



NATIONAL OPEN UNIVERSITY OF NIGERIA

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## **MODULE 1**

Unit 1	Historical Background
Unit 2	Essentials and Proof of Customary Law
Unit 3	The Colonial Legal System
Unit 4	Customary and Islamic Law Compared

### **UNIT 1 HISTORICAL BACKGROUND**

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#### **1.0 INTRODUCTION**

In the early times, the geographical area now known as Nigeria comprised different settlements. Among these settlements were some 350 ethnic groups and 500 dialects. Each ethnic group had its own language(s), cultures and customs.

Despite the ethno – linguistic differences, the various settlements were not isolated from one another. Rather, there existed some forms of political, economic, social and cultural relations. Some of the settlements were linked to one another by rivers, creeks, or land mass or a combination of two or all of them. These links provided routes which facilitated and promoted exploration, discovery, trade and commerce. They enhanced mobility of labour, migration, and other social relations and interaction. There were also inter-tribal wars.

The settlements in due course, either by conquest or by other growth processes, metamorphosed into kingdoms, empires and principalities, which by accident of history and by numerous geographical handicaps

or fortunes (as the case might be), attained varying levels of political, social, cultural and economic development.

Certain physical features influenced the occupational distribution of the early settlers, as well as their type of ancestral workshop. For example, northwards were savanna areas; the inhabitants were chiefly pastoral; they worshipped the god of the sky. Southwards were the forest belts; for the settlers who were mainly farmers, the object of their worship was the god of land. Still further southwards are the coastland areas; the settlers were mainly fishermen and they worshipped the goddess of the sea.

With time, these groups interacted with considerable frequency and in consonance with some established and regular process. Indeed, the notion of settlement itself connotes a level of human organisation; and where there is an organization, there has to be a scheme of rules or laws and compulsion to enforce obedience if the group or society must survive and continue.

Each of the ethnic- linguistic groups therefore had its own concept of law, judicial process and customary laws without which human society could not exist. These laws played a prominent role in the regulation of the affairs of members of the group. They varied with space, character and level of socio-economic development and challenges which faced the various settlements. As should be expected therefore, there were manifestation of different (and sometimes conflicting) ways and conditions as one moved from one place or age to another or one empire or kingdom to another and across the jurisdiction of different customary laws. Before delving into these conflicts, there need to be some understanding of the development of the legal systems and the nature of customary law.

## **2.0 OBJECTIVES**

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

- define “customary law”
- account for the historical development of customary law
- state whether or not custom is antecedent to statute, or otherwise
- identify the characteristics of customary law
- assess custom as a source of law and its importance in early communities.

### 3.0 MAIN CONTENT

#### 3.1 Historical Background

In the primitive state, men lived together in peace and happiness, having things in common. There was no private property. We may infer that there would have been no slavery and there was no coercive government. Order was of the best kind, for men followed nature without fail and the best and wisest men were their rulers. They guided and directed men for their good and were gladly obeyed as they commanded wisely and justly. As time passed, the primitive innocence disappeared; men became avaricious and dissatisfied with the common enjoyment of the good things of the world and desired to hold them in their private possession. Avarice rent the first happy society asunder, and the kingship of the wise gave place to tyranny, so that men had to create laws which should control their rulers. (Seneca).

In essence, Man as a creation of God in his image, has a divine character, celestial requirements and secular social needs which necessitate machinery for regulating human action. The stoics and early Christian fathers also subscribed to this view.

However, Aristotle expressed a contrary view, arguing that Man is a selfish animal from his birth whose first business is to preserve himself in the state of nature and next, to retain what is according to nature and to reject what is contrary to it. (Hence the state, law and sovereign).

In Darwin's view, life and death; creation and destruction - certainly no fact in the history of the world and so startling as the wide and repeated extermination of its inhabitants-extermination in which man is the active agent in a civilising mission.

#### **Cicero added:**

The variety of laws in different states proves that these codes (laws) must be based on utility which differs in different places.

By trial and error and changing nature of political conflicts, the Romans adopted various forms of government ranging from monarchy to oligarchy, democracy and even tyranny. Each had its forms of law. The different organs of government (e.g. The Senate, Courts, Tribunes, Prefects etc) evolved practices, which refined and revised the *corpus juris* to suit prevailing circumstances.

In the traditional African system, whether the society is a monarchy or gerontocracy, one common denominator according to Elias is the

constant aspiration towards the democratic principles in constitutional governance.

The different autonomous ethnic groups have their own systems of justice administration. They are informal, and based largely on unwritten Customary Law (and Sharia Law which is written). These laws are not only humane and flexible but also served the purpose of justice and the society.

### 3.2 Customary Law, Defined

Customary laws then may be defined as follows:

Practices, which by common adoption and long unvarying habits, have come to have the force of law

Rules, which in a particular community, have from long usage obtained the force of law

A body of customs, accepted by members of the community as binding upon them

Organic or living laws of the indigenous people, which regulate their lives and transactions

Unrecorded tradition and history of the people, which has “grown” with the “growth” of the people to stability and eventually become an intrinsic part of their customs

Usages or practices of the people, which by common adoption and acquiescence and by long and unvarying habits, have become compulsory and have acquired the force of law with respect to place, or the subject matter to which it relates.

#### SELF ASSESSMENT EXERCISE 1

1. Account for the evolution of customary law
2. Which of the various definitions of customary law do you prefer and why?
3. Distinguish between a habit and a customary law

### 3.3 Development of General Customs in Nigeria

The empires of the North as well as the kingdoms in the Southwest were chiefly societies. Authority was exercised along vertical lines, authoritarian and despotic in nature. Their legal system was centralized; exercise of judicial power was territorially delimited, and coercive.

At the same time, there were features of democracy. For example, the monarchs held consultations with their council of chiefs, queen mothers, court's, priestly officials, secret cults, etc. Powers were decentralized particularly in the Northern empires where Emirs, *Serikis* and others exercised delegated authorities. There were also checks and balances.



Akin Oyeboade noted that in the old Oyo empire, for example, the king makers or subordinate chiefs could demand that a tyrannical *Alafin* (the Monarch) should “open the calabash” or in other words to commit suicide. Elsewhere junior chiefs were empowered to secede from the commonwealth of a cruel king or in the alternative depose or banish him.

The East of the Niger was made up of chiefless societies and these societies were less integrated. Authority was organized along horizontal lines. Relatively, they were democratic and egalitarian. They relied more on synonym bonds, lineage and kinship within the clans and other social groups. The legal system was decentralized and judicial power was based primarily on the attainment of a specific rank, age or status within the social unit.

In both the chiefly societies of the North and the West and the chiefless society of the East, the members of the communities had no cause whatsoever to entertain any fear that the monarch or other rulers would be absolutist or tyrannical. There were broad similarities among the customs and cultures transcending ethnic boundaries as there were conflicting ones. The broad similarities served as bonds between the different communities and the people. They also served to regulate the relationship among the members of the communities. In effect, there was conformity with the social norms: and this was reinforced by the strong belief in myths, dogmas, and ancestral spirits. Everywhere – be it chiefly or chiefless, the legal system was the same – the enterprise of subjecting human conduct to the governance of rules. The law was no respecter of persons or ethnic group; the legal system served as an instrument for abridging the gaps between them.

## **SELF ASSESSMENT EXERCISE 2**

Discuss the adequacy or inadequacy of the customary law in coping with law and order in pre-colonial Nigeria.

### **3.4 Characteristics of Customary Law**

1. A mirror of accepted usage or culture of the people that observe it
2. Flexible (elastic), organic (not static), regulatory and a living law of the indigenous people subject to it
3. Largely unwritten – either wholly or partly unrecorded
4. Long and unvarying habits and in existence at the material time, not dead ashes or customs of by gone days
5. Accepted as a custom of universal application and enjoying the assent of the community, etc.

A customary law itself is subject to motives of expediency, adaptable to time, socio-economic change and altered circumstances; it reflects what is acceptable to the society without entirely losing its individualistic character; it is the custom, tradition and history of the subject people, and the people recognize it as binding and enforceable; it has been applied from ancient days, passing as such from hand to hand and from one generation to another. In fact what gives a customary law any validity is the assent and recognition of the community.

### 3.5 Customary Law: Different Schools of Thought

Note two areas of controversy:

- i. Whether or not custom is a source of law
- ii. The degree of importance, if at all, of the role played by the customary law in the early communities.

### 3.6 Custom as a Source of Law

Is custom a source of law and did it play any significant role in early history?

#### 3.6.1 Ancient Notions

1. Maine, in his *Ancient Law*, states: "Custom is a conception to that of themistes or judgments". Royal rules predate customs.
2. Gray's view was that customs evolved from the rules laid down by judges.
3. Anthropological researches have indicated that primitive folk were not living in a "custom – bound trance" as many would have us believe. They had neither the judiciary, legislature nor the police. They did have an appreciation of shades of legal liability greater than has been conceived. (Robson).

#### 3.6.2 The Socialist Perspective

1. Karl Marx conceived of law as an embodiment of class interests. The concept of "a rule of class interests" may exclude the customary law as law.  
Customary law is law independently of its being recognized by the legislature.

Customary law does not derive its legitimacy from the state. "Class interest" is an unfamiliar term in Nigeria.

2. A contrary view has been expressed by Vinogradoff, who has argued that law is a “set of rules imposed and enforced by society with regard to the attribution and exercise of power over persons and things. This notion accommodates customary law.

### 3.6.3 Positive Law

The Positivist idea of law rejected custom as a source of law, arguing that:

1. It falls short of “the command of the sovereign (Austin)
2. Law is a gapless system of rules and customary law lacks secondary rules (i.e rules as to how and by whom it is enacted, recognized, modified, extinguished – procedural rules (H. L. A. Hart)
3. Law is law as it is; it excludes metaphysic and consideration of any of its historical development.

Ironically, Positivists have argued also in favour of custom as a source of law by reason of the very important role it played in the early communities. They have argued that;

Law is not a gapless system. The courts exist to fill the gaps. (Dworkin) Judges may over rule past precedents; annul or confirm an enactment, etc.

Law is not just a model of rules, but an instrument of human interaction, which customary law is (Fuller)

Customary law owes its force to the fact that it has found direct expression, in the conduct of men and women towards one another.

Law is an abstraction, influenced by capitalism, socialism, feudalism and traditions or other ideologies in their respective spheres but nearly all emphasizing the idea of social control, orderly process and justice(Lloyd)

There are two binding forces of law:

- i. Fear of sanction (Austin and Bentham)
  - ii. Acceptance by the community (Hart)
- a) In his comments on the judgment or themestes of the early kings, Maine himself in his *Early Law and Custom* states:

They are doubtless drawn from pre-existing customs or usage conceived by the king spontaneously or through divine prompting (Pollock).

Isn't Maine, blowing “hot” and “cold” at the same time?

- b) Early history is at variance with the claim that all early customary law had its claim in royal dooms. For example the dispositional methods of “blood- feuds” and “self help” which were recognized among the Tuetonic races, could only be customary in origin.
- c) The XII Tables of Roman Law (about 449 BC) preserved and regulated “self help” as a dispositional method. It also gave statutory expression to other customary law that was in force during the regal period of Roman history. These signify that the recognition and enactment into law of method of self help was a conception posterior to the customary practice.
- d) Archeological finds have shown that the code of Hammurabi (about 2000BC) enacted customary laws which were antecedent to the Code and were in force in early Babylon.
- e) English land law furnishes us with a custom – Borough English or ultimogeniture – whereby upon the death of ones parents, the land owned by the deceased devolved on the youngest son. The customary rule has been recognized over the ages, and enforced until the Law of Property Act, 1926 abolished it.
- f) The historical school of jurists confirms that law developed from evolution of customs, which become adopted by the society.
- g) Customary law is distilled from the customs of the people in the particular ethnic group.
- h) Customary law contains the ground of its validity itself. It is law by virtue of its own nature as an expression of the general consciousness of right, not by virtue of the sanction, express or tacit, of any legislation” (Arndt)
- (i) Exponents of natural law have admitted that customary law possesses certain qualities of the natural law. Both connote the idea of a higher law with its objective of social solidarity, search for justice, and balance of interests and by reference to certain minimum conditions we cannot do without if life is to be decent.

(Recall also the development of Common Law in England)

#### **4.0 CONCLUSION**

Prior to the establishment of a formal system of laws, there had been a moral order. The purpose of law then was to maintain that order. From this premise customs evolved from which customary law was distilled.

The Positivists were divided on whether custom is a valid source of law and on the importance of its role. Dworkin explains this difference in terms of the fundamental tests of pedigree of the rules. The dominant view is that the rules and regulations of early societies were customary; an expression of the *volksgeist*, to use Savigny's terminology, and that custom is a material source of law.

Western writers have described the customary law as "barbaric". It is not clear what the term "barbaric" means. When the white man discovered Africa (including Nigeria), what he met were not cave dwellers or people not quite distant from apes. Rather he found "the cradle of civilization". He met an orderly society with its own peculiar forms of rulers, judges and laws.

## **5.0 SUMMARY**

We have, in this unit discussed the historical background of customary law and the nature of law viewed from different perspectives. The influence of custom on law was considerable in the early history of the legal system. There were also inherent conflicts to which we shall direct attention in the next units.

## **6.0 TUTOR-MARKED ASSIGNMENT**

1. Consider the reasons for and against the statement that "custom is a source of law".
2. "Custom is a conception posterior to that of themistes or judgment" (Maine). Discuss

## **7.0 REFERENCES/FURTHER READINGS**

Smith, S. (1976). *Welfare and Diplomacy in Pre-colonial West Africa* (2<sup>nd</sup> ed). The University of Wisconsin Press.

## **UNIT 2 THE ESSENTIALS AND PROOF OF CUSTOMARY LAW**

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  - 3.2 Problems
  - 3.3 Proof of Customary Law
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
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### **1.0 INTRODUCTION**

Unit 1, taught you about customs and customary law and how they evolved. We distinguished them from other phenomena and concluded that customary law is a code of conduct, mores or laws, which men set for themselves voluntarily and obey under pain of censure or coercion. It is consistent with the principles of:-

#### **1. Natural Law**

It had general acceptance; it professed principles of natural justice, and moral ideal of what is right and wrong.

#### **2. The Realist School**

It was a means of meeting desirable social ends.

#### **3. The Environmentalists**

It was a system of social control and orderly process for social change and adaptability

#### **4. The Historical School**

It developed from customs which became accepted by the society

At the same time, it was to some extent at variance with:

### **1. The Positivist School**

The test of enforcement and command and nothing else was inadequate. Conversely, the analytical positivists' claim that the law evolved logically from general principles would appear to suffice.

### **2. Social Perspective**

Customary law is not a product of inherent contradiction or conflict of class interest, neither is it an instrument of oppression instituted for the purpose of facilitating the exploitation of one class by another. Every customary law was once a custom. It met specific conditions and where customary law is disputed, it must be proved. The essentials and proof of customary law are the subject matter of this unit.

## **2.0 OBJECTIVES**

When you have studied this unit, you should be able to:

- state the essentials of a custom to qualify as a customary law
- prove the existence of a custom.

## **3.0 MAIN CONTENT**

### **3.1 Customs (Local and General)**

There are customs which are local and are not part of the customary law. Such customs do not meet the essentials of the customary Law. Some customs are restricted but are enforced. Examples are Trade Customs in the Law of Contract. There are other customs that are widespread and are accepted by the court as customary law, because they possess certain fundamental features. Here are some of the fundamental features of customary law:

1. It must be in existence at the material time
2. It must be an existing native law and custom; not that of by gone days
3. It must be flexible
4. It must be of universal application in a given community
5. It must enjoy acceptability as a custom
6. It must be unwritten (or partly written and partly unwritten).

Thus a custom, if it is to be a customary law, must be reasonable and obligatory, convenient, and neither arbitrary, discretionary,

objectionable nor unjust, and of continuous usage from time immemorial.

Customary law is not static, its flexibility and capacity for adaptation to change and socio-economic development underlines the resilience of customary law. A clear example of flexibility of customary law is the change from traditional concept of inalienability of family land to the modern concept of alienability.

It is important that the community must recognize, assent to, and accept the custom as binding or as a mirror of accepted usage.

### 3.2 Problems

The major problems of the customary law are:

1. It is not codified. For this reason it is uncertain and vague; and only in the minds of those who administer it or those who are subjects to it especially the custodian of traditions and customs.
2. It is a question of facts and difficult to apply by reason of its multiplicity, diversity, cultural apathy, ideological conflicts, influence of civilization etc.

See *Taiwo v. Dosumu (1965) 1 ANLR. 399 at Page 404.*

In *Lewis v. Bankole (1908) INLR 81 at 100, Osborne, CJ* said Obiter:

Now, native customary law is always a difficult law to apply. It is unwritten and the so called experts are usually forthcoming to bear testimony that corresponds exactly with the views put forward by the side on whose behalf they appear. Real experts are few and those who have made it special study and it is not a rule until some matters arise in which the facts are either somewhat peculiar or involved and one of the parties is dissatisfied with the ruling of the native authorities on the facts that the intervention of the courts is asked.

3. Even where a custom is reasonable, and certain and has fulfilled all the specified essentials, the court may still refuse to enforce it for the following reasons:-
  - (a) It is repugnant to natural justice, equity and good conscience
  - (b) It is incompatible with any law at the time being in force or other currently binding customs
  - (c) It is contrary to public policy
  - (d) It is injurious to public interest.



One question may be asked: Is a rule of customary law repugnant to natural justice, equity and good conscience merely because it is inconsistent with or contrary to the English Law?

Obilade notes that many customary laws are inconsistent with English Law and prescribing an incompatibility test by reference to English Law would result in a virtual abolition of customary law.

### 3.3 Proof of Customary Law

These problems which Osborne S.J pointed out one hundred years ago (1908) in *Lewis v. Bankole* still afflict the customary law today. In deed, it is increasingly more complicated as the society transforms from a simple socio-economic and homogenous life upon which most of the rules evolved into a complex heterogeneous modern living. Furthermore, it is more difficult to determine the circumstances in which the custom in one area may bind another area. Proof may grow more difficult because custom, as a question of fact, does not depend on judicial reasoning and activism. It must be proved by strong evidence. The burden of proof lies on those who assert that a particular customary law exists. The role of the court is simply to accept or reject it.

A customary law must be proved by strong evidence in any of the following ways.

1. Expert evidence and opinion e.g. evidence of *Kabiyesi*, *Offor*, or *Oba*, *Emir* or native chiefs who possess special knowledge of the subject matter.
2. Evidence of credible witnesses e.g. evidence of persons who are sufficiently acquainted with the custom.
3. Assessors: Persons with local knowledge and duly appointed assessors may assist with their knowledge.
4. Writers: Text books, manuscripts that are recognized by the subject people may be used in evidence.
5. Judicial Notice. The evidence Act provides that custom may be established as judicially noticed or evidence may be called to establish what a custom is and the existence of such a custom and to show that persons or a class of persons concerned in the particular case regard the custom as binding upon them.

It is thus clear that the court would not exercise any creative function in the development of customary law. A custom must be proved by strong evidence; it also may be judicially noticed.

In that event the court must apply it unless:

- i. It is repugnant to natural justice, equity and good conscience.
- ii. It is incompatible with any law for the time being in force.
- iii. It is contrary to public policy as where it is injurious to public interest.

#### **4.0 CONCLUSION**

Customary law consists of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws. It is not enacted but grows or develops with time. It expresses itself not in a succession of words, but in a course of conduct. It has no definite authors; there is no person or defined human agency one can praise or bless for its being good or bad (L. Fuller, 1968).

Every customary law was once a custom; it is not every custom that is customary law. The reason is that customary law has certain unique features. They also have their problems. It is a matter of fact to be proved by strong evidence unless it is already judicially noticed.

#### **5.0 SUMMARY**

Customary law means different things to different schools of thought. Even the Positivists are divided on the subject. Customary law is distilled from customs. It has its own characteristics, and methods of proving its evidence in court.

#### **6.0 TUTOR-MARKED ASSIGNMENT**

1. Customary law is flexible and adaptable to change and socio-economic development. Discuss with reference to decided cases.
2. Even where a custom is reasonable and certain and has fulfilled all the specified essentials, the court may yet refuse to enforce it. Comment with reference to decided cases.

#### **7.0 REFERENCES/FURTHER READINGS**

*Black's Law Dictionary* (1990) (7<sup>th</sup> ed). West Publishing Co.

*Fuller Lon Anatomy of the Law*, 71 (1968).

## **UNIT 3 THE COLONIAL LEGAL SYSTEM**

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### **1.0 INTRODUCTION**

In the traditional communities, the rulers exercised both executive and judicial powers. With the introduction of Islam, some form of separation of power came into existence among the Hausa communities. The established legal systems worked well. No person was above the law; presumption of innocence obtained; there was belief in oracle and in the supernatural. Every evidence including hearsay was admissible if it was relevant. Under the system, administration of justice was quick, cheap and simple, restitutive and reconciliatory.

The colonial legal system had some similarities and dissimilarities with the traditional legal system as we shall see shortly.

### **2.0 OBJECTIVES**

When you have completed this unit, you should be able to:

- distinguish the traditional system of arbitration from the modern judicial system
- explain why the traditional approach is still common in Nigeria despite modernization and development

### **3.0 MAIN CONTENT**

#### **3.1 Background**

Pre-colonial Nigeria possessed informal legal systems, and the machinery through which justice was dispensed in the different communities, which formed part of the hall mark of human civilization. Substantive law was recognizable, binding and obligatory although it

was unwritten. There were arrest and trial procedures. The trial process was quick, cheap, effective, open and participatory. The court room was known often under a big tree in the village squares. What to do with a convict was defined. Penal measures were non-custodial, and restitutive, the philosophy was reconciliatory (present day reformation and rehabilitation) and restoration of distorted equilibrium to the society. The personnel of the legal systems ranged from kings, chiefs, and elders to linguists, orderlies, messengers, town criers, age-grade and secret cults, diviners, oraclists and witch doctors. If there were differences at all between the legal systems existing in pre-colonial Nigeria and those in the societies of Western Europe, such differences were more of degree than of kind. But alien incursion and interests brought about conflicts.

The general policy of the British colonial administration was to adopt the United Kingdom as a model. It attempted to replicate in the colonies, the historical development of the English Legal System in a period appropriate to each particular colony. Hence every feature in the colonial and post colonial Nigerian Legal System (with a few exceptions) has its counterpart in the imperial legal system and practice.

Consistently with this policy, there was a conscious or subconscious omission to take cognizance of “outside features”. Everything that was not Western was “outside” and uncivilized. Thus the range of enormous pre-colonial human experiences as well as the native institutional facts that distinguished Africa and Africans as the “the cradle of civilization”, were given scant recognition, if at all. Rather the imperialists were according to Sheikh Anta Diop, committed to making “the Blackman believe that he has never been responsible for anything, at all, of worth, not even for what is to be found right in his own house and home. In this way, it is easy to bring about the abandonment and renunciation of all national aspirations on the part of those who are wavering, and the reflexes of subordination are reinforced in those who have already been alienated.

### **3.2 English Law and Customary Law**

Remember that the early settlements were homogenous. The custom, a local law was simple. As the settlements expanded into kingdoms and empires, they became heterogeneous. As people moved from one cultural group to another, conflicts were inevitable. This was further advanced by migrants, explorers, traders, missionaries and war. For example, Sunni Ali and Askia Muhammad over ran the Hausa States of Gobir, Kano, Katsina and Zaria and annexed them to the Songhai kingdom. The phoenicians of the tribe of Nimrod migrated from Upper Egypt to Ile-Ife and advanced the Yoruba Kingdom eastwards to

Dahomey and Benin. (1000 AD). The Portuguese Traders (1452) the British (1553) and the Dutch (1593) had by trade, treaties, diplomacy and military campaigns gained some foothold in different parts until the partition of Africa following the Berlin conference. Thereafter, the British consolidated her dominance, constituting the kingdoms and empires into the Protectorate of Northern Nigeria (1900), and the Colony and Protectorate of Southern Nigeria (1906), both of which amalgamated to form Nigeria in January 1, 1914. As people moved from homogeneity to heterogeneity and from one cultural grouping to another, conflicts inevitably arose.

*See Koney v Union Trading Co. (1934); Okolie v Ibe (1958), Olowu v Olowu etc.*

In the early times, judges in England executed justice “according to the law and custom of England” and translated the custom into law. So also the British imperialists by Ordinance No. 3 of 1863 formally established in the Lagos Colony, English type of courts which executed laws and custom in the colony. The Ordinance No. 4 of 1876 expressly empowered the courts to execute

- i.) The common law of England
- ii.) The doctrines of equity as applicable in England
- iii.) Statute of General Application as at 1<sup>st</sup> July 1874 (later varied to 1<sup>st</sup> January 1900)
- iv.) Local enactments
- v.) Customary laws that were not repugnant to natural law, equity and good conscience or incompatible with the law for the time being in force.

Aside from theory, local customs or practices of a particular area were not recognized. Even where custom has continuously prevailed from time immemorial and it is generally reasonable and accepted it was still required to pass the English man’s test of repugnancy and incompatibility, using the English standards.

The administration of English law side by side with customary law sometimes conflicted. The result was a delimitation of the relative spheres of operation of the rules and principles of the one or the other and generally, as to the determination of questions bordering on primacy or parity as between the received English law and the indigenous customary law.

The experience of Nigeria is that in constituting Nigeria into a federation (1951-4), and subdividing it into 3 region and subsequently into 4 regions (1963) and still later into 12, 19, 21, and 36 states and a

Federal Capital Territory (1967-99), similarity of cultures, ethnicity and language received little consideration if at all. The British type of political arrangement still prevailed, generating its good aspects as well as conflicts among the tiers of government.

See *Military Governor (Ondo State) v Adewunmi*, *Doherty v Balewa* (1981), *Archbishop Okogie and Ors v Governor of Lagos State* (1981), *Iffie v AG Bendel State* (1987), *AG Bendel State v Aideyan* (1989), *AG Bendel State v AG (Fed) and 22 Ors* (1982).

Thus, with a plurality of laws in a typically urban area, there would be the following:

- i) The Indigenous native custom
- ii) The customary laws accepted as such
- iii) The foreign laws and custom; each migrant group, invaders, traders, missionaries, explorers etc carried along, their political organization, religion, learning, laws and customs.
- iv) Traditional religions
- v) Islam and its variant.
- vi) Christianity and its variant

See: *Koney v Union Trading Co.* (1934), *Okorie v Ibo* (1958), *Olowu v Olowu*

Plurality of laws permits a situation where one system applies to one transaction and another system to another. For example different laws and incidences apply to Christian and customary law marriages, as well as to devolution of property upon intestacy.

See: *Cole v Cole* 1898, *Olowu v Olowu*, *R v Princewell*

A customary law may also apply to a transaction and dispute may arise as to whether or not that law applies to the parties in the transaction. Cases involving a native and a non-native often give rise to such a problem. The approach of the court has been that the customary law would apply where statutes so provide. In other cases the test is which law serves justice better: See *Lewis v Bankole* (1908), *Edet v Essien* (1932), *Nelson v Nelson* (1951), and *Agidigbi v Agidigbi* (1992).

However, these rules are not absolute. They may be displaced where:

- (a) The parties expressly agree that the customary law shall not apply. Sometimes the yardstick for applying customary law may differ. For example in the Northern States and Lagos State, the test for the application of a customary law is "Nativity Test". In the Eastern States, the test is "Nigerian descent test". In the

Western States, the High Court laws provide expressly where customary should apply.

- (b) In every case, application of a customary law is displaced where the nature of the transaction does not admit customary law
- (c) Where the transaction is unknown to the customs of the people, customary law would not apply. Typical examples of these are statutory marriage cases.

See: *Koney v UTC Ltd* (1934), *Queen v Owo* (1936) *Salam v Aderibigbe* and *Okocha v. Ibo* (1958).

The general rule is that the customary law applies if:

- a) There is a native law and custom applicable to the matter in controversy
- b) Such law and custom is not repugnant to natural justice, equity and good conscience or incompatible with the local ordinance, and
- c) If it shall not appear, that it was intended by the parties that the obligation under that transaction should be regulated by statute.

In essence, customary law applies where the nature of transaction is subject to customary law, or the statute provides that customary law shall apply. It is ousted where parties expressly so agree or deemed to have agreed, the nature of transaction is unknown to customary or laws or the nature of the transaction dictates that it is to be regulated by law other than customary.

Whether parties have agreed or deemed to have agreed on which law is applicable is, however, not easy to answer with any precision. Nonetheless, courts have been guided by considerations of:

#### **a. Interest of Justice**

Where a transaction is governed by the customary law and the parties are natives, it is in the interest of justice that the customary law applies.

Statute law is excluded if substantial injustice would be done to either party.

Even where parties are natives and non-natives, customary law may yet apply provided it would not occasion substantial injustice.

**b. Conduct of Parties**

Courts assume that in the absence of evidence to the contrary, parties for example to an Islamic marriage intend to be governed by the provisions of the Holy Qu'ran, just like parties of a Christian marriage intend to be governed by statute and British standards.

**c. Other Considerations are:**

- i) Social welfare principles
- ii) Life style principles

Aguda noted that any legislation which is expected to alter materially the social habits and values, even though meant to effect social justice can hardly be expected to succeed unless the masses are made to see the necessity for it. The reason is that cultures, tradition, social habits and values die hard, and it must be a mistake to attempt to alter, modify or abrogate any of them without sufficiently preparing the minds of the people for the change to come.

At the same time, the law in Friedmans' view, must, especially in contemporary conditions, articulate law making by legislators, courts and others, respond to social change if it is to fulfill its function as a paramount instrument of social order. It would appear also that the dichotomy between Engene Erlich's "formal law" and "living Law" is now more pronounced. People (and there are instances of such trends) react unfavorably to abrupt change of norms, which do not reflect the *volgeist*

This, in part, explains why the Northern states of Nigeria jettisoned the Criminal Code and the Criminal Procedure Act in 1959. Instead, they opted for the Penal Code and the Criminal Procedure Code like those of Sudan and India and of the Maliki School. Hence also the recent agitation for Sharia Law.

#### **4.0 CONCLUSION**

The traditional communities or settlements which made up Nigeria had their legal systems. But the Muslim invaders and the British imperialists superimposed their own legal systems. The latter was not as quick, cheap, or easy. It was technical. This in part explains the disrespect which people have for the modern legal system.



## **5.0 SUMMARY**

Traditional and modern approaches to the administration of justice sometimes correspond, and at other times differ. Both still operate side by side despite modernization and development

## **6.0 TUTOR -MARKED ASSIGNMENT**

The traditional legal system is “archaic”. Do you agree?

## **7.0 REFERENCES/FURTHER READINGS**

Obilade, O., *Nigerian Legal System*. Sweet & Maxwell.

Smith, S. (1976). *Welfare and Diplomacy in Pre-colonial West Africa*.  
University of Wisconsin Press.

Slapper, G. (2004). *The English Legal System*. Cavendish.

## **UNIT 4 CUSTOMARY AND ISLAMIC LAWS COMPARED**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Sources of Law
  - 3.2 Islamic Law and Customary Law
  - 3.3 Personnel
  - 3.4 Trial Procedure
  - 3.5 Dispositional Methods
  - 3.6 Other Features
  - 3.7 Constitutional Position
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

### **1.0 INTRODUCTION**

Nigeria is composed of different ethnic groups. Each had (still has) its own customs. Some of these customs are local. Others have developed into customary law. The Moslems, Christians, and Europeans brought also their local customs and laws. The Moslems, Christians and Europeans were not just one creed or stock. There were varieties of them. In some cases, there was an amalgam of two or more. To these were added local statutes and statutes of general application and then the Constitutions, 1922-99 all operating simultaneously within the same geographic area. A situation such as that would generate some worrisome conflicts and confusions, to which this unit is directed. This unit is an attempt at such a description.

### **2.0 OBJECTIVES**

When you have read this unit, you should be able to

distinguish between the following:

- local custom
- customary law
- common law
- Islamic law
- statute law
- the Constitution

### 3.0 MAIN CONTENT

#### 3.1 Sources of Law

The word source may mean

Origin; beginning

Starting point

Documents (E.g. books, reports, anthropological works, commissions of enquiry, official papers etc.) which serve as materials for study

The mainspring of authority as well as its material provenance

Fountain of authority of a rule of law of a special body, a dictator, will of the people.

Customary judges, through the judicial law making process, custom (i.e. norms, values, folk tales, proverbs, conduct) and/or traditions.

Members of the various African societies.

#### 3.2 Islamic Law and Customary Law

##### Islamic Law

The sources of Islamic Law include:

- The Holy Qu'ran – Given by God
- Sunnahi Hadith – sayings and deeds of Prophet Mohammed
- Ijma: Unanimous agreement of learned Islamic scholars
- Qiyas – Analogical deductions
- Istihad – Legal presumptions, customs, public interest.

Islam is the dominant religion in the Northern states of Nigeria, (the Middle belt area and Tivland, exempted). Before Islam however, there were customs and customary laws in these areas. There are still pockets of these customs and customary laws existing side by side with Islamic and other laws.

##### Customary Law

A custom or taboo becomes law if it is:

- In existence from time immemorial (i.e. or as at 1189)
- Exercised continuously within that period
- Exercised peaceably without opposition
- Obligatory
- Capable of precise definition
- Consistent with other customs
- Reasonable.

##### Comparative Features

Islam is regarded as a way of life. It determined the nature and character of the operating legal system, especially the Maliki School brand. Islamic law is written. The customary law of the different tribes is written only to the extent that it is incorporated in the Qu'ran.

### **Law and Procedure**

The Qu'ran has features of substantive, procedural and penal laws as well as its principles of general liability. For example, insanity, self – defence, mistake and non-age may serve as total or partial defences. Intoxication is a partial defence at common law and under the Criminal Code and the customary law. In Islamic law, intoxication is not a defence; rather it is a crime *per se*.

### **3.3 Personnel**

Personnel of the judicial system under the Islamic law include Islamic legal scholars and imams. Presumption of innocence is not prominent; standard of proof is not uniform as some crimes demand a very high standard. Examples are brigandage, adultery, fornication, theft, apostasy and other crimes of the kind of Huddud which require at least evidence of three competent male witnesses whose testimonies are similar and corroborative.

### **3.4 Trial Procedure**

The trial processes under the Islamic and customary laws are more involved. Monarchs, chiefs or *emirs*, diviners, witch doctors or oralists, *imams*, elders get involved in establishing guilt. Offence is proved upon strong suspicious. Confession may be obtained by threat; trial may be by ordeal. Process is cheap, quick, convenient and convincing.

### **3.5 Dispositional Methods**

Justice reflects the values, beliefs, and aspiration of the subject people. At common law and the Islamic Law, the philosophy is that the offender is punished. The tariff system of punishment obtains. For example, *Huddud* are serious crimes and mandatory sentences are attached. Thus the sentence for rebellion is death. It is stoning to death for adultery, flogging for drinking alcohol, loss of limbs for theft. Western writers have condemned these sanctions as barbaric and savagery, or repugnant to natural justice. But the Islamic scholars have argued that they are penalties prescribed by Allah and should not be judged by human reasoning and standards. This was the crux of the Sharia crises in Nigeria in 2000 – 2001. The punishment for less serious offences (Taa

zor) is discretionary. They range from admonition, fines, seizure of property, threat, reprimand, flogging to exile or death.

The penal measures provided by the customary law were less punitive. They include flogging, self help, banishment or death. At common law, parties to a crime are the state and the offender. The victim is a mere witness. In Islamic law especially in *Qiya's* offences, the victims or relations of the deceased may exert vengeance; or opt for "blood money". Under the customary law, substituted punishment may be imposed on an offender, compelling him to farm for his victim. The philosophy is restitutive.

### 3.6 Other Features

The Islamic legal system provides for observance of principles of separation of powers. *Ijma* exercises legislative power. The executive and judicial powers devolve on the *Imam* and the *Kadi* respectively. The head of the Islamic Caliphate is the Caliph, the Sultan of Sokoto.

In the Islamic communities, the Holy Qu'ran is the supreme law, and final authority; it prevails in all issues to which Islamic law applies. It applies over all persons subject to it. For instance, it applies to Muslims; it applies also to transactions where Islamic law or statute so declares.

Islamic Law applies if it is the personal law of the parties or the predominant law. For example, where the law of the court is the law prevailing in the area but a different law binds the parties, (as where two Ibos are parties in a Moslem court in an area where Moslem law prevails) the Native Court will, in the interest of justice, be reluctant to administer the law prevailing in the area. If it tries the case at all, it will, in the interest of justice, choose to administer the law, which is binding between parties.

Generally, conflicts of law, which arise in miscellaneous civil matters are resolved by courts by reference to the:

- a) Nature of the civil matter
- b) Express agreement by parties as to applicable law
- c) Personal law binding the parties
- d) Predominant law (*lex situs*)

In every case, the overriding consideration is the interest of justice.

### 3.7 Constitutional Position

It is not to be forgotten that the Constitution is supreme in a democratic dispensation. The provisions of the Constitution:

- Bind all authorities, institutions and persons throughout the Federation
- Override every contrary decision and conduct
- Prevail over every other law that is inconsistent to its provisions
- Form the bases of force and authority for other laws

Conflicts sometimes arise between the Constitution and the Acts of the National Assembly or laws of a State Assembly or subordinate legislations and customary or Islamic laws. The National Assembly legislates on the matters in the exclusive legislative list. Both the National and State Assemblies may legislate on matters in the concurrent legislative list. Wherever a state law or any other law is inconsistent with the Federal Law, that other law will not be enforced. It is null and void to the extent of such inconsistency. So also is any conflict between the Constitution and any other law.

Identical legislation on the same matter is not necessarily an inconsistency. In *Attorney General (Ogun State) v Attorney General (Federation)* 1982, Fatayi Williams, CJN said:

When identical legislations on the same subject matter are validly passed by virtue of their Constitutional powers to make laws by the National and State Assemblies, it would be inappropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of the particular subject matter. To say that law is ‘inconsistent’ in such a situation would not in my view, sufficiently portray clarity or precision of language. That explains what is usually referred to as the doctrine of covering the field.

#### **4.0 CONCLUSION**

The origins or bases from which law is drawn or developed in Nigeria have been the customs (or customary law), local statutes, and received English law. To be accepted as valid and enforceable, a custom must satisfy some laid down criteria. One of the characteristics of customary law which accounts for its resilience is its flexibility and capacity for adaptation to accord with changing social conditions. (*Kimdey & Ors v. Military Government of Gongola State & Ors*).

#### **5.0 SUMMARY**

We have tried to x-ray the community, see the criss-cross of customary laws in operation at the same time within the same space. It is interesting that the customary laws are not static laws. Thus they can and do change with the times in response to the rapid development and social and economic conditions.

## **6.0 TUTOR-MARKED ASSIGNMENT**

Explain with reference to a decided case, the doctrine of covering the field

## **7.0 REFERENCES/FURTHER READINGS**

Oyaro, A. T. and Osanwole S.A.(1999). *Reading on African Studies*.  
Ibadan: IATOR Publishing Co.

Unit 1	Historical Development of Judicial Institutions
Unit 2	Judicial Institutions
Unit 3	Personnel of the Nigerian Legal System
Unit 4	Personnel of the Court other than Judicial Officers

## **UNIT 1 HISTORICAL DEVELOPMENT OF JUDICIAL INSTITUTIONS**

### **CONTENTS**

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	Pre-Independence Judicial System
3.2	Modern Judicial Institutions
3.3	Role of the Judiciary
3.4	Independence of the Judiciary
4.0	Conclusion
5.0	Summary
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### **1.0 INTRODUCTION**

Judicial institutions refer to the established organization and processes of law of a public character which people can use for the purpose of resolving their disputes. They are institutions and processes that guarantee access to courts, and facilities for legal actions as well as rules, principles or practices relating to or by courts. In this module, we shall be talking about judicial institutions in colonial and modern Nigeria.

### **2.0 OBJECTIVES**

When you have read through this unit, you should be able to:

- identify the different courts in modern Nigeria
- explain the instruments which brought the different courts into existence
- distinguish between inferior and superior courts, and
- explain the scope of judicial independence.

### **3.0 MAIN CONTENT**



### 3.1 Pre-Independence Judicial System

Before the advent of the Europeans, Islam and Christian missionaries, there had existed certain forms of judicial institutions in the communities constituting the present day Nigeria. These indigenous judicial institutions played a critical role in creating and sustaining order and stability. On arrival, these foreign bodies and organizations or aliens superimposed, among other things, their own legal system and judicial institutions on the indigenous legal machinery. You will find it rewarding to read once again the pre-colonial legal systems in the preceding module. Our present focus is the colonial and post-colonial legal systems and judicial institutions.

The British assumed a direct, full, and absolute dominion of the colony of Lagos following the Treaty of Clesion in 1861. An Ordinance No. 3 was promulgated in 1863, setting up a Consular Court, Equity Court and the Supreme Court for the colony. The Supreme Court was to regulate trade. It was replaced in 1866 by the Court of Civil and Criminal Justice. The West African court of Appeal with headquarters in Sierra Leone served as Court of Appeal for the colony. Trial was by Jury. From this court, appeals lay to the Judicial Committee of the Privy Council in London. In 1876, a supreme court was re-established for Lagos and surrounding territories over which Britain exercised control. The court executed the common law of England, doctrines of equity and statutes of general application that were in force in England on 24 July 1874. (Later varied to 1<sup>st</sup> January, 1900). The court also applied local laws and customs which were not repugnant to natural justice, equity and good conscience or incompatible with any local statute.

Certain chartered companies also administered justice in territories over which they exercised trading rights from 1886 to 1889 when the charters were revoked. Some were empowered among other things, to make laws for their areas and protect their commerce. Such laws applied to British subjects- all persons, (other than Portuguese and other Europeans) and natives, who enjoyed Her Majesty's protection. These powers in the main were acquisitionist, protectionist, and expansionist in intent and purpose. Appeals from them lay to the Supreme Court. The native courts administered customary or native laws.

Following the proclamation of the protectorate of Northern Nigeria on 1<sup>st</sup> January 1900, new courts were formed; namely: the Supreme Court of the North, Provisional Courts (one for each province), customary courts and native courts. A Native Court Proclamation Ordinance, 1906, also permitted native courts to exercise judicial functions under the direction of the Chief Justice or other Justice of the Supreme Court.

They were to execute local laws and customs that were “not opposed to natural morality and humanity”.

The Protectorate Court Ordinance, 1933 carried out sweeping reforms in the court system. The Ordinance set up additional courts – the High Court and the Magistrate Court. The High Court exercised the same jurisdiction as the Supreme Court except that the matters of probate, divorce, matrimonial cause and admiralty matters remained within the exclusive competence of the Supreme Court. The magistrate courts exercised both criminal and civil jurisdictions. The native courts exercised jurisdiction over title to or interest in land, but the Native Court Ordinance 1933 empowered the Governor-in-Council to transfer such matters to another court. This ordinance also provided for appeals from decisions of native courts to the magistrate court and from the magistrate to the High Court, then from the High Court and Supreme Court to the West African Court of Appeal and finally from the West African Court of Appeal to the Judicial Committee of the Privy Council. Legal practitioners appeared in magistrate and the higher courts.

In 1943, the government passed a number of ordinances, which also affected the courts sub-systems. Examples were the Native Courts Colony Ordinance, the Supreme Court Ordinance and the West African Court of Appeal Ordinance etc. Each ordinance carried out one form of reform or another. For example, magistrate courts were established throughout the Federation. One Supreme Court now served the whole country.

Following the regionalization of the Federation, in October 1954, a Federal Supreme Court was established. A High Court was also established for the territory of Lagos and for each of the three regions. The magistrate courts remained. A Moslem Court of Appeal was also set up in 1956. This court exercised original criminal and civil jurisdiction. It was also an appellate court. At independence (1960), the Sharia Court of Appeal replaced the Moslem Court of Appeal. The Sharia Court of Appeal had civil jurisdiction only, and in cases governed by personal Moslem law. It had power to entertain contempt cases.

The magistrate exercised civil and criminal jurisdiction in the South. Towards independence, the magistrate courts in the North were restricted to criminal causes. The district courts were established for the purpose of exercising civil jurisdiction. Also at the eve of independence, a Court of Resolution was set up in the North to resolve whatever issue may have arisen between the High Court and the Sharia Court of Appeal. It determined which cases should go to the High Court and which to go to the Sharia Court of Appeal.

### **3.2 Modern Judicial Institutions**

At independence, (October, 1960) existing courts were reconstituted namely:

The Judicial Committee of Privy Council, the Federal Supreme Court, High Court of Lagos and of each region, magistrate courts, native courts (North) and customary courts (West and East). The courts in the regions were extended to the Mid-West when it was created in August, 1963. Appeals to the Judicial Committee of the Privy Council were abolished with effect from 1<sup>st</sup> October, 1963. A Supreme Court of Nigeria was reconstituted as the apex court. The Federal Court of Appeal Act 1976 established a Federal Court of Appeal.

Now however, the Constitution of the Federal Republic of Nigeria 1999 provides that there shall be established for Nigeria the following Federal Courts:

- The Supreme Court of Nigeria. (sections 230 – 236)
- The Court of Appeal (sections 237 – 254)
- The Federal High Court (sections 249 – 254)
- The High Court of the Federal Capital Territory (sections 255 – 259)
- The Sharia Court of Appeal of the Federal Capital Territory (sections 260 – 264)
- The Customary Court of Appeal of the Federal Capital Territory (sections 265 – 269 and 288).
- The National Assembly Election Tribunal (Section 285)

The Constitution similarly created for each state of the Federation, the following courts:

- The High Court of the State (sections 270 – 274)
- The Sharia Court of Appeal of the state (sections 275 – 279)
- The Customary Court of Appeal of the State (sections 280 – 284)
- Governorship and Legislative Houses Election Tribunal (section 285)

We shall discuss a number of these courts in greater detail in subsequent units of this module. Meanwhile let us look at the powers and the role of the judiciary.

### **3.4 Powers of the Judiciary**

The judicial powers of the Federation are vested in the courts established for the Federation. In the same way, the judicial powers of a state are vested in the courts established for a state, subject as provided by the Constitution.

Judicial powers extend to the following:

### **3.4.1 Inherent Powers and Sanctions**

Inherent powers and sanctions refer to those powers and sanctions that necessarily derive from an office, position or status (*Blacks Dictionary*, 7<sup>th</sup> ed.)

All matters between persons, or between governments or authorities and to any person(s) in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person.

Note the restrictions on judicial powers. For example, the following are beyond judicial powers:

- any issue or question as to whether or not any act or omission, law or judicial decision, is in conformity with the Fundamental Objectives and Directive Principles of State Policy as set out in chapter II of the Constitution
- any action or proceedings relating to any existing law made on or after 15 January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law.

## **3.5 The Role of the Judiciary**

The judiciary is the branch of governance invested with judicial power, the system of courts in a country, the body of judges (the bench); it is that branch of government which is intended to interpret, construe and apply the law. Its role may be summarized as follows:

### **(i) Interpretation of Statute**

Interpretation and application of the laws through the courts system serve as a check on the exercise of legislative and executive powers. Hence the judiciary can be described as the guardian of the Constitution. In fact, the Constitution is what the court says it is. (See 1963, 1(3), 259) Isn't this also a subordinate role?

In determining and interpreting the statute, the court adopts the passive operation of judicial procedure.

**(ii) Enforcement of Individual Fundamental Rights**

Any person who alleges that any of his/her rights has been, is being or likely to be violated is at liberty to apply to any court for redress.

**(iii) Defence and Maintenance of the Rule of Law**

Constitutionalism, as a system of restraint upon governments, has no practical value if, when the restraints are transgressed, no means of enforcing them exists. The enforcement of the limitation of the Constitution and other laws is the peculiar province of the court. Hence judicialism is described as is the backbone of constitutionalism (Nwabueze).

**(iv) Sustaining Peace and Order**

General Ibrahim Babangida, Military President of the Federal Military Government explained this as follows:

The importance of the function discharged by the (courts) in sustaining order, peace, harmony and happiness in our society is best appreciated through an analogy with the saying of the Holy Prophet Muhammad. He is reported by established authorities to have said; “there is a small organ in the body of man. If it is in perfect condition, then the whole of the body will be perfect and function well. If it is faulty, damaged or weak, then the whole of the rest of the body shall likewise be sick and in disarray”. That organ is the heart...Government, which is the functional expression of the living statement, like the living body has its own perfect heart if it is to function well. The dispensation of justice which is the task of the courts is the heart and soul of all good governance. When the Holy Prophet spoke, his concern was definitely not human biology. He was echoing the same wisdom revealed to Jesus of Nazareth... of the need, most absolutely, to maintain and do justice to all men. Indeed, there is hardly any human society known to recorded history, which does not make justice the absolutely essential condition of order, survival, happiness and good relation among men.

**(v) To Uphold Fundamental Human Rights**

It is for the judiciary to maintain the rule of law and protect individual fundamental freedom to do whatever is not forbidden by law. The process of judicial review, as an aspect of the rule of law enables the court to protect the individual human rights and fundamental freedoms

against the excesses of over-powerful executives within the restricted nature and procedure of the judicial review itself.

**(vi) To Determine Justice**

“What all this amounts to, says Hon. Justice Nnamani (JSC), “is a general recognition of the role of the judiciary as:

the defender of the rights which the Constitution has guaranteed the citizen  
 an insurance against arbitrariness in the exercise of power  
 a vehicle for settlement of disputes whether person to person and person and person(s) and state within accepted principles of law and procedure obviating the need to resort to self help measures  
 a guarantee for the maintenance of law and order, and  
 a democratic society.

The judge exists to administer justice. He hears the appeals of the weak and receives protests against the violation of rights. In the determination of justice,

there can be no balance of forces, no opportunism, no bargaining. A judicial decision derives its authority not from the fact that it is well adapted to the requirements of a particular temporary situation but from its being founded on reasons, which have general force and universal cogency apart from the particular case in point. All judicial institutions are based on two principles, which are spiritual in nature: legal logic, as a rational element and justice, as a moral element. These two principles, these two mainstays of the judicial functions, raise it above the rough and tumble in which the interests and passions of people, parties, classes, nations and races (ethnic groups) clash with one another. (P.C.I.J. Series C No. 7-1, Pg. 18).

The CFRN. Section 6 is explicit on the role of the judiciary. The role appears quasi-scientific and technical, considering the objective nature of legal analysis and the expertise required of judicial officers and legal practitioners.

Note that for the purpose of carrying out its duties and responsibility, the judiciary also exercises not only constitutional and statutory powers but also all inherent powers and sanctions of the court of law notwithstanding anything to the contrary. In so doing it tends to conform to the role- profiles into which it had been socialized under the colonial rule.

## **Independence of the Judiciary**

Independence of the judiciary is one of the more important principles of the Constitution of the Federal Republic of Nigeria. (Refer to the appropriate unit where this has been discussed). The doctrines of separation of powers and of the rule of law also emphasize the relevance of judicial independence in the scheme of things. As Justice Robert Jackson put it: “with all its defaults, delays, and inconveniences, men have discovered no technique for long preserving the government except that the Executive be under the law, and that the law be made by parliamentary deliberations”.

## **Appointment and Removal of Judges**

These are clearly set out in the Constitution, which is the Supreme Law of the Land.

Judges do not hold offices at the “state pleasure”. They are independent from interference by the Executive and have no duty to advise the presidency or any Executive on any matter which is not before them in the normal course of their functions.

## **Remunerations**

Salaries and emolument of judges are charged to the consolidated fund. They are not subject to annual review by the National or State Assembly.

## **Immunity**

Judicial officers enjoy judicial immunity over statements they make or over their acts or omissions in the discharge of their duties. Whether an action can be brought at all by an aggrieved party is not free from controversy. However, if an action arises, it rests with the complainant to prove that the judge had acted outside his jurisdiction. The reverse is the case where the defendant is a magistrate or one presiding over an inferior court.

Whether malice is capable of destroying this immunity is not settled. A judge or judicial conduct may be criticized. There is no immunity for criticism. But criticisms must be bona fide, genuine, not out of improper motives, malice or attempt to impair the administration of justice.

Immunity extends to statements made by parties or witnesses in the course of judicial proceedings. As a matter of public policy, a legal practitioner is immune from actions for negligence in and about the conduct of his “clients” case in court.

Persons or bodies exercising judicial functions (e.g Military Court Martial) also enjoy immunity from suit for acts done or statements made in the course of their duties.

A truly independent judiciary is a *sine qua none* if the judiciary is to be neutral such that the state governing the public can accept its decisions as legitimate; and respect and honour them as such.

This is merely illustrative, not extended to be an exhaustive exposition of judicial independence or immunity. Also refer to your course material on Constitutional Law.

#### **4.0 CONCLUSION**

The judiciary as we know it today, is British in origin, its structure may be traceable to the Supreme Court of Judicature Acts 1873 – 75 and subsequent amendments especially in the first half of the 20th century. The institutions, powers, roles, and independence are now provided for by the constitution or other instruments which established them.

#### **5.0SUMMARY**

The British systematically established the court system from 1863-1943 and adjusted it to correspond with the political structure of the Federation from time to time. Its powers, role and independence have remained topical and may yet be so for some distant future. This is because of an unending desire to preserve a free and better government operating under a law that has internalized the notion of fundamental human rights.

#### **6.0TUTOR-MARKED ASSIGNMENT**

1. The role of the judiciary is subservient, passive, subordinate, quasi-scientific and technical. Discuss.
2. Is there an independent judiciary in Nigeria? If there is, is it desirable?

#### **7.0REFERENCES/FURTHER READINGS**

Obilade, *Nigerian Legal System*. London: Sirect and Maxwell.

Slapper, G. (2004). *The English Legal System*. Cavendish.

Oyaro, A. T. and Osanwole, S.A. (1999). *Reading on African Studies*. Ibadan: IATOR Publishing Co.



## UNIT 2 JUDICIAL INSTITUTIONS

### CONTENTS

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### 1.0 INTRODUCTION

The focus of this unit is the organization of the courts, their jurisdiction, and procedure as well as their origins.

### 2.0 OBJECTIVES

When you have completed this unit, you should be able to:

- account for the origin and historical development of the superior courts
- explain the position of judges, their appointment, dismissal or removal from office etc.

### 3.0 MAIN CONTENT

#### 3.1 Superior Courts

These are courts of records; courts of unlimited jurisdiction. Generally nothing shall be intended to be outside the jurisdiction of a superior court except that which specially appears to be so specified. They exercise supervisory jurisdiction over inferior courts and for that purpose, may make prerogative orders of *certiorari*, *mandamus* and *prohibition*; and *injunction*.

They may punish contempt of court whether in *facie curia* or *ex facie curia*.

Examples of superior courts are:

The Supreme Court of Nigeria,  
The Court of Appeal,  
The High Courts (Federal and States),  
The Sharia Court of Appeal (Federal and States),  
The Customary Court of Appeal (Federal and States) and  
Other courts so designated by the National or State House of Assembly.

### **Inferior Courts**

Every court which is not a superior court is an inferior court. Examples are magistrate courts, coroners courts, juvenile welfare courts etc.

## **3.2 The Supreme Court of Nigeria**

Ordinance 3 of the 1863 established the first Supreme Court for the Colony of Lagos. It had both civil and criminal jurisdiction. It was replaced in 1866 by the Court of Civil and Criminal Justice. The Supreme Court ordinance, 1876 established the Supreme Courts of the colony of Lagos which applied the common law of England, doctrines of equity and statutes of general application that were in force on 24 July, 1874 as well as local laws, and customs which were not repugnant to justice, equity and good conscience.

Following the proclamation of the Protectorate of Northern Nigeria (1900), a Supreme Court, like that in the Colony, was established for the North. When the Northern and the Southern Protectorates were amalgamated in 1914, a new Supreme Court emerged.

The Protectorate Court Ordinance, 1933 set up the High Courts and the Magistrate Courts System. The jurisdiction of the Supreme Court and of the High Court was the same except that the Supreme Court had jurisdiction in matters of probate, divorce and matrimonial causes and admiralty. Appeals from the High Court and the Supreme Court lay to the West African Court of Appeal. The Supreme Court Ordinance, 1943 established one Supreme Court for the whole of Nigeria. It became the Federal Supreme Court under the Lyttleton Constitution, 1954.

Now, however, it is simply called the Supreme Court of Nigeria.

Read Chapter VII of the Constitution of the Federal Republic of Nigeria, 1999 in relation to the Supreme Court of Nigeria, especially;

Section 230: Establishment of the Supreme Court

Section 231: Appointment of the Chief Justice of Nigeria and Justices of the Supreme Court

Section 232: Original jurisdiction of the Supreme Court.

Section 233: Its appellate jurisdiction.

Section 234: How the Supreme Court may be constituted

Section 235: Finality of determination of the Supreme Court.

You should attempt to explain the aphorism that the Supreme Court is final not because it is infallible, it is infallible because it is final.

### **3.3 The Court of Appeal**

The Court of Appeal was formally known as the Federal Court of Appeal. This court was established for the Federation by the Federal Court of Appeal Act. 1976

Note the constitutional provisions relevant to the Court of Appeal, particularly the following:

Sections 237 and 238: Established of the Court of Appeal and Appointment of its justices

Sections 241 - 246: Exercise of right of appeal from High Courts (Federal or States), Sharia Court of Appeal, Customary Court of Appeal, and the Code of Conduct Tribunal and other courts and tribunals

Section 247: Constitution of the Court of Appeal

Section 248: Practice and Procedure at the Court of Appeal.

### **3.4 The High Courts (Federal and States)**

Following the reform of the court systems in 1933, the Protectorate Court Ordinance, 1933, was passed and it established the High Courts and the Magistrates Courts for Nigeria. The Ordinance denied the High Court of original jurisdiction in cases raising any issue as to titles to land, or interest in land where any such case was subject to the jurisdiction of a native court unless the Governor-in-Council had directed otherwise. Appeals lay from the Magistrates Courts to the High Courts from where appeals lay to the West African Court of Appeal and then to the Judicial Committee of the Privy Council.

When Nigeria became a federation in 1954 a High Court was set up for each region and the Federal capital Territory. The High Court Law, Western Nigeria, 1955 provided for enforcement of existing native laws and customs when “not repugnant to natural justice, equity and good conscience” (section 17). By the Chief Judge of a State Change of Title Act, 1976, the most senior Judge of the State becomes designated “The Chief Judge” of the State.

The jurisdiction of the High Courts (federal and states) are set out in the Constitution. As well as hearing cases, judges of the High Court serve on various tribunals such as the Robbery and Fire Arms Tribunals, Election Petition Tribunals. The High Court sits at the highest level in the state court hierarchy and has unlimited jurisdiction in both criminal and civil matters. It is presided over by one justice when exercising both original and appellate jurisdiction.

Note the constitutional provisions as regards the High Courts (Federal or States), particularly the following:

- S. 249, 255 and 270; Establishment of the Federal High Court and the High Court of FCT and of each state of the Federation
- S. 250, 256, and 271: Appointment of judges of the various High Court
- S. 251, 257 and 272: The High Courts jurisdiction
- S. 252, Powers of High Courts
- S. 253, 258 and 273 How the High Courts may be constituted
- S. 254, 259 and 274 Matters of practice and procedure.

It may widen the scope of your knowledge to distinguish the establishment, appointment, jurisdiction, practices and procedures and powers of the Federal High Court, the High Court of the Federal Capital Territory and the High Court of a State from one another.

### **3.5 The Sharia Court of Appeal**

In 1956, the Northern Region of Nigeria established a Customary Court of Appeal. It was called the Moslem Court of Appeal. It had original civil and criminal jurisdiction. It also had appellate jurisdiction. This court was replaced by the Sharia Court of Appeal at the eve of independence.

The Sharia Court of Appeal had only civil jurisdiction and on matters governed by personal Moslem Law.

The CFRN, 1990 has provided for

1. Sharia Court of Appeal of FCT
2. Sharia Court of Appeal of a State.

Read the 1999 Constitution and the provisions as to the following:

- Establishment of the Sharia Court of Appeal of the Federal Capital Territory and of a State : (sections 260 and 275).
- Appointment of Grand *Kadi* and *Kadis* (sections 261 and 276)
- The Courts Jurisdiction (Sections 262 and 277)

- The Constitution of the Courts (Sections 263 and 279)
- Practices and Procedure (Sections 264 and 279)

### **3.6 The Customary Court of Appeal**

Like in the 19 Northern States and the Federal Capital Territory, Abuja, the Constitution also provides for the establishment and administration of the Customary Court of Appeal in the Federal Capital Territory, Abuja and in the 17 States Southwards. In this connection. Read the following 1999 Constitution provisions,

Sections 265 and 280: Establishment of the Court

Sections 266 and 281: Appointment of the President and Judges

Sections 267 and 282: Jurisdiction of the Court

Sections 268 and 283: Constitution of the Court

Sections 269 and 284: Practice and Procedure in the Customary Court of Appeal

### **3.7 Special Courts**

Special courts include the Judicial Tribunal. The Constitution provides for the setting up of tribunals which exercise limited powers of court on specialized matters for which purpose they are created. For example, the Constitution, 1999 provides for the establishment and jurisdiction of:

- i. The National Assembly Election Tribunals for the Federation.
- ii. Governorship and Legislative Houses Election Tribunals for each state.

Read Section 285 of the Constitution. Note the composition, and jurisdiction and quorum of each of the tribunals.

There are other special courts of importance, such as the Court Martial and the National Industrial Court. These are examples only.

## **4.0 CONCLUSION**

There are superior and inferior courts. In chapter vii of the Constitution of the Federal Republic of Nigeria, 1999; you will find the list of the superior courts and the conditions for appointment and removal of judges of the courts.

## **5.0 SUMMARY**

In this unit, you have visited each of the most important courts in Nigeria. You must have noticed the names by which they are called, their jurisdictions, (original and appellate) and locations in the hierarchy. You also must have noted certain courts of coordinate jurisdictions.

## **6.0 TUTOR-MARKED ASSIGNMENT**

1. Discuss exhaustively, the jurisdiction of the Supreme Court.
2. Account from the Constitutional position of the removal of a judge from office.

## **7.0 REERENCES/FURTHER READINGS**

FRN: *The Constitution of the Federal Republic of Nigeria, 1999.*

## **UNIT 3 PERSONNEL OF THE NIGERIAN LEGAL SYSTEM**

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- 3.0 Main Content
  - 3.1 Constitutional Position of Judges
    - 3.1.1 Appointment
    - 3.1.2 Qualifications
  - 3.2 President and Judges of the Court of Appeal
  - 3.3 Judges of the High Court (Federal or State)
  - 3.4 President and Judges of the Sharia Court of Appeal
  - 3.5 President and Judges of the Customary Court of Appeal
  - 3.6 Resume of Appointing Authority
  - 3.7 Removal from Office
  - 3.8 Disqualification
    - 3.8.1 Judicial Offices
    - 3.8.2 Disqualification from Legal Practice
  - 3.9 Judicial Immunity
  - 3.10 Immunity from Criticism
  - 3.11 Other Considerations
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings.

### **1.0 INTRODUCTION**

This unit is devoted to judicial offices and their holders. It is not meant to be exhaustive; neither are you required to know the names of the incumbents. You should at least be aware of the various titles of judicial offices and officials as well as the courts in which they operate.

### **2.0 OBJECTIVES**

When you have read through this unit, you should be able to:

- identify the titles of various judges in Nigeria
- explain the pre-requisite qualifications, appointment procedure, the tenure, removal from office and effects of incapacitation of specific judicial officers who function at various levels within the judicial hierarchy

identify the roles of other judicial officers, law enforcement agents etc, who may be involved in any judicial process.

### **3.0 MAIN CONTENT**

#### **3.1 Constitutional Position of Judges**

##### **3.1.1 Appointment**

The Chief Justice of Nigeria and other judges of the Supreme Court are appointed by the President of the Federal Republic of Nigeria on the recommendation of the Nation Judicial Council, subject to confirmation of such appointment by the Senate (CFRN, 1999: Section 231)

The magistrate or other judicial officers are public officers. The statute or other instrument under which the particular courts are established also provide for the conditions of appointment and the removal from office, of the judicial officer. Judges and magistrates, on appointment, must take the Oath of Allegiance as well as the Judicial Oath by which each of them promises to “be faithful and bear truth allegiance to the Federal Republic of Nigeria... discharge his duties and perform his functions honestly, to the best of his ability and faithfully in accordance with the constitution of the Federal Republic of Nigeria and the Law; (to) abide by the code of the conduct contained in the Fifth Schedule of the Constitution of the Federal Republic of Nigeria, not allow personal interest to influence his official conduct or official decision, and preserve, protect and defend the constitution of the Federal Republic of Nigeria”.

##### **3.1.2 Qualifications**

The qualifications for appointment into certain judicial office are as follows:

Chief Justice of Nigeria and Judges of the Supreme Court

- i) The person must be qualified to practice as a legal practitioner in Nigeria.
- ii) He/she must have been so qualified for a period of not less than 15 years.

#### **3.2 President and Judges of the Court of Appeal**

The person must be a qualified legal practitioner in Nigeria for not less than 12 years. In making appointment to the office of the judges of the Supreme Court and the judges of the Court of Appeal, the President of



the Federation shall have regard to the need to have among them, persons learned in Islamic personal law and in customary law.

As to who is learned in Islamic or customary law, see CFRN 1999 Section 288) (b) – (c).

### **SELF ASSESSMENT EXERCISE 1**

What is the position of the law in the following situations?

- 1 Where a judge/magistrate does a thing before he/she takes the Judicial Oath and the Oath of Allegiance.
- 2 If the judge/magistrate delivers judgment when he/she is no longer a judicial officer
- 3 For anything done outside his/her jurisdiction

### **3.3 Judges of the High Court (Federal or State)**

They must be qualified legal practitioners in Nigeria for not less than 10 years.

### **3.4 President and Judges of the Sharia Court of Appeal**

They must have these qualifications:

- i) A Be legal practitioners in Nigeria, qualified to practice as legal practitioners for not less than 10 years
- ii) Recognized qualifications in Islamic law from institutions acceptable to the National Judicial Council
- B. Recognized qualifications from institutions approved by the National Judicial Council
  - i) Considerable experience in the practice of Islamic law
  - ii) Be distinguished scholars of Islamic law.

### **3.5 President and Judges of the Customary Court of Appeal**

They must have the following qualifications:

- i) Be legal practitioners in Nigeria qualified to practice as legal practitioners for not less than 10 years
- ii) Have considerable knowledge and experience in the practice of customary law in the opinion of the National Judicial Council, or
- iii) Have considerable knowledge of and experience in the practice of customary law.

### 3.6 Resume of Appointing Authority

The President and judges of the Sharia/Customary Courts of Appeal are appointed by the Governor of the state on the recommendation of the National Judicial Council and subject to the confirmation of the House of Assembly of the state.

The authority that appoints, recommends or confirms judicial appointments are shown below:

<b>Office</b>	<b>Recommendation by</b>	<b>Confirmation by</b>	<b>Appointment by</b>
1. Chief Justice of Nigeria	National Judicial Council	Senate	President
2. Justices of the Supreme Court	National Judicial Council	Senate	President
3. President of the Court of Appeal	National Judicial Council	Senate	President
4. Chief Judge of Federal High Court	National Judicial Council	Senate	President
5. Grand Kadi of The Sharia Court Of Appeal, FCT	Council National Judicial	Senate	President
6. President of the Customary Court of Appeal, FCT	National Judicial Council	Senate	President
7. Justice of the Court of Appeal	National Judicial Council	Senate	President
8. Justices of the High Court	National Judicial Council	Senate	President
9. Kadis of the Sharia Court of Appeal, FCT	National Judicial Council	Senate	President

10. Judges of the Customary Court Of Appeal, FCT	National Judicial Council	Senate	President
11. Chief Judge of the State High Court	National Judicial Council	State House of Assembly	Governor
12. Judges of the State High Court	National Judicial Council	State House of Assembly	Governor

### SELF ASSESSMENT EXERCISE 2

Any of the judicial officers indicated in serial 1-12 above may be removed if he is incapacitated and unable to function. Comment. Indicate the authority for your answer.

### 3.7 Removal from Office

#### WHERE A JUDICIAL OFFICE IS VACANT

- a) If the judicial officer dies, resigns or retires
- b) If, for any reason, he/she is unable to perform the functions of the office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct.

Note what follows:

- i) If the judicial officer is the Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the High Court of the Federal Capital Territory, Abuja, Grand *Kadi* of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and President of the Customary Court of Appeal of the Federal Capital Territory, Abuja, the President may remove him upon address supported by a two-thirds majority of the Senate.
- ii) If he is the Chief Judge of a State, Grand *Kadi* of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State, the Governor may remove him/her upon an address supported by a two-thirds majority of the House of Assembly of the State.
- iii) In any other case, the President or the Governor (as the case may be), may remove the judicial officer on the recommendation of the National Judicial Council. See CFRN 1999, Sections 230 (4), 238 (4), 250 (4), 261 (4), 266 (4), 270 (4) and 288-293.

### **3.8 Disqualification**

Certain persons are excluded from appointment to certain judicial offices. Here are some examples:

#### **3.8.1 Judicial Offices**

Who may not be appointed into a judicial office?

- a) Serving members of the National Judicial Council
- b) Serving members of the Federal Judicial Service Commission
- c) Serving members of Judicial Service Committee of the FCT
- d) Serving members of the State Judicial Service Commission

Disqualification lapses three years after he/she ceases to be such a member

#### **3.8.2 Disqualification from Legal Practice**

A judicial officer who ceases to be a judicial officer for any reason is disqualified from appearing or acting as a legal practitioner before any court of law in Nigeria.

### **3.9 Judicial Immunity**

When they are acting within their jurisdictions, judges and magistrates enjoy complete immunity in respect of:

- 1) Statements made in court.
- 2) Acts done or omissions made in the discharge of their official duties.
- 3) Wrong decisions upon a point of law.

Note also that statements, acts, or omissions in a judicial capacity include those made by:

- i) Persons and bodies exercising judicial functions.
- ii) Parties to the suit but only in the course of judicial proceedings.

A counsel is not liable to his client for negligence in and about the conduct of his/her client's case. The reason is that the counsel is a minister in the temple of Justice.

### 3.10 Immunity from Criticism

There is no immunity from criticism of judicial conduct. However, such criticism must

- 1) be made in good faith and
- 2) not input improper motives.

In essence, criticism is required to be genuine, not malicious or intended to be statements or behaviours that are tantamount to:

- 1) disobedience of the court's order;
- 2) a form of insult on the judge in the course of trial;
- 3) a publication of matters scandalizing the court.

When may a judge be said to act beyond proper judicial boundary and hence forfeit his/her immunity?

The law lays down no such boundary. Probably no action may lie against a judge acting in his judicial capacity. However, a judge or magistrate may be criminally liable if he/she accepts bribe. He may also be penalized if he improperly refuses to grant the writ of *habeas corpus* in the vacation.

When an action is brought against a judge, the onus is on the plaintiff (claimant) to prove, on preponderance of probability that the judge has acted beyond his jurisdiction.

There is some authority also that:

- i) the reverse is the case if the defendant is not a judge but a magistrate.
- ii) a magistrate may be liable if he is guilty of malice even when acting within his jurisdiction.

Judicial officers are individuals. They enjoy powers which the law has conferred on private citizens. Thus a judge may himself in his individual capacity, arrest or direct the arrest with or without warrant of any person(s) committing any offence(s) in his presence. He may commit the offender(s) for trial before another judge or even try the offender(s) by himself.

### **3.11 Other Considerations**

A Nigerian judge is expected to exhibit certain qualities such as integrity of character, patience, wisdom and courage. He is unimpeachable and must do right to all manner of people after the law and usages of the realm, without fear, favour, affection or ill-will, i.e. without partiality and prejudice.

As Lord Mackay, L. C puts it: the qualities of a judge are “good sound judgement based upon knowledge of the law, a willingness to study all sides of an argument with acceptable degree of openness, an ability to reach a firm conclusion and to articulate clearly, the reasons for the conclusion”.

## **4.0 CONCLUSION**

The judge has the ultimate responsibility in Nigeria of declaring, interpreting and applying the provisions of the Constitution and statutes. He and the law stand for the future as they stood for the past as the sustaining pillars of society. No wonder the Constitution meticulously provides for his appointment, the qualification he must possess, tenure, conditions of removal from office, and independence in carrying out judicial functions. Whether these Constitutional provisions are adequate or inadequate is a perennial subject of debate. Be prepared to subscribe your views but such views are to be founded on legal authorities.

## **5.0 SUMMARY**

We have discussed the constitutional provisions relating to appointment and removal of judges among other things. No reference was made to the attempt by the military to change the posture, as you would have learnt that in your Constitutional Law. Please refer to the unit.

## **6.0 TUTOR- MARKED ASSIGNMENT**

Do you consider the constitutional provision of a judge suffice to secure his impartiality in the dispensation of justice in Nigeria?

## **7.0 REFERENCES/FURTHER READINGS**

Karibi-Whyte, A.G. *The Relevance of the Judiciary in the Polity in Historical Perspective.*

*The Constitution of the Federal Republic of Nigeria.*

## **UNIT 4 PERSONNEL OF THE COURT OTHER THAN JUDICIAL OFFICERS**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
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    - 3.1.1 The Constitutional Position
  - 3.2 The Solicitor-General
  - 3.3 The Director of Public Prosecution (DPP)
  - 3.4 The Registrar
  - 3.5 The Sheriff
  - 3.6 Bailiffs
  - 3.7 Legal Practitioners
  - 3.8 The Police
  - 3.9 The Prisons
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

### **1.0 INTRODUCTION**

In the preceding unit, we examined the appointment and removal of judicial officers. In this unit, we shall focus on some officers who hold legal positions but who are not necessarily court officers.

### **2.0 OBJECTIVES**

When you shall have completed this unit, you should be able to:

- distinguish between judicial positions and legal offices
- explain, illustrate and critique the legal position of the Attorney-General, the legal practitioner and the police in the administration of justice.

### **3.0 MAIN CONTENT**

The personnel in the Nigeria legal system includes:

- i) Judicial officers, i.e judges and magistrates.
- ii) Legal officers other than judges and magistrates without whom the machinery for administration of justice may not function properly. Examples are the Attorney-General, the legal

practitioner, the police, prison officials, etc. (this list is not exhaustive).

### **3.1 The Attorney- General**

The office of Attorney-General was introduced to modern Nigeria by the British Colonial Administration. The chronology of Attorneys-General of the Federation, showed that one R.M Combe probably first served as Attorney-General from March 1918 to August 1918. Professor Elias informed us however, that the exact date of the origin of the office of Attorney-General before 1900 was obscure. In its remote beginning, the Attorney-General maintained the interest of the Crown before the courts. He subsequently emerged as the State's chief legal representative in the court. He appeared on behalf of the State, whether the proceedings involved civil or criminal matters.

In contemporary Nigeria, it would appear that most of the traditional functions performed by the British Lord Chancellor and those by the Attorney-General are performed in Nigeria by the Attorney-General and the Minister of Justice who is the chief law officer of the government.

#### **3.1.1 The Constitutional Position**

The Constitution of the Federal Republic of Nigeria provides that: The President may, in his discretion assign to any minister of the government of the Federation, responsibility for any business of the Government of the Federation, including the administration of any department of government. See CFRN, 1999, Section 148 (1).

Similarly the Governor of a State, may in his discretion, assign any commissioner of the government of the State, responsibility for any business of the Government by that State, including the administration by any department of government. See CFRN, 1999 Section 193 (1).

The Attorney General is accordingly assigned the Portfolio of the Minister or Commissioner responsible for the Ministry of Justice for the Federation or the State as the case may be.

The Attorney-General of the Federation is also:

- i) A member of the Federal Judicial Service Commission. (See Third Schedule, Part I , Para 12 ( c ) ) .
- ii) The public officer for the purposes of the Code of Conduct. (Fifth Schedule, part II (6), CFRN, 1999).
- iii) A member of the Council of State (Third Schedule, Part 1 B (h). also see Sections 150 and 195, CFRN, 1999.



To qualify for appointment as an Attorney-General, one must be a legal practitioner. One must also be so qualified for not less than 10 years.

The Attorney-General is a political appointee. Each government appoints its own Attorney-General. He is the chief law officer of the Federation or of the State. He represents the Federation or the State (as the case may be) in proceedings in which it is specifically mentioned. He is the legal adviser to the government. Note CFRN, 1999 Section 174 which provides that:-

1. The Attorney-General of the Federal (and also of the State) shall have power:-
  - a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly.
  - b) To take over and continue any such criminal proceedings that may have been instituted by other authority or person, and
  - c) To discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by him or any other authority or person.
2. The power conferred upon the Attorney-General of the Federation to institute, take over or discontinue a criminal proceeding may be exercised by him in person or through officers of his department.
3. In exercising his powers, the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent abuse of the legal process.

In practice, the Attorney-General may at any stage before judgement, enter a *nolle prosequi* either by stating in court or informing the court in writing that the State intends that the proceedings shall not continue. Thereupon the accused shall at once be discharged in respect of the charge or information for which the *nolle prosequi* is entered. It may be exercised through the Deputy Public Prosecutor (DPP) or the police.

The exercise of the power of *nolle prosequi* is not questionable. Besides the Attorney-General enjoys the sole right to prosecute in certain circumstances. He appears for the State in important cases at will. The decision whether to prosecute or not, the number of persons(s) to prosecute among confederates in any particular case is a quasi-judicial function. He does not take orders from the government; the court can not question it. In some jurisdictions, exercise of power of *nolle*

*prosequi* is subject to judicial review. Here, it is not. Try to subscribe to one view and with justification.

*Nolle prosequi* is meant to be used sparingly “to protect public interest, interest of justice and the need to prevent abuse of legal process”. The question one may ask is who decides these criteria?

What are the guiding principles, if any?

The following cases may enrich your understanding *R. V. D. P. Ex. C* (1994) *R. v DPP Ex. P Jones* (2000) and *R. V DPP. Ex. Manning* (2000).

### **SELF ASSESSMENT EXERCISE 1**

- 1) Dikko, a professor of law, has recently been appointed Attorney-General. He has never practiced since he graduated in law, at the Harvard University in 1988. Comment.
- 2) Discuss the role of the Attorney-General in the light of the doctrine of Separation of Power.

### **3.2 The Solicitor General**

The Solicitor General is a public officer. He is subordinate to the Attorney-General, their duties are similar.

### **3.3 The Director of Public Prosecution (DPP)**

He oversees the prosecution of criminal cases on behalf of the Federation or the State. He is responsible to the Attorney-General, advises government departments, the police, etc on important or difficult cases either on application, as a matter of law or practice or on his initiative.

### **3.4 The Registrar**

The Registrar may be a lawyer or a layman, responsible for the administrative work of courts. Invariably, the Chief Registrar is a lawyer. In some cases, he may hear and determine interlocutory applications.

Lay registrars serve in the court halls. They are the communication link between the judge and the parties or their counsels except when counsels address the courts.

You are advised to visit any court in session and you will find it richly rewarding.

### **3.5 The Sheriff**

The Sheriff is responsible for the execution of the judgements of the courts. The Chief Registrar often is the Sheriff.

### **3.6 Bailiffs**

Bailiffs are couriers. They serve court processes and are responsible to the sheriff through the Deputy Sheriff.

### **3.7 Legal Practitioners**

Legal practitioners are either solicitors, advocates or solicitors cum advocates. Solicitorship and advocacy are different. They are combined in Nigeria but separate in England.

#### **Qualifications:**

- i) A law degree in an approved institution or its equivalent.
- ii) Attendance at the Nigeria Law School and a qualifying Bar Certificate.
- iii) Good character.
- iv) Citizenship qualification.

He must also be formally called to the Bar, upon obtaining a Certificate of Call. Otherwise he is a solicitor and not an advocate.

A legal practitioner has a right of audience in any court sitting in Nigeria except where the law expressly excludes him or he defaults in paying practice fees, or the nature of his employment constitutes a disability.

The court is a temple of justice and the Bench or Inner Bar (magistrates and judges) as well as the Outer Bar (legal practitioners) are ministers in that temple of justice. The object common to both is the attainment of justice and what is right according to law.

The relationship between the legal practitioner and his client is fiduciary in nature and calls for utmost honesty, fairness and diligence. The relationship enjoys certain statutory recognition, privileges and immunities including professional secrecy.

Legal practitioners have a duty to the court. Hence they should be men of integrity who can be trusted not only by the court but also by the public for whom they act.

Certain controlling organs exist to sustain the integrity of the legal practitioners and standards of the legal profession. These include:

The Council of Legal Education  
 The Nigeria Bar Association  
 General Council of the Bar  
 Body of Benchers  
 Legal Practitioners Privileges Committee  
 Legal Practitioners Remuneration Committee and  
 The Legal Practitioners Disciplinary Committee.

What are the powers, duties and limitations of each of these controlling organs?

### **3.8 The Police**

There is a police force for Nigeria. It is known as the Nigeria Police Force. No other police force may, in law be established for the Federation or any State of the Federation. The duties of the police are specified in Section 4 of the Police Act. For example, the police in Nigeria fights crime, maintains law and order, detects and investigates crime, conducts prosecution in court, arrests, and searches, detains or releases on bail suspected offenders, summons or serves summonses, executes warrants of arrest, protects person and property among other things. Some members of the police force serve in quasi-judicial capacities, such as in the Armed Robbery and Fire Arms Tribunal, the Civil Disturbance Tribunal and the special Court-Martial. They serve as orderlies to the court, judge or Chief/Senior Magistrate. They render foreign services as the President directs.

They used to escort detainees between the prison and the court -a duty that the prison authorities had, until recently transferred informally to the police and the police by acquiescence had assumed. Now the prisons have properly assumed that role. The Police prosecute most criminal cases before the Magistrate Courts, which deal with 80 per cent of criminal cases. Some of their members who are qualified legal practitioners in Nigeria may prosecute criminal cases in both inferior and superior courts.

#### **SELF ASSESSMENT EXERCISE 2**

A national police service is constitutionally objectionable and politically dangerous. Discuss by reference to cases, events and illustrations.

#### **Legal Responsibility and Status of Police Officers**

The police constable is an officer of the peace. He has statutory powers, duties, and privileges as any other police officer, irrespective of rank or status.

As Lord Denning, MR, explained:

I hold it to be duty for the Commissioner of Police to enforce the law of the land... but in all these things he is not the servant of anyone, save of the law itself. No minister of the Crown (Federation or State) can tell him that he must or must not keep observation on this place or that, or that he must or must not prosecute this man or that one nor can any police authority tell him so. Responsibility for law enforcement lies on him; he is answerable to the law and the law alone.

### **Police Liability for Wrongful Act**

Both the offending police officer and the Inspector General of Police are liable for torts committed by the police officer in performance or purported performance of his functions. An offending police officer is responsible for the crimes he commits.

### **Complaints against the Police**

The nature of police duties involves some elements of “violence” but violence must not be deliberate or excessive. Where they are, the responsible police officer may be prosecuted.

In recent times violence against police officers in the course of their duties has increased. Perhaps, the statutory offence of assaulting or obstructing a police officer needs to be revisited and given more teeth.

Violence against the police may also be a component of the declining respect for the way the police operate. Quoting Nunn, Okonkwo enumerated other complaints against the police, namely:

- a) The exaggeration by the police in evidence in court.
- b) Fatuousness in dealing with police demonstration.
- c) Ineptitude in handling the public on occasion of public procession
- d) Incivility to members of the public and
- e) Unnecessary delay in attending to complaints.

These complaints may tend to widen the gap between the police and the public; they may also be reactions to the treatment they themselves encounter, the perception of the police organization or other stereotype.

How do you react to this with justification?

### **3.9 The Prisons**

It is hardly recognized that the prisons form part of the Nigeria legal system. The prison is a federal agency responsible for the convicted offenders during the period they are incarcerated.

The United Nations Congress on Crime Prevention and Treatment of Offenders has laid down a Standard Minimum Rules for Prisons, which Nigeria has adopted. Thus the treatment of persons sentenced to imprisonment or a similar measure shall have as far as the length of the sentence permits, the purpose of:

- i) Establishing in them, the will to lead law abiding and self supporting lives after their release and to fit them to do so.
- ii) Encouraging their self-respect and developing their sense of responsibility.

In essence the objective of the prison system is to reform and rehabilitate the offender. Hence the aphorism that the “offenders are sent to prisons as punishment but NOT for punishment”.

### **SELF ASSESSMENT EXERCISE 3**

Think about the aphorism just cited critically. Examine its validity in the light of your experience with prisons and treatment of offenders in Nigeria.

Still on treatment of offenders, legal writers and criminologists have claimed that the symbols of civilization include:

- i) The recognition of the rights of suspects at the police station, of accused persons in court and convicts in prisons.
- ii) Constant heart searching by the police, the court and prison authorities.
- iii) Desire and eagerness to rehabilitate offenders in a world of industry,
- iv) Tireless effort towards discovery of curative and regenerative processes in regard to treatment of crimes and criminals.

The public generally and the Bar and media in particular must be alert to encourage prison objectives and to resist any voice of indolence or cynicism that might belittle any efforts or hamper their further development and actualization. No one can afford to be indifferent. You too have a stake in the matter.

#### **4.0 CONCLUSION**

The Attorney-General is the chief law officer of Government. As a minister of the Federation or commissioner in the State, he may be assigned responsibility for any business of government (Federal or State as the case may be). He heads the Ministry of Justice, prosecutes important case and appears for the Federation or State as appropriate. Legal practitioners represent their clients. Sometimes they appear for the Attorney-General. The police prosecutes the majority of criminal cases while the prison strives to reform and rehabilitate the offender.

#### **5.0 SUMMARY**

The Attorney-General, legal practitioners, the police and the prisons are part of the personnel of the Nigeria legal system. They play important statutory and complementary roles in the administration of the criminal justice.

#### **6.0 TUTOR-MARKED ASSIGNMENT**

1. Write a critique of “*Nolle Prosecui*”
2. Rehabilitation of the offender is a public concern. Discuss.

#### **7.0 REFERENCES/FURTHER READINGS**

Elias, T. (1972). *The Nigerian Magistrate and the Offender*. Benin City: Ethiope Publishers.

## **MODULE 3**

Unit 1	Administration of Justice: Court Structure Unit
2	Administration of Justice: The Civil Process
Unit 3	Administration of Justice: The Criminal Process
Unit 4	Administration of Justice: Criminal and Civil Processes

### **UNIT 1 ADMINISTRATION OF JUSTICE: COURT STRUCTURE**

#### **CONTENTS**

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	Judicial Powers
3.2	The Court System
3.3	Jurisdiction
3.3.1	Jurisdiction: General or Limited
3.3.2	Jurisdiction Defined
3.3.3	Classification of Jurisdiction
3.4	Venue
4.0	Conclusion
5.0	Summary
6.0	Tutor-Marked Assignment
7.0	References/Further Readings

#### **1.0 INTRODUCTION**

In Nigeria, most issues between parties do not get to the court. In many cases, parties recognize and perform their legal obligations. Where there are controversies the parties involved often settle or resolve and dissolve them without recourse to the courts. Some certainly do get to the courts. In deciding such cases before the court between the parties involved in the controversy, judges determine certain rules of conduct which may turn out to become case law. In this unit, we shall examine the Court System and how cases get to the court, which exercises the



responsibility to interpret the laws, and apply them to the issues in dispute.

## **2.0 OBJECTIVES**

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

describe, explain, illustrate and critique the term jurisdiction  
describe and explain the Nigerian court system.

## **3.0 MAIN CONTENT**

### **3.1 Judicial Powers**

The judicial powers of the Federation and of the States of the Federation are vested in the court. See CFRN, 1999 Section 6. The term judicial powers include the inherent powers of a court of law, and the sanctions they can impose.

Subject to the provisions of the Constitution the courts exercise powers over:

- 1) All matters between persons, or between government or authority and any persons in Nigeria
- 2) All actions and related proceedings. See CFRN 1999 Section 6(5).

### **3.2 The Court System**

The court system is the channel through which laws are interpreted and applied.

The diagram above offers a general guide only. It does not contain every court. However, it suffices for your present purpose. Can you attempt to sketch it? Note the courts and whether they have original and appellate jurisdiction. Note also that the courts are not a series of Appeal Courts.

### **SELF ASSESSMENT EXERCISE 1**

Can you attempt to sketch the structure of the courts in your state? Indicate the courts, their titles, original and appellate jurisdictions where applicable.

It is important that you recognize that the courts are not a series of appeal courts.

### **3.3 Jurisdiction**

Jurisdiction is a very crucial issue in the court system. You should understand it from the outset.

### **3.3.1 Jurisdiction: General or Limited**

Some courts exercise general jurisdiction, and powers to hear all kinds of cases. Other courts have special or limited jurisdiction; they are limited in the types of cases they hear and decide. For example, a court may only hear a matter within a specified geographic area over which the judgement of the court will have effect. Hence decisions of courts in Nigeria are ineffectual outside Nigeria's borders.

#### **Jurisdiction as a Question of Law**

Jurisdiction is not conferred by the parties; it cannot be implied; it derives from the law. The jurisdiction of each court is expressly prescribed in the instrument, (Constitution or Statute) which brings the court into existence.

A legislation may expand the jurisdiction of the court but it cannot derogate from it, save by constitutional amendment.

### **3.3.2 Jurisdiction Defined**

The often quoted expression on jurisprudence which defines or describes the term: Jurisdiction, is by Bairamien, F.J who said:

A court is competent (i.e. has jurisdiction) when:

- a) It is properly constituted as regards members and qualification of the members of the bench and no member is disqualified for one reason or another and
- b) The subject matter of the case is within its jurisdiction (i.e space of authority) and there is no feature of the case, which prevents the court from exercising its jurisdiction (i.e Power or authority) and
- c) The case comes before the court, initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction (i.e Power's or authority)

Read the case of *Madukolu v. Nkemdilim* (1962).

In essence, a court has jurisdiction if:

- a) It has power to pronounce authoritatively and conclusively what the law is
- b) It has power to determine the legal rights and liabilities of parties in dispute.
- c) The subject matter and the parties and or property involved in the dispute are within the purview of the court.
- d) The controversy has arisen within the State or area over which the court exercises its powers.
- e) The parties to the litigation, (in particular the defendants) are available within the geographic area

### **3.3.3 Classification of Jurisdiction**

(A) Jurisdiction may be *in persona* or *in rem*

#### **i) *In persona* jurisdiction**

This is jurisdiction over the parties involved in the lawsuit. A court has jurisdiction over the defendant if:

- a) The parties can be served within the State or territorial jurisdiction of the court.
- b) The parties are resident in the State.
- c) In the case of a corporation, it is incorporated in, has an office or does business within the boundaries of the court's jurisdiction.

A plaintiff or claimant is deemed to submit to the jurisdiction of a court as soon as he files a law suit.

#### **ii) *In rem* jurisdiction**

This obtains where the property, which is the subject matter of the lawsuit is within the jurisdiction of the court.

(B) Jurisdiction may be original or appellate.

#### **i) Original Jurisdiction**

This refers to the powers of a trial court to hear and determine a controversy when it is first brought for adjudication. It is the court's power to entertain a matter, which can originate or be commenced in the particular court.

(C) Federal and State Jurisdiction

Federal courts are established by the Constitution or Statute. The High Courts, (Federal and State) have unlimited jurisdiction over matters

assigned to them. The Federal High Court may be regarded as a specialized court because the controversies which come before it involve Federal questions. The State High Courts cannot hear the cases which fall within the purview of the Federal High Court. To that extent also these courts are limited.

Certain offences are Federal and they defy state boundaries, Others are States and are limited by state boundaries. In order to mitigate the inconveniences at the court level which may arise from the Federal system and division of powers between the States and the Federal governments,, State courts generally are empowered to exercise Federal powers over Federal offences partly or fully occurring within the State except where otherwise expressly provided. This is eminently a sensible scheme.

#### **i) Federal Courts**

The Federal courts are the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the Customary Courts of Appeal and the Sharia Court of Appeal of the Federal Capital Territory. Also included in the list of Federal courts are other courts authorized by law to exercise jurisdiction on matters within the Federal legislative competence.

#### **ii) State Courts**

State courts include the High Court of the State, Sharia Court of Appeal of a State, the Customary Court of Appeal of a State and such other courts as may be authorized by law to exercise jurisdiction on matters within the legislative competence of the State.

### **3.4 Venue**

A particular court has power to hear and entertain a case only within a specified geographic area. A court in Lagos cannot sit in Kaduna over a matter in Kaduna State or any other State and vice versa. The Federal High Court is an exception to this general rule.

#### **General**

The issue of jurisdiction strikes at the competence of the court. It is fundamental and once there is a defect in competence (for example where a court entertains a matter over which it lacks jurisdiction), the entire proceeding is a nullity, however well conducted or brilliantly decided. Hence jurisdiction has been variously described as the “life wire”, “blood” “bedrock” and “foundation” of adjudication.

For the same reason also, any challenge of jurisdiction of court over a matter must be first settled before taking any or further step in the matter.

Read the cases of *Ojo-Ajao v Ors v. popoola Ajao & Ors* (1986) *Attorney-General (Anambra State) v. Attorney-General (Federation)* 1993, *Gafar v. Government of Kwara State & Ors* (2007)

#### **4.0 CONCLUSION**

Jurisdiction may mean:

- The general power of court, or exercise of authority over persons and things within its competence;
- The matters to which the court has authority to hear (i.e. the court's powers to decide a case);
- The geographic area where the court operates.

#### **5.0 SUMMARY**

The judiciary has the primary responsibility to interpret and apply laws through the court system in the process of settling controversies brought before the court. You have been acquainted with the different courts in which civil and criminal matters are administered. In both civil and criminal matters, jurisdiction has been described as the life wire, blood, bedrock and foundation of adjudication. Anything done outside it is a nullity.

#### **6.0 TUTOR-MARKED ASSIGNMENT**

Jurisdiction has been described as “the life wire, blood, bedrock and foundation of adjudication”. Discuss with reference to illustration and decides cases.

#### **7.0 REFERENCES/FURTHER READINGS**

The *Constitution of the Federal Republic of Nigeria* (CFRN). 1999.

Behr, Barbara E.(1980). *Study Guide to Accompany West: Business Law*. New York: West Publishers.

Slapper, Gary. (2004). *The English Legal System* (7<sup>th</sup> ed). London: Convendish Publishing Limited.

## **UNIT 2 ADMINISTRATION OF JUSTICE: THE CIVIL PROCESS**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Forms of Action
  - 3.2 Commencement of Civil Action
  - 3.3 Procedures
  - 3.4 Pleadings
  - 3.5 The Pre-Trial Process
  - 3.6 The Trial
  - 3.7 Determination of Law and Facts
  - 3.8 Remedies
- 4 Conclusion
- 5 Summary
- 6 Tutor-Marked Assignment
- 7 References/Further Readings

### **1.0 INTRODUCTION**

The courts determine actions and proceedings relating to questions of civil rights and obligations in all matters between persons, or between government or authority and any person in Nigeria. The proceedings for resolving such disputes are either civil or criminal. This unit is devoted to civil matters and civil procedures.

### **2.0 OBJECTIVES**

When you shall have successfully completed this unit, you should be able to:

- determine the forms of action in litigation
- identify the different steps or stages in a civil proceeding.

### **3.0 MAIN CONTENT**

#### **3.1 Forms of Action**

The earliest form of action was private vengeance. The strong man, armed, was alone secure of life and property; might, if not itself right, was at least its mother. Every injury then was a wrong. As it grew stronger, the State intervened only for the purpose of settling the amount of pecuniary compensation that might be paid in substitution for personal vengeance. Pecuniary compensation was payable to the injured person or his next of kin for the wrongs. The sovereign or State demanded fines for itself in respect of certain other wrong doing. Subsequently punishment of forfeiture of property, mutilation, and later still, death were imposed for wrongs, which were so serious that neither compensation nor fine would suffice. Thus criminal law, law of contract and of tort is comparatively modern. In fact Criminal law grew from civil process; as the earliest function of courts was to regulate blood-feud.

There were also prescribed forms of action in the early law for trespass. Where there was no form of action for a particular wrong, there was no remedy. Judges resorted to fiction in order to accommodate seemingly novel cases. Early forms of action have ceased to exist and today where there is a wrong, there is a remedy and that remedy is either civil or criminal.

#### **3.2 Commencement of Civil Action**

A Civil procedure seeks to systematize, in an intelligible form, the rules and practice of procedure in civil process. These rules can be found in the different Court's Civil Procedure Rules, Statutes and Case Law.

There are four ways of instituting a civil action, namely:

##### **1. Writ of Summons**

This is in printed form. It is obtained from the Court Registry. In some jurisdiction, the form is completed by the Registrar; and in others by the legal practitioner of the party seeking to sue. It is signed, and sealed when fees are paid. Writ of summons is most widely used. Where there is doubt as to the appropriate form, it is advisable to go by way of writ of summons.

##### **2. Petition**

Sometimes the law may prescribe the use of a particular form. For example, the law provides that remedy shall be by way of petition in matrimonial cause divorce proceeding or election petition.

### **3. Originating Summons**

This is an unusual form of action. It applies where there is a specific statutory provision for action. The matrimonial causes rules, practice and procedure demands that in claims for alimony *pendente litem*, originating summons applies. Originating summons is also applied for a claim under the Public Land Acquisition Law. It applies in non-contentious matters and by affidavit only. Where dispute arises later, it is varied to an action commenced by writ of summons.

### **4. Motion of Application**

This is appropriate for interlocutory matters and for prerogative writs or orders.

## **SELF ASSESSMENT EXERCISE 1**

How a matter may be brought before the court. Describe any one of the ways critically

### **3.3 Procedures**

Judicial procedure in Nigeria is adversary in nature. A party who feels injured by the action or commissions of another, consults a legal practitioner, narrates the story to him, and answers questions the latter may choose to ask.

The counsel satisfies himself as to the probable facts of the matter, that his client has a cause of action based on the relevant law. He identifies possible parties, the remedies available to the subject, possible costs, jurisdiction of court and venue. He adverts his mind to possible vitiating factors e.g. statute of limitation, immunity of any kind.

### **3.4 Pleadings**

The counsel decides on the appropriate form of action, and gist of complaint. He states expressly and in logical sequence, facts upon which plaintiff or claimant bases his/her cause of action and the remedy sought. He files these with the clerk of court, pays the necessary fees as assessed by Court Registrar who signs and seals the form, having been duly completed. It is the plaintiff or claimant who initiates proceedings. Where a matter is initiated by a wrong form of action, the case may be



struck out. Isn't it amazing that the forms of action which have been abolished are still reigning from their graves!

The original copy of every document filed is retained in court. A copy of every document filed must be served on the opposite side by the Sheriff, Deputy Sheriff, and officer of court, police, other persons specially appointed and in any manner the court may direct. The counsel may himself serve. Any writ filed, signed and sealed must be served within 12 months; but it may be extended half yearly. After service, the serving officer sends to the court a Certificate of Service, Affidavit of Service or Certificate of Posting as the case may be.

The defendant or the party against whom action is brought, has a specified period within which to answer the complaints against him or her and the remedy sought. There are prescribed rules for doing so. He may deny, admit wholly or partially or otherwise challenge the legal validity of the plaintiffs' claim. He/she may set forth a counter-claim or raise affirmative defence, giving reasons why the plaintiff's action must be dismissed. Whatever he files are similarly served on the other and such service is acknowledged as earlier set out. If the other side has any further reply to make to issues raised in answer, he does so within the period specified by law.

Then the issues at that stage are said to be joined. Each side has the other's case, claim and defence, and is able to determine the area admitted or disputed. Either party takes out a Summon for Directions, praying the court to narrow down the area(s) of controversy and set time for trial. Parties or their counsels appear before the court. The judge names a date acceptable to both sides for trial. Parties notify their witnesses. The counsels hold with their clients pre trial interviews to acquaint them with court procedure, how to give evidence and what evidence he/she may be required to give.

### **3.5 The Pre-Trial Process**

After the plaintiff's pleadings, the defendant's answer and the plaintiff's reply, certain pre-trial procedures may be considered necessary. Examples are:

#### **i) Demurrer Proceedings**

This is a motion by a defendant, claiming as a matter of law, that the plaintiff has not stated a claim upon which relief can be granted.

#### **ii) Motion for Judgement in the Pleadings**

It is open to either party to claim that based upon the pleadings, there are no issues requiring trial.

### iii) **Motion for Summary Judgement**

Where a genuine issue of material fact does not exist, either party may apply that the issue of law should be decided by the judge.

### iv) **Discovery**

This is a procedural device to obtain information or a compulsory disclosure at a party's request for information relating to the subject matter of litigation. Such a procedural device may include:

- a. Written questions or set of questions submitted to an opposing party in a law suit as part of discovery and the other answers.
- b. Sworn testimonies, given before and recorded by court officials for later use in court or for discovery purposes.
- c. A written request for admission made by one party to the other relating to matters involved in the case, documents, objects.
- d. Either party may pray the court for the production by the other party to the suit or proceedings upon oath, of any documents in his/her possession or power relating to any matter in question in the suit or proceedings.
- v) Subject to individual's right of privacy, the court may grant an application for physical and mental examination.
- vi) This has become part of the judicial proceeding in some states. In other states it may be initiated by a party or the court.

## **SELF ASSESSMENT EXERCISE 2**

Suppose you are a counsel to a party in a lawsuit, what action between the time a suit is filed and the trial stage do you think probable?

### **3.6 The Trial**

The preliminaries are concluded, parties or their counsels or both appear in court, the judge fixes a date acceptable to both sides for the trial.

Parties notify their witnesses and arrange for them to be present in court as scheduled.

Counsels hold with their clients pre-trial interviews to acquaint them with the courts proceedings, how to give evidence, and what evidence may be required of them. On the trial date, the court is set. The case is called, the parties may make opening statements. The plaintiff (claimant) calls his/her first witness. He leads him/her in evidence in chief. The other party cross examines the witness. The party who called him/her as a witness re-examines him/her. It is important that you note the purpose of evidence in chief, cross examination and re-examination.

After the last witness for the plaintiff has been re-examined, the plaintiff closes his/her case. The defence opens. His/her counsel may or may not make any opening speech. He also calls his witnesses one after the other. Each of the defence witnesses gives evidence in chief, cross examination and re-examination, just as the plaintiff's had done until the last witness has been re-examined. The defence closes his case.

The counsel for either of the parties may request to enter a verdict, depending on the state of evidence. Alternatively, both counsels may address the court. The court adjourns for judgement. On the appointed date, the Judge/Magistrate reads the judgement of court. The injured party may lose or succeed. Whosoever succeeds automatically gets damages. Where the suit succeeds the court considers the plaintiff/claimants prayers only and grants such remedies (legal and equitable) as he considers just.

### **SELF ASSESSMENT EXERCISE 3**

Write an essay on Court Trial Day, describing the court scene; groups of persons present and the trial process stage by stage before verdict.

### **3.7 Determination of Law and Facts**

The determination of facts of the case and what law to apply are separate and distinct functions. This distinction is important and must be clearly made. It has to be evident on record that the distinction has made. In a jury system, the jurors are tier of facts. Judges are tier of laws and they instruct the jury on matters of law. In other jurisdictions, such as ours where there is no jury system the two processes are entrusted to the judge. Even so, the separateness of the dual functions of finding of facts and applying the law must be maintained. One reason for this is that the leave of court is required for any appeal on issues of facts. Conversely, appeal on a point of law is a right and no leave of court need be first had and obtained.

#### **3.7.1 What is a Fact or What are Facts?**

A fact is any thing known to have happened or to exist, an aspect of reality, a piece of verifiable information. It may be an event, occurrence etc. as distinguished from its legal effect, consequences or interpretation (*New English Dictionary & Thesaurus*)

“All people are mortal” is a statement of fact. In relation to the law of evidence, John Wigmore defines fact as;

“Any act or condition of things assumed for the moment, or happening or existing”.

In the Evidence Act, a “Fact” includes:

- a) Any thing, state of things, or relation of things, capable of being perceived by the senses.
- b) Any mental condition of which any person is conscious.

#### **SELF ASSESSMENT EXERCISE 4**

Read the case of *Donogue v. Stevenion* (1932) and distinguish the statement of facts and the point of law.

### **3.8 Remedies**

Remedies may be legal, equitable or prerogative orders. Historically legal remedies, which the court of law may grant are:

- i) Possession of land
- ii) Possession of items of value
- iii) Money as compensation

#### **1. Legal Remedy**

Money Compensation

Money compensation now takes the form of damages and this may be:

- a) Compensatory
- b) Aggravated
- c) Exemplary
- d) Nominal, or
- e) Contemptuous

#### **2. Equitable Remedies**

When the remedies at law are inadequate, unavailable or would result in hardship, the court of law may grant equitable relief viz:

- a) Specific Performance
- b) Injunction
- c) Rectification
- f) Rescission

### **3. Prerogative Orders**

These include Orders of:

- a) Certiorari
- b) Prohibition
- c) Mandamus
- d) Injunction (including mareva injunction and Anton Piller Order)

### **Declaratory Judgement**

A declaratory judgement is a binding adjudication (based on the construction of an instrument or enactment) that establishes the rights and other relations of persons interested, without providing for or ordering enforcement.

## **4.0 CONCLUSION**

A civil process may commence by way of writ of summons, petition, originating summons and motions. This is followed by exchange of pleadings, joining of issues, interlocutory matters, trials, and verdict. The judge declares the facts as trier of fact, and determines and applies the law as a trier of law. If the facts are proved on preponderance of evidence, he grants remedies which may be legal, equitable, prerogative orders or merely declaratory.

## **5.0 SUMMARY**

You have gone through a civil process, the stages it passes through from commencement to final disposition. Attempt to rehearse or dramatize the process. Remember that the objective of the civil court is to ensure a high quality justice.

## **6.0 TUTOR-MARKED ASSIGNMENT**

Considering the jurisdiction, procedure and administrative machinery of civil justice, do you consider the civil process in Nigeria satisfactory, efficient and effective?

## **7.0 REFERENCES/ FURTHER READINGS**

Slapper, Gary (2004). *The English Legal System* (7<sup>th</sup> ed). London: Convendiish Publishing.

Aguda, Akinola (1976). *Principles, Practice and Procedure in Civil Action*. London: Sweet & Maxwell.

## **UNIT 3 ADMINISTRATION OF JUSTICE: THE CRIMINAL PROCESS**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Commencement of a Criminal Process
  - 3.2 The Charge Room
  - 3.3 The Crime Branch
  - 3.4 The Arraignment & Trial Process
  - 3.5 Mode of Trial
  - 3.6 Appearance in Court
  - 3.7 The Trial
  - 3.8 The Verdict
  - 3.9 The Sentence
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings.

### **1.0 INTRODUCTION**

No person shall be convicted of a criminal offence in Nigeria unless the offence is defined and its punishment is prescribed in a written law. The only exception to this rule is contempt of court. It is also presumed in law that every person (including one suspected of crime or even facing a charge before the court) is innocent until he is proved guilty. Each State of the Federation has its machinery of criminal justice for determining the criminal liability for one's acts or omissions. This is the focus of this unit.

### **2.0 OBJECTIVES**

When you have read this unit, you should be able to:

- explain, illustrate and critique the machinery for criminal justice in the Nigerian legal system
- explain the rights of persons accused of crimes
- identify the problems in the criminal justice system and attempt to proffer solutions.

### **3.0 MAIN CONTENT**

#### **3.1 Commencement of a Criminal Process**

Any police officer may, with or without warrant, arrest any person who commits an offence in his presence or whom he suspects, upon reasonable grounds of having committed an offence. In certain circumstances, a private person may also arrest another without warrant and as soon as practicable, hand him/her over to the police.

Similarly, a judge or magistrate may arrest or order the arrest of any person who commits an offence in his presence and within his/her jurisdiction. A person may also go to the police and lodge a complaint at a Charge Room that a crime has been committed by a suspected person (known or unknown)

#### **3.2 The Charge Room**

At the charge room, the officer in charge (charge room officer) hears the complaint, records it and attaches a label to his summation of facts in the light of his knowledge of law. If the label is other than a crime, he dismisses the complaint. The charge room officer may dismiss any complaint on the ground that it is false, trivial, vexatious, frivolous or civil. Otherwise, he admits the case, records it and refers both the complaint and the suspects if any to the crime branch for investigation accordingly. As a matter of practice, the charge room officer must record the name and address of the complainant, time, date, place and nature of every complaint he/she receives in the course of his/her duty, as well as his/her actions, and decisions on each.

#### **3.3 The Crime Branch**

The crime officer receives the complaint referred to him/her for investigation. An investigating police officer (IPO) or a team of investigating police officers is assigned to it.

When a police officer is endeavoring to discover whether or by whom an offence has been committed, he is entitled to question any person(s) whether suspected or not from whom he thinks that useful information may be obtained. The IPO obtains voluntary statements from the complainant and from witnesses if any. He visits the scene, gathers evidence, and tests the evidence at his disposal. He identifies the author(s) of crime and formally effects arrests. He informs the suspect(s) of the crime for which he (IPO or other) is arresting them and informally cautions them (the suspect(s)) that anything they say would be taken down in writing. The phrase "...and may be used in evidence AGAINST him/her" is not to be used.

The suspect may make (if he/she chooses) a voluntary statement under a formal caution and lead the IPO to his/her witnesses, if any. It is important that the suspects cooperate with the IPO in the process of investigation. The suspect may be released on bail if the crime is bailable or within police powers to grant bail. Otherwise, he may be remanded pending arraignment "as soon as practicable". Where the arrest is by warrant, it is usual to find the bail terms endorsed on it. Otherwise he is taken before the issuing magistrate or judge. Complaints against juvenile delinquents or women are generally assigned to female investigating police officers (W/IPOs).

On completion of investigation, the IPO or W/IPO puts up a comprehensive report and recommendation to his/her "superior" officer who decides. He may refuse the case because, in his opinion, there are no credible witnesses; it is false, frivolous, vexatious, trivial, civil or contrary to public policy to prosecute. Certain cases are to be referred to the Attorney-General (either as a matter of law or as a matter of practice) for legal advice, or prosecution. Where the case diary is not so referred the police officer may prefer a charge.

A charge means the statement of offence or statement of offences with which an accused is charged in a summary trial before a court.

### **SELF ASSESSMENT EXERCISE 1**

1. Mention 5 cases which the police must refer to the Attorney-General.
2. Mention 5 cases which the police may or may not refer to the Attorney-General.



### 3.4 The Arraignment and Trial Process

A criminal process may be initiated in any of the following ways:

1. Bringing a person arrested without a warrant before a court upon a charge by a police officer.
2. Laying a complaint before a Magistrate or High Court.
3. Filing information before a High Court with the consent of the judge.
4. First information report before a court.

For more details, read the following: The Criminal Procedure Act (CPA) Sections 77, 78, 340 and Criminal Procedure Code (CPC) Section 143. The choice between a “charge or “information” depends on the nature and seriousness of the crime and what the law stipulates.

The charge or the information sets out the particulars of the accused, the act or omission which forms the subject matter of charge, time, place, date of the act or omission and the law contravened or the law specifying punishment. The original copy of the charge sheet or information is retained by the court. A copy is usually served on the accused.

### 3.5 Mode of Trial

A trial may take any of the following forms or modes:

1. A summary trial for a summary offence
2. A summary trial for an indictable offence
3. Trial following a preliminary inquiry.

Statutes permit some indictable offences to be tried summarily. The motivation of the prosecutor in this regard may range from convenience, expedition, and desire to obtain a plea of guilty. Note Lord Parker’s caveat, “there is above all, the proper administration of criminal justice to be considered, question such as the protection of the society and the stamping out of the sort of criminal enterprise, if it is possible. In serious cases therefore, it may not be acting in the best interests of the society by inviting summary trial”.

See *Coe (1969)*, Also *Broad (1979)*

### 3.6 Appearance in Court

At the court, the registrar calls on the accused. He goes to the dock; the registrar confirms his name, reads the charge aloud, asks him if he understands and wants to be tried summarily or on indictment at the

high court, takes his plea if he elects summary trial and having confirmed that the accused understood the charge(s). The court provides an interpreter at State expense, as appropriate. Having elected trial, the accused may plead as follows:

**i) Guilty**

The police prosecutor thereat gives a resume of evidence. The court may confirm the plea and find him guilty if it satisfies itself that the accused clearly understands the meaning of the charge in all its details and essentials and also the consequence of his/her plea. The court may yet find him not guilty despite his admission of guilty in appropriate cases.

**ii) Not Guilty**

The court then records it, considers his bail or remand and adjourns for trial.

**iii) Autrefois Acquit**

This is pleaded if the accused person had earlier been tried and found “not guilty” for the same offence.

**iv) Autrefois Convict**

By this defence, the accused says that he had already been tried, and convicted for the same offence.

**v) Pardon**

This is a claim that he had been tried, convicted and pardoned by the State for the same offence.

**vi) Keeping Mute to Malice**

He may keep mute to malice, that is not saying anything and the court enters a plea of “Not Guilty”.

### **3.7 The Trial**

That is the hearing of evidence by a magistrate or judge and the full inquiry into a case culminating in a verdict. Parties and their witnesses are present in court. The case is called, the accused enters the dock while the witnesses leave the court and out of hearing. The prosecutor opens his case. He may or may not make a statement. He calls his first witness, leads him/her in evidence-in-chief. The accused or his counsel cross

examines and the prosecutor re-examines. The process is repeated for each witness. At the conclusion of the case for the prosecution (i.e when the court is done with his last witness), the accused must be warned of his right. These rights include:

- i) His right to elect to keep mute, remain where he is at the dock, not saying anything.
- ii) His right to elect to give evidence from where he is at the dock and he will neither be sworn nor questioned.
- iii) His right to elect to testify on oath in the witness box and be cross examined.

The accused must elect and his election recorded. Where he testifies in the witness box as a witness, he, like any other witness or witnesses, is led in evidence-in-chief, cross examined and re-examined. Should he introduce new matters, in the course of re-examination, the prosecutor will be given opportunity to rebut it. The magistrate/judge has power to call any witness or call on an earlier witness. At the conclusion of the case for the defence, the counsels on both sides address the court.

The court serves as both judge and jury. As a jury, the court must set out the facts of the case as it finds. As a judge, the court applies the law to the facts. There are general as well as special defences for a crime. You will learn more of this in your criminal law course.

### **3.8 The Verdict**

The court must give a verdict of either “guilty” or “not guilty” Upon a verdict of not guilty, the accused must be discharged and acquitted. Where the court finds that the prosecution has proved its case “beyond reasonable doubt” it would pronounce a verdict of “guilty”, if the accused is sane or “not guilty by reason of insanity” if he/she is insane.

### **3.9 The Sentence**

Upon a finding of “guilty” the court asks the accused (now a convict) if he/she has anything to say why a sentence should not be passed on him/her according to law. This is what is usually referred to as “allocutus”. The court receives evidence of the accused’s antecedent. This comprises evidence of anything in the convict’s favour, previous conviction, date of birth, education, employment, domestic and family life, circumstances, general reputation and association, date of arrest, whether he/she has been on bail or remand or if previously convicted, the date of last discharge. The totality of this information enables the court to arrive at an appropriate sentence. The sentence of court may be one or more of the following:

Death sentence (under 17, or pregnant women cannot be sentenced to death)  
 Imprisonment  
 Flogging (i.e. caning)  
 Fines  
 Forfeiture  
 Seizure  
 Disqualification  
 Probation  
 Discharge (absolute or conditional)  
 Compensation  
 Restitution  
 Costs  
 Damages  
 Reconciliation  
 Deportation  
 Binding over  
 Destruction

Except where it is mandatory, the choice and question of sentence is discretionary. In theory, the objective of sentence ranges from retribution, deterrence, to reformation and rehabilitation, or reparation. In practice the magistrate or judge considers such factors as:

Where the crime was planned  
 Whether the offender is a habitual criminal  
 Prevalence of the particular form of crime  
 Whether violence was employed  
 Public interest  
 Nature of the crime  
 Previous conviction for similar offence (if any).

The sentence is the gist of criminal proceedings and as Justice Stephen Brown has noted:” it is to a trial what the bullet is to a gun”.

### **Limitation on the Role of the Prosecutor**

Herbert Stephen emphasized that the object of the prosecutor is “not to get a conviction without qualification, but to get a conviction only if justice requires it”.

Ideally, the prosecutor takes no part or minimum part in the sentencing process. His proper role is to see that the prosecution case is fairly presented and that all weaknesses in the defence case are identified and fairly exposed to court”

The prosecutor is to state all the relevant facts of the case dispassionately, whether they tell in favour of a severe sentence or otherwise. Crompton likened the proper motivation of a prosecution to that of a Minister of Justice. Nonetheless, the prosecutor is entitled to present a strong case, to hit hard, but with blows that are scrupulously fair. Note the difference between the two sides:

1. The state (represented by the prosecutor) is interested in justice.
2. The defence is interested in obtaining an acquittal within the limit of lawful procedure.

#### **4.0 CONCLUSION**

A criminal process may be initiated by arrest, complaint, information or first information report depending on statute, convenience, expedition, public interest and proper administration of criminal justice. A summary offence is tried summarily, and an indictable offence either summarily or on indictment. Appearance in court of parties is indispensable. So also is the observance of certain rights conferred on an accused person.

#### **5.0 SUMMARY**

We have discussed the process of Criminal Justice Administration. We have examined the different ways in which a person charged with a crime may be brought before the court, his pleas and his rights. The court enters a verdict of either acquittal if he is not guilty or a sentence if he is.

#### **6.0 TUTOR-MARKED ASSIGNMENT**

1. What are the rights of a person charged before the court for an offence?
2. Write a critique of the administration of criminal justice in Nigeria.

#### **7.0 REFERENCES/FURTHER READINGS**

Slapper, G. (2004). *English Legal System*. London: Cavendish.

Obilade, O. *The Nigerian Legal System*. London: Sweet & Maxwell.

## **UNIT 4 ADMINISTRATION OF JUSTICE: CRIMINAL AND CIVIL PROCESSES**

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- 2.0 Objectives
- 3.0 Main Content
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### **1.0 INTRODUCTION**

The preceding unit was an explanation of the criminal process administration of the justice system in Nigeria. In this unit, we will deal

with additional features of criminal proceedings and issues of bail. Attempt will be made also to distinguish civil and criminal processes.

## **2.0 OBJECTIVES**

When you have successfully completed this unit you should be able to:

explain the concepts and hazards of private prosecution  
distinguish between civil and criminal proceedings.

## **3.0 MAIN CONTENT**

### **3.1 Who May Initiate a Criminal Process?**

The Attorney-General of the Federation as well as the Attorney-General of a State may commence a trial on an information. Other organizations that may prefer charges and prosecute on behalf of the state include:

The Nigeria Police (Station, State and Federal levels)  
The Custom and Excise  
The Immigration  
Economic and Financial Crimes Commission (EFCC)  
Independent Corrupt Practices Commission (ICPC)  
National Drug Law Enforcement Agency (NDLEA).

The title of a charge or information may differ according to its source. Examples Police v XYZ – Signifies charges from the Police Station; Commissioner of Police v BCD – refer to cases charged by a state CID; IGP v XYZ – refer to cases from Force CID, Federal Republic of Nigeria/State/Republic v ?? are more often from the Attorney General  
Note: There are no fixed rules on title.

### **3.2 Private Prosecution**

Any person – be he/she a victim or not a victim of the offence-may institute a criminal case. Secondly, the Attorney-General may instruct a private legal practitioner to appear in a criminal matter on his behalf.

A private prosecutor bears a number of burdens:

He/she bears the expenses of the proceedings  
He/she may be liable to pay such cost as may be ordered by the court if the private prosecution does not succeed.  
He/she may pay travelling expenses to enable his witnesses to attend the court to give evidence.

He/she must subscribe his/her name to the title of the charge or information.

He/she shall sign the charge or information

A law officer shall certify on the information that he has seen the information and declines to prosecute, at the public instance, the offence therein set forth.

The private prosecutor shall enter into a recognizance in a specified sum together with one surety to be approved by the registrar in the like sum, to prosecute that information to conclusion.

In lieu of entering into such a recognizance, he/she shall deposit specified amount in court.

### **3.3 The Limitation Act**

The Limitation Act does not affect criminal proceedings. Only civil proceedings may be barred after a specified period of time. A criminal proceeding may be instituted at any time after commission of the offence.

#### **3.3.1 Exceptions**

Statute has provided certain time limits for specified crimes from the date of commission of offence, when proceeding must commence.

#### **Examples**

Treason	24months
Sedition	6months
Defilement	2months
Specific custom and excise offences	7years

### **3.4 Running Offences**

The prosecution of running offences may be initiated where:

The initial element of the offence takes place.

The offender locates

Any offence committed in Nigeria aircraft or on board a Nigerian ship or in the high seas within Nigeria's territorial waters is deemed to have been committed in Nigeria and may be tried in any court in Nigeria.

An offence committed by a confederate in different countries may be prosecuted in Nigeria if any of the confederates is within the jurisdiction.

### **3.5 Bail**



Archbold defines bail as a surety or sureties taken by persons duly authorized for the appearance of an accused person at certain date or place to answer and be justified by law.

Kenny says that bail is a “contract” whereby an accused person is delivered to a surety or also the “contract” of the surety him/her self.

Bail signifies the obtaining of the suspect or the accused person on an undertaking, given by him/her or another (called a surety) that he/she shall appear to answer the Charge preferred against him/her at the time and place designated until the matter is disposed off.

### 3.5.1 Surety

A surety is a person who has undertaken responsibility in the amount fixed for the accused to answer his bail.

### 3.5.2 Bail

Constitutional & other statutory positions.

<b>Constitution of Fed. Republic of Nigeria (CFRN, 1999)</b>	<b>Criminal Procedure Act(CPA) of the Southern States</b>	<b>Criminal Procedure Act (CPC) of the Northern States.</b>
S 35; The right to fair hearing  S.36 Freedom from arbitrary Arrest and detention	S. 120; Amount of bail, S.125; Judge may vary bail  S. 17 Release on bail of persons arrested without warrant S. 118 When bail may be granted by the High Court.  S.119; Bail in respect of matters other than offences. S.134 Discharge of sureties.  S. 137; Forfeiture of recognizance	Code S. 345: Bond of accused and sureties S. 349: Amount of bond not to be excessive S. 341: When bail may be taken for a non-bailable offence  S.341 (2), (3) - do -  S. 343: Power to arrest bail 374: Deposit instead of bond 351-2: Discharge of sureties S.354: Forfeiture of bond

In a criminal process the question of bail is first raised at the police station upon arrest without warrant. Where arrest is by a warrant, the conditions for bail are often endorsed thereon. After he/she has been charged, and arraigned before the court, a court bail once again becomes an issue.

### **SELF ASSESSMENT EXERCISE**

1. (a) Suppose an accused person is denied bail; he is remanded and after trial, he is found not guilty, what implication has this in the constitutional presumption that one is innocent until he/she is proved guilty?
- (b) Suppose, on the other hand, the accused was initially granted bail; he is conscious of the fact that he did the act or made the omission for which he is charged and absconds. What implication has this on the public policy that an offender should not go unpunished?
2. (a) Bail is a right. Comment
- (b) Discuss critically and with references to statute and case law, the claim that there is a statutory presumption in favour of Bail.
- (c) In what circumstances may a convict be granted or refused bail pending appeal?

## **3.6 Civil and Criminal Processes Compared**

There are fundamental substantive and procedural differences between civil and criminal processes. Examples of the difference are as follows:

### **3.6.1 Applicable Law**

- a) The laws which govern the civil procedure include:

Civil procedural laws

Rules and practice of court

Rules which deal with the rights and duties between individuals and with private disputes and claims arising from contracts or torts.

- (b) The Criminal Law is the substantive law on crimes and criminals. It applies to wrongs committed against the public as a whole, which wrong is proscribed by statute and its punishment also proscribed. Examples are direct wrongs against the State (eg treason, sedition etc) or against property (eg stealing/theft, breaking offences) or against person (eg murder, rape, assault).

### **3.6.2 Parties**

- a) In criminal proceedings, the parties are:

The State

The offender (also called Defendant or Accused).

Those who prosecute on behalf of the State include the Police, the Attorney-General or even a private person etc.

- b) Parties in a civil suit are:

Plaintiff (or Claimant or Petitioner/Applicant), the party who complains, or sues.

Defendant; the party against whom some wrong is alleged (also called Respondent).

### **3.6.3 The Objectives**

- a) The objective of a criminal process is to punish the offender. Hence if he is found guilty, he must be sentenced. Where the sentence is fixed by law, the court simply administers it. Where it is not fixed, the court exercises its discretion over choice and quantum of sentence. Where he/she is not guilty, he/she is discharge and acquitted.
- b) In civil cases, the objective is compensation; the successful party obtains damages and reimbursement of legal cost, as the court deems fit. In some cases, the court awards exemplary or aggravated damages which are punitive in nature. It also grants equitable reliefs in appropriate cases.

### **3.6.4 Courts**

Civil and criminal matters may be administered in different courts and on different principles. A court is a civil or criminal court depending on the matter before it. Thus the same and one court may be criminal on a Monday or any other day and turn a civil court the next day or in alternate days. Even in a single day. It may be civil or criminal in the morning and the other some hours later.

### **3.6.5 Procedure**

Civil action is initiated by writ of summons, petitions, application or originating summons. Criminal matters come before the court mainly by way of charge or information etc.

Issues of bail arise only in criminal cases; parties need not be present in civil proceeding. A civil proceeding is not hindered by the absence in court of any party provided he/she had been put on notice. In a criminal matter both sides must be present. Plea bargaining or compromise is encouraged in civil proceedings. It is viewed with disfavour in a criminal charge.

### **3.6.6 Proof**

The plaintiff or claimant (civil) and the prosecutor (crime) bear the general burden of proof. That burden is discharged upon proof “beyond reasonable doubt” in a criminal cause and upon “preponderance of evidence” or “balance of probability” in civil.

### **3.6.7 The Verdict**

Verdict of court is guilty or not guilty (crime), liable, or not liable, proved or not proved (civil wrongs). Dispositional methods are different. Any party that succeeds in a civil suit receives damages and costs from the other who loses. In a criminal cause, the accused only earns an acquittal if the charge against him fails. If the charge is proved, he/she is subjected to a penalty.

### **3.6.8 Dispositional Method**

In a civil matter, the judge is confined to what the plaintiff claims e.g damages, and/or equitable reliefs. He may grant less than what a successful party demands, but cannot add to it. The court cannot award beyond what has been pleaded. But in a criminal matter, the court is free to choose any sanction ranging from discharge (absolute or conditional) to probation, caning, fine, imprisonment etc. Death sentence where applicable is mandatory. The court cannot pass a sentence which exceeds the prescribed punishment. If the punishment for an offence is one year imprisonment, the maximum the court can impose is one year and rarely does it do so. It often awards much less. Except in severely limited instances, the Statute of Limitation does not apply in criminal causes. It does in civil matters. The criminal process aims at punishing the accused person. In civil cases, the objective is to compensate the aggrieved party, and maintain a *status quo ante*.

The judicial powers of the Federation vest in the courts and extend to all matters between persons or between governments or authority and any person in Nigeria. It also extends to all actions and proceedings relating

thereto for the determination of any of the civil rights and obligations of that person. In the sphere of crimes, the Attorney-General (Federal or State) is the principal law officer and he exercises much control. He may institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial. His power to take over and continue or terminate it at any stage before judgement, is available only in criminal proceedings.

## **Judicial Precedents**

We have examined judicial precedents in Part I of this course. What we need to add here is the different ways it affects civil and criminal courts.

### **Civil Courts**

Remember that a majority of civil cases are dealt with in the Magistrates' Courts in the 17 Southern States and in the District Courts in the 19 Northern States. The more serious cases are heard in the first instance by the High Court. Appeals from decisions of the Magistrates or District Courts are heard in the High Courts. The Court of Appeal (Civil Division) hears appeals from the High Courts. Subject to certain stringent conditions laid down by court rules, there may be a further appeal to the Supreme Court.

### **Criminal Courts**

The Magistrates' Courts all over Nigeria deal with minor offences, appeals from their decisions are handled by the High Court from which there may be an appeal to the Court of Appeal (Criminal Division). There may be further appeal to the Supreme Courts but the pre-conditions are much more stringent in criminal than in civil matters.

## **Rules of Precedent**

### **The Supreme Court**

The Supreme Court has ceased to be bound by its own decision, but its decisions are binding on all lower courts.

### **The Court of Appeal**

The Court of Appeal is bound by the decision of the Supreme Court. Subject to certain exceptions, the decision of the Court of Appeal (Civil

Division) is binding on itself but it does not bind the Court of Appeal (Criminal Division).

Generally, the decision of the Court of Appeal binds all inferior courts. The court may overrule its own previous decision against a defendant. It cannot overrule its earlier decision in favour of the defendant. Only a full court composed of five justices of the court of appeal may do so.

### **The High court**

The decisions of the High Courts are binding on all lower courts. In turn, they are bound by the decisions of the Court of Appeal and the Supreme Court. Their own decisions do not bind them but are of persuasive interest.

### **Lower Courts**

The Magistrates' Courts, District Courts, and all other courts lower than the High Courts are bound by the decisions of the Supreme court. The lower courts never create precedent. They are also not bound to follow their previous decisions.

### **Courts of Coordinate Jurisdiction**

These are courts of equal status and powers. Examples are:

- All divisions of the Court of Appeal in relation to one another
- All High Courts (Federal and State) in relation to one another.

The decisions of courts of coordinate jurisdiction are not binding on one another. They enjoy persuasive authority. The decisions of each of the divisions of the Court of Appeal are binding on all High Courts.

## **4.0 CONCLUSION**

A criminal process may be initiated by arrest with or without warrant, laying of a complaint, filing of an Information or by a First Information Report. The accused is presumed by law to be innocent until he is proved guilty. He has a number of rights which must be observed if the entire proceedings are to be deemed a fair hearing. The Attorney-General and the police among others undertake prosecution. Upon a verdict of "guilty", the court passes a sentence on the convict. The

sentence is the gist of any criminal proceeding; it is to a trial what a bullet is to a gun.

## 5.0 SUMMARY

From your study of the administration of civil and criminal justice, you would have observed that civil and criminal cases are processed differently by different courts. They have their distinctive aims and objectives, rules and vocabulary. The results are also different.

## 6.0 TUTOR-MARKED ASSIGNMENT

1. What are the rights of a person charged with a crime before the court?
2. Distinguish the following:
  - a) A crime and a civil wrong
  - b) A civil process and a criminal process

## 7.0 REFERENCES/FURTHER READINGS

- Nwadialo, F. (1976). *The Criminal Procedure of the Southern States of Nigeria*. Ijebu: Adeyemi Press Ltd.
- Kasumu, A. (1977). *The Supreme Court of Nigeria*. Ibadan: Heinemann Educational Books.
- Slapper, G. (2004). *The English Legal System*. London: Cavenaish Publishing Ltd.
- Brown, Stephen (1975). *The Role of Counsel for the Crown in The Prosecution Process*. University of Birmingham, Institute of Judicial Administration.
- Stephen, Sir Herbert (1926). "The Conduct of an English Criminal Trial" in the *Criminal Law Review* (1979). London: Sweet & Maxwell.
- Humphreys Christmas (1955). *The Duties of Prosecuting Counsel*. (Crim L.R). 739.

## **MODULE 4**

Unit 1	Inferior Courts
Unit 2	The Legal Aid Scheme
Unit 3	Conceptual Classification of Some Legal Terms: Separation of Power, Legal Personality, Ownership and Possession, Deceit and Conversion

### **UNIT 1      INFERIOR COURTS**

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#### **1.0      INTRODUCTION**

The Constitution of the Federal Republic of Nigeria, 1999 has established both Federal and State courts. Nothing in the Constitution precludes the National Assembly or any House of Assembly from establishing courts, other than those to which this section of the Constitution relates, with subordinate jurisdiction to that of a High Court. The House of Assembly may also abolish, if they do not require it, any court which they have powers to establish or have brought into



being. Based on the constitutional provisions, governments (Federal and States) have by statutes established a number of courts, some of which we shall refer to in this unit.

## **2.0 OBJECTIVES**

When you have read through this unit, you should be able to:

- identify the courts (Federal or State) created by statutes
- demonstrate an understanding of the jurisdiction of the Magistrates Court
- evaluate and critique administration of the Justice System in Nigeria.

## **3.0 MAIN CONTENT**

It is not convenient to discuss all inferior courts. They differ from State to State. It suffices that we deal with a few of them and encourage you to get acquainted with the structure in your state.

### **3.1 The Magistrates' Court**

Among the inferior courts of record in the Nigerian legal system, the Magistrates' Court is the most important. The Protectorate Court Ordinance No. 47, of 1933 established for the Protectorate the High Court and the Magistrates' Court Systems. Appeals lay to the Magistrates' Court from the decisions of Native Courts. It was in 1943 that a unified system of magistracy emerged following the promulgation of the Magistrates' Court Ordinance No. 43 of that year. At the time, appeals lay from the Magistrates to the Supreme Court from which further appeals were heard at the West African Court of Appeal and ultimately by the Judicial Committee of the Privy Council. When Nigeria was split into three regions on October 1, 1954, the regionalization of the magistracy like other courts followed. Ever since, magistracy had followed political division of the country.

The term Magistrates' Court means any Justice or Justices of the Peace acting under any enactment or by virtue of his/her or their commission. The term covers courts of summary jurisdiction, juvenile courts, and examining justices.

Every State of the Federation has its Magistrates' Court Law as well as its Magistrates Court (Civil Procedure) Rules which provide for the establishment of the Magistrates Court System for the State, appointment and removal of magistrates, practice and procedure and other issues relevant to the administration of justice as the National or State Assembly deems fit and proper in its area of authority.

There are different grades of Magistrates' Courts. The grades also may vary from one State to another, generally but the procedural rules are largely similar. We shall concentrate on the Magistracy in Lagos State. It is older, larger and busier than any other in Nigeria. The grades of the Magistrates' Courts in Lagos State are:

<b>Court</b>	<b>Sentencing Power</b>	<b>Financial Limits</b>
Chief Magistrate 1	7 year imprisonment or a fine of N4,000	N25,000.00
Chief Magistrates II	6 years of imprisonment or a fine of N3,000	N15,000.00
Senior Magistrates I	5 years imprisonment or a fine of N2,000	N15,000.00
Senior Magistrate II	4 years of imprisonment or a fine of N1,000	N15,000.00
Magistrate Grade I	3 years of imprisonment or a fine of N500	N5,000.00
Magistrate Grade II	2 years of imprisonment or a fine of N200	N3,000.000
Magistrate Grade III	1 year of imprisonment or a fine of N100	N1,500.00

The Magistrates Court in the 17 Southern States exercise summary jurisdictions in both civil and criminal matters. It exercises only criminal jurisdiction in the 19 Northern States. It is only in the North there exists the District Court. This court hears civil matters only.

Another difference of note is that jurisdiction has no relation with grades of Magistrates' Court in Lagos State. It does in the Northern States. All grades of Magistrates Court in Lagos have power to try any non-indictable offence. Every grade of the Magistrates Court other than a Magistrate Grade III may try indictable offences except capital crimes, with the consent of the accused person, and of the prosecutor, if he is a law officer.

## SELF ASSESSMENT EXERCISE 1

The jurisdiction to try a case is different from the jurisdiction to punish for the offence in Lagos State. Comment.

### Application of the Criminal Procedure Act

In some parts of the Northern States, the Criminal Procedure (Punishment on summary Convictions) Order, has fixed the powers to try offences and punish offenders. In those areas the magistrates may try offences where maximum punishment is as follows:

Chief Magistrate	10 years or a fine of N1,000
Magistrate Grade I	5 years or fine of N400
Magistrate Grade II	2 years or a fine of N200
Magistrate Grade III	3 months or fine of N50

The jurisdiction of the magistrate to punish is as follows:

Chief Magistrates of N1,000	5 years imprisonment or fine
Magistrate Grade I	3 years or fine of N600
Magistrate Grade II	1 1/2 years or a fine of N400
Magistrate Grade III	9 months or a fine of N200

Unlike the Southern States, Magistrates Courts in the North may refer a case to a higher court for enhanced punishment. Except the Magistrates Court III, other courts may impose caning.

The Chief Magistrates' Court Grade I, exercises jurisdiction in civil matters in:

1. all personal actions arising from contract, or from tort or from both, where the debt or damage claimed, whether as balance of account or otherwise is not more than twenty five thousand naira;
2. all actions between landlord and tenant for possession of any lands or houses claimed under an agreement or refused to be delivered up, where the annual value or rent does not exceed twenty-five thousand naira(now varied by the Rent Control Law to two hundred and fifty thousand naira);
3. all actions for the recovery of any penalty, rates, expenses, contribution or other like demand, which is recoverable by virtue of any enactment for the time being in force; if:

it is not expressly provided by that or any other enactment that the demand shall be recoverable only in some other court;  
the amount claimed in the action does not exceed twenty-five thousand naira

He may appoint guardians *ad litem* and make orders, issue and give directives relating thereto. He can grant in any action instituted in the court, an injunction or other order. A person who has been convicted by a Magistrates' Court for an offence may appeal as of right to the High Court against conviction or sentence on a question of law or fact. However, if he had pleaded guilty or admitted the truth of the charge preferred against him/her, he can appeal only against sentence.

Magistrates' Courts exercise jurisdiction in various domestic proceedings. They sit in special courts, some of which are:

The Rent Control and Recovery of Residential Premises Tribunal  
Environmental Sanitation Tribunal  
Juvenile Welfare Courts  
Coroners Court  
Mobile Courts  
Such other courts as may by law be created for specific purposes.

Professionally, qualified legal practitioners serve as magistrates except the Magistrates Grade III, which deals with most traffic offences and other non-technical offences. Most Magistrates Grade III are retired police officers, or court registrars. Magistrates are appointed by the Governor of the State on the advice of the State Judicial Service Commission. They are civil servants.

### **3.2 Juvenile Welfare Courts**

One of the functions of the Magistrate is to sit at a Juvenile Welfare Court to hear charges against children and young people. Juvenile Welfare Courts are courts of summary jurisdiction which are established under the Children and Young Persons Ordinance No. 41 of 1943. The Juvenile Court is constituted by a Magistrate and two Assessors, one of whom is a woman. In some states the Chief Judge appoints the Assessor. Approved schools, remand schools and probation officers were specially instituted for the welfare of the delinquent.

The functions of the Juvenile Welfare Courts include the following:

1. To deal with juvenile delinquents other than those charged with homicide

2. To hear application in respect of children and young persons in need of care or protection, beyond parental control and in truancy cases.
3. To deal with applications for adoption of children where the law of a State so provides

Some states now have their Children and Young Persons Law. In this context children are persons who have not attained the age of 14 years. A young person is one who has attained the aged of 14 years but is under the age of 17 years. The children and Young Persons Law (Northern Nigeria Laws, 1963) defines a young person as a person who has attained the age of 14 years but has not attained the age of 18 years.

A person who is under the age of 17 years must be tried summarily for any offence except homicide. Strict rules have been laid down vis-à-vis the hearings in the Juvenile Welfare Courts against youngsters. There are also special provisions for the punishment or other treatment of such young offenders.

The juvenile offender may be committed for trial for an indictable offence if:

1. the court considers that if found guilty, he should be detained for a long time
2. he /she is charged jointly with an adult and in the interests of justice, the court considers it necessary to commit both for trial.

Juvenile Welfare Courts are special courts. They have special procedures. They sit as often as may be necessary. They must sit in a different room or building from that in which courts for adults are held or on different days. They shall not sit in a room in which sittings of a court other than a Juvenile Welfare Court are held if the sittings of that other court has been or will be held there within one hour before or after the sitting of the Juvenile Welfare Court.

Persons who may attend the Juvenile Welfare Court session are:

- members and officers of the court
- Parties to the case
- Parties' counsels
- Persons specially authorized
- Newspaper reporters with leave of court
- Others who may be directly concerned

The Juvenile Welfare Court has its own vocabulary. Certain terms are not applicable to juvenile offenders. Examples are "accused" and "conviction" Juvenile offenders are delinquents. If their "delinquency"

is proved, the court makes an “order”. Before it makes any order, the court must consider the antecedent of the delinquent, his/her home life, associates etc. The orders which the court may make include:

### **Dismissal**

The court may make an order dismissing the charge.

### **Fine**

The court may impose a fine; the parent or guardian may be ordered to pay a fine, cost or damage.

### **Probation or Supervision**

This order requires a person having attained the age of 17 years and convicted of an offence, the sentence for which is not fixed by law, to be under the supervision of a Probation Officer for a period from one to three years. The court may include requirements as to residence, mental treatment, and/or securing the probationer’s good conduct generally.

The Children and Young Persons Act sets out what the court must consider before making a probation order and the consequence of any breach.

### **Discharge**

The court may make an order discharging the delinquent. A discharge may be

- a. absolute or
- b. conditional, eg. that he commits no “further offence” for any period not exceeding three years.

One may ask: what does “further offence” mean in this context? Does it mean the same offence for which he/she is brought to court or a different type of offence? Will he/she now be dealt with for the latter offence only or for both the past and the present?

### **Caning**

Caning is most widely used in Nigeria; followed by fines, probation and binding over in that order. Canning must not exceed 12 strokes. Female delinquents are not caned. The desirability or otherwise is beyond the scope of this present syllabus.

### **Imprisonment**

A young person may be sent to jail if there is no other means of dealing with him/her. A person under the age of 17 years cannot be sentenced to death.

### **Committal (or Corrective) Orders (or Mandate)**

The court can make an order committing the delinquent to:

1. the case of a fit person
2. an approved school
3. a custody in a place of detention provided under the Children and Young Persons Law.
4. any other method.

Some state laws qualify these orders as “corrective orders”, “committal orders” or “mandate”

### **SELF ASSESSMENT EXERCISE 2**

1. Discuss exhaustively, committal or corrective orders in relation to juvenile delinquents.
2. Borstal institutions and remand homes or approved schools should be abolished. Comment.

### **Juvenile Offenders and the Police**

The Nigeria Police bears the burden of ensuring that delinquent children do not associate with adults charged with or convicted of any offence other than an offence with which the child or young person is jointly charged or convicted. This should be the order while the delinquent child is in custody or is being conveyed to or from the court.

The police has a Juvenile Welfare Branch for prevention of youthful offences and treatment of juvenile delinquents. The branch is made up of women police officers. Is this adequate? Would you recommend a full fledged special police command responsible for juvenile justice administration?

A juvenile delinquent is not to be detained by the police except in the following circumstances:

1. The charge is one of homicide or other grave crime
2. It is necessary in the interest of the delinquent to remove him/her from association with any reputed criminal or prostitute or
3. The police officer has reasons to believe that the release of such a delinquent would defeat the ends of justice.

Often the delinquent is released on self recognizance or to his parent or guardian with or without surety. Otherwise, he is detained. Detention must be in a place approved for detention under the Children and Young Person Act unless:

- it is impracticable to do so
- the delinquent is so unruly or so depraved a character that he cannot be safely detained or
- by reason of his state of health or his mental or bodily condition, it is inadvisable so to detain him.

A certificate to the above stated shall be produced to the court before which the juvenile is brought. Perhaps it may be important to distinguish between children and young persons who:

- a. violate the criminal law
- b. are maladjusted, anti-social or rebellious
- c. are orphans deserted by relations, are persons wandering, having no settled home or visible means of subsistence
- d. are beggars

It cannot be sufficiently stressed that in matters affecting children and young persons, the paramount consideration is their welfare, reformation, and rehabilitation.

### **SELF ASSESSMENT EXERCISE 3**

What is the place of National Open University of Nigeria in the Scheme of Juvenile Criminal Justice Administration?

### **3.3 The Coroner's Court**

A coroner is a person empowered to hold an inquest on the body of a deceased person, who appears to have died a violent or an unnatural death or on the body of a deceased person belonging to any other class, specified by the appropriate Coroner's Law.

Persons who serve as coroners are:

1. Magistrates
2. Other fit persons so appointed.

In some jurisdiction a coroner must be either a barrister, solicitor or a general medical practitioner of at least 5 years standing in their profession. The Coroners Law of each State lays down procedures for holding an inquest.



### **When an Inquest may be held**

The duty of the coroner is to hold an inquest when a person has died

- a. a violent or unnatural death
- b. a sudden death of which the cause is unknown
- c. in confinement in a lunatic asylum, prison or police custody

A coroner is not bound by rules of evidence, but he may receive evidence on oath. An inquest may hold on any day, in public or in private.

### **Findings and Reaction**

1. The coroner may direct interment where death is by a natural cause.
2. Where in his summon, the cause of death was murder, manslaughter or infanticide, the coroner may issue a summons or warrant of arrest to secure the attendance of such a suspect before a Magistrates Court.
3. If in the course of inquest, the coroner is of the opinion that sufficient grounds have been disclosed for instituting criminal proceedings, he must stop (for the time being) the inquest until the trial of the accused has been concluded. The coroner's findings are not a conviction but an indictment.
4. If the accused is discharged, or the charge is dismissed or the accused is at large, the coroner would resume or conclude its inquest.

Where a body has been wrongfully buried without first holding an inquest, the coroner may make an order for exhumation and conduct the necessary inquest, if the circumstances of death require the holding of an inquest.

### **3.4 The Courts Martial**

The Courts Martial are special courts. They are military courts set up to try violations of military law by persons who are subject to the jurisdiction of the court. Examples are The Nigerian Army, The Nigerian Navy and The Nigerian Air Force.

#### **Constitution**

A Court Martial may be composed of:

- A. (i) A President who holds the rank not below Major  
 (ii) Two other officers.

This type of a Court Martial has power to sentence an offender to imprisonment not exceeding two years.

- B. (i) A president, who must be of the rank of Major or above.  
 (ii) Four other officers

This court martial has powers to try officers of the rank of Warrant Officer. There is no limit to its sentencing power.

### **The Convener**

- i. A Commander of the Nigeria Army or his equivalent
- ii. A General Officer or his equivalent
- iii. A Brigadier or Colonel or other officer acting as (i) or (ii) above,  
 - presumably an Adjutant-General, Quarter-Master or Director General, Armed Forces Hospitals.

The statute does not forbid the convener from appointing himself as a member or even a presiding officer.

A person accused before a court martial may object to the competence of a member or members of the Court Martial.

The sentence by the Court Martial is subject to confirmation of the convening officer, his successor or superior. The convening officer, may confirm, vary or remit the matter back to the court with an order for revision.

The sentence is also subject to review by the Forces Council, an officer to whom the Forces Council may so designate or by a superior officer in command to the convening officer.

The power to review a sentence is ousted when an accused appeals to the Court of Appeal. Appeals from decisions of the Courts Martial go to the Court of Appeal. Appeals on Sentence of death are a right. Others are with leave of court. The majority of military offences are dealt with summarily and informally by appropriate authority. However more serious ones are dealt with at Court Martial. Examples of such serious offences are:

- Cowardly behaviour before an enemy
- Mutiny
- Desertion
- Looting

- Theft of service or public property
- Treason.

When a person subject to military law has been tried by the Court Martial or dealt with by his Commanding Officer for an offence, a civil court is debarred from trying him/her subsequently for the same, or substantially the same offence as that offence. If for example a soldier has been dealt with for theft by a Court Martial, he/she cannot be subsequently charged with that same theft offence before a civil court.

#### **4.0 CONCLUSION**

The Magistrates Courts deal with 80% of crimes charged to court. The Juvenile Welfare Courts deal with delinquent youths. There are other special courts which are established for particular purposes. Examples are the Coroner's Court and the Court Martial.

There are other important courts which you need to take note of. Examples are the Customary Courts and Area Courts.

#### **5.0 SUMMARY**

In exercise of their constitutional powers, State Assemblies have established a number of inferior courts in their respective States. Get acquainted with these courts operating in your State. The Magistrates Courts are particularly important since they deal with a vast majority of criminal matters.

#### **6.0 TUTOR-MARKED ASSIGNMENT**

1. Consider the doctrine of fair hearing in relation to Courts Martial.
2. Write brief notes on either
  - a. the Customary Courts system or
  - b. The Area Courts system.

#### **7.0 REFERENCES/FURTHER READINGS**

Kasumu, A. (1977). *The Supreme Court of Nigeria*. Ibadan: Heinemann.

Slapper, G (2004). *The English Legal System*. Cavenish.

## UNIT 2 THE LEGAL AID SCHEME

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- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 The Constitutional Position
  - 3.2 Legal Aid Act and Other Statutory Provisions
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### 1.0 INTRODUCTION

Legal aid or legal assistance is not a new phenomenon. It is in the nature of the African to assist his neighbour or relative – his “brother”- when he is involved in a dispute and every dispute necessarily has some legal aspects. If a poor member of the community is involved in a legal proceeding with a powerful chief, he would be represented informally or usually behind the scene by another powerful chief. No incidents were attached to such representation except that the chiefs received gifts during festivals. This marks the difference in the practice of “*clientele*” in the old Roman Republic whereby the poor attached themselves to *advocati* or *patroni* (powerful men) for political support in return for services. The practice in England was that the poor were assisted in civil matters and were flogged if they lost. However they were absolved from liability for costs and subsequently from court fees. By the 19<sup>th</sup> century, legal aid and assistance had become a common practice in France, Italy and Germany. It was also later extended to defendants.

The Legal Aid and Advice Act, 1949 (UK) advanced further the legal aid and advice scheme in England after the World War to give the generality of the English people access to the justice system. The Act was not an Act of General Application and did not apply to the Colony and Protectorate of Nigeria. None of the Colonial Constitutions of Nigeria provided for fundamental human rights for Nigeria either. However, the post independence constitutions have cured these omissions. The military government went further to promulgate the Legal Aid Act of 1976 which it also amended 10 years later.

## **2.0 OBJECTIVES**

When you have read through this unit, you should be able to:

- measure the reach and scope of legal aid in Nigeria
- subscribe to the political, social and economic implication of “access to equal professional legal practice to both rich and poor”
- evaluate the concepts of “interests of justice”, “merit”, “legal aid eligibility” etc.
- critique the legal aid legislation in Nigeria.

## **3.0 MAIN CONTENT**

### **3.1 Legal Aid: The Constitutional Position**

The Constitution of the Federal Republic of Nigeria, 1999, Section 46, provides that the National Assembly may confer upon a High Court, such powers as may be necessary or desirable for the purpose of enabling courts more effectively exercise the jurisdiction conferred upon it and shall make provisions:

- (1) for the rendering of financial assistance to any indigent citizen of Nigeria where any of his/her fundamental rights has been infringed or with a view to enabling him/her to engage the services of a legal practitioner to prosecute his/her claim, and
- (2) for ensuring that allegation of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

This special Jurisdiction of the High Court and Legal Aid are meant to assist any person who alleges that any of the provisions of Chapter IV of the Constitution has been , is being or likely to be contravened in relation to him to seek redress. For this reason, the Legal Aid Act should be read in conjunction with the Fundamental Human Rights provisions

in Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999, particularly the following:

- Section 15: Political Objectives
- Section 17: Social Objectives
- Section 34: Right to the Dignity of Human Person
- Section 35: Right to Personal Liberty
- Section 36: Right to Fair Hearing
- Section 37: Right to Private and Family Life
- Section 42: Right to Freedom from Discrimination

### **3.2 The Legal Aid Act and other Statutory Provisions**

Government enacted a Legal Aid Act, 1976 which established a Legal Aid Council and charged it with the responsibility for the operation of the Scheme for the grant of free legal aid to persons with inadequate resources. In some cases persons of moderate means may be granted legal aid but such persons may be required to contribute towards the legal expenses so incurred or to be incurred.

Legal aid is granted to those eligible for it in all courts up to the Supreme Court

There are other statutes which provide also for legal aid. Some of them are:

1. The Criminal Procedure Act, Section 352: Counsel for the State and defence in capital cases: Where a person is accused of a capital offence, the State shall, if practicable, be represented by a law officer, state counsel or legal practitioner and if the accused is not defended by a legal practitioner, the court shall if practicable, assign a legal practitioner for his defence.
2. Criminal Procedure Code, Section 186: Defence in capital cases: - Where a person is accused of an offence punishable with death, if the accused is not defended by a legal practitioner the court shall assign a legal practitioner for his defence.
3. Robbery and Firearms Tribunal (Procedure) Rules 1975.
4. Rule 5 similarly empowers the court to assign a legal practitioner for the defence of persons charged with robbery or armed robbery who are not represented.

5. The Court of Appeal Act and the Supreme Court Act.
6. Under the Acts the Court of Appeal or the Supreme Court as the case may be, may assign to appellants, legal practitioners in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the that court, it appears desirable in the interest of justice that the appellant should have legal assistance.

These powers have been exercised mainly in appeals against conviction in capital offences.

### **3.3 The International Dimension**

There are a number of Charters and International Conventions relating to legal aid and assistance to which Nigeria is a signatory and therefore obligatory. Some of them are

#### **3.3.1 Legal Aid to Women**

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa states that women and men are equal before the law and shall have the right to equal protection and benefit of the law. State parties shall take all appropriate measures to ensure:

- a) effective access by women to judicial and legal services, including legal aid
- b) Support to local, national, and continental initiatives directed at providing women access to legal services, including legal aid ... (See Article 8: Access to Justice and Equal Protection before the Law).

#### **3.3.2 Legal Aid and Children**

The African Charter on the Rights and Welfare of the Child also provides that the State parties to the Charter shall in particular ensure that every child accused of infringing the penal law shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence.

(See Article 17: Administration of Juvenile Justice)

The Convention on the Rights of the Child similarly prescribes as follows:

1. That every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. (Article 37 (d)).
2. That every child alleged or accused of having infringed the penal law has at least the following guarantees:
  - a) to be informed promptly and directly of the charges against him or her, and if appropriate , through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
  - b) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
  - c) To have the free assistance of an interpreter if the child cannot understand or speak the language used. (Article 40(2) (b))

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2000 on the “right to effective remedy” states that:

- a) everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the charter, notwithstanding that the acts were committed by persons in an official capacity
- b) The right to an effective remedy includes:
  - 1 access to justice;
  - 2 reparation for the harm suffered;
  - 3 access to the factual information concerning the violations

### **3.3.3 Access to Lawyers and Legal Services**

- a) States shall ensure efficient procedures and mechanisms for effective and equal access to lawyers by all persons within their territory and subject to their jurisdiction, without discrimination of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status.
- b) States and professional associations of lawyers shall promote programmes to inform the public about rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms.



### 3.3.4 Legal Aid and Legal Assistance

- a) A party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so requires, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.
- b) The interest of justice should be determined by considering:
  1. In criminal matters:
    - i) the seriousness of the offence;
    - ii) the severity of the sentence
  2. In civil cases:
    - i) the complexity of the case and the ability of the party to adequately represent himself or herself
    - ii) the rights that are affected
    - iii) the likely impact of the outcome on the wider community
- c) The interests of justice always require legal assistance for an accused in any capital case, including appeal, executive clemency, and commutation of sentence, amnesty or pardon.
- d) When legal assistance is provided by a judicial body, the lawyer appointed shall:
  1. be qualified to represent and defend the accused or a party to a civil case;
  2. have the necessary training and experience corresponding to the nature and seriousness of the matter;
  3. be free to exercise his or her professional judgement in a professional manner free of influence of the state or the judicial body
  4. advocate in favour of the accused or party to a civil case;
  5. Be sufficiently compensated to provide an incentive to accord the accused or a party to a civil case adequate and effective representation.
- e) Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources, and shall ensure that:
  1. when legal assistance is provided by the judicial body, layers with experience and competence commensurate with the nature of the

- case make themselves available to represent the accused person or party to a civil case
2. Where legal assistance is not provided by the judicial body in important or serious human rights cases, they provide legal representation to the accused or party in a civil case, without any payment by him or her.
    - f) Given the fact that in many states the number of qualified lawyers is low, states should recognize the role that paralegals could play in the provision of legal assistance and establish the legal framework of enable them to provide basic legal assistance
    - g) States should, in conjunction with the legal profession and non-governmental organizations, establish training the qualification procedures and rules governing the activities and conduct of paralegals. States shall adopt legislation to grant appropriate recognition to paralegals
    - h) Paralegals could provide essentials legal assistance to indigent persons, especially in rural communities and would be in link with the legal profession
    - i) Non governmental organizations should be encouraged to establish legal assistance programmes and to train paralegals

States that recognize the role of paralegals should ensure they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them carry out their functions with independence.

### **3.3.5 Victims of Crime and Abuse of Power**

- a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress as provided for by national legislation and international law for the harm that they have suffered.
- b) Judicial and administrative mechanisms should be established and strengthened, where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
- c) Judicial officers, prosecutors and lawyers, as appropriate, should facilitate the needs of victims by providing them with proper assistance through out the legal process;
- d) Informal mechanisms for the resolution of disputes, including mediation, arbitration and traditional or customary practices, should be utilized where appropriate to facilitate conciliation and redress for victims

e) States must ensure that:

1. victims receive necessary materials, medical, psychological, and social assistance through state, voluntary, non-governmental and community-based means
2. victims are informed of the availability of health and social services and other relevant assistance and be readily afforded access to them
3. police, justice, health, social service and other personnel concerned receive training to sensitize them to the needs of victims, and guidelines are adopted to ensure proper and prompt aid.

### **3.3.6 International Covenant on Civil and Political Rights**

1. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - a) To be tried in the presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means of pay for it.
  - b) To have the free assistance of an interpreter if he cannot understand or speak the language used in court, (Article 14).

### **3.3.7 Nigerian Contribution**

The Constitution of the Federal Republic of Nigeria has provided for the prescriptions of the international community. Furthermore there has been enacted the Legal Aid Act, 1976 which was amended in 1986 and codified in the Laws of the Federation, 2004. Essentially the motive is to enhance justice and public confidence in the law and administration of justice, build a just society where each person respects the rights of others, improve the existing social order and serve as a vanguard for social justice and emancipation of the oppressed, weak, economically less privileged and vulnerable groups.

### **SELF ASSESSMENT EXERCISE 1**

To what extent, if any, has the Nigerian Legal System conformed to the International Standards in respect of legal aid and assistance?

### **3.4 The Legal Aid Council**

The Legal Aid Act 1976, as amended by the Legal Aid (Amendment) Act 1986 established a Legal Aid Council. It is a body corporate with perpetual succession and a Common Seal. It can sue and be sued in its corporate name. The Legal Aid Council has responsibility for legal aid and advice to and in respect of persons entitled. The Council consists of:

- i. a Chairman to be appointed by the National Council of Ministers
- ii. a representative of the Attorney General
- iii. a representative of the Ministry of finance
- iv. a representative of the National Youth Service Corps Directorate
- v. a representative of the Inspector General of Police
- vi. two representatives of the Nigeria Bar Association to be appointed by the National Council of Ministers
- vii. the Director of Legal Aid
- viii. Five other persons to represent the interests, not otherwise represented above to be appointed by the National Council of Ministers.

The Legal Aid Council is to create an environment of justice and fairness through the provision of legal aid and assistance in appropriate cases.

#### **SELF ASSESSMENT EXERCISE 2**

Attempt a critique of the membership of the Legal Aid Council

### **3.5 The Nature and Scope of Legal Aid**

#### **3.5.1 Disqualification from Legal Aid**

No legal aid shall be granted in respect of:

- i. Any matter not specified in the statutes.
- ii. Any matter before any court or tribunal before which persons have no right to be defended or represented by a legal practitioner
- iii. In civil proceedings where the Director or other person authorized is not satisfied that the person has reasonable grounds for taking, defending, or being a party thereto
- iv. Any matter in which it appears unreasonable that he should receive aid in the particular circumstances of the case.

### 3.5.2 The Scope of Legal Aid

Legal aid may be granted in respect of criminal and civil matters specified in the Act, namely:

- (a) Proceedings in courts or tribunals (whether at first instance or on appeal) wholly or partly in respect of:
  - i. Murder
  - ii. Manslaughter
  - iii. Maliciously or willfully wounding or inflicting grievous bodily harm
  - iv. Assault occasioning actual bodily harm.
- (b) Aiding and abetting or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the offences listed above.
- (c) Such type or classes of criminal or civil proceedings as may be specified by regulation under the Act
- (d) Road Traffic Matters: Personal Accidents
- (e) The assistance of a legal practitioner including all such assistance as is usually given by a legal practitioner in the steps preliminary or incidental to any proceedings
- (f) Representation by a legal practitioner before any court
- (g) Such additional aid (including advice in civil causes and matters) as may be prescribed.

### 3.5.3 Faces of Legal Aid

Legal aid can thus be seen from different perspectives as:

- a) A government funded legal service to enable people, who cannot otherwise afford the services of legal practitioners, to be provided with those services by the state
- b) A welfare function designed to support the rights of the less affluent members of the community
- c) A potent instrument for developing the common good accruing from the rule of law
- d) A concrete step towards the realization of a just and egalitarian society in which no man woman or child shall be oppressed or denied justice.

### 3.6 Legal Aid Eligibility

Persons eligible to free legal aid include:

- Persons whose income does not exceed N1,500 per annum (later varied to N5000.00 per annum) or such higher sum as may be prescribed:
- Persons whose income exceeds the sum prescribed may be granted legal aid on contributory basis

In ascertaining a person's means, the Council may consider his income, personal and real property.

#### Statistics of Legal Aid and Assistance

Details of legal aid and assistance rendered by the Legal Aid Council from 1977 to 2006 are shown below:

No. of applications received,	69952
No. of applications granted	58843
No. of application rejected	11109
No. of completed cases	40419
No. of pending cases	18424

A comparative Analysis of civil and criminal cases, 2006 and 2007 is as follows:

<b>Details</b>	<b>2006</b>		<b>2007</b>		<b>Total</b>	
	<b>Civil</b>	<b>Criminal</b>	<b>Civil</b>	<b>Criminal</b>	<b>Civil</b>	<b>Criminal</b>
No. of applications received	4190	968	1937	433	5158	2370
No. of applications granted	4091	945	1871	426	5036	2297
No. of application rejected	99	23	66	7	122	73
No. of completed cases	234	467	1253	252	2808	1505
No. of pending cases	1750	478	618	174	2228	

#### SELF ASSESSMENT EXERCISE 3

Who is a poor or indigent person for purpose of Legal Aid?

The Legal Aid Eligibility criteria allow persons able to afford their own legal Practitioners to have access to legal aid rather than those who cannot. Discuss critically.

### **3.7 The Relationship between the Legal Aid Consumer and His Legal Aid Provider**

The Legal Aid Council may assign a legal practitioner by way of legal aid. The fact of persons receiving legal aid shall not affect:

- rights and privileges arising out of legal practitioner – client relationship
- rights or liabilities of other parties to the proceedings
- principles on which the discretion of any court or tribunal is normally exercised

The Legal Aid Council is not liable to pay costs awarded against assisted person. However, the rules of court relating to payment of fees do not apply to him

### **3.8 Funding Legal Aid**

The Legal Aid Act provides for the creation of Legal Aid Fund to which is paid:

- all such sums of money as may be provided by the government of the Federation and/or States for the services of the council
- all such sums provided by way of contribution
- any other sums accruing to the council by way of gifts, testamentary disposition, contributions from philanthropic persons or organization or otherwise however are paid into it.

The legal practitioners who have acted for persons receiving legal aid are paid for so acting out of this fund.

### **SELF ASSESSMENT EXERCISE 4**

Do you consider that the sources of funding the Legal Aid Scheme as prescribed in the Legal Aid Act are adequate? If not, what other ways of funding would you recommend?

### 3.9 Challenges

The Legal Aid Scheme faces a number of challenges. Some of them are:

- a. Access to justice and cost effectiveness.
- b. Public awareness and confidence in the legal profession.
- c. Limited reach and range of services of the Legal Aid Council
- d. Blurred legal aid eligibility criteria
- e. Demand that indigent and assisted person should bear costs
- f. Experience of legal aid providers, particularly the NYSC, the “New Wigs” and paralegals
- g. Whether legal aid is or is not a right; and whether it should be subject to ill defined concepts of “interests of justice” test , “merit” and priority vis- a- vis available resources
- h. Perennial problems of persons incarcerated in prisons or police stations awaiting trial, on remand or under investigation.
- i. Funding
- j. Obstacles that face ordinary Nigerians particularly those with low levels of education and knowledge about law and legal rights
- k. Official indecision to increase or reduce its role in providing legal aid
- l. Conflicts and imbalance of justice, justice according to law and the wider implications of social and economic justice
- m. Practical modalities that assures collaboration with the Nigerian Bar Association and private legal practitioners or paralegal
- n. The political, social and economic implications of the vexed question whether poorer people deserve the same quality of legal professional services as the more wealthy people.
- o. Remuneration for legal practitioners engaged in legal advice and assistance,
- p. Strategy for development of a network of legal service providers of assured quality, offering the widest possible access to information and advice about the law and assistance with legal problems.
- q. Determining the nature of legal aid and assistance that meets public needs and in the areas that touch their daily living

The list is not exhaustive.

### 4.0 CONCLUSION

The Legal Aid Scheme is designed to give access for all people to justice system. See section 46 and Chapter IV of the 1999 Constitution, CPA section 352, CPC Section 186, and Legal Aid Acts as amended. The Legal Aid Council exists to operate the Scheme. The Legal Aid Act sets out the legal aid eligibility criteria, the Legal Aid Fund and overall supervision by the National Council of Ministers. It seems ironical that



the Military Dispensation – itself an aberration to the sanctity of the Rule of Law-- was the first to recognize the need for a legislation establishing for Nigeria the Legal Aid Scheme, a scheme committed to the protection, preservation and enhancement of access to justice and the rule of law.

## 5.0 SUMMARY

Out of government concern for justice and access to legal machinery, the Legal Aid Act was passed. It created a Legal Aid Scheme to assure people who could otherwise not afford it, same professional legal services as the wealthy ones. This has political, social and economic implications. Yet without it, quality justice remains an illusion

## 6.0 TUTOR-MARKED ASSIGNMENT

1. The idea behind legal aid is to give access to people who could otherwise not afford the same professional legal service as the wealthier citizens. Comment.
2. Write a critique of the Legal Aid Legislation in Nigeria.
3. “The law grinds the poor and the rich rule the law” (Goldsmith in the *Traveler*). Discuss the validity or otherwise of this statement with reference to the Legal Aid and Assistance Scheme in Nigeria.

## 7.0 REFERENCES/FURTHER READINGS

Slapper, G. (2004). *The Nigerian Legal System* (7<sup>th</sup> ed). London: Cavendish.

Nwadialo, F (1987). *The Criminal Procedure of the Southern States of Nigeria* (2<sup>nd</sup> ed). Lagos: MIJ Publishers.

Richardson, S & Anor (1963). *The Criminal Procedure Code of Northern Nigeria*. London: Sweet and Maxwell .

FRN: *The Constitution of the Federal Republic of Nigeria, 1999*.

*LAoN News*; Vol.1 No.1 (August, 2007).

*LAoN News*; Vol.1 No.2 (November, 2007).

## UNIT 3 CONCEPTUAL CLASSIFICATION OF SOME LEGAL TERMS: SEPARATION OF POWER,

## **THE RULE OF LAW LEGAL PERSONALITY, OWNERSHIP AND POSSESSION, DECEIT AND CONVERSION**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Separation of Power
  - 3.2 The Rule of Law
  - 3.3 The Legal Personality
  - 3.4 Ownership
  - 3.5 Possession
  - 3.6 Deceit
  - 3.7 Conversion
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

### **1.0 INTRODUCTION**

There are a number of legal terms and phrases that are fundamental to the legal system. A few of them need to be explained. This is to enable you to see how the law has developed and expanded through judicial ingenuity and activism.

### **2.0 OBJECTIVES**

When you have completed this unit, you should be able to:

- write a critique on the practical value of the doctrine of separation of power
- identify the particular historical events which have impacted the legal system and the contents of human rights
- write a critique on a legal personality; its beginning and its end
- explain the concepts of ownership and possession
- explain the emergence of “deceit” as a distinct cause of action in Tort and its developing influence in the field of Contract
- illustrate the flexibility and power of self development of the Common Law, and in deed the Nigerian legal system

### **3.0 MAIN CONTENT**

### 3.1 Separation of Power

This topic has been treated in detail in Constitutional Law. It is only mentioned here very briefly for completeness. The doctrine of separation of power is posited on the existence of a rigid and complete function of government which is divided into three distinct water tight compartments: the Legislative, Executive and Judiciary completely independent of one another. Experience over the years has been “much over lapping, of powers, near complete fusion or blending of the Legislative and Executive powers” The factors responsible for this may include the following:

The nature of the Constitution

Pluralism of governments operating horizontally and vertically

Presidentialism and its attendant concentration of State power

Control of the Local Government. (See the case of AG (Abia State) and others v. AG (Fed), 2002.)

Confusion about intendment of the doctrine; compare for instance the views held by John Locke, Baron Montesquieu, Relate also to the Athenian City State participatory democracy and its principle of rotation.

Divergence from the traditional concept of governance, where<sup>3</sup> the monarch was “himself at once a judge, maker and guardian of the law, repository of wealth, priest, magician of the people, dispenser of gifts and leader in war.

Differences in the Constitutional provisions on the issue in 1960, 1963, and 1979 – 1999

The realities of Sections 4, 5, 6 and 7 of the 1999 Constitution and the effects of Judicial Review etc.

De Smith’s conclusion is apt that to the extent that there is a guarantee of independence of the judiciary, the doctrine of separation of power and the climate of thought to which it is a part has practical value. Another importance of the doctrine is that it affects the relationship among the tiers and organs of government on the one hand and between the ordinary citizens on the other. It has affinity with the rule of law to which we shall now turn.

### 3.2 The Rule of Law

Detailed materials on the rule of law are available in the Constitutional Law and the Human Rights Courses. In a nutshell, the rule of law sprang from the rights of the individuals; develop through history in and age-long struggle of mankind for his fundamental rights. In its earliest form, the rule was based on the maxim: “*ubi remedium, ibi jus*” In contemporary times. It is the reverse: “*ubi jus ibi remedium*” Initially, the rule elevated procedure over and above substantive law and legal rights. In modern times, the rule of law is vehement on substantive justice. In former times, the rule of law was an end itself; today it is only a means to an end. What could be responsible for these dramatic changes? Answers are to be found among the following:

The course of history which has impacted the legal system itself and the contents of human rights

The Renaissance, Reformation and the Counter Reformation

The political, social and cultural development, especially in the Enlightenment age

Natural Law philosophy

Titanic struggle between absolutism of kings and the supremacy of the law

Global dimensionality of the United Nations Declaration of Human Rights and Professor Albert Venn Dicey’s three diagonal postulation

The paradox that all governments (including revolutionary governments) profess adherence to the rule of law – a vague and nebulous term. Apartheid South Africa, Stalin’s Russia, Hitler’s Germany and all military governments in Africa, for example have claimed that their regimes were based on the principles of the rule of law.

Dynamism of the concept of the rule of law New Delhi Declaration, 1959 in relation the rule of law in the Third World and the Lagos Law, 1961 in relation to the rule of law in Africa.

The rise of written constitutions and the growing demand that everything must be done according to law and governments should be conducted within the framework of recognized rules and principles, which restrict discretionary powers.

Rule of law has become a variable and different people and institutions or governments with irreconcilable political agenda resort to it in finding

support for their political positions. It also serves as a device for encroachment by modern States in the daily affairs of the ordinary citizens and basis of State struggle to control the legislative process. In deed the legal system is affronted with a perplexity of what the rule of law really is: Is it a new despotism – a devise to undermine civil liberties? Could it be a pursuit of its own concept of public good or public interest? Be that as it may. A consolation is that the rule of law still connotes the supremacy of the law, democratic representative legislature, separation of powers, written constitution, equity, public order, limitation on exercise of arbitrary powers of government and the liberty of the citizens. It remains valid to the extent that it imposes effective inhibitions upon power and the defence of citizens from all intrusive claims.

### 3.3 The Legal Personality

A person who commences an action in a court must be a person known to law. If a person who is not a legal person is a party to an action, the person should be struck out and if it be the plaintiff, then the action should be struck out.

#### Who is a Legal Personality?

In legal theory, a person is a substance of which rights and duties are attributes. It is only in this respect that a person possesses any political significance and this is an exclusive point of view from which personality receives legal recognition (Glanville Williams, 1947). In essence, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person whether a human being or not. Every legal person is not necessarily a natural person. In some jurisdictions for example, animals or idols are conferred with legal personality. In the Indian case of *Pramatha Nath Millick v. Pradyumns Kumar Mulluk (1925)*, the estate of the deceased person (*hereditas jacens*) enjoys legal personality.

On the other hand, any being that is not capable of rights and duties is not a person, even though she/he is a natural person. In early law, a slave was a “thing” and had no legal personality. However, the law accorded him/her certain legal recognition. For example in the Law of Agency, the slave may act as an agent of his/her master. Similarly an unborn child has legal recognition but it is not a legal personality. Its legal recognition is based on the maxim: *masciturus iam nato habetur* (he to be born is treated as already born). For this reason a posthumous child enjoys full rights of testamentary and intestate succession. In *Dulieu v White*, D negligently crashed his horse and cart into a shop. P, a pregnant woman, seeing the accident suffered a nervous shock and a

premature birth of a child who turned out to be an idiot. She recovered damages. Unfortunately the child did not claim, thus denying the court the opportunity to decide whether or not he had a claim in tort for pre-trial injuries inflicted on him. The law was worse for it. But see the case of *Walker v Great Northern Railway of Ireland (1893)* where the court denied such a right.

Legal personality is conferred by positive law but human personality is a gift of nature. Hence a person may be a living body of a human being or an entity recognized by law as having rights and duties of a human being. As stated by Lord Blackburn in *Pharmaceutical Society V London and Provincial Supply Association, (1880)*, “the word ‘person’ may well include a human being and an artificial person, a corporation”

### **The Beginning of Legal Personality**

Generally, legal personality begins at birth. A child becomes a person when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not and whether it has an independent circulation or not and whether the navel string is severed or not. In relation to corporate associations, the Companies and Allied Companies Act, 1990 states that:

“As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with such liability in the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act. (Section 37).”

A corporate personality comes into existence therefore, as from the date of incorporation indicated in the certificate of incorporation.

### **Termination of Legal Personality**

The legal personality of a natural being terminates at death. Personal actions also die with him/her: *actio personalis moritur*. Hence, action would not lie in libel or defamation of a deceased person or in seduction or enticement of a deceased spouse nor in the killing of the deceased *per se*.

If X shot at and killed Z, X cannot be sued or killing Z – *actio personalis moritur*. Z's representatives have no claim against X or his representative for killing Z.

An action, however may lie in the tort of negligence, battery or other tortuous act(s) committed by X, which culminated in Z's death. This is the rule in *Baker v Bolton (1808)*. Under the Roman law, an heir may claim in *actio injuriarum* for the insult on the body of the deceased person.

A corporate personality comes to an end when the registered company or association is dissolved and this occurs upon:

- Cancellation of registration
- Removal of name from the register
- Order of court
- Winding up

### **SELF ASSESSMENT EXERCISE 1**

1. Examine critically, the crime of suicide in the light of the rule in *Baker v Bolton (1808)*.
2. Joseph has proposed to the Law Reform Commission that the Nigerian legal system should recognize legal personality before and after death. Comment.

### **Legal Personality and Particular Incorporated or Registered Bodies**

The statute creating a body may expressly confer on that body a juristic personality. For example, the Companies and Allied Matters Act (CAMA), 1990 CREATED A Corporate Affairs Commission and declared it a body corporate with perpetual succession and a common seal, capable of suing or being sued.

An individual of a firm consisting only of individuals may for the purpose of business or trade register his or their business name with the Registrar General of the Corporate Affairs Commission. The registered name of the individual or firm is not a legal person; they are legal persons in their individual capacities only. So also are building societies, industrial and provident societies (including cooperative societies) and the individual members.

Trade unions are not corporate personalities, neither are they corporations. Rather they are governed by the Trade Union Acts, which permit the trustees to bring or defend actions on behalf of the union in furtherance of trade disputes. See *Taff Vale Railway Co. v Amalgamated*

*Society of Railway Servants (1901)*. Conversely, an association of persons that is duly registered – be it private or public, limited (by shares or guarantee) or unlimited has a distinctive and separate personality of its own. It is an entity itself, a juristic person capable of being a party to a legal relationship in its corporate name. So too are banks

However, there are particular classes of natural persons whom the law has assigned peculiar legal capabilities or in capabilities. Examples are mental defectives, lunatics, or other incapacitated groups, infants, aliens, prisoners etc. Slaves and Castes have been proscribed. They are now juristic persons, the legal status of women have vastly improved and nearly assimilated to those of the other gender.

### **3.4 Ownership**

Elias confirmed that a clear distinction is everywhere drawn between ownership and possession particularly of land on the one hand and of all other forms of property on the other. The traditional conception of land was that it belonged to a vast family or community of whom many of its members were dead, few were living; and countless members were unborn. What the individual held was possession. The residuary or reversionary and ultimate ownership rested on the territorial community.

The distinction between ownership and possession exists in both the traditional and developed systems of law. In the latter, the State owns all the land and the individual is a tenant and the possessory title confers alienation almost at par with absolute free holding.

In relation to chattels, outright purchase and delivery may confer both possession and ownership on the purchaser. It is possible that a purchaser may acquire ownership of a chattel when the price has been paid while the vendor still retains possession. A lender of a trailer, for example obtains ownership while its hirer merely has possession. A servant may be a bailee of his master's goods, having possession while ownership remains in the master (bailor).

Definition of the terms: ownership.

The term ownership has been described as follows:

The collection of rights allowing one to use and enjoy property, including the right to convey it to others.

The right to possess a thing, regardless of any actual or constructive control



Control over something to the exclusion of all others, the continuing exercise of claim to the exclusive use of a material object

In its widest sense, the relationship between a person and any right legally vested in him – be it right *in rem* or right *in personam*

In its technical sense, ownership denotes rights, which, which man enjoys over his own property, (i.e. right *in re propria*) but excludes rights and obligations exercised over the property of others.

According to Austin, ownership is a right indefinite in points of user, unrestricted in points of disposition and unlimited in duration over a determinate thing.

Ownership rights are general, permanent and inheritable; a *de jure* recognition of claim maintainable by the will of the state as expressed in the law. Ownership is a guarantee of the law. Based on a claim of ownership, real action may lie for specific restitution. Conversely, right to possession may be defeated by proof of better title or prior possession. In other words a defence of better title (e.g. ownership) or earlier possession is a complete answer to an action of Ejectment or Writ of Right, *Assize of Novel Disseisin* or *Assize Mort d' Ancestor*. The law protects prior possession, first because more often than not, possessors are owners and second to prevent breaches of peace and good order. Ownership may be likened to the Fee Simple Estate under the English law or *Dominium* in the Roman law.

### **Characteristics of Ownership**

Two characteristics of ownership may be noted.

- a. Right to undefined residue or reversion of the advantages derivable from the thing in question.
- b. Single right of ownership irrespective of the number of particular rights carved out of it by the owner to others Exceptions are joint ownership and ownership in common.

Who finds and takes *res nullius* or *res derelicta* acquires ownership.

### **Limitations**

Ownership may be restricted in the following ways:

An owner may limit his/her own ownership.

Persons from whom he derives title may limit owner's rights

Owner's right may be limited by law, social control or even by private interests

Owner's rights may be restricted by agreement

What determines the extent of the rights, privileges, powers and immunities, which an owner may exercise, is the social policy of the particular legal order. For example in Nigeria, an owner will not be allowed to use his/her property in a way that constitutes private nuisance or injury to others: *sic utere tuo ut alienum non laedas*: An owner of an axe; would not be permitted to use it in chopping up peoples' heads.

### **Co-ownership**

There may be co-ownership of property. Examples are:

- Joint ownership.
- Tenancy in common

Ownership also may be:

- Legal
- Equitable

The Sales of Goods Act has specified when ownership shall be deemed to pass in sales of goods transactions

Dias and Hughes conclude that the idea of ownership of land and chattels is essentially one of the better rights to possess. Actual possession of them implies a right to possess until the contrary is proved and to that extent a possessor is presumed the owner. Those who assert that the defence of *jus tertii* requires a plaintiff to show an absolute title would maintain that ownership is now, in some respect at least, the best right.

Renner and Max have expressed the view that the concept of ownership of means of production, coupled with the institution of hire of labour is the source of power over persons for gain or profit. They maintain that every profit is a theft. The validity of this claim seems open to question in the light of increasing state welfare programmes, trade unionism and collective labour bargaining power as well as government's privatisation policies.

### **3.5 Possession**

Possession has been one of the most difficult and ambiguous conceptions in legal theory. Even today, the word "possession" still continues to tax the ingenuity of jurists. Its legal senses (and they are many) overlap the popular sense and even the popular sense includes certain assumptions which have defied verification. Salmond states that there is no conception more difficult than that of possession in the whole

range of legal history. According to Dias and Hughes, “the actual working of the law has not only been obscured by a fog of speculations but what is worse, decisions have been falsified so as to fit them into some preconceived theory”

### **Definition of Possession**

Something a person owns or controls

The fact of having or holding property in one’s power; the exercise of dominion over property

The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object

The continuing exercise of a claim of exclusive use of a thing

The interest one would have or a thing the loss of which renders that thing *res nullius* (thing belonging to no one).

In popular sense one has possession of anything of which he has apparent control or from the use of which he has the apparent power of excluding others.

Pollock and Wright have explained that any of the usual outward marks of ownership may suffice to prove possession in the absence of manifest power in some one else (i.e. the owner). At law, possession is a definite legal relation to something capable of having an owner, which relation is distinct and separate both from real and from apparent ownership, though often concurrent with one or both of them.

### **Attributes of Possession**

Possession may be

Both a fact and a right

*De facto* exercise of claim by self assertive will

A guarantee of facts

The basis of action for trespass

A product of a given set of circumstances

Restored or its value paid in an action *in personam* or detinue if possession is interfered with

A basis of protection in law save as against one who has a better title  
Equivalence of ownership by prescription subject to certain conditions under the Limitation Act or by giving up possession coupled with an intention to confer ownership

Prim facie evidence of ownership, root of title disposable *inter vivos*, by Will or upon intestacy. Hence described as the “nine points of the law”

Without physical control or *de facto* possession, there can be no ownership; possession may be evidence of ownership; the possessor of a thing is presumed to be an owner of it and may put all other claimants to proof of their title. Salmond's caveat is apt: that the consequences, which flow from acquisition and loss of possession, are many and serious.

### **Elements of Possession**

There are two elements of possession:

#### **1. Physical Element (i.e. *corpus*).**

This connotes the relation of the possessor both to other persons and the things possessed. Pollock and Wright assert that "the reality of de fact dominion is measured in inverse ratio to the chances of effective opposition"

#### **2. Mental Element (i.e. *animus*).**

The mental element may be

*Animus domini*: the intention to hold as owner; belief that one is an owner (Salmond)

*Animus excludendi*: Intention to exclude others (Sohn) or intention to appropriate to oneself the exclusive use of the thing possessed (Salmond)

Animus may be general rather than specific. It is not material that the article or object of possession is not of any value or benefit. A dead carcass is capable of being possessed. In appropriate cases, a trustee or a thief may have legal possession; One's chattel may be in or upon another's chattel while a thing on land may belong to the land owner or legal possessor. See *Johnson v Pickering (1907)* and *South Staffordshire Water Co v Sharman (1896.)*

### **SELF ASSESSMENT EXERCISE 2**

1. Henrietta forgets her cell phone under the desk in one of the tutorial classes at the Study Centre. The next morning, Aniete, in the process of cleaning the classroom, lays hold on the phone. At what point in time does Henrietta lose possession, if at all?

2. Ayo steals Chidi's trinket box, pawns it to Usman. Ayo seeks to redeem the pawn and recover the trinket box. Usman refuses to return the trinket box to Ayo on the ground that it is a stolen good and does not belong to Ayo.
  - a) Comment
  - b) Would your answer be different if Ayo had sold the trinket box to Adams and handed over the pawn documents?
3. A gardener, in the process of mowing the garden finds an expensive gold ring buried under the flower bed. The owner of the garden who employed the gardener, demands the gold ring but the gardener also lays claim to it. Advise both parties.

### **Tangible and Intangible Possession**

Tangible objects may be possessed physically. Intangible objects cannot be so possessed. Hence no one can possess copyright or patent. But should this be so?

However, intangible objects may be subject to quasi-possession or incorporeal possession. Proof of *corpus* may be assumed provided there is evidence of actual exercise of power over the use of the intangibles.

Right may be lost in the following situations

### **Loss of Possession**

A person in possession enjoys the right to possess against the whole world but such right may be lost in the following situations:

- i. Upon evidence of better title
- ii. When ousted or deprived
- iii. By operation of the law as where he/she suffers distraint for default of rent or in consequence of a court order of execution
- iv. Loss by one and finding by another.

Bare custody is itself a possession but it is not sufficient to defeat a legal possession. For example, servants, guests, licensees, bailees or other may have temporary custody (*corpus*) but not the *animus*.

### **SELF ASSESSMENT EXERCISE 3**

A large consignment of goods belonging to Chukwu, has by mistake, been delivered to your ware house. Discuss critically

For a guide see *Van Oppen v Tredger* in relation to bare custody and *Elvin v Plummer Roddies* in relation to involuntary bailee.

### **3.6 Deceit**

The notion of deceit developed more particularly in the 16<sup>th</sup> and 17<sup>th</sup> centuries and played a leading role in the development of early law. Indeed, the historical development of the notion of deceit illustrates the flexibility and power of self development of the common law.

#### **Historical Development**

##### **Interference with Court Process**

Deceit was first conceived as an actionable wrong where a party in a case used false names and thereby deceived the court and interfered with its proper working.

##### **Contractual Obligations or Promises**

Where there existed a contract between parties, element of deceit led to the development of “assumpsit” and enabled the court to grant new remedies, which otherwise were impossible. Assumpsit (“he undertook or assumed or promised”) was an old form of common law action of trespass on the case. It was founded on express promise (later extended to implied or even fictitious promise) by which a party undertook to do something or pay something to another, which contractual obligation or promise had been breached. Deceit helped to penalize or prevent fraud in sales of goods transactions. For example, it was deceit and therefore an actionable wrong in the eyes of the court if D sold cattle to P, which cattle he had no right whatsoever to sell

##### **Breach of Warranty**

Deceit gave remedies for a breach of warranty at a time when remedies for breach of contract had not developed. A warranty is an express or implied promise that something in furtherance of an existing contract is guaranteed by one of the parties, e.g. a seller’s promise that the article being sold is as represented or promised. Thus if a person uttered a representation (not mere sales talk or puffs and expressly warranted its truth, he/she would be held liable if it turned out to be untrue. Thus the court would seize on and penalize deceit in a situation where D sold a horse to P, warranted him that it was sound and without any malady where D knew that the horse was full of maladies in the eyes and legs or

where a horse warranted to be sound died from 'infirmity' within two weeks of purchase. See *Rosewell v Vaughan (1608)*.

### **Breach of Other Contractual Obligations**

Initially, the notion of deceit was restricted to express warranty, By the use of Writ on the case in the nature of deceit or simply deceit on the case, the principle of deceit then extended to implied and even to fictitious terms. The principle of deceit enabled the court to provide remedies in such situations as where:

X agreed to sell white acre to Z; Z paid the agreed price to X; But X conveyed to another.

P obtained the service of a lawyer for purposes of purchasing the Greenacres. His lawyer betrayed the trust and negotiated the sale of Greenacres to another person.

K, accompanied by his lawyer, travelled from Sokoto to Lagos to complete the purchase of a plaza, but the vendor is unwilling to complete it.

In each of these cases, the offending party appeared to derive some form of benefit from his/her breach. At other times the court it was irrelevant to the court that the defendant did or did not benefit in the transaction. This was the case where D told P that if P sold his car to S, he would see him paid. P sold the car to S but was not paid. This situation raises a number of issues:

What was D's benefit in this matter?  
Was D's mind guilty?

It took almost a century and a half before the court in *Crosse v Freeman (1789)* could hold that in an action of this kind, the defendant, would only be liable if he positively **knew** that the statement he was making was untrue.

The principle of deceit was extended further in *Taylor v Ashton (1843)* in this important case, the court held that remedy for deceit would lie not only where the defendant had actually known his statement to be untrue but also where he made the statement not **believing** it to be true.

### **Absence of a contractual nexus**

So far, the principle of deceit was relied upon for remedy only where there had been some form of a contractual relationship between parties.

By subsequent development, deceit was applied to redress situations like cheating by playing for money with false dice; making false statement in an inventory of goods for which duty was paid. It is significant that although there was no element of contract, an element of fraud was present.

In *Pasley v Freeman (1789)*, D willfully made a false statement to P to the effect that T was reliable and wholly credit worthy. Acting on the strength of this statement, P had sold goods to T. T defaulted and could not pay. P suffered loss and sued. The court rejected the argument that absence of a contractual relation between parties was fatal to P's action. It held that remedy lay even though no contractual nexus bound the parties. Thus, the court for the first time, gave an authoritative judicial recognition of a principle which had been implied in earlier cases, In arriving at its decision, the court relied in the dictum of Croke, J in *Bailey v Murrell (1616)*. In that case, D made a false statement about the weight of a load by one of the parties to a contract. Giving authoritative recognition of a separate tort of tort, Croke J said:

Fraud without damage or damage without fraud, gives no cause of action; but where these two concur, and action lies

## **Tort**

Deceit was a developing instrument in tort and helped to fill obvious gaps. Let us consider some situations very briefly:

**Case 1:** D sold P's gold rings and necklace.

**Case 2:** B asked AD to wash her wedding dress; AD did nothing or did it wrongly.

In Case 1, P has a remedy in the tort of trespass because D's conduct was a positive misfeasance. There was no form of action and therefore no remedy for acts of non-feasance as in case 2. The attitude of the early law was that B "himself invited trouble!" By inventing a new action of Trespass on the case, the notion of deceit was expanded to providing a remedy for non-feasance. All that was required of B to succeed in her action was simply to prove that the defendant had undertaken (however falsely) to wash the wedding dress or produce a given result and had failed to do so to Plaintiff's detriment.

The case of *The Humber Ferryman (1348)* was an action in deceit and also a significant landmark in the development of the law of tort. In that case, JB alleged that GF undertook to carry his mare safe and sound in his boat across the water of Humber, whereas the said GF overloaded



his boat with other horses, by reason of which overloading the mare perished to his tort and damage. JB succeeded and the foundation was laid for liability of bailees and common carriers.

### **Negligence**

The principle of deceit also influenced the development of the tort of Negligence. In *Peek v Gurney*, (1873), XY & Co Ltd sent a misleading prospectus to P and P bought shares in the company on an open market and lost. An action on deceit failed on the ground that the prospectus was designed to induce P to buy shares directly from the company and this he did not do. Rather, he bought from the open market. The tort of negligence has developed enormously and *Peek V Gurney* would probably be decided differently today.

### **Deceit Today**

Deceit today, is an independent tort in its own right. It is “a misrepresentation of fact made willfully, falsely, or without belief in its truth, or recklessly, falsely, not caring whether it were true or false, with intent that it should be acted upon and which was acted upon to the damage of the person to whom the representation was made”

Note the following elements in the definition:

- a. Representation of fact, (not law).
- b. Representation made with knowledge of its falsity.
- c. Intention that the representation should be acted upon by the plaintiff or by a class of persons which includes the plaintiff in a manner which resulted in damage to him/her.
- d. Plaintiff must have acted on the false statement and sustained damage by so doing,

### **SELF ASSESSMENT EXERCISE 4**

Read the following cases

- a) *Derry v Peek* (1889)
- b) *Hedley v Peek* (1964)

Summarize in one paragraph, the facts and decisions of each case.

Can you see how both cases interact?

Attempt to identify in each case, the place of intent or at least willful recklessness, if any.

Note that *Derry v Peek* is a decision in the tort of deceit and to that extent is limited. The decision in *Hedley Byrne v Heller* is the tort of

negligence but it has also filled the gaps in the formulation in *Derry v Peek*.

### **3.7 Conversion**

Studying Conversion in its present form of action without reference to the ashes of trespass, detinue, replevin, and trover is like studying fish out of water

#### **Trespass**

The term trespass may mean:

Any wrongful act, infringement or transgression of the rule of right.  
A legal wrong for which the appropriate remedy was a writ of trespass where there is a direct and forcible injury to person, land, or chattels.

The tort of trespass to land

Generally, trespass is a wrongful act against possession

If Hamzat causes damage to Jumai's property and makes no attempt to treat the property as though it were his own, action of trespass lies against Hamzat.

Suppose Chukwu takes possession of Ajose's wares and keeps them for his own use. The act of "taking possession" is trespass' redressible in an action of trespass; the act of "keeping them for his own use" amounts to conversion for which an action of Trover is remedial.

Both actions were separate and distinct until the 17<sup>th</sup> century when they became alternative forms of action and the court could be heard to say: Although he take it by a trespass, yet upon the other may charge him in action upon the case in Trover.

#### **Detinue**

Action of detinue has existed since the 12<sup>th</sup> century for recovery of personal property wrongly taken by another. It was available to a plaintiff who had immediate right to possession of goods against a defendant in actual possession of them and who upon proper demand failed or refused to deliver them up without lawful exercise.

Detinue has two aspects:

### **Detinue sur Bailment**

This action lay where a bailee unlawfully refuses to hand back the bailed goods to the bailor (owner).

Example: Lola bails her wedding diamond gift to Busola and when she asks for it.

### **Detinue sur Trover**

This action availed an owner of goods which had been lost and now claimed by the finder. The action was to compel the defendant to return the specific goods or pay their value in damages. The action failed if the defendant successfully resisted Plaintiff's claim by Wager of law. This was a method by which a person disproved a claim by simply swearing on oath that the claim was groundless and enlisting as many persons as were required (Compurgators), who need not know anything about the case. The remedy was a restitution of property in whatever conditions they were or pays in damages its value. If the goods were damaged, there was no remedy.

### **Replevin**

Action of replevin lay for repossession of personal property wrongly taken or detained by another, whereby the plaintiff sought to give security for and take custody of the property until the court decided who owned it. If the action succeeded, the court would make an order authorizing the retaking of property wrongfully taken, detained or distrained.

### **Illustration**

Chika owes Ada certain amount of money and Ada seizes Chika's laptop in lieu of payment of the debt.

The points to prove in an action of replevin were

1. That the property is a personal property
2. That the plaintiff at the point of the suit is entitled to immediate possession
3. That the defendant has wrongfully taken the property (replevin in the cepit), whether or not it was lawfully obtained in the first instance (replevin in the detinet)

Replevin penalized wrongful act against possession only; it was not concerned with title of goods. It was restricted to unlawful distress and the claim could also be resisted by wager of law. If Adigwe unlawfully distrained Ajayi's car in lieu of payment of debt owed to her, Ajayi had remedy in and action of Replevin. Because Adigwe's taking in distress did not amount to questioning Ajayi's title. In the car, action of Trover would not lie.

### **Trover**

Trover is a common law action for recovery of damages for **conversion** of personal property, the damages generally being measured by the value of property. In this context, conversion meant dealing with goods in such a way as to deprive the person entitled to them, of their use and benefit. It consisted of an absolute denial of ones right to deal with goods even though there was no physical interference with the possession of them (Winfield). In other words, conversion is what the defendant has done e.g. Appropriation of specific sum of money, legal documents etc. It ought to penalize or prevent "calling into question the title of another person to goods".

It should be noted that at the time, the action of conversion per se had not been developed; Trover served as its remedial action.

### **Action of Trover on the Case**

The gaps, deficiencies and injustices arising from writs of trespass, detinue, replevin, and trover at common law led the courts to formulate an "Action of Trover on the case" By this device, it became possible to:

1. Remedy the damage to goods bailed which the action of detinue had denied.
2. Remedy conversion by a defendant of Plaintiff's goods to his (i.e. defendant's) use
3. Articulate or assimilate both actions in detinue and in Trover on the case.

The result was the emergence of writ of Trover as a distinct form of action. In this action, it was required of the plaintiff to specify in the writ that:

He/she had been in possession of the goods

He/she had, by accident, lost the goods.

The defendant had found the goods

The defendant would not return the goods to the Plaintiff, even after being asked to do so.

The defendant had converted the goods to his own use.

See the case of *Lord Mounteagle v Countess of Worcester (1554)*. In practice, the losing by the plaintiff and finding by the defendant as contained in the writ were mere fictions. But the court would have satisfied itself of the following:

- a. Positive act of conversion, e.g. detention of plaintiff's goods: *M'Kean v M'lver (1910)*
- b. Infringement of plaintiff's possession otherwise by possession: *Armory v Delamirie (1722)*
- c. Immediate right to possession of property in the absence of physical possession: *Ratcliffe v Davies (1611)*
- d. Right to property in the thing and a right to possession, not being bare ownership: *Gordon v Harper: (1796)*.

### **SELF ASSESSMENT EXERCISE 5**

What forms of action are available in the following fact situation? Give your reasons.

1. P puts his wares in D's care and custody; P demands their return to him; D refuses to do so.
2. Tayo kept her wares in Deji's care. Deji kept them in the corner of his flat and they were stolen. Tayo has demanded for her wares without success and has sought to sue in Tayo.
3. Dupe gave her car on pawn to Timothy, who lodged it with Ambi. A few months later, Timothy died, subsequently; Dupe presented to Ambi the redemption money and documents, seeking to retrieve her car. Ambi has refused to accept. Dupe has asked Ambi for the car but Ambi has refused to return the car. Dupe has approached you to find out if she could maintain an action of Trover.

### **4.0 CONCLUSION**

We have deliberately omitted to develop in any detail, the doctrines of separation of power and the rule of law. The reason is that they have been treated elsewhere. They have however been mentioned in a nutshell because they are also fundamental to any legal system. This unit has shown the history of deceit and conversion and how they developed to become independent causes of action through sheer judicial activism and in response to an unending quest for substantial justice. The rest is a matter of the Law of Tort. Also the unit shows that only a legal person can sue or be sued and a legal personality is a creation of positive law. All the concepts in this unit and their historical development point to one direction: law and the legal system have become variables and a means to an end.

## 5.0 SUMMARY

The doctrine of separation of power is of practical value. It had a developing influence on the relationship among the three tiers as well as the three organs of government in Nigeria and the relationship between these and the ordinary citizens. The legal system is affronted with the perplexity of what the rule of law is or has been. Questions have arisen if it is a new despotism, a device to undermine civil liberties or a pursuit of its own concept of public interest. These questions require an answer.

Your understanding of a “legal person” should perhaps begin to agitate your minds as to whether or not suicide or like offences should be decriminalized. You would have noted that trespass is a wide field ranging from taking a chattel out of the possession of another, moving it from one place to another or even bringing one’s person into contact with it, or directing missiles at it. Refer once more to Salmond’s pessimism that in the whole legal theory, there is no conception more difficult than that of possession. Do you share the same idea? Is the Western conception in any way different from your own traditional concept? You must appreciate how deceit, from an element in the 12<sup>th</sup> century, grew to play a leading role in the development of the legal system and the law. In the same way, Conversion emerged and absorbed its predecessors – detinue, replevin and Trover, Is this welcome trend of flexibility and self development of law extinguished?

We must draw the curtain here. We hope you have enjoyed the course.

Now return to the last Self Assessment Exercise. Attempt it if you have not done so, before you proceed further. When you have done so, then you can read this guide and see how well you have fared

**Do not read this Guide until you have attempted the last Self Assessment Exercise**

What is required for Trover to succeed is a positive act of conversion of the goods by the defendant to his/her use. The pertinent question is whether a “refusal” to give back another’s goods amounts to a “positive act”. It does. Hence action lies in Detinue or Trover which in early times was impossible because both were separate and distinct.

Where, by negligence one loses the goods in one’s care or they are destroyed, there was in early law, nothing to return or convert. A **refusal** to deliver could amount to conversion but a **failure** to deliver could never be.

Read the cases of *Gordon v Harper* and *Ratcliffe v Davies*. In the former, the court refused the claim by a bare owner, arguing that in

order to maintain a trover, the plaintiff must have a right to property in the thing (meaning here, ownership of the thing) and a right of possession, and unless both these rights concur, the action will not lie. In the latter case, the court found for the plaintiff on the ground that although he had no possession, yet he had a right to re-possession on his/her producing redemption money.

A defendant, in an action of trover succeeded if he/she could prove the following:

1. That he/she had reasonable grounds for refusing to return the goods
2. Jus Tertii
3. That article is severed from land by the adverse party
4. Where the breach is default of obligation to pay money, that there is no duty to do so

Originally, trover was based on an infringement of possession otherwise than by possession. Since the 17<sup>th</sup> Century, a trover and conversion may well lie although the defendant came into them by a lawful delivery and by trover. (Finding).

## 6.0 TUTOR-MARKED ASSIGNMENT

1. An action of deceit would not lie in respect of statements which are false but merely carelessly so. How far is this true? Support your answer with decided cases
2. How has the notion of deceit contributed towards formulation of contractual remedies?
3. Explain the main elements of conversion
4. Write critically on
  - a) Trover
  - b) Detinue
  - c) Replevin
  - d) Trespass

## 7.0 REFERENCES/FURTHER READINGS

Elias, T. (1972). *The Nature of African Customary Law*. Manchester University Press.

*Blacks Dictionary*

Heuston, R Salmond (1977). *On the Law of Torts* (17<sup>th</sup> ed).

Geldart, W. (1984). *Introduction to English Law*. DCM Yardley(ed).

Shipman, B. ( 1923). *Handbook of Common Law Pleading*.