured creditor's right will rank in priority over the banker's set off right. The challenge with this solution of requiring a borrower's banker to waive their section 29(1) set off priority right via a tripartite agreement refers to the difficulty in using a contractual agreement to thwart a provision of statute: apart from the possibility of being adjudged a con-

⁷⁸ Transparency International, "Corruption Perceptions Index", 2020, available at: <https://www.transparency.org/en/cpi/2020/index/nga> [last accessed 18.5.2021].

tract illegal by statute, hierarchically, a statute is always deemed superior to a contract in the event of any conflict, although the court may allow the ‘doctrine of clean hands’ to be evoked against the party seeking to profit from the breach.

2.3. THE INVALIDATION OF NON-ASSIGNMENT CLAUSES

Admittedly, the overriding section 1 purpose of the STMA is to increase access to affordable credit by expanding the nature of assets that can be used to secure a credit transaction. In that case, it can be appreciated why the STMA invalidates non-assignment clauses⁷⁹ in contract under its sections 4(2)(b) and (3), although unlike the UK Business Contract Terms (Restrictions on Assignment of Receivables) Regulations 2015, which was made under the Small Business, Enterprise and Employment Act 2015, the STMA failed to specifically restrict assignment of receivables to individuals and lawful businesses, thus leaving the possibility that an obligee could arrange for the transfer of its receivables to an [illegal] special purpose entity and so forcing the obligor into an involuntary relationship with a fraudulent entity. The effect of sections 4(2)(b) and (3) is that a party to a contract (individuals and MSMEs) cannot be prevented from assigning the proceeds of a contractual right or any contractual right that can serve as a valuable consideration to a third party even though a clause in the contract bars him from doing so.⁸⁰ Therefore, sections 4(2)(b) and (3) allow a unilateral modification of contract: this shifts radically from the established freedom of contract doctrine that

⁷⁹ For a penetrating treatment of non-assignment clauses, see generally P. MacMahon, “Rethinking Assignability”, *Cambridge Law Journal*, 2020, Issue 2, pp. 288–314; G. McMeel, “The Modern Law of Assignment: Public Policy and Contractual Restrictions on Assignment”, *Lloyd’s Maritime and Commercial Law Quarterly*, 2004, p. 483; G. McCormack, “Debts and Non-Assignment Clauses”, *Journal of Business Law*, 2000, p. 422; G. Tolhurst, *The Assignment of Contractual Rights*, Oxford University Press, 2nd ed., 2016; G.J. Tolhurst, J.W. Carter, “Prohibitions on Assignment: A Choice to be Made”, *Cambridge Law Journal*, 2014, p. 405; J. Edelman, S. Elliott, “Two Conceptions of Equitable Assignment”, *Law Quarterly Review*, 2015, p. 228; M. Bridge, “The Nature of Assignment and Non-Assignment Clauses”, *Law Quarterly Review*, 2016, p. 47.

⁸⁰ B.D. Hull, “Harmonization of Rules Governing Assignments of Right to Payment”, *SMU Law Review*, 2001, pp. 475–478.

empowers capable parties to freely enter into a contract and perform it on the basis of *pacta sunt servanda*. The Nigerian contract law⁸¹ is essentially similar to its English law counterpart, and except for instances of unconscionability, unfair contract terms and vitiating elements, it generally enforces contractual agreements of parties.⁸² The freedom of contract doctrine is at the heart of the contract's party autonomy principle and is essentially realized through the hallowed principle of *consensus ad idem*. The freedom of contract doctrine enables individuals to choose their contractual partners carefully based on some assessments regarding competence and character so as to increase the chances of their full or substantial performance of the contract: by increasing the chances of full performance, parties minimize losses and instead maximize profits and wellbeing.

Unlike the UK that has experimented with the concept of assignment of 'choses in action' for several centuries, Nigeria does not have any specific legislation that provides a thorough guidance on the effects of a third party assignment of a contractual proceed.⁸³ For instance, under the UK's Contract (Rights of Third Parties) Act 1999, section 2(5) empowers a third party assignee to take advantage of any legal remedy that is originally available to the contract promisee, including the equitable remedies of injunction and specific performance, and both promisor and promisee may not "by agreement, rescind the contract, or vary it in such a way as to extinguish or alter the third party's entitlement under that right, without his consent".⁸⁴ Similarly, in respect of statuto-

⁸¹ See generally, I. Sagay, *Nigerian Law of Contract*, Spectrum Law Publishing, 2nd ed., 2001.

⁸² See *Earl of Chesterfield v. Janssen* (1751) 28 Eng Rep 82, 100 (where the court described an "unconscionable term" as "[t]hat which no man in his senses and not under delusion would make on one hand, and that which no honest and fair man would accept on the other hand". This doctrine is fully applicable in Nigeria. See *Okoli v. Morecab Finance (Nigeria) Ltd* [2007] 14 NWLR (pt. 1053) 37, where the Supreme Court deemed unconscionability as fraud, stating that "...fraud may be presumed from the nature of the bargain ... the circumstances and condition of the parties contracting, weakness, one sided, extortion and advantage taken of that weakness on the other. Fraud in such cases does not mean deceit or circumvention; it means unconscionable use of the power arising out of the circumstances and condition of the parties".

⁸³ Before the enactment of the STMA, the rule in *Dearle v. Hall* (1828) 3 Russ 1, governed the assignment and perfection of choses in action in Nigeria.

⁸⁴ Section 3(1), Contract (Rights of Third Parties) Act 1999, (United Kingdom).

ry assignments, section 136(1) of the Law of Property Act 1925 precisely provides an assignee with all “legal and other remedies”.

However, it is not clear from the wording of sections 4(2)(b) and (3) of the STMA whether an assignee of receivables will enjoy the same rights as the assignor under the original contract terms to directly enforce or alter provisions of contract without recourse to the latter. It is not clear what exactly remains for the assignor after a full assignment of receivables to a third party assignee, since the former will no longer be a creditor of the assigned debt and thus has no further power to forgive the debt or alter it as to amount, interest, or payment date because the property right in the debt becomes vested in the assignee upon assignment. And since section 4(2)(b) STMA permits a unilateral alteration of the contract in relation to the identity of a third party assignee, it is less clear whether such assignee has the power to compel the account debtor to renegotiate for a more convenient payment arrangement that was not initially a term in the contract between the account debtor and assignor. Therefore, one of the defects of section 4(2)(b) STMA relates to its inability to provide sufficient guidance for a situation where both assignor and third party assignee wish to sue the account debtor, or where one of them has sued the account debtor to judgment and the other desires to commence another proceeding since they are obviously distinct parties especially in respect of the performance and enforcement of the underlying rights of contract.⁸⁵

Another issue that deserves mention is the impact of sections 4(2)(b) and (3) on the pre-reform rule of perfection in respect of receivables in Nigeria, which was the rule in *Dearle v Hall*.⁸⁶ This rule was transplanted in Nigeria from England alongside its common law, and operated for several decades until 2017. The rule in *Dearle v Hall* promoted an ability to race with agility among assignees of an interest in ‘choses in action’ which includes debts. Under this rule of perfection, where there was

⁸⁵ A lot will depend on how the Nigerian courts will eventually interpret section 4(2) (b) and (3), STMA. If a third party assignee is accorded a similar right of enforcement as their assignor, courts could prevent the problem of consecutive actions by exploring the principle of double jeopardy to the effect that the account-debtor should not suffer twice in respect of the same wrong of non-performance.

⁸⁶ (1828) 3 Russ 1. See F. Oditah “Priorities: Equitable versus Legal Assignments of Book Debts”, *Oxford Journal of Legal Studies*, 1989, Issue 4, pp. 514–520.

more than one assignee with respect to an account-receivable, priority of payment in that account was not based on the order in which the individual assignments were created, but in the order in which the various assignees notified the account debtor. Following the enactment of the STMA, the rule in *Dearle v Hall* is no longer operative in Nigeria and has been replaced by the CBN collateral registry. However, sections 4(2)(b) and (3) do not solve the potential problem of multiple assignments by an account-owner who is not legally restricted in creating multiple assignments that are above the value of his account-receivable for which he delivers to all the concerned assignees at the same time, who will in turn approach the account debtor for payment. The STMA and its section 23 publicity system does not have a reasonable solution for this likely problem. Therefore as the STMA celebrates the heightened importance of the collateral registry under section 23, a possible solution to the forgoing difficulty imposed by sections 4(2)(b) and (3) is to statutorily require a contractual party wishing to assign his receivables to first of all register the financial value of receivables in the collateral registry against his name.⁸⁷ That way, a third party assignee of a contractual proceed in deference to sections 4(2)(b) and (3) will have an actual notice of the value of receivable as well as any preexisting encumbrance(s) before accepting to be assigned the assignor's receivables, thereby limiting the possibility of ostensible ownership and fraud under the receivables framework.⁸⁸

2.4. MULTIPLICITY OF MOVABLE COLLATERAL REGISTRIES

One of the features of an unreformed secured transactions legal framework is the existence of multiple registries that cater for the registration

⁸⁷ A cue could be taken from *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61 (where the Court held that a credit agreement that failed to disclose all the charges was unconscionable). Also see T. Tajti, "Franchise and Contract Asymmetry: A Common Trans-Atlantic Agenda?", *Loyola Los Angeles Int'l & Comparative Law Review*, 2016, p. 245.

⁸⁸ It should also be made an offence punishable by law under the STMA for an account-owner to create multiple assignments that are above the value of his account-receivable. For a discussion on the ostensible ownership doctrine under the UCC Article 9, see J.L. Schroeder, *The Vestal and the Fasces: Hegel, Lacan, Property, and the Feminine*, University of California Press, 1998, pp. 131-136.

of various security interests in a borrower's collateral.⁸⁹ This problem was existent in Nigeria in the pre-reform era, and continues to functionally exist even after the reform in 2017 that emphasizes a single registration at the National Collateral Registry.⁹⁰ As earlier stated, section 23 of the STMA provides that registration is the overarching method of perfection in a borrower's collateral. Except for the provision of section 31 that provides possession as a perfection method for documents of title and negotiable instruments, the section 23 registration as the mainstream method of perfection emphasizes extensively registration-publicity as the most efficacious means of creating third party effectiveness on tangible and intangible collateral, as well as discouraging the creation of secret liens and ostensible ownerships.⁹¹ However, under the UNCITRAL Legislative Guide on Secured Transactions,⁹² as well as the UCC Article 9-310, filing (registration) is not the sole method, or the most important method of perfection. Additionally – possession, control, and purchase money security interest – are equally provided as methods of perfection.⁹³ The overriding rule under the UCC Article 9 in respect of priority is 'first to file or perfect': thus, where two or more security interests in a collateral were perfected by filing, the first to be filed prevails. And where two or more security interests in a collateral were perfected via different methods, the first to have been perfected ranks in priority irrespective of the method used.⁹⁴

Thus, the principal defect with the STMA perfection system refers to its purported recognition of section 23 registration as the overarching method of perfection and publicity of encumbrances on borrowers' collateral even though in practice, the set off right under section 29 is

⁸⁹ J. Stiglitz, A. Weiss, "Credit Rationing in Markets with Imperfect Information", *American Economic Review*, 1981, Issue 3, pp. 393–410.

⁹⁰ See section 10 STMA. The Central Bank Collateral Registry is both an asset and debtor-based registry. Available at: <https://www.ncr.gov.ng/Search/Search/Search> [last accessed 17.5.2021].

⁹¹ See C. Mooney Jr, "The Mystery and Myth of 'Ostensible Ownership' and Art 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases", *Alabama Law Review*, 1988, pp. 725–763.

⁹² See Kohn and Morse, *supra* note 27.

⁹³ See Article 9-310 – 9-314 UCC on the various methods of perfecting a security interest.

⁹⁴ See sections 8 and 31, STMA.

equally a method of perfection.⁹⁵ The CBN was empowered under section 10 STMA to manage the collateral registry, which it made electronic. Regrettably, it failed to recognize the peculiar local conditions of Nigeria as a developing country where most of the citizens do not have access to the Internet to conduct checks and registration at the electronic National Collateral Registry. Even the World Bank is not yet opposed to paper-based registration.⁹⁶ In the US, some of the states simultaneously operate paper-based collateral registries with their electronic counterparts in order to cater for the varying realities of users. Yet the purpose of the STMA as documented under its section 1 is financial inclusion and expansion of access to affordable credit to individuals and MSMEs, and it should have therefore provided a perfection system that mirrors the prevailing realities among these demographics. According to a 2018 World Bank data, about 38% of adult Nigerians are illiterate,⁹⁷ and more than half reside in rural areas where electricity and Internet access is either absent or grossly inadequate.⁹⁸ Moreover, most of the individuals and MSME creditors in Nigeria are more familiar with possessory (pledge) security which is perfected by a creditor's possession of the borrower's collateral, and the CBN should have respectively kept possession and paper-based registration as functional equivalents to registration and the electronic National Collateral Registry.⁹⁹

Since the STMA also envisages human creditors and borrowers, the know-how, logistics and monetary costs associated with the mainstream method of perfection (i.e., registration at the CBN National Col-

⁹⁵ See Section 2.2 above.

⁹⁶ A.A. de la Campa, S.C. Downes, B.T. Hennig, *Making Security Interests Public: Registration Mechanisms in 35 Jurisdictions*, IFC World Bank Group, April 2012, p. 7, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/27088/713450WP-00Box30ity0Interests0Public.pdf?sequence=1> [last accessed 16.5.2021].

⁹⁷ See the World Bank data on the literacy rate of adult Nigerians. Available at: <https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?end=2018&locations=NG&start=2018%20World%20Bank,%20%E2%80%98Rural%20Population%20%E2%80%93%20Nigeria%E2%80%99> [last accessed 20.8.2021].

⁹⁸ Rural Population – Nigeria, World Bank, 2018, available at: <https://data.worldbank.org/indicator/SP.RUR.TOTL?locations=NG> [last accessed 20.8.2021].

⁹⁹ In respect of pledge, the CBN could draw reform insights from Articles 1–14 of the Polish Registered Pledges and the Pledges Register Act (1996). The English version is available at: <https://www.ebrd.com/downloads/legal/core/polandls.pdf> [last accessed 18.5.2021].

lateral Registry based on the stipulations of sections 10 and 23 STMA) are bound to create huge impediments on access to credit especially for most individuals in rural areas. Incidentally, many uneducated individuals or MSMEs who cannot afford professional guidance will likely not register their security interests and thus run the risk of losing priority in their borrowers' collateral: such a situation will gradually accumulate to whittle away confidence in the secured transactions system. It is less clear why Nigerian lawmakers chose the section 23 registration as the main method instead of the 'first to file or perfect rule' as obtainable under the UCC Article 9 and UNCITRAL Legislative Guide on Secured Transactions: in the US where the STMA type of law arguably comes from, 'possession' and 'control' are provided as equal perfection methods with the notice filing method (registration).¹⁰⁰ Their availability thus caters sufficiently for all business demographics and individuals in the US including the pawn industry¹⁰¹ that relies exclusively on UCC Article 9-313 possession as a perfection method.¹⁰² As it stands, a pawn industry which caters for consumer finance, where individuals borrow small loans and secure same with personal items of value (i.e., movable assets),¹⁰³ will hardly thrive in Nigeria owing to the absence of possession as a perfection method except for documents of title and negotiable instruments as stipulated under section 31 STMA. As earlier stated, given the level of Nigeria's social and technological advancement, the lawmakers should have provided possession and control as equivalents of registration with the choice on secured creditors to as-

¹⁰⁰ See Article 9-310 - 9-314 UCC. In a notice filing system, prospective creditors (registry searchers) ought to be diligent, wary, and ready to request additional information from their prospective borrowers as suggested in: UNCITRAL, Draft Security Rights Registry Guide (doc A/CN.9/WG.VI/WP.46 2011) para 53.

¹⁰¹ J. Shackman, G. Tenney, "The Effects of Government Regulations on the Supply of Pawn Loans: Evidence from 51 Jurisdictions in the US", *Journal of Financial Services Research*, 2006, pp. 69-91.

¹⁰² Even in England, the court in *Official Assignee of Madras v. Mercantile Bank of India Ltd* [1935] AC 53 Privy Council (explained how possession creates a similar type of notice that is also achievable by a collateral registry).

¹⁰³ H. Fleisig, "Economic Functions of Security in a Market Economy", in J. J. Norton, M. Andenas (eds.), *Emerging Financial Markets and Secured Transactions*, Kluwer Law International, 1998, p. 15.

certain which method is most convenient for them in a given transaction.¹⁰⁴

Another defect in respect of the collateral registries relates to their unlinked nature.¹⁰⁵ Apart from the National Collateral Registry which sections 10 and 23 STMA provide for, there are other registries that cater for the registration of security interests in movable assets: one of them is the Corporate Affairs Commission (CAC) registry where floating and fixed charges are registered as a precondition for perfection under the Companies and Allied Matters Act (CAMA) 2020.¹⁰⁶ Apparently, the law and policy makers failed to link the CAC registry with the National Collateral Registry even though section 2(3) STMA preserves the right of companies to create floating charges that are registrable at the CAC registry, thereby establishing two parallel registries that potential secured creditors are required to search before extending credit to borrowers.¹⁰⁷ Needless to add that the increased cost of searching unlinked multiple registries is likely to impact negatively on the cost of lending to individuals and MSMEs: this ultimately whittles away the realization of the section 1 purpose to expand access to affordable credit to individuals and MSMEs in Nigeria.¹⁰⁸ The forgoing is exacerbated by the existence of an intellectual property (IP) registry where licenses on trademarks and other IP rights are registered.¹⁰⁹ Yet encumbrances on IP rights such as licenses, assignments, and charges are within the bailiwick of sec-

¹⁰⁴ See D. Coenen, A.J. Givray, D.M. Quinn, P. Hilton, "Priority Rules of Article Nine", *Cornell Law Review*, 1977, p. 843.

¹⁰⁵ See generally, T. Japelli and M. Pagano, *supra* note 76, p. 2040.

¹⁰⁶ Section 222 CAMA 2020.

¹⁰⁷ G. Gilmore, *Security Interests in Personal Property*, Little Brown, 1965, p. 463 (arguing that "the typical pre-Code pattern included separate filing systems for chattel mortgages, for conditional sales, for trust receipts, for factor's liens and for assignments of accounts receivable. In such a situation the expense and difficulty of making a thorough credit check are obvious. Since the filing requirements were themselves frequently obscure and tricky, the chances were good that a lender who, through his counsel, was familiar with one device would inadvertently go wrong in attempting to comply with another and fail to perfect his security interest.").

¹⁰⁸ For a more penetrating discussion on this, see Esangbedo, *supra* note 41.

¹⁰⁹ On how IPRs are impacted in secured transactions law, see A. Tosato, "Security Interests over Intellectual Property", *Journal of Intellectual Property Law & Practice*, 2011, pp. 93-99; S. V. Bazinas, "Intellectual Property Financing under the UNCITRAL Guide", *Uniform Commercial Code Law Journal*, 2011, p. 601.

tion 23 registration as they are equally categorized as movable (intangible) property. Based on the understanding of the STMA reformers, every type of encumbrance or perfection on any category of movable property (whether tangible or intangible) ought to be registered within the precincts of section 23 and at the National Collateral Registry.

A significant percentage of Nigerians who live in urban areas own motor vehicles. The National Bureau of Statistics revealed that as at the third quarter of 2017, 'Nigeria had about 11,547,236 motor vehicles in the country. About 4,656,725 of these vehicles are privately owned while, 6,749,461 vehicles are registered as commercial vehicles. Another 135,216 vehicles are registered as government owned vehicles while 5,834 vehicles are registered for diplomats'.¹¹⁰ All over the world, including the US, a motor vehicle is a well-known type of movable asset that could be used to secure credit. In the US, the linked collateral registries provide information for registry searchers in respect of any motor vehicle regardless of whether they have been presented as collateral outside their state of registration. In Nigeria however, the problem that existed in the US before the emergence of the UCC Article 9 in which different unlinked motor vehicle registries existed in different states, is still present in Nigeria irrespective of the STMA reform and its section 23 emphasis on registration as the main method of perfection. At the moment, different unlinked motor vehicle registries exist where details of registration and ownership of vehicles are documented. These distinct motor vehicle registries are not also linked to the National Collateral Registry, and a potential secured creditor who has been offered a motor vehicle as collateral cannot confidently depend on the sole search at the National Collateral Registry to discover any encumbrances or issues appertaining to ownership of the vehicle unless he/she can expend additional costs to search the relevant motor vehicle registry of the state.¹¹¹ As Heywood

¹¹⁰ Nairametrics, 'Nigeria's Vehicle Population Data Reveals Towering Opportunities' *Nairametrics*, 10 February 2018, available at: <https://nairametrics.com/2017/12/11/vehicle-population-in-nigeria-is-11547236-nbs-data/> [last accessed 20.5.2021].

¹¹¹ See the Abuja motor vehicle registry. Available at: <https://fctevreg.com/aboutus.htm>; the Lagos motor vehicle registry. Available at: <http://www.lsmvaapvs.org/>; <https://lagosstate.gov.ng/blog/2017/07/05/lagos-and-motor-vehicle-administration/> [last accessed 18.5.2021].

Fleisig, *et al*, rightly argued, the existence of multiple registries ultimately diminishes a full realization of affordable access to credit.¹¹²

In sum, in addition to the regular complexities¹¹³ in concluding a security agreement in Nigeria's business environment, the existence of multiple and unlinked collateral registries creates an additional layer of difficulty in accessing affordable credit: secured creditors run the likely risk of losing senior positions owing to the confusion relating to where to search for or register a security interest. The lack of certainty regarding where to register might eventually translate into a risk averse attitude of lending credit at exorbitant costs as a cushioning measure against the potential risk of losing place in the hierarchy. Indisputably, a borrower who has borrowed a high cost credit owing to the forgoing challenge will not be competitive in business and might also be pushed to the brink of insolvency as a result, thus defeating the section 1 purpose of STMA vis-à-vis access to affordable credit.¹¹⁴ To solve this challenge, Nigerian policy and lawmakers must strive to link the various collateral registries so that a name or collateral search at the National Collateral Registry (as sections 10 and 23 STMA as well as the CBN Collateral Registry Regulations require) in respect of any movable collateral will show their details irrespective of in which registry the details were initially registered.¹¹⁵ a single database registry is the approach recommended by both UCC Article 9 and the UNCITRAL Legislative Guide on Secured Transactions in respect of third party effectiveness, and is hereby recommended for Nigeria.¹¹⁶

¹¹² See H. Fleisig, M. Safavian, N. de la Peña, *supra* note 29, p. 39.

¹¹³ In Nigeria, it is difficult and costly to conclude contractual transactions that require some official documents from the public offices owing to the high level corruption, bureaucracy, dilapidated infrastructure, and the generally unfavourable business environment, like poor electricity and a high level of insecurity.

¹¹⁴ A similar view can be found in J.A. Estrella-Faria, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage", *Uniform Law Review*, 2009, p. 16.

¹¹⁵ This will also minimize the existence and effects of secret liens. See, J. Benjamin, *Interests in Securities*, Oxford University Press, 2000, 105.

¹¹⁶ J.C. Lipson, "Secrets and Liens: The End of Notice in Commercial Finance Law", *Emory Bankruptcy Development Law Journal*, 2005, pp. 421-426.

2.5. AN OUT-OF-COURT (PRIVATE) ENFORCEMENT POWER WITHOUT ANY RIGHT TO MONITOR THE BORROWER'S COLLATERAL

The STMA introduced a new floating security in Nigeria—the after-acquired property right under its section 6(1)(b) – which is the functional equivalent of the US concept of floating lien.¹¹⁷ This section 6(1)(b) right can be created by a human as well as a corporate borrower. Prior to the reform in 2017, the CAMA floating charge existed as the sole floating security device for securing payment with a corporate borrower's present and future assets. Thus, before 2017, only incorporated companies could create floating charge securities and much of the experience documented in the Nigerian legal framework regarding a floating security device was in the context of floating charges created by companies. Thus, by introducing the section 6(1)(b) right which enables human and corporate borrowers to create a floating security over their movable assets to secure payment, the overriding aim of the STMA under section 1 appears realizable, but exposes the Nigerian lending industry to possible fraud by dubious [human] borrowers who might access credit on the basis of the section 6(1)(b) right and thereafter disappear from sight.¹¹⁸ In terms of corruption, Nigeria ranks 149th out of 180 countries. The UK (where the concept of a floating security) came from, ranks eleventh, based on the corruption perception index survey conducted by the Transparency International in 2020.

Even under the more advanced English legal system, floating charge under the Companies Act 2006¹¹⁹ is largely limited to incorporated companies for the simple reason that their winding up comes with several types of public notifications to their creditors: thus their disappearance from the market is not as easy as individual borrowers. In the 20th century US, the floating charge¹²⁰ concept received a muscular resistance from

¹¹⁷ For a detailed study, see generally M. Schwartz, "The Floating Lien under Sections 9-108 and 9-204: A Case Analysis", *Albany Law Review*, 1969-1970, p. 277.

¹¹⁸ J. Padilla, M. Pagano, "Sharing Default Information as a Borrower Discipline Device", *European Economic Review*, 2001, Issue 10, pp. 1951-1980.

¹¹⁹ Sections 860-867, UK Companies Act 2006, available at: https://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf [last accessed 16.5.2021].

¹²⁰ See *Illington*, *supra* note 66; *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710; *Re Spectrum Plus Ltd* [2005] UKHL 41, p. 106.

some US judges who considered it as a harbinger of fraud.¹²¹ Early cases such as *Benedict v Ratner*,¹²² expressed their dissatisfaction with the idea that a borrower will have an unfettered dominion over a creditor's assets without any right to monitor the borrower or his collateral.¹²³ As TC Gordon eloquently captured it, "the rule of *Benedict v. Ratner*, taking its name from the decision of the Supreme Court of the United States in that case, is substantially this: if a person impresses a lien on his property as security for a debt to another, and if the debtor reserves or is permitted to exercise power or dominion over the property that is inconsistent with the avowed purpose of the transfer—for example, if the debtor assigns his accounts receivable to secure a debt, but collects the proceeds of the accounts and commingles them with his own funds – the lien is illusory and void. Such reservations of power are sometimes referred to as 'unfettered dominion' in the debtor-lienor."¹²⁴ The *Benedict* right to monitor (or 'police')¹²⁵ the borrower/collateral therefore became an integral element of the validity of non-possessory security agreements and its use became widespread until the emergence of the UCC Article 9 around the mid-20th century. In fact, *In re Portland Newspaper Publishing Co*,¹²⁶ the US court particularly held that the fraud on accounts would have been obviated if the borrower's collateral was 'policed'.¹²⁷ The requirement of 'collateral policing' in the US regime before the advent of the UCC Article 9 was reflective of the status of their social and technological development at that time: the absence of a viable [electronic] collateral registry where registered encumbrances against a borrower's collateral can effectively be checked by third parties. In the UK, the fear regarding

¹²¹ For a seminal treatment of floating charge, see Pennington, *supra* note 70; R. Goode, *Principles of Corporate Insolvency Law*, Sweet & Maxwell, 1997. The UK Enterprise Act 2002, amended the right of a floating chargee to being only able to appoint an administrator. See Gullifer, *The Reforms of the Enterprise Act 2002 and the Floating Charge as a Security Device*, *supra* note 60, p. 419. Also see sections 202-205, CAMA 2020.

¹²² *Benedict v. Ratner* 268 US. 353 (1925).

¹²³ *Ibid.*

¹²⁴ T.C. Gordon, Jr., "Why *Benedict V. Ratner*?", *Washington & Lee Law Review*, 1964, p. 70.

¹²⁵ 'Policing' is a US secured transactions terminology. The right to 'police' a borrower or his collateral means the contractual power to monitor how the borrower utilizes his asset-collateral vis-à-vis the security agreement.

¹²⁶ (1966) 2 Bankr. L. Rep. (4th ed.) 11, 6172 at 71136.

¹²⁷ *Ibid.*

a fraudulent abuse of the floating charge was minimal considering its restricted use to incorporated companies: moreover, floating charge appeared and still appears indispensable considering that no other security device was/is suitable for securing payment with inventory collateral owing to its shifting nature.¹²⁸

The advent of UCC Article 9 abolished the *Benedict* right of collateral policing in the US which the *Benedict v Ratner* case had created. Its use is now a matter of agreement: if a creditor and his borrower agree that the latter's collateral be policed by the creditor, such agreement will be valid and enforceable under US law since the power to create a contractual policing right is enshrined under the UCC Article 9-205 and its Official Comment 2: experienced lenders are therefore likely to incorporate the right of policing in their security agreements.¹²⁹ Although collateral policing was abolished in the US under UCC Article 9-205, this paper recommends the adoption of the *Benedict*-collateral policing right in Nigeria as an antidote against the misuse of non-possessory security interests under section 6(1)(b) STMA. The UCC Article 9-609 also introduced the right to repossess a borrower's collateral by means of self-help. Of all the legal systems that transplanted the UCC Article 9 type of law, none had omitted the concept of self-help repossession: such private enforcement of security agreement is considered efficacious and in fact at the heart of realizing the mission of affordable access to credit especially in Nigeria where judicial enforcement is slow.¹³⁰ Unarguably, if MSMEs or even individuals are to access

¹²⁸ See Pennington, *supra* note 70. The After-acquired and future advance clauses of the UCC Article 9 can be found in its Sections 9-108, 9-204, and 9-205. Under the STMA, the equivalents can be found under Section 6(1)(b). For deeper insights, see N.L. Gordon, "The Security Interest in Inventory under Article 9 of the Uniform Commercial Code and the Preference Problem", *Columbia Law Review*, 1962, Issue 1, pp. 49-72; B.A. Campbell, "Contracts Jurisprudence and Article Nine of the Uniform Commercial Code: The Allowable Scope of Future Advance and All Obligations Clauses in Commercial Security Agreements", *Hastings Law Journal*, 1986, p. 1007.

¹²⁹ This collateral policing right has yielded the repo industry in the US, who operate as creditors' agents in repossessing vehicle{s?} and other types of movable collateral from defaulting borrowers. See the Repossession Market Industry in the US - Market Research Report, March 25 2020, available at: <https://www.ibisworld.com/united-states/market-research-reports/repossession-services-industry/> [last accessed 5.5.2021].

¹³⁰ J.J. White, "The Abolition of Self-Help Repossession: The Poor Pay Even More", *Wisconsin Law Review*, 1973, p. 503.

small loans in exchange for a security interest in their movable assets, it would make mockery of the process and aim of section 1 STMA, if their creditors are forced to resort to the generally slow and thus costly judicial system as a means of debt recovery.¹³¹

Yet, while section 40 STMA empowers a creditor to resort to self-help in repossessing collateral, it has not provided them with any statutory/contractual right to monitor/'police' collateral to make debt realization effortlessly achievable. A right to 'police' a debtor's collateral is in itself an *ex ante* remedy that assists the creditor to conduct early diagnoses about the financial health of his borrower's business and consequently decide how best to intervene or even assist the borrower in preventing a total financial collapse. Similarly, the right to repossess collateral owing to a borrower's inability to repay debt helps the creditor to cut his losses instead of waiting until insolvency when he will join a long queue of creditors with little chances of being [fully] repaid as an unsecured creditor.¹³² If such experience becomes widespread among consumer and MSME lenders, it will eventually create a lending apathy, thus defeating the aim of section 1 STMA. Arguably, the Nigerian reformers made a mistake in providing a right to repossess collateral by means of self-help under section 40 STMA without any accompanying right to 'police' the borrower's collateral. They seemed to have mistaken 'policing' under US secured credit jurisprudence as meaning a requirement of a creditor to use the Nigerian police to recover collateral as stipulated under section 40(6) STMA. Being a country that is still haunted by its past military rule for an accumulated period of 29 years, whereby police brutality was widespread, requiring creditors to use the Nigerian police to recover collateral seems to be a statutory reintroduction of police brutality by the backdoor.

Similarly, the potency of section 40's self-repossession right was whittled away by the requirement on the creditor to furnish a ten-day advance notice to the borrower regarding his intention to repossess, be-

¹³¹ *Ibid.*, pp. 511-530.

¹³² R. J. Mokal, "Priority as Pathology: The *Pari Passu* Myth", *Cambridge Law Journal*, 2001, pp. 585-587; V. Finch, "Security, Insolvency and Risk: Who Pays the Price?", *Modern Law Review*, 1999, pp. 633-644; R.M. Goode, "Is the Law too Favourable to Secured Creditors?", *Canadian Business Law Journal*, 1983, p. 53.

fore actually repossessing collateral.¹³³ Such notice requirement arguably destroys the idea of self-help repossession which thrives on the element of surprise. In the US where the concept of self-help repossession came from,¹³⁴ there is no such requirement to notify a borrower in advance of repossession and the high recovery rate of the repo men (the repossession agents) depends largely on this surprise element. A dubious borrower who has been notified ten days in advance is likely to relocate elsewhere in Nigeria with the encumbered assets, and given the lack of a functional database that holds data of all citizens (e.g., only 35% of the citizens have BVNs – bank verification numbers),¹³⁵ such a debtor is likely to totally escape the consequences. This paper argues that a creditor-statutory/contractual right to ‘police’ a debtor or his collateral will be consistent with Nigeria’s local conditions,¹³⁶ and should thus be included in the STMA while the right of a borrower to be notified ten days in advance be abolished.¹³⁷

¹³³ Section 40(3) STMA.

¹³⁴ See Article 9-609 UCC.

¹³⁵ O. Nwachukwu, “CBN, EFInA, SANEF in New Push for 80% Financial Inclusion by 2020” *Business Day*, 23 August 2020, available at: <https://businessday.ng/financial-inclusion/article/cbn-efina-sanef-in-new-push-for-80-financial-inclusion-by-2020/> [accessed 12.5.2021].

¹³⁶ According to the corruption perception index of Transparency International 2020, Nigeria ranks 149th out of 180 countries. Incidentally, many borrowers (compared to the UK and US), are more likely to honour the terms of their security agreement. Similarly, dubious borrowers may simply abuse the STMA’s favourable provisions on access to credit by creating a floating lien of section 6 STMA over their movable assets and later disappear from their known business location. Owing to lack of a comprehensive database of citizens, and the poor equipment of the law enforcement, it is will be difficult to detect fraudulent borrowers that are at large.

¹³⁷ The Article 9-205 UCC abolished the compulsory requirement to ‘police’ a borrower’s collateral as was decided in *Benedict v. Ratner*. As the Official Comment 2 to Article 9-205 explains, this policing right can only henceforth arise per an agreement of the parties.

2.6. INSURANCE COVER AS A PRECONDITION FOR A VALID SECURITY AGREEMENT

To avoid or block the possible challenges that will be occasioned as a result of the unavailable right to 'police' a borrower's collateral, the STMA reformers require parties entering into a security agreement for which the STMA governs, to stipulate details of an insurance cover in their security agreement as required under section 6(1)(c) STMA. In principle, the solution for the possible abuses of the section 6(1)(b) after-acquired security right by human borrowers could be achieved through an insurance cover.¹³⁸ However, Nigeria being a developing country, there are at least two problems with the section 6(1)(c) insurance requirement as a precondition for entering into a security agreement.

First, it erroneously imagines Nigeria as already a sophisticated country where the use of insurance is mainstream: even the US (where the STMA-law arguably comes from), does not require insurance as a precondition for entering into a security agreement irrespective of being a more sophisticated country with a well-established insurance industry. Nigeria has a population of over 200 million people and its insurance industry was only reformed less than two decades ago by the Insurance Act 2003, after several decades of dilapidation. In the event, it is still incapable of handling the logistical and financial demands that will ensue from the transactions of the several million Nigerians as section 6(1)(c) STMA seems to imagine. Second, section 50(1) of the Insurance Act 2003 states that "the receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance." In 2014, the section 50(1) provision received approval from the Nigerian Supreme Court in *Corporate Insurance v Ajaokuta Steel* (LPELR 22255). As insurance premiums will likely be borne by borrowers, it is therefore submitted that the requirement for insurance cover and the associated costs ultimately defeat the section 1 overriding purpose of expanding access to credit for individuals and MSMEs. Also, in respect

¹³⁸ For the US perspective, see A. Kronman, "The Treatment of Security Interests in After-Acquired Property Under the Proposed Bankruptcy Act", *University of Pennsylvania Law Review*, 1975, pp. 110-119.

of the business demographics imagined by section 1 STMA, many of them live or operate in rural areas where adequate electricity and Internet is a big challenge: they do not have the required know-how and financial resources to satisfy the requirement of insurance as a precondition for creating a valid security agreement for small loans.

As already stated, the cost of insurance premiums will most likely be borne by borrowers, thereby increasing the cost of credit as well as the cost of doing business and creating jobs, contrary to the section 1 purpose. Some creditors and borrowers may intentionally or unintentionally fail to comply with section 6(1)(c). Yet as insurance is a requirement for validity, and ignorance of the law is hardly enough excuse, a vast number of security agreements may in the last analysis be adjudged invalid owing to lack of compliance with section 6(1)(c), the consequence of which will be unenforceability of the security agreement whether in the ordinary course of business or in the context of insolvency of the borrower. Lack of compliance may also be adjudged as a contract illegal by statute and the *in pari delicto* doctrine may allow a loss to remain where it has fallen.¹³⁹ This paper argues that section 6(1)(c), which initially was not part of the draft bill, was a sort of regulatory capture by the insurance industry: this arguably destroys the section 1 purpose of access to credit and should therefore be removed.

CONCLUSION

This paper has attempted a critical exposure of the inherent defects in the STMA. The defects reflect the contradictions embodied in some of STMA's provisions that are in direct conflict with Nigeria's local conditions as well as STMA's section 1 ultimate aim of increasing access to credit for individuals and MSMEs. The STMA was arguably transplanted from the UCC Article 9, yet it failed to incorporate some of the fundamental elements of the unitary-functional approach that are reputed to be the backbone of modern secured transactions law. In disregard of other established methods of perfection under the UCC Article 9, such

¹³⁹ G.A. Strong, "The Enforceability of Illegal Contracts", *Hastings Law Journal*, 1961, p. 362.

as 'possession' and 'control', the STMA made registration under its section 23 the main method of publicity and perfection of security interests in borrowers' collateral. The CBN charged with the duty to institute and manage the collateral registry under section 10 STMA, made it an electronic registry. Yet owing to insufficient manpower (technical know-how) as well as the supply of electricity and Internet, electronic registration at the National Collateral Registry is not accessible to most Nigerians especially those living in rural areas, thus defeating the section 1 purpose of financial inclusion and expansion of access to credit to individuals and MSMEs. Also, the multiple but unlinked registries that cater for different security interests in movable assets continue to pose avoidable difficulties vis-à-vis access to affordable credit.

Similarly, the self-help remedy introduced by section 40 requires a creditor to furnish a ten-day repossession notice to their borrower and also to involve the Nigerian police to assist in the recovery of collateral. The notice requirement arguably defeats the surprise element that is regularly required for a successful monitoring/policing and repossession of collateral as practised in more experienced jurisdictions that have reformed their secured transactions law through the lens of the UCC Article 9. And the required use of the Nigerian police in repossessing collateral is foreseen to be a reintroduction of police brutality in Nigeria – a country that is still recovering from its past military rule when executive lawlessness and police violence on civilians were inexorably widespread.¹⁴⁰ Although there is no official impact assessment report of the STMA regarding its effectiveness in the lending industry, this paper doctrinally examined its framework and is of the conclusion that some of the provisions of the STMA do not stand the scrutiny of its section-1

¹⁴⁰ Nigerian courts were generally against the use of self-help to repossess collateral during the military era. See *Ellochim Nigeria Ltd and Others v. Mbadiwe* [1986] NWLR (pt. 14) 47, p. 165, where the court said: "It is no doubt annoying, and more often than not, frustrating, for a landlord to watch helplessly his property in the hands of an intransigent tenant who is paying too little for his holding, or is irregular in his payment of rents or is otherwise an unsuitable tenant for the property. The temptation is very strong for the landlord to simply walk into the property and retake immediate possession. But that is precisely what the law forbids." Also see *Ojukwu v Military Governor of Lagos State* [1985] 2 NWLR (pt. 110) 806; *Civil Design Construction Nigeria Ltd v SCOA Nigeria Ltd* [2007] 6 NWLR (pt. 1030), p. 300.

purpose as well as Nigeria's local conditions. Moreover, certain essential ingredients of the unitary-functional approach had avoidably escaped the attention of the Nigerian lawmakers, perhaps owing to an imperfect appreciation of the source law – the UCC Article 9.