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LAW 111: LEGAL METHODS I

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Module 1

with law in those terms. Rather it deals with law in the sense of law in relation to human actions. Although there is no universally accepted definition of "law", it is clear that law consists of a body of rules for human conduct.

3.1 Natural Law

Every society, primitive or civilized is governed by a body of rules, which the members of the society regard as the standard for behaviour. It is only when rules involve the idea of obligation that they become law. When rules ordinarily represent the notion of good and bad behaviour, they are rules of morality. But law is most effective when it conforms to the moral feelings of the members of the community. Mere coincidence of patterns of behaviour does not indicate the existence of law. Ordinary habits are thus, to be distinguished from obligatory rules.

Although, obedience to law is usually secured by sanction but there are people who obey the law merely because they believe that it is in the best interest of the society to do so. Sanctions, however, serve the purpose of protecting the general community against persons of defiant behaviour. Without sanctions, the continued existence of society would be in danger and society would not be peaceful.

In ancient or primitive societies, the obligatory rules of human conduct usually consist of customs, that is, rules of behaviour accepted by members of the community as binding among them. Customs are usually unwritten. In a primitive society, there is no centralized system for enforcement of rules; self-help is usually resorted to. Notwithstanding, the obligatory rules constitute law.

3.2 Modern Perspective

From the perspective of a lawyer, law consists of those rules of human conduct which the courts normally would enforce. From the layman's perspective law includes all rules of conduct which people generally are

expected to observe. From the layman's perspective, law has a broader scope than the lawyer's law, and may include those rules and regulations, which guide human behaviour any breach of such law is frowned at by the state or community that can enforce it. In other words, layman's notion of law includes those traditional and religious usages and norms, which no court of law will recognize nor enforce.

Also, law can be defined as the entire body of principles that govern human conduct and the observance of which can be enforced among the members of a given state. It is the bond that regulates people's behaviour in a society. The law of a given community is the body of rules which are recognized as obligatory by its members. From this definition, it is evident that the rules may derive from custom, legislation or case law. Case law consists of decisions of courts in decided cases.

In a traditional society, law consists mainly of the traditional usages and customs of the people inherited from their past. It changes often unconsciously and imperceptibly with the changing social, economic and religious ideas, and other needs of the people. Obedience to them is secured by social pressures and rarely by judicial actions. Today, the importance of these customary rules of conduct is on the decline even in the traditional society. Legal rules now come mainly from lawmakers and the courts.

For people law is a command. Although there are examples of rules of law that are in form of a command given by an authority and directed to an individual, most legal rules do not take that form. For instance, rules relating to the making of "WILLS" do not command any person to make a WILL. Example of command is an order t given by a traffic warden or policeman to a motorist to stop.

3.3 Judicial Perspective

There are people also, who think of law as only what the courts do. They argue that what is stated to be law by the legislator is not the law because it is subject to interpretation and that the interpretation given by the judges constitutes the law. Admittedly, there can be vague words in written rules, the practical meaning of which may depend on the opinion of the judge. However, most rules of law are seldom the subject of litigation.

Furthermore, some people say that law is normative in character. They contend that law states what people ought to do, that it prescribes norms of conduct. Others argue that law is imperative in character that it states what people must do and what they must not do. On the other hand, some others see law as a fact. Clearly, the existence of law may be considered as a fact because law cannot be understood except by making reference to facts. However, law is applied to facts and can therefore, be distinguished from fact.

In conclusion, whatever the opinion you may hold about law, may depend on the angle from which you view it. For instance, the average citizen may think of law simply as a body of rules which must be obeyed because he/she sees it from an external point of view and the judge may consider law simply as a guide towards conduct because he sees it from an internal point of view. Neither of them has a complete view of law. To this end, law is indeed a complex phenomenon.

Self Assessment Exercise (SAE) 1

The word "Law" cannot be given a universal meaning or definition. Do you agree?

4.0 The Importance of Law

In any organized society in which there are developments in commerce and communication, there emerges the great need of fashioning laws to regulate people's mutual rights and obligations. If there are however, no man-made laws, it may be that the people would be guided by principles of morality and choose to live and act in the same way as they do today. Man would conduct himself in accordance with the dictates of his conscience; the precepts of right living which are part of his religion and the ethical concept that are generally accepted in his community. However, problems may arise when a few individuals, who while enjoying the advantages of living in a civilized society, may be unwilling to conform to the established mode of behaviour, which make the civilized community possible in the first instance, by evading laws which are obeyed by others.

The regulatory effect of law on human conduct in present - day society cannot be overemphasized. Law makes man's behaviour in any given situation predictable. Therefore, when we live or move about in the presence of our neighbours, we are relatively sure that our security is guaranteed because we know their limits under the law. Law in a society means order, peace, stability and progress. In the absence of law, and a general disposition to disobey law, life would be impossible, for chaos, confusion, and a general feeling of insecurity would be the order of the day.

Individuals owe their dignity and basic rights to law. Even our religious life cannot be maintained in the absence of law. Our family life and relationships are recognized and well protected by law, which stipulates remedies against any uninvited invasion of our domestic rights. Because our belongings and us, our homes and families are secured by the Law, we generally can afford to rest or sleep peacefully, work, save, think and plan for the future.

Often, Law initiates changes in the political, economic, and social structures. For example, the change from Parliamentary to a Presidential system of government for Nigeria, was brought about by the promulgation of a legal instrument; the then Constitution of the Federal Republic of Nigeria, 1979. Customary law in some parts of Nigeria prohibits the intermarriage of so-called free citizens and members of some castes; for instance an 'Osu'. But this obnoxious rule, which established the Osu and disabled them from freely marrying other members of the community has been abrogated in the three Eastern States of Nigeria, by the Abolition of the Osu Supreme Law, 1956. It may be added, however, that in most cases, changes or the need for change in these systems precede and call for modification of the law.

When in a society people engage in killing or injuring their neighbours, to committing crimes and breaking agreements with impunity, then a state of anarchy or lawlessness is at the doorstep, and in the absence of any supreme temporal authority to hold these vices in check, the future will certainly be sad, bleak and uncertain. No man would be able to go about his business safely and none would confidently enter into any contract with his neighbour. Economic machinery of the society would grind to a halt. All political, social and economic institutions of the society would crumble. All the treasured values inherited from past would be debased, if not completely destroyed. In fact, the entire social fabric would give way, for there would be no bond, no social ties to hold the people together. Humans may even become wild and a wolf to his fellow man, for there would be no mutual respect, no responsibility and no accountability. In short, the society would lose all the features and qualities of a society and cease to have any attraction for people. Human will then go back to the state of nature, where life was solitary, poor, nasty, brutish and short. Because many would take to their heels, that might mean an end to the community, unless a saviour emerges to re-establish and restore order by means of laws.

Self Assessment Exercise (SAE) 2

Why do you think law is needed in any society? Based on your answer, do you think law has served that purpose in Nigeria?

5.0 Why the Law is Obeyed

Many factors operate to compel a general respect for and obedience to law. The law awards damages and other forms of remedies to the injured to repair any damage done to them. It also inflicts punishments on wrongdoers or compels them to pay damages or other awards to the victim. These are intended to soothe the mind and restrain to actions of the injured, and at the same time correct the wrongdoers and discourage from wrongdoing. In short, punishment for crimes apart from being aimed at protecting the society is intended to have corrective and deterrent effect on people.

There are five grounds of compliance with a rule of law:

i) Indolence;

ii) Deference;

iii) Sympathy;

iv) Fear; and

v) Reason.

By indolence, we refer to mental inertia. Many always prefer to follow the line of least resistance and will willingly and loyally accept what is laid down for them as guiding principles of behaviour, because they are too lazy to question either the rulers or the rules. The second reason involves deference, either to the personal authority of the lawgivers or to the impersonal authority of tradition. It is not good to flaw authority and so disturb the basis of the accepted order of social life. The third reason people obey law is sympathy for one another, in the delicate task of social adjustments rendered necessary by the facts of a common political life. The fourth reason is fear. People obey the law for fear of punishment,

whether by human authority or by divine intervention. The power of the state to penalize infractions of its laws or that of the supernatural agencies to castigate for outrages against divine ordinances, often act as a sufficient determent to would be offenders.

The last reason people obey law is because they consider it the reasonable thing to do. It is unreasonable to defy the law. Reason dictates that law is essential to the achievement of the purposes of social existence and that in any case obedience pays. It may be added that religious and magical sanctions as well as fear of ridicule, ostracism or economic exclusion contribute much in securing compliance with rules of established law.

Self Assessment Exercise (SAE) 3

Mention at list two other reasons why people obey the law apart from those highlighted above?

Self Assessment Exercise (SAE) 4

What would be the experience and lifestyle of citizens in a society where there are no laws? Give examples to support your answers.

5.0 Summary

Under this unit you learnt the various in which we can define Law. We stated that Law is the entire body of principles that govern human conduct and the observance of which can be enforced among the members of a given state. It is the bond that regulates people's behaviour in a society. It is the body of rules which are recognized as obligatory by its members.

You also learnt about the importance of the law. If there were no laws the entire social fabric would give way, because there would be no bond, no social ties to hold the people together. In addition we learnt the reason behind people's obedience to law. These reasons are:

1) Indolence;

2) Deference;

3) Sympathy;

4) Fear; and

5) Reason

6.0 Conclusion

In this unit, you have been exposed to the rudimentary aspect of law. We tried here to show you that although there is no universally acceptable definition of the word "Law", however, there are some working definitions that will guide you as new "entrants" in the field of law.

7.0 Tutor– Marked Assignments (TMAs)

a) For the peaceful co-existence in a given society, there must be a "watch-dog" in the form of law to oversee that the relationship between the citizens is cordial. Discuss this statement in the light of the importance of law in the society.

b) People obey law for different reasons. Why do you think people obey law in Nigeria? Is this obedience total or partial?

8.0 References

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Unit 2: Law and Justice in Society

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1.0 Introduction

In unit 1, you were introduced to the term, law. In other words, you can define what law is or what it is not. Under this unit, we shall consider law and justice in society. We shall also do a classification of justice; which will enable you as students of law to know what kind of justice operates in every given situation in your everyday interaction with fellow citizens.

2.0 Objectives

At the end of unit 2, you should be able to:

i) Differentiate between law and justice;

ii) Identify the classes of justice;

iii) Discuss the notion of justice in society such as ours; and define the concept of justice.

3.0 Law and Justice in Society

The idea of law, it may be argued has always been associated with the idea of justice, it is in this regard that the goal of the law is to strive for justice. Law must be assimilated to justice and law without justice is a mockery, and therefore a contradiction.

Justice is a moral value. It is one of the aims and purposes which human set for them in order to attain the good life. To this end, Thomas Aquinas defined justice as" The firm and constant will to give to each one his due". The notion of justice is based on the fundamental equality of all men. Since all human are fundamentally equal, they should also be treated as equals. To treat them unequally is injustice. If for instance, two people commit the same offence and are equally guilty, they should be given equal punishment. If for example, one of them is sentenced to four years imprisonment, while the other is sentenced to only two years imprisonment, there would be no justice in such a judgment.

Similarly, if two people do the same amount of work, they should under normal circumstances be given equal reward, equal reward for equal work, otherwise, there would be injustice. All this presupposes that all humans are fundamentally equal and should therefore be treated as equals. This is the basis of justice.

In his famous dialogue, the **Republic**, Plato sets out to explain what justice means. For Plato, the microcosm of the just man is a reflection of the pattern of the just society. Plato sought to arrive at the meaning of justice by depicting what is a just society, conceived as an ideal society, whether attainable on this earth or not, might be like. Such a society will be just because it will conform to Plato's conception of justice.

Plato taught that justice applies to both animate and inanimate objects, and that each object has its proper sphere and that justice means conforming to that sphere. For instance, a tool such as a saw or an axe has its proper

sphere of use in carpentry, which Plato regards as "just". So, too, the carpenter or the physician has his appropriate sphere, namely carpentry or healing the sick, performance of which to the best of his abilities represents 'justice'. In the same way, only the wise person is fit to rule, so that in a just society he alone will act as a just (justice) ruler.

This idea of justice being linked with equality of treatment undoubtedly owes much to association of justice with legal proceedings. The law is supposed to be applied equally in all situations and to all persons to which it relates without fear or favour, to the rich and the poor, to the powerful and humble alike. A law which is applied without discrimination in this way may be regarded as the embodiment of justice. What you need here is that justice in this sense is really no more than a formal principle of equality. It cannot be regarded even as a principle of equality without qualification. Justice cannot mean that we are to treat everyone alike regardless of individual difference. If this were so it would require us, for instance, to condemn to the same punishment everyone who has killed another person regardless of such factors as the mental incapacity or infancy of the accused.

What this formal principle really means is that, everyone who is classified as belonging to the same category, for particular purposes is to be treated in the same way. For example, if the vote is extended to all citizens of full age by the franchise laws of a given state, then justice requires that all persons qualified in this way should be allowed to exercise his or her vote, but justice would not be infringed by the exclusion of aliens and infants from the list of voters. In other words, formal justice requires equality of treatment in accordance with the classifications laid down by the rules, but it tells us nothing about how people should or should not be classified or treated.

Self Assessment Exercise (SAE) 1

1) Attempt a discussion of the concept of justice from the Platonic point of view.
2) What is the relationship between law and justice?
3) In your view as a Nigerian, can the platonic idea of justice become practicable in Nigeria?

4.0 Classification of Justice

The middle age or medieval philosophers classified justice into four kinds; namely:

1) Commutative justice;
2) Legal justice;
3) Distributive justice; and
4) Vindicative justice

4.1 Commutative Justice: This aspect of justice demands respect for the rights of others and the exchange of things of equal value. Hence cheating, fraud, thefts and destruction of other people's properties are violations of commutative justice.

4.2 Legal Justice: Legal justice is that aspect of justice which demands the observance of all laws aimed at the common good. Since the common good takes precedence over private interest, legal justice demands that the common good should not be sacrificed for the private interest of the individual or for his convenience. Hence the violation of any law directed towards the common good is a violation of legal justice.

4.3 Distributive Justice: This is the aspect of justice, which demands the fair or equitable distribution of the goods, privileges, work and obligations of a society to all the members of the society. In this regard, any unfair distribution of the goods of society to its members is a violation of distributive justice.

4.4 Vindicative Justice: Vindicative justice is that aspect of justice which demands an appropriate punishment for an offence, not out of the spirit of vengeance but in the interest of the community or for the correction of the offender; and it should not be more than is deserved by the offence.

We pointed out earlier that the foundation of justice is the fundamental equality of all men which demands, equal treatment, equal distribution of goods, rewards, punishment under normal circumstances. When we talk of equal distribution of the goods of a country among its citizens, the equality we refer to is the equality of proportion. Hence, it is more accurate or correct to talk of equitable distribution rather than equal distribution for there could be justifiable reasons why one section or some sections of a country should have greater share of the goods of the country than other sections.

In fact, situations when special circumstances demand otherwise, the equal distribution of the goods among all the citizens or all the sections of the country would itself be an unjust distribution. Just as the goods of a country belongs to all the citizens of the country and should be equitably shared among all, so do the goods of the earth belong to all the human inhabitants of the earth and should also be shared equitably among them all. But there is at present flagrant injustice in the distribution of the goods of the earth among its human inhabitants especially in a country like Nigeria. Many nations have unjustly appropriated to themselves most of the goods of the earth thereby leaving the vast majority of the world's population in extreme poverty and misery.

Many of the rich nations have more than they need and even destroy some of these goods because they have too much of them, and the vast majority of other nations live sub-human existence since they lack the basic needs of human existence. When therefore these poor nations ask the rich nations to

give them some of the goods they have greedily and unjustly appropriated to themselves, they are not asking for a favour but demanding their right, for the goods of the earth belong to all human inhabitants of the earth and should be equitably distributed among all the nations of the earth.

When St. Thomas Aquinas defined justice as the firm and constant will "to give to each one his due" he meant the reward or the punishment due to each man according to his deeds. In other words, everybody should be rewarded or punished, as they deserve. But it is not always easy to know what a person deserves. How is this to be decided? How does one decide, for example, what a person deserves for his or her labour? There are two aspects of work, namely, the effort put into it and what is achieved by it. Should individuals be rewarded for their efforts or for their achievement? Firstly, it is easier to determine the degree of individuals' achievements rather than the amount of effort exerted in doing their work. Moreover, rewarding people according to their achievements also has the advantage of encouraging productivity. But how do we adequately and fairly assess the achievements of people of different professions, such as farmers, teachers, physicians, engineers, nurses, lawyers etc. How do we assess their achievements and reward them accordingly and fairly? Most people would agree that people of certain professions are currently not being adequately and fairly rewarded by society as they deserve. Farmers and teachers, for example are not being rewarded, as they deserve in terms of their achievements.

In the light of the above, justice therefore demands that while encouraging success and productivity in our system of reward, those efforts that are not being crowned with success should not be ignored but should also be appreciated and rewarded.

Self Assessment Exercise (SAE) 2

Do you think there is any injustice in the world today with regards to the distribution of the earth's goods among the different nations of the worlds? Give reasons for your answer.

Self Assessment Exercise (SAE) 3

Briefly discuss the different kinds of justice you have learnt in this unit.

Self Assessment Exercise (SAE) 4

Law and justice are the backbone of any successful and equal society. Discuss.

5.0 Summary

In this unit, we learnt that the idea of law has always been associated with the idea of justice and this represents the ultimate goal to which the law should strive. We also said that the Platonic concept of justice was set out in his dialogue: 'the Republic'. For Plato, everything or person had its proper sphere of justice and that justice meant conforming to that sphere.

We also discussed that the idea of justice being linked with equality of treatment undoubtedly owes much to the association of justice with legal proceedings. The law is supposed to be applied equally in all situations and to all people to which it relates without fear or favour. The law which is applied without discrimination in this way may be regarded as the embodiment of justice.

Finally, we classified kinds of justice. To this end, we have four kinds of justice: It was pointed out above that the foundation of justice is the fundamental equality of all men which demands equal treatment, equal distribution of good rewards, and punishment under normal circumstances. Instead of talking of equal distribution of the earth's goods, we should

rather talk of equitable distribution of goods; this is where the distributive justice comes into play.

6.0 Conclusion

This unit is very important in that we discussed law and justice in the society. Having read this unit, you should be able to discuss the relationship between law and justice and how operational these two concepts are in Nigeria; and indeed all over the world. As you go further in your study, these concepts shall become clearer to you.

7.0 Tutor-Marked Assignment

Equality before the law is one of the constitutional provisions of most nations in the world, Nigeria inclusive. Law and justice presuppose that things or people are treated equally. How true is this statement in the light of your experience as a Nigerian between the period of 1983 to May 29, 1999, and from May 1999 till date?

8.0 References

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Unit 3: Law and Freedom

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1.0 Introduction

Humans are by nature free, freedom is part of their very nature as a rational being and to lose one's rationality is to lose one's freedom. Freedom is not only a gift to humans, but it is also a heavy burden and responsibility entrusted to them for they are held responsible for the way they use their freedom. Since human freedom is part of their very being and human is a finite being, it follows that human freedom is necessarily limited. The freedom of a limited being must of course be a limited freedom. For there can be no such thing as absolute or unlimited human freedom. Human freedom is circumscribed by human natural capacity; in other words, humans are not free to do what he is incapable of doing. What I am free to do must be what is within my power to do. So, in this unit three, we shall discuss how law restrains the freedom of persons.

2.0 Objectives

At the end of this unit, you should be able to:

i) Discuss how law restrains man's activities; or his actions;

ii) Differentiate between positive and negative freedom;

iii) Discuss the consequences of unrestrained and/or uncontrolled exercise of freedom.

3.0 Law and Freedom

Law functions as a means of directing and imposing restraints upon human activities and it must therefore look like of a paradox that the idea of freedom can be embodied in the law. We can glean from this seeming paradox by directing attention not on human solely as an individual living in an unfiltered state of nature, but on human as a social being living a life of complex inter-relationships with the other members of their community.

Jean Jacque Rousseau's celebrated **'cri de caer'** meaning *man is born free; yet everywhere he is in chains*, may have derived from the romantic notion that the savage lives a life of primitive freedom and simplicity, but in practice as J. J Rousseau realized, human is never isolated and free in this sense but always part of a community and the degree of freedom human enjoys or the extent of the social restraints imposed upon them will depend upon the social organization of which they are a member. Is a restraint necessarily an encroachment upon liberty? The law restricts physical assault by one person on another, but if indiscriminate assault were permitted, no human society could survive for there would not even be that minimum degree of security without which human calculation for the future would be vain. Hence, universal restraints of this character play an essential role if not a direct role in securing the freedom of all.

In the past, when inequality, rather than equality was regarded as the fundamental law of human society, freedom operated in law a little more than a concept whereby human freedom was to be guaranteed, so far as the law could achieve security in the station of life in which providence had placed them, together with the privileges if any, to which law or custom has established their entitlement. Indeed in a society which recognized slavery of serfdom, the slave or serf might enjoy no protection whatever by legal process or even custom. In traditional human society quasi-legal acceptance

of certain arrangements tends to become obligatory, for instance in the Roman Law of slavery or under feudalism. In modern times however, freedom has become closely linked with an equalitarian conception of society, the whole idea of freedom has assumed a central position in the scale of values as the operative ideals of a genuine social democracy following the Western pattern.

Jean Paul Sartre was of the view that it is not possible for a free being to avoid making a choice. Human beings are free to choose what they want, but they are not free not to choose since a refusal to choose is already a choice made. To refuse to choose is in fact one way of choosing to be part of a decision already taken. "Freedom is the freedom of choice but it is not the freedom of not making a choice. Not to choose is, in fact to choose not to choose. Sartre goes on to say that freedom is not free not to be free; that man cannot avoid being free for he is "condemned to be free" and whatever he decides to do is an exercise of this freedom. However man's exercise of his freedom is often obstructed by various factors of physical, psychological, social and environmental nature. But of these freedoms must be restrained by law. Some of these factors render the exercise of freedom completely impossible and consequently also remove moral responsibility.

Self Assessment Exercise (SAE) 1

Without the instrumentality of Law, humans would exercise their freedom ultra-vires. Do you agree?

4.0 Positive and Negative Freedom

There are positive and negative freedoms and distinctions of these concepts have been made over the years. Negative freedom is concerned with some organizing pattern of the society, which despite all the restraints and limitations that are placed upon individual action for the benefit of society as a whole. Nevertheless there remains large sphere for individual's choice and initiative which is compatible with the public welfare.

On the other hand, positive freedom is relatively a spiritual conception, which gives maximum opportunity for the 'self-realization of every individual to his full capacity as a human being. The law, by its very nature is concerned with the externals conduct rather than the inner state of spiritual development of the citizens who are subject to the law. It is therefore hardly surprising that as far as legal freedom is concerned the emphasis is on guaranteeing the maximum degree of 'negative' freedom. It is not the direct concern of the law how the individual makes his choices with such freedom as the law permits.

Self Assessment Exercise (SAE) 2

Differentiate between positive and negative freedom.

5.0 Are Human Beings Really Free?

Human freedom is a presupposition of ethics, a branch of philosophy. However, it seems an obvious fact that man is free but there are people who see human freedom as an illusion. All human actions, according to these people are determined by certain causes. Every human action, they claim, is an effect of a cause and is determined by the cause. To this end, human beings are completely explained in terms of cause and effect without any recourse to freedom. The view that humans are not free and that their actions are determined by certain causes is known as determinism. The crux of the matter is that whether man is free or not, all actions of humans are restrained by law. Law and freedom go together and any attempt to separate them, the society will return to the state of nature where there are no laws, where might is right, life is short, nasty and brutish.

Self Assessment Exercise (SAE) 3

Comment on Jean Jacques Roseau assertion that 'Man is born free but he is everywhere in chains'.

6.0 Summary

Under this unit, you learnt that humans are by nature free, that freedom is part of their very nature as a rational being and to lose one's rationality is to lose one's freedom. Also, we said that freedom is defined as the capacity of self-determination, that is, the capacity to decide what to do. Man, according to Jean Jacque Rousseau is born free yet everywhere he is in chains. This statement is derived from the notion that the savage lived a life of primitive freedom and simplicity. In practice, humans are never isolated and free in this sense but always part of a community. And the degree of freedom they enjoy or the extent of the social restraints imposed upon them will depend upon the social organization of which they are members.

You also learnt under this unit about positive and negative freedom. Negative freedom is concerned with some organizing pattern of society that despite all the restraints and limitations placed upon individual action for the benefit of society as a whole. Nevertheless there remains large sphere for individual choice and initiative that is compatible with the public welfare.

Positive freedom is relatively a spiritual conception which gives maximum opportunity for the self-realization of every individual to his full capacity as a human being. We concluded by saying that it seems an obvious fact that humans are free but there are people who see human freedom as an illusion. All human actions according to these people are determined by certain causes.

Self Assessment Exercise (SAE) 4

The presence of law in any civilized society presupposes freedom. How far is this statement true?

7.0 Conclusion

Humans have to exercise some level of freedom for self-determination. If this freedom is taken away from them, it will amount to false imprisonment. However, this freedom must be controlled by the instrumentality of law in any civilized society.

8.0 Tutor-Marked Assignment

Law is the retraining factor in the exercise of man's freedom; if not, man would have long returned to the state of nature. Discuss.

9.0 References

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Unit 4: Law, the State and Sovereignty

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1.0 Introduction

It is a commonplace in a society with a developed system of law that there must be some authority, invested with the power of law-making. In a simpler society law may be conceived rather as the customary observances handed down from generation to generation and only gradually modified as new usages arise.

In this unit, we shall examine the way in which sovereignty has arisen as one of the key concepts in the modern idea of law; the extent to which the concept provides the clue to the autonomy of law as possessing validity not dependent on anything outside positive law itself. We shall also examine the peculiar problems which sovereignty has created both in the constitutional state and in the world of international relations.

2.0 Objectives

At the conclusion of this unit, you should be able to:

i) Explain the relationship between the law, the state and the sovereign;

ii) Know who the sovereign is;

iii) Discuss the origin of the concept of sovereign; and

iv) Identify the source of the sovereign authority

3.0 The Law, Sovereignty and the State

Sovereignty as it is understood today connotes more than the notion of a supreme ruler. An absolute Monarch a Haround-al-Rashid for instance, may have unfettered power to govern and order heads to be struck off, but lacks legal power to alter, the established law of the community. The modern idea of sovereignty is associated rather with the Supreme power of law-making than with the supreme executive or judicial authority to embark on war, impose death sentences, govern the country in its day-to-day affairs and act on a final tribunal for settling dispute between subjects.

The sovereign in present usage is therefore that person or body which is the supreme legislator in a given community. It is by reason of its power to change the law that such a legislator is regarded as possessing the ultimate legal authority in the state and other authorities whether legislative, executives or judicial are at least theoretically subordinate.

This notion of the sovereign as supreme legislator owes its origin to three main historical sources: In the first place, there was the Roman Emperor; whose will in the language found in Justinian's institutes had the force of law! The influence of Roman law on the development of Western law was more manifested in the ultimate application of this principle of several rulers of the national European States, which consolidated their power and independence during the fifteenth and sixteenth centuries.

Secondly, during the so-called dark Ages that followed the fall of the Roman Empire, and the succeeding age of feudalism, the papacy secured for itself the office both in form and to a considerable extent, in substance of a supreme legislator for all Christendom. During the age when secular law had largely lapsed into a mass of local customs and in which emperors and kings were more concerned with the problem of extending their power over their rivals or over rebellious vassals, the pope, as vicar of Christ on earth and as the unique expounder of the divine law, alone possessed the

status for fulfilling the role of supreme legislators, and in this, he was assisted by a highly developed administrative machinery which was without rival among the feudal kingdoms or even in the imperial chancery.

When, however, the notional unity of European Christendom was broken up by the events compendiously referred to as the Renaissance and the Reformation, the third and indeed the most important source of the modern concept of sovereignty came to the fore. This was the rise of independent nation states which all through the latter middle Ages had been struggling to shake off the relies both of feudalism and of papal supremacy. Finally, these emerged as the successors to the unfettered sovereignty claimed in earlier ages by Pope and Roman Emperor.

Self Assessment Exercise (SAE) 1

Briefly discuss the relationship that exists between the law, sovereign and the state.

4.0 Sovereignty and the State

A new twist to the older idea of sovereignty was given by its association with the entity, which became gradually known as "the state". In the early days of new independent nations, the sovereign was still generally regarded as identical with whatever king or body. Such king or ruler was not necessary sovereign in the legislative sense but it became recognized that every independent country constituted in itself a self-supporting legal entity, 'the state', and accordingly, ultimate sovereignty resided not in any body or person for these were merely organs of the state but in the state itself.

Jean Bodin, a French lawyer in his theory in the 16th century said that it was the nature of every independent state to possess a supreme legislative power, and this power was supreme in two respects: that it acknowledged no superior and that its authority was completely unfettered. But with the increasing secularization of the modern state, the function of natural law as

a fetter on state sovereignty became more and more formal, until by the end of the 18th century, the national state was fully recognized as complete master of its own system of positive law.

The idea that the state itself is the wielder of sovereign power has not been consistently applied in the constitutional theory of modern states, as far as internal law is concerned. In Nigeria for instance, we regard a curious hybrid body, called the Executive as the possessor of legal sovereignty. The state is a more general notion than the sovereign, representing the community as a legal organization and thus symbolizing all the various manifestations of the legally organized community. In this sense, all the wielders of official power in the community are organs of the state, whether they are ministers making a general law or decree, judges deciding a legal dispute, or subordinate officials making an executive decision or carrying out an official order.

The state is a personification, for legal purposes, in all the ramifications of legal authority and though particular parts of that authority including even the sovereignty reign, legislative power, may be reposed in some particular person or body ultimately that power is regarded as derived from the state itself. This is a point which is peculiarly difficult to appreciate in a state such as England which has enjoyed prolonged continuity of constitutional development and where in particular parliamentary sovereignty has been accepted for centuries. If, nevertheless one transfers attention to such a political community as France, where there have been entirely new constitutions introduced at frequent intervals over the last two centuries, one can see the apparent difficulty in attributing ultimate sovereignty to whatever person or body that happens to wield this power under the arrangements in force for the time being, it is necessary to rest that authority or some more permanent source, namely the state itself.

Self Assessment Exercise (SAE) 2

The ultimate sovereignty rests on a group of persons rather than the state. Do you agree? If not, do a persuasive argumentation to buttress your view.

5.0 Who is the Sovereign?

Austin saw the problem of sovereignty not just in terms of locating the supreme legal authority in the state but as one of determining the source of ultimate power. Adopting an approach already adumbrated by Bentham, he interpreted sovereignty as meaning the power in the state, which commanded habitual obedience and which did not yield habitual obedience to any other power. In other words, sovereignty was not to be derived from legal rules which invest some body or person with supreme power but based on the sociological fact or power itself. This certainly served to cut the Gordian Knot of circularity, which derived law from law itself, but it still left open the question of how the source of actual power in any given community should be investigated and also how the result of the inquiry was to be transmuted into legal terms to provide foundation for the legal system.

For this purpose, Austin endeavoured to facilitate his task by resting on the postulate of his predecessors from Jean Bodin onwards, that for every community to possess a developed legal system, there must be a sovereign power to which within the community unqualified allegiance was paid and which rendered none to any other power outside or inside that community. For Austin, this was the essential mark of an independent state or 'political society. Obedience acknowledged to another outside authority would mean that the society was not an independent state at all but merely a subordinate part of some other state. And absence of a supreme power within the state meant nothing less than confusion and anarchy, the very antithesis of legality. **But how was the actual possessor of power to be located?** Apparently, it was not by a purely sociological inquiry into the actions of the community. Apart from the difficulty in conducting this, it would inevitably lead to sources of power such as economic or social or military

groups or various kinds of power **elites or eminences vices** which, however significant in practice, would afford no guidance whatever in answering the lawyer's question of how the legal validity of rules and decisions with which he and everyone else in the state is concerned is to be determined.

Austin, at least implicitly recognizes this difficulty by accepting the fact that if the constitutional rules for ascertaining the legal sovereign are not final, they cannot be ignored, since he appears to assume that they will almost inevitably provide an essential clue to the source of actual power in the state. Thus, for example, in England Austin attributed sovereignty not to the king in parliament in accordance with orthodox constitutional theory, but to the king, the House of Lords, and the electors of the commons. In this choice, he was particularly exercised by the problem of how in the case of the commons which ceases to exist during an election. Habitual obedience could be owed to a non-existent body. He therefore sought to fill the gap by substituting the electors for the common itself.

The difficulty with this solution is that it is really neither fact nor law; as far as fact goes, it involves a rather facile identification of democratic electioneering with the actual roots of power in the state. And so far as law is concerned, no body for that matter treats as legally binding anything emanating from the arbitrary assemblage of king, Lords, and the electorate a 'body' which, if it can be so described has no *locus standi* in the law at all.

Self Assessment Exercise (SAE) 3

According to Austin, discuss the essential mark of an independent state.

Self Assessment Exercise (SAE) 4

Sovereignty of a state rests in the electorates rather than the king. Discuss.

Self Assessment Exercise (SAE) 5

The law makes the king, not the other way round. Comment on this statement in that the king is under the law.

6.0 Summary

In this unit, we discussed that the notion of the sovereign as supreme legislator and owes its origin to three main historical sources. Sovereignty as it is understood today implies more than the notion of a supreme ruler. The idea that the state itself is the wielder of sovereign power has not been consistently applied in the constitutional theory of modern states as far as internal law is concerned. The state is a more general notion than the sovereign, representing, as it does, the community as a legal organisation and thus symbolizing all the various manifestations of the legally organized community.

7.0 Conclusion

You have learnt that sovereignty does not rest in a group of persons, by now you should be able to discuss with persuasive argument as to the idea of sovereignty. Sovereignty rests in the state itself vide the electorates.

8.0 Tutor-Marked Assignment

The idea of sovereignty in the Austinian concept is in contradistinction as to the idea of sovereignty practiced in a country like Nigeria. Discuss this notion in the light of the Nigeria President's powers to do and undo.

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Unit 5: Types of Law

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1.0 Introduction

Sometimes, it is out of place to speak of natural law as if it were a single approach to law. The history of natural law spans 2,500 years and during this period very many different natural law theories have been put forward.

This multidimensional opinion of natural law theories makes it difficult to give a precise content to the expression "natural law".

2.0 Objectives

At the end of this unit, you should be able to

(i) Explain some fundamental theses which have been held in common by most important writers on the various notions or ideas about law; and

(ii) Differentiate between the types of law.

3.0 Types of Law: Natural Law

The doctrine of natural law is an important aspect of the ethics of St. Thomas Aquinas. He defined law as "an ordinance of reason directed towards the common good and promulgated by the one who has the care of the community". This means that, according to Aquinas a law is a command, a directive which must be reasonable, if it is contrary to reason, then it cannot qualify as a law. It must be directed towards the common good, and not made for the private interest of a few people. A law must be made by the appropriate authority who is in charge of the community and it must be made known to all those intended to be bound by it.

Natural law is the law by which God governs rational beings. God governs all creatures each according to its being. Humans as rational creatures are not governed by God in the same way as the other creatures are governed, but in a special way through natural law which is a rational participation in the eternal law. "The natural law is nothing else but a participation of the eternal law in a rational creature". This participation in the eternal law by rational creatures is called "Natural Law". Thus, according to Aquinas, while God governs other creatures in the universe by the physical laws of necessity, he governs humans through the moral law.

St Aquinas' concept of natural law is synonymous with the moral law. When he talks of natural law, Aquinas in fact means the moral law. The question is, how are the principles of the natural law discovered? To Aquinas, the primary principles are self-evident and are known as **Synderesis.** The first and the most fundamental principles of the natural law is that good should be done and pursued and that evil should be avoided. All other principles of the natural law derive from this fundamental principle.

Other principles can be discovered by reflecting on man's natural inclinations, for man, according to Aquinas has certain natural inclinations towards certain ends intended for man by God. These natural inclinations

indicate God's will for man and by reflecting on them we shall come to know the principles of the natural, for "The order of the precepts of the law of nature follows the order of natural inclinations".

Self Assessment Exercise (SAE) 1

According to St. Thomas Aquinas, what are the differences between the way God governs humans and other creatures?

4.0 Human or Positive Law

Human positive law is the law made by people, especially civil law. All human laws must be based on natural law that derives from it. Any human law that conflicts with the natural law is, according to St. Thomas Aquinas, not a law at all but a perversion of law, and it has no binding force. Any law has the nature of law in so far as it is derived from the law of nature. If in any case it is incompatible with the natural law, it will not be law but a perversion of law. No ruler has the right to legislate any law that is contrary to the natural law; the state has no absolute power, a ruler is not free to make any kind of law because he too is subject to the natural law. Laws that are contrary to the natural law are immoral and should not be obeyed. Unjust laws are no laws at all and do not deserve to be obeyed.

Quoting St. Augustine, Aquinas said: **"There is no law unless it be just"**. So the validity of law depends upon its justice. But in human affairs, a thing is said to be just when it accords aright with the rule of reason to the extent that they are derived from natural law.

And if a human law is at variance in any particular point with the natural law, it is no longer legal but a corruption of law. Man is bound to obey secular rulers to the extent that the order of justice requires. For this reason if such rulers have no just title to power, but have usurped it or if they command things to be done which are unjust, their subjects are not bound

to obey them except perhaps in certain special cases when it is a matter of avoiding scandal or some particular danger.

Although, an unjust law does not deserve to be obeyed, yet Aquinas says that if the non-observance of such a law would cause scandal or public disturbance, it is better to obey it in order to avoid scandal or in the interest of peace. An example of such an unjust law is a law imposing an unnecessarily heavy burden such as excessive taxation on the citizenry. But if a law is contrary to the natural law and commands something that is immoral, it should not be obeyed. Any ruler who persists in making unjust laws is a tyrant and should be deposed by rebellion. Thus, Aquinas favours rebellion as a justifiable means of deposing a ruler who is misusing his power. The function of a ruler or a human legislator is to apply the natural law in the concrete circumstances of the society; and it is to this end that he should make laws. But if instead of doing this he makes laws that contradict the natural law, and he persists in doing so, then he should be deposed by rebellion. But Aquinas cautioned and said: if such a rebellion is likely to result in a situation that is worse than that which the rebellion is intended to remedy; then, it should not be carried out.

Self Assessment Exercise (SAE) 2

Do you think all legislative enactments should derive from the laws of God? If otherwise, what are your reasons?

Self Assessment Exercise (SAE) 3

Rebellion is the only procedure for deposing any despotic and tyrannical ruler. Comment.

5.0 Eternal and Divine Law

Eternal or divine law is the law by which God governs the whole of creation directing each creature to its respective end. It is, the law implanted in the very being of every creature, the law which makes every

creature behave the way it does, thereby fulfilling the purpose for which God made it. St. Aquinas describes it as the divine wisdom, which have implanted in creatures inclinations towards the ends for which they were intended by God. "Supposing the world to be governed by the divine providence, it is clear that the whole community of the universe is governed by divine reason. This rational guidance of created things in the part of God we can call the eternal law". It is clear that all things participate to some degree in the eternal law in so far as they derived from it certain inclinations to those actions and aims which are proper to them.

Self Assessment Exercise (SAE) 4

Differentiate between the types of law as discussed in this unit. Do you think all types of law should function conjunctively for an equitable society?

6.0 Summary

In this unity we discussed that Aquinas does not see human law in isolation. He has a unified view of the whole universe and of the role of law in it. He saw human law as legitimized by natural law. And natural law is viewed as ultimately being a means by which human beings participate in the eternal law.

Aquinas defines the eternal law as "the exemplar of divine wisdom as directing the motions and acts of everything". The basic conception is that speaking in a human way God has in his mind from all eternity a project which includes all. He wishes to do this overall project or plan is the eternal law. This eternal law is the foundation of all other laws: The laws of physics or chemistry as wall as the principles of morality, absolutely every sort of rational law or principle derives more of less directly fro the eternal law. All things have been created according to the blueprint of this eternal law and necessarily act according to it. We can then say that

Aquinas sees the whole physical creation as necessarily obeying the plan of God for them i.e the eternal law.

Aquinas compares the relations between the principles of natural law and many other law to that between the general purpose of a house and the specific design of its doors windows, corridors etc. As an example of this derivation from the principles of natural law through a process of determinism, Aquinas mentions how natural law prescribes "that whether this or that should be the penalty: the punishment settled is like a determination of natural law.

We also discussed that for Aquinas, a human law is just only if it derives from natural law. The practical significance of saying that this derivation can often take place through this process of determination or specification which leaves room for many different practical solutions, is that it implies that in regulating human affairs there can be many alternative solution for the same problem and that they can all be just in spite of being different from each other. Thus, to refer to the example given by Aquinas of the various possible punishments for a given criminal offence, as it is the case in Nigeria, the penalty for armed robbery is death by firing squad, while in other countries it may be as little as three years in prison. Confronted with this disparity, many people would think that it is impossible for both penalties to be "right". Aquinas in the contrary argues that there is no single penalty which is rationally appropriate for a given crime; the only guidance that reason offers us in respect of penalties is a set of very general principles.

7.0 Conclusion

Indeed, this is very important unit. It has helped you to know the kinds or types of law there are. The discussions on them will enable you to know the particular type of law operational in any given society. Sometimes the court makes references to these laws depending on the case being handled. See for example the case of **Ransome – Kuti Vs. Attorney General of the**

Federation (1985) 2. N.W.L.R pt 6, 211 at p. 230, in which the court considered the existence of natural rights. At that time, Hon Justice Kayode Eso JSC said, "But what is the nature of a fundamental right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to "**civilized existence**". These natural rights are part of natural law.

8.0 Tutor-Marked Assignment (TMA)

The validity of human positive law depends on its conformity with the Natural Law. But some schools of thought believe that the positive law need not conform to any moral standards in order to be valid. Dissect the above statement from the positivist point of view.

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Module 2

Unit 1: Classification of Law

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1.0 Introduction

Laws are classified into different segments. This segmentation is necessary so that you can identify the type or area of law you are dealing with. Basically, in practice, there are two broad classification of law to wit: Criminal or civil law. For comprehensive knowledge we shall touch other aspects, albeit briefly.

2.0 Objectives

The main objectives of this unit, is to acquaint you with the classification of law. Thus, at the end of this unit you should be able to place the different laws in their appropriate perspective and also, differentiate between criminal, civil and other kinds of law.

3.0 Classification of Law

Law can generally be classified according to the following typologies:

3.1 Common Law and Equity

Common law and equity can only be understood properly by examining the origins of English law. English legal development can be traced back to 1066 when William of Normandy gained the crown of England by defeating kind Harold at the battle of Hastings. Before the arrival of The Normans in 1066, there really was no such thing as English Law. There was no unified system of law for the whole country. The Anglo-Saxon legal system was based on the local community. Each area had its own courts in which local customs were applied.

The Normans conquest did not have an immediate effect on English Law; indeed William promised the English that they could keep their Customary Laws. The Normans were great administrators and they soon embarked on a process of centralization, which created the right climate for the evolution of the uniform system of law for the whole country i.e common law.

The Normans exercised central control by sending representatives of the King from Westminster to all parts of the country to check on the local administration. At first, these royal commissioners called the **CURIA REGIS** performed a number of tasks: they made records of land and wealth, collected taxes and adjudicated in disputes brought before them. Their judicial powers gradually become more important than their other functions. To start with, these commissioners or justices applied local customary law at the hearings, but in time, a body of rules applying to the whole country replaced local customs. The whole commissioners were usually referred to as **ITINERANT JUSTICES**. The courts were generally known as ASSIZES.

When the commissioners had completed their travels round the country, the justices returned to Westminster where they discussed the customs they had encountered. By a gradual process of sifting these customs, rejecting those which were unreasonable and accepting those which were not, they formed a uniform pattern of law throughout England. Thus, selecting certain

customs and applying them in all future similar cases created the common law of England. Hence the terms common law as used here **refer to those rules and principles that were developed in England by the regular or common law court.** In other words, the common law that was originally based to a large extent on the local customs has developed through the system of judicial precedent.

A civil action at common law was begun with the issue of a writ that was purchased from the offices of the chancery, a department of the Curia Regis under the control of the chancellor. These categories of writ were known as "forms of action".

Different kinds of actions were covered by different writs. The procedural rules and types of trial varied with the nature of the writ. It was important that the correct writ was chosen; otherwise the plaintiff would not be allowed to continue with his action. In fact, the statutes in the 13th century forbade the creation of new writs unless they were analogous to the old. This step severely, restricted the development of the common law because a plaintiff would have no remedy if he could not fit his case into one of the existing categories of writ.

Over a period of time the common law became a very rigid system of law, in many cases it was impossible to obtain justice from the courts. In a nutshell, through systematic application the common law became formalized, rigid and highly technical. The courts of common law failed to give redress in some cases where redress was needed. It then became the practice of aggrieved citizens, therefore, to petition the king directly for assistance that was then considered as the "**Fountain of Justice".**

Equity

The decisions of the court of chancery were often at odds with those made in the common law courts. This proved to be a source of conflict until the

start of the 17th century when King James the first ruled that in cases of conflict between common law and Equity, Equity was to prevail. For several centuries, the English legal system continued to develop with two distinct sets of rules administered in separate courts. Equity is not a complete system of law. Equitable principles were formulated to remedy specific defects in the common law. They were designed to compliment the common law rules and not replace them. Equity is therefore a gloss on the common law. It cannot exist without the common law. Equity is fairness, justice and equal treatment.

Self Assessment Exercise (SAE) 1

Briefly trace the history and development of common law and the emergence of equity.

3.2 Common Law and Civil Law

A lot has been said about the common law under the previous discussion. Here we shall just examine civil law.

Civil law is used to refer to the continental European family legal system also known as Roman law systems because of their heritage in legal reasoning and centrality of the use of codes dating back to the codes of the Roman Empire. However, civil law is also the title of one category of English Law. In one sense, civil law is all law other than criminal law and thus when people use the term 'civil law' they often mean English private law. Private law covers such subject areas as contract, family welfare, Tort, trusts and succession in general. Private or civil law deals with the rights and duties of individuals towards each other rather than towards the state.

Self Assessment Exercise (SAE) 2

What is the relationship between common law and civil law?

3.3 Public and Private Law

The expression "Public Law" has existed for some time but has had little significance other than to indicate that the subject matter in some way involved a public authority. Continental European legal systems on the other hand had developed the idea of public law into a separate and specialized body of rules applicable only to cases involving the state administration. The term public law is loosely used to refer to constitutional and administrative law.

Public law covers such subject area as criminal law, Administrative and constitutional law. This aspect of law deals with the entire society and everyone is affected by its application. It governs the relationship of the individual and the state.

On the other hand, private law appears wider in scope than the public law. This is because private law covers such subject areas as contract, family welfare, Torts, Trusts and succession in general; it deals with the rights and duties of individuals towards each other rather than towards the state.

Self Assessment Exercise (SAE) 3

Distinguish between these two concepts: Public and Private Law

3.4 Criminal and Civil Law

We all tend to have some understanding of what criminal law is. It is the embodiment of the power of the state to punish people for actions, or failures to act, which are deemed contrary to the interests of the society as a whole or the powerful interest groups that have assumed control of the legislative process.

As early liberal writers, such as Thomas Hobbes (1651) agreed, there is a basic controversy about criminal law in that it is the infliction of evil (punishment) in the name of the state's wrongful harm.

We can see criminal law as specie of public law in the sense that prosecutions of those accused of committing crimes are brought by public officials in the name of the state. Today, the state has the dominant role in investigating and prosecuting crimes but in the past, crimes were much more usually seen as a particular loss or injury to an individual. There is a close connection between civil wrongs (called torts), for which the individual would be able to claim compensation, and crimes. In many legal systems the two actions take place coincidently, but they are usually separated in the Nigeria legal system. Therefore, any such compensation would normally be claimed by civil action in the civil courts though in a criminal trail, the courts have power to award compensation to persons injured payable by a person convicted at trail.

Self Assessment Exercise (SAE) 4

Does the state have the power to prosecute in civil matters other than in criminal action? Give reasons for your submission.

3.5 Substantive and Procedural Law

The distinction between substantive and procedural law is in simple terms, the distinction between the rules applicable to the merits of a dispute (substantive law) and the rules governing the manner of resolution of a dispute (procedure). For those who practice law the rules of procedure are very important but at the academic stage of legal studies, the focus is on the substantive rules. It is nevertheless important to have some understanding of procedure because procedure can affect the application of the substantive rules. In fact, the rules of procedure were in the past of great significance in shaping the substantive rules, since Nigeria law, from the time when it was necessary to frame one's action within the form of an existing writ has proceeded from the existence of a remedy to the establishment of a right.

Self Assessment Exercise (SAE) 5

Without substantive law, no procedural law, and vice versa. Discuss

4.0 Summary

Under this unit, we did a classification of the different types of law. We did a historical development of common law and the need of equity which emerged to remedy the defects in the practices of the common law courts. There was also a brief touch of criminal law, civil law, public law and private law.

In understanding the common law tradition, there are a variety of uses of key terms that you need to understand. These need to be carefully distinguished and will provide a structure to guide further study.

5.0 Conclusion

The history of the Nigeria legal system can be traced to the English legal system. To this extent, it is necessary for us to study the development of common law, which is the 'heartbeat' of the English legal system and by implication of all common law jurisdictions, Nigeria inclusive. If you actually understood what we have discussed under this unit, the history and development of Nigeria criminal and civil justice under which you intend to practice after being called to the Nigerian bar, would not be new to you any longer.

6.0 Tutor Marked Assignment

1) The development of the Nigerian Legal System can be linked to that of British Legal System. Do you agree?

2) Do a classical classification of the different laws you have studied under this unit.

3) Whatever branch of law, be it criminal, civil, public, the state is connected in one way or the other during prosecution or litigation. How far is this assertion true?

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Unit 2: Legal Reasoning in Judicial Process

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1.0 Introduction

Under this unit, we shall study the methods of reasoning which lawyers use. Law is a practical discipline whose primary objective is not to describe the world but rather to help us decide how to act. Accordingly, the reasoning of lawyers is practical reasoning that is a reasoning that is oriented to action.

Practical reasoning is a topic on which philosophers have been concentrating their attention for so long a time. Here, we will concentrate on legal reasoning, which is one of the main species of practical reasoning. To this end, the various methods of legal reasoning will be considered: deductive and inductive reasoning.

2.0 Objectives

At end of this unit, you should be able to

(i) Apply logical reasoning used by legal practitioners and the courts.

(ii) Differentiate between general reasoning and practical reasoning.

3.0 Legal Reasoning in Judicial Process

A peculiarity of legal reasoning is that it proceeds in a roundabout way. Laymen are often struck by the fact that lawyers (primarily judges) do not decide cases by considering directly the merits of the possible alternative solutions to them; instead, they try to see whether the case fits into some predetermined categories or "legal concepts" and then they decide it according to the category or concept under which it falls.

We can illustrate the above scenario by this example. A Chimney-sweep while cleaning a flue discovers a jewel; is he entitled to keeps it? If this problem is posed to a layman he will endeavour to consider many reasons which may exist for allowing the chimney-sweep to profit from the finding and will compare them with those which favour the alternative claims of say, Chimney-sweep's master, the owner of the premises where the jewel was found or the jeweler to when the chimney-sweep took the jewel.

If a court becomes seized of the problem, the lawyers involved in the case, to the puzzlement of the laymen who may attend at the court, are likely to seem to disregard all those considerations that seemed essential to the laymen and will instead concentrate on considering with the most minute care and the use of arcane learning whether the chimney-sweep had acquired "possession" or not, and in the end, will decide the controversy on the basis of their conclusions on this issue.

This procedure is typical. If a seller sells goods to a buyer and is made bankrupt before the goods have been delivered, the question arises whether the creditors or the buyer are entitled to the goods. The law makes the answer to the problem depend on whether "property" had passed from seller to buyer. Obviously this way of deciding issues presents grave dangers. In some cases the judge may decide first of all what is the result that seems preferable to him on the basis of exactly the same considerations which would have moved a layman and then endeavour to decide whether or not a party has possession, property had passed, or trade unions are legal

persons in the way which will allow him to reach the desired result. Whenever this is the case the reasons which judges offer for their decisions are sheer mumbo-jumbo and the real reasons which moved them to decide one way or another are left unexpressed and therefore cannot be publicly examined nor criticized. Even worse, some judges may truly decide all cases which come before them on the basis of these legal concepts, never stopping to consider the potential consequences sometimes extremely serious of their decisions.

According to the dedicatory theory of law, it is no part of a judge's function to create rules of law; his only task is to apply already established rules. In deciding a case therefore all that he needs do is to ascertain the relevant rule and apply it to the facts of the case. On this view judicial reasoning assumes a fairly simple syllogistic form of the following pattern:

a) All fact situations of type "A" entail legal consequences B;

b) This is a fact situation of type A;

c) Therefore the legal consequences is B'

It is true that this term of argument is used by lawyers both in and outside court in all those numerous instances where the law is perfectly clear; since courts cannot use deductive reasoning to solve some problems the question is, what sort of reasoning do they use? In other words, how does a judge arrive at a decision in such a case? The fact that his reasoning is not purely deductive may tempt us to imagine it to be inductive. Inductive reasoning takes the following form:

1) $A_1, A_2, A_3 \ldots$ Aa is B_1

2) Therefore all A is B (or 2A. Therefore this A – Aa + I – is B)

The above symbolization is a process, whereby we argue from the observed to the unobserved, concluding that some quality found to reside in all observed members of a class must therefore reside in all members of it. Unlike deductive, it may lead to erroneous conclusion, for later evidence may show that the quality does not extend to the unobserved members; in other words the generalization may be wrong.

Self Assessment Exercise (SAE) 1

What is the difference between deductive and inductive reasoning

4.0 Distinguishing a Case or Sifting of Fact and Law in Courts

Since it is the facts and circumstances of a given case that determine the decision in that particular case, the court of Appeal has held that pronouncements of justices either of the supreme court or the court of Appeal should not be considered in isolation from those facts. This is true for all the courts engaged in the operation of precedents. As a general rule, the doctrine of judicial precedent makes it mandatory for a lower court to follow the decisions of a superior court even where is disagrees with the reasoning and conclusion reached therein. The lower court may however, find a way out of the clutches of precedent by distinguishing the case under consideration from the one urged as binding authority. This is the process by which a court rejects an earlier case as authority either on the ground that the facts of the earlier case are different from the facts of the case in hand, or that the decision is too wide, considering the issue before that court. Distinguishing may be restrictive or non-restrictive.

Restrictive distinguishing occurs when the court applying a previous decision limits the expressed ratio decidendi of the earlier case thereby taking the case under consideration outside its ambit. This is done where the judge is of the opinion that the rule or principle of law as formulated by his predecessor was rather too wide given the issues involved. It is more common with courts of co-ordinate jurisdiction since most judges will not readily question the decision of superior courts.

Non-restrictive distinguishing on the other hand occurs ordinarily where the court, without tampering with the ratio decidendi of the earlier case, finds that there is a significant and material difference in the facts of both cases rendering the principles in the previous case hapt as authority for deciding the subsequent one. **In the Queen vs. Governoor of Eastern Nigeria, Ex**

parte Warri (1960) 4, E. N. L. R 98, counsel had relied on a Western Region case in support of the application for an order of certiorari even though the law has limited its jurisdiction in chieftaincy matters. The court found that while the law considered in the Western Region case did not expressly exclude certiorari the relevant Eastern Region law did. The facts surrounding both cases were so sufficiently divergent as to render the earlier case important as a precedent for the case under consideration.

In order not to make a mess of the doctrine of judicial precedent judges who choose to distinguish cases should back up their opinion rather than make bare declarations that the facts of the cases are different. In the words of Thompson J. **in Board of customs and Excise Vs. Bolarinwa (1968) M.N.L.R, 350 at P. 352:**

It is not sufficient to say that the facts are different. A magistrate who does not intend to apply a decision of the High Court must state;

1) *The ratio decidendi of that decision;*
2) *The facts proved in that decision; and*
3) *Show by judicial reasoning in the body of the judgement in what manner the High court decision is different from the case before him.*

The above prescription which is recommended to all courts will serve to curb the incidence of reckless abandonment of binding precedents under the tenuous guise of distinguishing. Otherwise the whole essence of precedent could be defeated. It has been alleged that the process of distinguishing has rendered the notion of **stare decisis** a hollow sham because a judge is only bound by a case he chooses to be bound. This, to some extent may be true but it is not the same as leaving cases to the whims and caprices of judges, a situation that is sure to breed chaos and lead to a radical departure from the path of certainty and predictability. Fortunately, the situation is not as loose as it is made to appear although there are a few cases of reckless and unjustified shifts from the settled practice of obeying precedent through the

use of distinguishing. In most cases, restrictive distinguishing is done in courts of co-ordinate jurisdiction and the wholes process of distinguishing instead of defeating the purpose could in fact promote the working of precedent by allowing for the desired flexibility to cater for prevailing conditions at the time of deciding subsequent cases.

Self Assessment Exercise (SAE) 2

What does it mean to distinguish a case? What kinds of distinguishing exist?

5.0 Ratio Decidendi

The fact that common law courts in certain circumstances regard previous precedents as binding makes it obligatory for them to consider what particular element of an earlier decision is binding, so that this can be distinguished from other elements that may be merely persuasive. The portion of the decision that is binding is sometimes referred to as ratio decidendi i.e the reason for the decision. The underlying idea is that every court, which applies the law to a given set of facts is animated by a legal principle which forms the binding element in the case. For instance, suppose a court has to decide for the first time whether the posting of a letter amounts to a valid acceptance of an offer so as to create a binding contract in law even though the letter was lost in the post and so never reached its addressee.

The court upholds the validity of the contract by treating the posting as an acceptance. This decision involves the proposition of law that an offer can be effectively accepted by posting a letter of acceptance ad this proposition is necessary to the decision since without it the court could not have upheld the contract, hence it must be regarded as forming the ratio decidendi of the case.

This does not necessarily mean that the ratio is to be found always in the statement of the rule appearing in the judgment of the court as applying to the particular case. For it is a further established principle that cases are only binding in relation to other cases which are precisely similar. In other cases that are not precisely similar the court will have a choice as to whether or not to extend the analogy to other circumstances not exactly corresponding to those previously adjudicated upon.

Accordingly, a subsequent court may find upon scrutinizing the earlier judgment that the governing principle was, incorrectly or too broadly or too narrowly stated and may itself have to elucidate what the governing ratio of the earlier case actually was. This process may be rendered particularly complex and difficult where the previous case was an appellate one with these or more separate judgments each one stating in differing terms what is conceived to be the governing legal principle.

Moreover, much may depend upon the attitude of the later court to the earlier decision. The later court may take a favourable view of the principle embodied in the earlier case and be ready to apply it very broadly to any analogous situations. This is what happened after the majority decision of the House of Lords in 1932 laid down the duty of a manufacturer of goods to take reasonable care to ensure that the goods were not in a condition likely to do harm to potential consumers. This case so plainly involved a sensible rule that it has been treated as possessing the widest application.

It has, therefore, speedily been set up as expressing the essence of the law of negligence in imposing a general duty of care where physical injury to others can be reasonably anticipated from the conduct of any person. On the other hand, if the result of a binding decision is later viewed with disfavour, subsequent courts may strive to confine it very strictly to "its own facts" and so, by making subtle distinctions what the layman and indeed many lawyers may regard as hairsplitting give the earlier case a very limited field of operation or virtually distinguish it out of existence. In this

way, for instance, very heavy inroads were made upon two establishment but unpopular doctrines of the old common law, to wit: the rules that in a negligence claim any degree of negligence by the defendant himself which contributed to the accident would defeat the whole of his claim and that a master is not liable to his servant for injuries caused by the negligence of a fellow-servant. Nevertheless, these two doctrines still maintained an uneasy of diminished role of many decades before parliament finally abolished them both some years ago.

Self Assessment Exercise (SAE) 3

Why do courts have to give the ratio of a case? Is the ratio of lower court binding on the superior courts? Give reason for whatever your answers.

6.0 Judicial Precedents

Judicial precedent or case law consists of law found in judicial decisions. A judicial precedent is the principle of law on which a judicial decision is based. It is the ratio decidendi i.e the reason for the decision. It follows that it is not everything said by a judge in the course of his judgment that constitutes a precedent. Only the pronouncement on law in relation to the material facts before the judge constitutes a precedent. Any other pronouncement on law made in the course of a judgment is an obiter dictum (a statement by the way) and it does not form part of the ratio decidendi.

At common law, courts below it in hierarchy must follow the principle of law on which a court bases its decision in relation to the material facts before it, in similar cases. A settled hierarchy of courts and an efficient system of law reporting are therefore essential to the proper operation of the doctrine of judicial precedent. Where the legal principle must be followed, it is a binding precedent. Where it may be followed, it is a persuasive precedent. When it is said that a judgement, judicial decision or case is binding what is meant is that the ratio decidendi is a binding precedent.

The word "judgement" is usually used in a wide sense to mean all that the court says in disposing of a case before it. In law reports the judgement usually begins immediately after such words as "The following judgement made delivered by." The judgment of the court was delivered by ..." Judgment in this sense usually consists of a statement of the facts of the case, a statement of the issue or issues to be determined, a discussion of relevant legal principles, a statement of the applicable legal principles and the actual judgement, decision or order of the court. The actual judgement or decision with or without an order is the judgement or decision in the narrow sense. Judgement in this sense is binding on the parties to the case only, it is not binding in subsequent cases between other parties. As between the parties to the earlier case" the subject matter of the case is res judicata. The distinction between **ratio decidendi** and **res judicata** was well illustrated in **Re warning (1948) Ch. 221** a case involving a testator who died in 1940, leaving legacies to H and L. free from income tax. In 1942, the court of Appeal of England held in a base to which H. was a party, but to which L was not, that by virtue of a statute the legacy was subject to income tax. Latter, in **Berkeley vs. Berkely (1940) A. C 55**, a similar case to which neither H. nor L. was a party, the House of Lords overruled the 1942 decision. Subsequently, H. and L. applied to the Chancery Division of the High Court to determine whether in view of the House of Lord's decision their legacies were subject to income tax. Jenkins J. held that H's claim is but not L's claim was *res judicata* the 1942 decision of the court of appeal being binding upon H, and that the decision of the House of Lords in Berkely applied to L's claim.

An orbiter dictum is not binding in any circumstances. But like a persuasive precedent, it is of persuasive authority. Usually, it is made without being fully considered by the court.

Self Assessment Exercise (SAE) 4

Distinguish between *res judicata* and judicial precedent of a case.

Self Assessment Exercise (SAE) 5

What was the similarity in the cases of Re Waring of (1945) and Berkely Vs. Berkely of (1846)?

6.0 Summary

In this unit we have learnt about legal reasoning. It was said that legal reasoning proceeds in a roundabout way. We said that laymen often wonder at the way lawyers and judges decide cases by not considering directly the merits of the possible alternative solutions to them; instead they try to see whether the case fits into some predetermined categories or "legal concepts and then they decide it according to the category or concept under which it falls.

Also, ratio decidendi was treated albeit briefly. The portion of the decision that is binding is sometimes referred to as ration decidendi i.e the reason for the decision. The underlying idea is that every court, which applies the law to a given set of facts is animated by a legal principle which forms the binding element in the case.

Judicial precedent or case law consists of law found in judicial decisions. A judicial precedent is the principle of law on which a judicial decision is based. It is the ratio decidendi i.e the reason for the decision. It follows that it is not everything said by a judge in the course of his judgment that constitutes a precedent. Only the pronouncement on law in relation to the material facts before the judge constitutes a precedent.

7.0 Conclusion

This unit has stressed the importance of legal reasoning to 'a would be' legal practitioner. It also stresses the reason behind the decision of a case by a court of competent jurisdiction; and the meaning of judicial precedent.

8.0 Tutor – Marked Assignment

Critically assess the statement that judicial precedent and the ratio decidendi of a case are necessary desideratum for a particular judgment of a court.

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Unit 3: Legal Reasoning and Approach to Legal Problems

Table of Contents

1.0 Introduction

The use of language is crucial to any legal system in the special respect that lawmakers typically use language to make law and the court typically uses language to state their grounds of decision. It is therefore important that philosophers of law need a good philosophical understanding of the meaning and use of language. You should also be knowledgeable in the use of language in Law.

2.0 Objectives

At the end of this unit, you should be able to

(i) Distinguish between the use of language in law and others;

(ii) Examine the relationship between law and language,

(iii) Highlight the problems arising from the relationship,

(iv) Identify the approaches that have been taken to prevent the problem

(v) Examine recommendations on what should be the new approach to legal language.

3.0 Legal Reasoning and Approach to Problems

A peculiarity of legal reasoning is that it proceeds in a roundabout way. This is why laymen often wonder by the fact that lawyers or judges do not decide cases by considering directly the merits of the possible alternative solutions to them; instead they try to see whether the case fits into some pre-determined categories or legal concepts and then they decide it according to the category or concept under which it falls.

If a court becomes seized of the problem, the lawyers involved in the case, to the puzzlement of the laymen who may attend at the courts are likely to seem to disregard all those considerations that seemed essential to the laymen and will instead concentrate on considering with the most minute care and the use of arcane learning whether the chimney-sweep had acquired "possession" or not and in the end will decide the controversy on the basis of their conclusions on this issue.

Self Assessment Exercise (SAE) 1

How does the court approach a particular problem through legal reasoning?

4.0 Language of the Law

Language is the principal means used by human beings to communicate with one another. Language has been variously defined as a purely human and non –instinctive method of communicating ideas, emotions and desires by means of voluntarily produced symbols.

According to Bloch and Trager, *"A language is a system of arbitrary vocal symbols by means of which a social group co-operates. The institution whereby human communicate and interact with each other by means of habitually used Oral-auditory arbitrary symbols"*.

The importance of language in any given situation cannot be over emphasized. It is the chief medium of communication and thought. The fact that lawyers operate in the fields of social control, language is of even greater significance to them. Words are in a very special way the tools of the lawyer's trade. It has been said that words are to lawyers what the scalpel and insulin are to a doctor or a Theodolite and slide rule to the civil engineer.

Words occupy the lawyer's attention in the construction, drafting and the interpretation of contracts, statutes, Wills and other legal documents. Words are the effective force in the legal world. In statutes, they result in heavy fines, long imprisonment and even death. In contracts, deeds or Wills, they transfer large amounts of property. Hence the persistent teaching in our profession that the right words must be used.

Lawyers work with language all the time. They have been described as wordsmith, people whose craft and trade, and require highly competent use of both oral and written language. In the most fundamental sense, the law is language. Statutes, cases, regulations and lawyering whether transactional or litigation-oriented rely upon languages in their writing, drafting, corresponding and persuading. Thus, indicating that language is very fundamental to law.

According to Lord Denning:

> *To succeed in the profession of law, you must seek to cultivate command of language. Words are the jurists' tools of trade. The reason why words are so important*

is because words are the vehicle of thought... obscurity in thought inexorably leads to obscurity in language.

Self Assessment Exercise (SAE) 2

Discuss briefly, the importance of language to law.

4.0 Formality and Precision in the Use of Language and Distinctiveness of Legal Language

It is the very nature of language that presents the greatest problem to successful communication. Language is considered as "perhaps" the greatest human invention, yet it is a most imperfect instrument for the expansion of human though. It has tremendous potential for vagueness, ambiguity, nonsense, imprecision, inaccuracy and indeed all other horrors reorganized by parliamentary counsel. As John Austin stated:

> *It is easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the law giver.*

Justice of the Supreme Court in America Oliver Wendel Holmes says: *ideas are not often hard but words are the devil.*

Despite the imperfections of language, it still must be used in any society if only because it is the chief medium of expression. Therefore, a good command of language is vital to lawyers for a proper understanding of legislation in particular, the drafters and readers of an Act must understand that times, circumstances and social forces influence the meaning and usage of words.

To understand properly the language of the law, the sources of the problem must be studied. To this end, five main problems in relation to formality and precision in the use of language and distinctiveness of legal language will be discussed.

5.0 The Problem of Ambiguity

Ambiguity is a phenomenon describing a situation where a word or sentence is capable of more than one meaning. There are three kinds of ambiguity: syntactic, semantic and contextual ambiguities.

Syntactic (or grammatical) ambiguity results from combining unambiguous words in such a way that they become ambiguous when read together. For example, the sentence *"Flying aeroplane is dangerous at night"*. There is an ambiguity as to whether it is the aeroplane that is flying that is dangerous at night or it is the act of flying an aeroplane at night that is dangerous. Also, in the sentence *"an owner or a lessee or a person operating an industrial plant shall pay a tax of three thousand Naira"*. There is an ambiguity whether the words *"operating an industrial plant"* qualify only person or each of the other words owner or lessee. Another example is the phrase *"A clear water container"* which may mean a water container that is clear in colour or a water container that (whatever its colour) which is holding clear water.

Semantic ambiguity refers to the phenomenon where a word has more than one meaning. For example, the sentence, *"a person who has divorced on the first day of January 2000"* is open to two interpretations, depending on whether divorce is past participle or not. Thus, this provision could apply to a person who has already divorced on the first day of January 2000 and the person who acquired the status of a divorcee on the first day of January 2000.

Also, the term ***knowledge*** may be used for both the content of what is known and the process of knowing. Cardozo once observed that *"when things are called by the same name, it is easy by the mind to slide into an assumption that the verbal identity is accompanied in all the sequences by identity of meaning"*.

Finally, contextual ambiguity arises where a pronoun is used in a situation where there are two or more persons referred to, and it is not clear to which the pronoun refers. This is what is known as the pronominal uncertainly. An example is: *The employer shall ascertain from the employee whether he is a graduate*. The pronoun "he" may refer to the employer or the employee.

6.0 Problem of Archaic Words

Archaic words are ancient words, which are no more in general use, because they are old- Fashioned. Example of archaic words found in legal documents today include: "*Save and except*" "*hereinbefore*" "*Hereinaforesaid* " *and* "*hereinafter*". Such words make the reading and understanding of legal documents difficult.

7.0 Vagueness

Only few words, like numbers and certain technical terms, have a destructive meaning, constancy and exactness. Most other words do not have that constancy and exactness.

The three major sources of vagueness in words are:

1) Their generic character;
2) Their readiness to derive colour from the surrounding context; and
3) Their capacity to evoke emotional responses.

On the generic character, this can be illustrated with the word "Family" which normally brings to mind a married couple and their children. Yet, it was held in **Dyson Holding Ltd Vs Fox** that a relationship between an unmarried man and an unmarried woman having living together over a long period but having no children constituted a family relationship. It was held that family should not be construed in a technical or legal sense, but in the sense that would be attributed to it by the ordinary man in the street in view of the "permanence and stability of their relationship. In **Helby Vs.**

Rafferts, however, a similar relationship was held not to constitute a family in that it lacked "a sufficient degree of permanence and stability to justify the view that they were members of the same family".

The colour varies according to the circumstances of their use, the context, the personality of the speaker or writer and the audience that is addressed. The word "Line" for example, will work a different image in the mind of the railway stationmaster, the printer, the palmist, the telephonist, the shopkeeper, and the tennis player. The contest in which a word is used is crucial and vital to the meaning of that word.

7.0 Verbosity

Verbosity means that a document is wordy, i.e it contains more words than is desirable. Examples of the use of verbose language in legal documents include the following clause taken from an old precedent book.

The vendor hereby assigns, conveys, transfers, grants,
and or confirms the sale of the property to the purchaser.

The sentence is wordy as anyone of the listed words may sufficiently convey the intention of the vendor to assign the property to the purchaser. Furthermore, the word *document* means "something written or printed. Therefore *any book, documents, account, computer print- out* will all fall within the meaning of documents. Also, *computer system* should cover diskette and computer print- outs. When a write-up is too verbose, it gives room for confusion.

8.0 Impression

It is generally believed that words are not inevitably and unalterably chained to the objects they symbolize. Different words may be used to mean different thing and they may be used to mean the same thing. It follows that words have no absolute and no proper meaning.

In **Helvering Vs. Gregory,** Hand, L. J. said that *"the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can never obviate recourse to the setting in which all appear, and which all collectively create."*
Examples of commonly known imprecise words are:

1). "**SHALL**" AND "**MAY**"

"Shall" is generally imperative or mandatory, that is, in its ordinary signification, "shall' is a word of command. But "shall" is also sometimes intended to be directory, in which case it becomes equivalent of 'May'.

2) "**AND**" and "**OR**"

The use of the words 'and' and 'or' give rise to not a few difficult problems of interpretation. Therefore, the use of either of those words calls for a high degree of precision. Generally, 'Or' is disjunctive, and 'and' is conjunctive. 'And' connotes togetherness. 'Or' tells one to make a choice. However, Upjohn, J, in **Associated Articles Ltd Vs. Inland Revenue Commissioner** decided that "and" in that case should be construed disjunctively. Also in **J.S Tarka & or' vs. DPP**, the court held that 'Or' should be construed conjunctively in that case.

3) "**ANY**"

Another notoriously imprecise word is *any*. In **Texaco Panama Inc-Vs SHELL P.D.C. Ltd.**, the main contention was the meaning to be ascribed to the word *any* in the Oil Terminal Dues Act and it took a period of seven years for the case, which started at the trial court in 1994 to be disposed off by the Supreme Court in 2002.

In the lead judgement per Ogwuegu, JSC, as he then was, stated:

> *In constructing the word 'any' in section 3 of the Oil Terminal Due Act, its generality should depend on the setting or context and the subject matter of the Act, bearing in mind that the 'any' has diversity of*

meaning; and can be employed to indicate 'all' 'every' or 'some'. The word is also a determiner, for example, 'we don't accept just any student's, meaning that only very good students are accepted. 'Any room will do', meaning no mater which, where or what room.

Self Assessment Exercise (SAE) 3

Discuss in detail the various ambiguities associated with language, especially in drafting legal documents.

Self Assessment Exercise (SAE) 4

How did the courts construe or interpret the word "Any" in the case of Texaco Panama Inc. Vs. Shall P.J.C Ltd?

Self Assessment Exercise (SAE) 5

What recommendations would you make to legal drafters in the use of language?

8.0 Summary

In this unit, we discussed the fact that language is crucial to any legal system in that lawmaker typically uses language to make law and courts typically use language to state their grounds of decision. It is therefore important that philosopher of law need a good philosophical understanding of the meaning and use of language.

Also, we understand that language is the principal means used by human beings to communicate with one another and that it is a purely human and non-instinctive method of communicating ideas, emotions and desires by means of voluntarily produced symbols. Finally, we discussed the five major problems of language in law, as being ambiguity, archaic words, vagueness, verbosity and imprecision.

9.0 Conclusion

Language is very important in the interpretation of statutes or legislation, especially in legal documents. Without language, human communication would be impossible. To this end, you should try as much as possible to study further on the use of language in legislative drafting and in construction of documents.

1.0 Tutor- Marked Assignment

Do an analytical research work on the various current trends on the use of language in law.

Note: You may not find the answer in this unit. That is why it is a research question.

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Unit 4: Legal Rhetoric and Legal Logic

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1.0 Introduction

We will study in this unit the methods of reasoning which lawyers use. Law is a practical discipline whose primary objective is not to describe the word, but rather to help us decide how to act. Accordingly, the reasoning of lawyers in that is, a practical reasoning, which is oriented to action.

2.0 Objectives

At the end of this unit you should be able to:

1. Reason legally;
2. Conduct deductive reasoning; and
3. Differentiate between inductive and deductive reasoning.

3.0 Legal Rhetoric and Legal Logic

Some writers, notoriously some realists and members of the critical legal studies movement, have denied that there are many cases in which a judge can reach a decision by the straightforward application of a rule. It is useful, therefore, to reassert that there are cases, especially many of the routine cases handled at the lower levels of the judicial hierarchy, which can be decided by purely deductive application or legal logic.

A typical example of legal logic or of deductive reasoning is the following:

1) Men are mortal,
2) Peter is a man
3) Therefore, Peter is mortal.

This is an example of a valid deduction. *Valid* means that if premises in 1) and 2) above are true, it logically follows that the conclusion in 3) above must necessarily be true also.

A typical example of deductive reasoning in a legal context is the following:

1) Any undischarged bankrupt shall be guilty of an offence, if he obtains credits to the extent of N100 or upwards from any person without first informing the person that he is an undischarged bankrupt.
2) X, being an undischarged bankrupt, has obtained credit to the extent of N100 from Y, without first informing him that he was an undischarged bankrupt.
3) Therefore X is guilty of an offence.

This is also a valid deduction, if the truth of the premises is accepted; it would be self- contradictory to deny the truth of the conclusion. But, of course, logic itself cannot guarantee the truth of the premises. If the major premise were not an accurate expression of the law or the minor premise were a wrong description of what in fact happened, then the conclusion would be wrong even though the argument itself is valid.

Some people have contended that in spite of the appearances to the contrary; the last example above cannot be regarded as a syllogism on the grounds that legal rules cannot be true or false. This raises a problem of logical theory more than of jurisprudence, but it will be enough to say here that must modern logicians accept that logical relations, and thus valid inferences- are possible not only between statement of facts, but also between commands and norms.

Most cases are decided by the application of similarly straightforward deductive methods. This will happen whenever the court either rightly or wrongly entertains no doubts about the formulations of the rules of law that have to be applied in the case at bar, and the essential facts of the case are seen to be uncontroversial. It may be useful at this point to mark that in many countries a majority of defendant before magistrate plead guilty, accordingly, problem of facts play no role in their cases.

A case can become more "difficult" in different ways. It may be that the rule of law, which has to be applied in the case is itself uncertain. This may happen either because the scope of a rule of law is uncertain, because two or more conflicting rules seem to be applicable in the use, or because no known rule applies. The first two possibilities raise problems of statutory interpretation, and/ or of determination of the ratio or binding force of precedents, and/ or of clarification of the content or binding force of a custom. When there is no rule which is clearly applicable to the case the court itself will have to fashion one, either by widening the scope of an already existing rule or by developing a new rule, this is where the judges legal logic or reasoning comes to bear.

Also, a case may be *difficult* or *hard* because of problems posed by the fact of the case. To start with, it may be very difficult to establish what really happened: the witnesses may be unreliable, at worst, a judge may be faced with two contradictory and unsupported stories, each told by a seemingly unreliable person, and will have to choose which will not be considered here. But even after the facts have been established or taken as established, there may arise difficult problems of how to categorize those facts under legal rules. At this stage also, the court need the knowledge of legal reasoning or legal logic.

Self Assessment Exercise (SAE) 1

A judge, who wants to make success of his career in his judgment, must be knowledgeable to some extent in deductive or logical reasoning. Discuss.

Self Assessment Exercise (SAE) 2

Using good examples differentiate between deductive and inductive reasoning.

4.0 Legal Reasoning and Practical Reasoning.

Law is a practical discipline whose primary objective is not to decide the world, but rather to help us decided how to act. Accordingly, the reasoning, of lawyers is practical reasoning, that is, a reasoning which is oriented to action. Practical reasoning is a topic on which philosophers have been concentrating their attention for the last thirty years or so. The issue is extremely complex. Here, we will concentrate on legal reasoning, which is one of the main species of practical reasoning.

The above concept can be illustrated by considering a well-known example. A chimney- sweep while cleaning a flue discovers a jewel; is he entitled to keep it; If this problem is posed to a layman he will endeavor to consider any reasoning which may exist for allowing the chimney sweep to profit from the finding and will compare them with those which favour the alternative claims of, say, chimney- sweep master, the owner of the premise where the jewel was found or the jeweler to whom the Chimney-sweep took the Jewel.

Again, when the courts in the U.K and the U.S.A. came to decide the question whether trade unions should be liable in tort for the actions of their members, the non lawyers would have expected that judges would give the most anxious considerations to the weighty political and social consequences of deciding one way or the others. After all, a decision in the affirmative could have meant the financial ruin of most trade unions and not an end to the trade unions movement, while a negative answer could have meant a most dangerous precedent in a democratic society. But the non-lawyers would have been disappointed; apparently all that the judges

who decided these case cared about was whether trade unions were "legal persons" or not, ostensibly, it was on that basis alone that the cases were decided.

Obviously, this way of deciding issues present serious dangers. In some cases, the judge may well decide first of all what in the result that seems preferable to him, in the basis of exactly the same consideration which would have moved a layman, and then endeavour to divide whether or not a party had possession, property had passed, or trade unions are legal persons in the way which will allow him to reach the desired result. Whenever this is the case the reasons which judges offer for their decision are sheer mumbo-Jumbo, and the real reasons which moved them to decide one way or another and left unexpressed and therefore cannot be publicly examined nor criticized. Even worse, some judges may truly decide all cases which some before them in the basis of those "illegal concept", never stopping to consider the potential consequences sometimes extremely serous of their decisions.

On the other hand, however, all developed legal systems, without exceptions make extensive use of these concepts. What is more, it is clear that they are extremely useful for without them the law would be far more complex than it is. At present, for instance, we have some general rules that determine when a contract does exist and further rules which determine the conditions under which a party to a contract is liable to the other party. Because of the existence of these rules, if there is an accident in a train as a consequence of which the luggage of passenger is damaged, a lawyer will easily be able to inform that passenger whether or not s/he can recover from the railway or not he can recover from the railway company. If the lawyer is competent and the case is not extremely unusual that advice will be reliable.

But if the "concept" of contract did not exist, for the lawyer to be able to inform the passenger in his right and liabilities in such a case there would have to be rules which specified in detail the liability of railway companies whenever there is accidental damage to luggage and rules for liability of air

transport companies in similar circumstances and rules for bad companies for 'truck-pushers' and so on. Not only this, in respect of railway companies there would have to be rules for harm to luggage, different rules for harm to persons, and still different rules for harm to pets, etc. The only way to avoid having millions upon millions of different rules is to generalize and speak in terms of broader concepts like 'carriers' "contracts", possession" and so on.

How can these different considerations be reconciled? The solution lies in distinguishing two types of cases; those which are familiar and have arisen often in the past, and those which are novel. By and large, there is no harm in solving familiar cases through the application of rules framed in terms of general legal concepts, if the concepts used in a given legal system have been well chosen; they will reflect the considerations that are important in deciding a case one way or another. Also similar past cases will have been decided by using those same concepts; if the result have been starling it in likely that new rules would have been made. If this has now been done the chances are that at the very least the results are not clearly unjust in the estimation of most members of the society.

Even when cases are novel and present combinations of circumstances which had never before arisen for decision, it often happens that if the issue is examined on the merits none of the parties has a case clearly stronger than the other. This is the case, for instance, in the great majority of cases of finding or in most disputes between buyers and creditors of a seller. In these cases in which it is impossible to discriminate between alternative solutions on the basis of purely rational considerations, the law should at least try to avoid wasteful litigation. This objective is fostered by deciding such cases on the basis of principles framed in terms of the concept familiar to lawyers.

As can be seen, by and large in all these cases they use of legal concepts and reasoning presents the great advantage of reducing dramatically the

complexity of the law and hence of making it easier for everybody to know are acquired without having to pay any overwhelming price in terms of justice or social expediency.

The situation is very different in regard to novel cases in which serious injustice or inconvenience will be caused if they are decided by the rigid application of principles or rules framed in terms of familiar legal concepts. So, to decide them constitutes the vice that has often been stigmatized with the name of 'conceptualism' or 'formalism'. The problem with this method of legal reasoning is that it ignores that, as was argued, general rules alone cannot provide satisfactory solutions for all particular cases. In the teeth of this problem 'conceptualism' still try to remove from judges and discretion and bind them to reach the same decision whenever a set of circumstances are present irrespective of what other circumstances may accompany them.

The conclusion we reach is that legal concepts are highly beneficial, but that to try to decide all new and unfamiliar cases by the rigid application to them of concept which had been framed without considering in any way the type of situation which comes up for decision is a serious misuse of legal concepts and reasoning. The solution does not lie in abandoning legal concepts but in giving to judges a measure of discretion in using them.

A balance consideration of the way in which legal concepts can be used in sound way is reflected in the following words of Professor Lloyed.

> *Legal principles and concepts establish a broad framework setting out the general line of approach which the court will be disposed to adopt without necessarily depriving it all freedom of maneuver in particular cases. From the present point of view, nevertheless, the importance of the conceptual approach lies in this, that the court starts off with a strong disposition to move in a particular direction, the danger*

only arises when the court ceases to recognize that it still retains some freedom of action within this framework and that it is a question of policy how far such freedom is exercised or not.

Self Assessment Exercise (SAE) 3

In the Chimney – Sweeper's case studied under this unit, how would the court arrive at whether the sweeper has possession of the jewelry he found?

Self Assessment Exercise (SAE) 4

Legal and logical reasoning are necessary desideratum in arriving at a sound and valid judgment by a court in the administration of justice. Comment.

Self Assessment Exercise (SAE) 5

Differentiate between legal rules and legal principles.

5.0 Summary

In this unit, you learnt the following concepts: Legal rhetoric and legal logic, legal reasoning and practical reasoning. You have also been introduced to how a court would arrive at a decision through deductive and legal reasoning; and how legal rules and principles are applied.

6.0 Conclusion

This unit has stressed the importance of legal rhetoric, legal logic, legal reasoning and practical reasoning. It also talked about that where there are no existing rules to determine a particular case before a court of competent jurisdiction, the court must of necessity develop its own rules in order to be able to determine the case.

7.0 Tutor-Marked Assignment

Mr. Pius and Osemudiame entered into a contract to supply some electrical equipment. Mr. Pius did not furnish any consideration to Osemudiame. Mr. Pius has decided to sue Osemudiame for failing to supply the equipment.

1) How would the court rule upon this case?

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MODULE 3

Unit 1: Legislative Proposals

Table of Contents

1.0 Introduction

This unit deals with the process by which legislative proposals are put in a bill form ready for presentation to the legislative house for passing into law. The unit covers the process of drafting Acts of the National Assembly, Laws of the State Houses of Assembly, Warrants, Orders, Rules and Notices. It is a blend of drafting skills and a good working knowledge of Constitutional Law.

2.0 Objectives

At the end of this unit you should be able to:

(i) Describe how legislative proposals are made;

(ii) Define legislative drafting;

(iii) Explain what the legislative process is;

(i) Explain how to interpret laws or statutes; and

(ii) Identify types of legislations and law codifications.

3.0 Legislative Proposals

The legislative drafting process begins when the sponsor of the proposal gives formal instructions to the legislative drafter, and ends when the drafter puts them in usual form under our jurisdiction usually called bills before the legislative body in context called the National Assembly.

Self Assessment Exercise (SAE) 1

What are legislative proposals?

4.0 Legislative Drafting: Ambiguity, Archaic words, and Vagueness.

Legislative drafting is the process whereby a person is charged with the responsibility of putting policies in a bill form for the consideration of the parliament. As part of colonial apparatus of administration in Nigeria, the office of the Attorney – General under the Governor – General was responsible for the drafting of bills. This arrangement was carried over into the post-independence Nigeria and it has been convenient for legislative drafter to belong to the executive arm because the bulk of the bill before the legislature originates from the executive.

Due to the importance of legislation as a source of law, all the legislative houses in Nigeria now have in-house legislative drafter to serve individual members and the entire house. The advantage of this is that the house no longer depends on the ministry of justice to draft its bills. As we continue to grow in our democratic experience, the private practitioners will be involved in the drafting of bill. This is a departure from the previous experience where only the Attorney-General office was engaged in drafting bills.

Problem of ambiguity: This has been discussed in detail on page 52. You should try to study it again.

5.0 Legislative process

The legislative process begins upon the receipt of the bill by the appropriate body through the various stages it must undergo through beginning from the first reading to the second reading till when the purpose of the general policy of the bill is given full debate to the committee stage. At this stage the bills are examined line by line before they go for the formal third reading. Thereafter, the bill is sent to the other chamber to go through its own procedure that is often similar to the sending chamber. And finally it receives the assent of Mr. President and the bill becomes law or an Act.

Self Assessment Exercise (SAE) 2

Discuss in detail the various legislative processes a bill passes through up to the President's Assent.

6.0 Construction or Interpretation of Statutes.

The practical relevance of interpretation of statutes in our jurisprudence manifests itself each time there is a dissenting view by a judge or when the court departs from its earlier decision. Interpretation problem in the commonwealth jurisdiction is treated carefully because of the application of the doctrine of binding precedent. The tools needed to solve the riddle of interpretation include the interpretation Act-definition clauses, law dictionaries and decisions of superior courts defining a word or phrase. The traditional rules of interpretations that will be discussed here should not be regarded as rigid rules, rather they are principles that have been found to afford some guidance when it is sought to ascertain the intention of the legislature.

The methods used to discover the intention of the legislature vary. Sometimes the court simply interprets the words and applies the meaning to the statute; this is the 'referential approach'. And in other times, the court

considers the entire purpose (goal) of the statute as aid in the construction of the statute; this is the 'purposive approach'.

7.0 Types of Legislation, codification of laws

The various methods of interpretations are as follows:

7.1 The referential approach

a) Literal and plain meaning Rule

This rule states that if the precise words used in a statute are plain and unambiguous, the court is bound to construe or interpret them in their natural ordinary (grammatical) senses even through it leads to absurdity or manifest injustice. The rule has at its foundation, the assumption that words are not used in a statute without meaning, and are not tautologous or superfluous. The legislature is deemed not to waste its words or say anything in vain. This gives the literal rule priority over other rules of interpretation; hence, it has the privilege of being the first and most important rule of interpretation. Judicial pronouncements in support of its importance abound all over the law reports. In the case of **Major and St. Mellons Rural District Council Vs. New port Corporations Lord Simmons said**.

> *The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly restricted*

7.2 The purposive approach

a) Mischief Rule

Unlike the literal and golden rules of interpretations or construction of statutes, the mischief rule adopts the purpose approach to the interpretation of statutes. This approach does not restrict itself to the words of the statutes

only; it goes further to consider the purpose (object) of the entire statute. The principle in this rule is laid down in the Heydon's case where it was stated that in the application of the rule, four things are to be discerned and considered:

1) What was the common law before the making of the Act;
2) What was the mischief and defect for which the common law did not provide;
3) What remedy has parliament resolved and appointed to cure the disease of the commonwealth; and
4) The true reason of the remedy.

The case of **Smith Vs Hughes** further illustrates the applications of the mischief rule the issue in that case was the construction of section 1(I) of the Street Offences Act, 1959 (U.K), LORD PARKER said:

> *I approach the matter by considering what the mischief is aimed at by this Act. Everybody knows that this was an Act intended to clean up the street to enable people to walk the street without being molested or solicited by common prostitutes. Viewed in that way, it can matter little, whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street.*

By illustration, let us assume that a law provides that 'no students shall come into the examination center with notes". If a student came into the examination center with materials written on the palm, unless the court consider the mischief against which the law is directed, that is, cheating, the student is likely to argue that 'notes' presuppose paper and that he has not and that he is not liable under the law.

In this situation, the court should apply the mischief rule of interpretation; it should consider the mischief against which the law is directed. This is the object (purpose) to the law.

This rule equates the meaning of the statute with the purpose (object) for which the statute was enacted. Hence unlike the literal and golden rule, the court also does not limit itself to the words used in the statute; they go beyond them to discover the mischief (purpose or objects of the statute). This is what LORD DENNING MR. described in **Engineering industry Training meaning. We construe them according to their object and intent Board vs. Samuel Talbot (Engineers) Ltd** as follows: "*We no longer construe Acts of Parliament according to their literal*"

The advantage of this rule is that it takes cognizance of the changing function of the law and society, and the tendency for people to want to take advantage of the unsettled nature of word to perpetrate mischief. LORD DENNING was fond of this approach, according to him, it is a process of supplementing the written words so as to give "force and life' to the intention of the legislature. However, the rule has been criticized as encouraging judicial activitism. The House of Lords condemned this approach and referred to it as **"naked usurpation of the legislative function"**.

b) The Golden Rule

Some judges have suggested that a court may depart from the ordinary meaning where that would lead to absurdity. **In Grey Vs Pearson** Lord Wendsleydale said:

> *I have been long and deeply impressed with wisdom of the rules now, I believe universally adopted, at least in the courts of law in Westminster Hall, that in construing Wills and indeed statutes, and all written*

instrument, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no further.

This became known as "Lord Wensleydale" golden rule" following a dictum of Lord Blackburn J. in **River Wear commissioner Vs. Adamson**:

I believe that it is not disputed what Lord Wensleydale used to call the golden rule is right, viz, that we are to take the whole statute together and construe it all together giving the word's their ordinary significant, unless when so applied they produce an inconsistency or an absurdity or inconvenienced so great as to convince the court that the intention could not have been to use them in their ordinary significant and to justify the court in putting on them some other significant, which, though less proper, is one which the court thinks the works will bear.

One controversial aspect of this 'rule' was whether it could only apply where the words were ambiguous or whether it could also be used where the ordinary meaning was clear but 'absurd'. In so far as it was confined to the former situation, it was a statement of the blindingly obvious, that where statutory words are ambiguous interpretation that is not absurd is to be preferred to one that is. In so far as the 'rule' would be applied in the latter situation, it was clear that it should be used sparingly. Some judges argued, it would not be used in such a case at all. Lord Esher observed:

If the words of an Act are clear, you must follow them even though that leads to a manifest absurdity. The

court has nothing to do with the question whether the legislature has committed an absurdity.

c) Ejusdem Generis Rule

This rule stemmed from a rule laid down by LORD BACON that copulation *verborun* indicate acceptatioem in *codum sensu*, i.e the coupling of words together shows that they are to be understood in the same sense. Simply, *ejusdem generis* means "birds of the same feather". Blacks Law Dictionary describes its operation in the interpretation of statutes and other documents as follows:

Under ejusdem generis' canon of statutory construction, where general words follows an enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.

Let us consider the phrase "there are goats, sheep and other animals in the Zoo". Here the enumerated particulars are "goats and sheep", and the general is "other animals." On the question what animal would come within the phrase "other animal"? The court must have regard to the class formed by the enumerated particulars. And being domesticated animals 'Lions' cannot come within the same class as goat and sheep, therefore, the *ejusdem generis* rule would not apply.

In **Tillmans and Co. Vs. SS Knutsford Ltd**, the issue was the construction of a passage in a bill of lading that read:

Should a port be inaccessible on account of ice, blockade, or interdict or should entry and discharge at the port be deemed by the master unsafe inconsequence of war, disturbance or any other cause...

VAUCHAN WILLIAM L.J in his judgment observed that he does not wish to lay down any general rule beyond that necessary for the determination of the case. However, he is of the views that to apply the *ejusdem generis* rule, we should find some common bond between the words "war" and "disturbance", if a common bond could not be found, the necessary consequence would be that the words "or any other cause" would not be limited by the doctrine of *ejusdem generis*. The question is what that bond should be? He went on to state the principle thus:

> *The main principle upon which you must proceed is to give all the words their common meaning unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough". The common bond between "war" and "disturbance is that they are human causes. Therefore, the rule can only admit causes like "riot", "strike" but not natural occurrence like "storm, earth quake.*

7.3 Other Rules of Interpretation

There are other rules of interpretation applied by the courts in the construction of documents. They are properly called, maxims. The frequencies of reference to these rules underscore their importance. Unfortunately, most of these rules are still expressed in Latin, a habit that ought to be avoided.

a) Ut res magis valet quam pereat

Literally, this means that the things may have effect than be destroyed. The policy behind this rule is that the legislator himself intends the interpreter of an enactment to construe the enactment in such a way as to implement, rather that defeat, the legislative intention. Where there are two possible interpretations to a document, the court should adopt the interpretation that will aid the smooth running of the system than that which creates

confusion. Although, it is for the legislator to change the law when it desires to do so, the court ought to correct obvious slips in drafting. In this case, it is permissible for the court to depart from the strict literal construction in order to give effect to the legislator's intention.

This rule of construction is the basis of the liberal and broad approach to the construction of the constitution. This point is emphasized in **Tukur Vs Gongola State**. In that case the Supreme Court had to construe the provisions of sections 42(2), 230 and 236 of the then 1979 Constitution to determine the jurisdiction of the Federal High Court. The court held that:

> *Since the Supreme Court decision in Nafiu Rabiu Vs. The state (1981) 2 NCLR 293, the court has opted for the principle of constructions expressed in latin maxim ut res magis guam pereat, meaning that even if alternative construction are equally open, it shall opt for that alternatives which is consistent with the smooth the working of the system which the Constitution read as a whole as set out to regulate and so the alternative which will disrupt the smooth development of the system is to be rejected.*

b) Expresio unis est exclusio atterius

Literally, this means that the express mention of one thing is the exclusion of another. Therefore, where an enactment enumerates the things upon which to operate, everything else (not enumerated) must necessarily and by implication be excluded from it's operation and effect.

In **A.G Bendel Vs Aideyon,** one of the issues was whether a state land can be lawfully acquired compulsorily in Bendel State otherwise than under sections 17 and 24 of the land law, Bendel State. The Supreme Court held:

If it was intended that leasehold interest in state land could be freely acquired compulsorily, would there have been any need for making those specific provision? The maxim is expression uni est exclusio alterius: those specific provisions in sections 17 and 24 of the state Land Law exclude the intendment of a general power of compulsory acquisition of leases of state land.

c) Noscitur a sociis

This maxim means that the meaning of doubtful words or phrases in a sentence may be derived from the meaning of the other words accompanying it. And the meaning of a term may be enlarged or restricted by referring to the object of the whole clause in which it is used. In **Garba Vs FCSC and another**, one of the issues was whether section 3(3) of Decree No. 17 of 1984 can operate to affect proceeding commenced and pending in court before the commencement date of the Decree. The Supreme Court applied this rule to construe the provision of the Decree; the court explained its application thus:

In applying the NOSCITUR A SOCIIS rule of construction to the interpretation of the words "and if any such proceeding have been or are instituted before... the making of this Decree, the proceeding shall abate contained in S. 3(3) of DN 17 of 1984, the court will lay emphasis on the words "such proceeding" therein and read those words A SOCIIS the words "any act, matter or thing done or purported to be donė by any person under this Decree" for the words 'such proceeding" in the sub-section to have meaning, and escape from obscurity, it must be clear that the proceedings which are sought to be abated under section 3(3) of the Decree must be proceedings which are in respect of any act, matter or things done or purported to be done under the Decree itself, indeed any thing done during the life of the Decree and it only saw life the first time on 31st December 1983.

d) Contra proferentes

This rule of construction is commonly applied to commercial documents; it states that where a word or phrase in a document is capable of more than one interpretation, the document should be construed strictly against the maker. The application of this rule has been extended to apply to the construction of expropriatory and penal statutes. Thus in **A.G. Bendel Vs Aideyon**, on the issue whether states land can be compulsorily acquired, the Supreme Court said that:

> *It is settled law that expropriatory statutes which encroach on a person's proprietory right must be construed fortissime contra proferentes, that is, strictly against the acquiring authority but sympathetically, in favour of the citizen whose property rights are being deprived. Consequently, as against the acquiring authority, there must be a strict adherence to the formalities prescribed for acquisition.*

Self Assessment Exercise (SAE) 3

Discuss in detail the various canons of statutory interpretation adopted by the courts. Support your answer with appropriate judicial authorities in relevant situations.

8.0 Types of legislation, codification of law

Legislation is that source of law, which consists in the declaration of legal rules by a competent authority. The term is sometimes used in a wide sense to include all method of law making. To legislate is to make new law in any fashion. In this sense, any act done with effect of adding to or altering the law is an act of legislative authority. As used, legislation includes all the sources of law and not merely one of them. Thus, when judges establish a new principle by means of a judicial decision, they may be said, to exercise legislative and not merely judicial power.

Law that has its source in legislation may be most accurately termed enacted law, all other forms being distinguished as unenacted. The more familiar term however is statute law as opposed to the common law; but this, though sufficiently correct for most purposes, is defective, inasmuch as the word statute does not extend to all modes of legislation, but is limited to Act of parliament. Black stone and other writers use the expression written and unwritten law to indicate the distinction in question. Much law, however, is reduced to writing even in its inception, besides that which originates in legislation.

1) Supreme legislation

Legislation is either Supreme or sub-ordinate. The Supreme legislation is that which proceeds from the Supreme or Sovereign power in the state, and which is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is therefore dependent for its continued existence and validity on some superior or supreme authority.

2) Subordinate legislation

Enactments of legislative bodies inferior to the Sovereign constitute subordinate legislation. Such legislation is subordinate in that it can be repealed by and must give way to, sovereign legislation. It may also be, and in many cases is, of a derivative nature, the power to legislate having been delegated by the sovereign to the subordinate. In England for instance all forms of legislative activity recognized by law, other than the power of parliament, are subordinate and subject to parliamentary control.

The chief forms of subordinate legislation are five in number:

a) **Colonial**: The power of self-government entrusted to the colonies and other dependencies of the crown are subject to the control of the imperial legislature. The parliament or National Assembly may repeal, alter, or supersede any colonial enactment and such enactment constitutes,

accordingly, the first and most important species of subordinate legislation. It has been held, however, that for the purpose of the maxim **delegatus non potest delegare**, a colonial legislature is not a mere delegate of the imperial parliament, and hence can delegate its legislative power to other bodies that in turn are dependent upon it.

b) Executive: The essential function of the executive is to conduct the administrative departments of the state, but it combines with this certain subordinate legislative powers which have been expertly delegated to it by parliament, or pertain to it by the common law. Statutes for examples, frequently entrusted to some department of the executive government the duty of supplementing the statutory provision by the issue of more detailed regulations bearing on the same matter. So it is part of the prerogative of the Crown or President at common law to make laws for the government of territories acquired by conquest or cession, and not yet possessed of representative local legislatures.

c) Judicial: In the same way, certain delegated legislative powers are possessed by the judicature. The superior courts have the power of making rules for the regulation of their own procedure. This is judicial legislation in the true sense of the term, differing in this respect from the so-called legislative action of the courts in creating new law by way of precedent.

d) Municipal: Authorities are entrusted by the law with limited and subordinate powers of establishing special laws for the districts under their control. The enactments so authorized are termed by- law and this form of legislation may be distinguished as municipal.

e) Autonomous: All the kinds of legislation that we have hitherto considered proceed from the state itself, either in its supreme or in one or other of its many subordinate departments. But this is not necessarily the case, for legislation is not a function that is essentially limited to the state. The declaration of new principles amounts to legislation not because it is

the voice of the state, but because it is accepted by the state as a sufficient legal ground for giving effect to those new principles in its courts of justice.

In the allowance of new law the state may hearken to other voices than its own. In general, indeed the power of legislation is far too important to be committed to any persons or body of persons save the incorporate community itself. The great bulk of enacted law is promulgated by the state in its own person. But in exceptional cases, it has been found possible and expedient to entrust this power to private hands. The law gives to certain groups of private individuals' limited legislative authority touching matters which concern themselves. A railway company for examples is able to make by-laws for the regulations of its undertaking. A university may make statutes binding upon its members.

A registered company may alter those articles of association by which, its constitution and management are determined. Legislation thus effected by private persons and the law so created, may be called autonomic.

3) Codification of laws

The advantages of enacted law so greatly outweigh its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process which, since the days of Jeremy Bentham, has been known as codification, that is to say, the reduction of the whole corpus juris, so far as practicable, to the form of enacted law. In this respect, country like England lags far behind the continent. Since the middle of the 18thc the process has been going on in European countries and is now all but complete. Nearly everywhere the old Medley of Civil, Canon, customary, and enacted law has given place to codes constructed with more or less skill and success. Even in England and the other countries to which English law has spread, Nigerian inclusive, tentative steps are being, taken on the same road. Certain isolated and well-developed portions of the

common law, such as the law of bill of exchange, of partnership, and of sale of goods have been selected for transportation into statutory form.

The process is one of exceeding difficulty, owing to the complexity and elaboration of English legal doctrines. Unfortunately, many portion of the law are not yet ripe for it, and premature codification is worse than none at all.

Self Assessment Exercise (SAE) 4

Briefly discuss the various methods of subordinate legislation.

9.0 Summary

In this unit, you learnt the following concepts: Legislative proposals, legislative drafting, legislative process, construction or interpretation of statutes, types of Legislation, and codification of laws.

10.0 Conclusion

This unit has focused on how legislative proposals are made and put forward on the floor of the House by the sponsor of the bill. The various stages the bill passes through until it ultimately receives the President's approvals or assent was also discussed.

11.0 Tutor-Marked Assignments (TMAs)

1) Subordinate legislations are as valid as Supreme legislation, however, all animals are equal but some are more important than the others as regards Supreme and subordinate legislation. Discuss.

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Unit 2: Qualities of a Good Legislative Drafter

Table of Contents

1.0 Introduction

In this unit, you will learn the process by which legislative proposals are put in a bill form ready for presentation to the legislative house for passage into law. This unit will cover the process of drafting Acts of the National Assembly, and laws of the State Houses of Assembly. It is a blend of drafting skills and a good working knowledge of constitutional law.

2.0 Objectives

At the end of this unit you should be able to:

(i) Differentiate between legislative process and drafting process.
(ii) Explain qualities of a good drafter
(iii) Identify the various stages in drafting process
(iv) Describe who a drafter is

3.0 Who is a Legislative Drafter?

A legislative drafter is one who engages in the drafting of bills for the legislature at whatever level of government. In Nigeria today, legislative drafters are employed in the Ministry of Justice, the various legislative

houses and as private legal practitioners. Historically, legislative drafting developed in Britain where the drafter was called parliamentary counsel, and was charged with the responsibility of putting policies in a bill form for the consideration of the parliament.

Self Assessment Exercise (SAE) 1

Briefly describe who a legislative drafter is.

4.0 Qualities of a Good Legislative Drafter

Legislative drafting is a special skill that requires a lot of concentration, discipline and dedication. A drafter should be able to communicate with precision and in simple language. Legislative drafting is a science that is best learnt by practical exercise and not by mere reading textbooks. Therefore, most of the existing works on legislative drafting today have as their authors men who at one time or the other were legislative draftsmen. Legislative drafters must have a fair knowledge of the principles of law on a wide range of issues, as well as possess the ability to understand the society; their personal understanding of the socio-cultural influences in the society will be an added advantage. Laws are not drafted in vacuum; the society must be able to apply laws to true-life situation. And unless drafters possess this quality, they many engage most of their time creating unrealistic laws.

If we must continue to attract the best brains for excellence, there are basic tools which should be provided for the legislative drafter to work. The most basic of these tools is the drafter's work environment; he needs all the comfort in the world. The library must be well stocked with relevant textbooks and constantly updated with modern materials from within and outside the drafter's Jurisdiction, and must be allowed to update knowledge through interacting with colleagues, and by attending both local and international conferences.

Self Assessment Exercise (SAE) 2

In not more than ten sentences, summarize the basic qualities of a good drafter.

5.0 The Drafting Process

The drafting process begins when the sponsor of a bill instructs the drafter, presenting to the drafter instructions, and ends when the drafter completes a draft Bill ready for presentation to the legislature.

There are five stages.

1. Understanding drafting instructions
2. Analysing
3. Designing
4. Composition
5. Scrutiny

1. Understanding drafting instructions

Unlike the process of understanding instructions of clients to their lawyer, in legislative drafting that personal relationship between the client (the sponsor of the legislative proposal) and the drafter does not always exist. For example, the executive arm of government might formulate a policy to be presented to the legislature as a bill to be passed into law. Between the time when the policy formulated and the bill presented to the legislature, the drafter drafts the bill; the drafter will not be present when the policy decision is taken, so the drafter must be properly instructed. This method, by which the sponsor of a Bill instructs the drafter, takes the form of detailed drafting instructions.

Drafting instructions from the sponsor of a bill to drafters should be detailed enough to assist the drafter in doing their job. To this end, information should be provided in the following areas:

(a) Sufficient background information

This is the policy behind the law to be enacted; the policy may be described as the "problem or disease of the Commonwealth." Every law is designed to address issues and except the drafter is aware of this background, the drafter will labour but in vain. Sometimes the need for the law may have arisen from a court judgment, government white paper following the report of a commission of inquiry, a treaty; party manifesto, etc. It is ideal that the extracts of relevant reports, memoranda, and other sundry material that will assist the drafter should be attached to the drafting instructions.

(b) The principal object of the law.

While the background deals with the considerations of previous issues that existed before the law was enacted, the principal object of the law deals with the law itself. This is the spirit and intent of the law. Statute or law is never enacted in vacuum, it must have a purpose, and until the drafter is well informed of what the statute law is designed to achieve, the drafter cannot produce a draft bill that will serve its desired purpose.

(c) The means by which the principal objects will be achieved.

This deals with practical issues such as the enforceability of the proposed statute or law. It may be necessary to establish a new body or institution to enforce the law; this must be provided for in the drafting instructions. Instruction should be given about the powers, and administrative structure of the institution or body. This information is important to enable the drafter include the institution or body in the draft bill.

(d) Possible implication and problem envisaged

A proposed bill may have the effect of altering the existing order or law, which could lead to complications. These complications should be brought to the attention of the drafter in the drafting instruction, and it is the duty of the drafter to address these problems when drafting the bill.

2. **Analysis**

The legislative drafter is now assumed to have a proper grasp of the legislative proposal; he or she should analyze the drafting instruction by taking a look at these three issues:

(a) Existing laws

Rarely does it happen that there is no law, statute or otherwise, which is not related to the issue(s) addressed in the proposed bill. If this assumption is true, then the drafter should examine the existing laws within the jurisdiction or locality so that the drafter can identify these laws. The advantage of doing this is to avoid drafting a law that duplicate or impliedly repeal or council existing law. Drafters should not limit themselves to local laws; they should consider existing laws on the subject in other jurisdiction or locality.

(b) Potential danger areas

It is expected that drafters should not concern themselves with the rights and wrongs of the policy behind the proposed bill. The drafter is a servant who should be seen but not be heard; policy decisions should be the business of the sponsor. However, drafters by their legal training have a special responsibility to advise the sponsor on possible dangers in the proposed bill. By possible danger areas, it is meant the possibility of the new law conflicting with the old laws. It therefore follows that drafters should have general knowledge of the laws operative in their jurisdiction or locality, particularly the constitution. For instance, where a state wishes to enact a law on an item listed on the exclusive legislative list or a law to derogate from the proprietary right of citizens without compensation or a law that is against international law or contrary to public policy, etc. the drafter owes a duty to draw the attention of the sponsor to the constitutionality or otherwise of the legislative proposal.

In essence, the duty of the drafters does not go beyond advice, they cannot insist on their advice being taken or accepted. Where a drafter is not alert to

his or her responsibility in this area, the inconveniences of the court declaring the law unconstitutional is embarrassing, and the sponsor will shift the blame to the drafter. Hence, experienced drafters do not take oral instructions, they insist on written instructions and replies to any issue, raised in the course of drafting the bill.

(c) Practicability of the law

This is somehow similar to the issue of potential dangers areas, but the point here is that, nothing is gained by enacting law that is surrounded with the problem of enforcement. There are several reasons why a law may be impracticable. For example, in a predominantly polygamous society; it may be difficult to prosecute the offence of bigamy. Bigamy is an offence committed by any person who, being married and while the marriage subsists, married any other person during the life of the existing spouse. Drafters should consider the socio-cultural conditions and antecedents of the people and advise the sponsor accordingly.

(3) Designing the Draft

Designing the draft means planning the outline. This is to ensure effective communication of policies in an orderly manner. After a thorough grasp of the concept of the proposed bill, drafters must plan their work by producing a comprehensive outline, which is meant to present the draft bill in a logical order and arrangement.

One problem encountered by drafters at the design stage is the tendency to forget to include a relevant point. To ensure that nothing is left out, it is advisable to use a pre-prepared checklist that may have been compiled from precedents i.e. already prepared samples, and constantly reviewed to meet specific needs. The appropriate order should be the conventional order adopted in that jurisdiction or locality, which may however be improved upon, but should not be radically different as to do violence to the conventional way of doing things. The order of arrangement of a bill depends on the purpose of the bill, which may be meant to establish a

statutory body, amend a law, repeal a law or declare existing law void. Every statute or law has a provision for "Arrangement of sections", this page provides a useful guide for designing the outline.

A long and complicated bill should be divided and sub-divided if necessary into parts and each part and sub-divisions having its heading. For example, the 1999 Nigerian Constitution is divided into chapters and, sub-divided into parts. The length of a bill should not be the only consideration for dividing whether or not a bill should be divided into parts. The paramount test should be whether each of the parts should be construed with some independence from the other parts, if the answer is yes, then the statute or law is better divided into parts, and each part should contain only provisions that are related. A good illustration of this point is the formal arrangement of the Companies and Allied Matters Act of 1990. This Act is divided into three main parts:

i) PART A – COMPANIES

ii) PART B – BUSINESS NAMES

iii) PART C – INCORPORATED TRSTEES

Divisions into parts should not be confused with division into segments. Whether or not a bill is long and complicated, or it is short or simple, it must be arranged in a logical order according to segments and titled accordingly. Each segment comprises of a groups of related items. The usual segments are:

1. **Preliminary matters:** This provides for items such as the long title, preamble, short title, enacting clause, application, interpretation etc.
2. **Principal matters:** This comprises of substantive (the real essence of the statute), and administrative provisions. For example, the establishment of a Commission, its membership, functions, the Board, Finance, office etc.
3. **Miscellaneous matters:** This provides for items such as offences, penalties, power to make subsidiary legislations etc.
4. **Final Matters:** This provides for such items as transitional provision, savings repeal and schedule etc.s

The order of arrangement is not followed strictly, and depending on the jurisdiction or locality, the segments may be more or less and sometimes, one item may be grouped under a different segment, or the heading may be titled differently. For example, the order of arrangement of the Property and Conveyancing Law, 1959 is similar to the recommended arrangement only to the extent that:

1. Part I contains the parliamentary matters;
2. Part II contains the general principles;
3. Part XI contains miscellaneous matter; and
4. Part XII contains general provisions and schedules.

The recommended order of preliminary, principal, miscellaneous final is logical, intelligible and easily comprehensible. The arrangement whereby provisions such as short title, interpretation, commencement, application, and the likes are provided for at the end of a statute is clumsy. This is because it is better to define your terms at the beginning than at the end.

4. Composition

Where the design is satisfactory, it is expected that the composition becomes easy. This stage requires a lot of communication skills. At this stage of the drafting process, there is great reliance on precedents, several precedents, both local and foreign, and they should be used with the necessary amendment and modifications, this means that you will have to engage in careful "cut and paste" to compose a complete bill.

There are two important skills necessary for the proper composition of bills. Firstly, the drafter must be knowledgeable in the judicial interpretation of words and phrases; this skill is acquired by constantly consulting case law or decided cases, dictionary of judicial words and the interpretation Act. Most words used in drafting have acquired a technical meaning, and except drafters are careful with their choice of words, they may embarrass themselves and the sponsor. Secondly, drafters are required to be detailed,

they should avoid making mistakes; and where they do, they should learn from it because drafting a bill is a continuous process. Several amendments, checking and scrutiny of the bill are expected before the final copy is produced.

5. Scrutiny

At this stage drafters are expected to go over their entire draft again. This is necessary because there are some minor mistakes concerning ambiguity, punctuations, spellings, cross-references, numbering, placement of headings and material notes, and several others that could be embarrassing if not corrected. Some writers adopt a technique of self-criticism, by this they put away the draft for some time to refresh their thoughts only to come back and assess the draft later. This is ideal where there is no one to assist in editing the draft otherwise it is better to seek independent opinions.

Self Assessment Exercise (SAE) 3

In understanding drafting instructions from the sponsor of a bill, what are the important matters that information must be provided on to enable drafters in their job?

Self Assessment Exercise (SAE) 4

In analysis drafting instructions, what are the issues a legislative drafter should take a look at before drafting the bill?

6.0 Summary

In this unit, you learnt the following concepts: Who a legislative drafter is, and the qualities of a good drafter. You have also been introduced to the drafting process, which comprises of understanding drafting instructions; analyzing; designing; composition; and scrutiny.

7.0 Conclusion

Drafting of bills is a common feature in a democratic dispensation. To this end, the drafter should be knowledgeable in the process or stages of bill drafting right from the time the sponsor of the bill gives his instructions to the drafter till the final stage. This unit has focused on the drafting process, qualities of good drafter and who a legislative drafter is.

8.0 Tutor-Marked Assignment

There are basic stages that a bill ready for presentation to the legislature must go through before it is finally assented to by the president. Discuss in detail these various stages.

9.0 References

Imhanobe S.O. 2002. *Understanding legal drafting and conveyancing*. Nigerian Law School: Abuja.

Imiera, P.P. 2005. *Knowing the Law*. Fitco Publishing Nig Ltd. (FMH) Nigeria.

Unit 3: The Formal Parts of a Bill

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1.0 Introduction

A bill comprises of component parts that are assembled to form a whole. You need to understand these parts so that you will be enlightened on their relevance, and their placement within the structure of a bill. The components a bill depends on its objective. It is the duty of the drafter to select and organize these components.

3.2 Objectives

At the end of this unit you should be able to:

(i) Identify the formal parts of a bill;

(ii) Explain principal provisions of a bill;

(iii) Identify final provisions or component of a bill;

(iv) Distinguish between miscellaneous and the preliminary provisions in a bill.

3.0 The Formal Parts of a Bill and Preliminary Provisions

(A) Long title

Most statutes or laws have long title. The long title is meant to highlight the spirit and principal object of the statute. The drafter will insert in the body of the bill its object from the drafting instructions he received from the sponsor. The long title should be wide enough to cover the entire purpose of the statute, and where there is more than one purpose, they are separated by a comma or semicolon. The best way of ensuring that nothing is left out in the long title depends on whether the statute is a Federal or State statute.

There are several ways of drafting the long title. Examples are:

1. "An Act to regulate the management and collection of duties of customs and excise and for purposes connected thereto."

2. "An Act to establish the Corporate Affairs Commission, provide for the incorporation of companies and incidental matters, registration of business names and the incorporation of trustees of certain communities, bodies and associations."

(B) Preamble

Preamble or the introduction like the long title is part of the statute or law. A clear preamble is useful in the interpretation of ambiguous or unclear provisions in the statute. It is not common that the same statute have both the preamble and long title. Preambles are commonly used where it would be difficult to know the purpose of the statute. Preambles are not a common feature of democratically elected government but of military administration. This is because, under democratically elected government, the legislative process involves intense debate and the arguments for and against the statute is thoroughly canvassed on the floor of the house and the bill has annexed to it an explanatory note.

An example of a preamble is:

1. **The Constitution –** All the constitution of the Federal Republic of Nigeria from independence to date private for preambles. The 1999 constitution provides that: **"WE THE PEOPLE of the Federal Republic of Nigeria."** This is the preamble.

(C) Enacting Formula

This is a compulsory part of a bill that provides for the authority constitutionally empowered to enact the law. The main body of the bill is introduced by the enacting formula; it is placed immediately after the long title or preamble.

The style of drafting this clause varies.

In some jurisdictions or localities, the constitution provides for how the enacting formula should be drafted and in other jurisdictions, the words of enactment are provided for in other statutes. But in Nigeria, it is usually adopted from the drafting style used in the United Kingdom and it varies depending on the type government.

For example:

Under Military Administrations:

1. **Federal Government:** THE FEDERAL GOVERNMENT decrees as follows:
2. **State Government:** THE MILITARY GOVERNMENT OF LAGOS STATE OF NIGERIA makes the following edict:

Under civilian administrations:

1. **Federal Government:** BE IT ENACTED by the National Assembly of the Federal Republic of Nigeria and by the authority of same as follows:

2. **State Government:** BE IT ENACTED by the House of Assembly of Edo State of the Federal Republic of Nigeria and by the authority of same as follows:

(D) Purpose clause

This clause provides in the main body of the statute the object, goal and purpose of the law. The purpose clause started from the United States of American, where legislative draftsmen have responded to the attacks on the use of preambles by replacing it with the purpose clause.

The purpose clause is not commonly used in Nigeria. However, there is a good example in the Environmental Impact Assessment Act No 86 of 1992: It provides that:

Section 1: The objectives of any environmental impact assessment (hereinafter in the Decree referred to as **"the assessment"**) shall be –

(a) To .....

(b) To .....

(c) To .....

(E) Short title

The short title should be distinguished from the long title. The short title is the name by which the statute is cited and identified. It is meant for reference purposes only and it cannot be used to ascertain the scope of the statute.

The first word of the short title starts with a capital letter, and it reflects the subject matter of the statute.

An example:

Short title: This Act may be cited (known as the Environmental Impact Assessment Act .....)

(E) Commencement

Section 2(1) of the Interpretation Act distinguishes between when an Act is passed from when it comes into force. An Act is passed when the President assents to the bill. The drafter should be given instructions on when the Act will become operative and this date is inserted or placed in the Act. Where an Act is said to commence on a given date, it is interpreted to mean that the Act shall come into force immediately on the expiration of the previous day. An Act comes into force on a given date, a date in the past or in future. But where no provision is made as to when the Act shall come into force, the Act is deemed to come into force on the date it was passed or made, which is the date it received President's Assent:

There are two ways of drafting the commencement clause.

1.	Commencement	2nd January 1994
2.	Commencement	This Act shall become operative on the 2nd of January 1994

(a) Application

The application clause provides for the persons, territory or subject matter to which the statute shall apply. The application clause is not a common feature in statute because most statutes are applicable to all persons with the jurisdictional competence of the enacting authority. For example, the 1999 Constitution and The Companies and Allied Matters Act do not have application clause. This is because they are applicable to all Nigerians. However, an Act may be limited in application to a group of persons, a particular territory or subject matter and it is therefore necessary that there is a section in the body of the Act that provides for this.

An example:

Section 1(2) of the Property and Conveyancing Law, 1959 restrict the application of the Law to the Western Region of Nigeria only. It provides that:

> *"This law shall apply to land within the Region which is not held under customary law".*

Section 32 of the Navy Act illustrates how a law can be limited in application to a group of persons. It provides that:

> *The provision of this part of this Act as to discipline and difference shall apply only to persons who, for the time being are subject to this Act, unless the context otherwise requires.*

(H) Duration

This clause provides for the life span of the statute. The duration clause is also not a common feature in statute unless otherwise provided; a statute is perpetual in duration. A statute remains in force until it expires, lapse or replaced. But if it is intended that the statute should have expiry date, which the Interpretation Act equates with repeal, then it should have a duration clause. The power to repeal the statute may be vested in a person or may be upon the occurrence of an event.

Examples are:

1. "This Act shall come into operation on 1st of January 2006 and shall expire on the 31st of July 2006".
2. "The president may by an order published in the official gazette proclaim that any provision of this Act shall cease to be in operation".
3. "This Act shall cease to have effect from the date that an elected president is sworn in as commander in chief".

(F) Definitions

The definition clause, also called the interpretation clause provides for the meaning of certain words used in the statute. It is an aid to clarity in drafting; it shortens the length of the statute, and avoids repetition, where a word is used in it ordinary sense, there is no need for definition. But where there is addition or subtraction from the ordinary usage, a definition clause in necessary to show the sense in which the word is used.

Self Assessment Exercise (SAE) 1

Briefly highlight three matters contained in the preliminary part of a bill.

4.0 The Principal Provisions

After the preliminary provisions, the bill deals next with the principal matters. These are main provisions of the statute, they form the bulk of the content of the statute, and distinguish it from other statutes. The clauses that make up this segment are grouped or classified into two broad headings:

1. Substantive clauses
2. Administrative clauses

Substantive clauses

In a statute establishing a commission, agency, council, authority and other similar bodies, the substantive clause provides for the establishment of the body. And in other kinds of legislation, it provides for rules regulating or proscribing certain conducts, the rights and duties of those affected by the statute. It is important that each point should be clearly set out in a separate clause and arranged in a logical order.

Administrative clauses

This clause provides for the administrative structure of the commission or agency that will enforce the substantive clauses, i.e. appointment of officers, conditions of service of staff, head office, staff, use of the seal etc. these clauses are also arranged logically.

Miscellaneous Provisions

After the substantive and administrative provision there is the miscellaneous provision. This segment among others provides for offences, penalties and power to make subsidiary legislation.

Self Assessment Exercise (SAE) 2

What are the major matters provided for under the principal provisions of a bill?

5.0 Final provisions

Matters or an issue under this clause comes towards the end of the statute. For example, the saving clause, which is used to preserve rights and duties that exist at the time the statute, becomes operative. The section for repeal, transitional provisions and schedules are all provided for under this clause. Some of the matters contained are:

1. **Establishment**

The statute must expressly establish the body to be known by a particular name. There are different ways of doing this, one is just enough here:

> *The Nigerian Deposit Insurance Corporation Act Provides, S.I [I] There is hereby established a body to be known as the Nigerian Deposit Insurance Corporation [hereinafter in this Act referred to us] the corporation".*

2. Functions of the body

The functions of the body are derived from the objects, aims and purpose of establishing the body. This is carefully drafted; otherwise, the actions to be performed by the body outside the statutory function are ultra-virus.

Examples:

Section 4 [1] of cap 309 Laws of the Federation of Nigeria [LFN 1990] Provides:

> *For the purpose of carrying out the functions of the institute as specified in this Act, the council shall have power to....*

3. Financial provisions

This clause deals with the source of funds, income and expenditure, annual report, audit etc. And sometimes, the statute confers on the management board the power to accept gifts on behalf of the body.

There are several other provisions that may be contained in a statute, drafters from instructions before them should consider the inclusion of these provisions:

1. Transitional provisions;
2. Repeal and saving; and
3. Scheduled, etc.

Self Assessment Exercise (SAE) 3

Discuss in brief establishment, functions of the body and financial provisions under the final clause in a statute.

Self Assessment Exercise (SAE) 4

Examine the importance of the Duration clause in a statute, giving three types of examples.

6.0 Summary

In this unit, you have been introduced to the formal parts of a bill; the preliminary provisions of a statute; the principal provisions; and the final provisions.

7.0 Conclusion

The component parts of a bill was studied and stressed in this unit. You learnt that an understanding of these parts will enlighten you on the relevance and their placement within the structure of a bill. The component of a bill depends on its object and it is the duty of the drafter to select and organize these components.

8.0 Tutor- marked assignments

Using appropriate examples, draft two enacting formula under the military and civilian administrations.

9.0 References

Imhanobe, S.O. 2002. *Understanding legal drafting and conveyancing.* Nigeria Law School: Abuja.

Imiera, P.P. 2005. *Knowing the Law.* Fitco Nigeria Limited (FMH) Nigeria.

Unit 4: The Nigerian Court System

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1.0 Introduction

The emergence of the colonial administrators brought a major revolution or change in the Nigerian traditional judicial system. The results of which have been in existence in Nigeria legal system. One of the results of this major revolution was the introduction of English Law, which necessarily implies the establishment of Hierarchy of courts, which are graded according to their jurisdiction.

2.0 Objectives

At the end of this unit, you should be able to:

(i) Explain the Nigeria court system;

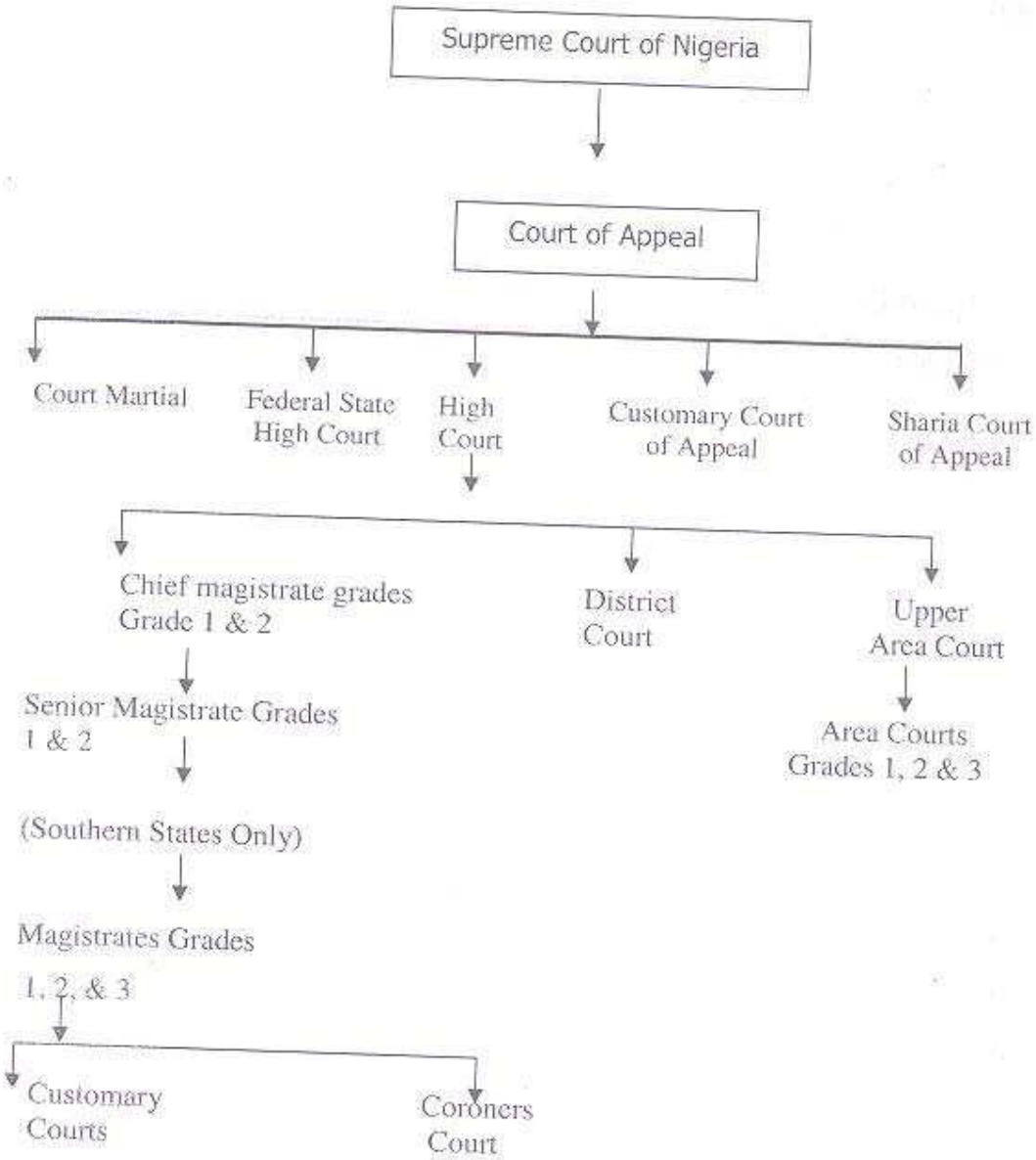
(ii) Describe the hierarchy of courts in Nigeria; and

(iii) Draw a graphical representation in hierarchical order of Nigeria Court.

3.0 The Structure and Systems of Nigerian Courts

The structure of the Nigerian Courts system can be represented graphically for easy understanding of the seniority or hierarchy of Nigerian Courts. This begins from the highest court i.e. the Supreme Court to the least.

HIERARCHY OF NIGERIAN COURTS



Self Assessment Exercise (SAE) 1

Using a graphical presentation do a hierarchical analysis of the Nigerian courts in an ascending order.

4.0 Hierarchy of Courts in Nigeria

1) The Supreme Court of Nigeria

The Supreme Court is the highest court in the hierarchy of courts in Nigeria. The court consists of the Chief Justice of Nigeria and such number of justices of the Supreme Court not exceeding 21 as may be prescribed by an Act of the National Assembly. Section 230 [2] of the 1999 Constitution of Nigeria. The Chief Justice of Nigeria and other justices of the Supreme Court are appointable by the President of Nigeria on the recommendation of the National Judicial Council subject to confirmation by the senate of the Federal Republic of Nigeria. Section 231 [1] [2] of the 1999 Constitution of the Federal Republic of Nigeria.

The Supreme Court has original, appellate and civil jurisdiction. The court has exclusive original jurisdiction in any dispute between the Federal and State or between States involving any question on which the existence or extent of a legal right depends. See section 232 [1] 1999 CFRN.

2) The Court of Appeal

The Court of Appeal is the next court to the Supreme Court in the hierarchy of courts in Nigeria. The Court of Appeal consists of a president and such number of justices of the Court of Appeal not less than 49 of which not less than 3 shall be learned in Islamic personal law and not less than 3 learned in customary law as may be prescribed by an Act of the National Assembly. Section 237 [2] [a] [b] 1999 CFRN.

The president of the Court of Appeal is appointed by the President of Nigeria on the recommendation of the National Judicial Council subject to

the confirmation of the appointment by the senate. Section 238 [1] [2] 1999 CFRN.

The appellate jurisdiction of the Court of Appeal rests on the fact that it has exclusive jurisdiction to hear and determine appeals from the Federal High Court, High Court of the state, High Court of the FCT, Sharia Court of FCT, customary court of appeal of FCT, Court martial and other tribunals as may be prescribed by an Act of the National Assembly. Section 240 1999 CFRN. [Constitution of the Federal Republic of Nigeria]

3) The Federal High Court

The Federal High Court was first established under Federal Revenue court No 13 of 1973 which is now F.H.C. Act, cap 134 Laws of the Federation of Nigeria [LFN 1990,] and was then known as the Federal Revenue Court. The Court was restyled or renamed Federal High Court by section 230 [2] of the 1979 constitution.

Under the 1999 Constitution, the court was established by section 249. The court consists of a chief Judge and such number of judges of the F.H.C. as may be prescribed by an Act of the National Assembly. The Chief Judge and other judges of the F.H.C. are appointed by the President of Nigeria on the recommendation of the National Judicial Council [NJC] subject to confirmation of such appointment by the senate in the case of the Chief Judge. Section 250 [1] [2] 1999 CFRN

Self Assessment Exercise (SAE) 2

Using the provisions of sections 234, 239 [2] and 250 [1] of the 1999 constitution, discuss the constitutions or composition of the Supreme Court, Court of Appeal and the Federal high Court.

4) State High Court

The Nigerian constitution established the state High Court. The High Court of a state shall consist of [a] a chief Judge of the State; and [b] such number of Judges of the High Court as may be prescribed by a law of the House of Assembly of the State. Section 270 [1] [2] [a] [b] 1999 CFRN

Jurisdiction of the State High Court

The State High Court is the Court with the widest civil jurisdiction under the constitutions. Under the 1979 Constitution the Court was vested with unlimited jurisdiction by section 236 of that constitution. However, under the 1999 constitution the word "unlimited" has been re-moved, the definition of the jurisdiction of the State High Court and the jurisdiction expressly subject to the exclusive jurisdiction of the Federal High Court. Section 272 [1] provides "subject to the provisions of section 251 and other provisions of this constitution the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existent or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue".

The implication of the above provision is that the state High Court under S.251 cannot entertain matters in respect of which the Federal High Court is vested with exclusive jurisdiction. It is worthy of note that inspite of these limitations; the State High Court is still the court with the widest civil jurisdiction under the constitution. The jurisdiction conferred on the High Court by S. 272 [[1] covered original, appellate and supervisory jurisdiction, section 272 [2] 1999 CFRN.

Self Assessment Exercise (SAE) 3

Discuss in detail the jurisdiction of the State High Court using the relevant provisions or section of the 1999 Constitution.

The Constitution or Composition of a State High Court.

For the purpose of exercising any jurisdiction conferred upon the State High Court under the constitution or any law, a High Court of a State shall be duely constituted if it consists of at least one judge of the court (Section 273 1999 CFRN). Since the jurisdiction conferred on the High Court includes appellate jurisdiction it follows that the Court will be duely constituted by one judge even when sitting on appeal. However, under section 63 of the High Court law of northern Nigerian, a court while sitting on appeal in the North is duely constituted by two judges.

Magistrate Courts

Magistrate courts are created by the constitution but exist by virtue of laws of the various States of the Federation. These laws stipulate the civil jurisdiction of the court. In Lagos State for instance, the magistrate court laws of Lagos State of Nigeria 1994 as amended provide for seven grades of magistrate under that law, namely:

1. Chief magistrate grade one;
2. Chief magistrate grade two;
3. Senior magistrate grade one;
4. Senor magistrate grade two;
5. Magistrate grade one;
6. Magistrate grade two; and
7. Magistrate grade three.

District Courts

In some states in the North, magistrate courts are called district courts when exercising civil jurisdiction. In the Federal Capital Territory, the district court is governed by District Court Act cap 495.

Also, in the North, there are customary and area courts which have civil jurisdiction in matters of native laws and customs.

Sharia Court of Appeal

There shall be for any state that requires it a Sharia Court of Appeal for that state. The Sharia court of Appeal of the state shall consist of:

(i) A Grand Kadi; and

(ii) Such number of Kadis, of the Sharia Court of Appeal as may be prescribed by the House of Assembly of the State: Section 275 [1] [2] [a] [b] 1999 CFRN.

The Grand Kadi and the other kadis are appointed by the Governor on the recommendation of the National Judicial Council subject to the confirmation by the House of Assembly. Section 276 [1] 1999 CFRN

Customary Court of Appeal

There shall be for any state that requires it a Customary Court of Appeal for that state: Section 280 [1] 1999 CFRN. The Customary Court of Appeal of a state shall consist of:

a. A President of the Customary Court of Appeal; and

b. Such number of judges of the customary court of Appeal as may be Prescribed by the House of Assembly of the state: Section 280 [2] [a] [b] 1999 CFRN.

Election Tribunals

There shall be two established election Tribunals, namely:

1. National Assembly Election Tribunal for the Federation, it has exclusive original jurisdiction to hear and determine petitions on the following:

(i) Validity of election of members of the National Assembly

(ii) Whether the seat of such person has ceased or become vacant; and

(iii) Whether a question or petition brought before the election tribunal has been properly or improperly brought: Section 285 1999 CFRN.

2. Governing and Legislative Houses Tribunal for the State, which has exclusive original jurisdiction to determine as to the person as a Governor, Deputy Governor or as member of any Legislative House: Section 285 [2] 1999 CFRN.

The composition of the National Assembly Elections Tribunals, Governorship and Legislative Houses Election Tribunals shall be as set out in the sixth schedule to the Constitution. The quorum of an election tribunal established under the relevant sections shall be the chairman and two other members. Section 285 [3] [4] 1999 CFRN

Self Assessment Exercise (SAE) 3

Conduct a research work on the causes or matters a chief magistrate grade one in Lagos state can exercise civil jurisdiction.

Self Assessment Exercise (SAE) 4

There are matters or actions that only the Court of Appeal and the Election Tribunals have original and exclusive jurisdiction. Itemize these matters in brief.

5.0 Summary

In this unit, you learnt about the structure and system of Nigerian courts; hierarchy of courts in Nigeria. A graphical representation of hierarchy of courts in Nigeria was presented and discussed as well as composition and jurisdiction of the various courts in Nigeria.

6.0 Conclusions

In this unit, you have been exposed to the various courts in Nigeria from the Supreme Courts to the least of them. The effort here is to show you that there is seniority in the court system in the Nigerian legal practice.

7.0 Tutor- Marked Assignments

Discuss briefly on the:

1. Appellate jurisdiction of the Supreme Court,
2. The constitution or composition of the Supreme Court.

8.0 References

Imiera, P.P. 2005. *Knowing the Law*. Fico Nig Ltd [FMH] Nigeria

Oyakhirome G.I. & Imiera, P.P. 2004. *Compendium of Business Law in Nigeria*. Oyaran Nigeria Limited.

Unit 5: The Constitution

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1.0 Introduction

The Constitution, are those laws, institutions, and customs which combine to create a system of government to which the community regulated by those laws accedes. A Constitution may also be defined as a document having a special legal sanctity, which sets out the framework and the principal functions of the organs of government of state and declares the principles governing the operation of those organs. It can further be described as an agreed fundamental principle of rules by which the people of a state are governed. A constitution states the composition and powers of organs of a nation- state, and regulates the conduct of various states to one another and to the citizens.

2.0 Objectives

At the end of this unit you should be able to:

(i) Define the constitution;
(ii) Distinguish between the written constitution and unwritten constitution;
(iv) Identify rigid, unitary and federal constitutions;

(v) List the characteristics of the constitution; and sources of Nigerian constitutional law.

3.0 Types of Constitutions

A constitution may either be written or unwritten, rigid or flexible and unitary or federal.

1) Written Constitution

A constitution is a written one when the particular country practicing it has decided to put down in a written and permanent form all rules and regulations governing its Constitution. This means in essence that the constitsution can be found in a document or in book form or in a code.

A written constitution is a product of an Assembly selected for that purpose, i.e. with the purpose of formulating the fundamental laws.

When the fundamental laws of the land have been formulated or framed, it is referred to or known as a "DRAFT Constitution" which needs to be adopted or approved by the electorate or the people. It is only when the draft constitution has been approved by the electorate that it becomes the constitution of that country in question. This is the reason why in every written constitution, there is always a preamble or a kind of introductory statement expressing the purpose or the essence of the constitution stating the fact that it is the electorates or voters that have decided to give themselves that constitution under God's guidance. For examples, the preamble to the Nigerian constitution states:

> *"WE THE PEOPLE of the federal republic of Nigeria, having firmly and solemnly resolved: TO LIVE in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to the promotion of Inter-African solidarity, world Peace, international co-operation and understanding. AND TO PROVIDE for a constitution .....DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following constitution"*

2) Unwritten Constitution

Unwritten Constitution simply means that the Constitution of a particular state or country is unwritten. That is, the Constitution of the place cannot be found in a code or a single documentation like the written Constitution of Nigeria, and the U.S.A. Great Britain is an example of a country having or operating an unwritten constitution.

3) Rigid Constitution

A Rigid Constitution cannot be changed or amended easily because it requires special process. The process is not only difficult but also complicated and the special process is actually laid down in the Constitution. The Constitutions of the following countries are rigid ones and they will require rigid processes to amend them if the need arises: Australia, U.S.A., Switzerland, Canada and Nigeria.

4) Unitary Constitution

In a Unitary Constitution, there is no sharing of power between the tiers of government. The central government is Supreme over other levels of government. In other words, other levels of government referred to are the local governments or States. The central government has full legal right to over-ride such local authorities.

The local governments are created by central government for the purpose and proper administration for the local needs of the people and they are subject to the control of the central government who would take away any powers granted to the local authorities. Countries like Ghana and U.K are examples of countries having Unitary Constitution.

5) Federal Constitution

A Federal Constitution is where power of government have been distributed or shared between one level of government and another. Each State is

autonomous or free to the extent of the powers and duties conferred on them by the Constitution. Nigeria is an example of a country having or operating a Federal Constitution.

Self Assessment Exercise (SAE) 1

Write short notes on the various kinds of constitution discussed in this unit.

4.0 Characteristics of the Constitution

1) Supremacy of the Constitution

The Nigerian Constitution is the Supreme law in the Nigerian legal system. It is the most potent and important law in that all the other laws derive their authority and validity from the Constitution. Other such laws must be in consonance with the Constitution; where other laws conflict with the constitution or are contrary, the Constitution will prevail. Section 1 [1] of the constitution provides:

> *This Constitution is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria*

2) Separation of Powers

A Federal Constitution must make provision for separation of power amongst the various arms of government. This concept of separation of powers was the brainchild of John Locke, which was later developed by the French Philosopher, Montesquieu.

The concept of separation of power simply means that once a government is put in place within a state and the functions of the organs of government clearly defined, each organ should concentrate on its own powers and functions; and should not interfere with the other organs, power and function.

The idea of separation of powers is borne out of the need to promote political liberty and to negate abuse of political powers. To this end, the

three organs of government must be separated from each other. There should be no fusion of powers since concentration of power in a few hands can lead to tyranny. According to Lord Acton; **"Power corrupts and absolute power corrupts absolutely".**

Lord Denning in his lecture, Freedom under the Laws said:

> *All power corrupts. Total power corrupts absolutely. And the trouble about it is that an official who is the possessor of power often does not realize when he is abusing it. Its influence is so insidious that he may believe that he is acting for the public good when, in truth, all he is doing is to assert his own brief authority. The Jack –in-office never realizes that he is being a little tyrant.*

3) Federalism

The Nigerian Constitution is a Federal one. Federalism is a situation where the powers of government within a nation state are divided between a central government and two or more state governments in such a way that each is given some competence over certain areas of governance. Federalism presupposes plurality of government and division or demarcation of powers among the federation. Section 2 [1] [2] 1999 CFRN.

All in all, Federalism is best for heterogeneous or different ethnic groups in a Nation like Nigeria if it is well practiced and the problems encountered in its operation are solved with the interest of the nation at heart. This is because federalism brings government nearer to the people and it encourages among other advantages, healthy competition among the states that make up the nation.

4) The rule of law

Every Constitution should make provision for the rule of law. The concept of the rule of law simply means that government should be run on democratic and regular basis. Things must or should be done according to law. It also means the Supremacy of the ordinary law as administered by the ordinary courts.

Individuals must be protected against the tyranny of any ruler or group of rulers; powers given to Government must be used in accordance with the law, and the law binds Government in the same manner as individuals. There should be no special protection for anyone. The rule of law rests mainly on three fundamental principles as enunciated by Albert Venn Dicey:

1. Equality before the laws;
2. Protection of fundamental freedom which must be guaranteed, preserved and respected by every body, especially by the government; and
3. There should be no secret law and there should be no retrospective Legislation. The law must be clearly stated, so that any person who breaches the law will be punished but a non-existent law cannot punish one. There should be no arbitrary powers.

Self Assessment Exercise (SAE) 4

Briefly highlight and discuss the basic characteristics of the Nigerian 1999 Constitution.

5.0 Sources of the Nigerian Constitutional Law

1. The historical origins from which the law is formed or from which it emanated, and.
2. Those means and channels whereby force and expression are given to constitutional law.

The above sources can further be classified into:

(i) Rules of law: These include legislation i.e. Acts of parliament and the enactments of other bodies upon which parliament has conferred power to legislate and more particularly statutory instruments. Secondly, judicial precedents, i.e. the decisions of the courts expounding the common law or interpreting statutes.

(ii) **Conventional rules:** i.e. rules not having the force of law but which can nevertheless not be disregarded since they are sanctioned by public opinion.

(iii) Advisory: i.e. the opinions of writers of authority.

Self Assessment Exercise (SAE) 3

State clearly and discuss in brief the sources of Nigerian constitutional law

Self Assessment Exercise (SAE) 4

The Constitution of the Federal Republic of Nigeria is the most potent source of Nigerian Law. Discuss.

6.0 Summary

In this unit, you have learnt about:

1. The Nigerian constitution;
2. The written and unwritten constitution;
3. The types of constitution;
4. The characteristics of the constitution; and
5. The sources of Nigerian constitutional law.

7.0 Conclusion

The Constitution is a very important document for a country or a nation operating a federal system of government. It is the documents that share powers between the organs of government; it is therefore very important source of law for any country.

8.0 Tutor- Marked Assignment

Conduct a historical research on the development of the Nigerian Constitutional law from the British era till date.

9.0 References

Imiera, P.P. 2005). *Knowing the Law*. Fitco Nig ltd (FMH) Nigeria

Oyakhirome, G.I and Imiera, P.P (2004). *Compendium of Business law in Nigeria*. Oyaran Nigeria Limited.

Module 1

Unit 1: What is Law?

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1.0 Introduction

In this unit, you will be introduced to the various schools of thought in the understanding and study of law. These perspectives include the natural law, modern perspective and judicial precedents. The significance of law and the principles governing human conduct and enforcement of laws will also be discussed.

2.0 Objectives

At the end of this unit you should be able to:

i) Define law;

ii) Explain the significance of law in the society.

3.0 What is Law?

In layman terms, the term or word "law" may be defined as a rule of action. In this sense, one may talk of laws of science. For example, one of the laws of science is Ohm's Law of Electricity. However, this course does not deal

Legal Methods I is the first part of a two-part course. The second part, Legal Methods II, will be offered in the second semester. It is a compulsory course for the Law degree programme. The course deals with methods of practising law in the Nigerian society. It introduces students to the meaning of Law, various legal techniques, legal and logical reasoning, and essential skills for legal practice.