





## **...FROM THE ACADEMIC SECRETARIAT**

### **ACKNOWLEDGEMENT**

The Justice Oputa Chambers being the current best Chamber in the Faculty, is one of the very few associations in the faculty that places premium importance on the academic welfare of its members.

We were tempted to make this material privy to only members of the Chamber, but we realized the need for everyone to be his “brother’s keeper” for we are in competition with no one we hope we all make it.

In line with our mandate, the Oputa Note Series; which was introduced last year, is designed to help achieve better understanding of the topics treated in class. We cannot pretend that this note is all encompassing and as such should be studied independently of other materials; it is simply intended as an aid in studying for exams. Students are advised to consult other academic materials.

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This work is presented in simple “legalese” which will make it understandable to students who aim for distinction in their academics.

**ACADEMIC SECRETARY**

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----- Justice Opata Student Chambers Notes Series compiled by Rilwan Shittu & co.

# **300LEVEL NOTES**

## **PPL 301**

### **LAW OF TORT I**



## **TOPICS**

- **LAW OF TORT- NATURE AND FUNCTIONS**
- **TRESPASS TO PERSON**
- **TRESPASS TO CHATTEL**
- **TRESPASS TO LAND**
- **NEGLIGENCE**

## **MATERIAL SOURCES**

- **CLASS NOTES**
- **LAW OF TORTS BY KODILINYE & ALUKO**
- **LAW OF TORTS BY ESE MALEMI**
- **WINFIELD AND JOLOWICZ ON TORTS**
- **NATIONAL OPEN UNIVERSITY SYLLABUS ON LAW OF TORTS**



## TOPIC 1

### LAW OF TORT- NATURE AND FUNCTIONS

Numerous attempts have been made to define “a tort” or tortious liability with varying degrees of lack of success.

According to **Kodilinye**

“A TORT may be defined broadly as a civil wrong involving a breach of a duty fixed by the law, such duty being owed to persons generally and its breach being redressible primarily by an action for damages.”

**Winfield’s** definition of tort was as follows:

“Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.”

In a similar tone, **Prof. Sir John W. Salmond** in his **book Salmond and Heuston, Law of Tort**, , defined tort as:

“A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation.”

From the above definitions, one can deduce that a tort is a breach of a civil duty imposed by law and owed towards all persons, the breach of which is usually redressed by an award of un-liquidated damages, injunction, or other appropriate civil remedy.

At a general level, it can be said that tort is concerned with the allocation of responsibility for losses which are bound to occur in our society and it aims to compensate persons harmed by the wrongful conduct of others. Tort is mainly based on case law and the substantive law of torts consists of the rules and principles which have been developed to determine when the law will and will not grant redress for damages suffered. Tort exhibits what the acceptable standard of behaviour in society is and it projects the expectations we have about life. Monetary damages or compensation is the commonest/normal remedy for a tort but there is also the remedy of injunction which is sometimes granted by the courts.

As a part of civil law, the purpose of the law of tort is to prohibit a person from doing wrong to another person, and where a wrong is done, to afford the injured party, right of action in civil law, for compensation, or other remedy, such as an injunction directing the wrongdoer who is known as a tortfeasor to stop doing the act specified in the court order and so forth.



## A SUMMARY OF THE OBJECTIVES OF TORT

The objectives of the law of tort can be summarized as follows:

- 1. Compensation:** The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.
- 2. Protection of interests:** The law of tort protects a person's interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various torts have been developed for these purposes. For example, the tort of nuisance protects a person's use or enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.
- 3. Deterrence:** It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others. This is encouraged by insurance companies.
- 4. Retribution:** An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.
- 5. Vindication:** Tort provides the means whereby a person who regards himself or herself as innocent in a dispute can be vindicated by being declared publicly to be 'in the right' by a court. However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.
- 6. Loss distribution:** Tort is frequently recognized, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re- distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant's insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover insurance payments will bear the cost. The process is not easily undertaken and it involves considerable administrative expenses which are reflected in the cost of the tort system itself. There are also hidden problems attached to the system, such as psychological difficulties for claimants in using lawyers and the courts, and practical difficulties such as the funding of claims which may mean that many who deserve



compensation never receive it. It has been suggested that there are other less expensive and more efficient means than tort for dealing with such loss distribution.

**7. Punishment of wrongful conduct:** Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

### THE RULE IN SMITH V. SELWYN

The common law rule in **Smith v. Selwyn** states that where a civil wrong is also a crime, prosecution of the criminal aspect must be initiated, or reasons for default of prosecution given, before any action filed by the plaintiff can be heard. Thus, it was the position that where a tort was also a crime, the filing of criminal proceedings against the wrongdoer, preceded the filing of a civil suit by the aggrieved party. This is known as the rule in **Smith v. Selwyn**. When the rule in *Smith v. Selwyn* was not observed, the civil action by the plaintiff could not proceed and it was bound to fail as long as the defendant had not been prosecuted or a reasonable excuse given for the lack of prosecution.

Formerly, the proper course when a civil suit was filed, was for the court to stay proceeding in the civil action until the criminal prosecution was finally completed.

### EXCEPTION TO THE RULE IN SMITH V. SELWYN

The right of an aggrieved party to sue in tort is not affected, once the matter was reported to the police and the police in the exercise of their discretion decide not to press criminal charges.

In **Nwankwa v. Ajaegbu (1978) 2 LRN 230**. The plaintiff reported an assault. The police did not bring criminal proceedings. The plaintiff then brought civil action claiming damages for assault and battery. The defence contended that the civil action could not proceed as criminal charges had not been filed by the police. The court held that the civil action was not caught by the rule in *Smith v. Selwyn* which required that where a case discloses a felony, the civil action should be stayed until criminal proceedings were concluded. The plaintiff having reported the assault to the police, whose duty it was to prosecute, if the police in their discretion failed to press charges, it was not the fault of the plaintiff. He was free to initiate civil proceedings for remedy.

### ABOLITION OF THE RULE IN SMITH V. SELWYN IN NIGERIA

However, the rule in **Smith v. Selwyn** which has been abolished in Britain, also no longer apply in Nigeria. In view of the fact that the rule is a breach of the Nigerian Constitution and other statutes



The Nigerian Constitution The rule in *Smith v. Selwyn* for instance breaches **sections 6(6)(b), 17(2)(e), 46(1) and 315(3) of the 1999 Constitution**, which provisions forbid the blocking of access to court. The above mentioned provisions of the Nigerian Constitution guarantee right of access to court for every person to institute action for the protection, or determination of his civil rights and obligations according to law. The applicability of the rule in ***Smith v. Selwyn*** in Nigeria was considered by the Court of Appeal in the case of ***Veritas Insurance Co. Ltd. V. Citi Trust Investments Ltd. (1993) 3 NWLR Pt. 281, P. 349 at 365 CA.*** where it held that in view of the provisions of the Nigerian Constitution, Criminal Code Act and the Interpretation Act, the rule no longer applies in Nigeria.

## **TORT DISTINGUISHED FRO OTHER LEGAL CONCEPTIONS**

### **TORT AND CRIME**

The main purpose of criminal law is to protect the interests of the public at large by punishing those found guilty of crimes, generally by means of imprisonment or fines and it is those types of conduct which are most detrimental to society and to the public welfare which are treated as criminal. A conviction for a crime is obtained by means of a criminal prosecution, which is usually instituted by the State through the agency of the police.

A tort on the other hand, is a purely civil wrong which gives rise to civil proceedings, the purpose of such proceedings being not to punish wrongdoers for the protection of the public at large, but to give the individual plaintiff compensation for the damage which he has suffered as a result of the defendant's wrongful conduct.

Another important difference between tort and crime in Nigeria is that the entire criminal law has been codified in the form of the Criminal Code of Southern Nigeria and the Penal Code of the Northern states, whereas the law of torts remains a creature of judicial precedent modified here and there by statute.

Notwithstanding the fundamental differences between criminal and tortious liability, it is significant to note that there are some torts, particularly trespass, have strong historical connections with the criminal law. So the same act may be both a tort and a crime, for example, assault, false imprisonment and defamation are both torts and crimes. **See sections 252, 365, 373-381 of the Criminal Code and sections 263, 264 and 391 of the Penal Code.**

There are in addition several examples of conduct which are both criminal and tortious. If A steals B's bicycle, he will be guilty of stealing (a criminal offence, see **sections 382-388 of the Criminal Code and sections 286-290 of the Penal Code**), and at the same time be liable to B for the tort of conversion. Again, if A wilfully damages B's goods, he is liable for



the crime of malicious damage to property (see section 451 of the Criminal Code and section 326 of the Penal Code) and for the tort of trespass to chattels.

Finally, an important distinction between tort and crime is that, to succeed in a criminal trial, the prosecution must prove its case beyond reasonable doubt. The same does not exist in civil actions because in an action in tort the plaintiff need only prove his case upon a balance of probabilities. However, where a tort is also a crime, the criminal standard of proof is under the Evidence Act is what is also required in the civil trial. In other words, whenever the commission of a crime is directly in issue in any civil or criminal proceedings, it must be proved beyond reasonable doubt. It is therefore easier for a plaintiff to succeed in tort than for the prosecution to secure a conviction in crime.

### **TORT AND CONTRACT**

The main distinction between tort and contract is that in tort the duties of the parties are primarily fixed by law, whereas in contract they are fixed by the parties themselves. In other words, contractual duties arise from agreement between the parties, tortious duties are created by operation of law independently of the consent of the parties. Even this distinction, however, is by no means always valid, for today in many cases the content of contractual duties is also fixed by the law.

Secondly, the duties owed by two contracting parties towards one another are frequently not duties which they expressly agreed upon but obligations which the law implies such as the terms implied under the **Sale of Goods Law 1958** or under the **Hire Purchase Act 1965**. The core of contract is the idea of enforcing promises whereas tort aims principally at the prevention or compensation for harm, and this difference of function has two principal consequences; First, that a mere failure to act will not usually be actionable in tort, secondly, that damages cannot be claimed in tort for a “loss of expectation”, that is, damages in contract put the claimant in the position he would have been in had the contract been performed, whereas damage in tort put him in the position he would have been in had the tort not been committed.

There are some areas of overlap between contract and tort; for instance, a victim of fraudulent misrepresentation in contract may sue for the tort of deceit, and a victim of negligent misrepresentation may sue for the tort of negligence. Also, there are some concepts, which are common to both contract and tort, for example, the concept of remoteness of damage and of agency. They also both award “damages”.

### **TORT AND BREACH OF TRUST**

Tort and trust are civil laws. A trust arises in any situation where one or more persons hold property for the benefit of another person or objects. However, there is little or no



difference between the legal rights and liabilities of tort and trust. The only real difference is mainly that of history; that the law of tort arose or developed from common law, whilst the law of trust grew from the doctrine of equity in the Court of Chancery and thus liability in tort and liability for breach of trust are fundamentally different in that whereas tort is a common law concept, trust is a purely equitable creation and was never recognized by the common law.

A claim for breach of trust is liquidated and is measured by the loss caused to the trust estate, whereas a claim for damages in tort is unliquidated. A claim for breach of trust is not properly regarded as a claim for damages at all, for damages is a purely common law concept. It is thus appropriate to regard the concept of breach of trust as belonging to an entirely separate system of law and having no connection with tort.

**NB:** Tort, crime, contract and trusts are not exclusive; a single conduct can give rise to liability in all these areas of law. Thus, where a trustee steals trust funds or misappropriates trust property, he may be liable for breach of trust under civil law. The trustee may also be successfully prosecuted for breach of trust in criminal law. Where the trust was constituted by a written instrument, there may be liability for contractual failure to carry out the trust duties. Additionally, there may be liability in tort for detinue, or conversion of the trust property.

Where a single wrongful act gives rise to a right of claim in several areas of law, it is advisable to bring the action in that one or more areas of law where it will yield the desired remedy. Therefore, the party who is suing should rely upon that aspect of law which puts him in a more favourable position.

## **DAMAGE AND LIABILITY IN TORT**

Often times, for a defendant to be held liable for a tort, the plaintiff must have suffered damage as a result of the conduct of the defendant. Where damage has been proved by a plaintiff, then the test of reasonable foreseeability or remoteness of damage will be applied to determine the extent, scope or amount of damage for which the defendant will be held liable and ordered to pay to the plaintiff.

However, because damage does not always lead to liability, three principles exist with respect to damages. These are:



### **DAMAGE WITHOUT LEGAL INJURY: DAMNUM SINE INJURIA**

Damage without a legal injury or *damnum sine injuria* is a loss or damage which does not have a legal remedy. Damage without a legal injury is where a wrong or damage has been done to a person, nevertheless, the person has no right of action to recover compensation because no legal wrong has been committed. It is a damage suffered without the breach of a legal right. Thus, the mere fact that a person has been harmed does not entitle him to maintain an action, unless a legal wrong has been done to him.

For a suit to succeed, the damage must result from a breach of a legal right of the plaintiff. Where a damage is suffered without the breach of a legal right, it is known in Latin as *damnum sine injuria* that is, damage without injury. It is for the courts to determine what constitutes legal injury.

Social and commercial life would become intolerable if every kind of harm were treated as a legally redressible injury; For example business competition which drives a trader out of business is not actionable in tort, since the well-being of the society depends upon the right of every person to compete in business. In some cases, the harm complained of may be too trivial or too indefinite or incapable of proof; in others, policy may require that the courts should balance the respective interests of the plaintiff and the defendant, and that the defendant's interest should prevail.

In others, harm may be caused by the defendant's exercising his own rights, or where he does damage to the plaintiff in order to prevent some greater civil damage befalling himself. In other cases, the harm caused may be protected by some other branch of law, such as where a statute or the criminal law provides a remedy, or where the harm consists merely of a breach of contract or breach of trust.

### **LEGAL WRONG WITHOUT DAMAGE: INJURIA SINE DAMNO**

Legal wrong without damage means legal wrong without loss. It is the breach of a person's legal right but without damage to the person. It is a legal wrong without damage. Whenever there is a breach of a person's legal right, the person has a right of action and may bring action to recover damages even though it is nominal damage. He may also obtain such other appropriate remedies, although he never suffered any harm as a result of the tort. This is a contrast to damage without legal wrong. This is a situation where there is a legal wrong committed or done against a person but no loss or damage was suffered by the plaintiff or no damage was established by the plaintiff.



As a general rule, where there is a legal wrong without damage, the law presumes damage even though damage was not suffered by the plaintiff nor was proved by the plaintiff. For the simple reason that a legal wrong has been done to the plaintiff and the plaintiff is thereby entitled to an award of general damages, at least nominal damages, however small the amount.

The principle of legal wrong without damage or *injuria sine damno*, is an exception to the general rule that there must be damage or injury before legal action may be brought against a wrongdoer in tort. The torts in which damage need not be proved for a right of action to lie, are torts which are actionable *per se*, that is, they are actionable upon being committed. In other words, these torts give a right of action to the plaintiff to sue, once they are committed even though no harm resulted to the plaintiff.

To succeed in a claim for compensation in torts that are actionable *per se*, the plaintiff only needs to prove on the basis of probability, that the tort he alleges was committed. However, the plaintiff need not go on to establish damage, except where he actually suffered damage, in which case the amount of damages the plaintiff will recover will accordingly be increased beyond nominal damages.

## **THE MENTAL ELEMENT IN TORTS**

### **INTENTION AND NEGLIGENCE**

In the majority of torts it must be shown that the defendant's invasion of the plaintiff's rights was either intentional or negligent. An act is intentional when it is done with full advertence to its consequences and a desire to produce them. It is impossible to prove what went on in the defendant's mind, however, the court may presume the defendant's intention by looking at what he said or did and at all surrounding circumstances. Further, it is a well-known principle of law that "a party must be considered to intend that which is the necessary or natural consequence of that which he does.

Thus, if for example, A fires a shot at B's dog intending to frighten it, and the bullet in fact kills the dog, A cannot escape liability by pleading that he only intended to frighten the animal for it must be presumed that the natural consequence of shooting at the dog will be to kill it.

Negligence differs from intention in that intention denotes a desire for the consequences of the act, whereas if the defendant is negligent he does not desire the consequence of his act but is indifferent or careless as to the consequences.

Negligence in the law of tort is used in two senses:

1. To mean the independent tort of negligence, and
2. To mean a mode of committing certain other torts, such as trespass or nuisance.



It is in the second sense that negligence must be distinguished from intention, and it is in this sense that it also amounts to carelessness. Negligence in the first sense has a more limited and technical meaning.

### **STRICT LIABILITY**

In some torts, the defendant is liable even though the damage to the plaintiff occurred without intention or negligence on the defendant's part. These are usually torts of strict liability, the most important examples being liability for dangerous animals and liability under the rule in **Rylands V. Fletcher**. Thus, for instance, if A keeps a wild animal such as an elephant, lion or monkey, he will be liable for any damage caused by the animal, even though the damage was unintended by him and he was in no way careless in allowing it to happen.

### **MOTIVE AND MALICE**

Motive means the reason behind a person's doing a particular act. Motive is generally irrelevant in the law of torts. Thus, if the defendant's act is unlawful, the fact that he had a good motive for doing it will not exonerate him. For example, if A locks his adult sister in her room from going out with a man whom A believes to be of bad character, A will be liable to B for false imprisonment, and the fact that A had a good motive will not excuse him.

Conversely, if the defendant's act is lawful, the fact that he had a bad motive for doing it will not make him liable. There are some torts, however in which malice is relevant. Malice in the law of torts has three distinct meanings; it may mean spite or ill will, wrong or improper motive or the intentional doing of a wrongful act without just cause or excuse. In the first sense, the presence of malice in the defendant's conduct is a factor to be taken into account in determining liability in nuisance. In its second sense, the presence of malice in the defendant's conduct may prevent him from relying on certain legal defences, notably fair comment and qualified privilege in defamation actions. Malice in this sense is also an essential ingredient of the tort of malicious prosecution.

Malice in the third sense is a purely technical form of words used in pleadings.

### **CLASSIFICATION OF TORTS**

The classification of torts is a good academic exercise. The classification of torts helps to ensure a better understanding and study of the law of tort as a whole by putting it in a better perspective. It also helps to know the relationship between various torts. Torts may be classified according to the kind of rights or interests which they protect. Therefore, torts may be grouped as follows as those that protect or concern:

#### **Torts Protecting Personal Interests**



The torts that protect a person, or prohibit trespass to person include the torts of trespass, such as, assault, battery, false imprisonment, malicious prosecution, the Rule in **Rylands V. Fletcher**, negligence, occupier's liability, etc. These torts are concerned with protecting a person from being injured in the body. They also protect the freedom, liberty and dignity of a person from being denied by way of arrest, false imprisonment, etc.

### **Torts Prohibiting Interference with Judicial Process**

The torts that prohibit interference with judicial process include malicious prosecution. This tort aims to protect persons against criminal prosecution without lawful excuse.

### **Torts Protecting Property Interests**

The torts that protect interests in property include trespass to chattel, trespass to land, nuisance, the Rule in **Rylands V. Fletcher**, negligence and interests in intellectual property, such as, copyright, passing off, injurious falsehood, patents, trademark, etc. These torts protect the proprietary interests of a person.

#### **Torts Protecting Interests in Reputation**

The tort that protects the reputation of a person is the tort of defamation. The law of defamation which is divided into libel and slander protects a person's right to his good reputation. It deals with wrongs to reputation. Defamation is also a crime. In criminal law, defamation consists of slander and libel. However, if a person does not have a good reputation, then there is nothing for the law to protect as the case may be.

### **Torts Protecting Economic Interests**

The torts which protect economic interests include; vicarious liability, deceit, passing off, interference with contractual relations and inducing breach of contract, malicious or injurious falsehood, conspiracy, intimidation, occupier's liability, etc. These torts protect the economic interests of a person, such as economic relations and trading interests. They protect the right of a person to be free from financial or economic harm.

### **Torts Prohibiting Interference with Relationships**

The torts which protect relationship between one person and another person include, interference with contractual relations, enticement and harbouring, etc. On the other hand, the law of tort cares about economic and contractual relationships. For instance, the law of tort protects one contracting party from being denied the service of the other contracting party through inducement by a third party to break the agreement. See the case of **Lumley V, Gye (1853)** and **British Motor trade Asso V. Salvadori**

The torts of enticement and harbouring are old common law torts which protect the matrimonial rights of married persons; for instance the right of one spouse not to be denied the consort of the other spouse by a third party. Although, enticement and harbouring are valid torts in Nigeria, they have been abolished in England. (**See section**



**2(9) of the Administration of Justice Act, United Kingdom; and the case of Best V. Samuel Fox & Co. (1952) 2 All ER 394.)** Furthermore, in these modern days, nobody will want to sue for these torts because they want to relate with their spouse freely and not by force of law.

### **Torts Protecting Miscellaneous Interests**

This group of torts covers other multifarious and less common interests which are protected by the law of torts.

### **TRESPASS TO THE PERSON AND RELATED MATTERS**

Trespass to the person involves direct interference with a person's body or liberty. In the old days, trespass was seen as any wrong committed recklessly, intentionally, negligently or directly against a person or his property. Today, trespass is defined as any wrongful or unauthorised interference, direct or intentional, with a person or a violation of a person's right to liberty.

It protects a person's right to violation of any form but because of its nature which is majorly deterrent, it has served as a viable tool in the protection of human rights.

Trespass to person is as much a tort as it is a crime. It is more deterrent than compensatory because the tort is actionable per se, that is, the plaintiff need not prove that he has suffered actual damage. Liability will arise by the act simply being committed. Trespass to a person can be a direct or intentional act. International here does not necessarily mean deliberate, rather it means more of the defendant intending to carry out an act, even if the end result is unintended.

The rule in trespass is thus that the defendant acts at his own peril for where the result of an act committed amounts to a direct interference with the plaintiff's interest, there is a liability for trespass. There are a few important points to note;

- A person's intention is deduced from the results of the act committed.
- The act amounting to trespass must be a direct interference with the person in question. Thus, if A places a log on the highway and B trips over the log and falls, that is not a direct interference. The result will be consequential but not intentional or direct. However, where injury or damage occurs as a result of an immediate act of the defendant, such an act will be said to be direct.
- If an act is intentional, it would give rise to liability in trespass and not negligence but if an act is negligent, it will give rise to liability in negligence and not trespass.

Trespass to person has four arms but consists of three (3) torts. They are;



1. **ASSAULT**
2. **BATTERY**
3. **FALSE IMPRISONMENT**
4. **OTHER ACTS INTENDED TO CAUSE PHYSICAL AND MENTAL HARM**

## **ASSAULT**

In ordinary everyday use, the word “assault” means to attack, beat or hit somebody. Thus, in ordinary parlance, the word assault is used to include both assault and battery. However, in the law of tort, assault and battery are two different and separate torts. Assault under the Law of Tort is threatening to harm or apply force on another person with the tortfeasor having the ability to carry out his threat. Such an act must put the other person in fear of the immediate application of unlawful or unwarranted force.

**Kodilinye** defines assault as:

*“any act which puts the plaintiff in fear that battery is about to be committed against him.”* Therefore any act, gesture, or menace by the defendant which puts the plaintiff in fear of immediate application of force to his person is an assault. Accordingly, any unlawful act of a person which puts another person in reasonable fear of battery is an assault.

Under the Criminal Code Act, the word “assault” is often used to cover both assault and battery. Accordingly, in criminal proceedings, they are usually charged. In view of this reason, sections 252-253 and 351-360 of the Criminal Code Act, define various types of assaults.

Assault is a crime and a tort. Since trespass to person is a tort and a crime, a victim may seek redress in both civil and criminal law. However, civil action is often not brought unless the tortfeasor or his employee has money and can afford to pay compensation. Otherwise, criminal action is often brought in the magistrate court by the police on behalf of the state as part of the public policy of the state to sanction crime and maintain law and order. Furthermore, assault and battery often occur together because they are often committed concurrently or simultaneously. Thus they are often charged together in criminal proceedings just as civil claim is often brought for both because one seldom occurs without the other.

In summary, in the law of tort, an assault is essentially:

1. An attempt or threat to apply force or violence to another person.
2. With the apparent ability to carry it out.
3. Which puts the person in reasonable fear of battery
4. Contact is unnecessary.



## **ELEMENTS OF ASSAULT: WHAT NEEDS TO BE PROVED:**

The elements a plaintiff needs to prove to succeed in a claim for assault are:

- 1. THAT THERE WAS A THREAT TO APPLY FORCE**
- 2. THAT THE ACT WILL PUT A REASONABLE PERSON IN FEAR OF BATTERY. IN OTHER WORDS, THAT IT WAS REASONABLE FOR THE PLAINTIFF TO EXPECT IMMEDIATE BATTERY.**

### **THAT THERE WAS A THREAT TO APPLY FORCE:**

There can be assault without battery. In assault it is not necessary to prove that the plaintiff was actually put in fear or experienced fear. What needs to be proved is that it was reasonable for the plaintiff to expect immediate battery. As a general principle, pointing an unloaded gun or even a model, or imitation gun at a person who does not know it is unloaded or that it is a model gun and therefore harmless, is an assault.

In **R v St. George**, the defendant pointed a gun he knew to be unloaded at the plaintiff who did not know that it was unloaded, at such a distance that the complainant could have been hurt if the gun was fired. On a claim for assault the court held: that there was an assault, even though the gun was unloaded, because the complainant was put in fear of being shot.

In **Innes v Wylie**, the defendant policeman who stood motionless in order to block a doorway, was held not to have committed assault on the plaintiff by so doing. See also **DPP v Little**.

In **Smith v Supt of Woking Police Station**, the defendant appellant frightened the complainant by looking through her bedroom window late in the night. The court held that the accused was guilty of assault as the complainant was put in fear of personal violence.

Also in **R v Barrett**, the defendant advanced towards the complainant, shook his fist angrily and threatened to beat the complainant there and then, as a result of which the complainant was put in fear of immediate application of force to his person. The court held: that there was assault.

In **Stephen v Myers**, the plaintiff was the chairman at a parish meeting where he was sitting at the head of the table with about 6 to 7 persons between him and the defendant. In the course of the meeting, the defendant threatened to eject the plaintiff from the venue of the meeting. He stood up and started advancing to the plaintiff to carry out the threat when he was stopped from reaching the chairman by the person sitting next to the chairman. In a claim for damages for assault the court held that assault was committed. The defendant was proceeding to throw out the chairman, though he was not near enough at the time to have struck him. He advanced with an intention which amounted to an assault in law.



### **AN ORDER COUPLED WITH A THREAT MAY BE ASSAULT**

It is also an assault to threaten to apply force to a person if the person does not immediately proceed to do some act or refrain from an act unless the defendant has legal justification. Similarly, an innocent act or conduct may amount to assault when coupled with threatening words.

In **Read v Coker** The defendant had a business disagreement with the plaintiff, his partner. The defendant thereupon ordered his workmen to throw the plaintiff out of the premises. They then surrounded the plaintiff rolling up their sleeves and threatening to break his neck if he did not leave the premises. The court held that there was an assault. There was threat of violence together with an intent to do battery to the plaintiff. Threatening to break the plaintiff's neck if he did not leave the premises was an assault.

In **Ansell v Thomas** the plaintiff who was the managing director of a company left the factory early due to the fact that two policemen invited by his co-directors threatened in words to forcibly eject him from the company's premises, if he did not leave voluntarily. In a claim by the plaintiff, the court held that the co-directors were liable in assault.

### **WORDS ALONE**

As a general rule, words alone, that is mere words do not amount to assault. To amount to an assault, the intention to apply force to the plaintiff must be shown by some action or gesture, however slight or subtle and not just in words or speech. A gesture alone may amount to assault. Similarly, a gesture coupled with words commonly amount to assault. On the other hand, words alone may amount to assault. This is so, for often a thing said is a thing done. Words often put a person in fear of personal violence. Thus, as an exception, whenever words of threat put a person in reasonable expectation of fear, there is assault. See for example the following cases:

#### **R v Ireland & Burstn**

The defendants made repeated silent phone calls to three victims. In some calls all he did was resort to heavy breathing. The victims were stalked for months and were afraid to be alone. The victims suffered mental illness or depression. The House of Lords held that there was assault. The silent phone calls having put the victims in fear of violence amounted to assault.

#### **Janvier v Sweeney**

The plaintiff, a French woman living in England was engaged to a German, who was detained in the Isle of Man, England during World War I. One of the defendants called at



her home and falsely told her that he was representing the military authorities and that she was wanted, because she has been corresponding with her fiancé, a German who was suspected of being a spy. As a result of the false threat, the plaintiff suffered nervous shock and on discovery that the accusation was false she claimed damages. It was held that she was entitled to damages for personal injuries for trespass to person. See also *Wilkinson v Downton* (1897) 2 QB 57.

Words may negate assault

On the other hand, words may explain and thus negate the possibility of battery or invalidate what would ordinarily have been an assault. Thus, words may prevent what would have ordinarily amounted to an assault from coming into being. This was the position in:

In **Tuberville v Savage**. The defendant put his hand on his sword, which act amounted to a menace or threat and therefore an assault, and said "if it were not assize time [court session time] I would not take such language from you." It was held that there was no assault. The words of the defendant showed that he did not intend to assault the plaintiff, as the judges were in town for a court session.

In **R v Light**, the accused husband raised a sword over his wife's head and said "were it not for the bloody policeman outside, I would split your head open". The court held: that the accused husband was guilty of assault. See also **R v Wilson**.

Sometimes, a battery may be committed straight away, without first having committed an assault, such as giving a person a blow suddenly from behind, or whilst he is asleep or otherwise unconscious.

#### **THAT THE ACT WILL PUT A REASONABLE MAN IN FEAR OF BATTERY:**

Finally, for assault to be committed, the act of the defendant complained about must be such that would put a reasonable man in fear that force is about to be applied to him. The act must put a reasonable man in fear of violence. This test is an objective test and it is not subjective to any particular plaintiff alone. Therefore, where the threat would not put a reasonable person in the shoes of the plaintiff in fear of violence, the tort of assault is not committed.

However, the mere fact that the plaintiff who was threatened with battery is a brave person and was not frightened by the threat, will not bar the plaintiff from successfully claiming damages for assault, as long as the alleged act of assault would make a reasonable man or reasonable person in his shoes to be afraid of battery.

In **Hurst v Picture Theatres Ltd**, the plaintiff paid for admission to the defendant's theatre. The defendants believing that the plaintiff had entered without payment asked the plaintiff to leave. He was not afraid and refused to leave and was forcibly ejected. He sued for damages. The court held that the defendants were liable for assault and false imprisonment.



In **Brady v Schatzel**, the defendant pointed a gun at the plaintiff and threatened to shoot the plaintiff. The plaintiff sued for assault. Giving evidence in court the plaintiff said that he was not scared at the time. The court held that the defendant was nevertheless liable for assault. The act in question amounted to an assault. It was immaterial that the plaintiff was not scared. The purpose of the law is to make people free from threat of violence or immediate application of battery.

Where a threat is impossible of being carried out there may be no assault. Accordingly, where a threat is clearly impossible of being carried out, there is no assault.

## **BATTERY**

Battery is the application of force, however slight on another person without his consent and without legal justification.

According to **C.F. Padfield**, battery is:

*"applying force however slight to the person of another, hostilely or against his will."*

And according to **Gilbert Kodilinye**:

*"battery is the intentional application of force to another person."*

It may be explained that battery is the application of force however slight, on another person. Thus the slightest, merest or the least touching of another person is battery. It is the use of unlawful force on another person without his consent. Accordingly, it is the unlawful application of force to another person regardless of its degree. It is any act of the defendant which intentionally causes some physical contact with the person of the plaintiff, without the plaintiff's consent.

It includes striking, or touching a person in a rude, angry, revengeful or insolent manner. The touch must be hostile and the plaintiff must not have consented to it. It is battery to intentionally touch another person or to bring any object into contact with another person. Such contact is sufficient application of force to give right to a claim in battery.

Battery can be a direct or indirect contact with a person or something on his person. For an act to amount to battery;

- The act must be done with the intention to bring about an offensive, harmful contact with the person.
- The contact is unwelcome, without consent and where consent is procured, it is done with force.
- The contact is not otherwise privileged.

Battery can be committed in many different ways, for instance: Beating with a stick, pouring water on a person, or shooting a person with a gun, Knocking a person down, or running a person down with a motor vehicle, spitting on a person's face or throwing stone



at a person, removing a chair from under a person who thereby falls to the ground, pulling a person away from something for his own good, setting a dog to attack a person, etc.

### **ELEMENTS OF BATTERY: WHAT NEEDS TO BE PROVED**

What a plaintiff needs to prove to succeed in a claim for battery are:

- 1. APPLICATION OF FORCE; AND**
- 2. INTENTION TO APPLY FORCE**

#### **THAT THERE WAS APPLICATION OF FORCE:**

There must be application of force on the plaintiff, no matter how slight. However, common forms of social touching that are reasonable and are generally acceptable are not battery, principally, because they are not regarded as tortuous and there is implied consent to such touching. Examples of reasonable and generally acceptable social touching which are not regarded as tortuous and to which there is implied consent include tapping a person on the back as part of a congratulation, or to draw a person's attention, jostling in a crowd, etc.

#### **THAT THERE WAS INTENTION TO APPLY FORCE**

It is sufficient for the plaintiff to establish that the intention of the defendant was to apply force. It is not necessary to prove intention to hurt the plaintiff. If there is intention to injure any person other than the plaintiff, there is battery, such as where a stray bullet hits a bystander. In **Stanley v Powell**, the defendant was a member of a shooting party who were hunting game. The defendant fired his gun and a pellet hit a tree and bounced off into the eye of the beater who was employed to drive birds to the shooting party. The court held that in the absence of intention or negligence, the defendant was not liable to the plaintiff for battery. Also see the following cases: **Wilson v Pringle** and **Lane v Holloway**.

#### **BATTERY NEED NOT BE VIOLENT, INFLICT PAIN, NOR INJURY**

It is not necessary that the contact be violent or inflict pain and injury need not result. Therefore, touching a person, or touching a person's cloth or anything attached to a person, if done unlawfully, wilfully, or angrily is battery. Therefore there may be battery without violence. Also, a surgical operation when done unlawfully without the patient's consent may constitute battery. Accordingly, battery includes the slightest contact, touch or force, so that harm need not result.

#### **MINIMUM CONTACT IS BATTERY: THE MINIMUM CONTACT RULE**

The least touch or contact is sufficient to constitute battery. Though a plaintiff may only obtain a nominal award of damages for such contact. In light of this, unlawful application



of force to a person, or contact with anything attached to a person may be battery in view of the minimum contact rule.

Let us consider some cases.

In **Scott v. Shepherd**, the defendant lit a squib "fire work" at a trade fair and threw it at B's stall. B threw it away to C's stall, and C threw the squib to the plaintiff's stall, where the squib exploded and injured the plaintiff. In a claim for damages for battery the court held: that the defendant who lit the squib was nevertheless liable to the plaintiff. The chain of causation of damage set in motion by the defendant was not broken by the actions of Band C.

In **Fagan v Metropolitan Police Commissioner**, a policeman asked the defendant appellant to park his car. The defendant drove the car onto the policeman's foot on which a tyre then rested. When the defendant realised what he had done, he refused the policeman's request to reverse off his foot. The court held that the appellant was liable for battery.

In **Collins v Wilcock**, a police woman wishing to question the plaintiff appellant on suspicion of prostitution, took hold of the appellant's arm to detain her for the purpose of questioning her. The police woman was not exercising a power of arrest at the material time as she was not on duty. Held: that there was battery of the appellant. The defendant police woman's conduct had gone beyond acceptable lawful physical contact between persons and accordingly her act constituted battery on the plaintiff appellant.

In **F v West Berkshire Health Authority**, the court on application of the health authority allowed sterilization of a woman suffering from a serious mental disability without her consent. In an action for damages for unlawful sterilization without consent, the House of Lords held that the court had the power to make such order under its inherent jurisdiction provided that the operation was accepted as being in the best interest of the patient, that is, the operation was accepted as appropriate treatment by a reasonable body of medical opinion, skilled in that particular form of treatment.

In **R v Martin**, the defendant placed an iron bar across an exit door of a hall, put off the lights on the staircase and shouted "fire". In the struggle to escape, several persons were injured. The court held that the defendant was liable for battery.

In **Leon v Met. Police Commr**, the plaintiff rastafarian was wrongfully suspected of carrying drugs. The police pulled him off a bus, punched and kicked him. The court held that there was battery of the plaintiff.



In **Ballard v MPC**, the plaintiffs who were feminists were attacked by police during a demonstration. One was felled down and carried away unconsciously. Another was felled down and poked with a baton in the stomach and hit over an eye. The police hit the head of the third lady with a baton. The court held: that there was battery.

In **Pursell v Horn**, the defendant threw water on the plaintiff. The court held that it was battery to .throw water on a person.

In **Cole v Turner** Holt CJ held "that the least touching of another in anger is battery." To touch another person in anger, though in the slightest degree or under pretence of passing is a battery. If two or more persons meet in a narrow passage and without violence or design of harm one touches the other person gently, it is not battery. However, if any of them uses violence against the other to force his way in an inordinate manner or engages in any struggle about the passage to a degree as may do hurt, it will be a battery.

In **Nash v. Sheen**, the plaintiff went to the defendant hair dresser and requested for a perm. Instead of a perm, the defendant gave the plaintiff an unwanted tone rinse or hair dye which caused rashes on the head of the plaintiff. It was held that the defendant was liable for battery.

In **R v Day**, the defendant slit the complainant's clothes with a knife, and as the complainant tried to stop it by reaching for the knife, his hand was cut. **Parke B** held that it was battery to use a knife to slit the clothes which a person was wearing and although the complainant's hand was cut in reaching for the knife, it was immaterial as this does not subtract from the offence. In other words, there were two acts of battery; the slitting of the clothes and the cut on the complainant's hand.

## INVOLUNTARY CONTACT

As a general rule, involuntary contact, or infliction of force over which a person has no control is not battery and may therefore be excused from liability.

In **Gibbons v Pepper**, the defendant was riding his horse. The horse, in sudden fright ran away with him on it. He called to the plaintiff pedestrian to get out of the way and upon his failure to do so, the horse ran him over against the defendant's will. The plaintiff sued for assault and battery. The court held: per curiam, that the defendant was liable and judgment was given for the plaintiff. In the court's opinion; if I ride upon a horse and another person whips the horse so that he runs away with me and runs over any other person, he who whipped the horse is guilty and not me. But if I, by spurring the horse, was the cause of the accident, then I am guilty. In the same manner, if A takes the hand of B and with it strikes C; A is the true trespasser and not B.

## KEY POINTS



- Battery need not be a hostile act. Thus, it may amount to battery to carry out surgery without consent, emergency, or justification or to kiss a woman against her will.
- Battery may be committed on a person not only when the person is conscious, but also while a person is unconscious, such as, when a person is asleep, or unconscious during surgery.
- An omission, especially if it persists may be a battery. For instance, a motorist, who accidentally drove his car on to a police constable's foot while parking his car commits no battery, but he commits battery, if he ignores the constable's plea to 'get off my foot'.

In *Fagan v Metropolitan Police Commissioner*, the defendant appellant was reversing his car whilst the complainant police constable standing in his front indicated where he should park. He then drove the car onto the policeman's foot and stopped thereon. The constable told the appellant to get off his foot and received an abusive reply. The constable repeated his request several times and the appellant finally said "Okay man, Okay" and slowly reversed off the constable's foot. He was charged with assaulting a police officer in the execution of his duty. The court held that the appellant was liable and his appeal was dismissed. The appellant's conduct could not be regarded as mere omission or inactivity. There was an act of battery which at its inception was not criminal because there was no element of intention, but which became criminal from the moment, the intention was formed to produce the apprehension which flowed from the continuous act of being on the complainant's foot.

- An act of battery must be intentional, reckless or negligent. Thus, not all acts of contact or touch are battery. Contacts conforming to accepted practice or ordinary incidents of daily life are not battery and are not actionable. Thus, for instance, to jostle or push in a crowded bus or sports stadium is not battery. Consent is generally presumed. This is so because, a person is expected to put up with the ordinary hazards of daily life, such as stepping on another's foot, and elbowing when walking on the street. To succeed in a claim for battery in such circumstances, a plaintiff is usually required to prove a hostile intention or negligence. However, it may be battery, if a person uses violence to force his way through a crowd in a rude or inordinate manner. To touch a person to attract his attention is not battery.

In **Coward v Baddeley**, in the course of a fire incident, the plaintiff lay his hand on the defendant fire officer to attract his attention. Whereupon the defendant fireman assaulted and beat the plaintiff and gave him to a policeman and caused him to be imprisoned in a police station for a day and afterwards taken into custody after leading him along public streets before a magistrate. The court held that the defendant was liable for trespass to person. A person cannot justify taking another



person into custody for merely laying a hand on him to draw his attention, if the touching was not done hostilely.

Also, In **Stanley v Powell**, the defendant was a member of a shooting party who were hunting game. The defendant fired his gun and a pellet hit a tree and bounced off into the eye of the beater who was employed to drive birds to the shooting party. The court held: that in the absence of intention or negligence, the defendant was not liable to the plaintiff for battery.

In **Fowler v Lanning**, the defendant shot the plaintiff with a gun. The plaintiff sued for personal injuries. The plaintiff did not allege that the shooting was intentional or negligent but simply averred that the defendant on a certain date and place shot him. The court held that the action must fail. An action for trespass to person does not lie if the trespass was neither intentional nor negligent.

## **FALSE IMPRISONMENT**

False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by law. False imprisonment protects a person's freedom from restraint and right to liberty. Imprisonment is something more than mere loss of mobility power, it includes the notion of restraint within some limited space defined by a will or power exterior to our own. For false imprisonment to occur, there need not be actual physical constraint, it will be sufficient if the person though had the physical capacity to leave, it would be unreasonable to expect him to do so. There must be an intention to deprive the claimant of his liberty. And the claimant would not be required to prove ill will or malice. The presence of intention is sufficient.

Imprisonment usually means locking up a person in jail but in this context the term imprisonment has a much wider meaning and includes any physical restraint of a person in a locked or an open place.

**Lord Edward Coke CJ** clearly explained the law thus;

*"Every restraint of the liberty of the free man is imprisonment, although he be not within the walls of any common prison"*

Similarly, **Sir William Blackstone** also said;

*"Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets"*



Some of the characteristics of false imprisonment are;

1. Depriving another person of his right to personal liberty and freedom of movement without just cause.
2. Compelling a person to remain where he does not wish to remain or to go to where he does not wish to go.
3. Restraint need not be in any cell or prison but may be in the open street.
4. There need not be battery.
5. The use of authority, any influence, order, trick, or request is sufficient so long as the person is available to his captor.
6. The person need not be aware that he is being detained at the time. See **Meering v Graham White Aviation Co**
7. The restraint must be total or complete. In **Bird v Jones**, a bridge construction company lawfully stopped a public footpath on Hammersmith Bridge, London. A spectator of a boat race insisted on using the footpath but was stopped by two policemen who barred his entry. The plaintiff was told that he may proceed to another point around the obstruction but could not go forward. He declined to go in the alternative direction and remained there for about half an hour and then sued for false imprisonment. The case was fully decided in an appeal. On appeal, **Patterson J** said; "...but imprisonment is as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring upon him..."

### **CONFINEMENT IS NOT NECESSARY**

For there to be false imprisonment there need not be confinement in a prison or in a police cell. The mere holding of the arm of a person as when a police officer makes an arrest in the open street is sufficient. Thus, one may be confined or falsely imprisoned in a house, vehicle, cell, prison, mine, in a street, estate or in a specific locality, such as a district or province, so long as the restraint is complete and the person is made to remain where he does not want to remain or to go to where he does not want to go.

### **THE INTENTION OF THE TORTFEASOR IS IRRELEVANT**



The state of mind, that is, the intention or malice of the tortfeasor is irrelevant. Once there is an act of false imprisonment, the tortfeasor is prima facie liable in the absence of a lawful excuse. Thus, where a tortfeasor recklessly or negligently locks a door or allows a door to lock against another person, he would be liable for false imprisonment even though he did not know that there was a person in the room or house. Thus, any unlawful restraint of personal liberty, freedom of movement or arrest of a person without legal authority is a false imprisonment. An arrest without lawful authority is a false arrest or false imprisonment because it restrains a person's liberty. Any person who takes away another person's liberty in these manners may be sued for this tort. In **Warner V. Riddiford**, the defendant terminated the employment of the plaintiff, his resident manager and locked his room upstairs so that the plaintiff could not collect his belongings and leave the premises. It was held that there was false imprisonment, since locking up his personal effects placed an active restraint on his mobility.

The purpose of the tort of false imprisonment is to protect the fundamental right to personal liberty and freedom of movement from being taken away by government or any person. The presence of ill-will or malice is not a relevant element of this tort. However, where intention or malice is proved by a plaintiff, punitive damages may be awarded in addition to compensatory or nominal damages.

In **John Lewis & Co. Ltd v Timms**, the plaintiff, a lady and her daughter were detained for some time in a supermarket by its security men on suspicion of shop lifting. It was later discovered that she was innocent of the suspicion. The House of Lords held that there was false imprisonment and she was entitled to recover damages.

The following cases may also prove instructive on this topic.

**Kuchenmeiser v Home Office; Collins v Wilcock; Weldon v Home Office; Hague v D.G. of Parkhurst Prison; and R v Self.**

In **Dumbell v Roberts**, the plaintiff was returning from work dressed in his uniform and carrying a bag of soap flakes when he was stopped and questioned by the defendant police officers. He was taken to the police station and charged with being in unlawful possession of soap flakes, which charge could not be substantiated and was dismissed by court. The plaintiff sued for false imprisonment. There was no evidence to suggest that the plaintiff had stolen the goods or that he had received them knowing them to be stolen. The court held that the police officers were liable for false imprisonment. When the two defendants arrested the plaintiff without a warrant and made no attempt to ascertain the



plaintiff's name and address, they failed to comply with the condition precedent to the exercise of their right to arrest him without warrant under the statute.

In **Burton v Davies**, the plaintiff was riding in a motor vehicle driven by the defendant. He prevented the plaintiff from coming down from the vehicle at a certain place by driving past in excessive speed. It was held that driving a motor vehicle past and preventing a passenger from alighting at his destination was false imprisonment.

In **Onitiri v Ojomo**, the defendant magistrate was presiding at a court where the plaintiff was a party in a certain proceedings. For an alleged contempt in the face of the court, the defendant ordered the plaintiff to be detained pending the plaintiff's trial for the contempt of the defendant's court. The plaintiff believing the detention to be wrongful sued the magistrate for damages for false imprisonment. **De Commarmond S.P.J.** in the High Court held that the defendant as a magistrate was not liable in damages for any act done or ordered to be done when acting in his judicial capacity. See also **Soji Omotunde v AG. Fed. The Guardian and Liversidge v Anderson**

In **Union Bank of Nigeria Ltd & Anor v Ajagu**, the plaintiff/respondent customer of the 1st defendant appellant bank, on a certain day went to the branch where he operated an account. When he was about leaving the premises, the 2nd defendant appellant an employee of the appellant bank locked the gate leading into and out of the bank premises in spite of the plaintiff's entreaties to be allowed to leave. The plaintiff spent some time inside the bank's premises, after the conclusion of his financial transaction. The plaintiff sued for false imprisonment. The Court of Appeal held: that there was false imprisonment and the defendant appellant bank was vicariously liable for the false imprisonment of the plaintiff by its servant.

In **The Queen v Lambo Sokoto**, the accused allegedly caught hold of a girl in a street, took her to his room, undressed her, forced her to kneel down naked, and placed a piece of cloth on her head and by means of a hypnotic trance she was unable to move or speak. He immobilised her until the girl's father and a policeman who were looking for her arrived at the scene. On request by the police officer, the accused promised to release the girl if he was treated gently, which he did by calling the name of the girl thrice and by speaking to her in a language unknown to the policeman. She was thereupon able to speak and move. On being charged to court, the evidence as to whether the accused had locked the door of the room where the girl was found was inconclusive.

**Charles J** in the High Court held that there was false imprisonment. The court found that the accused had no lawful excuse for confining the girl against her consent. In this case His Lordship stated the law thus: "if one person immobilises another in a room by hypnotism, he confines that other in the room just as much as if he had locked the door of



the room.” The accused had no lawful authority or excuse for confining the girl, who did not consent to the confinement.

In a charge for false imprisonment, it is unnecessary to prove that a person had exercised his powers of volition by deciding to leave a place of confinement but had been prevented from giving effect to that decision. It is sufficient to prove that he did not consent to the confinement. The onus of proving reasonable cause for the false imprisonment is on the defendant.

### **RESTRAINT OF THE PERSON IS NECESSARY**

Restraint of the person is necessary, for instance, preventing a person from leaving a place, restraint of movement, or confinement of the person, whether in a prison or in an open street, and so forth. Thus the offence or tort of false imprisonment is committed once, the free movement of a person is prevented by any act. Thus, false imprisonment is any act that prevents liberty or free movement without legal justification.

### **THE RESTRAINT MUST BE TOTAL**

For there to be false imprisonment, the restraint of the plaintiff must be total. Where there is a reasonable route, exit or means of escape, there is no false imprisonment. However, it is not a tort to prevent a person from leaving a premises when he has not fulfilled a reasonable condition on which he entered.

In **Meering v Graham White Aviation Co. Ltd**, the plaintiff was suspected of stealing some items from the defendant who was his employer. Two policemen who provided security to the defendant's office, asked him to accompany them to the company office for interrogation. The plaintiff who did not know what was his offence and was not aware that he was a suspect and agreed to the request. He remained in the office while the two policemen remained outside the room without the plaintiff's knowledge that they were there and with instructions to prevent him from leaving. He later sued for damages for false imprisonment. The court held that there was false imprisonment and he could claim. His lack of knowledge of the imprisonment at the material time was irrelevant.

The restraint of the plaintiff must be total or complete. Therefore, to bar a person from going in three directions, but leaving him free to go in a fourth direction is not false imprisonment as he has not been in a situation of total restraint.

In **Bird v Jones**, a bridge construction company lawfully stopped a public footpath on Hammersmith Bridge, London. A spectator of a boat race insisted on using the footpath but was stopped by two policemen who barred his entry. The plaintiff was told that he may proceed to another point around the obstruction but that he could not go forward. He declined to go in the alternative direction and remained there for about half an hour



and then sued. It was held that there was no false imprisonment since the plaintiff was free to go another way.

In **Wright v Wilson**, there was no false imprisonment where the plaintiff was able to escape from his confinement, after committing nominal act of trespass on a third party's property.

The means of escape must however be reasonable. Therefore, a means of escape which will endanger the life of the plaintiff will not excuse the defendant from a claim for false imprisonment. However, where a means of escape is available which will not endanger life, or cause a maim, there will be no false imprisonment.

If a person is on a premises or property and is denied exit or facility to leave, there is false imprisonment unless the restraint is an insistence on a reasonable conduct. Thus, as a general rule, it is false imprisonment to deny a person facility to leave a place without lawful justification.

Thus in **Warner v Riddiford**, the defendant terminated the employment of the plaintiff, his resident manager and locked his room upstairs so that the plaintiff could not collect his belongings and leave the premises. Held: There was false imprisonment, since locking up his personal effects placed an effective restraint on his mobility.

In **Herd v Weardale Steel, Coal & Coke Co**, a miner went into a mine as usual with the understanding to work for the specific period of his shift before coming to the surface. A dispute arose between him and his employers in the mine pit and he demanded to return to the surface but the employer refused to grant him the use of the hoisting cage for him to come to the surface and he was stranded in the pit for about 20 minutes. It was held that there was no false imprisonment. The miner entered the pit of his own freewill and the employers were under no duty to bring him to the surface until the end of his shift.

**Restraint for the Shortest Period of Time Is False Imprisonment**

The shortest period of restraint or confinement is false imprisonment. Thus no fixed period of time is necessary. However, a false imprisonment that is for a very brief time may only attract nominal damages.

### **CONTACT AND USE OF FORCE ARE NOT NECESSARY**

In committing false imprisonment, it is not necessary that force be used on the plaintiff by way of battery. There need not be any physical contact. A threat to use force on the plaintiff whereby the plaintiff is restrained by fear is sufficient. Therefore, an order such as "stay there or I'll shoot you" may be evidence of false imprisonment. The use of authority, intimidation, threat, influence, order, trick, hypnotism, pronouncement of arrest, or request to follow the tortfeasor is enough. Therefore, where a police officer wrongfully orders a person to follow him to the police station, without giving him the



option of refusing to go, and the person obeys, the police officer may be liable for false imprisonment though he never touched the plaintiff.

In **Aigoro v Anebuwa**, the plaintiff was at a train station and about to board a train when the defendant called on a policeman to assist him to prevent the plaintiff from leaving on the train. The policeman then invited the plaintiff to come with him to the police station. No physical force was used to restrain the plaintiff. The court held: that there was false imprisonment. The plaintiff by being asked to come to the police station was not doing what he wanted to do, nor acting of his own free will.

In **Clarke v Davis**, the defendant police officers invited the plaintiff to accompany them to the police station. However, they assured him that he had the option not to come with them. The plaintiff went with them. The plaintiff later sued for false imprisonment. The court held that there was no false imprisonment. The plaintiff had an option to avoid the restraint. He acted of his own free will and could not turn around and complain.

### **MERE WORDS MAY NOT AMOUNT TO FALSE IMPRISONMENT**

Generally, mere words without more do not constitute false imprisonment.

In **Genner v Sparkes**, the defendant/court bailiff informed the plaintiff that he had come to arrest him. The plaintiff who was holding a pitch fork used it to prevent the bailiff from reaching him, while he ran into his house. In a claim by the plaintiff, the court held: that there was no false imprisonment, as mere words in the absence of any other act, such as, attempt to hold, or immobilise the plaintiff, could not amount to false imprisonment. Mere words without more would not make a false imprisonment.

In **Russen v Lucas**, the defendant/Sheriff of Middlesex, England shouted to the plaintiff who was behind a door at a bar: 'I want you'. The plaintiff then replied, "wait for me outside the door, and I will come to you". The plaintiff quickly escaped by another exit. On a claim for damages for false imprisonment, the issue was whether he was arrested and escaped from custody. Abbott C.J. held that there was no false imprisonment.

Mere words may not constitute arrest; and if an officer says "I arrest you" and the person runs away, it is no escape from custody but if the party acquiesces to the arrests, and goes with the officer, it will be a good arrest. The declaration of intention to restrain the plaintiff without actually restraining him was not enough. The defendant cannot be liable for escape from arrest.



### **KNOWLEDGE BY THE PLAINTIFF OF THE FALSE IMPRISONMENT AT THE MATERIAL TIME IS IRRELEVANT**

It is not necessary for the person who is restrained to know at the material time that he was detained, restrained, confined, or being prevented from leaving. It is sufficient if he is informed of the false imprisonment later. Thus, a person may be falsely imprisoned while unconscious, asleep, or otherwise unaware and so forth. The person need not be aware so long as the false imprisonment is a fact or complete. If he learns about it from another person, he is entitled to sue.

In **Dele Giwa v I.G.P**, the plaintiff, who was a top flight journalist and columnist was arrested and detained by the police. He brought action for enforcement of his fundamental right to personal liberty and for damages. **Jinadu J.** held, that the defendants were liable. The plaintiff was entitled to his freedom and the sum of N10,000.00 was awarded for the unlawful arrest and detention of the plaintiff being compensation for the false imprisonment resultant loss of liberty, and the indignity to which he was subjected. See also **Shugaba v Minister of Internal Affairs**

### **OTHER ACTS INTENDED TO CAUSE PHYSICAL OR MENTAL HARM, OTHER THAN TRESPASS TO THE PERSON.**

There are instances in which a person intentionally and wilfully carries out an act to cause harm or injury to a person but these acts cannot be categorised as trespass to the person as they do not involve any direct act on the plaintiff, also they cannot be categorised negligent acts as they are wilfully carried out.

For example, in **Wilkinson V. Downton**, D by way of a practical joke, falsely told C, a married woman that her husband had met with an accident in which both his legs had been broken, was lying at The Elms at Leytonstone and that she was to go in a cab to fetch him home. The effect of this upon the claimant, who was found to be a person of normal fortitude, was that she suffered a violent shock. In holding D liable to C, **Wright J** said that the defendant wilfully inflicted physical harm to the plaintiff and on her legal right to safety and it is thus a sufficient cause of action, despite there being no justification alleged for the act.

Thus, acts such as the one in the case explained above would qualify as an act intended to cause physical or mental harm due to the difficulty or inability to classify it under trespass to person or negligence.

Here, liability arises for words calculated to cause physical injury or psychotic harm. The justification for liability is that it amounts to a wrongful interference to another's personal safety and it is intended to cause harm. In order to satisfy the requirement under this rule,



there must be an actual damage and an intention to cause harm or damage. An action would not lie for mere intentional harassment that does not result in physical harm or a known psychiatric injury or damage

Other acts that do not give rise to physical or mental harm but which amounts to harassment have been legislated upon in the United Kingdom and liability will arise under the **Protection From Harassment Act 1997**. It has been adopted in the UK in the case of **Majrowski V. Guys and St. Thoms NHS Trust**.

It was held in the case of **Wang V. Capsips Health NHS Trust** that madness and unfriendliness leading to emotional distress was not regarded as amounting to injury calculated to infringe on a person's right to personal safety.

**Section 1 of the Act** makes it an offence to pursue a course of conduct which the defendant knows or ought to know amounts to harassment of another and by **Section 3** this is civilly actionable, leading to damages for any anxiety caused by the harassment and any financial loss resulting from the harassment.

Harassment there may be defined to include persistent behaviour that torments or threatens a person. These are capable of causing mental and physical discomfort.

## DEFENCES TO TRESPASS TO PERSON

The defence to an action for trespass to person includes:

### 1. Self-defence or Justification.

Under common law, a person has a right of self-defence. The only requirement for a successful plea of self-defence is that the self-defence should be reasonable or proportionate. This includes self-defence and or the defence of another person, especially, where a person is morally or legally obliged to protect another person. However, only reasonable force may be used in self-defence.

**2. Defence of property:** A person may commit commensurate or reasonable trespass to person, such as assault, battery or false imprisonment in order to protect his property or the property of another person which he has a moral or legal obligation to protect. In England the common law right of self-defence has been supplemented by statute law by section 3(1) of the Criminal Law Act 1967. Thus, reasonable measures may be taken or reasonable force may be used to eject or deter a trespasser from entering a property.

**3. Consent of the plaintiff Express or implied consent is a complete defence.** Consent is a defence when it is obtained freely in the absence of fraud, trick, deceit, force, duress or undue influence and so forth. Consent is deemed in sports. Accordingly, consent is often a defence for injuries suffered in sports events. As a general rule participants in sports are



deemed to consent to reasonable contact within the rules of the game except where the act is unreasonable, involves considerable hostility or is deliberate.

**4. Medical Treatment:** Medical Care and Medical Surgery: In medical care, a patient is usually deemed as having consented to the normal course of treatment for his ailment except where such treatment is outside the scope of the patient's express or implied consent. Thus, consent to medical care is consent to assault, battery and false imprisonment, but it is not consent to negligent medical treatment. As a result, treatment or surgical operation carried out in good faith with reasonable skill, knowledge and care for the benefit of a patient is a lawful excuse in a claim for trespass, because, these are contacts which are usually for the plaintiffs benefit.

#### **5. Inevitable Accident.**

#### **6. Judicial Authority.**

Under judicial authority, such as a court order, warrant of arrest, prison sentence and so forth, lawful arrest may be carried out. Detention may be ordered and punishment may be imposed according to law.

A judge or a magistrate acting within his judicial authority may grant a warrant of arrest and persons carrying out such an order of arrest may use reasonable force to detain the person named in the warrant. All convicts serving various terms of imprisonment are in jail pursuant to the judicial authority of judges and magistrates.

**7. Lawful Arrest** (See statutes such as the Criminal Code Act, Police Act, etc.), Detention, Stop and Search: All persons owe a duty not to disturb the public peace by committing crime or causing other breaches of peace and so forth. The police have powers under the Criminal Code Act, Police Act and other criminal statutes to arrest, detain, or stop and search a person in public where they reasonably suspect that a person has committed a crime, or maybe carrying a stolen, contraband or prohibited item, etc.

The police and other law enforcement agents and private citizens have powers to make arrest with or without a warrant as the case maybe. A lawful arrest, detention, or stop and search and so forth are defences to assault, battery and false imprisonment.

#### **8. Statutory or Lawful Authority**

Trespass to person may be excused where it is committed in preservation of society (see (1999) **Constitution, sections 33(2), 34(2), 35, 41, 44 & 45; Liversdige v Anderson** and **Brogan v UK**), under any enabling statute for instance, under the Nigerian Constitution. Under the Nigerian Constitution, a person may be lawfully deprived of his personal liberty or his fundamental rights otherwise restricted in certain circumstances.



These include;

- (i) In connection with a criminal case by lawful arrest or in execution of the order or sentence of a court;
- (ii) In a connection with infectious disease, or unsoundness of mind;
- (iii) In connection with immigration law;
- (iv) In connection with the education and welfare of infants or apprentices who are minors, etc.

### **9. Necessity**

This is a rare defence. A defendant may show that he committed the trespass to person to avoid a greater harm, such as forcefully feeding a person to preserve the person's life. This was the situation in *Leigh v Gladstone* (1909) 26 TLR 139, where prison warders out of necessity forcefully fed the defendant who was on hunger strike whilst in custody in order to save her from dying from hunger.

## **TOPIC 2**

### **INTERFERENCE TO GOODS/TRESPASS TO CHATTEL**

A chattel is any moveable thing which is capable of being owned, possessed, or controlled other than a human being, land and immoveable property. Examples of chattel include cars, furniture, animal, vessel, aircraft, sea craft, and anything whatsoever which is moveable and capable of being owned.



Trespass to Chattel is any direct and unlawful interference with a chattel in the possession of another person. It is the intentional or negligent interference with the possession of a chattel without causing any harm to it may in appropriate circumstances be actionable and entitled the plaintiff to get nominal damages.

The tort of trespass to chattels protects all the chattel, goods, or personal properties of a person who has title or possession by prohibiting all interference without legal justification.

Trespass to chattel is designed to protect the following interests in personal property;

1. Right of retaining one's chattel;
2. Protection of the physical condition of the chattel; and
3. Protection of the chattel against unlawful interference or meddling.

The three forms of trespass to chattel are each actionable per se upon commission or occurrence without the plaintiff having to prove damage.

In **Erivo v Obi**, the defendant respondent closed the door of the plaintiff appellant's car and the side windscreen got broken. The appellant sued inter alia for damage to the windscreen and the loss he incurred in hiring another car to attend to his business. The defendant respondent alternatively pleaded inevitable accident. On appeal, the Court of Appeal held that the defendant respondent was not liable. He did not use excessive force but only normal force in closing the door of the car. He did not break the windscreen intentionally or negligently. It was an inevitable accident which the exercise of reasonable care and the normal force used by the respondent could not avert. 105

In this case, the Court of Appeal restated the position of the law that, trespass to chattel is actionable per se, that is, without proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of a chattel, even though no harm has been done to the chattel. Therefore, for trespass to chattel to be actionable, it must have been done by the wrongdoer.

#### **TYPES OF TRESPASS TO CHATTEL**

In Nigeria, the tort of trespass to chattel is made up of three types of torts. These are:

- **TRESPASS TO CHATTELS PER SE**
- **CONVERSION; AND**
- **DETINUE.**

#### **TRESPASS TO CHATTELS PER SE**

In the wider context, the tort of trespass is closely related to any tort or law which has to do with the protection of interest in personal property such as protection of interest in



personal property such as negligence, malicious damage such as arson and other damage to property or interest in property.

Trespass to chattel is any direct and unlawful interference with the chattel in the possession of another person the interference may either be negligent or intentional. Another author said that it is a wrongful physical interference with goods and it could take the form of numerable or innumerable interference.

In the case of **Davies V. Lagos City Council**, Justice Adefarasin elaborately explained that trespass to chattel is actionable per se. in that case, the defendant council had granted the plaintiff a hackney carriage licence to operate a taxi cab in the Lagos area. The plaintiff was well aware that the permit was for exclusive use and was not transferable but he nonetheless caused it to be transferred to a 3<sup>rd</sup> party who operated a taxi cab on the strength of it on leaving that, certain officials of the council in the purported exercise of their power to revoke the permit, seized the plaintiff's taxi and detained it at the LCC pound. In an action brought by the plaintiff for trespass, **Adefarasin J** held that the council was entitled to revoke the plaintiff's permit for non-compliance with the regulations governing the use of hackney carriage licenses, but it was not entitled to seize the vehicle or otherwise take possession of it. The council was therefore liable to trespass.

It is no defence in an action for trespass to chattel that the tort was committed when carrying out the instruction of the executive arm of government as distinct from the judicial arm.

In **Ajao V. Ashiru**, the plaintiff's pepper mill was seized by the defendant and the defence to the claim of the plaintiff was that the peppermill was seized by the police. The court held that the defendant was liable based on the ground that the police acted at his own instance in seizing the peppermill of the plaintiff.

The keyword in trespass to chattel is possession of the claimant is not in possession at the time of the alleged meddling or interference, he cannot sue for trespass. Only the person who has the right of possession or immediate possession can sue.

Anyone who has possession or caretakership of a chattel may sue any other person who meddles with the chattel. This is so for the object of the tort of trespass is to protect possession, or the right to immediate possession. In other words, anyone who has possession or right to immediate possession can sue. Accordingly, some persons who do not have legal right are deemed by law to have possession, so that they will be able to protect chattels left under their care. For instance, an employee to whom an employer has given custody of goods, a repairer, caretaker, personal representatives of a deceased and so forth. Therefore, the persons who may sue for trespass to chattel, provided they have possession at the material time of the interference include: Owners, Bailees, Lenders,



Assignees, Trustees, Finders, Custodians, Caretakers, Adverse possessors, because mere possession gives a right to sue to retain possession 10. Executors 11. Administrators of estates; etc.

In **National Coal Board v Evans & Co**, the defendant contractors were employed by a county council to work on land owned by the defendant council. A trench had to be dug, which the defendants employed a sub-contractor to do. An electric cable passed under the land, but neither the council, nor Evan & Co. who were head contractors, nor the sub-contractors knew this, and the cable was not marked on any available map. During excavation, a mechanical digger damaged the cable and water seeped into it causing an explosion, and thereby cutting off electricity supply to the plaintiff's coal mine. The plaintiff sued claiming damages for trespass to the electricity cable. The court held that in the absence of establishing negligence on the part of the defendant contractors, there was no fault and there was no trespass by the defendants. The damage was an inevitable accident.

### **EXAMPLES OF TRESPASS TO CHATTEL**

Trespass to chattel may be committed in many different ways. However, the trespass must be intentional or negligent. Trespass may be committed by mere removal or any damage and it can be committed when there is no intention to deprive the owner, possessor or custodian permanently of the chattel. Examples of trespass to chattel include:

1. Taking a chattel away
2. Throwing another person's property away, such as in annoyance
3. Mere moving of the goods from one place to another, that is, mere transportation.
4. Scratching or making marks on the body of the chattel, or writing with finger in the dust on the body of a motor vehicle
5. Killing another person's animal, feeding poison to it or beating it.
6. Destruction, or any act of harm or damage
7. Touching, that is, mere touching, for instance, touching a precious work of art which could be damaged by mere touch
8. Use, that is, mere using without permission
9. Driving another person's car without permission
10. Filling another person's bottle with anything.
11. Throwing something at the chattel
12. Damaging or causing any harm to a chattel, by any bodily or indirect contact, such as, running one's car into another person's car.



## THE DEFENCES FOR TRESPASS TO CHATTEL

In an action for trespass to chattel, the defences a defendant may plead include:

1. Inevitable accident
2. Jus tertii, that is, the title, or better right of a third party, provided that he has the authority of such third party. See C.O.P. v Oguntayo (1993) 6 NWLR pt. 299, p. 259 SC.
3. Subsisting lien.
4. Subsisting bailment
5. Limitation of time, as a result of the expiration of time specified for legal action.
6. Honest conversion, or acting honestly, etc.

## THE REMEDIES FOR TRESPASS TO CHATTEL

The remedies available to a person whose chattel has been meddled with, short of conversion or detinue are:

1. Payment of damages
2. Replacement of the chattel
3. Payment of the market price of the chattel
4. Repair of the damage.

A frequent demonstration of these remedies is in motor accident cases. Where one vehicle runs into another, damages may be paid, or the parts of the vehicle that are affected may be replaced or repaired.

## CONVERSION

According to **Sir John Salmond**,

*"A conversion is an act... of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it"*

Conversion is any interference, possession or disposition of the property of another person, as if it is one's own without legal justification. In other words, conversion is dealing with another person's property as if it is one's own. Conversion is any dealing which denies a person of the title, possession, or use of his chattel. It is the assertion of a right that is



inconsistent with the rights of the person who has title, possession or right to use the chattel.

It is dealing with a chattel which belongs to another person in a manner that is inconsistent with the rights of the person. In other words, conversion is any intentional interference with another person's chattel which unlawfully deprives the person of title, possession or use of it. Conversion includes wrongful taking, wrongful detention, and or wrongful disposition of the property of another person. Therefore, conversion includes denying a person of the title or possession, or use of his chattel. It is not necessary to prove that the defendant had intention to deal with the goods. It is enough to prove that the defendant interfered with the goods. It is immaterial that the defendant does not know that the chattel belongs to another person, for instance, if he innocently bought the goods from a thief. In criminal law, conversion is known as stealing or theft.

Essentially, conversion is:

1. Any inconsistent dealing with a chattel
2. To which another person is entitled to immediate possession
3. Whereby the person is denied the use
4. Possession; or
5. Title to it.

Thus, an owner can sue for conversion. Likewise, a person who has mere custody, temporary possession or caretakership can sue any third party who tries to detain, dispose, steal or otherwise convert such chattel.

In *North Central Wagon & Finance Co. Ltd v Graham*, the defendant hire purchaser sold the car in contravention of the terms of the hire purchase agreement. In the circumstances the court held that the plaintiff finance company was entitled to terminate the hire purchase agreement and sue the selling hire purchaser in the tort of conversion, for recovery of the car.

## **DIFFERENCES BETWEEN CONVERSION AND TRESPASS**

Conversion is different from trespass to chattels in two main respects. These are:

1. In conversion, the conduct of the defendant must deprive the owners of the possession of the chattel, or amount to a denial or dispute of the title of the owner. Conversion is known as stealing or theft in criminal law. Therefore, mere touching or moving of a chattel and so forth, only amount to trespass.
2. To maintain an action in conversion, the plaintiff need not be in actual possession of the chattel at the time of the interference. It is enough if the plaintiff has right to immediate



possession of the chattel, that is, the right to demand for immediate possession of the chattel.

In **Ashby v Tolhurst**, the defendant car park attendant who negligently allowed a car thief to drive away the plaintiff's car from a car park under his watch was held: not liable in conversion. The driver had possession of the car which he had parked, for he has right to immediate possession. The defendant car park attendant is a bailee who only guarantees the safety of the car that is bailed in the car park as a bailee. The claimant should have sued in the tort of negligence for the loss of the car.

In **City Motor Properties Ltd v Southern Aerial Service**, an owner of a chattel was held liable in conversion for dispossessing the plaintiff bailee of it, during the subsistence of the bailment, which was not unilaterally determinable at will by the plaintiff owner.

Also, in **Hollins v Fowler**, a cotton broker acting on behalf of a client, for whom he often made purchases, bought cotton from a fraudster who had no title to the cotton. The broker then sold it to his client and received only his commission. At the suit of the true owner for conversion sale, and loss of the goods, the court held: that the broker was liable in conversion for the full value of the goods.

## EXAMPLES OF CONVERSION

Conversion of a chattel, belonging to another person may be committed in many different ways. Examples of conversion include:

### 1. CONVERSION BY TAKING

Where a defendant takes a plaintiff's chattel out of the plaintiff's possession without lawful justification with the intent of exercising dominion over the goods permanently or even temporarily, there is conversion. Contrast this proposition with the decisions in the cases of **Fouldes v Willoughby** and **Davies v Lagos City Council**. Another example is the Ghanaian case of **Tormekpey V. Ahiable**, here the defendant had sold and delivered a lorry to the plaintiff on delivery, which was that property in the lorry passed to the plaintiff on delivery, with no right of seizure reserved to the defendant wrongfully seized the lorry and refused to hand it back to the plaintiff. The Court of Appeal of Ghana held that the defendant was liable in conversion as well as in trespass to detain.

On the other hand, a defendant may not be liable; if he merely moves the goods without denying the plaintiff of title.

### 2. CONVERSION BY USING

Using a plaintiff's chattels as if it is one's own, such as, by wearing the plaintiff's jewellery, as in the case of **Petre v Heneage** or using the plaintiff's bottle to store wine as was the case in **Penfolds Wine Ltd v Elliot** is a conversion of such chattel. And to pour the contents



of his carbolic acid drums into the defendant's tank as seen in **Lancashire and Yorkshire Rly Co V. McNicholl**.

**3. CONVERSION BY DESTRUCTION, CONSUMPTION OR ALTERATION:** to intentionally destroy or consume the plaintiff's chattel constitutes conversion. For example, where the defendant smashes the plaintiff's window or drinks his brandy. Merely to damage the chattel is not conversion but trespass to chattel. In each case, it is a question of degree as to whether or not the damage is so great as to amount to destruction. It is also conversion to alter the identity of a chattel. For example, to sew cloth into a dress, to grind wheat into flour, or to turn grapes to wine.

By changing its form howsoever. See **Simmons v Lillystone** and **Hollins V. Fowler**.

### **6. CONVERSION BY RECEIVING**

Involuntary receipt of goods is not conversion. However, the receiver must not willfully damage or destroy the goods unless the goods constitute a nuisance. Receiving a chattel from a third party who is not the owner is a conversion. This is wrongful, for it is an act of assisting the other person in the conversion of the chattel, or the receiving of stolen goods.

### **7. CONVERSION BY DETENTION**

In **Armory v Delamirie**, a chimney sweep's boy found a jewel and gave it to a jeweler for valuation. The jeweler knowing the circumstances, took the jewel, detained and refused to return it to the boy. The boy then sued the jeweler for conversion and for an order for return of the jewellery to him. The court held: that the jeweler was liable for conversion. A finder of a property has a good title, and he has a right or interest, to keep it against all persons, except the rightful owner of the property or his agent.

However, a temporary reasonable refusal by the finder or custodian of a property to hand it over to a claimant, in order to verify the authenticity of the title of the claimant is not actionable, except where the refusal is adverse to the owner's better title.

### **8. CONVERSION BY WRONGFUL DELIVERY**

Wrongfully delivery of a person's chattel to another person who does not have title or right to possession without legal justification is a conversion.

### **9. CONVERSION BY PURCHASE:**

At common law, conversion is committed by a person who bought and took delivery of goods from a seller who has no title to the chattel nor right to sell them. Such as when a thief, steals and sells a chattel. A buyer in such a situation takes possession at his own risk, in accordance with the rule of law that acts of ownership are exercised at the owner's peril.



#### **10. CONVERSION BY WRONGFUL DISPOSITION:**

Such as by sale, transfer of title or other wrongful disposition.

In **Chukwuka v C.F .A.O. Motors Ltd**, the plaintiff sent his car to the defendant motor company for repairs. Thereafter, he failed to claim the car. Nine months later the defendants sold the car to a third party who re-registered it in his own name. The plaintiff sued for conversion. The High Court held: that the defendant was liable to the plaintiff for conversion of the car.

#### **INNOCENT RECEIPT OR DELIVERY IS NOT CONVERSION**

Generally, innocent delivery, or innocent receipt are not torts, nor criminal offences. Thus, innocent delivery is not conversion. Therefore, where an innocent holder of goods, such as, a carrier, or warehouseman, receives goods in good faith from a person he believes to have lawful possession of them, and he delivers them, on the person's instructions to a third party in good faith, there would be no conversion. Similarly, innocent receipt of goods is not conversion. However the receiver must not willfully damage or destroy the goods unless the goods constitute a nuisance.

In **Unipetrol v Prima Tankers Ltd**, the defendant oil tanker owners had a contract to carry Unipetrol's cargo of fuel from Port Harcourt. The captain of the vessel allegedly went elsewhere with the cargo of fuel. The plaintiff appellant Unipetrol sued for the conversion and loss of the cargo. The Court of Appeal held: that the respondents were liable in conversion. The word "loss" is wide enough to include a claim for conversion against a carrier. It is elementary law that in a claim for conversion, the claimant is entitled to the return of the article seized, missing, or in the possession of the other party, or reimbursement for its value.

In **Owena Bank Nig. Ltd v Nigerian Sweets & Confectionery Co. Ltd**, the 1st respondent was granted an import licence by the Federal Ministry of Trade to import granulated sugar. However, the 2nd respondent opened a letter of credit and imported the sugar. The 1st respondent sued for damages for the wrongful conversion of the import licence. On appeal by the bank, the Court of Appeal held: That the defendants were liable for conversion of the import licence papers.

Thus, an action for conversion will lie in conversion for any corporeal personal property, including papers and title deeds.

Conversion is any dealing with a chattel in a manner inconsistent with another person's right whereby the other is deprived of the use and possession of it. To be liable, the defendant need not intend to question or deny the right of the plaintiff. It is enough that his conduct is inconsistent with the rights of the person who has title, or right to



possession, or use of it. Conversion is an injury to the plaintiff's possessory rights in the chattel converted. Whether an act amounts to conversion or not depends on the facts of each case, and the courts have a degree of discretion in deciding whether certain acts amount to a sufficient deprivation of possessory or ownership rights as to constitute conversion.

In conversion, negligence or intention is not relevant, and once the dealing with the chattel of another person is in such a circumstance that the owner is deprived of its use and possession, the tort of committed.

### **POSSESSION IS TITLE AGAINST A WRONGDOER OR STRANGER**

At common law, mere de facto possession is sufficient title to support an action for conversion against a wrongdoer.

In **C.O.P v Oguntayo**, the plaintiff respondent brought action against the defendant appellant police, for the wrongful detention and conversion of his Mitsubishi van, which he drove to a police station on a personal visit to a police officer. The police impounded the vehicle on the allegation that it was a lost but found vehicle. The respondent asserted that he brought the van from a third party who was now deceased. The respondent sued the police claiming for the return of the van. On appeal, the Supreme Court held: that the plaintiff respondent was entitled to the release of the vehicle to him.

To establish conversion, the law is that what is required is proof of de facto possession and not proof of ownership. In the instant case, the impounding of the vehicle by the appellants police was unlawful and their failure to deliver it to the plaintiff respondent after demands for it constituted a conversion. The plea of jus tertii that is, the plea of the better title of a third party to, was not open to the police as it was not proved.

### **THE RULES REGARDING FINDING LOST PROPERTY**

The rules of law applicable to finding a lost property were authoritatively settled by the English Court of Appeal in the case of **Parker v British Airways**. However, the rules are not often easy to apply. The rules applicable to finding lost property may be summarized as follows: -

1. A finder of a chattel acquires no rights over it, unless it has been abandoned, or lost, and he takes it into his care and control. He acquires a right to keep it against all persons, except the true owner; or a person who can assert a prior right to keep the chattel, which was subsisting at the time when the finder took the chattel into his care and control.
2. Any servant, or agent who finds a lost property in the course his employment, does so on behalf of his employer, who by law acquires the rights of a finder.



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3. An occupier of land or a building has superior rights to those of a finder, over property or goods in, or attached to the land, or building. Based on this rule, rings found in the mud of a pool in the case of **South Staffordshire Water Co. v Sharman** and a pre-historic boat discovered six feet below the surface were held as belonging to the land owner in the case of **Elwes v Briggs Gas**.

4. However, an occupier of premises does not have superior rights to those of a finder in respect of goods found on or in the premises, except before the finding, the occupier has manifested an intention to exercise control over the premises, and things on it.

In **Parker v British Airways**, the plaintiff was waiting in the defendant airways lounge at Heathrow Airport, London, England when he found a bracelet on the floor. He handed it to the employees of the defendant, together with his name and address, and a request that it should be returned to him if it was unclaimed. It was not claimed by anybody and the defendants failed to return it to the finder and sold it. The English Court of Appeal held: that the proceeds of sale belonged to the plaintiff who found it. **See also South Staffordshire Water Co v Sharman and Waverley Borough Council v Fletcher**

In **Bridges v Hawkesworth**, the plaintiff finder of a packet of bank notes lying on the floor, in the public part of a shop was held entitled to the money instead of the shop owner, upon the failure of the rightful owner to come forward to claim the money. See also **Hannah v Peel** and **Moffatt v Kazana**.

As a general rule of law, anybody who has a finder's right over a lost property, has an obligation in law to take reasonable steps to trace the true owner of the lost property, before he may lawfully exercise the rights of an owner over the property he found.

## WHO MAY SUE FOR CONVERSION?

The tort of conversion, like other trespass to chattel, is mainly an interference with possession. Those who may sue in the tort of conversion include:

### 1. Owners

An owner in possession, or who has right to immediate possession may sue another person for conversion.

### 2. Bailees

A bailee of a chattel may sue another person for conversion of a chattel or goods bailed with him. However, a bailor at will has title to immediate possession of a chattel he has deposited with a bailee and can maintain action against a bailee for conversion.

In **The Winkfield (1902) P. 42 at 60**, a ship ran into another ship, a mailship which sank. The Post-Master General though not the owner of the mails in the ship that sank was held



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entitled to sue the owners of the Winkfield, as a bailee in possession for the value of the mails that were lost in the sunk ship. COLLINS MR in the English Court of Appeal held: that the owners of the Winkfield were liable and that “As between a bailee and a stranger, possession gives title.

Other persons who may have right to immediate possession and therefore, may be able to sue another person for conversion of a chattel include:

**3. Holders of lien and pledge**

**4. Finders, see *Armory v Delamirie*, *London Corp v Appleyard* and *Hannah v Peel*.**

**5. Buyers**

**6. Assignees**

**7. Licensees**

**8. Trustees**

**DEFENCES FOR CONVERSION OF A CHATTEL**

In an action for conversion of a chattel, the defendant may plead:

1. Jus tertii, that is, the title or better right of a third party
2. Subsisting bailment
3. Subsisting lien
4. Temporary retention; to enable steps to be taken to check the title of the claimant. A defendant may temporarily, refuse to give up goods, while steps are taken to verify the title of the plaintiff who is claiming title before the chattel is handed over to the plaintiff if he is found to be the owner, or has right to immediate possession.
5. Limitation of time.

**WHO MAY PLEAD JUS TERTII?**

Jus tertii is the right of a third party. It is the title or better right of a third party to the chattel, goods, or property in dispute. As a general rule, a defendant cannot plead that a plaintiff is not entitled to possession as against him, because a third party is the true owner of the chattel. A defendant can only plead jus tertii, that is, the better right of the true owner or third party only when he is acting with the authority of the true owner.

In **C.O.P v Oguntayo, OGBUEGBU JSC** stated the law clearly that:

*“A person cannot plead jus tertii of a third party, unless the person is defending on behalf of, or on the authority of the true owner. In the instant case, the appellant claims title on behalf of an unknown owner, but as the third party is not discoverable and the respondent has made out a good prima facie case of title by possession, the respondent has title as against all other persons including the appellants.”*

Therefore, for a defendant to successfully plead jus tertii, that is, the better right of a third party who has right to immediate possession, the identity of such true owner, or third



party must be disclosed, his title or better right to immediate possession must be established, and the defendant must be claiming for, on behalf, or under the title of the alleged true owner, or third party who has a better right to immediate possession.

### **THE REMEDIES FOR CONVERSION**

In a claim for the conversion of a chattel several remedies are available to a plaintiff. The court in its judgment may order any, or a combination of any of the following reliefs:

1. Order for delivery, return or specific restitution of the goods; or
2. Alternative order for payment of the current market value of the chattel.
3. An order for payment of any consequential damages. However, allowance may be made for any improvement in the goods, such as, where a person honestly in good faith buys and improves a stolen car and is sued by the true owner; the damages may be reduced to reflect the improvements.
4. Recovery of special and general damages. Special damage is recoverable by a plaintiff for any specific loss proved.
5. General Damages: Furthermore, where for instance, a plaintiff whose working equipment or tools are converted by another person, a plaintiff may sue for the loss of profit, or existing contract or wages for the period of the conversion of the work tools or equipment

### **DETINUE**

The tort of detinue is the wrongful detention of the chattel of another person, the immediate possession of which the person entitled. Detinue is a claim for the specific return, delivery, or surrender of a chattel to the plaintiff who is entitled to it. It is the wrongful detention or retention of a chattel whereby the person entitled to it is denied the possession or use of it.

As a general rule, to successfully sue in detinue, a plaintiff must have possession before the detention, or have right to immediate possession of the chattel.

Essentially, the tort of detinue is:

1. The wrongful detention of the chattel of another person
2. The immediate possession of which the person is entitled.

An action in detinue is a claim for the specific return of a chattel wrongfully retained, or for payment of its current market value and any consequential damages. Anybody who



wrong fully takes, detains, or retains a chattel, and after a proper demand for it, refuses, or fails to return it to the claimant without lawful excuse may be sued in detinue to recover it or its value. In the United Kingdom, the **Torts (Interference with Goods) Act 1977** has abolished the tort of detinue as a separate tort, and merged it with the tort of conversion where it is now known as conversion by detinue or detention.

In Nigeria, it still exists as a separate tort.

Examples of detinue are many and include the following:

1. A lends his chairs and tables to B for a one day party, and B neglects, refuses or fails to return the furniture at the end of the day as agreed or after the expiration of a reasonable period of time.
2. C gives his radio set to D and pays him to repair it, and D fails or refuses to release or return it after a demand has been made on him for its return. In each of these circumstances, there is a right of action to sue for detinue of the chattel.

### **WHEN TO SUE FOR DETINUE**

A plaintiff can only maintain action for the tort of detinue after satisfying two conditions which are:

1. The plaintiff must have title that is ownership or right to immediate possession of the chattel.
3. The defendant who is in actual possession of the chattel must have failed, and or refused to deliver the chattel to the plaintiff after the plaintiff has made a proper demand for the return of the chattel, without lawful excuse. Thus, there must have been a demand by the plaintiff for the return of the chattel and a refusal or a failure to return them. This making of a demand by the plaintiff on the defendant is a condition precedent which the plaintiff must establish to succeed in his claim for detinue.

In **Kosile v Folarin**, the defendant motor dealer seized and detained the motor vehicle he had sold to the plaintiff on credit terms, upon delay by the plaintiff to fully pay up. The plaintiff buyer sued for detinue claiming damages. The Supreme Court held: inter alia that the seizure and detention of the vehicle by the defendant was wrong. The plaintiff was entitled to the return of the vehicle or its value and for loss of the use of the vehicle until the date of judgment at the rate of N20 per day.



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In the above case, the Supreme Court emphasised the requirement that in an action for detinue, there must have been a demand by the plaintiff on the defendant to return the chattel, and if the defendant persists in keeping the chattel, he is liable for detinue.

In **West Africa Examinations Council v Koroye**, the plaintiff sat for an examination conducted by the defendant council. The defendant neglected and or refused to release his certificate. The plaintiff successfully claimed in detinue for his certificate and was award damages in lieu of the release of the certificate by the Supreme Court.

In **Davies v Lagos City Council**, the defendant city council wrongfully seized and detained the plaintiff's taxi cab. The plaintiff sued claiming damages. The Lagos High Court held that: The plaintiff was entitled to a return of the vehicle and loss of earnings on the vehicle as a result of the unlawful detention. In this case ADEFARASIN J as he then was stated that a plaintiff is entitled to loss of earnings on his chattel which he uses for work or business.

In **Steyr Nig. Ltd v Gadzama**, at the end of their services, the plaintiff appellant company sued the defendant respondents who were former employees of the appellant for detaining official cars and household items which were in their use as top management staff of the company. The Court of Appeal held: that the respondents were to pay reasonable prices for the items in lieu of returning the chattels.

In **Shuwa v Chad Basin Development Authority**, a third party sold a bulldozer which they had no authority to sell to the plaintiff appellant. The bulldozer was in the custody of the defendant respondent authority who had a lien on it. The respondent authority refused to release it to the appellant unless the third party seller paid the money due on it to the respondent authority. The third party who was the owner of the bulldozer had forfeited it to the authority under the terms of an unfulfilled contract. The appellant buyer sued for the detention of the bulldozer. The Court of Appeal held: that the action of the plaintiff appellant must fail. The third party had no authority to sell to the plaintiff as they no longer had title. The plaintiff in a claim for detinue must establish that he is the owner or that he has right to immediate possession of the thing the recovery of which he is seeking.

As a general rule, where there is a subsisting lien on a property, a claim for detinue will not succeed as was held in **Shuwa v Chad Basin Development Authority**.

In **Otubu v Omotayo**, the plaintiff respondent kept his title deeds with a third party who subsequently deposited the deeds with the defendant appellant as collateral to secure a loan. The plaintiff respondent sued the defendant appellant for return of the title deeds. The Court of Appeal held: that an action cannot succeed where there is a subsisting lien on the chattel. Where there has been an equitable mortgage by deposit of title deeds as collateral to secure a loan, by a third party who does not own the deeds, but had custody



of the deeds, an action for detinue cannot be maintained for return of the deeds or chattel, prior to payment of the amount due on it, or redemption of any outstanding obligation.

### **THE DIFFERENCES BETWEEN CONVERSION AND DETINUE**

Detinue covers the same ground as the tort of conversion by detention. However, some differences are to be noted which include the following:

1. The refusal to surrender or return a chattel on demand is the essence of detinue, or detention. There must have been a demand for return of the chattel.
2. Detinue is the proper remedy where the plaintiff wants a return of the specific goods in question, and not merely an assessed market value. However, where specific return of the chattel or a replacement will not be possible, an award of the current market value of the chattel is usually made to the plaintiff.

Before the Common Law Procedure Act 1854, was enacted a defendant had a choice to either restore the actual chattel or pay the market value. However, since the enactment of the Act, a court has discretion to order specific restitution, or award the market value of the chattel to the plaintiff or it may award damages alone if the goods can be replaced easily.

### **THE DEFENCES FOR DETINUE**

In an action for detinue, a defendant may plead that:

1. He has mere possession of the goods
2. That the plaintiff has insufficient title as compared to himself
3. The defendant may plead *jus tertii*, that is, a third party person has a better title, provided the defendant is the agent, or has the authority of the third party, or is claiming under the third party.

*Jus tertii*, is the better title of a third party. *Jus tertii* is a defence, that is, based on ownership by a third party, and it is not pleaded, except the defendant is defending under the right of such third party who has ownership, or paramount title, that will enable him to establish a better title, and the right to possession, than the plaintiff. Otherwise, as CLEASBY BJ said in *Fowler v Hollins* (1872) LR 7 QB 616 at 639:

"Persons deal with the property in chattels, or exercise acts of ownership over them at their peril".

4. Innocent delivery
5. Subsisting bailment



6. Subsisting lien on the chattel. See *Otubu v Omotayo* (supra)
7. Temporary retention of the chattel to enable steps to be taken to check the title of the plaintiff
8. Inevitable accident, see **National Coal Board v Evans**.
9. Reasonable defence of a person or property, such as when one beats or injures a dog that was attacking him or another person.
10. Enforcement of a court order or other legal process, such as levying of execution of property under a writ of *fifa*, or the police taking away goods they believe to have been stolen for the purpose of use as exhibit in evidence before court, etc.

### **THE REMEDIES FOR DETINUE**

When a person's chattel is detained by another person, the person who is denied possession or use of such chattel, has several remedies open to him which include:

1. Claim for return of the specific chattel
2. Claim for replacement of the chattel
3. Claim for the current market value of the chattel
4. Recapture or self help to recover the goods.
5. Replevin, that is, release on bond pending determination of ownership.
6. Damages

We shall briefly examine these remedies.

#### **1. Claim for Return of the Chattel:**

This is a claim for the return of the specific chattel, especially, if the chattel has not changed its character, content, and it has not been damaged nor destroyed during its detention.

#### **2. Replacement of the Chattel:**

Where possible or appropriate, a defendant may be ordered to replacement the chattel by supplying an identical or similar chattel. This is possible for instance in the case of manufacturers of products, who can easily replace the goods by supplying an identical or similar product.

#### **3. Claim for the Market Value of Chattel:**



This is a claim for the current market value of the chattel as may be assessed. The measure of damage in detinue is usually the market value of the goods as proved at the time of judgment. The onus is on the plaintiff to prove the market value. Therefore, where there is default of restitution a plaintiff may claim for payment of the value of the chattel. This option appears to be the best form of action, where the chattel has otherwise been removed from jurisdiction, or hidden, damaged, destroyed or otherwise not found. In such circumstances there is no alternative than to claim for the market value of the chattel as assessed, plus any specific and general damages for its detention.

#### **4. Recapture or Self help:**

A person who is entitled to possession of goods of which he has been wrongfully deprived may resort to self-help and retake the goods from the custody of the person detaining it, using only reasonable force after he has made a demand for their return. However, he may not trespass through the land of an innocent party to retake the goods. He may only go on such land with permission. However, recapture as a remedy is usually frowned upon by court for the breach of peace and other offences it may occasion. This is because self help is an instance of taking the laws into one's hand.

Therefore, a person may not resort to the option of recapture or self help except it is safe, expected, and reasonable or if it will not be resisted by the defendant and or persons acting for him.

#### **5. Replevin or Release on Bond:**

This is a return of the goods on security, pending the determination of the ownership of the chattel. When a third party's goods have been wrongfully taken in the course of levying execution or distress of the movable property of another person or judgment debtor, such third party claiming ownership may recover them by means of an interpleader summons determining their ownership. The registrar will then issue a warrant for the restoration of the goods, to such third party or claimant on bond. Therefore, Replevin is the re-delivery to an owner of goods which were wrongfully seized, the action for such re-delivery, and for any specific and general damages suffered by him as the result of the detention.

#### **6. Damages:**

When a defendant has been found liable in detinue, he cannot deprive the plaintiff of his right to damages for detention of the chattel, simply because he has not been using it, nor earning anything from its use. Also, if the wrongdoer has been making use of the goods for his own purpose, then he must pay a reasonable hire for chattel to the plaintiff. The reasonable hire usually includes the wear and tear of the goods. Therefore, as the courts have often affirmed the remedies available for the tort of detinue are an order for specific return of the chattel, or in default, an order for payment of the value and also damages



that were suffered due to loss of use by the defendant up to the date of judgment or re-delivery of the chattel to the plaintiff. Also general damages may be awarded as may be assessed by the court. General damages are usually presumed in this action, especially for the loss of the use of the chattel. As in claims in other areas of law, general damages may be awarded at least to cover part of the cost of the legal action.

### TOPIC 3

#### TRESPASS TO LAND

Land according to **Sir Edward Coke** comprehended in its legal significance refers to “any ground, soil or earth whatsoever..”

Legally it also includes all castles, houses and other buildings.

**Blackstone’s Commentaries on Laws of England** says

*“Land comprehends all things of a permanent substantial nature being a word of extensive signification... (including houses and other buildings) yet in its original and proper and legal sense. It signifies any other thing that may be holding provided it be in permanent nature, whether it be substantial or insubstantial ideal kind”*

Land is defined in Nigeria in almost the same light to include the land itself and everything attached to itself. Note that in defining land in Nigeria, it excludes all resources by virtue of the **1999 Constitution** which are vested in the federal government of Nigeria to be held in trust for the benefit of all Nigerian citizens.

Trespass to land, also called *Trespass quare clausum fregit*, is committed where the defendant, without lawful justification, enters upon land in the possession of the plaintiff, or remains upon such land, or directly places or projects any material object upon such land.

It is an injury to or interference with possessory right or interest in land. It comprises any intentional or unintentional act which directly interferes with the plaintiff’s exclusive possession of land. It is further defined as a wrong committed against a person who is in exclusive possession of the land trespassed on.

Trespass to land was originally conceived as a remedy against forcible and aggressive entry onto the land of other, but it was later extended to include any wrongful entry whether forcible or not, as well as merely remaining on the land unlawfully, or wrongfully placing a material object on it. Trespass to land is actionable per se without proof of damage.

As pointed out in the definition, trespass protects and is rooted in exclusive possession. The plaintiff in such a matter would not be required to prove that he has the right to or he is entitled to exclusive possession. Considering that this tort protects possession and not ownership, the owners of land may be found liable for trespass.



In **Universal Vulcanizing V. Ijesha United Trading and Transport Company**, it was held that when a land which was trespassed on or is in the lawful and exclusive possession of another person, a suit in trespass is not maintainable by the owner of the land who has no right to immediate possession as at the time of the trespass.

In the same vein, a person who is entitled to or has a right of possession or is in actual possession of a particular parcel of land cannot be liable for trespass on same land.

In **Eze V. Obiefuna**, the Supreme Court said that trespass to land consists of the slightest disturbance of the possession of land by a person who cannot show a better right to possession.

The right to acquire and own land or immovable property anywhere in Nigeria is a fundamental right guaranteed in the Nigerian constitution. As a result of the right, a person is entitled to have and enjoy quiet possession of his land, and any interference with land in the possession of another is a trespass to land.

Essentially, trespass to land involves;

1. Any direct interference
2. With land
3. In the possession of another person

As a general rule, trespass is usually a direct rather than a consequential interference with another person's land. Any "indirect trespass" to a person's land are often in the form of nuisance, especially private nuisance and the right of action is usually in the tort of nuisance. While any indirect interference which affects the general public is a public nuisance.

In the case of **Entick V. Carrington**, it was held that every invasion of private property, be it so minute is a trespass.

Apart from entering into land, anything done that interferes with a person's right to possession amounts to trespass. The lack of motive on the part of the trespasser will not vitiate an action for trespass, thus it will not be a defence that he was trespassing or that he honestly believed that the property/premises belonged to him or that he did not know that by entering into the land, he would be interfering with the rights of another person.

In **Basely V. Clarkson**, the defendant was mowing his lawn when he innocently and unintentionally entered into his adjoining neighbour's land by mistake and he cut the grass thinking he was still on his land. He tendered some money in satisfaction of the interference. At the suit of the plaintiff for trespass and damages, the court held that the defendant had committed trespass to land and mistake was not a defence.



**NB:** When a person abuses the purpose for which he has been permitted to be on a land, he becomes a trespasser ab initio. Thus, where a right to enter is abused it may be a trespass in **Harrison v. Duke of Rutland**, the plaintiff entered the defendant's land and interrupted a grouse shooting party. Its entry was held to be a trespass to land.

In **Hickman v. Maisey**, the defendant were making notes on a highway of the form of the race horses, being tried out on an adjoining land, held: that the writing of marks on the highway was an act of trespass since the proper use of a highway is for passing and re-passing.

**NB:** Once the plaintiff is able to establish that the defendant unlawfully entered into his land or that while on the land he did things which were outside that which was lawful for him to do, he would be entitled to damages even though he has suffered no loss or injury.

### **WHERE TRESPASS MAY BE COMMITTED**

Trespass to land may be committed in so many ways;

- (1) Airspace above the land to extent reasonable for user
- (2) Earth surface or land surface; and
- (3) Beneath the earth surface, or underground such as by tunnelling or mining of mineral resources... etc.

### **TRESPASS TO THE AIRSPACE ABOVE LAND**

As a general rule, entry below the surface of the land, or entry on the airspace, if it takes place within the area of ordinary use is trespass.

In **Kelsen v. Imperial Tobacco Co. Ltd**, an advertisement signboard fixed by the defendant company on an adjacent premises projected into the plaintiff's airspace a few feet signboard into his airspace, the court held: that there was trespass. The invasion of the airspace by the advertising sign was a trespass. The plaintiff was entitled to an injunction for its removal, even though the act complained of resulted in no harm.

In **Bernstein v. Skyviews and General Ltd**, the defendant company was taking aerial photographs from about 650 feet, in the air crossing the plaintiff's land in the air in order to do so. The plaintiff claimed damages for trespass to his airspace and for invasion of his privacy. **Goff J** held that the defendants were not liable. An owner at common law had right above his land to such height in the sky as was reasonably necessary for the ordinary use and enjoyment of the land and structures on it. The plane in this case which flew at a



height of 630 feet did not interfere with reasonable use of the land. It was too high to be trespassing.

## KEY POINTS

- Liability does not arise in respect of flights which are at a reasonable height in the air, and which comply with statutory requirements. However, liability in trespass or nuisance may arise from other wrongful activity carried on, by or from an aircraft, for instance, deliberate emission of smoke that pollutes the plaintiff's land.
- Exclusive possession in trespass to land means actual or constructive possession. Mere physical presence/mere usage of control of land does not translate to possession, thus a servant in a house cannot sue for trespass neither can a visitor on a premises.

A person cannot bring an action on the basis of de-factor possession. Thus, the plaintiff will not be able to bring on action for trespass that occurred before he got into possession of the land.

However, a person who is entitled to some interest on the land will be able to sue for trespass or interference by the trespassers.

For instance, a person who has a right or has been given a right to enjoy an easement or to take something from the land of another will be able to bring an action against trespassers who took to interfere with his interest on the land.

- It should be noted also that a person who has no title over land but who has been put in possession can bring an action against any trespass on the land as possession without a legal title is sufficient to sustain an action, however he will not be able to bring an action against the owner of the land or any person that shows a better title or stronger claim to the land.

See the cases of **Olaniyan v. Fatoki** and **Oladipo v. NGS B**

- It will not be defence for the defendant to state that there is a person with a better title than the plaintiff who has mere possession and no title except he acts with the authority of such a person.
- Interference need not be substantial, it will be sufficient if it is a mere interference with the plaintiff's right to possession. See **Unakanba v. Eze**.
- Whatever the form of interference, it must be direct and immediate. Intention is essential in determining whether there is a trespass. Where there is an intention to act, it is inconsequential whether the plaintiff was acting under a no nest mistake.

## EXAMPLES OF TRESPASS TO LAND



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Any unauthorised entry on another person's land is a trespass, in the absence of lawful justification. Trespass to land may take innumerable forms. Some of them include;

1. The slightest entry of land.
2. Learning on a fence of a land
3. Refusing to leave and remaining on land after permission is revoked
4. Putting anything on land or projecting anything above land
5. Walking on or crossing another person's land
6. Silting on another person's wall
7. Using a private landed property as a shortcut to get to another place.
8. Driving animals into another person's land
9. Throwing refuse or anything into another person's land
10. Projecting any object into the soil of another person's land or immediate airspace.

The court in **Entick v. Carrington** said

*"Every invasion of private property, be it ever so minute is a trespass though there be no damage".*

In **McPhil v. Persons Names Unknown**: Some persons, whose identity were unknown moved into the plaintiff's property and started squatting there. The plaintiff brought an action for trespass to eject them. The court held that there was trespass.

## THE ELEMENTS OF TRESPASS TO LAND

The elements of trespass to land are;

1. That there is or was a direct entry on the land, remaining on, placing or projecting any object on or above the land.
2. That the plaintiff has possession or right to immediate possession of the land.
3. That the entry is without lawful justification.

## VARIOUS FORMS OF TRESPASS

### (1) TRESSPASS BY WRONGFUL ENTRY ON LAND

Any wrongful entry into another person's land is a trespass. Entry is by far the commonest form of trespass. The commit trespass in this matter, the slightest overstepping or entry into another person's land without more is sufficient.



**Lord Camoen CJ** stated the rule in **Entick v. Carrington**

“Every invasion of property, be it ever so minute is a trespass.”

Therefore, when a person enters another person’s land, such as by walking, loitering, sitting, driving or by other means enter into it, he commits trespass to land, unless he has lawful justification. It is not a defence for a trespass to plead that he entered it, in the honest but mistaken belief that he was still within the boundary of his own land, or that he thought he had a right of entry on the land, or that the place was a public place or resort, or that he had acted under a mistake of fact or law. This is because the principle of law is that mistake is no excuse. However, where there is a trespass by mistake and no harm is caused to the property, the plaintiff would most likely only get an award of nominal damages.

In **Basely v. Clarkson**, the defendant was mowing the lawn of his land, crossed into the adjoining property honestly believing that he was still within in his own land. The court held that there was trespass and he was liable. Mistake is not a defence.

However, when an entry is accidental, such as where a motor vehicle skids into a land abutting a public highway, a claim for damages in trespass to land may not succeed, but a claim may succeed in negligence. Also, where entry is involuntary such as when a person is unwillingly pushed or carried into a premises, it is the 3<sup>rd</sup> party that did the pushing or the carrying that would be liable for the trespass to land.

**NB: KODILINYE’S** view however, is that an intentional trespasser is strictly liable for all damages caused by his presence on the land, whether such damage is done wilfully or accidentally. Thus, he will be liable not only for such deliberate act, but also for accidental damage.

## (2) **TRESPASS BY REMAINING ON ANOTHER PERSON’S LAND**

A person is liable in trespass, if after entering a land lawfully, he remains in it after his purpose or right of entry has been rented, or come to an end.

Thus, for example, a person who pays for admission to a cinema, and refuses to leave at the end of the show, becomes a trespasser. To refuse or omit to leave the plaintiff’s land is as much as trespass as to enter originally without right.

In **Balogun v. Alakija**, the defendant had engaged the plaintiff to collect rents for him. One night, the defendant called at the plaintiff’s house for a statement of account of rents collected. An argument ensued, and the plaintiff requested the defendant to leave. The defendant did not leave until about 15 minutes later. The plaintiff sued for trespass.



**DE LESTANG CJ** delivering the judgment of the court, held that the defendant was liable in trespass because of his failure to leave when he was asked to.

in **McPhil v. Persons Unknown**, persons moved into the plaintiff's property and started squatting on the premises. The plaintiff went to court for an order to eject them. The squatters contended that they were entitled to proper notices and due process of law before eviction. On appeal, the English Court of Appeal held that the squatters were trespassers and the plaintiff was entitled to an order for ejectment specifying a date within which they should vacate the land. In this case, **LORD DENNING MR** stated the law thus:

*"When a tenancy has come to an end, the land lord is not entitled to take possession except by an order of the court, and on making the order the court has the power to fix the date for possession. The date is a matter for the discretion of the court, but in the ordinary way, where the defendant has no statutory authority to remain, the usual order is from 4-6 weeks".*

Generally, the legal position of a trespasser is not much. In **Aboyaji v. Momoh**, the Supreme Court re-affirmed that a trespasser in possession does not have a legal or equitable possession. However, such wrongful possession may mature into ownership, if possession continues for a period of 12 years and confer title on the trespasser.

### (3) **TRESPASS BY PLACING THINGS ON THE LAND**

It is trespass to place any material object on the land of another, or to bring any object into direct physical contact with another's land without lawful justification. For example, to fire a gun into the soil to drive a nail into or place a ladder against a wall, to remove a door or window from a house, to encourage a dog to enter a premise, or to blow noxious gas into a house.

It is essential for liability in trespass that the placing or projecting of the object on to the plaintiff's land should be direct. If it is indirect, there can be no liability on trespass, but only in nuisance, in which case the plaintiff must prove damages. Thus for instance, to plant a tree on the plaintiff's land is a direct invasion and therefore, a trespass but to allow the roots of a tree to spread from adjacent land to that of the plaintiff is indirect and therefore a nuisance, to throw stones into neighbouring land in trespass, but to allow a stance to become rumous and to collapse on such land is only nuisance.

The distinction between direct and indirect invasion of land is illustrated by the case of **Onasanya v. Emmanuel**. In that case, the plaintiff complained that the defendant, in laying the foundation of a building had encroached by about 10 feet upon land in the plaintiff's possession. He also complained that the defendant had thrown water and refuse on to his land, and had allowed excreta to escape from a slaga on his premises. **OMDULU THOMAS**



J. held that the throwing of water and refuse on the plaintiff's island were direct acts and thus, mounted to trespass, but the escape of excreta was indirect invasion and therefore not trespass but nuisance.

In **Gregory v. Piper**, the defendant placed a heap of garbage near the plaintiff's land which dried up and rolled into the plaintiff's land by means of natural forces. It was held that there was trespass by the defendant. The defendant ought to have known that this would happen.

## **TRESPASS AB INITIO**

Trespass ab initio means trespass from the beginning. Under law, certain persons have the right to enter premises in the course of the lawful discharge of their duties. Examples include the police, a postman delivering letters, consumer goods inspector visiting manufacturing premises, electricity and telecoms personnel in the exercise of their lawful duties, firemen on inspection of safety gadgets on premises, etcetera...

The doctrine of trespass ab initio means that when a person enters the landed property of another person by authority of law, which is distinct from permission granted by a plaintiff, and the person subsequently misbehaves or abuses his right of entry by stealing, damaging, destroying, assaulting, breaching the peace etc.

The abuse relates back to his time of entry (i.e. from the beginning) and he becomes by operation of the law, a trespasser ab initio. In other words, he becomes a trespasser from the beginning, from the moment he entered. Under this doctrine, the defendant is treated as if he had been a trespasser from the moment he entered the land, so that damages will be assessed on the basis of his entire conduct and not merely his subsequent wrongful act was tortious.

## **EXCEPTIONS TO TRESPASS AB INITIO**

Where the authority, licence, permission, or invitation to enter was made by the person on possession to a defendant or trespasser, the doctrine of trespass ab initio does not apply, because the defendant entered wrongfully as an invitee, license or upon an invitation to treat, etc.

In the **Six Carpenters Case**, the six defendants who were carpenters, entered a tavern, a public place by virtue of the nature of its business, and signboard outside which an institution to the public to treat. They ate and drank and paid for the first service. Upon a second service, they refuse to pay on request. The proprietor sued to recover damages. The court held that the carpenters entered the promises on an invitation extended by the proprietor to the public. They were not trespassers from the beginning. In this case, the cart explained the position of the law as follows:

*“When an entry, authority or license is given to anyone in law, and he abuses it, he shall be a trespasser ab initio” but not where the entry, authority or license is given by the party”.*



Furthermore, an omission cannot make a party a trespasser from the beginning. Therefore, the failure, inability or omission of the carpenters to pay their bill cannot make them trespassers from the beginning.

**NB:** Where a tenant 'holds over' or overstays in a premises he has life or otherwise remains in possession after his tenancy has ended, or he remains in possession after a proper notice to quit served on him has expired, he does not thereby become a trespasser, or a trespasser ab initio. His position is different in law.

The Residential and recovery of premises law of the various states protects a tenant who holds over the premises he has let under the law, the proper course of action open to a land lord or plaintiff after the expiration of the requisite notices under law, is to sue for recovery of possession, and obtain an order for ejection. In addition to the order for possession, the landlord or his agent may claim damages for any harm done to the property. He is also entitled to claim mesne profit, which is intermediate profit, money or compensation, 'or rent' payable by a tenant for use of his premises until the day he vacates, i.e. until the day he gives up on possession of such premises.

### CONTINUING TRESPASS

Remaining on a land, or leaving anything on a land after an initial trespass, is a continuing trespass, which act gives a cause of action and right to claim damages 'de die in diem' (from day to day) until the trespass is discontinued. Therefore, whenever a person wrongfully enters another's land, without lawful exercise, he is liable for the initial entry, and additionally, for the neglect, failure and or refusal to leave the land or remove his things from the land. So long as the trespasser, or his things remain on the land, there is a continuing trespass taking place which gives right to the plaintiff to sue from day to day, and claim damages from day to day until the trespass is abated by removal of the person or thing from the land. A trespass may therefore be brief and temporary or continue for some period of time.

In **Lajide v. Oyelaran**, the defendant laid the foundation of a building on the plaintiff's land which he failed to remove. The High Court held that the defendant was liable for a continuing trespass on the plaintiff's land and the fact that the defendant had stopped going to the land is not a defence to an action for continuing trespass.

In **Korskier v. Goodman Ltd**, the defendant building contractor had permission from the possessor of a building to leave rubble on the land while renovating the premises. He failed to remove the rubble after the permission was withdrawn. Action was brought by a tenant on the premises to make him abate the continuing trespass. It was held that the failure of the contractor to remove the rubble after the expiration of the license to keep the rubble on the land was a trespass.

**NB:** However, the consequences of a trespass which has ended are not regarded as a continuing trespass. Therefore, where a defendant goes into a plaintiff's land and makes a trench, as soon as he leaves the land, the act of trespass terminates, if he never comes back to the land again. In such circumstances, a trespasser will be liable only for that entry,



but his failure to fill up the trench will be viewed as a nuisance but not as a continuing trespass.

## INTERFERENCE WITH POSSESSION

It is fundamental that the law of trespass is designed to protect possession of land rather than ownership. Thus, the owner of land who has let the land to a tenant, and thereby given up possession to the tenant for the duration of the tenancy cannot maintain an action in trespass during that period unless he can show that the trespass has caused or will cause permanent damage to the property and so affect the value of his reversionary interest.

Possession here means *de facto* i.e. actual possession. Thus, protection is extended not only to those who are lawfully in possession (such as owners on fee simple, holders of statutory or customary rights of occupancy or tenants or sub-tenants under valid leases or sub-leases) but also to persons whose possession is wrongful and who have no legal equitable or customary right to it. The principle was explained in **Amakor v. Obiefuna** by **Fatoyi – Williams JSC** thus:

*“It is trite law that trespass to land is actionable at the suit of the person in possession of the land. The person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because the exclusive possession of the land gives the person in such possession. The right to retain it to undisturbed enjoyment of it against all wrong doers except a person who could establish a better title”.*

Therefore, anyone (other than the true owner) who disturbs his possession of the land, can be sued in trespass and in such action, it is no answer for the defendant to show that the title to the land is in another person. To resist the plaintiff's claim, a defendant must show either that he is the one in actual possession.

Accordingly, even a plaintiff who is himself a trespasser can, if in *de facto* possession, maintain an action in trespass against a defendant who subsequently enters the land, unless the latter can show that he had a better title or a better right to possession than the plaintiff.

*“An original trespasser... can, if he is in exclusive possession of the land, maintain an action in trespass against a later trespasser, whose possession, whether taken by force or not would be clearly adverse to that of the original trespasser”.*

## PERSONS WHO MAY SUE FOR TRESPASS TO LAND

Any person who has title or right to possession, whether temporary or long term, may sue to protect his right to possession from interference by any trespasser. Ordinary possession means physical control of land or landed property. Possession is often



evidence of ownership. It includes physical occupation, or occupation through servants, agents, licenses, tenants etc.

Thus, the persons who may sue for trespass include;

1. An owner of landed property.
2. A person claiming in trust for the owner such as a caretaker, agent, attorney, manager, trustee, person in loco parentis, servant... etcetera...
3. Tenants
4. A holder of reversionary interest.
5. A sub-tenant living under a valid sub lease.
6. A purchaser who has not yet taken possession.
7. A trespasser or adverse possessor whose trespass has matured into ownership.

## PROOF OF POSSESSION

What is required to maintain an action for trespass to land, is actual possession. Possession in itself, is a sufficient right to maintain a claim for trespass to land.

In **Ekpan v. Uyo, Obaseki JSC** defined possession thus:

*“Possession of a parcel of land means the occupation or physical control of the land either personally or through an agent or servant.”*

Therefore, a person is in possession of a landed property when he:

1. Has physical possession or custody; or
2. Has some form of control over the land, through another person, for instance a caretaker, tenant or other agent.

In an action for trespass, the onus is on the plaintiff to show that he was in de facto possession (i.e. possession in fact) of the land at the material time. In **Wuta-Ofiei v. Danquah**, the judicial committee of the privy council held that in order to establish possession, it was not necessary for a claimant to take some active steps in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which indicates possession must vary with the type of land which can be done on the land to indicate possession moreover the slightest amount of possession would be sufficient to entitle the person who is so in possession to recover as against a mere trespasser.

Where both the plaintiff and defendant claim to be in possession of land, the court will resolve the doubt in favour of the one who can prove title, that is the one who has “right to possess”.

As **IDIGBE J** stated in **Efana v. Adekunle**;



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*“If there is a dispute as to which of two persons is in possession, the presumption of law is that the person having title to the land is in possession. In the well-known case of **Jones v. Chapman, Mauce J**, observed that... if there are two persons in a field each asserting that the field is his, and each doing something in assertion of the right of possession, and ... if the question is, which of those two is in actual possession, the answer is that the persons who has the title is in possession and the other is a trespass.”*

Furthermore, a plaintiff in actual possession of land cannot maintain an action on trespass against one who can show that he has a better title or right to possession i.e. it is a defence to an action for trespass that the defendant has a right to possession of the land, or acted under authority of the person having such right.

However, it is a well-settled rule that a defendant who is sued for trespass to land cannot plead the *jus tertii*, i.e. he cannot justify his trespass by showing that a 3<sup>rd</sup> party has a better title or right to possession than the plaintiff who is in *defacto* possession, unless the defendant entered under the authority or as the agent of the 3<sup>rd</sup> party.

### **TRESPASS BY RELATION**

Under the doctrine of “trespass by relation”, a person having the right to immediate possession who enters the land in the exercise of that right, is deemed by legal fiction to have been in possession from the time his right of entry occurred, so that he can sue for any trespass committed during the period he was in fact out of possession.

Thus, a lessor who is entitled to re-enter after the termination of the lease may, after re-entry, sue in respect of any trespass committed between the time the lease determined and his re-entry.

### **TRESPASS AS BETWEEN CO-OWNERS**

Since both joint tenants and tenants in common of land enjoy “unity of possession”, one joint tenant or tenant in common cannot maintain an action in trespass against his co-tenant except where the latter has excluded or ousted the plaintiff from the land or committed destruction waste of common property. The effect of unity of possession is that each co-owner is entitled to the possession of the whole property jointly or in common with his fellows, and each is entitled to his share of the rents and profits of the property. If any tenant takes more than his proper share of the profits, he does not commit any tort against his co-tenants and their only remedy is an action to an account.

### **REMEDIES FOR TRESPASS TO LAND**

Where there is an act of trespass to land, several remedies are available to a plaintiff. A plaintiff may pursue the remedy that is most appropriate having regard to the circumstances, of the trespass. The remedies for trespass to land include:

1. Action for title and recovery of land.
2. Order for recovery of possession.



3. Damages.
4. Injunction.
5. Ejection of the trespasser and his properties by self-help.
6. Re-entry and dedence of property.
7. Distress or seizure of property in lien of payment of damages.
8. Claim of mere profit.
9. Putting up a noticed warning trespassers to keep off etc.

## **ACTION FOR TITLE AND RECOVERY OF LAND**

This is an action by an owner to recover land from another person who is claiming title to the land.

## **ORDER FOR RECOVERY OF POSSESSION**

This is an action for the ejection of a trespasser, or a tenant who has overstayed after his tenancy has been properly determined by relevant quit notices. Where one person for instance, wrongfully enters another person's land erects any structure thereon, starts squatting there, takes unlawful possession, ousts the plaintiff from possession, remains therein, refuses or fails to vacate the land etc...

A plaintiff who is:

1. In actual possession or
2. Has an immediate right to possession of the land; or
3. Can show that the trespass is, or has caused damage to the land or that it will adversely affect the value of his reversionary interest, may bring an action against the trespasser for recovery of possession of the land by establishing that he is the one that has title, or that he has a better title, or right to possession than the defendant who is trespassing.

In **McPhail v. Persons Unknown**, the defendant brought an action for recovery of possession against trespassers whose names were unknown that were squatting on the land. The English Court of Appeal held that the plaintiff was entitled to an order for recovery of possession and ejection of the trespassers from the property.

In **Adeyemi v. John**, the plaintiff sued to enable him to take possession of land he had purchased from the defendant's mortgage. The court rejected the defendant's contention that no action for recovery lay as the plaintiff had never previously been in possession. It was held that the plaintiff had a right to immediate possession and an order for possession would issue.

## **DAMAGES**

A plaintiff may claim damages from a defendant for harm done to his land as a result of trespass. Damages may be nominal, compensatory etc. A plaintiff is entitled to full restitution for his loss. Generally, the depreciation in the selling value of the property is an



adequate measure for destruction, or damage done to land and buildings thereon, expecting fair wear and tear.

The plaintiff may also recover such specific damages, for instance, loss of any item on the site, damage to structures thereon, business profits, cost of reinstatement, repairs etc.

In **DUNN v. LARGE**, the defendant ejected the plaintiff from an inn, closed it down and sent the custom elsewhere; the plaintiff sued and got judgment for trespass to the premises but was refused an award for the loss of sales for that period because he did not specially plead it.

In **BISNEY V. SWANSTON**, the defendant put a trade on the plaintiff's case ground, so as to interfere with the plaintiff's business as much as possible. Damages were awarded for loss of business. Aggravated damages were also awarded against the defendant for intentionally interfering with the plaintiff's land and business with malice and spite.

## **INJUNCTION**

A plaintiff may with a without claiming and proving damages pray to an order of injunction where trespass is established, to restrain further acts of trespass. However, in an appropriate case, a plaintiff may bring an action claiming per all three, remedies that is to say; a plaintiff may claim for recovery of possession, award of damages, injunction and all may be granted as the case may be.

## **EJECTION BY SELF HELP**

Self help is the use of physical force by an owner of a property or thing to claim his property, title or right. It is an extrajudicial remedy. It is highly frowned at by the courts, for it is a case of taking the laws into one's hands.

## **THE DEFENCES FOR TRESPASS TO LAND**

### **1. POSSESSION OF BETTER TITLE OR TITLE TO THE LAND**

A defendant may show that he has title to the land or that he has a better title than the plaintiff who brought the action, and that he has a high right to immediate possession of the land.

### **2. ACTING UNDER THE AUTHORITY OF PERSON HAVING TITLE**

This is known as just tertii, that is the better title of a 3<sup>rd</sup> party primarily, just tertii is to disallow persons who have no title from initiating action to take possession from a defendant who also has no title provided that the defendant is claiming for, on behalf or through such 3<sup>rd</sup> party who has better title. In **Oguche v. Iliyasu, Jones SPJ** explained the law thus:

*"It is a defence to an action for trespass that the defendant has a right to possession of the land, or acted under who authority of the person having such right".*



### 3. ENTRY TO ABATE A NUISANCE

A defendant may enter a neighbouring land to abate a nuisance which is interfering with the lawful use and enjoyment of his land. He may however not commit any wrong in the process of doing so, other than the abatement of the nuisance.

### 4. ENTRY TO RETAKE THE CHATTEL

A defendant may enter a plaintiff's land to retake a property or chattel owned by the defendant, provided that such chattel was placed on the land by the plaintiff, or occupier of the land, or possibly by a 3<sup>rd</sup> party.

### 5. ENTRY BY CONSENT, LICENCE OR PERMISSION OF THE OCCUPIER

Entry by the consent, licence or permission of the occupiers, express or implied may be pleaded. According to **Pollock**, a license is

*“that consent which, without passing interest in the property to which it relates, merely prevents the act for which consent is given from being wrongful.”*

Where a person gives consent to a trespasser to build a house on his land, then he has waived his right, and cannot turn round to sue for trespass later.

In **Adebajo v. Brown**, the defendant appellant in building his house encroached on the plaintiff respondent's land. Initially, the encroachment was a trespass on the respondent's land. However, the trespass was condoned by the respondent who allowed the appellant to continue with the construction after an agreement was reached between the parties for the surrender of that particular plot to the appellant. The defence of consent by the defendant appellant succeeded.

### 6. STATUTORY RIGHT OF ENTRY

This is an entry justified by law. The category of persons who have lawful authority to enter a premises in discharge of their duties are several. The police have specific powers of entry under the criminal law, such as to make arrest or to search premises in the course of investigations.

Therefore, a claim for trespass to land may not succeed and there may be no liability where it involves the police. Public health fire inspector also has specific powers to enter certain premises in the lawful discharge of their duties.

In **Cope v. Sharpe**, the defendant, went on the adjoining land of the plaintiff and made a firebreak by cutting a path through the grass, in order to prevent the spread of a burning fire on his own land. The plaintiff sued for trespass to his land. The court held that the defendant was not liable for trespass to land and that the defendant had acted reasonably in the circumstances by taking steps to abate the danger posed by spreading fire in the protection of his property.

### 7. ACQUIESCENCE AND LASHES



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Acquiescence and laches is negligence, inactivity, silence, indolence, laxity or unreasonable delay in asserting, or enforcing one's right. As a general rule, after 12yrs a trespasser's adverse possession matures into ownership or title to the land.

In **SMITH V. CLAY**, the court explained the position of the law times;

*"A court of equity has always refused its aid to state demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but convenience, good faith, and reasonable diligence."*



## TOPIC 4

### NEGLIGENCE

From a practical point of view, negligence is the most important and dynamic of all torts. Not every act of carelessness or negligence is actionable under the tort of negligence. **LORD WRIGHT** reasoning in this view in **LOCHGELLY IRON & COAL CO V. MCMULLAN** explained negligence thus;

*"in strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing"*

And in **Odinaka V. Moghalu, Akpata JSC** summed up negligence thus;

*"negligence is the omission to do something which a reasonable man under similar circumstances would do, or the doing of something which a reasonable and prudent man would not do."*

The tort of negligence may therefore be defined broadly as the breach of a legal duty to take care which results in damage undesired by the defendant, to the plaintiff.

Negligence in torts means omission to do something which a reasonable man would do or do something which a reasonable man wouldn't do. Negligence is the breach of a legal duty to take care which result in damage underserved by the defendant to the plaintiff. This unlike intentional tort where the defendant desired the consequences. Here it is undeserved damage to the plaintiff.

There are 3 elements to the tort:

1. **A DUTY OF CARE OWED BY THE DEFENDANT TO THE PLAINTIFF**
2. **A BREACH OF THAT DUTY BY THE DEFENDANT**
3. **DAMAGE TO THE PLAINTIFF RESULTING FROM THE BREACH**

### DUTY OF CARE

The development of this tort is categorized into 3 phases. The first phase was when negligence was merely a component of other torts.

The second phase when Negligence develop into action on the cases and this saw the beginning of negligence as an independence tort.

The third phase was from the decision of **Donoghue v Stevenson**. In this case, Negligence was fully recognized as an independent tort capable of extension into new category.



The first question to be determined in any action for negligence is whether the defendant owed a duty of care to the plaintiff. In general, a duty of care will be owed when whether in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed. Where a person does not owe a duty of care, he is free to be as negligent as he pleases.

**LORD ESHER MR** explained it thus, in **LE LIEVRE V. GOULD**

*“a man is entitled to be as negligent as he pleases towards the whole world, if he owes no duty to them.”*

In simple words, a duty of care means the duty a person owes in law to take care, so that his actions or omissions do not injure another person. The concept of duty of care, when it is owed and when liability will attach for its breach was established in the case of **Donoghue V. Stevenson**.

In **Donoghue v Stevenson**, a manufacturer of Ginger Beer sold his product to a retailer, the retailer resold it to a lady who bought it for a friend of hers who was the plaintiff in the case. The plaintiff had consumed most of the ginger beer when she noticed the decomposed remains of a snail in the beer. She became so sick that she had to be hospitalized and sued the manufacturer for damages in respect of her injury. The manufacturer claimed that there was no contractual relationship between it and the consumer and for that reason the plaintiff is not entitled to an action.

**LORD ATKIN** made a definition of the duty of care, when it existed and to whom it could be owed. The foreseeability test was laid down in the rule and it is known as “the neighbourhood principle”. He said in his famous dictum that;

*“the rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, ‘who is my neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”*

In the case of **Heaven V. Pender**, **BRETT MR** explained when a duty of care existed as follows;

*“whenever one person is by circumstance placed in such a situation with regard to another, that everyone of ordinary sense who did not think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would*



*cause danger or injury to the person or property of the other, a duty rises to use ordinary care and skill to avoid such danger”*

In the **Heaven V. Pender** case, the defendant dock owner made a stage outside a ship on the dock under a contract with the ship-owner to paint outside of the ship, using the stage. The plaintiff, painter who went on stage to paint the ship. However, one of the ropes by which the stage was slung, being unfit for use when it was supplied by the defendant broke, and the plaintiff fell down to the dock and was injured. The English Court of Appeal held that the defendant was liable in the tort of negligence. The defendant dock owner, was under an obligation to the plaintiff to take reasonable care that at the time he supplied the stage and the ropes, they were fit to be used and for negligence of this duty the defendant was liable to the plaintiff for the injury sustained.

The court may deny that a duty of care is owed, on the ground of policy. In **Ashton V. Turner**, it was held that a man who had been seriously injured by the careless driving of his friend whilst they were fleeing from the scene of a burglary which they had committed, was owed no duty of care by the friend and could not therefore recover in negligence. The duty of care was denied based on the assertion of **Ecobank J.** that:

*“The law... in certain circumstances may not recognise the existence of a duty of care by one participant in a crime to another participant in the same crime, in relation to act done in connection with the commission of that crime.”*

In order to establish that he has a good cause of action in negligence, it is not sufficient for the plaintiff to show the existence of circumstances which gives rise to a national duty of care to him, and he can establish this only by showing that the harm suffered by him was the reasonable foreseeable consequence of the defendant’s conduct.

In other words, negligence in the air or towards another person is not enough; the plaintiff cannot build a wrong to someone else.

Thus, for example where a meter cyclist carelessly collides with a car, he will be liable to the owner for any damage caused, since he owes a duty of care to all road users which are within the foreseeable range of impact, and whom he could reasonably foresee would be harmed by his carelessness but will not be liable for the shock and consequent miscarriage suffered by a pregnant woman standing 15 yards away who does not see the accident but merely hears the crash and sees blood on the road afterwards, since a duty of care, *“only arises towards these individuals to whom it may reasonably be anticipated that they will be affected by the act which constitutes the alleged branch”*.

The importance of the decision in **Donoghue v. Stevenson** are as follows;



1. It establish negligence as a separate tort.
2. It establish that the existence of contract, a privity of contract is irrelevant for a successful claim in negligence.
3. It established that a claim for negligence will succeed if the plaintiff proves the elements of negligence which are; duty care, breach of duty of care and damage,
4. It established that there is a duty of care if the neighbourhood principle applies.

The neighbourhood principle which is based on the biblical story of the Good Samaritan means that there is a duty of care on us, whenever lack of care in our conduct will cause injury to any person anywhere in the world. The neighbourhood principle is also known as the doctrine of proximity or nearness.

Accordingly, any person who will be injured by our conduct is near, or proximate to us and he is our neighbour.

4. The manufacturer of goods or products owes a duty of care to his consumers and he may be liable for breach of duty in the tort of negligence.

In **Ibekandu v. Ike**, the plaintiff respondent was walking by the side of the highway, when Toyota Hiace bus driven by the defendant appellant ran into him. He sustained injuries on his leg which was amputated.

He sued for damages for personal injuries. On appeal, the Supreme Court held that the defendant appellant was negligent and was liable to the plaintiff in damages.

In **Black v. Fife Loal Co. Ltd.** the husband of the plaintiff widow was killed by an outbreak of poisonous gas in the coalline of the defendant company who were his employers. In an action for damages, the court held that the defendant company was liable for the negligence of its servants and their failure to comply with the rules prescribed for safety under the English Mines Act.

In **Spartan Steel Alloys Ltd v. Martin and Co. Ltd**, the defendant negligently damaged a cable belonging to the electric power authority, whereby electricity supply to the plaintiff's nearby steel factory was cut off during production and consequently the plaintiff suffered loss of profit. The plaintiff sued the defendants for negligence and for damages. The court held that the defendant was not liable for loss of profit due to the stoppage of still production.

## STANDARD OF CARE

Generally, the standard of care that is required of a person is that which is expected of a reasonable man in his shoes. It is the standard of care that would be exercised by a



reasonable man who is confronted by the same circumstances under consideration. It is the standard of care an ordinary prudent man in his shoes would show. This test of determining what a reasonable man who was put in his position would have done is an objective test. When compared, if a reasonable man would have done what the defendant exhibited sub-standard care than a reasonably man would have done, then he is liable for negligence.

In the words of **Baron Alderson** in **Blyth v Birmingham Water Works**;

*“Negligence is the omission to do some thing which a reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.”*

### **WHO IS A REASONABLE MAN?**

In simple words, a reasonable man is an adult of normal intelligence, with average knowledge, and common sense in every day matters. The reasonable man has been defined in England as the “*man in the Clapham Omnibus*” and so forth.

In Nigeria, the reasonable man was defined severally by **ESO JSC** in the case of **Adigun v. AG Oyo State** as:

1. The pleasant housewife shopping for a meal in sand grouse market.
2. The ordinary worker in Kano City.
3. The plain woman in Okrika dress.

...It is what this reasonable “man” sitting as an impartial observer, thinks... that would matter.

### **BREACH OF DUTY**

Having decided that a duty of care was owed to the plaintiff in the particular circumstances, the court’s next task is to determine whether the dependant was in breach of such duty. This is the question which, in practice, occupies most of the court’s time. In deciding the question, the court considers whether or not a reasonable man placed in the defendant’s position, would have acted as the defendant did.

In deciding what a reasonable man would have done in the circumstances and in assessing the standard of care expected of the defendant, the court may take into account what may be called **the risk factor**. This has 5 elements.

1. The likelihood of harm the conduct poses.
2. The seriousness of injury that may arise.
3. The relevance of utility of the defendant’s activity.
4. The cost and practicability of safety measure; and
5. Sometimes the amount of knowledge presently available to humanity on the issue in question.



### 1. THE LIKELIHOOD OF HARM THE CONDUCT POSES

The greater the likelihood that the defendant's conduct will cause harm, the greater the amount of caution required of him. In **Lord Wright's** words:

*"The degree of care which the duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled."*

This may be illustrated by comparing 2 cases. In **Bolon v. Stone**, the plaintiff was struck and injured by a cricket ball as he was walking along a public road adjacent to a cricket ground. The plaintiff contended that the defendant, who was in charge of the ground, had been negligent in failing to take precautions to ensure that cricket balls did not escape from the ground and injure passers-by but the court held that, taking into account such factors as the distance of the pitch from the road, the presence of a 7 foot high fence, and the frequency with which balls had escaped previously, the likelihood of the harm to passers by was so slight that the defendant had not been negligent in allowing cricket to be played without having taken further precautions such as raising the weight of the fence.

In **Hilder v. Associated Portland Cement Manufacturers**, on the other hand, where the plaintiff, whilst riding his motorcycle along the road, crashed and sustained injuries after being struck by a football kicked from the defendant's adjacent land where children were in the habit of playing, the defendant was held negligent in having failed to take precautions to prevent footballs from being kicked onto the road, since in the circumstances, the likelihood of injury to passers-by was considerable.

### 2. THE SERIOUSNESS OF INJURY THAT MAY ARISE

The gravity of the consequences if an accident were to occur must also be taken into account. The classic example is **Paris v. Stepney Borough Council**. There the defendants employed the plaintiff as a mechanic in their maintenance department.

Although they knew that he had only one good eye, they did not provide him with goggles for his work, while he was attempting to remove a part from underneath a vehicle, a piece of metal flew into his good eye and he was blinded.

It was held that the defendants had been negligent in not providing this particular workman with goggles, since they must have been aware of the gravity of the consequences if he were to suffer an injury to his one good eye, though it was pointed out that the likelihood of injury would not have been sufficient to require the provision of goggles in the case of a two-eyed workman.

### 3. THE RELEVANCE OF UTILITY OF THE DEFENDANT'S ACTIVITY



The seriousness of the risk created by the defendant's activity and where they defendant's conduct has great social value, he may be justified in exposing others to risks which would not otherwise be justifiable.

For instance, "if all the trains in his country were restricted to a speed of 5 miles in an hour, there would be fewer accidents, but our national life would be intolerably slowed down.

The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk. Thus, the driver of an ambulance or fire engine answering an emergency is entitled to proceed at a speed and take some traffic risks which would be unjustifiable.

For instance, it was held in **Beim v. Goyer** that an ordinary motorist, a policeman, in carrying out his duty to apprehend criminals may be justified in resorting to use of firearms, thereby exposing innocent bystanders to some risk. In all cases, one must balance the risk against the end to be achieved, and "the commercial end to make profit is very different from the human and to save life or limbs." ← **WATT v. HERTFORDSHIRE**.

#### 4. THE COST AND PRACTICABILITY OF MEASURE TO AVOID THE HARM

Another relevant question is how costly and practicable it would have been for the defendant to have taken precautions to eliminate or minimize the risk, for in every case of foreseeable risk, it is a matter of balancing the risk against the measures necessary to eliminate it and a reasonable man would only neglect a risk of small magnitude if he had some valid reason for doing so, e.,g. that it would involve considerable expense to eliminate the risk.

Thus, where a factory floor had become slippery after, and the occupiers → **LATHER v. A.E. LTD** did everything possible to make the floor safe but nevertheless a workman slipped on it and sustained injuries, the court held that the occupiers had not been negligent. The only other possible step they could have taken would have been to close the factory, and the risk of harm created by the slippery floor was not in the opinion of the court, so great as to require such a costly and drastic step.

#### 5. THE AMOUNT OF KNOWLEDGE CURRENTLY AVAILABLE ON THE ACTIVITY OF THING

Where the matter or activity under consideration is on the fringes of science, and the amount of knowledge currently available to man on the matter does not avail an answer to the risk posed, then if society for reasons of utility and so form, permits such activity to continue, a defendant would have discharged his duty of care if the amount of care he exercised, was in consonance with the level of knowledge available to humanity on the matter.



In determining whether a defendant's action is up to the standard of care expected of a person in his shoes, the court usually considers the;

1. Intelligence
2. Knowledge; and
3. The skill of the defendant in question

#### 1) INTELLIGENCE

In determining whether the defendant in his actions came up to the standard of a reasonable man, the court will measure those actions against the conduct expected of a person of normal intelligence and the defendant will not be excused for having acted "to the best of his own judgment" if his best is below that to be expected of a man of ordinary intelligence. Thus, it is no defence that the particular defendant had unusually show reactions or lower than average intelligence or possessing unusually quick reactions will not be adjudged by his own high standards, and will not be liable for having failed to use those exceptional qualities.

#### 2) KNOWLEDGE

A man is expected to have that degree of common sense or knowledge of everyday things which a normal adult would possess. Also, a reasonable person is expected to have notice of what a reasonable person in his circumstance should have noticed. In **Glasgow Corp v. Tayloy, LORD SUMNER** stated he position of the law thus:

*"A measure of care appropriate to the inability or disability of those who are immature, or feeble in mind or body is due from others, who know or ought to anticipate the presence of such persons, within the scope and hazard of their own operations."*

In **Yachuk v. Oliver Blans C. Ltd**, a boy of a persuaded a garage attendant to let him have a tin of petrol, by a false, tale that his mother's car had run out of petrol some distance from the garage. The boy poured it over some wood and set it ablaze. The fire caused an explosion severely injuring the boy. The Privy Council held that it was negligence on the part of the garage attendant to entrust a child with such a dangerous thing as petrol. A reduction of damages would not be made on the ground of the contributory negligence of the child.

#### 3) SKILL

A person who holds himself out as having a certain skill either in relation to the public generally leg. a car driver) or in relation to a person for whom he is performing a service leg. a doctor) will be expected to show the average amount of competence normally possessed by persons doing that kind of work, and he will be liable in negligence if he falls short of such standard.



Thus, for example, a surgeon performing an operation is expected to display the amount of care and skill usually expected of a normal, competent member of his profession, whereas a jeweller who pierces ears for earrings is only expected to display the amount of skill of a normal jeweller and not that of a surgeon.

Somewhat surprisingly, however, it has been held that a learner driver must comply with the same objective and impersonal standard as any other driver. This decision may perhaps be explained on the ground that a car is a potentially lethal weapon, and public policy requires that the strictest possible standards of care be maintained, even by learners.

## **EXCEPTIONS TO THE STANDARD OF CARE OF THE REASONABLE MAN**

- (1) Children; and**
- (2) Mentally ill and disabled persons.**

### **THE AMOUNT OF CARE EXPECTED OF CHILDREN**

Children are usually treated as a class of their own. Based on authorities in this area, the degree or standard of care required of a child is the standard of care expected of a child of his age. It is the degree of care expected of a reasonable child in the shoes of the child in question. The test is objective and not subjective. Furthermore, the general rule is that the actions and omissions of negligence of children is not usually treated as contributory negligence. However, it appears that each case may be decided based on its facts.

### **THE AMOUNT OF CARE EXPECTED OF DISABLED PERSONS**

The general rule is that the standard of care to be expected of a person who is subject to incapacity or infirmity is the degree of care to be expected from an average person who is subject to the same infirmity. The test is objective.

In **Roberts v. Ramsbottom**, the defendant had a minor stroke before driving off in his car. He was not aware that what he had suffered was a stroke, although he agreed that he felt somehow dizzy. In the course of his journey, he collided with and injured the plaintiff. The defendant was held to be liable as he knew of his disabling health condition before he went on the road.



## **PROOF OF NEGLIGENCE AND RES IPSA LOQUITUR**

The burden of proving negligence (i.e. that the defendant was in breach of the duty of care he owed to the plaintiff) always lies on the plaintiff whereas, in actions of trespass it is for the defendant to exonerate himself by showing that the injury to the plaintiff was an inevitable accident and not due to any wilfulness or carelessness on his part, in the tort of negligence it is for the person who suffers the injury to prove affirmatively that it was caused by the defendant's carelessness.

**Res ipsa loquitur** is a Latin phrase which means “*the facts speak for themselves*”. The term is used to refer or describe anything that is plain, clear or self explanatory and needs no further explanation, proof or clarification. The principle is a rule of evidence and does not apply when the facts of what happened are sufficiently known, but the rule applies only when there is no explanation. The principle aims at assisting the plaintiff in establishing his claim for negligence against the defendant.

The most popular statement of when **Res ipsa loquitur** is applicable was made in **Scott v. London & St. Katherine's Dock Co.** In this case, the plaintiff, a custom officer was passing in front of the defendant's company's warehouse when he was injured by bags of sugar which fell on him from the upper floor. The plaintiff relied on the principle of **Res ipsa loquitur**. **ERLE CJ** explained when the principle will apply to a case thus,

*“where the thing is shown to be under the management of the defendant, or his servants, and the accident is such that, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, if the absence of explanation by the defendant, that the accident arose from want of care.”*

Where **Res ipsa loquitur** is successfully invoked, the effect is,

- (i) To afford prima facie evidence of negligence, so that the defendant cannot succeed in a submission of “no case to answer” and
- (ii) To shift the onus on the defendant to show either that the accident was due to a specific cause which did not involve negligence on his part, or that he had used reasonable care in the matter.

Thus, **Adefarasin Ag. C.J.** pointed out:

*“The maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are ought to be within the knowledge of the defendant.”*

## **REQUIREMENTS FOR APPLICATION OF RES IPSA LOQUITUR**

1. There must be an absence of explanation of the occurrence by the plaintiff.



2. The thing that caused the harm must have been under the management or control of the defendant or his servant; and
3. The accident or harm must be one which in the ordinary course of things, does not happen without negligence on the part of the defendant.

#### (1) THE ABSENCE OF EXPLANATION BY THE PLAINTIFF

Whenever the court is able to find out from the evidence adduced how and why the occurrence or injury took place, then there is no need for the application of **res ipsa loquitor** and the presumption of negligence.

In **Barkway v. South Wales Transport Co**, tyre of an omnibus burst and the bus mounted the pavement and fell down a nearby embankment. The court held that the doctrine of **Res ipsa loquitor** was not applicable, as evidence of the circumstances of the accident has been given to the court and the court was satisfied that the system of tyre inspection in the garage of the defendant had been negligent. The defendant transport company was liable for negligence based on the evidence given before the court.

Where a plaintiff is only liable to present a partial evidence of how and why the accident happened, he is not prevented from relying on **Res ipsa loquitor**.

#### (2) THE THING WAS UNDER THE MANAGEMENT OR CONTROL OF THE DEFENDANT OR HIS SERVANT

Where the thing that caused the injury was not under the management or control of the defendant or his servant, then the doctrine is inapplicable. The question whether or not the thing that caused the harm was under the management or control of the defendant or his servant is to be decided based on the circumstances of each case. A common example of a person having the management or control is a driver. A driver is presumed to have control of his vehicle and the surrounding circumstances to warrant the applicable rule in a case of negligent driving.

Also, where the thing caused injury is under the control of several servants of a defendant and the plaintiff cannot identify the particular servant that is responsible, for instance, during a surgery operation in hospital when a patient is under anaesthesia, the doctrine will still apply to make the defendant vicariously liable for the act of the unidentified servant.

#### (3) THE THING DOES NOT ORDINARILY HAPPEN WITHOUT NEGLIGENCE BY THE DEFENDANT

The harm must be one that does not ordinarily happen if proper care is taken by the defendant. Thus, the accident or injury must be one, which in the ordinary course of things



does not happen without negligence by the defendant. Negligence is readily presumed where human experience shows that the type of accident or injury does not usually happen unless the defendant has been negligent.

In **Strabag construction Nig. Ltd. V. Ogarekpe**, the plaintiff respondent technician was an employee of the defendant appellant company. While the plaintiff and two others were on top of a tower being installed at a considerable height, the crane on which they were hoisted up suddenly collapsed and they fell down suffering serious injuries. He sued for damages and pleaded **res ipsa loquitor**. The Court of Appeal held that the doctrine applied and that the appellant company was liable for negligence.

**NB:** The majority of Nigerian cases in which the doctrine of **Res ipsa loquitor** has been invoked concern road accident. A typical example is **Ifeagwu v Tabansi Motors Ltd**. Here, the plaintiff was sitting in his brother's roadside shop at a village on the Onitsha-Enugu road when a petrol tanker enroute Enugu with 3000 gallons of petrol collided with a nearby electricity pole, overturned and burst into flames. The plaintiff was badly burnt in the inferno and he subsequently sued the defendants, as employees of the tanker driver, for negligence, relying on *Res ipsa loquitor*. **Arsene J** held that the doctrine applied.

In **Kuti v Tugbobo**, the plaintiff was injured when the lorry in which he was travelling from Oloto to Ijebu-Ode skidded on a wet road, crashed into the pillar of a bridge, and overturned. The trial judge held that **res ipsa loquitor** applied, and this finding was upheld by the Supreme Court.

### **DAMAGE CAUSED BY THE BREACH**

Having established that the defendant owed a duty of care to him and that the defendant was in breach of that duty, the plaintiff must then prove that he has suffered damage for which the defendant is liable in law. There are 2 aspects to this requirement, namely;

#### **(1) CAUSATION IN FACT**

#### **(2) REMOTENESS OF DAMAGE IN LAW**

##### **(1) CAUSATION IN FACT**

The first question to be answered is: *“Did the defendant’s breach of duty in fact cause the damage?”* It is only when this question can be answered in the affirmative that the defendant may be liable to the plaintiff. A useful test which is often employed is the **“but-for”** test: that is, if the damage would not have happened but for the defendant’s negligent act. The claimant must prove the existence of a causal link on the balance of probabilities, which is taken to mean a likelihood of more than 50%. If the court finds that



it was as likely as not that inc injury would have occurred without the defendant's negligence, the action will fail even if there is an admission of carelessness.

The operation of the “but-for test” is well illustrated by **Barnett v. Chelsea and Kensington Hospital Management Committee**. In this case, the plaintiff's husband, after drinking some tea, experienced persistent vomiting for 3 hours. Together with two other men who had also drank the tea and were similarly affected. He went late that night to the casualty department of the defendant's hospital where a nurse contacted the casualty officer, Dr. B. by telephone, telling him of the man's symptoms Dr. B, who was himself tired and unwell, sent a message to the man through the nurse to the effect that they should go home to bed and consult their own doctors the following morning. Some hours later, the plaintiff's husband died of arsenical poisoning and the coroner's verdict was one of murder by a person or persons unknown. In a subsequent action for negligence brought by the plaintiff against the hospital authority as employers of Dr. B. it was held that, in failing to examine the deceased, Dr. B. was guilty of a breach of his duty of care, but this breach could not be said to have been a cause of the death because even if the deceased had been examined and treated with proper care, he would in all probability have died anyway. It could not therefore be said that “but for the doctor's negligence the deceased would have lived.”

A more severe application of the ‘but-for’ test occurred in **McWilliams v. Sir. Williams Arrol & Co. Ltd.**, there, a steel erector was killed when he fell from a building on which he was working. Had he been wearing a safety harness, he would not have fallen. The defendants, his employers were under a statutory duty to provide safety harnesses for all their employers working on high building and they were in breach of that duty by failing to provide them. Nevertheless, they were held not liable since they proved that on previous occasions, when safety harnesses had been provided, the plaintiff had never bothered to wear one. Thus, it could not be said that the failure to provide a harness was a cause of the death.

However, the test often runs into hitches, where for instance, the wrong of the defendant is followed by another wrong which does not substantially alter the initial scenario, but does add to it. See **Baker v. Willoughby**, here, as a result of the defendant's negligence, the claimant suffered on injury to his leg. Damages for this injury had been fully assessed. However, before trial was concluded, armed robbers shot the claimant several times on the same leg resulting in the amputation of the leg. Ordinary justice would have adequately compensated the claimant since they would be held only accountable for injury to an already damaged leg. The original port feasor had to bear full responsibility.



Again, where there is more than one wrong doer each contributing fully or substantially to the case of the claimant's injury.

In **Fairchild v. Glenhaven Funeral Services Ltd**, the House of Lords had to qualify the 'but for' test to allow recovery in a case where it was impossible on the state of scientific evidence to determine which one or more of several employers, all admittedly in breach of duty, caused the claimant to suffer a fatal illness.

According to **Markesinis and Deakin**, "*these cases suggest that although the 'but for' test is based on notions of the limits of individual responsibility, and in particular on the precept that the defendant should not be liable for a loss which he personally and not cause, such a principle may come into conflict with the aim of ensuring that the volition of tortuous conduct is fully compensated for losses caused by fault.*

In the same vein, **Lord Nicholls** notes, "*even the sophisticated versions of the 'but-for' test cannot be expected to set out a formula whose mechanical application will provide infallible threshold guidance on causal connection for every tort in every circumstance. In particular, the 'but-for' test cannot be over-exclusionary.*

We also have a probabilistic cause, here, we see a situation where the court is faced with several probable causes of the claimant's injury of which the defendant's action is one. What should be done? Clearly one of the probable causes is responsible for the claimant's damage but there is no certainty which one is actually the cause.

In **McGlee v. National Coal Board**, the plaintiff contracted dermatitis after working in a Kiln where he was exposed as cement dust. The defendants were not faulted for this as this was incidental to his contract of employment.

However, the employers were in breach of their common law duty of care in failing to provide washing facilities at the place of work. However, medical evidence about the causes of dermatitis was such that it was not possible to say that had washing facilities been provide the pursuer would have escaped the disease. But the defendant's failure had substantially contributed to the claimant's injury. The House Lords held that the claimants was entitled to succeed.

In **Fairchild**, the result of the case that all contributors were made to bear responsibility equally rather than send the claimant away. However, the position varied in **Barker v Corus**, and proportionate liability imposed in relation to the extent of the defendant's liability imposed in relation to the extent of the defendant's liability.



There is also the question of loss of a chance for recovery which appears not to be receiving favourable consideration loss of enhances cases appear to be treated as a failure to prove causation.

### REMOTENESS OF DAMAGE

This is known as concession in law. The question of remoteness arises only after concluding the question in fact. The essence of concession in law is to avoid the situation where the defendant liable ad infinitum (indefinitely); for all the consequences of the wrongful conduct. In certain cases, consequences of the defendant's tortious conduct would be considered too remote if his wrongdoing to impose on him responsibilities for those consequences. The court, therefore, imposes the cut-off point beyond which the damage is said to be too remote.

An independent event which occurred after breach of duty and which contributed to the plaintiff's damage may break the chain of causation, so as to make the defendant not liable to any damage that occurs beyond this point. Where this occurs, the event is void to be novus actus intervenes.

In **Monye v. Diurie**, the plaintiff was knocked down as a result of careless driving of a lorry by the defendant. He suffered injury to his leg and was rushed to the hospital almost immediately. However, before completion of his treatment and against the doctor's medical advice, he discharged himself only to return after two days. The leg was infected and consequently it was amputated.

A claim for the loss of the leg brought against the defendant by the plaintiff failed because, though, it was foreseeable that the plaintiff would as a result of the accident sustained injury. It was not foreseeable that the defendant would against medical advice leave the hospital for two days leading to infection that necessitated the amputation of his leg. This was held to be too remote and the defendant was not held liable.



## **TUTORIAL QUESTIONS**

- 1. Discuss the objectives of the law of torts.**
- 2. Write short notes on the following:**  
  
**(i) Tort and crime (ii) Tort and contract (iii) Tort and breach of trust**
- 3. What is the purpose of the law of assault?**
- 4. Mere words do not amount to an assault. Discuss.**
- 5. Battery must be intentional, negligent or reckless. Discuss.**
- 6. Write short notes on five defences to trespass to the person**
- 7. With the aid of decided cases, explain the differences between trespass to chattel, conversion and Detinue**
- 8. Account for the differences between Conversion and Trespass**
- 9. Discuss the remedies for Detinue.**
- 10. What are the elements of negligence and how are these established**
- 11. Critically examine the standard of care required of the defendant in the care of Negligence**
- 12. Explain the Neighbourhood principle enacted in Donoghue v Stephenson.**
- 13. The standard of a reasonable man is based on subjective criteria. Discuss.**



**300LEVEL NOTES**  
**LAW 301**  
**GENDER AND THE LAW I**





## TOPICS

- AGENCY
- HIRE PURCHASE

## MATERIAL SOURCES

- PROF. FOGAM'S HANDOUT ON AGENCY
- COMMERCIAL LAW IN NIGERIA BY E.O AKANKI
- COMMERCIAL LAW IN NIGERIA BY M.C OKANY
- CLASS NOTES



## LAW OF AGENCY

### INTRODUCTION

The employment of agents in commercial transactions has assumed great importance in modern business practice and thus the relationship between a principal and an agent is fundamental in the modern commercial law.

According to **Robert Lowe**, “it lies at the very heart of the subject and without it, modern commerce would not exist”. Others *believe* that commerce would literally come to a standstill if businessmen and merchants could not employ the services of factors, brokers, estate agents, auctioneers, and the likes were expected to do everything themselves.

### PURPOSE OF AGENCY

A variety of reasons have been given for the important role that an agent plays in the conduct of commerce:

- 1) The agent may possess special skill or expertise for which he is needed.
- 2) She/he may have special knowledge of a particular market, area or community.
- 3) Distance at times presents some difficulties, and therefore could be disadvantageous to the astute businessman; consequently he (the principal) finds it necessarily to appoint an agent in such distant places where he has business interests.
- 4) All men are not equally talented in doing business. People differ in terms of their technical knowledge as well as in their skill and experience so that it has become very necessary for a principal to employ the services of an agent.
- 5) The principal may simply be too busy to make every contact personally.

Essentially, the Law of Agency is concerned with the special rules put in place to regulate the complications and problems that may arise from the introduction of a third person to perform certain tasks on behalf of another. The employment of an agent introduces another person, whose conduct can affect in a variety of ways, the legal position of the one on whose behalf he acts and the one with whom he deals.



The Law of Agency is particularly common law; hence the cases provide a lot of insights into this area of the law.

## DEFINITION AND CHARACTERISTICS OF AGENCY

There has never been any definition of agency which is comprehensive enough for all purpose and free from controversy. This is due to the complex nature of the subject matter and thus the alternative would be to do an analysis of the relationship between the parties.

AGENCY has been described as a special type of contract in which one party called the principal expressly or impliedly agrees that the other party called the Agent should act for him for the purpose of bringing him into a contractual relation with a third party.

**FRIDMAN** in his Law of Agency talks of agency as, "... the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts on the disposition of property."

**ADESANYA** and **OLOYEDE** defined agency as; "a consensual relationship existing between two parties by which one, the agent, expressly or impliedly authorized to act on behalf of another, the principal, in any dealings with the third parties."

Another attempt by the **AMERICAN RESTATEMENT OF THE LAW OF AGENCY** talks of Agency as; "... the relationship which results from the manifestation of consent, by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act."

**NB:** The agent is an instrumentality or conduit pipe through which the principal acts and he immediately drops out of the arrangement after accomplishing the transaction between the principal and a third party.

- Agency contemplates the execution of a lawful transaction. If an agent carries out an unlawful act, he becomes liable as a party to the offence or as a joint-tortfeasor with the principal.



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- The idea behind the concept of agency is the recognition by the common law that a person need not always do things that change his legal relations himself. He may utilize the services of another person.

## LEGAL IMPLICATIONS OF THE DEFINITIONS OF AGENCY

\*The act of the agent in concluding a contract on behalf of the principal binds the principal and will therefore create reciprocal rights and liabilities or privity of contract between the principal and a third party.

\*The act of the agent will bring about the same consequence on the principal as if he had contracted for himself. This is expressed by the Latin maxim, **oui facit per alium facit per se** (He who acts through another acts for himself).

## CHARACTERISTICS OF AGENCY RELATIONSHIPS

- 1) Agency creates two types of relationships: a bi-partite relationship between the principal and the agent on the one hand a tri-partite relationship between the principal, the agent and the third party.
- 2) The law of agency applies only in situations where the agents' representation or action on behalf of the principal affects the principal's legal position that is his rights against, and liabilities towards other people.
- 3) Agency relationship arises only in circumstances where it is considered in law to arise. It is not what the parties choose to call their relationship, or intend it to be, that matters, but the effect the law attaches to it.
- 4) Admittedly, most agency relationships arise from agreement or consent whether express or impliedly but not all agency relationships are consensual. For example, in the case of agency of necessity or estoppel, there is no form of agreement or consent.
- 5) In an agency relationship, the agent represents the principal and thus he is like the 'alter-ego' of the principal or at least a conduit pipe connecting the principal and the third party.
- 6) Agency creates fiduciary relationships, that is, a relationship of trust and confidence honesty.
- 7) Agency, although creates an exception to the rule of privity of contract; but since the law allows an agent to be channel connecting the principal and the third party. Generally it is opined that it reinforces the rule of privity in such situations because



the agent drops out of the transaction and allows the principal and third party to have a direct contractual relationship.

The primary role of agents is the negotiation and conclusion of contracts. But “agency” is a very flexible concept. Although the legal definition of the word agency bears a close resemblance with the popular concept of the word, the word agency is sometimes used in a particular sense. For example

- a car dealer is loosely referred to as an agent.
- a distributor of a certain make of a product manufactured by a particular industry or firm is also referred to as an agent.

The above types may be described as the **“MANUFACTURERS SOLE AGENT”** in a given area.

That however does not mean that when a dealer sells a car to a customer, he is acting as an agent in the strict legal sense of the word. In practice, such a dealer buys the car or products from manufacturers and sells on his own account to purchasers. In this case, he sells not as an agent but in his own right as a principal.

The existence of agency relationships in the legal sense is a matter of law, in that there is no need for the parties to intend to create a relationship of agency to exist. The law may hold such a relationship to exist even when the parties did not contemplate it.

The distinction between a “SOLE AGENT” and “AN AGENT” in the legal sense can be illustrated with the case of **Lamb W.T and Sons v. Goring Brick**. In this case, the defendant appointed the plaintiff a “SOLE SELLING AGENT” for their goods for a fixed period but before the expiration of that period, they informed the plaintiff that they would henceforth sell the goods themselves. It was held that the intention to start reselling the goods themselves amounted to a breach of contract since they have given the sole selling to the plaintiff for a fixed period, and are therefore bound by that contract.

## **AGENCY DISTINGUISHED FROM OTHER RELATIONSHIPS.**

There are several other relationships recognized by law which show some of the features of an agency relationship. Even though recent commercial developments have tended to assimilate these distinct relationships, it is still important to separate and distinguish the relationship the relationship of principal and agent from other similar ones.



## **AGENCY AND TRUSTS**

Trust involves an equitable obligation binding on a person called a trustee to deal with the property over which he has control for the benefit of another person called the beneficiary.

### **(SIMILARITIES)**

- In both cases they are part of a fiduciary relationship in that both are persons who act on behalf and for the benefit of others.
- Both of them must not allow their interest to conflict with their duties.
- In both cases, they may be able to transfer a good title to a bonafide purchaser in good faith.
- Certain equitable remedies in respect of property in the hands of an agent may in the same way that they are available to the beneficiary against a trustee. For example, an agent who makes a secret profit must account for it in equity, in the same way as a trustee who makes a secret profit out of his trust.

### **(DIFFERENCES)**

- A trustee is the legal owner of property but an agent is only authorized on behalf of the principal.
- An agent represents his principal, and can create contractual relations between his principal and 3<sup>rd</sup> persons but a trustee is not in any way the representative of his beneficiaries; hence does not involve his beneficiary in personal responsibility for the trustees acts, whether in contract or not.
- An agency can generally be created between parties without any special form, but in many cases a trust must be created in writing.

## **AGENCY AND BAILMENT**

A bailment is the delivery of personal property by one person to another for a specific purpose in the understanding the property would be returned after the special purpose is achieved.

A bailee is the person who receives possession of goods from the owner for the specific purpose.



### **(SIMILARITIES)**

- Ipso facto a bailee is not normally an agent of the bailor. However when exercising some of his powers over the property e.g. to have them repaired or serviced, the bailee incidentally involves the bailor in liability on contract made for the purpose just as an agent can involve a principal.

### **(DIFFERENCES)**

- The bailee does not represent the bailor. He merely exercises with leave of the bailor, certain powers in respect of the property.
- The bailee has no power to make contracts on the bailors' behalf; nor can he make the bailor liable, simply as bailor for any of his acts.

### **AGENCY, SERVANTS AND INDEPENDENT CONTRACTORS**

A servant is one who, by agreement, whether gratuitously or for his reward gives his service to another.

An independent contractor on the other hand, is one who by agreement, usually for reward provides services for another.

Both terms describe people who (like agents) have power to act for others. The servant is said to be someone who is completely subject to the control of his master as to what he does and how he does it; whereas an independent contractor is his own master, but must provide what he has contracted to provide in the way of work or services.

It has been suggested that the distinction between servants and independents contractors on the one hand and agents on the other hand is essentially one of action, in that agents are mainly employed to make contracts and to dispose of property, while servants are often employed for other tasks

### **CLASSIFICATION OF AGENTS**

As a result of modern developments in commerce and the changing need for specialization, certain types of agents have distinguished themselves by name and function. Consequently, they have been invested with varying degrees of authority or power often stemming from the customs and usage of the particular community, trade, business or profession in which they operate.



**NB:** The important of classifying agents lies in the fact that it helps to determine the extent to which a principal may be made liable for the unauthorized acts of his agent.

Agents are generally divided into 3 main classes. They include

### **SPECIAL AGENTS**

This type of agent is appointed to carry out or perform a specific action or to represent his principal in some particular transactions which is not within the ordinary course of his business.

For example, where X appoints Y his agent for the purpose of providing for him a machine suitable for sewing clothes. The only authority given to Y as agent is that necessary to produce the type of machine mentioned.

**N.B:** The scope of authority of a special agent is therefore necessarily limited to the performance of a specific task as a rule he is not entitled to alter or extend his sphere of operation beyond the strict limit of his employment.

If he acts outside his instructions, his unauthorized action will not bind his principal.

### **GENERAL AGENTS**

A general agent is

- (a) One who is employed to do some actions in the ordinary course of his business or profession as an agent on behalf of his principal.

For example, a solicitor, factor, broker or auctioneer who is employed to perform in the ordinary course of his business is a general agent of his employer in relation to that employment.

- (b) One whose authority extends to the performance of any act whether specially authorized or not which becomes incidental or necessary to the performance of some general scheme of operation for which he is employed.

### **UNIVERSAL AGENT**

A universal agent is one whose authority is unlimited, that is, he has authority to act for his principal without any restrictions. Such types of agents are rare in practice but when they do exist, they are appointed by extensive powers of Attorney. The only limits which



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are imposed upon the authority of a universal agent are those of which the law imposes with regards to the legality of the object and the capacity of the parties in relation to contracts in general.

## **TYPES/KINDS OF AGENTS**

Within the general classification of agents can be found particular types of agents. Some of these types distinguished by name and function have been invested, as a matter of law, with varying functions stemming from the authority they possess as agents employed in a particular trade, business or profession. Some of the main characteristics of a number of special classes of agents are as follows;

- 1) MERCANTILE AGENTS
- 2) DEL CREDERE AGENTS
- 3) AUCTIONEERS
- 4) ATTORNEY OR LEGAL PRACTITIONERS
- 5) SHIPMASTER
- 6) CONFIRMING HOUSES
- 7) SOME OTHER COMMERCIAL ARRANGEMENT

### **1) MERCANTILE AGENTS**

**Section 1 of the Factors Acts 1889** defines a mercantile agent as a person “... having in the customary course of his business as such agent authority to sell goods or consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.”

This definition encompasses two types of agents recognized by the common law namely;

- **FACTORS; and**
- **BROKERS**

**FACTORS:** The term ‘Factors’ is not defined by the **Factors Act 1889**. Under the common law, however, it has been defined as referring to a mercantile agent who has been entrusted with the possession of goods for sale only.

In **Boring v. Corrie, Abbott C.J** described a factor as referring to “... a person to whom goods are consigned for sale by a merchant residing abroad or at a distance away from the place of sale and who normally sells in his own name without disclosing that of his principal.” This definition was qualified in **Steven v. Biller** where it was held that an agent



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does not lose his character of factor by reason of his acting under special instruction from his principal to sell the goods at a particular price and to sell in the principals' name.

A factor is therefore simply an agent to whom goods are consigned for the purpose of sale. He has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale.

**N.B:**

- Possession of goods for the purpose of sale is therefore the distinctive mark of a factor.
- He has a right to receive money from the buyer and also a right to bring an action against the buyer for the purchase price.
- A factor cannot pledge the goods entrusted to him for sale.

- **BROKERS:** A broker is a mercantile agent who is employed to negotiate contracts on behalf of another, for the sale or purchase of property or goods for a commission usually called a brokerage. Such an agent is normally a member of an institution, for example; the Nigerian Stock Exchange; and he buys and sells in accordance with the rules of such institution. He, unlike a factor, has no possession of the goods. Consequently, he has no lien on them, and as such can only sue in his principals' name.

**N.B:** The essential distinguishing feature of a broker is that unlike a factor, a broker is not entrusted with the possession of the goods or merchandise in which he deals. Also, he cannot sell in his own name. Therefore, he has no authority as a broker to receive the price, and ordinarily not being entrusted with goods he has no right of lien.

## **2) DEL CREDERE AGENTS**

A Del Credere Agent is also a mercantile agent but the special feature of this type of agency is that the agent in return for extra commission called "del credere commission" promises to indemnify the principal if the 3<sup>rd</sup> party introduced by the agent fails to pay what is due under the contract. In other words, such an agent undertakes to be liable to his principal for the price of goods sold by him to a third party in the event of the third party making a default in payment.

The liability is secondary and only arises when the buyer he procures for his principal refuses payment of what is due under the contract.



**N.B:**

- A Del credere agent is in the position of a surety to his principal for the due performance by the persons with whom he deals of contracts made by him with them on his principals behalf. Although it appears similar to a contract of guarantee, it is actually a contract of indemnity and need not be evidenced in writing as prescribed by **Section 4 of the Statute of Frauds 1677**. In the case of **Omoriegie v. B. Portland Cement Fabrik**, the court held that in the absence of clear words or something definite in the parties' course of conduct, a del credere agency could not be easily inferred.
- The obligation Del credere agency is confined to answering for the failure to pay any ascertained sums which may become due as debts. In other words, liability does not extend to other breaches of the contract by the other parties e.g. where the other parties breach the contract in some other manner such as refusal to take delivery of the goods.

The Del Credere agency may be inferred from the course of the conduct of the parties, but what is paramount is that there must be evidence of a higher reward due to the agent; otherwise del credere agency will be difficult to infer.

### **3) AUCTIONEERS**

Auctioneers are agents whose ordinary course of business is to sell goods or property by public auction, for a reward generally in the form of a commission.

An auctioneer is an agent licensed by law and authorized to sell goods or property for another at a public sale, called auction. He may or may not have possession of the goods to be sold but it is clear that when given such possession, auctioneers are "mercantile agents" within the **Factors Act 1889**.

### **CHARACTERISTICS**

- He is primarily the agent of the seller but he may act as agent for both parties for the purpose of signing the memorandum of the sale provided he does so personally and at the time of sale.
- He has implied authority to receive the purchase price of the sales in the case of goods, but cannot sell on credit.
- He can also receive deposit in case of sale of land and he can sue for it in his own name.
- He has possession of the goods auctioned in his own capacity etc.



#### 4) ATTORNEYS OR LEGAL PRACTITIONERS

A legal practitioner (or attorney at law) is a person who has legal authority to act on behalf of someone engaged in legal proceedings. However, the effect of his/her action will depend on the nature of the authority. A legal practitioner, acting under a general retainer has authority to accept service of process and appear for the client, but has no authority to commence an action unless he is specifically instructed to do so, or such authority may be reasonably inferred from the terms of the retainerhip.

**N.B:** While acting in his capacity as a legal practitioner, the attorney at law can however be liable in negligence. Any contract with his client relieving him of such liability is void. See **Legal Practitioners Act 1975 Sect 9**. The exception is where he acted gratuitously or his negligence arises from the conduct of his client's case in court or tribunal.

#### 5) SHIPMASTER

The shipmaster has authority to enter into contracts in matters relating to the usual employment of the ship e.g. contract for repairs of the ship or purchase of necessities when he cannot communicate with the owner; and where he can in no other way obtain money thereafter he has authority to give customary bond for such necessities. This would only bind the owner if given strictly for necessities and bonafide.

#### 6) CONFIRMING HOUSES

In the export trade, when the supplier receives an order from a customer abroad, he may seek confirmation of that order by a person or firm in the suppliers' country. The confirming house for an agreed commission adds confirmation or assurance to the bargain which had been made by the buyer, and is reasonably liable to the supplier if the buyer abroad fails to perform the contract.

The operation of this type of agency is aptly illustrated by the case of **SOBELL INDUSTRIES v. CORY BROSCO**. Here, the Turkish buyers placed a large order for radio sets with the plaintiffs and the defendants confirmed the order. After receipt of part of the consignment, the buyers refused to take delivery of the rest. It was held that the defendants as confirmers were liable for damage for non-acceptance.



## 7) SOME OTHER COMMERCIAL MARKETING ARRANGEMENT

It is apparent that agency is only one of the possible arrangements which may be used by a business as a means of marketing its products or services

Therefore, it is necessary in any given case to examine arrangements closely in order to decide if it does amount in law to an agency. In this regard, some of the other possible relationships that may be used are;

**a) DISTRIBUTORSHIP:** in a distributorship, the manufacturer will agree to supply the dealer with products, and may well agree not to appoint any other distributor for its products in the dealers' area. In return, the dealer will normally agree to develop the market for the manufacturers' products and possibly not to sell competing products.

The relationship between the manufacturer and the dealer will largely depend on the terms of the distributorship agreement.

**b) FRANCHISING:** a franchise can be said to be a form of business organization in which a firm which already has a successful product or service (the franchisor) enters into a continuing contractual relationship with other businesses (franchisee) operating under the franchisor's trade name and usually with the franchisor's guidance, in exchange of a fee.

Franchising thus is an agreement where one party (the franchisor) grants another party, (the franchisee) the right to use its trademark or trade-name as well as certain business systems and processes to produce and market goods or service according to certain specifications.

**c) SUBSIDIARIES:** another method often used is for a business to establish a network of subsidiaries to market its products and/or services. This course is often taken by companies, which market products through a network of trading subsidiaries. Each subsidiary company will have a separate legal personality from the holding company or proprietor.

## CREATION OF AGENCY RELATIONSHIP

### CAPACITY TO ACT AS PRINCIPAL AND AGENT



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The general rule is that both principal and agent must be capable as such. In this regard, the ordinary rules of contract apply to the contract of agency. It follows therefore that:

- (i) The 3<sup>rd</sup> party must have capacity to contract in order that the contract with the agent makes with him on behalf of the principal may be enforceable.
- (ii) Generally, the agent must have capacity to contract if his contract is to be enforceable; otherwise the agent and principal may not be able to enforce the rights and duties arising under the contract of agency.

However, there is a marked distinction between a person's capacity to act as a principal and his capacity to act as an agent.

### **CAPACITY TO ACT AS A PRINCIPAL**

Only persons with full capacity to act contractually may appoint an agent to act on his behalf. Thus, the capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal himself to make the contract or do the act which the agent is authorized to make or do.

To this general rule, there are 2 exceptions

- First, where the act is required by statute to be done by the person himself.
- Secondly, where the competence to do the act arises by virtue of the holding of some public office.

**N.B: Section 39(1) of the Companies and Allied Matters Act 1990** prescribes that a company cannot appoint an agent to do acts which are not in the objects clause of the company because it will be beyond the powers of the company (*ultra vires*)

\*A principal that does not have full contractual capacity cannot make a contract by employing an agent who has full contractual capacity, that is those who lack capacity to contract, like an infant or lunatic cannot as a general surmount his contractual disability by employing agents to enter into a contract on their behalf

\*An infant cannot appoint an agent to purchase goods other than necessities for him since such contracts would be void.

**Section 1 of the Infants Relief Act of 1874** states situations where contracts entered into with an infant will be void. It follows therefore that an infant cannot appoint an agent to contract on his behalf with a 3<sup>rd</sup> party as regards such contracts.



He can only appoint an agent in circumstances in which he himself has the power to act. This restricts an infant's capacity to appoint an agent only to kinds of valid contracts which he himself can make.

\*Also, mentally unsound persons have no capacity except during their "lucid intervals", hence they cannot appoint an agent to contract on their behalf during the time they are mentally incapacitated.

Nevertheless, there may be cases where a mentally incompetent person (or a drunkard) can be treated as a principal; for instance (1) if the 3<sup>rd</sup> party contracts in ignorance of his condition and (2) without taking advantage of the disability.

The same rule also applies to drunkards. They have limited or capacities to appoint an agent at the time of their disabilities. The rule is stated clearly in the case of **Imperial Loan Company v. Stone**. The rule is to the effect that

*"Where a party to a contract is of unsound mind, the contract is nevertheless binding upon him unless he can prove that he was so insane as to not know what he was doing and the fact was known to the other party who took advantage of it"*

\*It is also important to note that although the principal may have capacity at the creation or inception of the agency, but subsequent loss of capacity through insanity for instance, may bring the agency relations to the end. The case of **Yonge v. Toynbee** is illustrative of this point. (Check the handout for the facts and judgment)

\*The position canvassed earlier on corporations and their capacity to appoint agent seems to have now been affected by recent legislations on companies. **The Companies and Allied Matters Act in Section 38** now gives a company all the powers of a natural person of full capacity for the furtherance of its authorized business or objects unless its memorandum or any other enactment otherwise provides

**Section 39** abolishes the harsh effects of the doctrine of ultra vires as so that the ultra vires of a company are now ipso facto void.



## **CAPACITY TO ACT AS AN AGENT**

The capacity to act as an agent is not completely governed by the same rules as capacity to act as a principal, since an agent does not enter into a contract on his own behalf consequently, it is not necessary that he should have full contractual capacity.

All persons of the said mind, including infants and other persons with limited or no capacity to contract on their own behalf are competent to act or contract as agents.

In other words, since agency depends on agreement and not necessarily on contract, a person under contractual incapacity is not disabled from serving in the capacity of an agent. The rationale of these rules is not that the agent is a mere instrument and that it is the principal who bears the risk of adequate representation.

Thus, an infant may act as an agent in any type of contract provided that he has sufficient understanding to consent to the agency and do the required act. It is therefore, irrelevant to his capacity to act as an agent, that because of his infancy he may not be liable to the 3<sup>rd</sup> party on the contract, where adult agents would have been personally liable.

## **FORMALITIES FOR APPOINTMENT OF AN AGENT**

Generally, no formality such as writing or deed is required for the valid appointment of an agent. There is no particular form prescribed by law, thus an agent can be appointed orally, in writing or implied from the circumstances.

A great number of agencies are created orally, and very often without any express arrangements at all. This is so even if the agent is appointed to make contract which is required by law to be evidenced in writing or to be evidenced by a note or memorandum in writing signed by the party to be charged or his lawfully authorized agent. However, writing is always advisable even where it is not required.

## **CREATION OF AGENCY**

The relationship of principal and agent may arise in one of the following 4 ways:



1. EXPRESS AGREEMENT (Express or Implied)
2. RATIFICATION
3. ESTOPPEL
4. BY OPERATION OF LAW

## EXPRESS OR IMPLIED AGREEMENT

The commonest and by far the simplest means of relationship is by express agreement in the form of a contract.

An agency agreement must be based upon some indication by the principal to the agent that he consents to having the latter act on his behalf, and a similar manifestation of consent by the agent to act for the principal.

- No particular form is required for such agreement for it may be expressed or implied from the conduct of the parties. It could also be written or oral, unless he is authorized to execute a deed in which case his appointment must be by deed. Thus, **Abina & Ors v. Farhat**, it was held that, a deed signed by an agent on verbal authority was inoperative.
- Where such an agreement is oral, proof would be essential for the mere spoken words may be easily misunderstood or misinterpreted. The burden of proving the existence of such relationship rests on the party who asserts it. In the absence of such proof, the court should hold that there is no agency by agreement.
- Where such an agreement is inferred from conduct, the law demands that there must be some positive act from which such inference can be drawn. Accordingly mere silence without more would not be sufficient.
- There are a few other cases in which an agent's appointment must be under seal and a few cases where it must be in writing. Appointment under seal (or by deed) is necessary where the agent is given power on behalf of his principal to make contracts under seal. An appointment in this form is termed a "power of attorney" and it is commonly given by a person temporary leaving the country to an agent who is to look after his affairs during his absence. Appointment in writing is necessary on cases where the disposition of land or an interest in land is concerned. See sec. 78 of the **Property and Conveyancing Law 1959** which provides that an agent could not create or dispose of an interest in land or dispose of an equitable interest or trust on behalf of a principal unless he himself had been appointed in writing.



- It is important to note that not all agency agreements are strictly contractual, manifesting all the features of the common law contract. An agency may be gratuitous, if so, it is not truly contractual. The main difference between consensual and contractual agency lies in the absence or presence of consideration (remuneration) to the agent.

## IMPLIED APPOINTMENT

This type of authority may arise under two situations

1. First, it may arise from the express authority conferred, thus, an agent appointed to conduct a particular trade or business can do all such things as are necessarily incidental to the conduct of such trade or business. In **Ryan V. Pilkington**, an estate agent was instructed by the owners to find a purchaser for a private hotel, he did so and accepted from the prospective purchaser a small deposit 'as agent' of the owners. It was held that although the estate agent was not expressly given the authority to accept deposits, he had acted within the ostensible scope of his authority.
2. Secondly, an agreement to create an agency may be also implied from the conduct of the parties.

The law will imply such an agreement of the partner have, by their conduct, consented to a state of affairs which is expiable only in terms of agency.

In general, however, it will be the assent of the principal which is more likely to be implied, for, expects in certain cases, "it is only by the will of the employer that any agency may be created. Such assent may be implied where the circumstances clearly indicate that he has given authority to another to act on his behalf.

This may be so even if the principal did not know the true state of affairs. The effect of such implication is to put parties on the same position as if the agency had been expressly created.

## RATIFICATION

This arises where a person without authority (or who having an authority exceeds that authority) acts on behalf of another and that afterwards accepts and adopts the act as if there has been prior authorization to do the act.



Agency by contract as seen earlier is usually created before anything has been done by the agent, that is the agent's authority to act is granted before the existence of that authority. But with ratification, the situation is reversed.

In ratification, what is done on behalf of the principal is done at a time when the relationship of principal and agent does not exist, in that the agent has no authority to do what he does at the time he does it. But also happens that subsequent to the act, the person on whose behalf it is done accepts it or adopts it. The process of adopting the act or transaction is known as ratification.

- The doctrine of ratification is well expressed in the Latin maxim, “*omnis ratihabitio retrotrahitur et mandato priori aequiparatur*” (an act without precedent authority becomes the act of the principal, if subsequently ratified by him).
- Ratification is retroactive. It relates back to the time of transaction and not to the time of ratification, and thus supplies the authority lacking at the time of transaction. This is exemplified in the famous constructional case of **Buron v. Denman**, in which the defendant, a British Naval Commander, forcefully freed some slaves belonging to the plaintiff. Subsequent ratification by the secretary of state and the Admiralty, Lords was held to render the defendant's act an “Act of State” for which he could not be made personally answerable.
- Ratification need not to take a particular form. In most cases any act of statement which clearly shows the intention of the principal may be a sufficient act of ratification (even for a written contract). But if the contract made by an agent is on the form of a deed, then the principal's ratification must be by deed.

## CONDITIONS/REQUIREMENTS FOR A VALID RATIFICATION

For a ratification to be valid, the following conditions must be satisfied.

### i. THE AGENT MUST EXPRESSLY CONTRACT AS AN AGENT

The agent must profess at the time of making one contract that he is acting on behalf of and intending to bind the person who subsequently ratifies the contract. He must make it clear that the principal is a party to the contract.



This is based on the principle that a man may not incur liability on his account and then assign it to someone else under the color of ratification.

Therefore the possibility of ratification does not depend upon what the agent's state of mind actually was but upon one way his statements and conduct were reasonable understood by the 3rd part. Hence, only the person under whose authorization the agent has purported to act can take the benefit of or be made liable under one agent's act.

**N.B: Lord Macnaghten** remarked that

“Civil Obligations are not to be created by, or founded upon undisclosed intentions”.

If a relationship of principal and agent is to exist and affect third parties, it must be based upon knowledge on one parts of all concerned, and their joint intention that such a relationship should exist and affect rights and liabilities.

## ii. THE PRINCIPAL MUST BE IN EXISTENCE

**Wills J.** in **Kelner v. Baxter** said

“Ratification can only be made by a person in existence either actually or in contemplation of law. This means that the principal must be a live human being or a juristic person.

In order to effect a valid ratification, the principal must be in existence at the time the act was purportedly performed on his behalf.

**Fridman** says “no one can purport to act as an agent for a person who will come into existence at a future date, even if the agent can reasonably expect that his act will be adopted”.

Thus in **Caligara v. Giovanni Sartori and Co. Ltd.**, it was held that a company cannot ratify a contract purported to have been entered into on its behalf by the promoters prior to its incorporation.

\*This rule is important for example in its bearing on the liabilities of companies for pre-incorporation contracts. The common law position is that since a company has no legal existence before incorporation, it cannot ratify any contract made prior to incorporation. So in **Kelner v. Barter**, the court rejected the purported ratification of contract by a company which had not been formed at the time the contract was made.



\*The agent must purport to act on behalf of an identified or identifiable person, and under the authority of that person before that person can ratify the agent's act. Hence, the only person under whose authorization the agent has purported to act can take the benefit of, or be made liable under the agent's act.

For example, in **Wilson v. Tuman**, a sheriff under a writ of execution wrongly seized goods which were not the property of the judgment debtor. When it was sought to make the execution creditor liable for his trespass it was held that he was liable because the execution creditor could not ratify the sheriff's act so as to become liable for the sheriff's trespass. This was because the sheriff acted in pursuance of a public duty, under the authority of the law which ordered him to seize debtor's goods, not under the authority, and on behalf of the execution creditor. See also **Barclays Bank Ltd v. Roberts**.

### iii. CAPACITY OF THE PRINCIPAL TO CONTRACT

The principal must have the legal capacity to make the contract both at the date of the contract and at the date of the purported ratification.

If an agent enters into a contract on behalf of a principal who is at the time, incapable of making it, no ratification is possible.

Therefore, infants, mentally incompetent and other incapacitated persons for example, may not be able to ratify acts purported to be done on their behalf, if at the time when the acts were done, they were incapable of doing them, even a prior agreement between the parties would not have this defect.

See **Boston Deep Sea fishing and Ice co v. Farmham** for illustration of this.

### iv. KNOWLEDGE OF THE FACTS

Ratification does not bind the principal unless he acts with the knowledge of all the important facts. There must be full disclosure of all the important and material facts of the agent to the principal (see **Savery v. King**) or it must be sworn that he was ready to ratify the matter no matter the circumstances. (See **Marsh v. Joseph**)

### v. THE LEGAL QUALITY OF THE ACT

Generally, the principal may ratify any act which he could have authorized at the time the act was performed. However, certain acts are not capable of ratification so that any purported ratification could not make the principal liable. This act which the principal



could not have authorized in the first place because it was legal or contrary to public policy does not become effective by ratification.

In **Urhobo v. Chief J.S Tarka**, a Lagos High Court held that if a pre-incorporation contract is purported to be made by the company which does not exist, the contract is a nullity and neither the company when formed nor the promoter whose signature is added can sue or be sued on the contract and the company cannot take any benefit under it.

Also, there can be ratification of a legal nullity or as it was put more recently “Life cannot be given by ratification to prohibited transactions”. So acts which are illegal or void cannot be ratified.

For example, if the directors of a company enter into a contract that is not within the scope of its memorandum of association, the contract cannot be ratified even with the assent of every shareholder, because it is ultra vires and therefore void.

Similarly, acts which amount to crimes cannot generally be ratified. Acts like forgery for example cannot be ratified, as seen in the case of **Brook v. Hook**. In that case, the agent forged his principal’s signature as the marker of a promissory note. Before the note matured the holder discovered the forgery and threatened to persecute the agent. Whereupon the principal refused to ratify the agent’s act. Later the principal refused to pay on the note. The question before the court was whether he was liable.

The majority of the court thought that the attempt at ratification was void because the act sought to be ratified was illegal. See **Union Bank of Australia v. McClintock**

#### vi. **REASONABLE TIME**

Ratification must be within a reasonable time of the agent making the contract.

In **Folashade V. Alhaji Durusholae**, it was held per curiam that a proper case of ratification is subject to the important qualification that ratification must be within a reasonable time after which an act cannot be ratified to the prejudice of a third party.

Where the agent and the third party stipulate time ratification, the principal can validly ratify only if he acted within the period so prescribed. Thus, in **Metropolitan Asylum Board Managers v. Kingham & Sons**, it was held that an act must be ratified within a reasonable time after acceptance by an authorized person, and that such contract cannot be ratified after the date fixed per performance to commence.



#### vii. **PROOF OF RATIFICATION**

Generally speaking, ratification need not be expressed in writing. Any act which clearly shows the intention of the principal is sufficient. But if the contract made by the agent is one form of a deed then the principal's ratification must be by deed.

Furthermore, any conduct on the part of the principal showing clearly that he was approved or adopted what has been done on his behalf may constitute a sufficient act of ratification.

\*Usually the principal must perform or do some positive or unequivocal which indicates ratification. At first it was believed that merely standing by without objecting will not be sufficient, that is silence was not ratification but in **Suncorp Insurance and Finance v. Milano Assicurazioni, Waller J** stated that mere acquiescence or inactivity may be sufficient to establish ratification.

The English view is therefore that in certain circumstances, the inactivity of the principal can constitute implied ratification of an unauthorized act. **Also see Bolton Partners v. Lambert.**

#### **EFFECT OF RATIFICATION**

**Iguh JSC in Vulcan Gases Ltd. V. GF Industries** said "the effect of ratification of the agent's act is to put the partners concerned in the same position as that in which they would have been if the act ratified has been previously authorized".

Ratification renders the contract as binding on the principal and their party as if the agent had been properly authorized beforehand.

**Harman J in Boston Deep Sea Fishing Co v. Farham** said "Ratification as we all know has a retroactive effect". Thus it furnishes the authority lacking at the time of commission of the act.

**Lord Sterndale in Koenigsblatt v. Sweet** said "It related back, it is equivalent to an antecedent authority when there has been ratification the act that is done is put in the same position as it had been antecedently authorized".

The principal that ratification is retroactive may sometime cause some curious situation. For instance, can the third party withdraw from the contract before ratification?



The better view and that supported by case is that notwithstanding that the 3<sup>rd</sup> party has given notice to the agent of his withdrawal from the transaction, the ratification is nevertheless effective. To hold otherwise would be to deprive the doctrine of its retrospective effect. Thus, in the troublesome case of **Bolton Partners v. Lambert**, an offer of purchase was made by the defendant to A; the plaintiff company's managing director and agent who was not authorized to make any contract of sale. The offer was accepted by A on behalf of the plaintiff company. The defendant then withdrew his offer and ten days after his withdrawal, the plaintiff company ratified the acceptance of the offer by A.

It was held that ratification related back to the time of acceptance by A and that therefore the defendant was bound notwithstanding his purported withdrawal.

This is a decision which appears at first sight to be anomalous, harsh and difficult, considering the principle of contract that an offer may be revoked at any time before acceptance by the offeree.

But who was the offeree? It was not the agent personally because, as far as the 3<sup>rd</sup> party knew, the offer was being made to the agent's principal and irrespective of the true state of affairs between the principal and agent, the position must be taken in the way in which it appears to the 3<sup>rd</sup> party.

Hence, so far as the 3<sup>rd</sup> party was concerned there was a binding contract the moment the agent accepted the offer. On the other hand, if the principal had never ratified the agent's acceptance of the offer, there could have been no valid contract.

The third party can escape this problem by expressly or implied making his offer "subject to ratification". In such circumstances, the offer is conditional and there is no binding contract with ratification of the agent's acceptance.

In conclusion, it would appear that notwithstanding the otherwise harsh effect of **Bolton v. Lambert**, the principle of ratification applies within very narrow limits. **Bolton v. Lambert** is therefore still good law and after more than a century of that decision and it was confirmed in 1994 in the case of **Presentaciones Musicales SA v. Secunda**.

## AGENCY BY ESTOPPEL

**Estoppel** is a rule of evidence which precludes a person from denying the truth of certain matters under his or her control and upon the strength of which others have altered their position.



This type of agency arises largely as a result of the conduct of their parties. Thus, where a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such belief, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person in suffering some kind of detriment.

A largely binding agency relationship may arise where in fact; no formal agency agreement is in effect.

A principal may give an appearance of agency relationship, for example, furnishing his or her firm's call cards or other stationery to the agent. In such cases, the existence of an agency may be presumed, and the principal may be bound by the acts of the agent performed on the principal's behalf.

Everything depends upon the way the situation appears to the outside world, on the light of what is usual and reasonable to infer, and upon the reliance which is placed by third parties upon the apparent authority of the person whom they are dealing.

In **Racch v. Standard Co of Nig. Ltd**, X was employed to act as agent for the defendant for the purchase of produce to the knowledge of the defendant's representative. Subsequently, this representative instructed X not to purchase any more for the defendant. X induced the plaintiff to enter into a contract to sell produce to him. The plaintiff had previously dealt with X as agent for the defendant and honestly believed that X still retained the authority of the defendant. It was held that the defendant was liable to the plaintiff for the price of the produce.

## REQUIREMENTS FOR ESTOPPEL

Before an agency by estoppel can rise, the following conditions must be fulfilled.

1. **THERE MUST BE A REPRESENTATION:** This simply means that the principal must make a statement or conduct himself in such a manner as to lead 3<sup>rd</sup> parties reasonably to believe that an agency exists. Such statements or conduct must be clear and unequivocal.

Thus, on **Colonial Bank and Anor v. John Candy and Anor**, the executors of a deceased signed bank transfers on the back of shore certificates to enable these to be registered in their own names. The broker, with whom the certificates were deposited for necessary action, fraudulently made them out to himself and deposited then with a bank as security for a loan to him. The bank took the bonafide and without notice of the fraud. It was held that the conductors of the executors in delivering the certificates to the



broker did not amount to a representation that the broker had insensible authority to deal with the certificates in his own name.

Their conduct it was held further was consistent either with an intention to sell or pledge the shares or to have themselves registered as the owners and therefore were not estopped from setting up their title as against the bank for the bank ought to have inquired into the broker's authority.

## **2. THERE MUST BE A RELIANCE ON THE REPRESENTATION**

The 3<sup>rd</sup> party must know of such conduct or representation and act in reliance on the representation.

The party who raises the issue of estoppel must show not only that representation was made to him but also that he actually on it.

Thus, if he had acted at all or acted but not on the faith of the representation, no agency of estoppel has been created.

In **Farguharsson Brothers & Co. v. King and Co**, a firm of timber merchants gave authority to one of their clerks to make limited sales to their know customers. The clerk under an assumed name, fraudulently sold timber to the respondent who was not one of such known customers, but the respondent knew nothing of the clerk or his real name and bought and paid for the timber in good faith. It was decided the firm had not held out the clerk to the respondent as their agent to sell to the respondent and therefore was not estopped from denying the clerk's authority to sell.

## **3. THERE MUST BE AN ALTERATION OF A PARTY'S POSITION RESULTING FROM THE RELIANCE**

It has been held that the representation in order to operate as an estoppel must be "the proximate cause of the loss".

Even where a representation has been proved to have been made by the principal and acted upon by one third party, the latter must further show that he altered his position thereby and to his detriment.



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Thus, if he has not altered his position at all, or has done so out has not suffered any loss thereby, or has done so but not on the faith of the representation, there is no agency by estoppel.

In **Mac Fisheries Ltd v. Harrison**, it was held that the defendant was not estopped from setting up the true state of affairs because whatever representations were made, they did not reach the plaintiff nor cause him to act to his detriment.

## **AGENCY BY OPERATION OF LAW**

In certain circumstances, although no relationship of “principal and agent” exists, the law regards what has been done by someone as having been done with the authority of some other person and therefore as his agent.

Two instances clearly illustrate such circumstances,

- a. **AGENCY OF NECESSITY**
- b. **AGENCY PRESUMED FROM COHABITATION**

### **1. AGENCY OF NECESSITY**

This often arises when in emergency occasions a person is obligated to act in order to prevent irreparable loss to the property or interest of another. In such a situation although the person who so acts has no authority to so do, yet because of the urgent necessity, such an authority is implied. Agents of necessity are a very limited class and the courts are very reluctant to increase their number.

However, if an agency of necessity is to be conferred the following conditions must be satisfied.

**PRIOR CONTRACTUAL RELATIONSHIP:** This kind of agency is very readily implied in situations where there is in existence, a prior contractual relationship between the parties and the act consisting the agency of necessity is a mere extension of that relationship by the agent who in the unforeseen circumstances that have arisen is compelled to exceed his authority.



Examples of such re-existing contracts are usually seen in cases in cases of common carriers entrusted with another's property who finds it necessary to do something to prevent that property from total loss, a master of a ship for example, has wide powers in relation to the ship or its cargo of either is in danger.

Carriers of goods by land have also sometimes been treated in a fashion similar to shipmasters in respect of goods they carry. Thus in **Great Northern Railway v. Swaffield**, a railway company was held to be an agent of competent to incur expenses in housing it in a stable.

Apart from cases where a prior contractual relationship existed, the doctrine of agency of necessity hardly applies. Thus where someone gratuitously interferes to protect another's property for example, where a stranger, not bound by an existing contract with the owner looked after a stray animal, no liability to reimburse the stranger could be imposed on the owner, for the general principle is that benefits (or burden) cannot be imposed on a person behind his back. See **Binstead v. Buck**.

#### **THERE MUST BE AN ACTUAL OR IMMINENT COMMERCIAL NECESSITY OR GENUINE EMERGENCY TO WARRANT OF THE AGENCY**

This recruitment is often construed strict and so would usually apply in cases where the goods are perishable or consist of say livestock which has been tended, fed or watered.

So the reason for the decision on **Swaffield's** case was therefore the need to look after the horse which otherwise might have perished through lack of food and care. Where therefore goods are not of a perishable nature and are not likely to deteriorate in quantity of properly stored, an agency of necessity will not easily be implied. In this connection, mere inconvenience for example, will not create an agency of necessity.

In **Sachs v. Miklos**, S stored his furniture on m's premises free of charge. Three years later m wanted the space which was occupied by the furniture for other purpose. But he was unable to communicate with s. he sold the furniture. There was certainly no emergency and therefore m was liable in conversion.

Similarly in **Munro v. Wilmot**, the defendant allowed the plaintiff to park her car in his garage. It was left there for some years, after which time the defendant found it too inconvenient to keep it further. He was unable to locate the plaintiff to take her car away. The defendant sold the car. The defendant was held not justified in selling the car,



for no state of emergency, but only of inconvenience had arisen. The defendant was therefore liable for conversion.

### **IT MUST BE IMPOSSIBLE OR IMPRACTICABLE TO COMMUNICATE WITH THE OWNER OF THE GOODS IN ORDER TO GET HIS INSTRUCTION**

In **Springer v. Great Western Railway Co**, the plaintiff, one Mr. Springer consigned tomatoes from Jersey to London, the ship delivered the consignment of tomatoes and owing to a railway strike the tomatoes could not be unloaded until a further two days later. When unloaded they were found to be bad and the railway company decided to sell them locally. No attempt was made to communicate with Mr. Springer. The railway company was held liable in damages to Mr. Springer as they should have communicated with him and asked for his instructions as soon as the ship arrived.

However, modern means of communication where there is widespread use of telephone, fax, telex etc has generally minimized the occasions where anyone can successfully claim to be an agent of necessity in this circumstance.

### **THE AGENT MUST ACT BONAFIDE IN THE INTEREST OF ALL THE PARTIES**

In **Prager Blastspiel Stamp & Heacock Ltd**, the defendants as agent bought skins to be dispatched to the plaintiff a fur merchant in Romania. But owing to the German occupation of Romania, it was impossible to send the skins to him or to communicate with him. Thereupon, the defendant sold the skin which meanwhile had appreciated in value. It was held that as the skins were not likely to deteriorate in value if properly stored, the defendant had not acted bonafide in selling the skin.

### **AGENCY PRESUMED FROM COHABITATION**

Agency presumed from cohabitation is the second case of agency by implication of law.

Where a married woman is cohabiting with her husband and both maintain a household establishment there is a presumption that she has (implied) authority to pledge the husband's credit for necessities suitable to the style which they live. This is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way, certain departments of the household expenditure, and to pledge their husbands credit in respect of matters coming from within departments. The question whether goods are necessities is one



of fact. But in determining this (i.e. whether goods applied are necessities), it seems regard is had to the man's style of living rather than his action means.

Where a man and a woman live together and cohabit although they are not married, agency of cohabitation is created. In other words, the presumption applies equally in the case of a woman living with a man as his mistress. Therefore, a wife or mistress who has been deserted by her husband and who is living apart due to the fault of the husband, is her husband's agent of necessity. In defining necessities, **Willes J** said in **Phillipson v. Hayter**.

“What the law does infer is that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife”

It would appear therefore that it is the ostensible and not the justifiable mode of living that sets the standard and if a husband chooses to live beyond his means, his liability may be correspondingly increased.

However, the liability of the husband is always subject to the proviso that the goods are suitable and reasonable not only in kind but also in quantity.

Necessaries include clothing, for the wife and children, food, medicine, hiring of servants. So if a wife orders things which are not suited to the husband's style of living or if excessive quantity, or extravagant nature, there is no presumption of authority and action cannot be maintained against the husband.

## **REQUIREMENTS FOR SUCH AGENCY**

The presumed agency rests essentially on two major factors:

1. COHABITATION
2. DOMESTIC ESTABLISHMENT

### **a. COHABITATION**

In this connection, the law requires that the husband and wife must be cohabiting in such a manner from which it is reasonable to infer that the wife is acting on behalf of her husband when she orders necessities.



**NB:** Marriage is not a prerequisite. As long as there is cohabitation between a man and woman in circumstances in which the outside world takes them for a man and wife, the woman will be in the same position as a wife.

The only basis for presumption is the fact that the husband and wife are living together, if therefore the wife is separated from her husband, she has no authority to pledge his credits and this of agency cannot be invoked to create liability in the husband. But the appreciation of the presumption will depend on the reason for separation. Where the parties are living apart by reason of wife's misconduct e.g. where she is guilty of desertion, or committed adultery, the does not have his authority.

Secondly, where the parties are separated as a result of court order, the husband is not liable for necessities supplied to her so long as he complies with the order for alimony or maintenance.

Thirdly, where the separation is by mutual consent without any formal judicial decree, the existence of the presumption will depend upon whether there has been an agreement between the parties on the subject of maintenance to pledge his credit unless the agreement then she has presumed authority unless the wife has other adequate means of support, whether coming from her husband or elsewhere.

#### **b. DOMESTIC ESTABLISHMENT**

The fact that the parties cohabit is in itself insufficient. They must in addition be living together as man and wife in circumstances which show that they are a family. This point is very well illustrated in **Debenham v. Mellon**. In that case, husband and wife were managers of a hotel where they lived and cohabited. The wife had an allowance for clothes, but the husband forbade her to pledge his credit for them. The wife bought clothes from the plaintiff in her own name and paid the bills. Then she incurred a debt with the plaintiffs who demanded payment of it from the husband. It was held by the House of Lords that the husband was not liable, one of the reason being that the parties were not cohabiting on a domestic establishment but in a hotel.

#### **Conclusion**

Where all the ingredients exist, the tradesman must still prove to the satisfaction of the court that the goods supplied to the wife are necessities. He is liable to do this, for instance, where the goods contain jewels or articles of luxury, his only action lies against



the wife, unless he can show an express or implied assent by the husband to the contract.

### **FACTORS WHICH DEPRIVE THE WIFE AUTHORITY**

Even where the goods are undoubtedly necessities, the husband is only presumptively liable, and he may rebut the presumption and so escape liability. The presumption is rebutted if he proves any of the following:

- a. That the goods were supplied exclusively on the wife's credit.
- b. That the trader has been expressly warned not to supply goods to the wife on the husband's credit.
- c. That the wife was forbidden to pledge his credit whether or not the supplier knew of this. However, it is important to observe here that if the husband has held his wife out in the past to the plaintiff so to invest her with apparent authority under the doctrine of estoppel, then a mere private prohibition addressed solely to the wife will not relieve him from liability in respect of the future purchases of a similar nature. In such a case, it is his duty to convey an express meaning to the tradesman.
- d. That the goods though necessities are excessive or extravagant having regard to the husband's income.
- e. That the wife was already supplied with sufficient articles of that kind or with sufficient allowance with which to purchase them.

What is the reliance of the wife's dependent means?

**Lord Denning** in **Biberfeld v. Berens** suggested that in compacting the husband's liability for necessities a "means state" must be applied. The reasoning is, that it must follow from the modern equality of the sexes, that one wife, if she can afford it must help in distinguishing the household accounts, and that a wife who is well off is not entitled to spend all her money on luxuries and know all domestic liability on the shoulders of the husband.



## THE SCOPE OF THE AGENTS AUTHORITY

Agency is essentially a matter of authority. It is the most central and important feature of the whole agency relationship. The scope of the agent's authority determines not only the legal relations of the principal and his agent, but about the relations which may emerge between the principal and 3<sup>rd</sup> party, or the agent and 3<sup>rd</sup> party.

It is important to know the scope of the agent's authority for two important reasons:

1. Although, the scope of the agents authority may depend on a large extent on the manner of creation of the agency relationship (e.g agency of necessity) may in fact have, or later acquire additional authority. In other words, regardless of the manner of creation of the agency relations an agents authority can be enlarged by other consideration base on usage, custom and outward appearance
2. It is necessary to ascertain the real extent of the agent authority because the rights and duties as between principal and agent may depend on it, and so also may the legal position both as between the principal and the 3<sup>rd</sup> party and as between the agent and the 3<sup>rd</sup> party. An agent who acts within the scope of his authority carries out his obligation to his principal and succeeds in bringing his principal into legal relationship with the 3<sup>rd</sup> party.

Generally speaking, an agent's authority is conferred by the same method leading to the formation of the contract of the agency. Thus, express confers actual or express authority and agency by estoppel confers apparent authority. The principle however, is that regardless of the type of authority conferred on the agent, it must not be ambiguous, (where for instance express instructions given to an agent are ambiguous, the agent will not be liable) neither must the authority be greater than the powers of the principal to act on his behalf. If the authority is ambiguous and the agent acts in good faith, according to one interpretation, the principal would be bound by the act, even though he expected the authority to be exercised in a different sense. Also, the principal would not be bound by the acts of his agent which are done in excess of the agents authority (**Obaseki v. African Continental Bank & Ors**)

As stated above, an agent who has no authority to contract on behalf of another, or who exceeds the authority which he has, will be liable in damages to the third party with whom he contracts, for a breach of an implied warranty of authority, even if he acted innocently in each case

The rationale is that every person who professes to act on behalf of another impliedly warrants that he has authority to act as he did. If it turns out that he acted without such authority, he will be liable in damages to the third party who is induced to contract with him. Unless the third party knows or ought to have known of his lack of authority.



The elucidation of the notion of the agents' authority is usually made complicated by the fact that there is hardly one unique and integrated notion of authority. In fact, there are several varieties of authority, and as noted earlier, the particular authority involved in any given agency relationship depends on the type of agency being considered.

### 1) EXPRESS AUTHORITY

Express/Actual authority is that which the principal confers on the agent, by agreement. It includes not only the authority expressly stated in the agreement (whether written or oral), but also the authority which is implied in the circumstance of the express agreement.

This type of authority arises directly from the authority expressly or directly given by the principal to the agent under an agreement or contract between them.

So, if the agent's authority is contained in a deed (i.e. power of attorney), the instrument or deed will be strictly construed according to the rules of construction which are usually applicable to all kinds of deeds. But where the agents authority in a document under seal, i.e. it is written or given by parole, the agents authority is to be construed having regards to the purposes of the agency i.e. the surrounding circumstances and the usual course of the business in which the agent is concerned.

**N.B:** Written documents containing the agents authority is of prime importance. The scope of such documents is to be ascertained by applying ordinary rules of construction. Again if theres any ambiguity about the wordings of the agents authority then, as long as the agents act in good faith and in accordance with a reasonable construction of his authority, he will be considered to have acted within his authority, whether or not what he did was what the principal intended he should do. See the cases of **Boden v. French**, **Ireland v. Livingston**.

### 2) IMPLIED AUTHORITY

It is hardly possible for an express agency to spell out the full extent of the authority of the agent. And as was said in **Ghandi v. Pfizer International Products Ltd**, a term which is not expressed in a contract will be implied if it is so necessary that the parties averted to the situation, they must have intended that it should be a term of the contract. This type of authority is therefore derived from the express authority of the agent, and simply



means that the agent has authority to do whatever is necessary for, or ordinarily incidental to the effective execution of his express authority.

Thus, where an agent is appointed to conduct a particular trade or business, he can do all such things that are necessarily incidental to the conduct of such trade or business. For instance, an agent employed to sell certain property has implied authority to describe the property and state to an intending purchaser any facts which may affect its value. See **Mullens v. Miller**

### 3) USUAL AUTHORITY

This goes hand in hand with the agents implied authority. It is the type of authority possessed by agents employed to act for a principal in connection with matters concerning a particular trade or business or to act for the principal in the ordinary course of his business, trade or profession for the purpose of carrying out his authority or anything necessary or incidental thereto. Thus, a commissioned agent employed to make a bet for his principal is impliedly authorized to pay the bet if he lost.

**N.B:** The principal will be liable for the acts of the agent unless he has prohibited or restricted the agent from acting in the way he has done and the third party has notice of the prohibition or restriction. This is in keeping with the well-established principle that “if a person employs another as an agent in a character which involves a particular authority he cannot by secret reservation deprive him of that authority.

### 4) CUSTOMARY AUTHORITY

Where an agent is employed to act for his principal in a certain place, market or business, then the agent is impliedly authorized to act according to the usages and customs of such place, market or business. Such is customary authority which itself is a variety of usual authority but the difference between the two being that whereas the essence of usual authority is an inference from the ordinary course of a particular trade, business or profession, the essence of customary authority is the custom and practice of a particular place, market or business.

However, the principal can only be bound where the custom is known to him, or be so notorious that he cannot be heard to say that he had no knowledge of it. Moreover, the custom must be reasonable and lawful. If, while lawful, it is not reasonable custom, then the principal will not be bound by it unless he expressly consents to be bound by it.



## 5) APPARENT AUTHORITY

An agent's apparent authority or ostensible authority as it is also usually called, is the authority which the principal by his words or conduct has led 3<sup>rd</sup> parties acting as reasonable and prudent persons justifiably to believe is conferred on the agent by the principal. The principle of an apparent authority is in fact, an application of the principle of estoppels; for estoppel means only that a person is not permitted to resist an interference which a reasonable man would draw from his words or conduct. Thus where one person expressly or impliedly represents another to have authority to act on his behalf so that a third party reasonably believes him to possess that authority and deals with him in reliance on the representation the person making the representation will be bound to the same extent as if the actual authority had in fact been conferred. He is estopped from denying the ostensible authority which he has created.

**N.B:** The main difference between implied authority and apparent authority is that implied authority is based upon inferences from matters which are the subject of agreement between the principal and the agent, whereas apparent authority arises from a representation by the principal to a third party independently of any agreement which may or may not exist between the principal and the agent.

## THE RELATIONSHIP BETWEEN PRINCIPAL AND AGENT

### DUTIES OF AN AGENT TOWARDS HIS PRINCIPAL



Generally, there are six (6) duties that an agent owes the principal

1) **DUTY TO PERFORM THE UNDERTAKING:** If an agent is employed to perform a particular function, if he fails to do such, he may be liable for damages. The general/basic rule of a contract of agency is that the agent must perform his obligations under the agency.

A gratuitous agent is usually not being paid thus the general principle is that he is not liable if he fails to perform the function. However, if a gratuitous agent decides to perform and starts the performance, he is under the same undertaking as a paid agent. See **Coggs v. Bernard**

**N.B:** If an agent is employed to perform an illegal act, he cannot be held liable if he fails to perform it, whether or not he was paid

2) **DUTY OF OBEDIENCE:** The agent, in the performance of the undertaking, must act in accordance with the authority which has been given him. This principle is that an agent must comply strictly with the instructions of the principal. He must obey the instructions contained in his express authority (as long as they are lawful).

An agent is meant to obey the express instructions he has been given even if it is to the detriment of the principal. If it is ambiguous, the agent can go ahead and do what is best for the principal. See **Fray v. Voules**.

If there are no express instructions given to the agent, he may go ahead and compromise it in the best interest of the principal. But in this modern time, a prudent agent should try and get in touch with his principal and get clearer instructions.

An agent is under a duty to obey express instructions provided the instructions are lawful. In order to determine whether the agent has complied with the instructions given, one would have to look at the literal meaning of the instructions. The court will have to look at the instructions and interpret them in their ordinary meaning

**N.B:** Where an authority is given by general words, those words are limited by special words describing that which the agent ought to perform. See **Jacob v. Morris**

- The principal will not be bound by the agents act if the instructions has been withdrawn or varied before it was performed and it is purportedly carried out by the agent, and it does not matter that the third party knows the original instructions. See the cases of



## **Michelle v. Charaf and Nigerian Craft Bags Ltd v. Express Clearing and Shipping Nigeria Ltd**

- If the agent is a professional person, such a person would be bound by the rules and ethics of his profession. Such an agent would not be required to perform an act which is contrary to those rules.

3) **DUTY OF CARE AND SKILL:** In addition to performing his duty, an agent is also required to exercise the requisite skill and diligence in the performance of his duties. All agents whether contractual or gratuitous owe this duty to their principals.

However, a distinction is often made between the standard of care to be observed by contractual and gratuitous agents. In the case of contractual agency, the standard of care to be observed by the agent is the skill which an agent in his position would usually possess and exercise.

Thus, as long as he has behaved with normal care and skill, having regard to the nature of his business, and has acted in as reasonable a manner as could be expected from an agent employed in such an undertaking, the agent will not be liable for negligence even if his efforts were not successful.

In this connection, the Privy Council in **Omotayo v. Ojikutu** held these two rules:

- A principal who appoints an agent knowing his skill and experience, is not entitled to expect or require from that agent, a higher measure of skill or knowledge than one of his position and experience could reasonably be expected to possess
- The agent does not guarantee the successful outcome of transactions undertaken by him on behalf of his principal, and provided he acts honestly, no more can be demanded of him than that he should show a measure of skill and diligence which could be expected of one of his position and experience.

Thus, if an agent is employed to sell, it is his duty to obtain the best price reasonably obtainable. It has been held that this duty to obtain the best price obtainable does not cease when the agent had procured an offer which has been conditionally accepted by the principal

**N.B:** A gratuitous agent as seen earlier is under no obligation to act. But if he does act, the degree of care and skill required of him is that which a reasonable man would exercise in respect of his own affairs. Where the agent has expressly or impliedly held himself out to his principal as possessing skill adequate to the performance of a



particular undertaking, he must show such skill and care as would normally be shown by one possessing the skill.

4) **NON-DELEGATION:** The agent may not, as a general rule delegate to another person to another person that which he has undertaken to do. This is usually expressed in the latin maxim “delegatus non potest delegare” (a delegate cannot delegate). The origin of the rule is to be found in the assumption (or in the fact) tht the relayionship between the principal and agent is a confidential one in which the principal imposes trust in the agent of his choice. Hence the obligation of the agent is to act personally, in conformity with the maxim.

However, there are a number of occasions when because of exigencies of business, the above rule is relaxed in order to enable the agent to delegate his powers. This may be so in the following cases (exceptions):

- ❖ Where the duties to be performed are purely ministerial acts, which do not involve any special care and still they can be normally delegated
- ❖ Where the usage or custom of the trade or nature of the business permits delegation
- ❖ Where unforeseen circumstances arise which necessitates the agent delegating
- ❖ Where the principal expressly sanctions or consents to delegation

The employment by the agent of a sub-agent does not normally bring into being any privity of contract between the principal and the sub-agent. In this case, the sub-agent is responsible to the agent alone and cannot be sued directly by the principal.

In the case of **Calico Printers Association v. Barclays Bank**, it was held that where an agent has power to appoint a delegate or a sub-agent, the sub-agent becomes the agent of the agent and not of the principal, unless the principal has given authority to his agent not merely to appoint a delegate or sub-agent but to appoint someone to act as agent for the principal.

Thus, where the principal expressly or impliedly authorizes the delegation or where he ratifies a delegation which has already taken place, privity of contract is established. The sub-agent becomes responsible to the principal for the due discharge of the duties which his employment casts upon him, and a fiduciary relationship arises between them. See also the cases of **Kahler v. Midland Bank** and **De Bushe v. Alt.**



**5) DUTIES ARISING FROM THE FIDUCIARY NATURE OF THE AGENCY – (DUTY OF GOOD FAITH):** Besides those ordinary duties which are implied by law into an agency relationship, there are certain other duties that are owed by the agent to the principal which arise from the fiduciary nature of the relationship between them. Those duties/principles are as follows:

- (i) The agent must not make a ‘secret profit’: any secret profit made undisclosed would be refunded. Such profit may include rebates, bribe or payment of a secret commission. The agent will be liable for the profit received, because the contract between the principal and the agent is one of utmost good faith. See **Palmer Nig. Ltd v. Fonsela**
- (ii) The agent must not accept ‘bribe’: an element of criminality is involved here. The agent may not be entitled to remuneration. The collection of bribe here by the agent is too detrimental to the principal. The third party giving the bribe has acted corruptly and the principal will suffer damage as a result of it.
- (iii) An agent must not put himself in a position where his interest conflict with the interest of the principal. In other words, where the agent is in a position in which his own interest may affect the performance of his duty to the principal, the agent is obliged to make a full disclosure of all the material circumstances, so that the principal with such knowledge can choose whether to consent to the agents acting.
- (iv) An agent must not compete against the principal in the same business as they will definitely be in a position of conflict. The agent being a fiduciary of the principal must act in utmost fidelity, honesty and transparency. See the case of **Igben & Oke v. Etaware**

**6) DUTY TO ACCOUNT:** Money or property entrusted to the agent must be accounted for to the principal. Because of this fact, the agent is prompted or required to keep proper records showing receipts and expenditures in order that a complete accounting may be rendered. Any money collected by an agent for his principal should not be mingled with the funds of the agent.

## **RIGHTS OF THE AGENT AGAINST THE PRINCIPAL**

**1) RIGHT TO INDEMNITY:** the principal is obliged to indemnify the agent against all losses and liabilities and to be reimbursed for all expenses incurred in the lawful execution of his duties. Accordingly, the right of indemnity exists whether the agency is contractual or quasi contractual. Where it is contractual, the right may be express, but even if it is not, it would be implied as regards payments made within the authority of the agent. The



normal limit on this right is that it is lost if the loss was caused by the agents own default or breach of the duty or if he knowingly acted illegally or outside the scope of his authority.

2) **RIGHT OF LIEN:** the general rule is that every agent has a general or particular possessory lien on the goods or chattels of his principal in respect of all lawful claims he may have as such agent against the principal, for remuneration earned, or advances made, or losses and liabilities incurred in the course of the agency or otherwise arising in the course of the agency provided;

- That the possession of the goods or articles was lawfully obtained by him in the course of the agency, and in the same capacity as that in which he claims the lien.
- That there is no agreement inconsistent with the right of the lien; and
- That the goods and chattels were not delivered to him with express directions or for a special purpose inconsistent with the right of lien.

The agent's lien will be lost where;

(a) The agent waives the lien

(b) The agent voluntarily parts with both actual and constructive possession of the goods or chattels. This is so because possession is of the essence of the right of lien.

(c) The agent enters into any agreement or acts in any capacity which is inconsistent with the continuance of the lien.

3) **RIGHT TO REMUNERATION:** the primary right of every agent is to receive a remuneration for the services that he rendered to the principal. The remuneration of an agent is usually in the form of commission and represents his reward in respect of the duties performed by him. The obligation to pay the agents remuneration and the amount to be paid is usually found in a contract express or implied between the principal and the agent

**N.B:** It is important to note that a gratuitous agent is not entitled to remuneration.

Remuneration is determined on the basis of **quantum meruit**. The quantum meruit is only taken by the court when the agent ought to be remunerated. If there is an express agreement, the principle of quantum meruit will not apply.



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In **Bryant v. Flight**, the agent left the amount of payment he is to receive entirely to the principal, it was held that there was an implied term for some remuneration and that the agent could recover on a quantum meruit basis.

In **Badawi v. Elder Dempster Agencies Ltd**, it was held that where an estate agent is employed to sell property, he is entitled to commission at the standard rate charged by the profession if that is known to the principal.

Even where it is expressly or implied agreed by the principal that he will pay the remuneration, another problem which arises is to determine at what stage remuneration is payable. It is immaterial to the payment of remuneration that the principal has derived no benefit from the agent's acts. As long as the agent has performed what he was employed to do, and has not been at fault in failing to benefit his principal, the latter will be bound to pay the agreed commission. See **Fisher v. Drewett**

**N.B:** Can a principal prevent the agent from earning his commission?

This was the central issue raised in **Luxor Ltd v. Cooper**. In that case, L had engaged C, to negotiate the sale of property. 10,000 pounds commission was to be paid to C, 'on completion of the purchase'. Offers were secured for the properties but agreement made with the purchasers was expressed to be "subject to contract". A binding agreement between L and the purchaser was not complete because L decided not to sell. C sued L claiming damages for an implied term that L would not, without just cause, do anything to prevent him earning the commission. It was held that C would not succeed because no sale has been effected and there was no implied term in the contract that L should not act as to prevent C from earning his commission.

## THE PRINCIPAL AND THE THIRD PARTY

Whether the principal or agent can sue or be sued upon the agreement made by an agent depends upon the circumstance of the case.

In general, the right and liabilities of the principal and agent depend upon whether agency was disclosed when the contract was made. Three situations usually arise

### (a) WHERE THE PRINCIPAL IS NAMED

This is the case where the agent contracts as agent and reveals the name of the principal to the third party. In this case, the third party knows the agent is contracting as agent and knows also the person for whom the agent is acting.



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The general rule is that only the principal acquires rights or assume liabilities. The agent having made the contract on behalf of a named principal drops out of the contract.

However, an agent would incur personal liability in the following cases

- (i) If he signs a bill of exchange in his own name, he is liable on the bill
- (ii) Where he executes a deed in his own name, he liable on the deed
- (iii) If though purporting to act as an agent, he is shown to be the real principal
- (iv) Where the particular custom of the trade makes the agent liable.

#### **(b) WHERE THE AGENT ACTS FOR AN UNNAMED PRINCIPAL**

In this case, the agent discloses the existence of the principal to the 3<sup>rd</sup> party but does not disclose the name of his principal. The position here is like the case of the named principal and the presumption is that the principal alone incurs obligations and takes the benefits under the contract.

However, the presumption will be more readily rebutted where it is shown that it was the intention of the parties that the agent should be bound by the contract. In such a case, he and not the principal would be bound by it. In those cases where an agent would incur personal liability when contracting for a named principal, he will also incur liability when contracting for an unnamed principal.

#### **(c) WHERE NEITHER THE EXISTENCE NOR THE NAME OF THE PRINCIPAL IS DISCLOSED**

This is the situation whereby neither the identity of the principal nor the fact that the agent is acting on behalf of someone else is revealed to the third party with whom the agent contracts. In such a case the 3<sup>rd</sup> party believes that he is contracting personally with the agent and only after the contract has been made does the 3<sup>rd</sup> party become aware that there was an agency relationship in existence.

The third party when he discovers the true state of affairs is entitled to enforce the contract against the agent with whom he actually contracted. The rule is that the third party must make his election of the party he wants to sue within a reasonable time of discovering the principal. Once the 3<sup>rd</sup> party elects to hold either principal or the agent liable he cannot afterwards change his mind and sue the other. This is because the liability of the principal is not a joint liability with that of the agent but an alternative liability.



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On the other hand, the undisclosed principal can seek to enforce the contract against the 3<sup>rd</sup> party, by so doing however; he also renders himself personally liable to the 3<sup>rd</sup> party.

An undisclosed principal cannot however enforce a contract against the 3<sup>rd</sup> party under the following circumstances:

- (i) Where the principal could not have been a party to the contract at the time it was made
- (ii) Where the identity of the principal was so important to the third party that he could not have entered into the contract had he known the principals real identity.

### **TERMINATION OF AGENCY**

Essentially, there are two broad facets of the termination of agency

#### **1) BY ACTS OF THE PARTIES**

#### **2) BY OPERATION OF LAW**

#### **1) BY ACTS OF THE PARTIES THEMSELVES**

##### **(a) Agreement of the Parties**

The most obvious way by which an agency relationship may be terminated is by mutual agreement between the principal and the agent. Since the relationship of principal and agent is usually created by agreement between the parties, it follows that relationship can also be determined by mutual agreement (bilateral).

However, where an agency has been created to accomplish a certain purpose or for the duration of a definite period, then the agency automatically ends with the completion of the specific purposes, or when the period has elapsed

##### **(b) Revocation or Renunciation**



The agency relationship can be determined by the unilateral revocation of the authority by the principal. In this case, express notice must be given to the third party with whom the agent has been dealing, otherwise the agent will be assumed to have continuing authority to contract for the principal.

Similarly, the agent can unilaterally renounce the authority of the principal and must give notice to the effect. But the notice of revocation or renunciation will not affect any rights or liabilities which may have been created between the principal and third party prior to the notice.

## **2) BY OPERATION OF LAW**

### **(a) Death**

The death of the agent obviously terminates his authority. Except in cases of irrevocable agencies, the death of the principal or the liquidation of the principal puts an end to the agency relationship. This is so even if the agent had knowledge of the death of his principal. The agent cannot sue for remuneration or indemnity

In addition, the agent may be liable to the third party for breach of warranty of authority.

### **(b) Insanity**

Once either the principal or agent is insane, the contract of agency automatically comes to an end except of course in cases of irrevocable agencies. But the rights of third parties are unaffected provided that the third knew nothing of the principal's condition. See **Drew v. Nunn**

### **(c) Bankruptcy**

Bankruptcy of an agent terminated the relationship

### **(d) Subsequent Illegality**

The occurrence of an event that renders the continuance of the agency unlawful may also bring an agency relationship to an end



### (e) Frustration

The destruction of the subject matter of the agency for example, or the occurrence of any other frustrating event may terminate an agency relationship.

## TOPIC 2

### HIRE PURCHASE

In ordinary parlance, “Hire purchase” means agreement entered into to buy some goods and subsequently pay by instalments. The hire purchase system was actually designed to avoid the provision of **Section 9 of the Act 1889** which enables a person who has bought or agreed to possession if then, to pass good title to an innocent purchaser for value. The main rationale was that when property in the goods has passed, even if the sum had not been paid, the new buyer passes a good title.

**DEFINITION:** a contract of hire purchase is one under which an owner of goods lets them out on hire to another person the hirer on condition that the hirer to makes stipulated install mental payment called rent, usually with the provision that the hirer will become the owner when he completes payment of the stated instalments or when after completing payment, he exercises an “option to purchase” by paying a nominal option fee.

The case of **Helby V. Mathews** is an example of hire purchase in this case, the owner of a piano agreed to let it on hire, the badly agreeing to pay monthly instalments. The term of the agreement provided that the bailee might terminate the hiring by delivering up the piano to the owner, the bailee remaining liable for all areas of hire charges. It was also agreed that if the bailee should punctually pay all the monthly instalments, the piano should become his sole property and that until such full payments the piano should continue to be the sole property of the owner. The bailee was given possession of the piano. He paid a few of the installments and then pledged it with a pawn broker as security for an advance.

The House of Lords held that on the true construction of the agreement, the bailee was under no legal obligation to buy but merely had an option ether to return the piano or to become its owner by payment of all the installments. In other words, the bailee has not agreed to buy the goods in the real sense of it.



The basic element on all the true hire purchase agreement is the interaction of bailment of goods and the option open to purchase the goods.

However, the statutory definition as per **Section 20 of the Hire Purchase Act, 1965** is that “a bailment of goods in pursuance of an agreement under which the property in goods will or may pass to the bailee” and hire purchase agreement shall be construed accordingly and where by virtue of 2 or more agreements, none of which by itself constitutes a hire purchase agreement, there is a bailment of goods and either that the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreement shall be treated for the purposes of the Act as a single agreement made at the time when the last of the agreement was made.

From the foregoing, a few points are worth nothing about is hire purchase transaction

- i. Hire purchase is a contract of hire not of sale or of agreement to sell
- ii. There is no obligation on the part of the hirer to complete the instalmental payment or to buy after payment of installment.
- iii. The hirer has not agreed to buy the goods as his in **Section 75(2) of the sale of Goods Act 1893**. Therefore, he is not a buyer in possession.

The essential features of hire purchase may thus be summarized as follows:

1. It is a form of bailment
2. Hirer has an option not an obligation to purchase the goods
3. It is possession that passes to the hirer not ownership which rests with the owner.

Therefore, hirer cannot sell. It is a credit business transaction like:

- |                            |                             |
|----------------------------|-----------------------------|
| (a) Credit Sale agreements | (b) Conditional Credit Sale |
| (c) Loan and Mortgage      | (d) Hire                    |
| (e) Pledge                 |                             |

## **DISTINCTION BETWEEN SALE AND HIRE PURCHASE**

The main difference between a hire purchase and a sale agreement is that under the latter, the buyer is under a legal obligation to buy but in a hire purchase agreement there is no such obligation. The agreement will usually provide either that the property in the goods shall pass to the hirers when he has paid all the installments, or that after he has paid all the installments, he may buy the property by paying a nominal sum liberty to return the thing hired without liability to pay further installments is the great inducement to person who enter hire purchase contracts.



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In **G.B Ollivant V. Alansanya** the owner resumed possession of a motor car after the hirer had defaulted in paying the installments. He sued the hirer not only for the amount of installments outstanding but also the balance of the purchase price. It was held by **Butler LLOYD J**, that in resuming possession of the motor car, the owner has satisfied himself against the hirer.

\*Differences in commercial practice and the existence of separate statutes on the two types of transactions made the differences between sale and hire purchase contracts more apparent. No special formalities or procedures are necessary to effect a sale of goods. A sale or agreement to sell can be spelt out even where the parties express only the bare elements of the contract. In a hire purchase contract on the other, care has to be taken in spelling and the intentions of the parties to the contract.

### **OTHER DEFINITIONS OF HIRE PURCHASE**

1. Hire purchase agreement is a contract of hire paid by installments under which the hirer may become the owner of the goods if he completes payments of the hire purchase price
2. A hire purchase contract is a contract by which goods are delivered to a person who agrees to make provisional payments by way of hire with an option of buying the goods after the stated installments have been paid.

### **DISTINCTIONS BETWEEN HIRE PURCHASE AND SIMILAR LEGAL TRANSACTION**

#### **CREDIT SALE**

Under a credit sale agreement, the seller sells and transfers ownership in the goods to the buyer but agrees to receive installmental payment. The buyer can therefore pass title.

If the buyer defaults payments of installments, the seller's remedy is an auction for the accrued installment not recovery of possession.

#### **CONDITIONAL CREDIT SALE**

Have the buyer agrees to buy the goods and takes possession of them. But ownership is not to pass until the buyer pays all the installments.

Unlike in a hire purchase contract where there is a mere option to purchase; there is an obligation to purchase in conditional credit sale. The seller under a conditional credit sale



may recover possession of the goods of the buyer defaults payments. But if the buyer resells the goods to a 3<sup>rd</sup> party, he transfers good title under **SECTION 15 (2) of the Sale of Goods Act 1893**.

## **HIRE**

Here, there is no option to buy the goods. Money is paid for more use e.g. hire of a taxi or equipment. There is a contract nonetheless. The hirer must why use the goods for the purpose stated and agreed. For as long as this is so, the owner may not review or reposes the goods during the period of time.

## **LOAN AND MORTGAGES**

A potential buyer, under this transaction may obtain goods from the seller and if he has no money to pay, the mortgages the goods back to the seller as security for payments of the price under the mortgages, the seller is entitled to repossess and all sell the goods if the buyer makes default in payment.

Alternatively, the buyer may obtain loan from a 3<sup>rd</sup> party, (e.g. a finance house), purchase the goods outright and mortgage then to the creditor. This type of transaction is human not a very popular form of credit sale because of the requirements of the **Bill of Sales Act**.

## **HIRE PURCHASE UNDER COMMON LAW**

Hire purchase at common law is based on contract principles parties are free to contract and to import any terms to the contracts. No special form is required for common law. Hire purchase other than the hirer's option to buy the goods. Where there is no such option, then no hire purchase agreement.

In **J. Allen & Co V Sanni Adewale**, where the agreement did not give an option to buy, for example, **Kingdom CJ** said it is not hire purchase agreement because parties to common law hire purchase agreement are not equals, terms of the contract are usually heavily weighted in favor of the owner of the goods the only bar being that parties cannot exclude the performance of what they contracted to do

In **Ogwu V. Levantis Motors Ltd**. A procured a new vehicle on hire purchase. What was delivered was, however, an old vehicle the court held that reliance as an exclusion clause cannot avail in this circumstance



Also, at common law, the debtor is not usually regarded as the agent of the owner except in respect of

1. Receiving offers from the hirer
2. Delivering goods to him
3. Receiving notice of revocating of hirers offer.

The common law tends to regard the dealer as agent of the hirer the obligation of the owner under common law hire purchase is merely to supply gives reasonably fit and suitable for purpose even where the hirer relied on the skills of the owner/dealer.

In **Stephen Anoka V. SCOA**, a man obtained through hire purchase a lorry which and a defective engine which he had to replace to make the lorry function effectively. His attempts to hold the dealer liable for defect failed. It was held that the dealer could not have discovered the fault without dismantling the lorry.

In general, there was a considerable hardship under common law hire purchase because:

- (a) Owners usually hire hirers in purchase transaction without explaining to them thoroughly the financial implications of the transaction
- (b) hirers were often time not give possession of copies of the hire purchase agreement which they had signed and which were prepared by the owner in the first instance and which tend to exclude all conditions and warranties.
- (c) Owner reserved the right to renew the goods in the slight breach using force or entering the hirer's premises, not minding it cause of hirer's default
- (d) Higher purchase agreements usually contained a minimum payment of clause under which the hirer was obliged to pay a subtotal sum the owner for depreciation on the termination of the agreement.
- (e) If the owner repossessed and sold the hire purchase goods, he was not accountable to hirer for any excess reached over the amount outstanding.
- (f) The hirer's payments and rates of interest were fixed at very high levels because there was no regulation.
- (g) The right of the owner to seize goods where the hire default is absolute under the common law, we see this in operation in **Adeniyi Atere V. Dada Amao** where it was held that the owners would seize a lorry even though 995 pounds out of 1000 pounds had been paid to him.



**N.B:** The **Hire Purchase Act of 1965** was an Act passed to remedy the injustice which was prevalent at common law in respect of hire purchase transactions. Hence, the Act can at best be described as complementary to the common law position on hire purchase agreement in that it willed out the sharp practices prevalent at common law and more or less confirm the good ones.

#### **NOTE:**

The following features are definite and must be present in a hire purchase agreement for it to be qualified as one.

1. A hire purchase is a bailment of goods (i.e. delivery of possession of goods). Possession must pass to the hirer.
2. There is an option to purchase the goods being conferred on the hirer not an agreement to buy at the time of the contract.
3. Title in the goods therefore remains in the owner; so that if the hirer sells the goods before he has exercised his option to purchase he does not pass good title to the purchaser.

This point is illustrated clearly by the case of **Helby v. Matthews**. In this case, the owner of a piano hired it to a bailee. The agreement provided that the bailee should pay monthly instalments, he could terminate by delivering the piano to the owner, and if he paid all the instalments punctually, he would become the owner of the piano but until such time, the piano would be property of the owner.

Before paying all the instalments, the bailee pledged the piano with a pawn broker as security for an advance. It was held that the owner would recover the piano from the pawnbroker because the bailee had not agreed to buy the piano; he merely had an option either to purchase the piano by paying all the instalments, or to return the piano. Consequently, he could not pass title to the pawnbroker. See also **Olanitan v. C.F.A.O**

**N.B:** It should be clearly noted that in construing the Hire Purchase contracts, the courts have regard to the substance and not to the form of words used by the parties. If the transaction is in substance a sales or an agreement to sell, parties cannot make it a Hire Purchase merely by calling it one.

#### **FORMATION OF CONTRACT OF HIRE PURCHASE**



## FORMALITIES

To be valid and enforceable, the hire purchase contract (like any other contract) must satisfy the essential ingredients for the formation of a valid contract. These include offer and acceptance, consideration, capacity of the parties to the contract, contents, intention to create legal relations etc.

(a) There are no special formalities required in the formation of a Hire Purchase agreement at common law. It may therefore be made under seal, in writing or by the words of the mouth.

\*Although the situation is now different in respect of Hire Purchase transactions that fall within the scope of the Act. **Section 2.**

(b) Can an infant be held liable as a hirer under hire purchase contracts?

The locus classicus can be seen in the case of **Merchantile Union Guarantee Corp. Ltd. v. Ball** where an infant was held not liable under a trading contract (which of course is void of an infant) in which he failed to pay the hire instalment due in the Hire Purchase agreement. But where the goods are necessary, the ordinary principles of contract law apply.

(c) Under common law Hire Purchase agreement, the presumption of “consensus ad idem” is a necessary prerequisite of a valid transaction.

## PARTIES TO A HIRE PURCHASE CONTRACT

Originally, the two parties to a hire purchase agreement are the OWNER and the HIRER. In other words, a hirer in the hire purchase transaction ordinarily thinks he has entered into an agreement with the owner. This is so in every case where a dealer in goods, as the owner of the goods, lets them out on hire purchase terms to a hirer. But this is not always so in all cases.

A hirer purchase may however involve a finance company, who buys the goods from the owner and let it to the hirer on hire purchase. This can occur in cases of more expensive consumer and industrial goods such as motor vehicles and machineries. In this situation, the owner (dealer) then seeks the assistance of a finance company and who somewhat serves as an intermediary between the hirer, and the finance company is generally known as the dealer.

Essentially, a hire purchase agreement is thus tripartite in nature. There are usually three parties to it:



## **FINANCE COMPANY (OWNER) ----- DEALER ----- HIRER**

The function of the dealer is mainly to negotiate the terms and conditions of the transaction with the hirer. The takes the deposit or initial payment from the hirer and secures the completion by him of the credit proposal form and hire purchase agreement. The proposal form agreement is usually addressed to the finance company who may accept or reject the offer.

Assuming that the company approved the transaction, a Hire Purchase contract is signed between the hirer and the finance company. There is therefore strictly speaking, no contractual relationship between the dealer and the hirer. If therefore something goes wrong with the goods therefore entitling the hirer to sue; the hirer would prima facie have no course of action against the dealer. He can only sue the finance company as the owner of the goods. The dealer is not in any respect even considered the hirers agent unless he has express or apparent authority to act on the hirers behalf.

## **OBLIGATIONS OF THE PARTIES UNDER THE HIRE PURCHASE CONTRACT**

As noted earlier, the parties to hire purchase transactions were the owner and the hirer. But modern hire purchase now have 3 parties involved in the transaction of hire contracts .The dealer ,the Hirers and the Finance Company who becomes the owner of the goods ,during the first day of the contract of hire purchase before the option to purchase is exercised by the hirer. It is however clear that irrespective of the parties involved; the whole concept of hire purchase agreement is to enable them to sell and the hirer to eventually buy when he exercises this option. The “Merry-go-round” procedure is adapted to as the provisions of the sales of goods act and the factors. It is no surprise therefore that the whole basis of hire purchase contract has been aptly described as a “legal fiction”

## **OBLIGATIONS OF THE OWNER**

The obligation or duties of the owner under a hire purchase have to be ascertained from the express and implied term agreement itself and from the provisions of the **Hire Purchase Act 1990** in circumstances where the agreement falls within the Act. However, the terms of the hire purchase agreement at common law usually improve the following obligations on the owner.

**(1) DELIVERY OF THE GOODS:** It is the duty of the owner to deliver the hirer, the goods which he has agreed to let on hire and the hiring commences only when the hirer has



accepted the delivery. The prima facie rule is that the place of delivery is the owners place of the business if he has one, and if not, his residence.

The contract may be repudiated by the hirer where the owner fails to deliver the goods as stipulated by the law. For a breach of the obligation to deliver the goods, remedy lies in action for damages not specific performance unless the goods are of a rare kind. In **National Cash Company v. Stanley**, where the hirer failed to take delivery and the bailor sued for rent and arrears, the court held that the bailor was only entitled to damages for breach of contract.

**(2) TITLE TO THE GOODS:** There is an implied condition of the contract of hire purchase that the owner is capable of conferring a good title both at the time when the hiring commences (i.e. delivery of goods to the hirer) and at the time when the hirer ceases to exercise his option to purchase.

Breach of this condition may give rise to total failure of consideration. It is therefore the duty of the owner of the goods to ensure that he had a good title to the goods let on hire. If therefore at any time the owners title to the goods is defective, hirer is prima facie entitled to repudiate the transaction and recover from the owner all sums paid as money paid on consideration which has totally failed.

**(3) DESCRIPTION OF GOODS:** The owner is under a duty to supply goods of the description which he has agreed to let on hire. Where there is letting by description, the goods turnout to the hirer must exactly correspond with the description which may go beyond the physical state of the goods and extend, for example to the way the goods are packed. If the owner fails to satisfy this condition the hirer may reject the goods for the breach of the implied condition or alternatively he may elect to affirm the contract and sue for damages for breach of warranty.

**(4) FITNESS AND QUALITY OF THE GOODS:** where a hire purchase agreement is entered into upon the strength of an express or implied undertaking given by the owner or his agent as to fitness of the goods for the purpose for which they are hired, the hirer would be entitled to repudiate the agreement or sue for damages upon a breach of that undertaking.

Ordinarily, for the condition to apply, a hirer must have made known to the owner, the purpose for which he wants the goods in circumstances that indicates that he relies on the skill and judgment of the owner.

In **Bentworth Finance Company v. DeBank Transport**, the court confirmed that where the hirer makes known the purpose for which the goods are required so as to show that he relies on the sellers skill and judgment the term is implied the goods shall be fit and



suitable for that purpose as reasonable care and skill can make them. See also **Amusan v. Bentworth Finance**.

Furthermore, where the defect makes the goods unfit for its purpose is hidden at the time of the agreement, the owner may not be guilty of the breach of this duty. This, in **Stephen v. SCOA**, the plaintiff bought a lorry on hire purchase from the defendant. The engine was defective and the plaintiff had to replace it with another engine. He defaulted in payment and the defendant seized and sold the lorry.

The plaintiff brought an action demanding inter alia damages for breach of the implied terms for fitness. The court held that in a hire purchase agreement, the implied condition in the fitness for purpose does not extend to hidden defect in the hire article. The only way in which the owner might have discovered the defect was by dismantling the engine and this was more than could reasonably be expected of him. Therefore there was no breach as to the implied term as to fitness.

**(5) QUIET POSSESSION:** The owner is under a duty not to interfere with peaceful, quiet possession and the enjoyment of the goods by the hirer. Where the owner wrongfully interferes with the hirers' quiet possession and enjoyment, then there is a breach of warranty as to quiet possession. The hirer in this event can only sue for damages.

## THE OBLIGATIONS OF THE HIRER

The terms of the purchase agreement would usually also contain clauses that spell out the obligations towards the owner of the goods. The terms usually contain obligations relating to the following matters:-

**(1) ACCEPTANCE OF DELIVERY:** It is the duty of the hirer to accept the delivery of the goods which he had contracted to hire. The hirer would be liable to the owner for any loss occasioned by his neglect or refusal to take delivery. This owner in these circumstances may maintain an action against the hirer for non-acceptance.

**(2) CARE OF THE GOODS:** The contract usually provides that the hirer should have custody and control and not his expense put them in good order and repairs. A hirer must accordingly take reasonable care of the goods and may be liable for loss or damage due to wrongful use. A hirer is generally required to insure the goods in the name of the owner



or in the joint names of the owner and the hirer, since both of them have an insurable interest in the goods.

However, where the goods perish without the fault or negligence of the hirer, the hire purchase agreement may be said to be frustrated and the parties discharged of this obligations. See the cases of **Bentworth Finance V. Sam Bakari** and **Salami V. Bentworth Finance**.

If the contract is determined and the hirer returns damaged goods to the owner, he will be liable in damages unless he can prove that he took reasonable care. He is not liable for accidental damage or damages which occurred due to no fault of his.

**(3) PAYMENT OF INSTALMENT:** A hire purchase agreement usually contains damages as to the hire purchase price i.e. the total sum of the money payable in the transaction. The instalments are usually of the stated number and the hirer is obliged to pay the installment as they fall due punctually. See **Animashaun V. CFAO**. Defaults may lead to the termination of agreement and repossession of goods. The owner's right to reposes is not affected by the fact that only a very small sum is left unpaid by the hirer as in **Atere v. Amao**.

**(4) RE-DELIVERY:** The hirer is under a common law duty to re-deliver the goods to the owner or his agent upon the termination of the hiring. He is not however obliged to send the goods back to the owner unless there is an express term to that effect.

But he is obliged to deliver the goods to the owner when he comes for them and not to prevent the owner from collecting his goods. A failure to re-deliver the goods on demand would render the hirer strictly liable for any loss or damage to the goods which occur while his failure continues.

### **OBLIGATIONS UNDER THE HIRE PURCHASE ACT (1962).**

**Section 4 of the Hire Purchase Act** implies additional terms into any hire purchase contract, whether under the Act or at common law. These terms are:-

- (a) Quiet possession by the hirer
- (b) Right to sell the goods at the time when property is to pass - a right of the owner.
- (c) Merchantable quality.

These terms are now conditions not mere warranties. The last - merchantable quality, will not apply however if the goods are second hand and this is stated in the agreement, if the



defects are such that the owner would not reasonably have been aware of them, if the hirer has examined the goods or a sample of them and the examination ought to have revealed the defects.

- (d) An implied warranty of freedom from encumbrance such as a hirer or storage fee, or tax on the goods.
- (e) An implied warranty of fitness for purpose where the hirer makes known the particular purpose for which the goods are required.

## **GENERAL REQUIREMENTS UNDER THE ACT**

**SECTION 2** provides for:-

1. Notification of the actual prices of the goods – It is very important for the exact price of the goods to be known to the hirer, hence the **Act** requires the owner to state in writing to the prospective hirer the “cash price” of the goods.
2. Apart from cash price requirement, it is also an essential ingredient of a valid hire purchase contract/agreements for the owner to satisfy the following:- There must be a note or memorandum of agreement signed by the hirer and all the other parties to the agreement or their representatives. This note or memorandum must contain the following:-
  - (i) A Statement of the hire purchase price
  - (ii) The amount of each of the instalments
  - (iii) The dates or the mode of determining the dates upon which the instalments are payable.
  - (iv) A statement of the deposit paid
  - (v) A statement of the true rate of interest as prescribed by the minister from time to time and published in the gazette.

## **VOID PROVISIONS (SECTION 3)**

**SECTION 3 OF THE ACT** voids any provision in a Hire Purchase agreement which

- Empower owner or his agent to enter the hirer's premises and remove goods.
- Excludes or restricts hirer's right to terminate the agreement.
- Makes anyone acting on behalf of owner or seller in connection with the hire purchase the agent of the hirer.
- Imposes on the hirer the services of an insurer or repairer or any such person.



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- Subjects the hirer to any liability over and above the liability he would have incurred had he terminated the agreement himself.
- **CONDITIONS AND WARRANTIES (SECTION 4)**
- UNDER **SECTION 5 OF THE ACT**, THE MINISTER IS VESTED WITH CERTAIN POWERS OF REGULATION TO BE PUBLISHED IN THE FEDERAL GAZETTE IN RESPECT OF THE HIRE PURCHASE TRANSACTIONS.
- APPROPRIATION OF PAYMENT UNDER THE HIRE PURCHASE AGREEMENTS (**SECTION 7**)
- DUTIES OF PARTIES TO FURNISH INFORMATION (**SECTION 6 (1) & (2)**)
- RIGHT OF HIRER TO DETERMINE HIRE PURCHASE AGREEMENT (**SECTION 8**)
- RECOVERY OF GOODS (**SECTION 9**)
- POWER OF COURT IN ACTIONS TO RECOVER GOODS (**SECTION 10**)

### **TERMINATION OF HIRE PURCHASE AGREEMENT**

The ordinary rules of termination of simple contracts apply to hire purchase agreement. Again, because it falls squarely under some specialized contract, it can also be terminated under certain peculiar circumstances. The well-known forms of terminating hire purchase agreements are as follows:-

#### **1. PERFORMANCE:**

So long as the parties to the transaction perform their own side of the bargain, and bearing in mind that the essence of this transactions for the hirer to ultimately purchase the good involved, it stands to reason, that the most obvious way of terminating this type of agreement is through performance of the contract. Hence, once the hirer exercises his option to purchase, the contract is brought to an end by performance.

#### **2. BY AGREEMENT:**

Whatever the stage the agreement has reached, it is noted clearly that the transaction can be terminated at any time (whether it is executory or executed) so long as the parties consent to the terms of the termination; i.e. there must be mutual agreement to terminate.

#### **3. BY REPUDIATION**



This may occur where either party breaches certain conditions of the contract, or of course it entitles the innocent party to repudiate and go further to claim damages since the contract is treated because of such breach as having ended.

#### 4. BY NOTICE (S. 8 (1)):

Both under the term of the agreement and under the Hire Purchase Act. It is usual for the agreement to provide for the hirer to terminate the contract before the end of the hire purchase transaction since the essence of hire purchase is to ensure that his freedom to choose whether to purchase or not is not fettered or rendered illusory.

#### 5. BY FRUSTRATION

Where according to the doctrine of frustration the goods are lost or destroyed by any of the frustrating events e.g. fire, theft, act of God etc which is not due to the fault of the parties to the agreement, the hire purchase transaction automatically ceases to have any legal effect, since the contract has become impossible of performance.

In **Bentworth Finance V. Sam Bakari**, a hired vehicle was destroyed in an accident and the destruction was not shown to be due to the default of the hirer. It was held that the contract was frustrated and the hirer discharged from all liability arising after the frustrating event, namely the hire arrears and unpaid balance of the hire purchase. See also **Salami V. Bentworth Finance**.

#### 6. BY JUDGEMENT OF A COURT:

The Courts as well, have wide powers to terminate a hire purchase contract, due to the fault of either the hirer or the owner. Where such a judgment is validly passed, it automatically brings the hire purchase transaction to an end.

#### OPTION TO RETURN GOODS

Hire purchase agreement usually gives the option to buy or to return the goods. If the buyer decides to return, he must pay the outstanding arrears of instalment and perhaps compensation for depreciation where this is enforceable. He is under no obligation to deliver the goods at the owner's business or private address. All he is required to do is to hold them ready for collection at his own address - and this takes effect as soon as the hirer gives notice to the owner of his decision to terminate

#### OPTION TO BUY

The agreement may be terminated by the hirer exercising his option to purchase the goods. Where the hirer exercises this option, he is liable to pay the sum stipulated as the option price.

# 300LEVEL NOTES

## PUL 301

## CRIMINAL LAW I





## **CRIMINAL LAW (PUL 301).**

### **OUTLINE.**

**MEANING OF CRIME AND CRIMINALISATION POLICY:** The definition of Crime and the Policy of Criminalisation underlying the Criminal Code, the Penal Code and Other Penal Systems in Nigeria.

**HISTORY OF NIGERIAN CRIMINAL LAW AND CULTURAL COMPATIBILITY OF NIGERIAN CRIMINAL LAW:** Sources of criminal law in Nigeria and the extent of compatibility of the laws with Nigerian culture.

**CLASSIFICATION OF OFFENCES:** Legal classification of offences into misdemeanours, simple offences and felonies and other descriptive criteria for classification of offences.

**TYPES OF CRIMINAL RESPONSIBILITY:** Personal. Corporate and vicarious.

**THE BASIS OF CRIMINAL RESPONSIBILITY:** Freewill, as per Aristotle and Bradley, and as per classical, neo – classical and utilitarian schools. Determinism, as per the positivist school, Freewill versus Determinism.

**THE CONTENT OF CRIMINAL RESPONSIBILITY:** Section 24 of the criminal code and the defence of mistake.

**PRELIMINARY/INCHOATE OFFENCES:** Attempt and conspiracy

**PARTIES TO OFFENCES:** Principal, accessories and common intention.

**NON – SEXUAL PERSONAL OFFENCES:** False imprisonment, attempted suicide, abortion, assaults, murder, manslaughter.

**SEXUAL PERSONAL OFFENCES:** Rape, indecent assault, defilement, sodomy, abduction.

**NON-PERSONAL SEXUAL AND OTHER ALLIED OFFENCES:** Bestiality, indecent acts, obscenity, offences allied to prostitution/trafficking.

**DEFENCES TO CRIMINAL LIABILITY:** Self-defence, defence of others, self-preservation, provocation, insanity, intoxication, immaturity due to non-age.



## HISTORY AND SOURCES OF NIGERIAN CRIMINAL LAW

Essentially, Nigerian criminal law derives from English common law but the present relationship between those two systems of law has tended to become confused.

For several centuries, the basis of English criminal law has been the common law, supplemented by statutes but mainly found in cases which form the primary source of all Nigerian criminal law is Nigerian legislative enactment.

Cases, whether Nigerian or English may help in the understanding and interpretation of the statute law but nevertheless the proper starting point in any case is the relevant legislative provision.

There are two categories of statutes in Nigeria relating to criminal law.

1. There is a host of Federal and state statutes defining what may be described as “technical offences”. These are intended to regulate, by the threat of penalties, the conduct of people in all walks of life.
2. The second category consists of criminal statutes, namely the two codes; **The Criminal Code**, which applies in the southern states and **The Penal Code** in the Northern states.

## HISTORY OF NIGERIAN CRIMINAL LAW

Prior to the arrival of the British Criminal Law, a large number of systems of criminal law existed in Nigeria.

The advent of the British did not at first alter the prevalent situation so much with the development of centralized government, however, some need began to be felt by the British administration for a clearly worded, concise and unified set of criminal principles to be applied in British courts.

The common law of crime was unsuitable because it was, and still is, relatively complicated and not easily ascertainable.

In 1904, the Lugard Administration in Northern Nigeria introduced by proclamation, a criminal code whose purpose, the preamble stated, was to declare, consolidate and amend the criminal law.

It was extended in 1916 to the whole country after the unification of Nigeria in 1914.

The application of the Northern criminal code was at first strictly limited and thus even after 1916, most criminal cases in Nigeria were still governed not by the code but by native law and custom. The code was seen merely as a special variety of native law and custom.



Therefore, there were about two or more systems of criminal law existing side by side in the same geographical area and it created a dilemma, especially in Northern Nigeria where Moslem Law, as interpreted by the **Maliki School** was firmly entrenched.

These two laws were in contrast in a number of areas but the most frequent cause of friction was the concept of provocation which is recognized by the **criminal code** as capable of reducing murder to manslaughter, but which was not admitted in Maliki Law.

The punishment for manslaughter varied under these two laws.

Maliki law was an integral part of the Northern Moslem's way of life, and there was no particular desire to undermine its authority, nor was it politic to do so in any but a gradual way the process of gradual change was the solution adopted.

There were a number of reasons why the adoption of the **criminal code** without qualification was not acceptable. The most notable being that the **criminal code** was not drafted for a Moslem community and had incurred odium in the North.

Also, the demands of the traditionalists could not be ignored at the time due to the political situation of the country.

In 1933, the legal system was overhauled and **section 4 of the criminal code ordinance** was amended and thus it appeared to do away with unwritten customary criminal law.

In the case of **Gubba v. Gwandu N.A** in 1947 it was the view that the 1933 amendment intended virtually to sweep away criminal native law and custom except with respect to the few offences not covered by the code.

But the various reports of the **1949-52 Native Courts Commission of Inquiry** undertaken by **Commissioner Brooke** clearly show that this view was wrong.

The criminal code did not in every case create new offences but was codified English law for some of which native law and custom had its own offences and penalties.

N.B The instructions, however, laid it down that while a native court may charge a person for offences under native law and custom, the punishment which may be inflicted where the offence is also one under the **Criminal Code** must be in accordance with the punishments laid down in the **Criminal Code**.

N.B By 1957, after the leading case of **Maizabo v. Sokoto N.A** the position was settled that the correct law was that native or customary courts were empowered to apply customary criminal law, even if there was a provision in the **criminal code** on the subject. But they must not pass a sentence in excess of the maximum that could have been imposed if the case had been tried under the **criminal code**.

## CONCLUSION



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The code which eventually emerged to displace the **criminal code** in 1959 was **the penal code law**. It was based on a code which had been working successfully in a Moslem community (**Lade of the Sudan**) and had strong link that English law.

The **Northern Nigeria Penal Code** represents a compromise between the reformers and traditionalists but reference to native law and custom is not entirely excluded.

The Northern legislature did not possess power to create certain offences e.g treason, sedition etc. these were enacted by parliament as an addendum to the **penal code**.

In the rest of Nigeria, traditional criminal law was much less firmly entrenched than in the North and the decision was taken at the 1958 constitutional conference to abolish customary criminal law in Nigeria altogether. Thus the following section was written into the **1959 Bill of Rights**, and became **Section 22 (10) of the 1963 constitution**;

*“No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law”*

In the North, the abolition of customary criminal law is made clear by **section 3(2) of the Penal Code Law** which states that:

*“No person is to be liable to punishment under any native law or custom”*

The dual system of customary and statute criminal law therefore now replaced by a **dual code system**.

Traditional offences are preserved only in so far as they are contained in an enactment.

## **THE RELATIONSHIP BETWEEN THE TWO CODES**

Each code covers offences committed within the territory to which it applies and only within that territory.

Difficulties could arise, however, where an offence comprises several elements, some but not all of which occur outside the territory.



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The criminal and penal codes contain identical provisions in **sections 12(a) and 4** respectively, for dealing with problem.

- If the initial act or omission of such an offence occurs within the territory covered by a code, and other elements occur outside, then the committer is liable as if all the subsequent elements had occurred within the territory.
- But a man has a defence if he did not intend his initial act to have effect within the territory in which it was done.
- If the initial act or omission of the offence occurs outside the territory, but other elements occur within, and the committer then enters the territory, he will be liable as if the initial act had occurred within the territory.

**N.B** These provisions do not apply where the only material event occurring in the particular territory is the death of a person whose death was caused outside the territory at a time when he was outside.

See the examples cited in **Okonkwo & Naish**.

## **MEANING OF CRIME AND CRIMINALISATION POLICY**

The formulation of a satisfactory and unanimously accepted definition of the word “crime” has been and still is one of the most difficult tasks for writers in criminal law.

The difficulty stems largely from the complexity of the concept and the elusive imprecision of the word “crime” to the critical inquirer.

The definition of crime in Nigerian criminal law appears to conform to the pattern of the general observations made on the different efforts at a definition of the word “crime” in the **criminal code** and the **penal code**, the word offence is used instead of the traditional word “crime”. But since the adjective “criminal” is also used in both codes and in the constitution, the words “crime” and “offence” would appear to be interchangeable and the courts use both terms indiscriminately.

### **Blackstone proffered that;**

*“A crime, or misdemeanor, is an act committed or omitted in violation of a public law, either forbidding or commanding it”*

It can be seen from this definition that Blackstone achieved nothing beyond pointing to sign posts towards the identification of conduct as criminal.



**Sir James Pity Stephens** proffered a definition which is extremely challenging. After clearly indicating that there is a difference between the popular and legal meaning of the word “crime”, **Stephens** went on to define crime in its strict legal connotation as

*“An act or omission punished by law”*

**Russell** says a crime is an

*“Act or omission involving breach of a duty to which by the law of England, a sanction is attached by way of punishment in the public interest, and for which the ordinary remedy is by indictment”.*

**Halsbury’s** definition is not materially different, he wrote that

*“a crime is an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment”.*

**Professor Kenny** in his outlines of criminal law also offered his own definition. He said

*“A crime is a wrong whose action is punitive and is in no way remissible by any private person but is remissible by the crown alone, it remissible at all”.*

**Cross and Jones** say that;

*“A crime is a legal wrong the remedy for which is the punishment of the offender at the instance of the state”*

**Prof. Adeyemi** defined a crime as

*“An act/omission which amounts on the part of the doer or ommitter to a disregard of the fundamental values of a society thereby threatening and/or affecting the life, reputation and property of another or other citizens or the safety, security, coercion and other political, economic, and social aspects of the community at any given time to the extent that it justifies society interference through and by means of its appropriate legal machinery”.*

Whatever definition of a crime may be adopted, the fact still remains that a crime;

- IS AN ACT OR OMISSION



- PRESCRIBED BY THE STATE; AND
- HAS A PUNISHMENT FOR ITS OCCURRENCE

## KEY POINTS

- The prosecution for an offence is usually taken up at public expense though occasionally we have private prosecutors. In civil matters the aim is to get monetary compensation or restitution for the injured plaintiff.
- A plaintiff may waive his civil rights and forgo the prosecution of his claim; it is however only the state that can pardon an offender or order a 'nolle prosequi'. The primary aim of the criminal law is the punishment of the offender though occasionally compensation or restitution may be ordered. In some cases what is immoral is also criminal but that is not to say that morality and criminality are co-extensive.
- An act or omission may be a crime as well as a civil wrong. Assaults, libels, malicious damage and fraudulent conversion are examples of crimes that also give rise to civil liability. But treason, traffic offences, drug offences, currency offences and a host of others are pure crimes which are prohibited in interest of the state or the public in general: they do not as such give rise to a civil claim by the citizen.
- Under our **Criminal Code Act (Sect. 2)**, an act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any act, or law, or statutes is called an offence. By this definition of an offence, we are saved from engaging in the controversy of what is a satisfactory definition of a crime.
- Crimes are those breaches of the law resulting in special accusatorial procedure controlled by the state, and liable to sanction over and above compensation and costs.
- There is no special intrinsic characteristic of criminal conduct distinguishing it from non-criminal conduct. We can only say that it is a crime after first having enquired whether it is prohibited by law, it is also attended by the requisite legal procedure.

## PRINCIPLES OF CRIMINALISATION

**Joel Feinberg** has identified ten guiding principles that should provide a guide for making determinations about one type of conduct that should be prohibited by penal legislation. **Feinberg** labeled these principles as "liberty limiting principles".



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A liberty limiting principle is one which states that a given type of consideration is always a morally relevant reason in support of penal legislation even if other reasons may in the circumstances outweigh it.

It is important to note that other liberty limiting principles propounded by other philosophers are distinct and separate from Feinberg's but not rivals as all of them could be true.

These ten (10) principles have been zeroed down to four (4) principles and recognized by Anglo-American philosophy. They include;

- The harm principle
- The offence principle
- Legal paternalism
- Legal moralism

## THE HARM PRINCIPLE

The harm principle owes its origin to the work of **John Stuart Mill**. It is designed to chart the parameters of permissible government interference with liberty/autonomy of citizen.

Thus it aims at restricting the state in its coercive use of power. In this connection, the sole reason for this interference as posited by **Mill** is for 'self-protection' and to prevent 'harm to others'.

## CRITICISMS

**Feinberg** argues that the harm principle cannot be the only relevant principle of criminalization. It is only an element and thus cannot stand on its own.

**Holtug** also disagrees, saying that the harm principle is a necessary but not a sufficient condition for criminalization.

**Mill's** views have been criticized for oversimplification of criminalization in that there are other principles that should justify society's interference.

It has also been criticized for being too broad to delineate the distinction between conducts not deserving penal prohibitions.



Also, it has been described as being too narrow to capture whether interference will inflict harm on the person it is trying to protect.

**Feinberg** connecting on **Mill's** principles noted that not every act causing harm to others can be rightly prohibited but those that cause avoidable and substantial harm.

Thus, the harm principle must be sufficiently precise to clarify the criterion of which act is serious enough to justify state interference.

## THE MEANING OF HARM

Failed attempts to develop a plausible version of the definition of the harm principle has added to the frustration with Mill's famous harm principle.

The dictionary defines 'Harm' as physical, mental, or oral injury or damage. This definition is not helpful as it does not explain that qualifies as harm, merely concentrating on the effect of harm as an injury or damage. 'injury and damage' in the definition also needs to be determined.

**Jerome Hall** is of the view that criminal harm includes physical harm, but more essentially, it refers to harm to intangible interest and injuries to intangible values or abstract values. To **Hall**, criminal harm signifies or is equated to loss of value. This loss of value is dependent on what society thinks to constitute value.

Two important novelties advanced by **Hall's** conception of harm have been identified. The first is the attempt to find a notion of harm capable of fitting all sorts of crimes, and second, as a necessary consequence, the abstraction of harm towards a notion of incorporeal interest and values.

**Albner Eser** noted that whatever amounts to a loss of intangible interest is dependent on whether the society thinks value to be of great importance such that public opinion will impose some normative relationship on that value to protect it from harm.

For example, the society thinks that loss of women's bodily autonomy and reproductive right is threatened by RAPE and ABORTION LAW, the society through the instrument of public opinion influences the government to legislate against rape and other offences threatening its value or interest.

**Eser** believes harm is the violation of a legally protected interest, worthy of protection and recognized in harmony with the spirit value order established by the constitution.



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In that connection, criminal harm becomes the endangering negation and destruction of an individual, group or state interest deemed valuable, harmonious with the constitution and protected by criminal sanction.

To **Kleinig**, harm principle is the legalization of the concept of harm. He argues further that legalization of the concept of harm is designed to rationalize legal interference with the liberty of citizens.

Of course, this is true but **Kleinig** misses the point in that the interference by the state is strictly to protect legally and socially recognized interest.

**N.B** The most extensive and detailed meaning of Harm is given by **Feinburg** and they are divided into 3 senses:

- **DERIVATIVE/EXTENDED SENSE:** In this sense, anything can be harmed. The reference to the harm done to the property is not because of the grief resulting from the harm, but that the harm is done to the interest in the affected object, hence in a transferred sense.  
The derivative sense of harm focuses on damage to the object but not why the object is deserving of legal protection. Thus, legal protection is only relevant when the object possess an interest beneficial to the owner.
- **THWARTING/SETTING BACK/DEFEATING AN INTEREST:** In this sense, a person is said to have an interest in a thing when he has a stake in its well-being. Thus, he has a stake when he stands to gain something depending on the nature or condition of the thing.  
It follows that, if that thing or the condition of that thing is diminished, his interest in it is thwarted or defeated.  
A person, according to **Feinburg** is harmed in the legal sense whether the invasion has in fact set back that interest, depends on whether the interest is in a worse condition than it would have been had the invasion not occurred.
- **NORMATIVE SENSE:** Harm in this sense occurs when one person wrongs another by his inexcusable and unjustifiable conduct which violates others right or defeating others interests.  
**Feinberg** consequently believed that **Mill's** Harm principle overlaps between the 2<sup>nd</sup> and 3<sup>rd</sup> senses: setbacks that are wrongs and wrongs that are setbacks to interest.

## THE NOTION OF HARM TO OTHERS



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A critical part of the harm principle is the notion of harm to others – **Mill's** harm principle does not support criminalization of just any kind of harm but the harm that affects others.

**Nina Persak** has argued that the issue of the identification of “others” in criminal law can perhaps be more easily approached via the identification of ‘victim’ or victims.

It is generally with respect to the person whose right or interest is the object of the protection of criminal law that the meaning of “others” in the harm principle can be properly understood.

### **WHO IS A VICTIM OF A CRIME FOR THE PURPOSE OF UNDERSTANDING THE “OTHERS” IN THE HARM PRINCIPLE?**

**Feinberg's** sense of a victim is similar to **Bedan** who conceived that a person has been victimized whenever any of his or her rights have been violated by another.

### **IS THE SCOPE OF “OTHERS” EXTENDED TO THE STATE?**

Yes it does extend because as criminal law protects individual rights and interests, it also protects that of the state.

**N.B** The state is not an abstract entity because if harm is to be suffered by the state, it will not be limited to the inanimate environment but also the group of people who reside in that environment.

Conducts that rarely cause any clear or substantial harm to any person or group is said to cause harm to the public or society. For example, corruption, smuggling, tax evasion, contempt of court etc. are all harms not affecting anyone individually but they do on a collective scale.

See the example of the massive financial corruption and executive lawlessness and the impact it has on the Nigerian society.

Also, see indiscriminate emissions of harmful gases into the atmosphere destroying the ozone layer and endangering live human elements through global warming.

### **• LEGAL MORALISM**

Legal moralism is concerned with the question whether the criminal law should be used to punish immorality “as such”.

This concept is subsumed under the debate on relationship between law and morality.



Legal moralism posits that immorality is a justified reason for criminal proscription of that conduct.

**Feinberg** thus explained that legal moralism approves that it is morally legitimate to forbid or prohibit conducts that are inherently immoral and do not pose harm to individuals, stare or the actors.

This principle is rejected by liberalists who assert that immorality alone should not criminalize a conduct except it causes harm to others.

Liberalists however also believed and accepted that a large think of criminal law reflects moral values but they reject drawing a general justification from such instances as basis for arguing that the criminal law should punish conducts that are immoral.

**Jeremy Bentham** lent his voice by asserting that a distinction between public morality and private morality by saying that there are useful or advantages acts beneficial to the state that the law ought not to command as well as those that the law ought not to forbid, but which morality forbids. Consequently, he argued that

“Legislation has the same centre with morals, but it has the same circumference”

## THE DEVLIN/HART DEBATE

Modern debate on legal moralism versus liberalism can be traced to the **Delvin/Hart** debate in the second half of the 20<sup>th</sup> century. The debate was set against the background of the **Wolfednen Report** the report of the committee on Homosexual offences and prostitution.

In recommending the decriminalization of homosexual practices between consenting adults in private, the committee identified what it perceived to be the function of the criminal law thus:

*“The function of Criminal Law ... is to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because there are young, weak in body or mind, inexperienced, or in a state of special physical, official of the law to intervene in the private lives of citizens, or to seek to*



*enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined”*

The committee stressed the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. The committee noted that:

*“Unless society deliberately attempts to equate the sphere of crime with sin, there must remain a realm of private morality and immorality which is not the law’s business”*

**Patrick Devlin** disagreed with the view that there is a realm of private morality and immorality that should not be the business of the law.

He argues that there exists what he called “public morality”, conceived as a community of ideas about the way society’s members should behave and govern their lives.

This public morality is not ascertainable by majority public opinion but by the standard of a reasonable man who is different from a rational man.

This reasonable man is not expected to reason anything but to just feel. This feeling of the right-minded person must be supplemented with or by a feeling of reprobation, intolerance, indignation and disgust because these are the forces behind the moral law, in the absence of which the “feeling of society cannot be weighty enough to deprive the individual of his/her freedom of choice.

**Hart** rejected **Devlin’s** thesis by calling for examination of these feelings to subject them to critical reasoning, sympathetic understanding and scrutiny so as to sieve out ignorance, superstition and misunderstanding.

**Feinburg** advocating for **Hart** says that appealing to conventional or popular morality as the rightful basis of criminal responsibility is unfruitful if it is predicated upon widespread prevalent feelings without rational support. Thus, if ‘B is immoral’ is changed to ‘B is criminal’ then it must be by critically objective and correct moral principles.

**Ronald Dworken**, another one who criticized **DEVLIN’S** postulations asserts that Devlin’s thesis is based on an anthropological sense.

Thus, if most men think homosexuality as an abominable vice, it is possible that it is as a result of a compound prejudice. It is worthy to note that **HART, DWORKEN** and **FEINBERG’S** criticisms are insightful because it asserts that in a liberal democracy, ideas about morality and enforcement by criminal law should not be shielded from extensive rational inquiry. Hence, the thrust of their argument is that criminal law doesn’t extend to



matters that cannot be justified after critical and rational interrogation. Sometimes the majority may be genuine and ignorantly wrong.

## **MORALITY AND HARM**

On the concept of suicide, euthanasia etc. and other self-inflicting harm, **HART** asserts that this brand of morality is explained away from the realm of legal moralism but in legal paternalism, being a principle designed to protect individuals from themselves which according to **HART** is a coherent policy.

**HART'S** sudden attempt to direct legal paternalism from legal moralism can be best described as **POLEMICAL PROSTITUTION**

This is because, earlier on **HART** already condemned society's interference into private lives of citizens and that interference can only be justified when the public is faced with harm. A person seeking euthanasia to die peacefully/painlessly being in a vegetative state does not pose threat or defeat any interest of government. He is in fact in his privacy. On what basis then is society interfering with his private morality and choice to end as otherwise excruciating and worthless existence since no harm is suffered by society. If the interference is because of protection from self which results in death in this instance, why doesn't the society apply the same logic to homosexual who by their unnatural acts are ultra-vulnerable to illnesses and infectious diseases arising from the act. Since it is medically proven that sodomy has in fact numerous negative health consequences. This is none other than selective absorption of facts.

**MACCOMMICKS AND NAGEL** disagree with **HART** by asserting that they cannot be diverted or demarcated. **FEINBERG'S** meaning of harm in the normative sense is related to **COMMICKS AND NIGEL'S** stance.

**FEINBERG** asserts that no person has any moral right to protection of interests that are cruel, wicked, sadistic and morbid. We can see that **MR. FEINBERG** is also guilty of oscillation. What if conducts that are qualified with the above adjectives are non-injurious to society? Would that not be interference with private morality? He continues that those cruel interests are not deserving of legal validation.

**FEINBERG'S** theories could also be criticized in that he failed to delineate or decipher which conducts are inexcusable and unjustifiable. His idea of wrongfulness is incomplete because he bases then on implicit and intuitive specification of what a person's right are.



## PRINCIPLE OF OFFENCE TO OTHERS

There are some offences that wrong people but do not fundamentally affect them as to cause harm. These offences that are merely wrongful without causing any harm may be regarded as minor offences that only attract less punishment or even caution. But those that cause substantial harm are those that should be sanctioned in accordance with the severity of the act (**i.e. commensurately**)

**Sections 234, 231, 242 and 247** are examples of minor offences that are properly punished, albeit mildly.

## LEGAL PATERNALISM

This legal principle supports criminal probation of harm to the actor himself. Thus, it aims at protecting the actor from himself even when he doesn't harm himself.

**KLEINIG** believed that some paternalistic laws are coercive active paternalism and others are not passive paternalism.

- Active paternalism in under laws on hearing of seatbelt, helmet, life preserver for ship crews etc
- Passive paternalism includes laws that prohibit swimming at dangerous and ungraded beaches, use of narcotics, suicide, euthanasia, etc **section 299**

## CLASSIFICATION OF OFFENCES

The classification of offences is highly important. Offences can be classified in a number of ways depending on the objective of the classifier. Some classifications may be made merely for the sake of convenience and thus have no legal significance.

Classifications are significant in that different legal consequences can attend different types of offence. Thus the procedure of trial can differ according to whether an offence is triable summarily or on information. Classification of offences is also based on the account of the procedure followed in prosecuting these offences.

Such classifications may include;

- **Mala in se**
- **Mala prohibita**
- **Statutory or common law offences**
- **Offences against person, property or state**



- **Personal offences, fraudulent offences**
- **Violent offences, sexual offences**
- **Indictable/non-indictable offences etc**

However, from the point of view of substantive law, the only classification of importance is contained in **section 3 of the criminal code act**. Offences in the act are divided into three (3). They include;

1. **FELONIES**
2. **MISDEMEANOURS AND**
3. **SIMPLE OFFENCES**

NB: An indictable offence is any offence which upon conviction may be punishable by a term of imprisonment exceeding 2 years, punishable by fine exceeding N 400 and not being an offence created by law to be punished by summary conviction.

**Indictable offences** include capital offences and punishments like life imprisonment etc

A non – indictable offence is one which upon conviction is punishable for less than 2 years, punishable by a fine of less than N400 and also by summary conviction.

### 1. **FELONIES**

A felony is any offence which is declared by law to be a felony, or is punishable, without proof of previous conviction, with death or with imprisonment for three years or more.

It is basically an offence which is punishable with three years imprisonment or more.

A felony is a crime of a more serious nature and includes offence punishable with death, life imprisonment etc.

Summary conviction is a conviction of a person for a violation or a minor misdemeanor as a result of a trial before a magistrate.

At common law, a felony is one occasioning total forfeiture of either land or goods to which capital punishment might be imposed according to the degree of guilt.

At early common law, felony applied to describe more serious offences recognizable in the Royal court, conviction of which entails forfeiture of life, limb, chattel etc



## 2. MISDEMEANORS

Misdemeanors are offences lower than felony and punishable generally with fines, forfeiture or imprisonment. They are offences punishable upon conviction for a term which exceeds 6 months but below 3 years.

It should be noted that at times a misdemeanor (e.g a seditious pamphlet advocating the overthrow of the government) may be far more serious in its effects than a felony (e.g the stealing of six kobo) which just exposes the roughness of this classification. The fact that the court may feel that a felony merits little or no punishment does not alter the fact that it is a felony; and the consequences which attend on a felony, but not a misdemeanor or simple offence, must apply.

3. **SIMPLE OFFENCES:** Simple offences are lower than misdemeanors and felony. They are punishable by mere caution, discharge, fine, forfeiture, or very rarely with imprisonment not more than 6 months.

### THE LEGAL SIGNIFICANCE OF THE CLASSIFICATION.

The consequences attendant on that classification are both procedural and substantive. Some of the rationale for the classification are as follows;

1. The classification is based on the gravity of punishment prescribed by law for an offence which is determined by a court that has jurisdiction. The power of a private person to arrest a suspect for misdemeanor is restricted, unlike the power to arrest a suspected felon. In as much as private citizens can arrest a felon without a warrant, they can only arrest a person who committed a misdemeanor if the act is committed at night.
2. It is easier to obtain bail for a simple offence or misdemeanor than a felony.
3. There is the rule of English law in **Smith v. Selwyn** (now obsolete in England since 1967), that if a plaintiff brings a civil action which is founded on a felony (e.g a young girl sues a man for damages in a civil action of trespass to the person, claiming that he raped her), and if she has not taken reasonable steps to have the felony prosecuted, then the court will stay the proceedings until the felony has been prosecuted. This rule only applies to felonies and the basis of it is that where an



offence is serious, an offender should first be brought to justice by public law before an individual can proceed with a civil claim.

4. It is only in respect of felonies that there are such offences as compounding, and neglect to prevent the commission of an offence. - The punishment for attempts or conspiracies to commit offences, and for being an accessory either the fact will vary according to whether the substantive offence contemplated or committed was a felony, misdemeanor or simple offence.
5. There are a number of defences available to charges of assault or more serious types where the assault was committed by public officers or private citizens in preventing the escape of felons.

#### **BASIS OF CRIMINAL RESPONSIBILITY.**

Criminal

responsibility is defined in **section 1 of the criminal code** as “liability to punishment as for an offence”. In other words, it simply means culpability. Culpability in the sense that you have done an act contrary to law and thus you should be punished for it. The basis for criminal responsibility are basically the indices, yardstick or barometer upon which an average criminal offender should be punishable for his criminal conduct.

Over the years, there has been injustice in the sense that the basis of criminal responsibility was misjudged. People were punished for no justifiable reason. The harsh punishments were given to the small crimes and vice versa.

There have been contributions from various schools in the search for a philosophical basis for criminal responsibility. They include:

#### **1. THE CLASSICAL SCHOOL.**

#### **2. THE NEOCLASSICAL SCHOOL.**

#### **THE POSITIVIST SCHOOL.**

**3.**

1. **The Classical School.** They were the first and its writers based their discussions on the writings of the classical era, that is **Aristotle, Plato, Cicero** etc. rather than the religious texts of **St. Augustine** and **Aquinas** which gave the power to punish wrongdoers to an absolute monarch ruling under divine rights. They believed that every human being is rational and offences were committed out of free will and as such people should be punished for wrongdoings.



**Cesare Bonesaria Beccaria** was one of the prominent classical writers like the social contract theorists, he considered that people have agreed to sacrifice a portion of their freedom of action so that they might enjoy the rest in peace and safety. **Beccaria** was an exponent of certainty of the law, he opposed retroactive legislation and capital punishment. He was also in support of duration of punishment rather than intensity. He abhorred torture of criminals and recommended jury trials. Also importantly, he was an exponent of proportionality of punishment and was against the death penalty.

## 2. The Neo-Classical School.

The neo-classical school comprises of writers like **Jeremy Bentham, J.S Mill, Romely etc.** They were also classicists albeit with some modifications. The only area they tried to criticize was the thesis that all human beings are rational. They said that some people should be exempted from criminal responsibility due to certain circumstances and they highlighted 3 categories; Women Infants and Insane people.

**Bentham** is the father of the utilitarian principle, that is he believed in the law of felicity calculus which is a situation whereby you place an imaginary scale before you and you pain and pleasure on a scale. If pleasure outweighs the pain, people would be encouraged to go into criminal activities and vice versa (Theory of hedonism).

## 3. The Positivist School.

Their central thesis was the theory of determinism. They were against the postulations of the classical and neo-classical schools. The positivists are scientific because they believed in empiricism and thus carried out a lot of research and experiments. They believed that not every criminal offence is because the people desire to, but because of circumstances beyond their control. The scholars in this category include **Cesare, Rombroso, Conte, Thery, Quetellet, Garofaro, and Erico Feri, Rombroso** came up with a theory that some people were born criminals along with 16 other anatomical deformities. The scholars also have a lot of other theories such as the hereditary theory which states that if a twin in a particular place is committing a crime, the other twin is most likely doing the same. There is also the parental deprivation theory, family factor etc.

**N.B:** Today we have the defences of mistake in **sect.35** of the criminal code, alcoholism in **sect.29**, insanity in **sect.28**, bonafide claim of rights in **sect.23** and immaturity due to young age in **sect.30**. All these defences exemplify the significance of the contributions of the scholars of the classical and positivist schools to the basis of criminal responsibility in Nigeria.



The Nigerian criminal law incorporates the principle of “no liability without fault”, that is no one should be held criminally responsible for his act or omission unless he is to a certain extent, at fault. The underlying philosophy of this position is that it is better that ten guilty men should escape than one innocent man should suffer. The leading English case often cited in Nigerian courts is the case of **Woolmington v. DPP** and another example can be seen in the case of **R v. Amadu Adamu**. In that case, the deceased had gone out, armed, to hunt the accused whom he suspected of theft. There was no doubt that the accused, who was a thief had killed him, but was not clear from the evidence how the clash between them had occurred. The killing might well have been in self-defence, therefore the accused’s conviction was quashed by the court of appeal.

The Nigerian courts have also given recognition to the offences where they have pleaded successfully. Some courts absolve the defender absolutely while others substitute with lesser conviction especially in homicide cases.

Criminal law presupposes a blame and harm relationship. Harm is any violation of an interest of a person or collective interest e.g humanity, community, state etc. Blame involves a moral assessment of a person’s conduct although criminal law is not necessarily contagious.

Criminal law entails causation, that is the nexus between conduct and harm. This led learned writers to embark on a voyage of discovery about the basis of criminal responsibility.

## **ELEMENTS OF CRIMINAL RESPONSIBILITY**

The thrust of this topic is depicted in the latin maxim “actus non facit reum nisi men sit rea” which means that a guilty act alone does not make a person liable for an offence unless it is accompanied by a guilty mind.

A person cannot usually be found guilty of a criminal offence unless two elements are present: an **actus reus**, latin for guilty act; and **mens rea**, latin for guilty mind. Both these terms actually refer to more than just moral guilt, and each has a very specific meaning which varies according to the crime, but the important thing to remember is that to be guilty of an offence, an accused must not only have behaved in a particular way, but must also usually have had a particular mental attitude to that behavior.

**N.B** The exception to this rule is a small group of offenders known as crimes of strict liability.

Hence, as established earlier, in the commission of an offence, two elements are always required to be present before a conviction can be granted. They are:

### **1. THE PHYSICAL ELEMENT (ACTUS REUS)**



## 2. THE MENTAL ELEMENT (MENS REA)

This position is predicated on the principle of criminal law that there shall be no liability without fault – **Woolminigton, V. DPP.**

### 1. THE PHYSICAL ELEMENT

The physical element may consist of an act or more carely an omission and sometimes a passive state of affairs. It may not only be limited to the conduct of the accused but it may also include the consequences of the conduct. For example, in the case of Assault, the actus reus is not only limited to the fact that the accused hit the victim with his fist but also the injury inflicted on the person. In the case of murder, the actus reus is not united to the gunshot or machete hit but also in the fact that it results to death.

**N.B** An actus reus can consist of more than just an act; it comprises all the elements of the offence other than the state of mind of the defendant. Depending on the offence, this may include the circumstances in which it was committed, and/or the consequences of what was done. For example, the crime of rape requires unlawful sexual intercourse by a man with a person without their consent. The lack of consent is a surrounding circumstance which exists independently of the accused is act.

According to **Glanville Williams**,

*“actus reus means the whole definition of the crime with an exception of the mental element”.*

Generally speaking, omissions can hardly constitute the actus reus of an offence but in the few instances where it does, the statute has been specific about it.

Omissions are therefore criminalized where it is essential that the people ought to be compelled so that anarchy and cruelty do not reign supreme. These instances may be where the law places a duty on a person to act and he fails, omits, and or refuses to act, resultant of which someone is exposed to harm, injury or even death.

Under **Section 199 of the criminal code**, duties are imposed on police officers to suppress riot. Also in **section 346 – 348**, those in charge of railways, trains or ships are under a duty to ensure the safety of passengers.

Under **Section 243**, the law criminalises negligent omission in respect of these who handle fire or explosives or who are in charge of machinery that requires them to exercise caution against danger.

**Section 344** makes it a general offence for anyone to cause harm by negligent omission in breach of a duty. Most important of all, **Chapter 26 of the criminal code** contains matters



on life preservation as it affects the vulnerable and helpless and duties are imposed on heads of families to take care of the needs of those under then failure of which would attract criminal sanction.

**Section 368** punishes failure to repair highways and bridges while **Section 515** punishes neglect to prevent the commission of a felony.

The **criminal code** also provides that it is an offence generally for anyone to omit, without lawful excuse, to perform any duty which he is bound to perform by the provisions of any legislative enactment – **Section 202**

Hence, the breach of any of these acts or duties would constitute an offence even though it is not expressed through a positive act.

However, where no duties are imposed, there is no crime if the person fails to act even though he has the ability to prevent an injurious act.

**N.B** The **Belgian Penal Code** was amended in **1951**, to incorporate a duty to rescue persons who are exposed to serious danger. This is recommended for Nigeria.

Apart from physical act, we have actus reus being negative by public defence.

A public executions has justification to shoot and kill a condemned prisoner even though the actus reus and mens rea are present.

**N.B** Actus reus must be proved. Hence there can be mens rea without actus reus where it is proved that the actus reus does not exist.

For example, if a wants to steal a property not knowing that it belongs to him. The mens rea is there but no actus reus.

## 2. THE MENTAL ELEMENT

Mens rea is the latin for “guilty mind” are traditionally refers to the state of mind of the person committing the crime. It has been expressed in various epitets – intention, recklessness, negligence, accident, unconsciousness.

It is also called culpable mind. The justification for punishing an offensive act is that it must be predicted on a culpable mind.

**N.B** When discussing mens rea, we often refer to the difference between subjective and objective test. But simply, a subjective test involves looking at what the actual defendant was thinking lor in practice, what the magistrates or jury believe the defendant was thinking; whereas an objective test considers what a reasonable person would have thought in the defendant’s position.



## Intention

In common criminal law parlance, a man is said to intend the happening of an event if he foresaw or desired it. Desire for the consequences is often said to be the hallmark of intention, however vague and subconscious the desire may be.

In **Nyann v. DPP** dealing with intention in cases of murder, one House of Lords held that there is an intention to cause death or grievous bodily harm if the accused deliberately the intentionally did an act knowing that death of grievous bodily harm was a probable consequence of it, even though he did not desire that result.

Most crimes require proof of some kind of intention.

Intention has always been expressed in other terms e.g foresight, purposed intention, basic intention e.t.c for example; in burglary and housebreaking, the specific intent must be the intention to commit a felony.

At common law, there are cases of transferred intent imalice. As it was held in **R.V. Latiner** that if A intends to strike B, aims a blow at him and strokes and wounds C accidentally, then it is said that A is guilty of maliciously wounding C.

However, **Section 24 of the criminal code** exempts a man from responsibility for acts done by accident.

**N.B** The proof of intention has been difficult even from the onset **Brown C.J** in an English medieval case once said that;

“the devil himself knowest not me intention of man”

Also, **Bowen L.J** in **Edgington V. Fitzmaurice** said;

“the state of a man’s mind is as much a fact as the state of his digestion”

**William Shakespeare** also said in **Macbeth** that;

“There is no act to find the mind’s construction on the face”

Hence, it is only when one confesses that he foresaw or intended that one can be sure of what it was, although it can also deceive us. It must also be noted that acts originate from the realm of thoughts.

Intention can be construed or inferred, and the test is subjective, hence intention can be inferred in the case of murder from the severity of the blow.



In the case of **Nungu V. R.** a man who intended to hack his brother down with the sharp end of an axe later turned the wooden axe to hit him but he still died. It was held that he intended to cause grievous bodily harm and as such liable for murder.

**N.B** Motive must be distinguished from intention. Motive is the reason for the accused's conduct and which induces him to do an unlawful act while intention is the mental element of the offence defined by law.

## **RECKLESSNESS**

Recklessness is a condition of mind where a man may foresee what is likely or probably going to happen out does not actually desire it, and may indeed desire it not to happen. Two different types of recklessness exist which are named after the cases in which they were defined: **R.V Cunningham** where the subjective test was upheld and **MPC V. Caldwell** where the objective test was upheld.

## **NEGLIGENCE**

A man may not himself foresee what is going to happen. Nevertheless the law sometimes holds that he ought to have foreseen it and was guilty of negligence.

## **ACCIDENT**

Not even a reasonable man in his position would have foreseen what was going to happen, which was therefore occurred by accident. Normally an accused in this position will escape liability except where liability is strict – **Sect 24 of the C.C**

## **UNCONSCIOUSNESS**

Although, for a psychologist, the line between conscious and unconscious action is exceedingly rough, the criminal law will not attach responsibility to a man who is considered to have acted unconsciously and in a state of what is often called "automatism".

## **CONCURRENCE OF THE PHYSICAL AND MENTAL ELEMENTS**

Actus reus and mens rea must concur and it must be simultaneous to a point of time.

Thus, if a man forms an intention to kill his wife and later changes his mind and eventually accidentally kills her, there is the actus reus of murder but no simultaneous mens rea.



Conversely no subsequent amount of malice can turn and originally justified assault into an offence.

However the notion of simultaneousness of actus reus and mens rea is not to be taken too literally.

In **Thabo Meli V.R.**, the appellants struck a man with intent to kill him. Believing him dead, though in fact the man was only unconscious, they rolled him over a cliff in order to make his death appear accidental. He died from subsequent exposure. The defence argued that the intent to kill did not concur with an act causing death, and that the subsequent act which caused the death was not accompanied by an intent to kill, and that therefore in respect of the latter act they should be guilty not of murder but of the lesser offence of culpable homicide. The prior council rejected the argument on the ground that the transaction could not be divided up in this way.

**N.B** The principle laid down in this case must be treated with some caution.

It was explained by the Rhodesian Federal supreme court in **R.V Criswibo** as applying only to situations where the disposal of the body formed one part of the single transaction to kill the victim and had been planned beforehand. But in the instant case the burying of the body was not part of the same preconceived transaction.

**N.B** It is submitted that the **Thabo Meli** principle should not be applied unless it can be fairly be said that the intention continues notionally up to the moment that the intention is actually effected.

The test should be – if the accused (mistakenly believing that his original intention has already been effected) were apprised of the true facts at the moment at which his original intention were about to be come effective, would he still say, “yes, I desire that to happen”? if not, then it is submitted that it cannot be said that the physical and mental elements concur (though the might be liable for a different offence e.g for manslaughter by negligence).

## **TYPES OF CRIMINAL RESPONSIBILITY**

Criminal responsibility strictu sensu is personal. The law of crime puts culpability on blame worthiness of an act. Thus, it is not all criminal conduct that attracts culpability, blame worthiness is a very essential element.

**N.B** There is an exception in the instance of vicarious liability where B is liable for A's conduct. The issue of mens rea is not applicable even if it is present with the actor of the crime.



## **CORPORATE CRIMINAL RESPONSIBILITY – SECTION 35**

Generally a company is a legal person. It can do virtually all work a natural person can do – it can be sued and can sue, acquire property, capable of succession etc.

However, a corporate person has its limitations. The old position at common law is that a corporation cannot commit an offence that requires mens rea, it cannot stand in the dock to face prosecution and moreso it cannot be imprisoned.

According to **Berkeley** in **R.V Anglo Nigerian Tin Mine Ltd;**

*“There was no one who could be brought before the court, and if necessary, placed in the dock”*

However, with the proliferation of modern companies from 1944, the common law scope of corporate liability was considerably extended by virtue of the decision in **R. V ICR College** and also **Moore V. Brestler**. The decisions in these cases pointed out that the old order in previous cases was considerably extended.

The Nigerian position is that a corporation can be made criminally liable by the express wordings of a particular state. However the criminal code makes no special provision concerning the criminal liability of corporations (as distinct from the individual liability of the members composing the corporation).

For example, the Nigerian position can be seen in **Section 74(5) of the factories act** which makes companies, cooperative society, or other body of persons criminality liable.

Under the **criminal code**, a corporation can be made criminally liable. This is because every offence begins with “any person” and the meaning of person as defined in **section 3 of the interpretation act** includes any company or association or body of persons, corporate or incorporate.

**Part 51 of the criminal procedure act** further provides that persons, corporate persons can be charged with an offence.

## **JUSTIFICATION FOR ASCRIBING CRIMINAL LIABILITY OF COMPANIES**

Supporters of corporate liability argue that there is a need for it to effect the curtailment of careless company procedures, to effect improvement in company regulations and safety procedures, deterrence from future harmful conduct through the stigma attached to adverse publicity and fines.

Deprivation of unjust enrichment and the promulgation of greater control by shareholders and ultimately bear the financial penalties imposed.

There are two ways in which a limited liability company can be held liable for criminal acts.



1. **VICARIOUS LIABILITY; OR**
2. **THROUGH THE DOCTRINE OF IDENTIFICATION**

### **VICARIOUS LIABILITY**

Companies are being held vicariously liable for crimes committed by its employees. This applies in instances of statutory crimes or strict liability where the court has been able to give an extended meaning to words such as sell, supply, use etc.

In **Tesco Stores Ltd. V. Brent London Bureau Council**, the defendant company was charged with supplying a video with an '18' classification certificate to a youth of 14 years in violation of the **video recordings act 1984 section 11(1)**.

The statute provided a defence in **Section 11(1) (6)** to a defendant who neither knew nor had reasonable cause to believe that the purchaser had not attained the designation age. Tesco argued that none of the directive minds of the company had the requisite knowledge, but the divisional court dismissed Tesco's appeal, holding that it was unrealistic to expect those in control of a large company to have knowledge of info of every video purchaser and that of expect that would defeat the objective of the statute.

Consequently, it held that the knowledge of the employees should be properly attributed to the company. This therefore meant that the offence was one of vicarious liability. See also **R.V British Steel Plc.**

**N.B** The doctrine of vicarious liability has been criticized on the ground that it is too wide in attributing wrong doings of all and any employees to the company and it is too narrow in leaving no opportunity to explore the company.

### **THE DOCTRINE OF IDENTIFICATION (ALTER EGO PRINCIPLE/DOCTRINE)**

The court recognizes certain senior individuals as being the company itself and the acts of these individuals when acting in the company's business are treated as the acts of the company.

In **DPP V. Kent Sussex**, a company was held criminally responsible under defense intent to deceive by producing falsified documents of information signed by one of the officers of the company who was known to the court to be the "brain" and therefore liable.

It has been said that certain members of the company can be regarded as its brains and the others as mere hands. The brains therefore can be the directors, company secretaries and other senior members who are in a position of control and exercise sufficient



executive power. This metaphoric delimitation between brains and hands was provided by **Lord Denning** in the corn case popularly called **Bolton v. Grahame**. He said

*“A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and acts in accordance with directives from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will of the company and cannot also be said to control what it does. The state of mind of these managers is the state of mind of the company and it is treated as such by the law”.*

However, in **Tesco Supermarket Ltd V. Mates**, the branch manager of the company was held not to be the brain of the company and as such the company was the personally liable.

**N.B** In **John Henshaw Quarries Ltd V. Harrey** a weight bridge operator was held not to be the brain of the company.

Also, in **Magna Plant Ltd V. Mitchell**, a depot engineer was held not to be the brain of the company. However, in **Merridian Globacom Management Ltd V. Securities Commission**, **Lord Hoffman** adopted their attribution test when he held that two senior management managers employed by the company were brains of the company.

Corporate criminal liability has been extended to manslaughter cases by virtue of **corporate Homicide Act 2007** in England.

Examples of instances in which corporations have been convicted include the cases of sedition – **R.V Zik Press Ltd**, **R.V African Press Ltd** and **R.V Service Press Ltd** where the company was convicted for contempt of court.

Also in the case of **Mardila Karaberise V. IGP** it was stated that the company will be convicted for stealing.

**N.B** Where the court holds that a particular person is not a “brain” in the delinquent, that person although he cannot activate the company’s vicarious liability for his actions, he himself will be held personally liable for his actions.

## **VICARIOUS LIABILITY INDIVIDUAL**

In civil actions, the employer will be vicariously liable for the liability of its servants. This enables the victim of the tort to the tortfeasor’s employer who is more likely to pay should liability be proved.



However, this principle does not apply to criminal wrongs because liability is extended to the perpetrators of the criminal act.

The rule that criminal liability is personal and not vexatious was an age long principle which was obliterated in the case of **Huggens 1730 strange 83** where there was an attempt to hold the head of the prison was valorously liable for the negligent criminal act of the jailer.

**Raymond CJ** stated that:

*“It is a point not to be disputed that in criminal cases, the principal is not answerable for the acts of his deputy as he is in civil matters. They must each answer for their own acts and stand or fall by their own behavior”*

However, some basic exceptions were laid down which includes public nuisance and criminal libel.

**N.B** The rationale for vicarious liability is basically to enable the court to punish the employers so that the law will keep him on his toes and ensure that it carries out regular safety checks. For example, on his fleet of Lorries.

This also applies to license cases where the holders of the license is held vicariously liable for any offence committed with the license.

Apart from license cases which are expressly stated by the law that they attract liability to the license holder, there are also instances of implied vicarious liability in cases of driver/owner of delivery lorries or trucks. The books have also predicated the adoption of vicarious liability option on the need to entrench public policy especially when it has to do with interest informed criminal wrongs.

Sometimes the language of the legislature is clear, it is express but when it is not clear, it is implied. And when it is implied, the courts have constructed it based on the principle of delegation and agency.

On the delegation principle, the mens rea of employee B is imputed to Employer A where there is a delegation of duty.

Thus as **Lord Coleridge C.J** affirmed in the old English case of **Somerset V. Hart** that;

*“It is permissible that a man may put another in his position so as to represent him for the purpose of knowledge”*

On that proposition you can see the case of **Allen V. Whitehead** in that case, the owner of a café was charged with knowingly by permitting prostitutes to meet together and remain in a place where refreshments were sold. The café was run by a manager who knew about the prostitutes; the accused had no knowledge of them. The court held that the café



owner had delegated his statutory duty, and therefore was vicariously liable, so that his manager's actus reus and mens rea could be assigned to him.

However, in **Ogwuagu V. Police**, a newspaper proprietor who has earlier instructed the man he led to publish not to publish a seditious article was acquitted of sedition, when the man who published it in disobedience to the proprietors instructions.

## STRICT LIABILITY

These are instances in which the offences are touched by the legislature in a way that the ingredients are devoid of mens rea elements. This can be distinguished from vicarious liability where the mental guilt of the real perpetrator is required to be proved.

Strict liability otherwise called absolute offences are purely created by the statutes except from public nuisance, outraging public decency, criminal libel, and some parts of contempt of court. Hence, the courts are supposed and required to discover the intention of the parliament through the wordings of the statutes.

Thus in **R. V Efana, Webber J.** held that even though both accused believed in all innocence that the second accused was entitled to take certain cases out of customs they were guilty of offences in respect of taking those cases away because the relevant sections of the customs ordinance were absolutely prohibitive.

Examples of strict liability offences as provided by **Section 35 of the Road Traffic Offences of England** which made it a crime to drive or attempt to drive a motor vehicle on a road or other public places or having consumed alcohol to such an extent that the amount of alcohol which was passed into the blood stream at the time the specimen of breath is taken exceeds the prescribed limit which is at present 35 mg per 100ml of breath.

The breathalyzer legislation has created a strict liability offence the intoximeter be used to test the alcohol level at the roadside. If it is positive, the offender is liable for disqualification for at least one year.

In Nigeria, under the **Custom Act**, there are offences of strict liability. In **Dosunmu V. Comptroller of Customs and Exercise Duties, Hubbard J** pointed out that the customs ordinance (now act) contained three classes of offences i.e offences of 1. Absolute prohibition to which guilty knowledge is irrelevant, 2. Offences in which prosecution must prove mens rea 3. Thirdly, an intermediate class of offences involving mens rea but where the onus of proof is shifted onto the defendant to disprove guilty knowledge.

See the case of **Noble V. Adam Yahaya** where strict liability was applied to for feature under the customs act. The courts construe the intent of the legislators as regards to strict liability offences through the wordings of the statutes. For example; where the words like "permitting" or "allowing are used (i.e. it is couched in this way).



It is an offence to allow or permit a person to do an act. Maybe to drive a vehicle with defective tyres, and this is usually in road traffic offences.

Also, the use of the words cause (i.e. causing something to happen. For example, the offence is committed as a result of the effect of an act. These are called “result crimes” e.g murder.

In the case of **Worthwell Ltd v. Yorkshire Water Authority** it was held that the defendant caused a poisonous matter to enter the stream.

The use of the word “possession” is also relevant there. If the statute provides that it is an offence for a person to be in possession of something, whether firearms, drugs, prohibitive substances etc, it will be construed strictly.

**N.B** This would not extend to instances or situations where the substance is stopped into your apartment without your notice. See **Wamer V. Metropolitan Police Commission**.

It was also held in **Harrison 1996 CLR 200** that strict liability applies to offences under **Section 19 of the firearms act of 1968**, the offence of having a loaded shotgun in a public place. All that is required to be proved is knowledge of the fact of possession and not of the nature and quality of the thing possessed.

Other instances of strict liability application includes sale of goods, and drinks, laws covering the environment and public safety for example; **section 3 of the Dangerous Drugs act 1991** provides that it is a strict liability offence that owners of dogs that are dangerously out of control in public places.

Also, in the case of sedition, the wordings of the statute has been construed to intend a strict liability offence. In the Gold Coast case of **Adjli V.R**, a newspaper editor was found guilty of publishing a seditious article and the appellant who is the chairman of the paper, was also convicted though he neither consented to nor knew about the publication.

The **WACA** rejected his appeal and held him vicariously and strictly liable. The court held that the definition of sedition contains no such qualifying words as knowingly or negligently.

It was implied that it was the policy in this case to make sedition a strict liability offence since it was an offence against the safety of the state.

Strict liability has also been construed by the courts where the policy in the offences affect public welfare. In **Lynchin Iyke V.R**, it was stated that where the subject matter of the statute has to do with the regulation of public welfare of a particular community i.e statute regulating the sale of food, drinks and milk, it has been inferred that the legislature that such activities should be carried out under conditions of strict liability.



However, the Nigerian position is not strictly similar in the medium of mental guilt required. See **section 243(1) of the Criminal Code** which deals with sale of things that are unfit for food or drinks. They are of mental requirements of guilt **section 244 of the criminal code** deals with diseased meat e.g meat infected by tapeworm. The provisions require a mental element.

## CRITICISMS OF STRICT LIABILITY

Strict liability offences have been criticized on the following grounds:

1. It is unjust to punish conduct without fault simply for the protection of society.
2. It cannot be expected that people who have done their best to do more than that
3. Vicarious liability is a specie of strict liability.
4. Vicarious liability may be revoked or criminal instances under corporate criminal liability.

## INCHOATE OFFENCES

The inchoate offences: attempt, conspiracy and incitement are concerned with the preparatory stages of other criminal offences.

A person may be convicted of an inchoate offence even if the main offence was never actually committed: in some circumstances he or she may be guilty of an inchoate offence even if it would for some reason have been impossible to commit the complete offence.

One of the reasons for the existence of inchoate offences is that without them the police would often have to choose between preventing an offence being committed, and prosecuting the offender – it would be ridiculous, for example, if they knew a bank robbery was being planned, and had to stand by and wait until it was finished before the robbers could be punished for any offence.

All the inchoate offences are offences in their own right, but they can only be charged in connection with another offence, so a person would be charged with incitement to rob, on attempted murder, or conspiracy to blackmail, but not with ‘attempt’, ‘conspiracy’ or ‘incitement’ alone.

1. **ATTEMPT**
2. **CONSPIRACY**



## 1. **ATTEMPT**

**Section 4 of the criminal code** provides a definition of attempt thus

*“When a person, intending to commit an offence begins to put his intention into execution by means adapted to its fulfillment and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is said to attempt to commit the offence”.*

It is an offence to attempt to commit any offence. In certain offences, the punishment for an attempt is specified e.g life imprisonment for attempted murder (**c.c.s. 320**) or armed robbery with violence (**c.c.s. 403**).

There is one offence – (attempted suicide) – Where it is only the attempt which is criminal, a successful suicide is not an offence one who aids, counsels, or provides the attempt of a offence may himself be guilty of the offence of attempt. Since conspiracy is an offence there may be a conviction for attempted conspiracy.

### **MENS REA/THE INTENT**

The essence of the offence of attempt is intention. The acts of the accused person which may amount to the actus reus of an offence derive their significance from the accused's intention.

The acts, in themselves may appear to be innocent but when added to the accused is intention they constitute a crime. For example, if the lights a cigarette lighter beside a curtain in a restaurant this may or may not constitute attempted arson, depending on whether he does so intending to set fire to the curtains.

It is therefore important that the prosecution must establishment the accused person intended to commit the offence which he is alleged to have attempted.

In **R.V Seidu**, the accused person could not be guilty of attempting to commit rape because he did not intend sexual penetration. Also, in **R.V Offiong** the accused entered a woman's room uninvited, took off his clothes, expressed a desire for sexual intercourse upon the woman and actually caught hold of her. The court held that “these acts fell short of an attempt to commit rape – they are merely acts which indicate that the accused wanted to have and had made preparation to have connection with the complainant”.

There was no evidence that offiong intended to force the sexual intercourse upon the woman without her consent, and therefore this could not be attempted rape since intent to do it without the woman's consent is of the essence in rape as defined in **Section 357 of the criminal code**.



Since **Section 4** requires proof of intent “to commit an offence”, and not merely intent to do an act which constitutes an offence, it is arguable that the rule that ignorance of the law is no excuse is excluded by necessary implication, and that the accused must know that what he is intending to do is an offence.

Since an accused must intend to commit an offence, he cannot be guilty of attempting to commit a crime which can be committed only recklessly or negligently.

Although murder can be committed merely by recklessness, it is not possible to be guilty of attempted murder by a reckless act – there must be an intention to kill.

In **R.V Whybrow**, the court of appeal held that although on a charge of murder, proof of an intention to cause grievous bodily harm would suffice to establish mens rea, on a charge of attempted murder “the intent” becomes the principal ingredient of the crime. According, it had to be proved that the accused intended to kill.

## **ACTUS REUS**

The three elements required to constitute the actus reus of attempt under **section 4 of the criminal code** are as follows:

- i. That the accused had begun to put his intention into execution by means adapted to its fulfillment;
- ii. That he has not fulfilled his intention to such an extent as to commit the offence; and
- iii. That his intention be under manifest by some overt act.

With regard to (ii) above, once the accused person has fulfilled his intention to such an extent as to commit the offence the attempt merges in the successful crime. The proper charge would be to charge the accused for committing the substantive offence.

Under (iii) above it is not required that the accused has done all that is necessary on his part for the completion of the substantive offence.

The application of (i) and (iii) above is a bit complex. The real problem here is to determine at what stage one can say that the accused person has attempted to commit the offence we shall now examine the approaches which have been adopted in England and in Nigeria at solving this problem; (continue)

## **INVOLUNTARY MANSLAUGHTER**



Involuntary manslaughter occurs where a person causes death under such circumstances that he did not intend to kill and did not foresee death as a probable consequence of his conduct but there is some blameworthiness, such as gross negligence, in his conduct. It may also occur where death is the result of an unlawful act which involves the risk of harm to another. Being an unintentional killing it follows that there can be no attempt or conspiracy to commit involuntary manslaughter.

### **(a) NEGLIGENCE**

When a person does an act or makes an omission and death results from negligence on his part, the question whether he is guilty of manslaughter depends on the degree of negligence. The criminal code is silent as to the requisite degree of negligence but Nigerian courts have held that the degree is the same as in English law.

The negligence must be above the ordinary tortious, negligence. Accordingly, simple lack of care or more inadvertence such as would create civil liability is not sufficient. There must be gross negligence or recklessness.

### **(b) MEDICAL NEGLIGENCE**

This concerns members of the medical profession. **Section 3030 of the code** imposes a duty upon any person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, to have reasonable skill and to use reasonable care in doing so.

A doctor who negligently causes a patient's death is not guilty of manslaughter unless his negligence or incompetence is so great as to show a disregard for life and safety and to amount to a crime against the state. See the case of **R V. Akerele**

### **(c) MOTOR VEHICLES**

Another important line of cases concerns drivers of motor vehicles. In **R V. Kojo**, the driver of a car which had defective steering and useless brakes was held guilty of manslaughter when without any apparent reason his car mounted a pavement and killed a child because his conduct in driving the car in the condition in which it was shod a reckless disregard for the life and safety of others.

Where a taxi driver entered a main road with an excellent view in both directions and collided with a lorry properly driven on the road at a time when he had been signaled to stop and had conviction of a woman for conspiracy with others to procure an abortion on herself, even though she was not in fact pregnant



Some specific cases of conspiracy under **cc** are;

- (i) Conspiracy to commit treason – **section 37 (2)**
- (ii) Conspiracy to bring false accusation – **section 125**
- (iii) Conspiracy to pervert the cause of justice – **section 126 (1)**
- (iv) Conspiracy to defile a woman or girl – **section 227**
- (v) Conspiracy to murder – **section 324**
- (vi) Conspiracy to defraud – **section 422**

## **PARTIES TO AN OFFENCE**

A number of people may be involved in the commission of an offence, but the degree of their involvement may vary a good deal, and the law has to decide what degree will suffice for criminal responsibility.

The commission of the offence may be instigated by A, assisted by B, the actual commission effected by C and D may take steps to enable all the parties to the offence to escape detection and prosecution.

In Nigerian, under the **criminal code**, A, B, and C, are referred to as principal offenders while D is referred to as necessary after the fact. So in essence, there are two distinct classes of parties;

- Principal offender; and
- Necessaries after the fact

This is in contrast with English law where a distinction is drawn between principal in the first degree and principal in the second degree. Principal in the first degree is the person who actually commits the offence while principal in the second degree is the person who aids, abets counsel or procures the commission of offence.

The provision of **section 7 of the criminal code** sets out the mode of participation in a crime that constitutes the basis of liability as a principal offender

It provides that when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it

- (a) Every person who actually does the act or makes the omission which constitutes the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling another person to commit the offence;
- (c) Every person who aids another person in committing the offence; or



(d) Any person who advises, counsels or procures any other person to commit the offence

Any participation in the commission of an offence within the provisions of paragraph (a), (b), (c), (d) make the party a principal offender and such party may be charged with actually committing the offence

## LIABILITY AS A PRINCIPAL OFFENDER UNDER

### SECTION 7 (A)

**Section 7 (a)** provides that

“Every person who actually does the act or makes the omission which constitutes the offence”

Little discussion of this category is necessary. The man who sticks the knife in is the man who does the murder. And if, as in **Julius Caesar**, a number of people stick a knife in and it is possible to say that each blow caused death, then all are said to have done the act constituting the offence.

There is no reference in **section 7** to the mental element required to render the party liable as principal offender. In **R V. Solomon**, the Queensland court of criminal appeal held that **section 7** should be read in conjunction with **section 24** and **section 7** is not intended to create responsibility for unwilled acts arising out of a plan or concert.

The implication of this holding is that before a person is liable under **section 7 (a)** he must have done the act or make the omission with the requisite mental element required by law for the offence.

In fact stopped for a moment, he was convicted of manslaughter of a passenger who died in the collision because his conduct showed gross negligence and a complete disregard for the lives and safety of his passengers.

### (d) UNLAWFUL ACTS RESULTING IN ACCIDENTAL DEATH

## 3. OTHER OFFENCES

### a) AIDING SUICIDE – Section 326



Any person who procures or aids another to kill himself or counsels him to kill himself and thereby induces him to do so is guilty of a felony punishable with life imprisonment. An attempt to commit suicide is a misdemeanor punishable with imprisonment for one year – **section 327**

**b) INFANTICIDE**

The felony of infanticide is committed where a woman willfully kills her child who is under twelve months old, and at the time of the killing, her balance of mind was disturbed because she had not fully recovered from the effect of child birth or because of the effect of lactation following the birth of the child. For this offence the woman is dealt with as if she has committed manslaughter.

In **R. V Chima**, a woman gave birth to twins and within an hour afterwards she killed them because of a custom prevalent in her town that it was an abomination to give birth to twins. She was convicted of murder but on appeal it was held that the conviction, if any should have been for infanticide and not murder.

**c) KILLING AN UNBORN CHILD – Section 328**

**Section 328** provides that any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child has been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony, and is liable to imprisonment for life.

This provision must be read subject to **section 297 of the code**, under which it may be lawful in certain circumstances to destroy an unborn child for the preservation of its mother's life

**d) ATTEMPTS TO PROCURE ABORTION – Section 228, 229, 230**

**Section 228** any person who, with intent to procure miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever is guilty of a felony, and is liable to imprisonment for 14 years. See also **s. 299 and 230**

**e) CONCEALMENT OF BIRTH**

Any person who, when a woman is delivered of a child, endeavours, by any secret disposition of the dead body of the child to conceal the birth, is guilty of a misdemeanor and is liable to imprisonment for two years.

**f) ATTEMPT TO COMMIT MURDER – S. 320**

Any person who attempts unlawfully to kill another, or with intent unlawfully to kill another does any act, or omits to do any act which it is his duty to do, such act or omission



being of such a nature as to be likely to endanger human life is guilty of a felony and is liable to imprisonment for life.

## ASSAULT

Strictly speaking, an assault is an attempt or a threat to apply unlawful force on another person in such a way that he believes that such force is about to be applied on him.

At common law, the **actus reus** of assault consists in the expectation created in the mind of the victim that unlawful force is able to be applied on him. The **mens rea** consists in intentionally causing such expectation in the victims mind. It is no defence that the offender did not in fact intend to apply such force and could not, in fact, have applied it. If force is actually applied, the offence is a battery.

The distinct between an assault and a battery is that the former does not involve the application of actual force whereas the latter does. Thus, the common law maintains this distinction between the two offences of assault and battery.

**Section 252 of the criminal code** provides for the offence of assault in the sense that it uses the word “assault” to cover the meanings of both assault and battery. It appears from a literal interpretation of that section that where there has been an actual application of force, no proof of intention is required but it is suggested that the section envisages intentional conduct and the courts will so interpret it.

**Section 252** requires that where a person attempts or threatens to apply force on another person he shall have actually or apparently a present ability to effect his purpose. If A points a loaded gun at B, it is an assault because A has actually a present ability to effect his purpose. If unknown to B the gun is not loaded, but A purports it to be loaded, this is also an assault because A has apparently a present liability to effect his purpose **R V. St. George**

**Section 252** does not say anything about the victim’s state of mind. It merely says that a person “who by any bodily act or gesture attempts or threatens to apply force,” etc., has committed an assault. Thus it would seem that a person commits an assault who points a loaded gun at another from behind or attempts to apply unlawful force on a sleeping person.

It is not necessary that the victim’s state of mind should be one of fear or alarm. It is enough if he merely expects the application of unlawful force. In **Brady v. Schatzel**, the accused pointed a loaded gun at the prosecutor and threatened to shoot him. The prosecutor said in evidence; “I was not a bit scared”. It was held, nonetheless, that this was an assault words alone, however provoking, without any bodily gesture intended to cause an apprehension of impact, will not constitute an assault. Furthermore, words



accompanying an act or gesture which would ordinarily be an assault, may explain the conduct so that no assault is committed.

Thus, in **Tuberville v. Savage** it was held that the plaintiff did not commit an assault when he put his hand upon his sword and said to the defendant: “if it were not assize-time, I would not take such language from you” because as the court said, “the declaration of the plaintiff was that he would not assault him, the judges being in town; and the intention as well as the act makes an assault.

## UNLAWFUL ASSAULTS

To constitute an offence, the assault must be unlawful. An assault is unlawful only if A is not authorized or justified or excused by law. For example, an assault committed in the course of executing the sentence, process or warrant of a court is authorized by law provided the act constituting the assault is duly authorized by the court expressly or impliedly.

Also, a person who performs a surgical operation on another person for the latter's benefit incurs no criminal liability provided the performance of the operation is reasonable.

## CONSENT

To be unlawful, the assault must be done without the consent of the person assaulted. The law presumes that persons who go about in public consent to that degree of contact which is an inevitable incident of everyday life.

Accordingly, if A loses his pen and B having found it pats A on the shoulder to give him the pen, no assault is committed, where persons rush to catch a bus and jostle one another in the process, no assault is committed. It is inevitable that persons who play football or other lawful games may come in bodily contact with one another. Such contacts do not constitute assault. But if a player deliberately disregards the rules and assaults another player he commits an offence.

Consent, expressly given usually negates the offence of assault. Consent to an assault is ineffective if the assault is of a nature likely to endanger human life or to amount to a breach of peace. Consent obtained by the use of threats or intimidation is not valid consent nor is consent obtained by fraud because fraud vitiates consent.

## PROVOCATION

In Nigeria, provocation may be a valid defence to a charge of assault. **Section 284 of the code** provides that a person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the



provocation of the power of self control, and act upon it on the sudden and before there is time for his passion to cool, provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous harm. The force used must not be disproportionate to the provocation. Provocation is a complete defence to a charge of assault. But on a charge of murder it merely reduces the offence to manslaughter

## **ASSAULT ENDANGERING LIFE OR HEALTH**

**Chapter 25 of the code** which deals with assaults does not create any offences but in **chapter 29** there are various offences of assault the least of which is a misdemeanors – see **section 351**

**Section 352, 353, 354, 455, 456** assault with intent to commit an unnatural act.

**Chapter 28** contains several offences which involve danger to life or health. For example an assault with results in grievous harm to another may constitute an offence under **section 335 of the code** which provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for seven years,

## **SEXUAL ASSAULTS**

### **RAPE**

Rape is the gravest and most serious kind of sexual assault and is punishable with imprisonment for life with or without whipping (**section 358**)

The offence of rape has been defined in **section 357 of the criminal code** as follows;

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape”

In summary, rape is any unlawful, non-consensual carnal knowledge of a girl or woman by a man.

### **INGREDIENTS/ELEMENTS OF RAPE**

1. Absence of consent
2. Penetration



## 1. ABSENCE OF CONSENT

On a charge of rape, absence of consent is very important and the prosecution has to prove that the accused had carnal knowledge of a woman or girl without her consent.

It is no excuse that the complainant is a common prostitute, that she had consented to intercourse with the accused on other occasions; or that she is the accused person's concubine. Consent obtained by force or by means of threats or intimidation or fear of harm is no consent. Consent given because of exhaustion after persistent struggle and resistance would appear to be no consent. In eng English case of **DPP V. Morgan**, the House of Lords held that if an accused person believed that the woman was consenting he should not be guilty of rape even though he had reasonable grounds for his belief. In case of **Kaitamaki**, a New Zealand case that was decided by the Privy Council. The accused claimed that as at the time he was initiating penetration he believed the victim was consenting. It was after he had achieved penetration he discovered she was actually not consenting and he didn't stop. He was held liable for rape.

The issue of consent is very important as it is the only thing that differentiates ordinary sexual intercourse from rape.

## 2. PENETRATION

For the offence of rape to be committed, penetration is required. Rape is complete as soon as the male organ touches the outer cover of the female organ without lawful consent. Therefore, any slightest touch of the female labiamajora by the penis is sufficient. Mere sexual gratification such as scratching or rubbing of the opening of the vagina with the penis leading to ejaculation will not constitute rape but indecent assault because there was no penetration.

In **R V. Mayberry**, the court held inter alia that the offence of rape is committed upon penetration whether or not there was ejaculation and that the act of sexual intercourse which accompanies it is part of the offence. Therefore, where a person gives aid after penetration the aider is also liable.

## DEFENCES TO CRIMINAL RESPONSIBILITY



The following defences are open to any person charged with an offence;

- **INTENTION, MOTIVE**
- **MISTAKE**
- **BONAFIDE CLAIM OF RIGHT**
- **INTOXICATION**
- **INSANITY**
- **DEFENCE OF IMMATURITY ( NON-AGE OR , INFANCY)**
- **PROVOCATION**

#### **SECTION 24: INTENTION, MOTIVE**

A person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will or for an event which occurs by accident.

An event occurs by accident if:

It is too remote and indirect a consequence of the accused's unlawful act or omission

A reasonable man in the shoes of the accused, would not have foreseen it as likely or probable. The accused person could not reasonably have foreseen as likely or probably

Illustration through cases:

DTimbu Kohan (1968) H and W quarrelled violently. H became tired of the verbal exchanges, went outside the house and sat down. W followed H outside, berating him. It was dark. He picked up a light stick, aimed a moderate blow in the direction of W's voice. The blow struck the little baby W was carrying in her arms on the head and killed it. Held the event is an accident in that the accused could not reasonably have foreseen it and did not in fact foresee it.

#### **State v Appoli (1970)**

A and B were pushing each other near a river, T warned them that they were playing a dangerous game. B pushed A further. A slipped, fell into the river and drowned.

Rejecting a defence of accident, the court held that a reasonable person would have appreciated the danger of pushing another near a river in the particular circumstance

An act or omission which occurs independently out of the exercise of one's will is an accident and this terms is in two senses



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1. Of consequences due to some external agency over which the accused has no control e.g. a person riding a horse bolting against the will of the rider and without any fault on his part, knocks another person down.
2. Of unintended consequence of a lawful or voluntary act, (e.g. where a man working with an axe and its head flies up and kills a bystander or where in a lawful game, e.g one of the parties in the boxing tournament kills his opponent.

## **MISTAKE**

Mistakes as a defence to crime, are of two kinds:

1. Mistake of law
2. Mistake of facts

### **Mistake of Law**

Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence. Mistake of Law, also called ignorance of law, is an invalid defence.

Except where knowledge of the law is an element of the offence charged. Thus a mistake of Law would be a valid defence in the following cases; action from a bona fide claim of right, action from execution of an erroneous sentence, process or warrant, action from Sentence or Process or warrant without jurisdiction, action from Irregular process or warrant.

To avail a defence in such cases, the accused must act in good faith and in the belief that the sentence, process or warrant was issued with authority.

### **Ogbu v R (1959)**

O was alleged to have given a bribe to D in order to induce him (D) to appoint O a village head and therefore a tax collector.

O and D were both charged. O pleaded a mistake of law, contending that he did not know it was an offence to so bribe D and was acquitted. On appeal by the other accused (D). The Federal supreme Court expressed its opinion that it was not satisfied that the trial court was right in law in acquitting the first accused on those findings.

Ignorance of law is a good defence where knowledge of the law by the offender is expressly declared to be an element of the offence. Example are: receiving stolen



property, not knowing them to be stolen and uttering Counterfeit coins, not knowing them to be counterfeits.

### Mistake of facts

A person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist, **section 25, Criminal Code**

Where there is a reasonable and honest mistake of fact the offence is treated as if the fact had been true.

B reasonably mistakes D's bicycle for his and takes it.

The mistake must be such that any reasonable man would be likely to make the same mistake.

It is a defence when the accused believes in a state of affairs, which if true, would justify the act done. In other words, an actor is not responsible for the consequence, which ultimately follow his/her act which results from a mistake on his/her part.

Where Amuda shoots and kills at an object which he thinks is a dog or a ghost which turns out to be a man, he would not be treated as though he killed a dog or a ghost as the case may be.

Note the limitation of the defence: the operation of this rule may be excluded by the express or implied provisions of the law relating to the subject

### Corporation

A corporation is responsible for its corporate acts or omissions like any adult and it may be charged in its corporation name with any offence other than capital crimes or offences involving violence.

As in servant-master relationship, a corporation may be responsible for the acts of its servants.

### Corporate Mens rea

A Corporation may be guilty of offence involving mens rea.

1. See **DPP v Kent of Sussex contractors Ltd (1994)** 2. **R v I.C.P Haulage Ltd (1944)**

A Corporation cannot be charged with murder, being a capital crime. But there is authority that it can be guilty of manslaughter

In **R v Coroner** for Eash Kent, ex parte Spooner (1989), the court was prepared to accept that a corporate body could be guilty of manslaughter where both the mens rea and actus



reus could be established against those who were the “embodiment of the corporate body itself”

Also in **R v P & O European Ferries (Dover) Ltd, Turner J** held that a company could incur liability for manslaughter, arguing that He state:

“..... if it be accepted that manslaughter in English Law (as in Nigeria law) is the unlawful killing of one human being by another human being (which include both direct and indirect acts) and that a person who is the embodiment of a corporation acting for the purposes of the corporation is during the act or omission which caused the death, the corporation as well as the person may also be guilty of manslaughter

Molan considers this judgment at least a theoretical victory for the prosecution and proponent of corporate liability for manslaughter. To convict a company, there must be evidence of gross criminal negligence, unless the offence is one of strict liability. The person doing that act is a senior manager, Director or other officer of sufficiently high status who is a manifestation or embodiment of the corporation and whose human mind can be identified as that of the corporation. If the offence is of strict liability the evidence required is absence of due diligence. Generally, corporate liability depends on the interpretation of the particular statute creating the crime.

## **BONAFIDE CLAIM OF RIGHT**

A person is not criminally responsible as for offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an of right and without intention to defraud

Example: if a father takes away his illegitimate child from its mother who is reluctant to part with the child, he merely exercises his bona fide claim of right. He has a defence to child stealing. Cc. 23 & 371.

## **INTOXICATION**

If KJ allows himself to be intoxicated of his own free will, he is responsible for his acts and its consequences.

Voluntary Intoxication is never an excuse in a crime. But if it is as to prevent a person from knowing what he was doing or that what he was doing was wrong; offender will be treated in the same way as a man, who is insane or under delusion as the case may be.



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Intoxication includes a state produced by drinking, drugs, narcotics etc. The cases where intoxication is raised as a defence are dealt with in the same way as insane. To avail a defence, therefore, the accused must show that he was so drunk at the time of the criminal act as to be incapable of forming the special intent in the crime.

Intoxication is a defence if:

1. Intoxication is caused by the negligent act of another 2. The person charged was by reasons if intoxication insane temporarily or otherwise at the time of such act or omission.

In **Ahmed v State 1999, Ogundare, JSC** said:

Intoxication per se is not a defence. To be a defence, it must be shown by the accused that the intoxication is not self-induced or that the extent of it rendered him at the time of the act or omission insane temporarily or otherwise, that is that he did not know<sup>2</sup> what he was doing.

In **Imo v State (1991)**, per **Nnaemeka, JSC** observed:

For the defence of intoxication to be available to the accused person, as a defence, he must prove on a preponderance of evidence, that at the time of the act or omission, that is called in question, he was in such a state that he did not know that such an act or omission was wrong or did not know what he was doing. Furthermore, he has to prove either that the state of intoxication was not self induced or was caused without his consent by the malicious or neglected act of another person (s. 29 (2) (a) or that the extent of intoxication was so high that he was insane, temporarily or otherwise at the time of the act or omission (S, 29(2) (b)).

There are two principles of law relating to this defence:

The presumption of law that a person intends the natural consequences of his act.

The presumption of law that every person is sane.

Both presumption are rebuttable

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequence of his act: See **R v Owarey and Egbe Nkanu v Stae (1980)**

The burden of proving intoxication is on the accused person. The standard of proof is preponderance of evidence.

## INSANITY



You have learned that **sections 24 and 25 of the Criminal Code** provide general defences to criminal responsibility. Thus no person can be held liable for acts or omissions which occur independently of the exercise of his will or by accident. Insanity prevents the exercise of one's will and therefore a general defence in criminal law.

Every person is presumed to be sane, until the contrary is proved. A person is exempted from criminal responsibility if it is proved that his insanity is such that:

1. He did not understand what he was doing
2. He did not know that he ought not to do the act or make the omission.
3. He was incapable of controlling his action. In this context insanity means either a state of mental disease or a state of natural mental infirmity

### **DEFENCE OF IMMATURITY ( NON-AGE OR , INFANCY)**

It is an irrebuttable presumption of law that a child under seven years in age has no mens rea. He/she is exempted from criminal responsibility.

A child of 7 years and under 12 years of age is presumed to be incapable of crime unless a mischievous discretion is clearly proved.

A male child under 12 years is presumed to be incapable of any offence involving sexual intercourse by him.

### **PROVOCATION**

The term "provocation" used with reference to an offence of which an assault is an element, includes, except as hereinafter stated, any wrongful act, or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under the immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered, (section 283 CC)

### **DEFENCE OF PROVOCATION**



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A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the passion to cool; provided that the force used is not disproportionate to the provocation and is not intended and is not such as is likely to cause death or grievous harm, (**section 284, CC**)



**300LEVEL NOTES**  
**PUL 503**  
**HUMAN RIGHTS AND**  
**CIVIL LIBERTIES LAW I**





## TOPICS

1. THE CONCEPT, PHILOSOPHY AND HISTORICAL DEVELOPMENT OF HUMAN RIGHTS
2. RIGHT TO LIFE – **SECT. 33** – (RIGHT TO DIE)
3. RIGHT TO FAIR HEARING – **SECT. 36**
4. RIGHT TO PERSONAL LIBERTY – **SECT. 35**
5. FREEDOM OF EXPRESSION AND THE PRESS – **SECT. 39**
6. RIGHT TO DIGNITY OF THE HUMAN PERSON – **SECT. 34**
7. ECONOMIC, SOCIAL AND CULTURAL RIGHTS
8. MODERN THREATS TO CIVIL LIBERTIES.



## TOPIC 1

# THE CONCEPT, PHILOSOPHY AND HISTORICAL DEVELOPMENT OF HUMAN RIGHTS.

## THE CONCEPT OF RIGHTS.

The word “rights” in the noun form means that to which a person has a just or valid claim, whether it be land, a thing, or the privilege of doing something or saying something. (Grammatical Meaning)

In the legal parlance, a right is the legal capacity residing in one man or a group of men of controlling, with the assent and the assistance of the state, the actions of others or even the state. (Legal Meaning)

A privilege on the other hand is a permission, license or concession, the breach of which would lead to the withdrawal of the conferral of that permission or license.

The key of a right is that it is something that can be enforced, while the key of a privilege is that it is a concession which can be withdrawn by who confers such privilege.

According to **SALMOND**,

***“a right is an interest respect for which is a duty, and the disregard of which is wrong”***

He identifies four types of rights in a wider sense as rights, powers, liberties and immunities.

## THE CONCEPT OF HUMAN RIGHTS

The word “human” has been defined as “pertaining to, characteristics of, or having the nature of mankind”. Human rights are rights that are peculiar to human beings, i.e. those rights that human beings can claim and enforce when necessary.

Human rights are rights which all human beings everywhere and at all times equally have or ought to have by virtue of being human beings. A human being is defined in **The Criminal Code Act** as someone who has proceeded from the womb of a mother. Human rights are inherent in human beings simply because of their humanity, and have accordingly been defined as rights which are inherent in human beings. They are rights to be enjoyed by all human beings of the global village and not gifts to be withdrawn, withheld or granted at someone’s whim or will.



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‘Human Rights’ mean the freedoms, immunities and benefits that according to modern values, all human beings should be able to claim as a matter of right in the society in which they live.

Human rights are a precondition to a civilized existence. In this sense, they are said to be inalienable or imprescriptible and are part of the very nature of human beings. The concept of human rights embraces both human rights that have been guaranteed by positive law and moral human rights which ought to be, but have not yet been guaranteed by positive law.

Another way to describe human rights is through Natural Rights. “Natural Rights” are a specie of rights which belong to human beings by virtue of their humanity. They are rights conferred by nature and inherent in human persons.

They are fundamental rights and are imprescriptible (that is, not conferred by any government or human authority. It is inherently conferred by God)

The court in **SIDDLE V. MAJORS** defined fundamental rights as

*“those which have their origin in the express terms of the constitution or which are necessary to be implied from those terms”*

**ESO (JSC)** in **RANSOME KUTI V. AG FEDERATION** opined that

*“a right qualified as “human” removes that right from the ambit of positive law. No government person is the donor but the creator himself. A fundamental right is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence and what has been done by our constitution since independence... is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the non-immutability of the constitution itself”*

The idea of natural law is also evident in the preamble of the **AMERICAN DECLARATION OF INDEPENDENCE 1776**

*“It is a self-evident principle that the creator has endowed man with certain inalienable rights... life, liberty and the pursuit of happiness”*

According to the court in **ASEMOTA V. YESUFU**

*“Fundamental right is undoubtedly an inalienable right, which corresponds to a “jus naturale”. It is the greatest right, and when it is contained in the constitution of a nation, it enshrines a people’s expression of political and civil rights (as endowed by nature) but only to the extent that the strictness of largeness of the modern does permit”*



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These rights cannot be waived by the state or by the individual where the right is not for his sole benefit, but in the control of the state or the courts. Also, a person does not lose a fundamental right on ground of its non-exercise.

Worthy of note is the fact that the idea of fundamental human rights has a changing content or rather a growing and new rights are constantly being interpreted into old ones and some formerly thought to be not so important being elevated to greater heights .

For example, the right to development and health, reproductive rights etc.

### **CAN HUMAN RIGHTS BE ENFORCED IN SPITE OF THE WISHES OF THE VICTIM?**

The question or issue came up in the case of **ARIORI V. ELEMO**. In that case, **JUSTICE KAYODE ESO (JSC)** said;

*“Because of the comparative young age of the Indian and the Nigerian constitution vis-à-vis the American constitution (the Indian constitution was assented to by the president of India on November 4 1949), one can easily compare the situation in this country with that of India. In this country, the people are largely illiterate. The comparative educational backwardness, the socio-economic background of the people and the reliance that is placed as a result of this backgrounds in courts...I think the Supreme Court has a duty to safeguard the fundamental rights in this country which from its age and problems that are bound to associate with its still having an experiment with democracy.”*

The enlightened members of the society must ensure the enforcement of human rights. As noted by **GANI FAWEHINMI (SAN)**, it is the duty of the courts to enforce the fundamental rights of the individuals despite the inability, incapacity or inpercuinity of the individual.

The courts shall encourage and welcome public interest intigation in the human rights field and no human rights case can be dismissed on the grounds of lack of locus standi.

In particular, human rights activists, advocates or groups as well as any non-governmental organisation may institute human rights action in respect of any applicant.

Human rights applicants may include;

- Anyone acting as a member of a group of more than five persons.
- Anyone acting in his own interest.

### **THE SOCIAL CONTRACT THEORY.**



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The principle of social contract according to JEAN JACQUES ROUSSEAU is predicated on the idea that an individual surrenders a certain part of his right to the state (rights such as safety and security) in exchange for state protection.

In the case of a breach of any right surrendered to the state, the state is liable due to the doctrine of privity of contracts (that is, you cannot enforce a contract on a third party)

The idea of social contracts is a deliberate action to maintain social equilibrium.

For instance, if Mr A slaps Mr B, the remedy is not in human rights enforcement procedure, rather the individual can sue in private law and torts of assault.

Whenever there is a transgression of rights, the remedy has a specialized outlet in private law as opposed to public law.

### **THE CONCEPT OF CIVIL LIBERTIES.**

The concept of civil liberties is an American creation and this is because America is the greatest transgressor of human rights. They are the only country with civil liberties that are superior to international laws and this is by virtue of their domestic laws.

CIVIL LIBERTIES are those rights that can be claimed and enforced anywhere. The concept of civil liberties is conterminous with human rights in terms of its content and connotation but the US introduced the liberties as an extension or aspect of its state sovereignty.

The idea of civil liberties is to domesticate human rights and keep it within its domestic sphere.

In 1964, **Malcolm X** argued that civil liberties are actually Human Rights. He was able to connect American civil rights with international human rights.

Civil liberties and human rights are essentially and grammatically similar but each value laden. But the US wants to let us understand that it is loaded in content.

### **CLASSIFICATION AND DIMENSIONS OF HUMAN RIGHTS.**

Several schemes of classification of human rights have been adopted. Human rights have been classified into

- Personal Rights – Right to life, personal liberty, dignity etc.
- Political and Moral Rights – Right to freedom of expression, association, religion etc.
- Propriety Rights – Right to property, privacy etc.
- Procedural Rights – Right to fair hearing, due process etc.



- Equality Rights – Right to freedom from discrimination, equality before the law etc.

The concept of human rights is not static but dynamic. According to **Professor Akin Ibido-Obe**, the concept of hierarchy of human rights is a misnomer as human rights are indivisible, that is there is an essential unity in human rights.

Human rights have also been classified according to the period they emerged or were recognized. However, in order to describe the nature of human rights, it's best to arrange them according to their currency and not seniority. Thus, the generation of rights is not the most important but the currency of those rights.

There are three well known stages in the development of human rights as advanced by the French Jurist, **Karel Vasak**.

1. **FIRST GENERATION RIGHTS – (THE CIVIL AND POLITICAL RIGHTS)**
2. **SECOND GENERATION RIGHTS – (ECONOMIC, POLITICAL AND SOCIAL RIGHTS)**
3. **THIRD GENERATION RIGHTS – (GROUP OR SOLIDARITY OR PEOPLE'S RIGHTS)**
4. **FOURTH GENERATION RIGHTS - (ENVIRONMENTAL RIGHTS)**

#### 1. **FIRST GENERATION RIGHTS – (THE CIVIL AND POLITICAL RIGHTS)**

The first generation rights – the civil and political rights emerged from the ashes of the English, American and French Revolutions. They are aimed at securing the liberty of the individual from the arbitrary actions of the state.

Included in this category of rights are the liberty oriented rights set out in **Articles 2-21 of the UDHR**. Also belonging to this category are all the rights guaranteed under **Chapter IV of the 1999 Constitution of Nigeria**.

These rights are called negative rights because they, by and large entail negative obligations on governments not to interfere with the exercise of these rights by individuals without imposing positive obligations on the state for their realization. It must however be noted that all human rights somehow entail positive obligation on the state at least in the sense of obligation to protect the rights.

What is constant in this first generation conception is the notion of liberty, a shield that safeguards the individual, alone and in association with others, against the abuse and misuse of political authority.



## **2. SECOND GENERATION RIGHTS**

The second generation rights correspond by and large to the economic, social and cultural rights. This category of rights is predicated on the assertion that attainment of a certain level of social and economic living standard is a necessary condition for the enjoyment of the negative rights.

These rights therefore entail positive obligations on the government to provide the living conditions without which the negative rights cannot be enjoyed.

## **3. THIRD GENERATION RIGHTS**

The third generation rights group or solidarity or people's rights. According to **Vasak**, they are a response to the progressive unfolding phenomenon of global interdependence. They are the products of the rise and decline of the nation-state in the last half of the twentieth century. Some of these rights reflect the emergence of the third-world nationalism and its demand for a global redistribution of power, wealth and other important values.

The rights in this category include the right to development, the right to share in the common heritage of mankind, right to self-determination, right to clean and healthy environment and the right to international peace and security. These rights require international cooperation for their realization.

## **4. FOURTH GENERATION RIGHTS**

The growing global awareness on the necessity for conservation of natural resources and environmental protection now subsumed under the term "sustainable development" has given rise to what has been described as the fourth generation of human rights which deals with environmental issues.

The world court is interested in environmental issues. On 31<sup>st</sup> March 2014 it gave a decision concerning Japan's Whaling activities.

Environmental rights are now so important that they are now part of international human rights law. The more positive we are to our environmental rights, the longer we will live.

## **5. FIFTH GENERATION RIGHTS**

The new frontiers of human rights – rights to democracy and good governance are regarded as the fifth generation of human rights.



The rights in this category are historically traceable to the insistence by western donor countries on open and accountable government as a condition precedent to aid to poor and developing countries. Democracy is the only system of government under which human rights can flourish or be realized.

## **HISTORICAL EVOLUTION AND PHILOSOPHICAL FOUNDATION OF THE CONCEPT OF HUMAN RIGHTS.**

Overtime, rights have been agitated for. Then, they were not referred to as rights in the real sense of the word.

The concept of human rights has its philosophical ancestry in the natural law school. The foundation of human rights is therefore natural law and the subsequent concept of natural rights.

The doctrine of natural rights is traceable to the medieval and ancient times when it was then fashioned as natural law. As a result of the close relationship of these concepts, the expression “**human rights**” had been used synonymously with natural law and natural rights.

Natural law is predicated on the assertion that there are objective moral principles which depend on upon the nature of the universe and which can be discovered by reason. In other words, the theory of natural law is based on the reasoning that the rules of human conduct are deductions from the nature of man as they reveal themselves in reason.

The theory of natural law draws its inspiration from nature. It is predicated on the assumption that there is a law of nature according to which tenets and principles all things, including man himself, ought to behave. As human nature is identical in all human beings and does not vary, its precepts have universal and immutable validity, notwithstanding the diversity of individual conditions, historical and geographical environments, civilizations and cultures.

In considering the historical evolution of human rights, the periods must be emphasized. This however is a rough periodization and should not be viewed as a perfect chronology of events. They are;

- **THE PERIOD OF THE GREEK PHILOSOPHERS**
- **THE PERIOD OF NATURAL LAW THEORISTS**
- **THE RENAISSANCE OR ENLIGHTENMENT OR REFORMATION PERIOD**
- **THE PERIOD OF THE GREAT HUMAN RIGHTS DOCUMENTS**



## - THE PERIOD OF THE INTERNALISATION OF HUMAN RIGHTS

### THE PERIOD OF THE GREEK PHILOSOPHERS

This period encompasses the eras of **SOCRATES**, **PLATO**, and **ARISTOTLE**.

**SOCRATES** was a philosopher in the 5<sup>th</sup> and 4<sup>th</sup> century B.C. He lived in the Greek city state of Athens. He as a man of ideas of reasoning and a public speaker per excellence. He was the first natural law philosopher. During his period there was dictatorship in Athens and he held liberal views and thus he was victimized.

Socrates was on the hit list of the military dictatorship in Athens and they caught up with him and consequently he was charged with treason and propounding of heresy and sedition. After Sparta defeated Athens there was a need for a strong leadership and the government was recognised.

Socrates was eventually tried by a military tribunal and he was later convicted. His punishment was to drink “**hemlock**” a type of poison, until he died.

Socrates says nature is primary i.e. the order of things God created is primary, fundamental and lasting. But law is dynamic and susceptible to change. Human law will change as personalities evolve.

In essence, nature has its own set of laws that are permanent. He made three propositions;

- He said natural law is wise whole human law is based ob expediency – based on whims and caprices.
- Nature is primary while law is secondary and derivative.
- Nature created man to be equal while law imposed inequality. Human law applies to man whether good or bad. The laws of nature are norms and it is obligatory, there are no compulsions.

### PLATO (427-347 B.C)

He was a very prolific writer who wrote so many books and dialogues which include **Timaeus**, **The Statesman** and **the Republic**. He was Socrates’ student.

Plato and Socrates both believed in and preached natural law but with noticeable differences. Plato put forward the doctrine of individualism as the centrepiece of human rights, while Socrates believed in an agglomeration of families as making up the state.



## **ARISTOTLE**

Aristotle was Plato's student and was vast in many disciplines; biology, astrology etc. He was also a natural law philosopher and writer. He wrote the books; **Ethics and Philosophy**.

The central thesis of Aristotle's works and writings was that natural law (the law of God) is better than the laws of man. Hence, he postulated that divine or natural Law is better than positive law.

## **THE PERIOD OF THE NATURAL LAW THEORISTS**

Natural law theorists transcend about seven centuries. The persons who categorised this period were constituted mainly of Catholics and they include:

**ST. Thomas Aquinas, ST. Ambrose, and ST. Augustine** to name a few.

### **AMBROSE**

Ambrose was the Bishop of Rome in the 5<sup>th</sup> century. He saw a young man lost in bigotry and reckless abandon, but he discovered that the young man was very smart, intelligent and good at poetry. That man was St. Augustine and Ambrose decided to bring him out of the debauchery and brought him to the catholic faith.

### **ST. AUGUSTINE**

St. Augustine was born in Lumidia which is on the coast of Africa. He was very intelligent and made strides in the intellectual field, despite his debauchery. He left Lumidia and wandered to Rome where St. Ambrose found him.

He wrote a number of books including, Confessions, City of God, amongst other. In City of God, he made a few illustrations. According to St. Augustine, the City of God is the city where natural law holds sway. It is a city where there is serenity, law and order. He then contrasted it with the city of man i.e. Earth where human law holds sway. In his view, Human law is based on ideas, expedience and selfishness.

Part of the Human Rights thesis of St. Augustine was to talk about racial discrimination and human rights. He was basically the first person to discuss racial profiling under human rights. He was part of the first people to mention racial profiling under human rights.

## **THOMAS AQUINAS**



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He was a catholic priest who lived in the 13<sup>th</sup> Century A.D. He was also a natural law philosopher. Thus based on the works of St. Ambrose, St. Augustine and St. Thomas Aquinas, human rights became the pillar of Catholicism and the liberation theology.

**FATHER ROBERO** is also another outstanding catholic priest who joined the Brazilians in their fight against military dictatorship. He espoused violence as a tool of achieving freedom. He believed in **liberation theology** i.e. violence as a tool in acquiring freedom.

**HUGO GROTIUS**, the acclaimed father of international law used natural law as the vehicle to propound his international law principles.

International law had a principle that the world is “**terra nullius**” i.e. “**no man’s land**”. Grotius deployed natural law to debunk the idea of “**terra nullius**”. He said that if god create all men equal, then all men are equal and thus there is no such thing as “**no man’s land**”. He said each state had its rights to its own land and to use its own natural resources.

## **THE REFORMATION / RENAISSANCE / AGE OF ENLIGHTENMENT**

This fell within the 17<sup>th</sup> century. The medieval period or the period of the monarchical era in Europe preceded this period. During the medieval period, there was wanton abuse of human rights because the monarchy was an abolitionist/totalitarian regime. Thus, the renaissance was a response to this prevalent abuse by the monarchy.

**THOMAS HOBBS** in his book **Leviathan (1651)** considered the issue of abuse of power by the monarchy with his book via making a metaphor of the title of the book. He emphasized that life is brutish, nasty and short.

The panacea was offered by **JOHN LOCKE** in his book **Civil Government (1690)** where he emphasised on the need for a republican system of government.

**BARON DE MONTESQUIEU** in his book **L’ESPIRIT DE LOIS (THE SPIRIT OF LAW 1721)** considered the effectiveness of separation of powers between different organs or government whereby each would act as a check and balance to the other.

**JEAN JACQUES ROUSSEAU** in his popular book **Social Contract** emphasized that the relationship between the citizen and the state is contractual i.e. an agreement between equals. He said that citizens have agreed to relinquish some of their rights to the state authority in exchange for their protection/security by the state. The social contract theory presaged and laid out the background for the documentation of human rights and constitutionalism.



## THE PERIOD OF THE GREAT HUMAN RIGHTS DOCUMENTS

The period of documentation of human rights when it was realised that the concept of human rights was beyond conjecture and that it should be documented for posterity and thus creating a point of reference.

This period is not within an exact time span but it is in chronological continuation between various centuries.

### THE MAGNA CARTA OF 1215

This was the first documentation of human rights and was in the medieval period. **KING JOHN OF ENGLAND** was instrumental in the coming alive of the Magna Carta and it was negotiated over five days in **Runnymede**. It was a product of demands and compromises between the dissident Barons and King John.

The Barons constituted the buffer class. There is clear evidence that this period of documentation did not just begin after the renaissance but has been on and will still be on continuously. Before 1215, the Barons (in King John's kingdom) turned against the king and aligned with the masses or proletariats and waylaid him at Runnymede where he signed the Magna Carta, granting the people some rights.

The rights were however not granted to all. They were concessions which King John made to his barons – that is, the Lords, the Knights and other land owners. The Magna Carta however did begin the process of granting certain rights by the King to his subjects.

The importance of the charter in the history of liberty lay less in its individual provisions than for the principle that the power of the King (or government) is subject to the laws of the land and the voice of the subjects.

### THE ENGLISH BILL RIGHTS OF 1689

A bill of rights is a section of a constitution that talks about the rights of individuals vis-à-vis the state. The Bill of Rights (U.K) is a statute passed by convention parliament of England in December 1689 as part of the Revolution settlement for declaring the rights and liberties of the subject and settling the succession to the crown. Through the Glorious Revolution of 1688 the people of Britain removed another absolutist monarch from the throne. Parliament then installed a monarch, William of Orange, who acceded to its Declaration of rights.



The Declaration in due course became the basis for the bill of rights which settled the “religion, laws and liberties of the kingdom”, in order that the future might not be in danger of again being subverted.

### **THE AMERICAN DECLARATION OF INDEPENDENCE OF 1776**

This was presaged by the American war of independence and they developed their own bill of rights in 1778/1779.

### **THE FRENCH DECLARATION OF RIGHTS OF MAN AND THE CITIZEN.**

This was presaged by the French revolution. The Bastille is the symbol of the French revolution. The proletariats stormed the Bastille and took over power from the government. The worldwide trend of reducing human rights into writing has gone through the hierarchy.

### **INTERNALISATION OF HUMAN RIGHTS.**

The active involvement of the international community in the promotion and protection of human rights is what is known as the internalisation of human rights. Until the **United Nations Charter of 1945**, international law did not expressly recognise the human rights of the individual despite developments in that direction.

Among the early developments in the international recognition of human rights were the conclusion of treaties to protect religious freedom and treaties to ban slave trade.

Another impetus to the evolution of international human rights law was the intervention of the states, through international legal processes, seeking to secure human rights for the inhabitants of other states.

**The Treaty of Versailles 1919** that ended the First World War further laid the foundation for the internalization of certain human rights. The peace treaties guaranteed to the minorities, “full and complete protection of life and liberty without distinction at to birth, nationality, language, race or religion”.

Other historical factors that led to the internationalisation of human rights include the provision of minimum standards for labour under the supervision of the international labour organisation and the mandate system for the colonies of the defeated powers in the First World War.



The express recognition of human rights by international law began in 1945 after the end of the Second World War. The victorious allies were determined to introduce into international law, new concepts designed to make the recurrence of wars less probable.

It was reasoned that once human rights are recognised and protected all over the world, democracy will be secure and the probability of war and widespread violations of human rights will be remote.

The most important landmark in the internalisation of human rights is the United Nations Charter of 1945 following the Second World War. It ushered in a new international order of human rights which laid to rest the dogma that how a state treats its own citizens was a matter of domestic and now international concern. It was the coming together of the international community to ensure peaceful co-existence among themselves, thus it was not a human rights document per se. It is tied to human rights by its history, coming so close after the mass murder of the Jews by **Adolf Hitler**.

The Universal Declaration of Human Rights represents a common statement of goals and aspirations by the world community – a vision of the world as the international community would want it to become. It is an authoritative definition of human rights, setting out the principles and norms for securing respect for the rights of man everywhere in the world.

Though the **UDHR** at the time of adoption did not impose legally enforceable obligations on member states but was only symbolic and represented aspirations to which member states aimed to attain, it is now being conceived as forming part of customary international law, binding all states and not just the members of the UN.

It took the world 18 more years after the UDHR to prepare and adopt other bills of rights. Ideological and political differences – human rights versus national sovereignty, individual liberty versus communal needs – prevented a consensus. The dispute revolved around the question: whether economic, social and cultural interest should be recognised as rights at par with the civil and political rights.

The capitalist countries – (U.S and her allies) were opposed to the uplifting of the status of economic, social and cultural rights, to a position of equality with the civil and political rights. On the other hand, the communist countries – the former Soviet Union and her allies – held contrary position, and were supported by the newly independent states from the third world.

To resolve the stalemate, the drafters agreed to prepare two covenants, one dealing with civil and political rights while the other one would deal with economic, social and cultural rights, thus giving states the option to ratify either or both of them.



Consequently, on 16<sup>th</sup> December 1966, the **International Covenant on Economic, Social and Cultural Rights (ICESR)** and the **International Covenant on Civil and Political Rights (ICCPR)** were adopted. This document came into existence as a result of “ideological polarism”

The **UDHR** and the **ICESR** and **ICCPR** (the two covenants) constitute the **International Bill of Rights**.

Apart from the human rights treaties and declarations that have concluded under the auspices of the UN, three regional conventions; **The European Convention on Human Rights and Fundamental Freedoms (1950)**, **The Inter-American Human Rights Conventions (1969)** and **The African Charter on Human and People’s Rights (1981)** guarantee human rights in their respective regions.

The human rights treaties and declarations concluded at the UN and regional levels constitute the international law of human rights. Through these multi-lateral treaties, sovereign states consented to be bound by the obligation to respect and secure the human rights specified in the treaties within their own territories, for all individuals over whom they have jurisdiction, including both citizens and aliens.

According to **Professor Akin Oyebo**, what the international protection of human rights implies is that it enables an aggrieved person to make demands on his state of nationality far beyond what the domestic law provides based on internationally prescribed minimum standards.

A law (including human rights law), whether international or domestic, which does not correspond to justice cannot be binding in conscience. Such a law lacks moral legitimacy and its enforcement involves a violation of human dignity and rights. This is the thesis of natural law.

**Professor Ben Nwabueze** observed that no society in which morality and religion are absent can never attain and maintain liberty, democracy and justice. Liberty, democracy and justice are actually morality based values.

It has thus been acknowledged that although the concept of human rights is a product of the **UN Charter** amplified by the **UDHR**, it has been influenced by traditional concept of natural rights.

## **SOURCES OF HUMAN RIGHTS**

### **DOMESTIC SOURCES**



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- **THE CONSTITUTION – The 1999 Constitution of the FRN.** The fundamental human rights in Nigeria are cedified on **Chapter IV of the Constitution.** However, the entire constitution itself is regarded as a Human Rights document and human rights also exist in other sections of the documents.
- **FEDERAL LAWS**  
There are federal laws governing all aspects of human rights like health, education, child rights, economic and social rights etc.  
Any law touching on any aspect of human rights is a source of human rights.
- **STATE LAWS**  
For example; **LASEPA, The Criminal Code Act** etc.
- **LOCAL GOVERNMENT LAWS / BYE LAWS**

### **CHARACTERSITICS OF HUMAN RIGHTS.**

The most important characteristics of human rights have been listed as follows:

1. Human rights are founded as respect for the dignity and worth of each person.
2. Human rights are universal, meaning that they are applied equally and without discrimination to all people.
3. Human rights are inalienable in that no one can have his or her human rights taken away other than in specific situations.
4. Human rights are indivisible, interrelated and interdependent, for the reason that it is insufficient to respect some human rights and not others. In practice, the violation of one right will often affect the respect of several other rights.  
All human rights should therefore be seen as having equal importance and of being equally essential to respect for the dignity and worth of every person.

## **TOPIC 2**

### **THE RIGHT TO LIFE**

Life is the most precious and the most important of all human rights, and it is only when a right to it is ensured, that all other rights and be obtained and effectively enjoyed.



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Right to life is a phrase that describes the belief that a human being has an essential right to live, particularly that a human being has the right not to be killed by another human being.

The concept of a right to life is central to debates on the issues of euthanasia, the death penalty, abortion, self-defence and war. Accordingly, the **African Commission on Human and Peoples Rights** observed in **Forum of Conscience V. Sierra Leone** that the right to life is the fulcrum of all other rights, it is the fountain through which all other rights flow.

**Section 33 of the 1999 Constitution** provides that:

*"Every person has a right to life, and no one shall be deprived intentionally of his life, save in the execution of a sentence of court in respect of a Criminal offence of which he has been found guilty"*

**Article 4 of the African Charter on Human & People's Rights** also provides that:

*"Every person has a right to life and no one shall be deprived of his life intentionally"*

**Article 2 of the Universal Declaration of Human Rights** also ensures an individual's right to life thus:

*"Everyone has a right to life, liberty and security of person"*

## **WHERE DOES PERSONHOOD BEGIN?**

In respect of the right to life of an unborn child, there are 2 schools of thought –

### **PRO LIFE and PRO CHOICE.**

**The Pro-life** school opines that the government has an obligation to preserve all human life, regardless of intent, viability or quality of the foetus' life and the school also stringently prohibits abortion.

**The Pro Choice** school on the other hand, asserts that individuals have unlimited autonomy in respect to their reproductive system. Hence, the school supports abortion as long as it is effected within the pregnancy's first two trimesters. This opinion is hinged on the decision in the landmark case of **ROE V. WADE**.

**Facts of the case:** The case was filed by **Norma McCorvey**, known in court documents as **Jane ROE** against **Henry WADE**; the district attorney of **Dallas County** from **1951 to 1987**, who enforced a Texas law that prohibited abortion, except to save a woman's life. The U.S. Supreme Court, in a **7-2 decision**, affirmed the legality of a woman's right to have an



abortion under the **Fourteenth amendment to the Constitution**. The court held that a woman's right to an abortion fell within the right to privacy (recognized in **Griswold V. Connecticut**) protected by the Fourteenth Amendment. The decision gave a woman a right to abortion during the entirety of the pregnancy and defined different levels of state interest for regulating abortion in the second and third trimesters.

**SECTION 307 OF THE CRIMINAL CODE** seems to be in agreement with this position in providing that a person only becomes a human being when it is independent of its mother's body, whether or not the umbilical cord is severed.

**Article 4 of the Inter-American Convention of 1969** - The Human Rights treaty which governs the South American Continent, and which is of Catholic roots posits that Human Life begins at the moment of conception. However, no one can pinpoint the exact moment where conception occurs.

#### **GENERAL REACTION TO THE RIGHT TO ABORTION.**

Pursuant to **ROE V. WADE**, fictitious names are often adopted in cases involving abortions in order to protect the identities of the concerned parties from extremists. In a suburb of Miami, Florida, a mainly constituted Cuban community with majority being of Catholic faith where an abortion clinic was established by **Dr. John Bayer**, a gunman shot the doctor about six times. This isolated event occurred in 1994.

#### **THE DEATH PENALTY DEBATE**

According to **Professor Akande**, there are five offences present in Nigeria which are punishable by death. They are:

1. Murder - **Section 316 of the Criminal Code**
2. Treason - **Section 37 & 49 of the Code**
3. Treachery - **Section 208 of the Code**
4. Trial by ordeal - **R V. Baganza**
5. Giving or fabricating of false evidence with results in the conviction and execution of an innocent person.
6. Abatement of the suicide of a child or an insane person.



In all these cases, the death penalty can be applied as an exception to the right to life. However, children under the age of 17 years at the time of the commission of the offence cannot be sentenced to death, and any sentence on a pregnant woman must not be effected until she has been delivered of her child. There is a raging controversy about the continuance of the death penalty as a means of punishment all over the world. The entire European Continent have abolished the death penalty and about 18 African countries have abolished the death penalty as a penal disposition.

There is a moratorium on the death penalty in about 20 other African countries, Nigeria inclusive. This was put in place by the Obasanjo administration in 2004, and in 2012, the Edo State Government recommended the execution of prisoners. In **Catholic Commission for Justice and Peace in Zimbabwe V. AG**, the Zimbabwean Supreme Court stated that the delayed execution of the prisoners and the degrading conditions under which they were held was unconstitutional. In the cases of **Draff V. AG. Jamaica** and **State V. Makwanyare**, the courts held unanimously that the death sentence was unconstitutional and it amounted to cruel and degrading treatment or punishment and affects the unqualified right to life guaranteed in **Section 9 of the South African Constitution**. In **Nosiru Bello V. AG Oyo state**, the deceased who was accused of armed robbery was executed while his appeal was pending. The court in this case called it a reckless disregard of life and liberty of a subject and principles of the rule of law and thereby unjustly depriving the defendant of his life.

**Should the right to life be subject to the power of the state to kill?** In states where democracy has taken its toll, the death penalty is usually abolished. The death penalty is tied to a totalitarian government as it has been a tool of suppression and depression. In the United States of America, 38 States out of 50 have abolished the death penalty. In the retentionist States, the rate of murder and unlawful killing is generally higher than that of the abolitionist States. Generally, around the world, the rate of murder is higher in retentionist Nations that in abolitionist Nations. The Constitution provides that the death penalty must be imposed by a duly constituted court of law and it must be duly passed. It should not be imposed by a mere military tribunal without confirmation of the sentences by the highest military council as the law requires. Sections 33(1) and 36(1) aligned show us the specifics of the concept of a court. A court differs from a tribunal in several ramifications. However, a tribunal guaranteed in such a manner to secure its independence and impartiality could carry out a court's functions. For the death penalty to be valid, it must have been pronounced by a duly constituted court for an offence that is prescribed by law.



## THE DEATH PENALTY DEBATE

The death penalty issue has not left the front burner of human rights discourse and the morality has not ceased to be discussed by people on the international scene. As seen in the cases of **Furman V. The State of Georgia** (1972) and in **Gregg V. Georgia**. In those two cases, both appellants had been sentenced to death. They challenged the death penalty as unconstitutional because according to them, it discriminates against black people.

**The Eighth Amendment** to the **U.S. Constitution** prohibits "cruel and unusual punishment." At face value, this would appear to include killing people—that's a pretty cruel punishment by most people's estimation—but the death penalty is so deeply entrenched in British and American legal philosophy that the framers of the Bill of Rights clearly did not intend to prohibit it. The challenge the Supreme Court faces rests in properly restricting the use of this historically unassailable, but constitutionally problematic, form of punishment.

### **Furman v. Georgia (1972)**

The Supreme Court struck down the death penalty altogether in 1972 due to the arbitrary enforcement of death penalty laws. As one might expect from a state in the Deep South in the mid-twentieth century, Georgia's arbitrary enforcement tended to correlate along racial lines. **Justice Potter Stewart**, writing for a Supreme Court majority, declared a moratorium on the death penalty in the United States:

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race ... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"

### **Gregg v. Georgia (1976)**

After Georgia revised its death penalty laws to address arbitrariness, Justice Stewart wrote again for the Court, this time reinstating the death penalty provided that checks and balances are in place to ensure that some objective criteria are used to determine its enforcement:



The basic concern of *Furman* centred on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way, the jury's discretion is channelled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

The history of Supreme Court death penalty law over the past 40 years has centred on adhering to these basic criteria.

International Human Rights is moving at a great pace towards to total abolition of the death penalty. There exists a protocol known as the Second Optional Protocol which aims at abolishing the death penalty. The law enjoined ratifying states to expunge the death penalty from its respective penal processes and statutes. Incidentally, about 30 states have ratified the protocol.

An International Non-Governmental Organization; **Amnesty International** has made the abolition of the death penalty a major plank of her stay.<sup>38</sup> out of the 50 states in the US have expunged the death penalty from their respective statutes.

Some Nigerian cases have examined and challenged the constitutionality of the death penalty. In **Peter Nemi V. The State**, the basis of the challenge by Agbakoba was that Peter Nemi has been tried and convicted after about 22 months. And also that the sentence was unconstitutional because of the prolonged delay, thus the man had been sentenced to cruel, inhuman, and degrading treatment.

### **WHEN IS A DEATH SENTENCE DULY PASSED?**

In the Nigerian jurisdiction, taking the case of the Ogoni 9 who were tried before the Civil Disturbances Tribunal as an example, the law states that for a sentence of death to be passed, it compulsorily has to be ratified by the **Provincial Ruling Council** (PRC) of the Abacha regime, and this procedure ought to be within 30 days but in this case, the Ogoni 9 were executed before the ratification.



----- Justice Oputa Student Chambers Notes Series compiled by Rilwan Shittu & co.

Gani Fawehinmi challenged the tribunal's decision in the case of **Gani Fawehinmi V. PRC**, but the court held that he had no locus standi.

In addition, a minor offender may not be sentenced to death. In Mohammed **Garba V. AG Lagos State, Longe J**'s judgment was given on 3rd of October 1990, where 8 kid robbers were convicted and sentenced to death. **Longe J** said that the death sentence was contrary to international charter. Also, in **R V. Bangaza**, it was held that the material time for determining whether the offence was committed or not was the time of the commission of an offence.

In **Zamani Lekwot V. Judicial Tribunal and Anor**. Lekwot challenged the death sentence imposed on him and other persons on the ground that the sentence had not been duly passed. Lekwot's contention was that it was against the tenets of Fair hearing. The court held that it was duly passed.

In **Nosiru Bello V. AG. Oyo State**, Bello had been convicted and sentenced to death, then he appealed but before his appeal was heard, he had been executed. It was submitted that his sentence was not duly passed and consequently, the court held that the execution was unconstitutional.

## THE RIGHT TO DIE

The right to die is an ethical or institutional entitlement of any individual to commit **suicide** or to **undergo voluntary euthanasia**. Possession of this right is often understood to mean that a person with a terminal illness should be allowed to commit suicide or assisted suicide or to decline life-prolonging treatment, where a disease would otherwise prolong their suffering to an identical result. The question of who, if anyone, should be empowered to make these decisions is often central to debate.

Proponents typically associate the right to die with the idea that one's body and one's life are one's own, to dispose of as one sees fit. However, a legitimate state interest in preventing irrational suicides is sometimes argued. **Pilpel** and **Amsel** write, "Contemporary proponents of 'rational suicide' or the 'right to die' usually demand by 'rationality' that the decision to kill oneself be both the autonomous choice of the agent (i.e., not due to the physician or the family pressuring them to 'do the right thing' and commit suicide) and a 'best option under the circumstances' choice desired by the stoics or utilitarians, as well as other natural conditions such as the choice being stable, not an impulsive decision, not due to mental illness, achieved after due deliberation, etc."

## REASONS WHY PEOPLE COMMIT SUICIDE



People commit suicide for various reasons but for the purpose of this text, it would be summarily classified into the following encompassing themes:

- Shame or embarrassment
- Cultural practices or beliefs
- Religious expression
- Heroism

## SHAME OR EMBARRASSMENT

Shame connotes the feeling of guilt, utter regret, or sadness that you have because a person knows he has done something wrong. A classical example of a situation whereby the element of shame pushed an individual over the edge up until the point of taking his own life, (and in this case multiple lives) is the Italian case of the **Mani Pulite** (clean hands) investigations involving two of Italy's best-known businessmen **Gabriele Cagliari** and **Raoul Gardini**. Cagliari was the chairman of Ente Nazionale Idrocarburi; a huge company, widely known as ENI. While Gardini was the chairman of Italy's second-largest private company, the Ferruzzi-Montedison food and chemicals conglomerate. Both men committed suicide after being implicated in corruption allegations involving top Italian political officers. Gabriele Cagliari, asphyxiated himself with a plastic bag in the confines of his jail cell. Gabriele Cagliari even left a suicide note to that effect; an excerpt of it read:

**"The world was under my feet, I had the best of the best, now I am chained in prison like a dog in a kernel"**

Mr. Gardini on the other hand put a gun to his head after looking at morning newspapers with banner headlines on what a former lieutenant of his, Giuseppe Garofano, was telling the police about his bribing of public officials after four days of questioning.

## CULTURAL PRACTICES

Some eccentric cultural practices and traditions also encourage, or right put; permit suicide in some extreme cases. The Asian nation of **Japan** has the highest suicide rate in the entire world and this can be traced to its popular **seppuku** cultural tradition with teachings entrenched in the ideology of **"death over dishonor"**. Incidentally, in Tokyo, there is a mountain called the suicide mountain which is a favorite spot for aspiring suiciders. Another Japanese cultural practice, **Harakiri** which connotes the falling on his sword by a Japanese warrior to avoid being captured alive by enemy forces.

In **India**, there exists the cultural practice of **Self-Immolation** where a jilted woman sets herself ablaze in a vicious bid to take her own life. In **Tibet**, protesters have been known



to set themselves ablaze in an overzealous aim to gain media attention and sufficiently convey their views.

In the West African region of Nigeria, specifically in the Oyo kingdom, in 1951, there existed a tradition whereby the **Alaafin's**(King's) horseman (**Eleshin Oba**) was to accompany him to the grave in the event of his death. i.e. a form of ritual suicide.

## RELIGIOUS EXPRESSION

Another reason people take their own lives is the aspect of religious expression. **Hinduism** for example accepts the right to die for those who are tormented by terminal diseases or those who have no desire, ambition or no responsibilities remaining; and allows death through the non-violent practice of fasting to the point of starvation (**Prayopavesa**). **Jainism** has a similar practice named **Santhara**. Other religious views on suicide vary in their tolerance, and include denial of the right as well as condemnation of the act. In the Catholic faith, suicide is considered a grave sin. Followers of other Christian denominations have also been known to partake in some suicidal events which in most cases have been fuelled by radical leaders. **Reverend Jim Jones**, the leader of the **People's Temple** orchestrated the mass suicide of **913** of its members with cyanide in November 1978, in Jonestown, Guyana. In another isolated event on March 26, 1997, police discovered the bodies of 39 members of a religious group called **Heaven's Gate** who had committed mass suicide by drinking a poisoned liquid because they were sinful. They believed that the poisoned liquid wouldn't be fatal, but instead, cause a heavenly chariot to take them to heaven, much like in the Bible case of Elijah.

## HEROISM

Samuel Taylor Coleridge in one of his poems wrote thus:

*"It is better to die in the flower of youth on the chance of winning a noble name than to live at ease like sheep and die unloved and unrenowned"*

Another writer commented:

*"Heroes and martyrs offer themselves to death with such scorn that lesser men see as fool hardy"*

During the second world war, the Japanese employed the use of **The Kamikaze** against the **Allied Forces**. The Kamikaze orchestrated suicide attacks using military aviators against the allied naval vessels in the closing stages of the pacific campaign of World War II, designed to destroy warships more efficiently than was possible with conventional



attacks. The pilots of these so called "suicide planes" literally sacrificed their own lives in a drastic act of heroism.

## EUTHANASIA

Euthanasia which originates from the Greek words "**eu**" (which means well or good) and "**thannatos**" (which means death) refers to the practice of intentionally ending a life in order to relieve pain and suffering from an incurable disease or vegetative state.

There are different euthanasia laws in each country. **The British House of Lords Select Committee on Medical Ethics** defines euthanasia as

*"a deliberate intervention undertaken with the express intention of ending a life, to relieve intractable suffering".*

In the Netherlands, euthanasia is understood as "termination of life by a doctor at the request of a patient". In Nigeria, **Sections 311, 326 and 329** of the **Criminal Code** prohibits any form of assisted suicide.

Euthanasia is categorized in different ways, which include: passive, active, physician-assisted or involuntary.

- **Passive Euthanasia** - This involves the hastening of someone's death through the alteration of life support, thereby letting nature take its course.
- **Active Euthanasia** - Involves causing death through a direct action in response to a direct request from the ailing patient.
- **Physician-assisted Euthanasia** - This occurs when a physician supplies such patient suffering a terminal illness with information or a means of carrying out the suicide out.
- **Involuntary Euthanasia** - Killing of a person who has not explicitly asked for it, often because such a person is in an unconscious or vegetative state.

Voluntary euthanasia is legal in some countries, U.S. states, and Canadian Provinces. Non-voluntary euthanasia is illegal in all countries. Involuntary euthanasia is usually considered murder. In some countries there is a divisive public controversy over the moral, ethical, and legal issues of euthanasia. Those who are against euthanasia may argue for the sanctity of life, while proponents of euthanasia rights emphasize alleviating suffering, bodily integrity, self-determination, and personal autonomy. Jurisdictions where euthanasia or assisted suicide is legal include the European states of **the Netherlands, Belgium, Luxembourg, Switzerland, Estonia, Albania**, the US states of **Washington, Oregon** and **Montana**, and, starting in 2015, the **Canadian Province of Quebec**.



## LANDMARK RIGHT TO DIE CASES:

### PRETTY v. UK

#### Facts

Diane Pretty was suffering from motor neurone disease and was paralysed from the neck down, had little decipherable speech and was fed by a tube. It is not a crime to commit suicide under English law, but the applicant was prevented by her disease from taking such a step without assistance. It is however a crime to assist another to commit suicide (**section 2(1) of the Suicide Act 1961**).

Pretty wanted her husband to provide her with assistance in suicide. Because giving this assistance would expose the husband to liability, the Director of Public Prosecutions was asked to agree not to prosecute her husband. This request was refused, as was Pretty's appeal before the Law Lords.

#### Judgment

In a unanimous judgment, the Court, composed of seven judges, has found Pretty's application under **Articles 2, 3, 8, 9 and 14 of the European Convention on Human Rights** admissible, but found no violation of the Convention.

Significant conclusions include that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from **Article 2** of the Convention. As concerns Pretty's right to respect for private life under **Article 8**, the Court considered that the interference in this case might be justified as "necessary in a democratic society" for the protection of the rights of others.

### SUE RODRIGUEZ V. ATTORNEY GENERAL OF BRITISH COLUMBIA

#### Facts

Sue Rodriguez was a 42 year-old mother who was diagnosed with Amyotrophic lateral sclerosis (ALS or "Lou Gehrig's disease") in 1992. By 1993 it was found that she would not live more than a year, and so she began a crusade to strike down **section 241(b) of the Canadian Criminal Code**, which made assisted suicide illegal, to the extent that it would be illegal for a terminally ill person to commit "physician-assisted" suicide.

She applied to the Supreme Court of British Columbia to have **section 241(b) of Criminal Code** struck down as it violated **sections 7** (the right to "life, liberty, and security of the



person), **12** (protection against "cruel and unusual punishment"), and **15(1) of the Canadian Charter of Rights and Freedoms (equality)**.

## Judgement

**Justice Sopinka**, writing for the majority, found that there was no violation of **section 7**. He first considered whether the prohibition on ending one's life engaged the right to security of person. He found that the prohibition had sufficient connection with the justice system by its impact on an individual's autonomy and right to life by causing physical and psychological pain.

Sopinka, however, found that the provision did not violate any principles of fundamental justice. He examined the long history of the prohibition of suicide and concludes that it reflects part of the fundamental values of society and so could not be in violation of fundamental justice.

He also rejected the claim that the provision violated the **section 12** right against cruel and unusual treatment or punishment as a mere prohibition did not fall within the meaning of treatment.

Lastly, he considered the **section 15** equality challenge. He noted that the issue is best not resolved under this right, but in assuming that it did violate **section 15** he found that it was clearly saved under **section 1**. He found that the objective was pressing and substantial, rational, and that there was no lesser means to achieve the goal.

**Chief Justice Lamer** held a dissenting opinion that **Criminal Code section 241(b)** had infringed on the **section 15** and did not consider **sections 7 and 12**.

**Justice Cory** ruled that the right to die is as much a protected freedom under section 7 of the Charter as any other part of life.

**Justice McLachlin's** judgment was that **Criminal Code section 241(b)** violates the **section 7** right to security of the person and that this violation was not saved under **section 1**.

- Some bodies and associations across the continents of the world exist which aid in the supporting of the proponents of the right to die, all of these bodies are members of World Federation of Right to Die Societies. Some of these bodies include:

## Africa

South Africa: Dignity South Africa

South Africa: SAVES - The Living Will Society



Zimbabwe: Final Exit Zimbabwe

## **Asia**

Hong Kong: Awakening Research Foundation Hong Kong Limited

Japan: Japan Society for Dying with Dignity (JSDD)

## **Europe**

Ireland: Living Wills Trust (LWT)

Switzerland: Dignitas

United Kingdom: Friends at the End (FATE)

## **Middle East**

Israel: **LILACH** - The Israel Society for the Right to Live and Die with Dignity

## **North America**

Canada: Dying with Dignity

United States: Death with Dignity National Center

## **Oceania**

Australia: Northern Territory Voluntary Euthanasia Society

New Zealand: End-of-Life Choice, Voluntary Euthanasia Society of New Zealand Inc.

## **South America**

Columbia: DMD Columbia

Venezuela: DMD Venezuela

## **LIMITATIONS OF THE RIGHT TO LIFE**



Permissible limitations on the right to life are contained in Section 33(2) of the 1999 constitution which provides that:

**"A person shall not be regarded as been deprived of his life in contravention of this section... if he dies as a result of the use, to such extent and in such circumstance as are permitted by law, of such force as is reasonably necessary."**

- For the defence of any person from unlawful violence or defense of property.
- In order to effect a lawful arrest or to prevent the escape of a person lawfully detained.
- For the purpose of suppressing a riot or mutiny.

### **SELF DEFENCE OF ANOTHER**

When a death occurs as a result of a person defending himself or another person due to reasonable apprehension of death or grievous harm as a result of the act of another person, right to life is not violated.

**Section 286** of the **Criminal Code** provides that when a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to as is reasonably necessary to repel the assault, provided that the force used is not intended and not likely to cause death or grievous harm.

In **Okonkwo V. State**, the deceased forced himself into the house of the first accused person at about 12 midnight armed with a dagger. When challenged, he tried to use the dagger on the first accused who raised an alarm and enjoined him in physical combat. During the scuffle, other occupants of the compound including the appellant came to him in beating the deceased and tied him down. The first accused called the Police who came and put the deceased in their boot and later deposited his body at the mortuary. The trial court found the appellant and the first accused guilty of murder. On appeal, the **Court of Appeal** held that **Section 30 of the 1979 Constitution** which grants the right to life allows the use of reasonable force which was not found to be excessive herzee.

NB- For self defense to apply, there must be a reasonable apprehension of death or grievous bodily harm; force used in repelling attack must also be reasonable and proportionate to the force used by the attacker. (**Odu V. State**)

In **Odu V. State**, the appellant and 3 others were charged with conspiracy and murder. Allegedly, the 1st and 2nd appellants had seized the wristwatch and cap of the deceased. Two days later, whilst the deceased's brother and a witness were playing football, they noticed that the deceased was trying to retrieve his things from the 2nd appellant who



had the cap on. The 3rd accused person kicked and slapped him, hitting him with a stick, the 1st appellant brought a dagger which the 2nd appellant used in stabbing the deceased.

The 2nd appellant's plea of self-defence was rejected because there was no reasonable apprehension of death or grievous harm from the deceased's action. Thus, the nature of weapon used to repel the attack and disparity of strength is taken into consideration here.

However, when a person is unlawfully attacked without provocation, he can use such force as is reasonably necessary. If however, the attack causes reasonable apprehension of death and the person being attacked cannot by the method he is using preserve the life of the assailant, he is excused if death occurs. In **Sunday Amala V. The State**, the deceased had challenged the appellant as to what he was doing up on the palm tree and threw sticks at him. When he got down from the tree, a fight ensued during which the deceased died. The appellant raised the defences of provocation, accident and self-defence, all of which were rejected by the trial court and the Court of Appeal. The Supreme Court held that there was no reasonable apprehension of death or grievous bodily harm.

For the defence of self-defence to hold, the following conditions must be fulfilled:

1. The original assault must be unlawful, i.e. it must not be authorized by law.
2. The assault must be unprovoked by the person accused of homicide.
3. There must be reasonable apprehension of death or grievous bodily harm.
4. Force used in repelling attack must be reasonable and proportionate to the force used by the attacker.

## DEFENCE OF PROPERTY

The Criminal Code provides in relation to a dwelling place that it is unlawful for a person in peaceful possession of a dwelling house and anyone assisting him to use force as it believed to be on reasonable grounds to be necessary so as to prevent forcibly breaking and entering of the house.

In **Okonkwo V. State**, the use of force was allowed since it was not the excessive. In **Ahmed V. The State**, the court held that the force used to repel attack of property by unharmed assailants was disproportionate, thus the appellant could not avail himself under this provision.

In relation to movable property, person in peaceful possession of it or anyone acting under his authority can use such force as is reasonably necessary to resist taking of the property by a trespasser or to retake it from the trespasser.



## **DEATH IN THE PROCESS OF EFFECTING A LAWFUL ARREST OR TO PREVENT ESCAPE OF A PERSON LAWFULLY DETAINED**

Whenever a police officer is effect the lawful arrest of a person committing a felony, to prevent escape, he can use force as is reasonably necessary.

This protection is also extended to those helping him with such arrest. If the offence is punishable by death or not less than 7 years imprisonment, the officer may kill in the process of effecting arrests if there is no other means of arresting the offender.

**NB:** The test of reasonableness is objective, and it is f for the courts to decide as to the necessity of the use of force. The police officer or arresting person is responsible for any excessive use of force. (**section 298 of the Criminal Code**). Thus, in **R V. Ndo**, killing an escaped felon was in the circumstance held to be murder; in **R V. Aniogo**, it was held to be manslaughter.

## **DEATH AS A RESULT OF THE SUPPRESSION OF A RIOT OF MUTINY**

Willfully killing as a result of a riot or mutiny is permitted by law. Thus, the Criminal Code provides that it is lawful to use force that is reasonably necessary and reasonably proportioned to danger apprehended so as to stop continuance of the riot of mutiny. (**Section 276 of the Criminal Code**)

Such measures can be taken either by a police officer, any person acting under the orders of a police officer, or any other person whether subject to military law or not in a situation where it is believed that serious mischief will result from the riot, and there is no time to procure the intervention from a police officer.

Furthermore, it is lawful for a member of the armed forces or police force to obey the lawful command of a superior officer in relation to the suppression of a riot, unless it is unlawful and whether or not a command is lawful is not a question of law.



## TOPIC 3

### THE RIGHT TO FAIR HEARING

The right to a fair hearing is perhaps the most intrinsic of all guaranteed rights. It is the foundation on which all other rights hold ground because it is at the root of the administration of both civil and criminal justice. It connotes a judicial proceeding that is conducted in such a manner as to conform to fundamental concepts of justice and equality.

The Supreme Court in **Kotoye V. Central Bank of Nigeria and 7 Ors** held that;

*"Fair hearing anticipated by the constitution implies that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all parties concerned."*

In the first place, it guarantees a right to a hearing; that is a right to access to court and tribunals established by law whenever there is any question or dispute As to the rights and obligations of a person or whenever any person is charged with a criminal offence.

In the second place, it imposes a duty on such courts and tribunals to act fairly, fearlessly, openly and impartially.

The rule of fair hearing is not a technical doctrine, it is one of substance. The question is not whether injustice had been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given the opportunity of being heard.

The Right to a Fair Hearing is guaranteed in **Section 36 of the 1999 constitution. Section 36(1)** provides that:

*"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality."*

In **Peterside V. IMB (Nig.) Ltd, NIKI TOBI JCA**, following the definition in the **Black's Law Dictionary** came to the conclusion that the word **"civil"** in **Section 33(1)** (the equivalent of **Section 36(1) in the 1999 constitution**) is not used in contradistinction to the word **"criminal"**. **"Civil rights"** as in **Section 36(1)** connotes human rights and excludes other legal rights i.e. contract, tort, etc.



Fair hearing is entrenched in the two concepts of natural justice. Thus, Section 36(1) is a reduction to the writings of common law maxims. They are;

1. **AUDI ALTERAM PARTEM**
2. **NEMO JUDEX IN CAUSA SUA.**

### 1. **AUDI ALTERAM PARTEM**

This rule demands that each party involved in a case must be given an opportunity to present and state his case.

Hence, all the parties must be given notice of hearing so as to have the opportunity to present their cases before a decision is made. He must be given the full statement of the facts against him and evidence relied upon must be made available to him.

In the Nigerian case of **Garba V. University of Maiduguri, Oputa JSC.** explained the rule thus;

*"God has given you two ears, hear both sides"*

### 2. **NEMO JUDEX IN CAUSA SUA**

This arm of natural justice requires that a person should not be a judge in a case in which he is interests are brought to the fore. Between both sides, the judge must hold the scale impartially and disinterestedly, his only interest being that justice be done and be seen to have been done.

Everything must be cleared which will engender suspicion and distrust of the court. Interest may come from the court having direct, peculiarly or proprietary interest, or simply from bias against one of the parties.

## **BIAS**

Bias has been judicially defined to mean an inclination or preconceived opinion or disposition to decide a case or an issue in a certain way which does not leave the mind perfectly open to conviction.

The rule against bias is that if an adjudicator has any interest in the matter in court, he ought not to adjudicate. In the consideration of bias, the courts are not concerned with whether the adjudicator is actually bias, but whether there is a likelihood of bias which could be determined from all the circumstances of the case.



The test of bias, whether there is a reasonable suspicion of bias, should be looked at from the objective standpoint of a reasonable man and not from the subjective standpoint of an aggrieved party.

In **Nnamdi Azikwe University V. Nwafor**, the **Court of Appeal** held that by allowing the members of the examinations committee who allegedly saw the alleged acts of examination malpractice by the respondent to take part actively in the deliberation of the senate which decided to suspend the respondent, these members of the examination committee were judges in their own case.

However, in **Deduwa V. Okorodudu**, the Supreme Court held that the mere fact that the trial judge's mother was an Itsekiri (i.e. of the same ethnic group as the respondents) and lived in an Itsekiri community at the material time is not sufficient to disqualify him from adjudicating on the matter on the ground that he had an interest in the subject matter of the suit. This was reinforced by the fact he had no pecuniary or proprietary interest in the matter.

## INDEPENDENCE OF THE COURT

**Section 36(1) and (4) of the 1999 constitution** provide not only for the right to a fair hearing but a fair hearing by an independent and impartial court or tribunal.

According to the Supreme court in **LPDC V Fawehinmi**, the expression "**court or tribunal**" are interchangeable within the context of the constitutional provisions. They defined it as "**any statutory body which has the power to decide controversies and give decisions**"

Independence of the judiciary means far more than immunity from interference, it means that judges are free to bring their own sense of value to bear in interpreting a law and do not simply reflect the values of government.

The issue of independence of the court is therefore no longer simply one of protecting the judiciary as an institution from executive or legislative interference. It extends to shielding the judge from any form of pressure and sources of influence or pressure.

In **Abiola V. Federal Republic of Nigeria**, the Supreme court held inter alia, that it is clear from the provision of **Section 33(1) of the 1979 constitution** that the independence and impartiality of a court are part of the attributes of fair hearing.

## BODIES OF PERSONS TO WHOM IT APPLIES

The rules of fair hearing under the constitution which incorporates the rules of natural justice applies not to just to proceedings before courts or tribunals, but also to hearings before administrative authorities as provided for in **Section 36(2)**.



----- Justice Oputa Student Chambers Notes Series compiled by Rilwan Shittu & co.

In the case of **LSPDC V. Foreign Finance Corporation**, a right of occupancy was revoked by an administrative body under the **Land Use Act**. The court held that it was a matter affecting the civil rights and obligations and that the persons affected must be allowed to make a representation which includes the right to be furnished with sufficient particulars of the ground of revocation. Also in **Fawehinmi V. LPDC**, it was held that the LPDC is bound to obey the rules of fair hearing. In this instance, the Chairman of the tribunal was also the chief prosecutor. This opposes the maxim of **nemo judex in causa sua** which states that you cannot judge in your own cause.

## **TRIAL IN PUBLIC**

In relation to the determination of civil rights and obligations, the constitution provides in **Section 36(3)** that proceedings of court or tribunal as to the determination of civil rights and obligations of parties shall be held in public. All legal disputes must be heard in open court.

In **Mohammed V. Nwobodo**, the proceedings of a matrimonial case were held in the judge's chambers for two days, although none of the parties requested trial in camera. The Supreme court held that the judge's chambers is not a court hall to which members of the public would normally have access to, and thus rendering the proceedings null and void. It would appear then that the determinant factor is whether or not the public have access to the venue.

## **FAIR HEARING AND CRIMINAL TRIALS**

Criminal matters cannot be tried by administrative bodies such as disciplinary committees, investigative panels nor executive and legislative arms of government as it is beyond their jurisdiction under **the 1999 constitution**.

**Oputa JSC.** in **FCSC V. Laoye** stated that:

**"the jurisdiction of the ordinary courts to try an allegation of crime is a radical and fundamental tenet of the rule of law and the cornerstone of democracy"**

**Section 36 (4) - (12) of the 1999** constitution makes elaborate provisions aimed at safeguarding the right of the accused in criminal trials. The constitution, in those sections lays down specific requirements, which must be observed by a court in the criminal trial of an accused person.

## **SECTION 34(4) - CRIMINAL FAIR HEARING STATED**



By virtue of the provisions in **Section 36(4)**, the following requirements are expressly stated to be indispensable to a criminal trial;

- Fair hearing
- Trial in public
- Trial within reasonable time
- Trial by a court or tribunal

### **SECTION 36 (5) - PRESUMPTION OF INNOCENCE**

*"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty"*

This presumption puts the burden on the prosecution to prove the accused person's guilt, and the standard of proof is proof beyond reasonable doubt. In the cases of **Are V. COP** and **Woolmington V. DPP**, the court held that it is the duty of the prosecution to prove its case beyond reasonable doubt and a balance of probabilities. This provision forms the basis of Section 137 of the Evidence Act which examines the burden of proof in civil and criminal cases.

### **SECTION 36 (6) - CRIMINAL COURT PROCEDURE**

By virtue of the provision of **Section 36 (6)**, the accused person is also entitled to the following rights;

- a. To be informed promptly and in a language he understands and in detail, the nature of the offence for which he is to be charged.
- b. Adequate time and facilities for the preparation of his defence. -  
In **GOKPA V. COP**, it was held that the adequate facilities were not given to the plaintiff as he was denied bail and adjournment of his trial.
- c. Defend himself in person or by a legal practitioner of his own choice - In **Udofia V. The State**, the Supreme court held that fair hearing was denied when an accused person was represented **"improperly, ineffectively and half-heartedly"**.  
In **Awolowo V. Usman Saki**, Awolowo's lawyer was denied entry into Nigeria. The Supreme Court however claimed that the right to a counsel is qualified by the willingness and the ability of the counsel. **In this case, the counsel was willing but was not able.**
- d. Examine witnesses of the prosecution and present his own witnesses.



- e. Assistance of the interpreter - In **SHENFE V. COP** it was held that a **"blow by blow interpretation is required every sentence must be properly and fully interpreted to and from the accused."**

### **SECTION 36 (7) - RIGHT TO RECORD PROCEEDINGS**

*"When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings and the accused person or any other persons authorized by him in that behalf shall be entitled to obtain copies of the judgment in the case within seven days of the conclusion of the case."*

The purpose of this is to allow the accused to pursue his constitutional right of appeal. In **FRN V. OJUOLA OBISAN & Ors** where the record of proceedings was demanded and his former judgment which is the imprisonment of 3 years to a fine of 300 naira at the appeal court.

### **SECTION 36 (8) - NO RETROSPECTIVE LEGISLATION**

*"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed"*

Essentially, the law states that you cannot back-date a written law. A person cannot be convicted of a crime which was not a crime at the time it was not committed. The Military regime in Nigeria is most guilty of this. There are about 300 military decrees guilty of retrospective legislation.

In the case of **Bartholomew Owoh V. Benard Osadegbe**, the plaintiff committed the offence of drug trafficking before the military decree of death penalty for the offence but was still convicted and summarily executed.

Also, in **Ikpasa V. The State**, the appellant who was charged with murder was prosecuted under a new law, not the one in the force at the time of commission of the act but which attracts the same penalty as the old one, and had only a procedural difference. The court held that argument based on the rule against retroactive legislation was misconceived as there was no miscarriage in justice.

### **SECTION 36 (9) - DOUBLE JEOPARDY**



*"No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as the offence, save upon the order of a superior court"*

This provisions codified the common law doctrine of **autre fois acquit or autre fois convict** as the case may be. In **Rabiu V. The State**, it was contended before the Supreme court that proceedings on appeal against acquittal of an accused infringed **Section 33(9) of the constitution** (now **Section 36 (9)**). The court held that the subsection was not infringed since the subsection contemplates the trial of an accused person by a court of first instance.

### **SECTION 36 (10) - PARDON**

A pardon is the forgiveness of a crime and the cancellation of the relevant penalty; it is usually granted by a **head of state** (such as a monarch or president) or by acts of a parliament or a religious authority. It is a general concept that encompasses several related procedures: pardoning, commutation, remission and reprieves.

**Section 36 (10) of the 1999 constitution** provides that:

*"No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence"*

Today, pardons are granted in many countries when individuals have demonstrated that they have fulfilled their debt to society, or are otherwise considered to be deserving. Pardons are sometimes offered to persons who are wrongfully convicted or who claim they have been wrongfully convicted. In some jurisdictions, accepting such a pardon implicitly constitutes an admission of guilt, so in some cases the offer is refused. Cases of wrongful conviction are nowadays more often dealt with by appeal than by pardon; however, a pardon is sometimes offered when innocence is undisputed to avoid the costs of a retrial. Clemency plays a very important role when capital punishment is applied.

Some incidents where heads of states and governments and governors of states have granted convicted persons pardons includes the following:

- President **Olusegun Obasanjo** pardoned notorious armed robber; **Sina Rambo**.
- Former American President, **Richard Nixon** was pardoned by President **Gerald R. Ford** after the Watergate Scandal.
- **General Yakubu Gowon** granted Dim **Chukwuemeka Ojukwu** a pardon 13 years after going to Cote d'Ivoire on exile for inciting the Biafra war.
- Ex- Bayelsa governor, **Diepreye Alamiyesiegha** was pardoned by current Nigeria president **Goodluck Jonathan**.



### SECTION 36 (11) - SELF INCRMINATION

*"No person who is tried for a criminal offence shall be compelled to give evidence at the trial"*

In **Agbachom V. The State**, the trial judge put the accused in the witness box, examined, convicted and sentenced him for contempt. It was held on appeal that putting the accused in the witness box compulsorily and not in the dock, and putting questions to him contradicted **Section 22 (g) of the 1963 constitution** (which is similar to **Section 33 (11) of the 1999 constitution**).

### SECTION 36 (12) - WRITTEN CRIME

*"Subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law"*

In **AOKO V. FAGBEMI**, the conviction of an accused person for adultery was set aside because adultery was no offence under any written law in Southern Nigeria.

Written law as expressed by the constitution refers to any Act of the National Assembly or a law of a State House of Assembly.

### EFFECT OF NON-COMPLIANCE

In **Adigun V. AG. Oyo State**, the Supreme court per **Obaseki JSC** proclaimed the consequence of a breach of the right to fair hearing succinctly by stating;

*"the right to fair hearing being a fundamental constitutional right guaranteed by the constitution, the breach of it in any trial or investigation or inquiry and any action on them is also a nullity."*

**NB:** Once a breach of the right to be heard is established, whether or not the decision made subsequently is correct is irrelevant because any breach of any component of the right to a fair hearing renders the proceedings in the case null and void.



## TOPIC 4

### RIGHT TO PERSONAL LIBERTY

After life, the most precious right is the citizen's right to move about freely, unencumbered, unrestricted, as he wills, within the bounds of law.

Personal liberties are personal guarantees and freedoms that the government cannot abridge, either by law or by judicial interpretation. Though the term differs amongst various countries, some examples of personal liberties include the freedom from torture and death, the right to liberty and security, freedom of conscience, freedom of press, freedom of religion, freedom of expression, freedom of assembly, freedom of speech, the right to privacy, amongst a host of others.

John Stuart Mill sought to define the....*"nature and limits of the power which can be legitimately exercised by society over the individual,"* and as such, he describes an inherent and continuous antagonism between liberty and authority and thus, the prevailing question becomes *"how to make the fitting adjustment between individual independence and social control"*.

According to Lord Denning MR in his book **"FREEDOM UNDER THE LAW"** (1949), he defined personal liberty as the freedom of every law abiding citizen to think what he will, say what he will on lawful occasions without any let or hindrance from any other person.

However, the narrower interpretation of personal liberty was given by **A.V. Dicey** in his book; **"CONSTITUTIONAL LAW"**. he defined personal liberty to mean the right not to be subjected to imprisonment, arrest and any other physical coercion in any manner that does not admit of legal justification.

### STATUTORY FRAMEWORK

- Section 35 of the C.F.R.N
- Article 3 U.D.H.R
- Article 9 I.C.C.P.R
- Article 6 A.C.H.P.R



**Section 35(1) of the 1999 Constitution** guarantees the right to personal liberty and provides as follows:

*"Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law"*

- a. In execution of a sentence or order of court in respect of a criminal offence of which he has been found guilty;
- b. By reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law;
- c. For the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
- d. In the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare;
- e. In the case of a person suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs, or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
- f. For the purpose of preventing the unlawful entry of any person into Nigeria or for effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.

**NB:** The pre-trial constitution guarantees are aimed at ensuring the presumption of innocence, and to prevent unnecessarily long incarceration by way of bail. The proviso to **Section 35 (1)(f)** qualifies the whole of Section 35 to the extent that detention even for criminal offences shall not be perpetual and it states that such detention shall not be longer than the period which is the maximum term for imprisonment prescribed for the offence. These are otherwise called the **"detainees rights"**

**Article 6 of the African Charter on Human and Peoples' rights** also guarantees the right to liberty as follows:

*"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained."*

The concept of liberty according to William Blackstone, in its widest connotation, means the:

*"Power of acting as one thinks fit, without any restraint or control".*



In **Adewole V. Jakande, Omolulu J**, while interpreting **Section 32 of the 1979 Constitution** which is identical to **Section 35 of the 1999 Constitution**, held that the closure of private schools will amount to interference with the personal liberty of parents to train their children as they deem fit.

A persistent question is whether Section 35 (1) (a-f) is exhaustive of the circumstances under which deprivation of liberty is permitted. **Professor Ben Nwabueze** answers this question in the affirmative. He maintained that **Section 35(1) of the constitution** is the substantive provision spelling out the constitutionally permitted grounds for deprivation of liberty. He insists that an order of a tribunal or a body other than a court cannot be a ground for deprivation of liberty in the light of constitution provision.

In **Balewa V. Doherty**, the sections of the tribunals and Inquiry Act which empowered a commission of inquiry to impose a sentence of fine or imprisonment were declared void for being in contravention of **Section 20(1) of the 1960 constitution** which forbade a deprivation of personal liberty by any order save for one made by a court of justice.

#### **SECTION 35 (2): RIGHT TO SILENCE UNTIL CONSULTATION WITH A LEGAL PRACTITIONER OR ANY OTHER PERSON OF HIS CHOICE**

Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any person of his own choice. (**Article 55 (2)(b) of the Rome Statute of the International Criminal Court** contains a similar provision).

In **State V. Rabi, Ngwuta J** lamented that this provision of the Nigerian constitution is honored more in breach than obedience by the police. His Lordship observed the confessional statement obtained in breach of Section 35 (2) of the constitution cannot be received in evidence.

In **R V. Mallinson**, the Court of Appeal of New Zealand held that the key point of the right to consult a lawyer without delay was that it was to be exercised before the legitimate interests of the person who was arrested were jeopardized. Therefore, the right to be informed of the right to consult must be accorded immediately on arrest. No particular formula was required so long as the content of the right was brought home to the arrested person.

The right to remain silent renders unconstitutional the practice whereby the Nigerian police use torture to extract confessional statements from persons who are under arrest or detention. Note that this is contra-cultural because it does not suit the design of our African criminal justice system, although aimed at preventing the subject from self-



incrimination. It is doubtful if the legal practitioner will not tutor the suspect to conceal the subject to conceal the truth about the facts of the case.

Some people are detained longer than necessary for the purpose of obtaining confessional statements from them. In **R V. Te Kira**, the appellant successfully appealed against his conviction for robbery for breach of **Section 23 (3) of the New Zealand Bill of Rights** (Rights of person arrested for offence and not released to be brought as soon as possible before a court), in circumstances where he had been kept in custody on holding charge pending further investigation of a possibly more serious charge to which he confessed during that time. The COA held that a confession obtained as a result of following this practice should be excluded unless in circumstances where it is fair to depart from the prima facie rule.

### **SECTION 35 (3): RIGHT TO BE INFORMED IN WRITING WITHIN 24 HOURS IN A LANGUAGE UNDERSTOOD OF THE FACT & CIRCUMSTANCES OF THE ARREST AND DETENTION**

Any person who is arrested or detained shall be informed in writing within 24 hours, (and in a language he understands) of the facts & grounds for his arrest. The requirement that he should be so informed turns in the elementary proposition in this country, a person is prima facie entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed. If it is effected with a warrant, the warrant of arrest must be shown to the suspect.

In **Minister of Home Affairs and Anor V. Austin and Anor**, the Supreme Court of Zimbabwe held that in drawing up the grounds of detention, it was incumbent upon the detaining authority to appreciate that the detainee must be furnished with sufficient information or particular to enable him prepare his case and to make effective representations before a review tribunal.

In the case of **Christie V. Leachinsky**, a police constable arrested a person for receiving stolen goods without telling him of his grounds of his arrest. The arrest was declared unlawful.

### **SECTION 35 (4)**

Any person who is arrested, or detained in accordance with **subsection 1(c)** of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of -

- a. 2 months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or



- b. 3 months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for a trial at a later date

**Justice Kessington (rtd)** of the Lagos High court granted bail to 136 inmates of the Ikoyi prisons in suit no. **M/115 of 1994** because the detainees had been in detention for over 9 years without trial.

## SECTION 35 (5)

Reasonable time for the purposes of **subsection (4)** above is defined in subsection (5) as follows:

- a. In the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometers, a period of 1 day.
- b. In any other case, a period of two days or such longer as in the circumstances may be considered by the court to be reasonable.

**Section 35 (4) & (5)** does not yield to easy interpretation. What is clear about the subsections, however is that a person who is arrested or detained must be brought to a court of competent jurisdiction within 24 hours or 48 hours as the case may be depending on the availability of a court within 40 kilometers or otherwise.

In **A.G Ondo State V. A.G Federation**, the Supreme court held that **Section 35 of the Corrupt Practices and Other related Offences Act** is unconstitutional for violating the right to personal liberty guaranteed in the constitution. **Section 35 of the Act** empowers the ICPC to arrest and detain persons indefinitely until the person complies with the summons of the commission.

In **Eda V. C.O.P**, **Sections 17 of the CPA and and 27 of the Police Act** which empower the police to take an arrested person to court as soon as practicable were held to be unconstitutional for being inconsistent with **Section 35 (1)(c), (4) & (5) of the 1999 constitution which** requires that such a person be taken to court within a reasonable time.

Bail may be denied in certain circumstances. In **Onu Obekpa V. COP**, the applicant was arrested by the police on **30th August, 1980** on allegation of commission of the offence of theft. On **15th September, 1980**, he was brought before the Grade II magistrate court on a **First Information Report** and his counsel made an application for bail on his behalf. The police prosecution opposed the application for bail on the ground that there were some other suspects who were at large and that if the applicant was released on bail, it may be difficult to arrest those other suspects. The learned Magistrate accepted this explanation



and refused bail and accordingly remanded the applicant in prison custody until **22nd September, 1980.**

The learned judge, **IDOKO J**, said in the case;

*"As it appears, the spirit behind the provisions in Section 32 (4)(a)(b) of the constitution is to keep an accused person out of incarceration until the process of court trial. It is a conditional privilege which he is entitled to under the constitution"*

He went further to adduce the rationale for that provision as being that:

*"It allows those who might be wrongfully accused, to escape punishment which any period of imprisonment would inflict while awaiting trial, the stay out of prison guarantees easy accessibility to counsel and witness and ensures unhampered opportunity for preparation of the defense. Of much further advantage in this regard is the fact that unless the right to bail or to freedom before conviction is preserved, protected and allowed, the presumption of innocence constitutionally guaranteed to every individual accused of a criminal offence would lose its meaning and force."*

The right to personal liberty could be suspended where there is a threat to national security. In **Dokubo-Asari V. FRN**, Asari and others at large, were said to have signed one communiqué which castigated Governors, Local Government Chairmen and Niger Delta Development Commission Directors, alleging that they in connivance with the Federal Government looted the oil revenue accruing to the people of Niger Delta while pursuing their personal interests. The appellant was arrested by the police and taken to court on a 5-count charge of conspiracy, treasonable felony, forming, managing and assisting in managing an unlawful society. Asari Dokubo, was subsequently denied bail.

## **ARREST, DETENTION & BAIL**

The practice whereby the police or other security agencies arrest people simply in order to make it easier for them to obtain information, without any real suspicion that the person is involved in an offence, has been held to constitute a breach of **Article 5 (1)(2) of the European Convention** which is quite similar to the provision in **Section 35 (1)(c) of the constitution**, since it was not aimed to achieve one of the purposes permitted under the paragraphs.

Furthermore, a person cannot be arrested for the offence of another. Criminal liability is personal and not vicarious. Article 7 of the African Charter on Human and People's Rights



stipulates clearly and unequivocally that punishment is personal and can be imposed only on the offender.

**In ACB V. Okonkwo, NIKI TOBI JCA** (as he then was) said:

*"I know of no law which authorizes the police to arrest another for the offence committed or purportedly committed by the son. Criminal responsibility is personal and cannot be transferred."*

A person who merely reports a case to the police does not ipso facto become liable if the police on basis of the report effect arrest. It was held in **Fajemirokun V. C.B (C.L) (Nig.) Ltd.** that it is for the applicant who alleges that he was arrested and detained by the police on the instigation of another person to prove his arrest & detention where the respondent denies the allegation. In such circumstance, the onus lies on the appellant who alleges that he was arrested and detained to show that the respondent set the law in motion against him and that the respondent was actively instrumental to his arrest and detention.

To constitute an arrest, the police officer shall actually touch the body of the person to be arrested, unless there be a submission to custody by word or conduct. The person is not to be handcuffed, bound or subjected to unnecessary restraint without the order of a court, magistrate or justice of the peace, except where there is a likelihood of violence being committed or an attempt being made to escape or for the personal safety of the person concerned. There is no arrest where a person is merely invited to the police station and he honours the invitation (**Afeze V. Momo**).

According to the court, **"a holding charge"** is unknown to Nigerian law and an accused person detained there-under is entitled to be released on bail within a reasonable time before trial, more so in a non-capital offence.

In **Ayinla & 191 & Ors V. AG Lagos State & Ors**, the applicants had been under remand for periods ranging from 5 months to 9 months for capital offences, mostly armed robbery under a "holding charge"/

Similarly in **Bayo Johnson V. Lufadeju**, the COA held that there cannot be a holding charge hanging over an accused person in court pending the completion of investigations into the case against him. According to the court, neither the Nigerian constitution nor any other law in force in Nigeria provides for a **holding charge**.

## **BAIL IN RESPECT TO PERSONS SUSPECTED OF COMMITTING CAPITAL OFFENCES**

In cases involving capital offences, though Section 35 (4) & (5) are inapplicable, a person should not be detained by the police for too long before being taken to court, and if taken to court, the court ought not to order indefinite detention, except where information has actually been filed against the accused.



In **Pius Ozo Anaekwe V. COP**, the appellant and 9 ors were charged before the Chief Magistrate court, for conspiracy and murder. The learned Chief Magistrate ordered that the accused persons be remanded in prison custody. Application for bail was filed before the High Court and the judge refused it on the ground that the offence allegedly committed was murder. Dissatisfied with the refusal of the application, the appeal court held as follows:

*"Unless the right to pre-trial is preserved, the presumption of innocence secured after centuries of struggle, would lose its meaning. And the constitutional presumption of innocence enshrined under Section 33 (5) of the 1979 Constitution can be invoked in a capital offence where a prima facie case has not been established against the accused"*

Thus, even where a prima facie case has been made against an accused in a capital offence, he still retains the right to be released if he has not tried within a reasonable time.

### **RELEVANT FACTORS IN CONSIDERATION OF A BAIL APPLICATION**

In **Bamaiyi V. State**, the Supreme Court held that the factors which the court must consider in application for bail are the following:

- The gravity of evidence against the accused.
- The availability of the accused to stand trial.
- The nature and gravity of the offence.
- The likelihood of the accused interfering with the court of justice.
- The criminal antecedents of the accused person.
- The likelihood of further charges being brought against the accused.
- The probability of guilt.
- The protection of the accused.
- The necessity to procure medical or social report pending final disposal of the case.

Bail can be generally defined as surety taken by a person duly authorized for the appearance of an accused person at a certain day and place, to answer and be justified by law. In **Fawehinmi V. The State**, one of the circumstances accepted by the COA as justification for grant of bail on the ground of special circumstances is ill-health.

### **SECTION 35 (6): REMEDIES, COMPENSATION AND APOLOGY**

By virtue of **Section 35 (6) of the constitution**, a person unlawfully arrested or detained, i.e. contrary to constitutional requirements is entitled to compensation or public apology from the appropriate authority of person, i.e. "an authority or person specified by law".



The courts have stated the fact that a person or authority known to law here refers to public persons and institutions, and not provide individuals when enforcement is sought through the Fundamental Rights (Enforcement) Procedure Rules 1979. Action may however be brought under common law against an individual. According to the court in **Madu V. Onauguluchi**, the word person in the section includes "Any company or bodies of persons corporate or incorporate."

In **Minister of Internal Affairs V. Shugaba AbdulRahman Darman**, Coker JCA stated that "such an award must be adequate to repair the injury to the plaintiff's reputation which was damaged, the award must be such as would atone for the assault on the plaintiff's character and pride which were unjustifiably invaded."

In **Ogor V. Kolawole**, the court stated that the award of compensation in cases of unlawful deprivation of liberty under Section 35 (6) of the 1999 constitution is mandatory.

## SECTION 35 (7)

Nothing in this Section shall be construed:

- a. In relation to **Subsection (4) of this Section**, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital offence; and
- b. As invalidating any law by reason only that it authorizes the detention for a period not exceeding 3 months of a member of the armed forces of the federation or a member of the Nigerian Police force in the execution of a sentence imposed by an officer of the armed forces of the federation or of the Nigerian Police force, in respect of an offence punishable by such detention of which he has been found guilty.



## TOPIC 5

### FREEDOM OF EXPRESSION & THE PRESS

The right to freedom of expression is one of those rights seen as very essential and fundamental to the development of a civilized society. It is the foundation for the enforcement of other rights, encroachment of which is made known by expression. A major determinant of a nation's respect for the rights of its people is the extent to which they can express themselves.

Freedom of the press or freedom of the media is the freedom of communication and expression through mediums including various electronic media and published materials.

While such freedom mostly implies the absence of interference from an overreaching state, its preservation may be sought through constitutional or other legal protections. With respect to governmental information, any government may distinguish which materials are public or protected from disclosure to the public based on classification of information as sensitive, classified or secret and being otherwise protected from disclosure due to relevance of the information to protecting the national interest. Many governments are also subject to sunshine laws or freedom of information legislation that are used to define the ambit of national interest.

The **United Nations' 1948 Universal Declaration of Human Rights** states:

*"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and impart information and ideas through any media regardless of frontiers"*

This philosophy is usually accompanied by legislation ensuring various degrees of freedom of scientific research (known as scientific freedom), publishing, press and printing the depth to which these laws are entrenched in a country's legal system can go as far down as its constitution. The concept of freedom of speech is often covered by the same laws



as freedom of the press, thereby giving equal treatment to spoken and published expression.

As remarked by the President of the **International Court on Human Rights**:

*"Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific & cultural societies, and in general, those who wish to influence the public."*

According to **Prof. B.O Nwabueze**, free speech and free press are instruments of self-government by the people to be informed and educated about the affairs of the government. Political responsibility as a concept of democratic government requires that public opinion shall be one of the factors informing the actions of the government. Free speech and free press enable; corruption, abuse of office and other official wrongdoings to be exposed.

It was the press that published stories of the systematic torture of Algerians by French soldiers during the Algerian war of independence. The press botched the presidential ambition of Garry Hart of America when his amorous past was put in the public glare. The Nigerian press was at the forefront of the opposition to the corrupt, inept, and dictatorial regime of **General Ibrahim Badamosi Babangida** and **General Sanni Abacha**. It was the alliance between the media and the National Assembly that botched the ambition of former **President Olusegun Obasanjo** to secure a 3rd term in office through manipulated constitutional amendment.

The declaration of Principles on Freedom of Expression in Africa reaffirmed the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms. In **IGP V. ANPP**, the court of appeal described freedom of expression as the bone of democracy.

**Section 39 of the constitution** which guarantees the right to freedom of expression provides as follows:

1. Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
2. Without prejudice to the generality of **Subsection (1)** of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions, provided that no person, other than the government of the federation or a state, or any other person or body authorized by the president on fulfillment of a condition laid down by an Act of National Assembly,



shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

The **African Charter in Article 10** guarantees the right to freedom of expression as follows:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinion within the law.

Under the constitution, the obligations of the press in the context of the fundamental objectives and directive principles of the state policy are stated in the following terms:

*"The press, radio, television and other agencies of mass media shall at all times be free to uphold the responsibility and accountability of the government to the people."*

The question whether the constitutional guarantee of freedom of expression shields media practitioners from being required to disclosed the sources of their information arose in a number of cases. The case of **Attorney General V. Foster** where the English court of Appeal ruled that the journalists are not entitled to immunity of non-disclosure represents the common law position.

On the contrary, the court held in **Adikwu V. Federal House of Representatives** that a newspaper cannot be required to disclose its sources of information except in grave or exceptional circumstances.

However, the court in **Tony Momoh V. Senate**, the Senate Committee of Inquiry summoned the then Editor of Daily Times, Tony Momoh, to disclose the source of his information which formed the basis of an article he published about the senators. The court held that such disclosure could violate his right to freedom of expression guaranteed under **Section 39(1) of the 1999 constitution**. On appeal, the Court of Appeal held that:

*"The press or any other medium of information cannot claim any right to confidentiality of the source of their information in a proper investigation by a House of the National Assembly of the police."*

Any restriction on the right to freedom of expression must be in accordance with law which is reasonably and such law must have the objective of achieving any of the purposes set out in either **Section 39(3) or Section 45(1) of the 1999 constitution**.

Under Section 39 (3), the right to freedom of expression could be restricted by a law reasonably justifiable in a democratic society, for the purpose of preventing the disclosure of information received in confidence, or for the purpose of maintaining the authority and independence of the courts. Under Section 45 (1), permissible limitations must be reasonably justifiable in a democratic society in the interest of defense, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons.



The concept of press freedom is not the sole property of journalists or proprietors, but can also be legitimately claimed by the society at large, and even the government to some extent. It is clear that press freedom connotes the following:

1. No prior or subsequent censorship. i.e the freedom to own
2. Freedom to gather & the right not to be compelled to disclose the source of information
3. Freedom to import
4. A passive right to receive
5. Freedom from unreasonable punishment for what is published.

According to **Cahn**:

*"No other institution affects the shapes & nature of society so directly, no other civil liberty penetrates community life so pervasively and since freedom of the press is at the bottom of mutual covenant among all the people- no other covenant they undertake displays so precisely the people's estimate of their own intelligence, critical judgment, and moral worth. To consider the law of press freedom is to consider the social quality and torture hopes of democracy itself"*

### **1. FREEDOM FROM INITIAL OR SUBSEQUENT CENSORSHIP**

This connotes the freedom to own and establish a press. This freedom which belongs to the proprietor of the press, is the principal meaning and concern of the press since there is no real danger by merely publishing. Many civilised and modern constitutions prohibit initial censorship, which usually affects ownership. All these forms of censorship were unlike its predecessors, expressly or by implication, prohibited by the 1999 constitution.

Thus in Section 39(2):

"Without prejudice to the generality of **Subsection (1)** of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions."

There is a proviso to the section that:

*"... that no person, other than the government of the federation or a state, or any other person or body authorized by the president on fulfillment of a condition laid down by an Act of National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever."*



In the US, the ban of newspapers, magazines or other publications are permitted, but only in exceptional cases. For example, where it is prejudicial to the prosecution of a war which the country is involved or incites acts of violence and overthrow by force of orderly government.

The government has to prove that situation necessitating the ban was exceptional. There is no doubt that it is more desirable for the exercise of such power to be subject to litigation.

## **2. FREEDOM TO GATHER INFORMATION & THE RIGHT TO BE COMPELLED TO DISCLOSE ITS SOURCE**

This freedom is enjoyed both by proprietors and journalists. As regards to gather information, it would appear that this is an important right incidental to that of freedom of the press in the light of the constitutional rights to receive ideas without interference. There is however, no constitutional rights actually guaranteeing unrestrained right to gather any type of information not normally available to the general public.

It cannot be denied that some measure of freedom to gather information is very necessary for the press to be able to perform its very necessary role of keeping the public informed about governmental activities and being a watchdog for the public.

For example, in the US, there exists the **Freedom of Information Act of 1974** which gives some measure of right in this respect by imposing certain duties on the custodian of an information.

A more important point is whether under the Nigerian constitutions, the press has a right not to be compelled to disclose the source of an information. This point was contested in **Oyegbemi & Ors V. AG Federation** where the court held that:

*"No person, be he an editor, reporter, or publisher of a newspaper can be compelled to disclose any source of his information for any matter published by the person and non-disclosure cannot be contempt of court. This is subject to interest of justice, national security, public safety, order, morality, welfare of persons or prevention of disorder or crime. Consequently, the right to withhold information like all other freedoms, not absolute."*

## **3. FREEDOM TO IMPORT**

The Proprietors & journalists of a press have the right to import information gathered to members of the public. This freedom to "import ideas" is specifically mentioned in **Section 39 of the constitution** thus signifying its importance. Also, the freedom to gather and that



of the public to receive, which will later be discussed, would be of no use without this crucial freedom.

#### 4. FREEDOM TO RECEIVE INFORMATION

There is also a corresponding right of the populace to receive or obtain information imparted by the press. This is based on the right of the people to be informed about the workings of their government & society generally.

The freedom of the press to impart information would be of no use without the corresponding right of the populace to receive. This right only starts when the information leaves the press and ends when it is received. It may be impeded by banning of writing, or jamming of radio or television programmes.

#### 5. SCHOOLS

The right to hold opinions, receive and impart ideas information without interference has also been used to cover establishment and ownership of schools. In **Adewole V. Jakande**, the court held that the provisions of the **1979 constitution** guaranteeing the right to freedom of expression extends to instructions given and received in schools, and is not limited to freedom of the press only.

The Court in **Archbishop Okogie V. AG Lagos state**, held that:

*"While it is conceded that... the constitution permits the imposition of reasonable restrictions on the exercise of the rights to freedom of expression, it is difficult to conceive of a reasonable restriction that would be justifiable in a democratic society in refusing to allow private primary schools to operate."*

The court has however recognized in many cases, duty of the government to regulate the standard of education.

Worthy of note is the fact that under other jurisdictions, this right has been used to cover other areas of public life such as correspondence of prisoners, right to view parliamentary proceedings, issues of commercial speech, etc.

Thus, in **Tinker V. Des Moines Independent Community School District**, high school principals banned the wearing of black armbands by students, used as a symbol against the United States' action in Vietnam. The court in reinstating the students suspending for violating the ban held that the students as well as the teachers do not shed their constitutional right to expression even while in school.



This right has been applied to the right of prisoners to receive mail and outsiders to send mail to the prisoner who can be only be censored in the interest of security, order & rehabilitation.

It has also been extended to the issue of right to view parliamentary proceedings. In **NB Broadcasting V. Nova Scotia**, a television company wanted to televise the proceedings of the House of Assembly of the Canadian province of Nova Scotia and the speaker refused the request. The court held that the ban on television prohibits a mode or means of expression. To limit a mode of expression is to limit freedom of expression.

## LIMITATIONS

Laudable as this right is, it is not and cannot be absolute. Though the public has a right to accurate information and fair comments, this must be balanced against other claims in the society which may often conflict except when overridden by public interest.

**Blackstone** is of the view that:

*"To punish us as the law does.... any dangerous or offensive writings which when published, shall in a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only foundation of civil liberty."*

As stated in all the international and regional instruments, limitation by law and imposition of duties in this respect is permitted. Thus, **Section 39 (3) of the 1999 Constitution** provides:

"Nothing in this section shall invalidate any law that is reasonably justifiable on a democratic society -

- a. For the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephone, wireless broadcasting, television or the exhibition of cinematograph films, or
- b. Imposing restrictions upon persons holding office under the government of the federation or of a state, members of the armed forces of the federation or members of the Nigerian Police force or other government security services or agencies established by law.

Thus, in the light of these constitutionally permitted grounds, the following restrictions have been imposed by law;]



## INFORMATION RECEIVED IN CONFIDENCE

Various issues come under this head :

### 1. State Privilege:

This has been defined as "the right of the state through its agents or functionaries to withhold evidence which it considers injurious to public interest of revealed in open court.

### 2. Official Secrets:

Provisions relating to the disclosure of official secrets are provided for under the **Criminal Code** and **The Official Secrets Act** and as has been noted; this area is undoubtedly the most comprehensive... on restrictions on access to government held information.

**Section 97 of the Criminal Code** provides the mode of punishment for any person who being employed on the public service, publishes or communicates any fact which is meant to be secret.

Similarly, **Section 1 (1) of the Official Secrets Act** makes it an offence for anyone to transmit classified matters to anyone who is not authorized on behalf of the government to transmit it.

### 3. Contempt of Court:

In the course of the administration of justice by the courts, there is no doubt about the need to ensure the absence of improper interference and obstructions, and the courts themselves play an important role in this respect.

One very crucial power exercised by the court here is in relation to the law of contempt of court, which is a limitation of the right to freedom of expression. The exercise of this power stems from the authority of judges to control what happens in or around their court and is part of the inherent powers and sanctions of the Court under **Section 6 (6) (a) of the 1999 Constitution**.

### 4. Perjury:

The offence of perjury affects the right to freedom of expression & the press and is directed towards the maintenance of the authority and independence of the courts.



In **R V. Onward**, where a poorly paid clerk who had been charged with stealing some petrol drums of considerable value, denied ownership of a car which belonged to him, the court held that it amounted to perjury.

Apart from the above stated grounds, **Section 45 (1) of the 1999 Constitution** also generally makes provisions for further restrictions:

- a. In the interest of defense, public safety, public order, public morality or public health.
- b. For the purpose of protecting the rights and freedoms of other persons.

## 5. Obscene and harmful publications

The basis for restriction here is in the interest of public morality. In Nigeria, the applicable law is fashioned after the **English Obscene Publications Act of 1959** which has been modified by the **1964 Obscene Publications Act** and the **Criminal Law Act of 1977**.

Under **Section 2 of the Children and Young Person (Harmful Publications) Act**, it is an offence to publish any book or magazine which is a kind likely to fall into the hands of children or young persons which portrays the commission of crimes, the acts of violence or cruelty, or incidence of a repulsive or horrible nature.

An article or matter is only obscene if it's likely audience will be depraved or corrupted by it. The test of obscenity is whether the effect of the article in question upon that person is such as to deprave or corrupt him.

In **R V. Clayton**, on a charge of selling obscene photographs to 2 policemen, the court held that the charge against the accused person could not hold since the persons they sold the photographs to were not persons likely to be depraved or corrupted by it.

## 6. Sedition

This limitation is perhaps one of the most objectionable, perhaps because it infringes on freedom of expression in the political context. The offence of sedition is provided for in the **Criminal & Penal Code**.

In **African Press Ltd. V. The Queen**, the appellants were charged for printing a seditious publication. The court held that the purpose of the article was not only for the purposes of causing disaffection and discontent towards the colonial administrative officers by the people but was also capable of causing discontent & disaffection among the administrative officers.



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In **DPP V. Chike Obi** where the appellant referred the Federal Supreme Court to the point whether or not the law of sedition contravened his right to freedom of expression guaranteed under **Section 23 of the 1963 Constitution**. The Supreme Court held that the law was "**reasonably justifiable in a democratic society**" and therefore was constitutional.

In **Nwankwo V. State**, Chief Nwankwo was charged, convicted and sentenced to 12 months imprisonment for publishing a pamphlet titled "**How Jim Nwobodo rules Anambra State**". The court went ahead to justify Chief Nwankwo's act, saying that he was entitled to a freedom of expression.

## 7. Defamation

Another way in which the right to freedom of expression is limited under the law relating to defamation of character. Ad was succinctly put by Lord Denning:

*"To our way of thinking it is elementary that each man should be able to inquire and seek after the truth until he has found it. Everyone in kind should be free to think his own thought, have his own opinions, and to give voice to them, in public or in private, so long as he does not speak ill of his neighbor."*

In **Tony Momoh V. The Senate House of Assembly**, the fact of such limitation on free speech was recognized. **Section 45's** general derogation clause also makes this limitation constitutional. For the purpose of protecting the rights & freedoms of other persons, which here is a person's right to a good reputation or a good name.

As stated by the court in **Times Publishing Company V. Carlisle**, good name is amongst a man's priceless possessions. A man's reputation is therefore absolutely indispensable in the pursuit of happiness.



## TOPIC 6

### RIGHT TO DIGNITY OF THE HUMAN PERSON

At the heart of human rights is the belief that everybody should be treated equally and with dignity – no matter what their circumstances. This means that nobody should be tortured or treated in an inhuman or degrading way. It also means that nobody has the right to ‘own’ another person or to force them to work under threat of punishment. And it means that everybody should have access to public services and the right to be treated fairly by those services. This applies to all public services, including the criminal justice system. For example, if you are arrested and charged, you should not be treated with prejudice and your trial should be fair. This right is one of the most intrinsic rights of a man and can be seen as the determinant of personhood.

**Article 1 of the Universal Declaration of Human Rights** provides:

*"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

The concept of human dignity and personhood transcends the limitation of national constitutional provisions.

**Section 34 of the 1999 constitution** provides:

Every individual is entitled to respect for the dignity of his person and accordingly -

- a. No person shall be subjected to torture or to inhuman or degrading treatment.
- b. No person shall be held in slavery or servitude; and
- c. No person shall be required to perform forced or compulsory labour.



## **A. RIGHT AGAINST TORTURE, INHUMAN OR DEGRADING TREATMENT**

The **United Nations General Assembly** once stated that torture constitutes an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment.

In similar vein, the **European Commission on Human Rights** maintained that the word torture is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.

According to **Prof. Nwabueze**, this covers not only the type of punishment meted out to an offender, but his treatment in police custody or prison. In the words of **Niki Tobi**;

*"the word torture etymologically means to put a person to some form of pain which could be extreme. It also means to put a person to some form of anguish or excessive pain."*

In **State V. Rabi**, the confessional statement credited to the respondent was obtained by use of torture.

An inhuman treatment has been defined as a barbarous, uncouth, and cruel treatment, a treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty.

In **Mogaji V. Board of Customs & Excise, Adefarasin CJ** held that it was a violation of the constitutional prohibition of inhuman or degrading treatment to organize a raid with the use of guns, horse-whips and tear gas in a market in the course of a purported search of contraband goods & to injure custodians of such goods.

Also, in **Alaboli V. Boyle**, the beating, pushing and submersion of the applicant's head in a pool of water by the first respondent was held to constitute inhuman and degrading treatment.

### **I. CAPITAL PUNISHMENT**

Decisions from foreign jurisdictions and international tribunals have been consistent that corporal punishment as a sentence imposed by a judicial or quasi-judicial body constitutes inhuman and degrading treatment. **Protocol No. 6 to the European Convention of Human Rights and Fundamental Freedoms** provides for example in **Article 1** that *"No one shall be condemned to death penalty or executed."*

In the Indian case of **Triveniben & Ors V. State of Gujarat & Ors**, the court held that an inordinate delay in the execution of a death may entitle a prisoner to come to court for examination of whether it is just and fair to allow it.



In **Madhu Metha V. Union of India**, the death sentence was altered to life imprisonment because the prisoner has been awaiting a decision on his mercy petition for over 8 years as a result of which he had suffered mental agony of being under death sentence for too long.

**The European Court of Human Rights** held in **Soering V. United Kingdom** that extradition could amount to inhuman or degrading treatment under **Article 3** of the **European Convention on Human Rights** because of the death row condition in the death row centre. This was because it was found that a man went for about 6-8 years before execution in the American state of Virginia where the applicant was to be extradited to, and his crime of murder may have well attracted the death sentence.

There is to this day no Nigerian decision under this head, although Nigerian criminal law still authorizes whipping as a measure of punishment on juvenile offenders.

## **II. PRISONERS, DETAINEES AND THE RIGHT TO HUMAN DIGNITY**

The right to dignity of the human person is most commonly violated in Nigeria in relation to detainees and prisoners. Detainees in Nigeria are subjected to all manner of torture, inhuman and degrading treatment, in some cases for the purpose of extracting confessional statements from them.

The Supreme Court of India stated unequivocally that a person during lawful detention is entitled to be treated with dignity befitting any human being and the mere fact that he has been detained lawfully does not mean that he can be subjected to ill treatment much less tortuous beating.

In **Catholic Commission for Justice and Peace V. AG. Zimbabwe & Ors**, the Supreme court of Zimbabwe pointed out that "**prison walls do not keep out fundamental rights and protections**" and thus prisoners, no matter the magnitude of the crime are not reduced to non-persons but retain all basic rights, save those inevitably removed from them by law, expressly or by implication. Consequently, they are entitled to the right to human dignity.

Violations here have been held to include medical neglect, beating of prisoners, housing of prisoners in poor prison conditions, deplorable sanitation, overcrowding of prison inmates, starvation and malnutrition, etc. In the light of this, there is no doubt that conditions in Nigerian police cells and prisons negate this right to dignity of the human person. This makes rehabilitation as a goal of punishment almost impossible to achieve as many of the prisoners come out disillusioned and much more hardened.

As was reported in the **Newswatch of June 19, 1989**, the Nigerian prisons have become a national disgrace. Convicts who survive the ordeal of the prison come out usually worse, mentally and physically wrecked. In **Fawehinmi V. Abacha**, the court of appeal held that



the state has a responsibility to ensure that a person in custody is not put under undue danger of his health and safety.

## **B. PROHIBITION OF SLAVERY OR SERVITUDE**

To further enhance this prohibition, **Section 364 of the Criminal Code** makes it a crime to unlawfully imprison, or take a person out of Nigeria without his consent, or prevent him from applying to the court for his release; or from being discovered by any other person; or prevent a person who ought to have access to him from discovering the place of imprisonment.

Furthermore, **Section 366 of the Criminal Code** makes it a crime to intimidate a person, make and compel him to do an unlawful act, or prevent him from doing an act he is unlawfully entitled to do. For example, through threats of injury to his person; reputation or injury to any other person; or through persistent following, besetting or watching the person or his place of abode or work. In other words, under these provisions, any type of slavery or servitude, or compulsion to act in a particular way is prohibited.

## **C. PROHIBITION OF FORCED OR COMPULSORY LABOUR**

This means all forms of forced labour, whether legally imposed or not are generally prohibited here. **Section 34 (2)** however makes provisions for some exceptions to this:

- a. Any labour required in consequence of the sentence or order of court.
- b. Any labour required of members of the armed forces of the federation and the police force in pursuance of their duties as such or, in the case of persons who have conscientious objections to serve in the armed forces of the federation, any labour required instead of such service.
- c. Any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or
- d. Any labour or service that forms part of;
  - i. Normal command or other civil obligations for the well being of the community i.e. environmental sanitation.
  - ii. Such compulsory National service in the armed forces of the federation as may be prescribed by an act of the National Assembly.
  - iii. Such compulsory National Service which forms part of the education & training of citizens of Nigeria as may be prescribed by an Act of the National Assembly. e.g. the National Youth Service Corps scheme.



In *Nkpa V. Nkume*, the court of appeal acknowledged that under **Section 34 (2) (d)**, forced or compulsory labour does not include any labour or service that forms part of normal communal or other civil obligations for the well-being of the community.

#### **D. DISPROPORTIONALITY OF PUNISHMENTS TO THE OFFENCE COMMITTED**

The right to the dignity of the human person may be violated when punishment is disproportionate to the offence committed. In ***Soering V. United Kingdom***, the **European Court of Human Rights**, held that it might be necessary to take account of such factors such as the proportionality of punishment contravenes the provision against inhuman and degrading treatment.

In ***State V. Makwanyane*** the **Constitutional Court of South Africa** held that proportionality is an ingredient to be taken into account on deciding whether a penalty is cruel, inhuman and/or degrading.

### **TOPIC 7: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS**

The Supreme Court in ***Abacha V. Fawehinmi*** held that the provisions of the charter have become part of Nigeria's domestic law and are enforceable in Nigerian courts. That decision has gone a long way in settling the issue of the legal enforceability of ECOSOC rights under the charter in Nigeria.

The recent pronouncement in ***SERAC V. NIGERIA*** is a watershed in the evolving jurisprudence of ECOSOC rights under the charter. The commission affirmed the internationally accepted notions of four levels of obligations imposed by Human Rights instruments and held that these notions apply in the application of the charter. The commission noted that the obligations imposed on states embraced the duty to "respect, protect, promote and fulfill" the rights guaranteed under the charter.

#### **PROMOTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS USING DOMESTIC LEGAL MECHANISMS**

Three important factors impede effective promotion and protection of economic, social and cultural rights in most jurisdictions, in particular, common law jurisdictions such as Nigeria.

- The first, arising from the classification of rights in international law into generations, is the wide conception that ECOSOC rights, unlike civil and political rights, are not justiciable.



- Closely following this reasoning is yet a wider conception that the provisions of fundamental objectives and directive principles of state policies, in most modern written constitutions, are ECOSOC rights provisions, and therefore, are by the constitutions, non-justiciable.
- The third factor is the provision of the very international treaty that codified ECOSOC rights to the effect that ECOSOC rights should be realized or implemented progressively. The justification for this is said to be that ECOSOC rights require financial and material resources and that international law or the municipal legislature would not impose obligations with the financial implications on the executive government. Each government should, therefore, fashion out how it would realize the ECOSOC rights based on the resource available to it.

It is noteworthy that not all ECOSOC rights require vast resources; for instance, labor rights, rights to free economic activity, and so on.

**The International Convention On Economic, Social And Cultural Rights (ICESCR)** provides in **Article 2 (1)** that:

*“Each state party to the present Covenant undertakes to take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant”*

## **DIRECTIVE PRINCIPLES & ECOSOC RIGHTS**

Most written constitutions, such as Nigeria, set out objectives and state policy goals which the government is obligated to pursue for the better life of its citizens. These directive principles are also made non-justiciable.

Under the **1999 constitution**, Directive Principles in **Chapter 2** enjoins the state to ensure that its policies and actions aim towards the full realization of ECOSOC rights such as health, education, employment, etc.

**Section 6(6) (c)** of the constitution provides that:

*“The judicial powers vested in the courts shall not extend to any issue or question to whether any law or any judicial decision is in conformity with the Fundamental objectives and Directive Principles of State Policy set out in Chapter 2 of the Constitution.”*

The wide conception and interpretation given to the provision is that Chapter 2 of the constitution contains ECOSOC rights provisions, and **Section 6(6) (c)** of the constitution disallows the courts from entertaining complaints of the breach of those rights. In other words, the jurisdiction of the courts over ECOSOC rights has been removed by **Section 6(6)**. In a number of cases concerning ECOSOC, the courts had declined to offer any



remedy pleading the non-justiciability clause in **Section 6(6) (c)**. In **Uzoukwu V. Ezeonu II**, the Nigerian Court of Appeal said concerning ECOSOC rights that:

*“There are other rights which may pertain to a person which are neither fundamental nor justiciable in court. These may include rights given by a the constitution ads under the Fundamental Objectives and Directive Principles of State Policy under Chapter 2 of the constitution.”*

Provisions for ECOSOC rights can be seen in many other municipal laws, for instance, the right to housing and protection from forceful eviction is provided under the **National Housing Fund Decree, Recovery of Premises laws** of various states of the federation. The latter provides that no one shall be evicted without due process and set out what amounts to due process in various circumstances depending on the nature of the tenure. **The Land Use Act** protects land tenure and provides for adequate compensation for land acquisition for public purposes.

## **PROGRESSIVE REALIZATION OF ECOSOC RIGHTS**

States are required to implement progressively to its capacity ECOSOC rights in the covenant. Resources and capacity of states vary, thus richer states would have more capacity to implement these rights that the poorer states. Therefore, each state is expected to implement those rights at the pace of its resources, though progressively.

There is no doubt that the implementation of most ECOSOC rights have financial implications, such as building schools, health centres, subsidizing healthcare, creating employment, etc. However, a state that cannot provide access to education cannot also guarantee the right to freedom of expression of its citizens. So, if a state unconstitutionally undertakes to implement civil and political rights, it must also be ready to implement ECOSOC rights in order to give effect and content to the former.

## **THE AFRICAN CHARTER AND ECOSOC RIGHTS**

The African Charter contains a number of recognized ECOSOC rights such as the Rights to Health, Education, safe environment, etc. For instance, **Article 15 – 17 of the Covenant** provides that:

- 15.** Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.



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**16(1).** Every individual shall have the right to enjoy the best attainable state of physical and mental health.

**(2).** State parties to the present charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

**17(1).** Every individual shall have the right to education.

**(2).** Every individual may freely take part in the cultural life of the community.

**(3).** The provision and protection of morals and traditional values recognized by the community shall be the duty of the state.

**Articles 21, 22 & 24** provide that:

**21(1).** All people shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

**(2).** In a case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

**22(1).** All people shall have the right to their economic, social and cultural development with due regard to their freedom and in equal enjoyment of the common heritage of mankind.

**(2).** State shall have the duty, individually or collectively, to ensure the exercise of the right to development.

**24.** All parties shall have the right to a general satisfactory environment, favorable to their development.

The above provisions, are of course, part of the municipal laws of Nigeria, and are therefore, enforceable domestically. In fact, on the basis of the above judicial authorities, these provisions in the Charter are superior to any other domestic legislation. Though there is still debate as to whether the Charter's provisions are superior to the constitution under the new democratic dispensation. The line of cases shows that the charter is on its own and cannot be inferior to any law, including the constitution. The Supreme Court has settled this controversy in favor of the constitution (**Abacha V. Fawehinmi**).

## **SECTION 6 (6) (C) AND THE AFRICAN CHARTER**

Now, the provisions of **Section 6 (6) (c) of the 1999 Constitution** operates as an ouster clause over ECOSOC provisions in Chapter 2 of the constitution. To that extent, the powers



of court to enforce those rights are prohibited. But the courts still have powers to enforce those same rights as contained in the African Charter.

There is no doubt that the African charter is a source of Human rights law in Nigeria and a good avenue for the enforcement of ECOSOC rights despite the prohibition of enforcement of Directive Principles by the constitution.

## **INTERNATIONAL HUMAN RIGHTS INSTRUMENTS ON ECOSOC RIGHTS APPLICATION IN NIGERIA**

- **Universal Declaration of Human Rights**
  - Article 22 - Right to Social Security
  - Article 23 - Right to work
  - Article 24 - Right to rest & leisure
  - Article 25 – Right to health
  - Article 26 – Right to education
- **International Covenant on Economic, Social and Cultural Rights (ICESCR)**
  - Article 6 - Right to work
  - Article 7- Right to just and favorable conditions of work
  - Article 8 - Right to form and join trade union
  - Article 9 - Right to social security including social insurance
  - Article 10 - Right of Family
  - Article 11 -Right to adequate standard of living
  - Article 12 - Right to food, clothing and housing
  - Article 13 - Right to education
  - Article 14 - Right to partake in cultural life
- **African Charter on Human & People's Rights**
  - Article 15 - Right to work
  - Article 16 - Right to health
  - Article 17 - Right to education
  - Article 18 - Protection of family
  - Article 22 - Right to peoples to economic, social and cultural development
  - Article 24 - Right to a general environment favorable to their development

In **SERAP V. NIGERIA**, the African Commission on Human Rights construed the right to shelter from the specifically guaranteed right to health, right to property and the



provisions of the Charter protecting family, life and found violation of the right to shelter, health, and environment of the Ogoni people.

### ENFORCEMENT THROUGH ECOSOC COVENANT

The enforcement of ECOSOC rights is achievable through **Bangalore Principles**. The Bangalore principles declare that national courts should have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law for the purpose of removing ambiguity from national constitutions, legislation or common law.

- See progressive decision of **TOBI JCA in Mojekwu V. Ejikeme** holding that Nigeria is a party to CEDAW and the courts should give teeth to its provisions.

### ENFORCEMENT THROUGH AFRICAN CHARTER

The Supreme Court held in **Abacha V. Fawehinmi** that the provisions of the charter have become part of Nigeria's domestic law and are enforceable in Nigerian courts.

### ENFORCEMENT THROUGH EXPANSIVE INTERPRETATION OF CIVIL AND POLITICAL RIGHTS GUARANTEED BY THE COUSTITUTION

The adoption of a holistic approach towards human rights – **Vienna Declaration of Programme** of action adopted at the **World Conference Of Human Rights**, Vienna (14<sup>th</sup> – 25<sup>th</sup> of June 1993) declared that the universality, indivisibility, interdependence and interrelatedness of human rights.

Indian courts have given expansive interpretation to civil and political rights to cover ECOSOC rights. In **Olga Tellis V. Bombay Municipal Corporation**, the Indian Supreme Court construed the right to livelihood from the right to life guaranteed by the Indian constitution.

In **Director of SSS V. Agbakogba**, the Court of Appeal held *inter alia* that the right to hold a passport is a necessary contaminant of the right to freedom of movement.

### ENFORCEMENT THROUGH OTHER LEGISLATION

The provisions of **Chapter II** of the constitution which provides for directive principles of state policy are not justiciable by virtue of **Section 6(6) (c) of the constitution**. Note however that **Section 6(6) (c)** does not foreclose the possibility that any provisions of



Chapter II can be made justiciable. Indeed, in **AG. ONDO V. AG. FEDERATION & ORS**, the Supreme Court sustained the constitutional validity of the ICPC Act **vide Section 15 (5) and item 60 (a)** on the **Executive Legislature list, Part 1 of the Second Schedule** to the constitution.

In **Federal Republic of Nigeria V. Anachie, Niki Tobi JSC** noted that the non-justiciability of Section 6 (6) (c) is not total or sacrosanct because other provisions of the constitution may make any provisions of Chapter II justiciable.

Examples of other laws protecting ECOSOC rights are:

- The Labour Act (regulating employment)
- Factories Act (regulating health and safety rules in employment)
- Recovery of Premises Law (protecting the right to housing by prohibiting forced eviction)

Sometimes, government policies, although indirectly, also protect some ECOSOC rights.

## ENFORCEMENT THROUGH ECOWAS COURT

There is a new window of enforcing ECOSOC rights through the **Court of Justice of the Economic Community of West African States**. In **SERAP V. FEDERAL REPUBLIC OF NIGERIA** (decided on 14<sup>th</sup> December 2012) the ECOWAS Court held that by virtue of **Article 9 (4) of the Protocol of the Court** (as amended) the court has jurisdiction to determine cases of violation of human rights that occur in member states. Its human rights mandate, the court held, extends to all the international human instruments including the **African Charter on Human and People's Rights**, the **International Covenant on Civil and Political Rights** and the **ECOSOC Covenant**.

## THE RIGHT TO ADEQUATE HOUSING

The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

Pursuant to **Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights** (ICESCR), state parties recognize that the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.



The committee has been able to accumulate a large amount of information pertaining to this right. Since 1979, the committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The committee has also devoted a day of general discussion to the issue at each of its third and fourth sessions.

In addition, the committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the global strategy for shelter to the year 2000 adopted by the General Assembly.

Although a wide variety of international instruments address the different dimensions of the right to adequate housing, **Article 11 (1) of the Covenant** is the most comprehensive and perhaps the most important of the relevant provisions.

Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing. There remains a disturbing large gulf between the standards set in **Article 11 (1)** and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resources and other constraints, the committee also observes significant problems of homelessness and inadequate housing also exists in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed. There is no indication that this number is decreasing. It seems clear that no state party is free of significant problems of one kind or another in relation to the right to housing.

The right to adequate housing applies to everyone. While the reference to **"himself and his family"** reflects assumption as to gender roles and economic activity patterns commonly accepted in 1966 when the covenant was adopted. The phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups.

Individuals as well as families are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must in accordance with Article 2 of the Covenant not be subject to any form of discrimination.

In the committee's view, the right to housing should not be interpreted in a narrow or restrictive sense, which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons:

In the first place, the right to housing is integrally linked to other human rights and the fundamental principles upon which the covenant is premised. Thus, "the inherent dignity



of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly the right to housing should be ensured to all persons irrespective of income or access to economic resources.

Secondly, the reference in **Article 11 (1)** must be read as referring not just to housing but to adequate housing.

As both the **Commission on Human Settlements** and the **Global Strategy for Shelter** to the year 2000 stated:

*“Adequate shelter means... adequate privacy, adequate space, adequate security, adequate lighting, adequate ventilation, adequate infrastructure, and adequate location with regard to work and basic facilities – all at a reasonable cost.”*

Thus, the concept of adequacy is particularly significant in relation to the right of housing. The committee identified certain aspects of this right that must be taken into account in any particular context. They include the following:

#### **A. LEGAL SECURITY OF TENURE**

Tenure takes a variety of forms, including rental (public and private) accommodation, corporative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.

#### **B. AVAILABILITY OF SERVICES, MATERIALS, FACILITIES AND INFRASTRUCTURE**

An adequate house must contain facilities for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of land storage, refuse disposal, site drainage and emergency services.

#### **C. AFFORDABILITY**

Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by state parties to ensure that the percentage of housing-related costs in general, is commensurate with income levels. Subsidies should also be provided for those unable to obtain affordable housing. In accordance with the principles of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increments.



#### **D. HABITABILITY**

Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors.

#### **E. ACCESSIBILITY**

Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-Positive individuals, persons with persistent health problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere.

#### **F. LOCATION**

Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centers, and other social facilities. Similarly, housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

#### **G. CULTURAL ADEQUACY**

The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured.

While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one state party to another, the Covenant clearly requires that each state party take whatever steps are necessary for that purpose. This will almost inevitably require the adoption of a national housing strategy which, as stated in **Paragraph 32 of the Global Strategy for Shelter:**

*“defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and the time-frame for the implementation of the necessary measures.”*

Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with,



and participation by all those affected, including the homeless, the inadequately housed, and their representatives.

In some states, the right to adequate housing is constitutionally entrenched. In such cases, the committee is particularly interested in leaving the legal and practical significance of such an approach. Detail of specific cases and of other ways in which entrenchment has proved helpful should thus be provided.

The committee views many component elements of the right to adequate housing as being at least consistent with the provisions of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to:

- a. Legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions.
- b. Legal procedures seeking compensation following an illegal eviction.
- c. Complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance and racial or other forms of discrimination.
- d. Allegation of any form of discrimination in the allocation and availability of access to housing, and;
- e. Complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems, it would be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness,.

Finally, **Article 11(1)** concludes with the obligation of state parties to recognize the essential importance of international cooperation based on free consent. Traditionally, less than 5% of international assistance is devoted towards housing or human settlements, and often the manner by which such funding is provided, does little to address the housing needs of disadvantaged groups.

State parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed.

## **FORCED EVICTIONS**

In its **General Comment No. 4 (1991)**, the committee observed that all persons should possess a degree of security of tenure which guarantees legal protection against eviction, harassment and other threats. It considered a significant number of reports of forced eviction in recent years, including instances in which it has determined that the obligations of state parties were being violated, the committee is now in a position to seek to provide



further clarification as to the implications of such practices in terms of the obligations contained in the covenant. It seeks to protect all people from and providing legal protection and redress for forced evictions that are contrary to the law, taking human rights into consideration, and when evictions are unavoidable, ensuring as appropriate, that alternative suitable solutions are provided.

**The Commission on Human Rights** has also indicated that "forced evictions are a gross violation of human rights." This expression seeks to convey a sense of arbitrariness and illegality.

The term "**forced evictions**" as used throughout this general comment is defined as the permanent or temporary removal against the will of individuals, families, and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International covenants on human rights.

Owing to the interrelationship and interdependency which exists among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

Many instances of forced evictions are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence.

Other instances of forced evictions occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects.

The obligations of state parties to the covenant in relation to forced evictions are based on **Article 11.1**. In particular, **Article 2.1** obliges state parties to use all appropriate means to promote the right to a adequate housing. The state itself must refrain from forced evictions and ensure that the law is enforced against its agents or 3rd parties who carry out forced evictions. Moreover, this approach is reinforced by **Article 17.1 of the International Covenant on Civil and Political Rights** which complements the right not to be forcefully evicted without adequate protection. That provision recognizes *inter alia*, the right to be protected against "arbitrary or unlawful interference with one's home."

Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights



(including home ownership) or rights of access to property, of accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of **Articles 2.2 and 3 of the Covenant** impose an additional obligation upon governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.

Whereas some evictions may be justifiable, such as the case of persistent non-payment of rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner and by a law which is compatible with the covenant and that all the legal resourced and remedies are available to those affected. It is pertinent to recall **Article 2.3 of the International Covenant on Civil and Political Rights** which requires state parties to ensure "an effective remedy" for persons whose rights have been violated and the obligation upon the competent authorities to enforce remedies when granted.

Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to matters such as forced evictions which directly invoke a large number of the rights recognized in both the international covenants on human rights. The committee considers that the procedural protections should be applied in relation to forced evictions include:

- a. An opportunity for genuine consultation with those affected.
- b. Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction.
- c. Information on the proposed evictions, and where applicable, on the alternative purpose for which the land or housing to be used, to be made available in reasonable time to all those affected.
- d. Where groups of people are involved, government officials or their representatives should be present during an eviction.
- e. All persons carrying out the eviction should be properly identified.
- f. Evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise.
- g. Provision of legal remedies and;
- h. Provision, where possible, of legal aid to persons who are in need of it to seek redress from the Courts.

## THE RIGHT TO EDUCATION

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of



poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labor and sexual exploitation, promoting human rights and democracy, protecting the environment and controlling population growth. Increasingly, education is recognized as one of the best financial investments states can make. But the importance of education is not just practical; a well educated, enlightened and active mind, able to wander freely and widely, are one of the joys and rewards of human existence.

The **International Covenant on Economic, Social and Cultural Rights** (ICESCR) dedicates two articles to the right to education, - **Article 13 & Article 14**.

**Article 13**, the longest provision in the covenant is the most wide-ranging and comprehensive article on the right to education in International Human Rights law. The committee has already adopted **General Comment II** on **Article 14** (Plans of action for primary education); General Comment II and the present General Comment are complementary and should be considered together. The committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a constant goal. Moreover in many cases, this goal is becoming increasingly remote.

## **NORMATIVE CONTENT OF ARTICLE 13**

### **ARTICLE 13 (1): AIMS AND OBJECTIVES OF EDUCATION -**

State parties agree that all education, whether public or private, formal or informal, shall be directed towards the aims and objectives identified in **Article 13 (1)**. The committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in **Articles 1 & 2 of the charter**.

For most part, they are also found in **Article 26 (2) of the Universal Declaration of Human Rights**, although **Article 3 (1)** adds to the declaration in three aspects:

- Education shall be directed to the human personality’s “sense of dignity”.
- It shall enable all persons to participate effectively in a free society.
- It shall promote understanding among all ethnic groups, nations & religious groups.

- ❖ Of those educational objectives which are common to **Article 26(2) of the Universal Declaration of Human Rights** and **Article 13 (1) of the covenant**, perhaps the most fundamental is that “Education shall be directed to the full development of Human Personality...”



The committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education shall be directed. Accordingly, the committee takes the view that state parties are required to ensure that education conforms to the aims and objectives identified in Article 13 (1).

### **ARTICLE 13 (2): THE RIGHT TO RECEIVE AN EDUCATION -**

While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular state party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

#### **a. Availability**

Functioning educational institutions and programmes have to be available in sufficient quality within the jurisdiction of the state party.

#### **b. Accessibility**

Educational institutions and programmes have to be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.

- **Non – Discrimination:** Education must be available to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.
- **Physical Accessibility:** Education has to be within safe physical reach, either by attendance at some reasonably convenient geographical location (e.g. a neighborhood school) or via modern technology (e.g. access to a distance learning programme).
- **Economic Accessibility:** Education has to be affordable to all. This dimension of accessibility is subject to the differential wording of **Article 13 (2)** in relation to primary, secondary and higher education; whereas primary education shall be available “free to all”. State parties are required to progressively introduce free secondary and higher education.

#### **c. Acceptability**

The form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents, this is subject to the educational objectives required by **Article 13 (1)**.



#### d. Adaptability

Education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

When considering the appropriate application of those interrelated and essential features, the best interests of the student shall be a primary consideration.

#### Article 13 (2) (a): the right to primary education \_

Primary education includes the elements of availability, accessibility and adaptability which are common to education in all its forms and at all levels.

The committee obtains guidance on the proper interpretation of the term “primary education” from the World Declaration on Education for all which states:

*“The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied and take into account the culture, needs & opportunities of the community.”*

While primary education is not anonymous with basic education, there is a close correspondence between the two. In this regard, the committee endorses the position taken by UNICEF: “Primary education is the most important component of basic education. As formulated in Article 13 (2) (a), primary education has two distinctive features: It is “compulsory” and “available free to all”.

#### **ARTICLE 13 (2) (B): THE RIGHT TO SECONDARY EDUCATION –**

Secondary education includes the elements of availability, accessibility which are common to education in all its forms and levels. Secondary education includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.

**Article 13 (2) (b)** applies to secondary education in its different forms, “thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The committee encourages “alternative educational programmes which parallel regular secondary school systems. According to Article 13 (2) (b), secondary education, “shall be made greatly available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.



## **TECHNICAL AND VOCATIONAL EDUCATION –**

Technical and vocational education forms part of both the right to education and the right to work. Article 13(2) (b) presents technical and vocational education as part of secondary education.

Also, the Universal Declaration of Human Rights states that technical and professional education shall be made generally available. – **Article 26(1)**. According to the **UNESCO Convention on Technical and Vocational Education (1989)**. Technical and vocational education consists of all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and undertaking relating to occupations in the various sectors of economic and social life.

Underlined in this way, the right to technical and vocational education includes the following aspects:

- a. It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the state party's economic and social development.
- b. It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy and occupational health, safety and welfare.
- c. Provides re-training for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes.
- d. It consists of programmes which give students, especially those from developing countries, the opportunity to receive technical and vocational education in other states, with a view to the appropriate transfer and adaptation of technology.
- e. It consists in the context of the covenant's non-discrimination and equality provisions of programmes which promote the **TVE** of women, girls, out-of-school youths, unemployed youths, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.

## **ARTICLE 13 (2) (C): THE RIGHT TO A HIGHER EDUCATION –**

Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education and its forms at all levels. While Article 13 (2) (c) is formulated in the same lines as Article 13 (2) (b), there are three differences between both provisions. Article 13 (2) (c) does not include reference to either education “in its different forms” or specifically to TVE. In the committee's opinion these omissions reflect



only a difference of emphasis between Article 13 (2) (b) and (c). if higher education is to respond to the needs of students in different social and cultural settings, it must have a flexible curricula and varied delivery systems, such as distance learning, in practice. Therefore, both secondary and higher education have to be available in different forms.

The third and most significant difference between the provisions is that while secondary education shall be made “generally available and accessible to all”, higher education shall be made “equally accessible to all, on the basis of capacity”. According to Article 13 (2) (c), higher education is not to be generally available, but only available to on the basis of capacity. The capacity of individuals should be accessed by reference to all their relevant expertise and experience.

#### **ARTICLE 13 (2) (D): THE RIGHT TO FUNDAMENTAL EDUCATION –**

Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. In general terms, fundamental education corresponds with basic education set out in the World Declaration on Education for all. By virtue of this provision, individuals who have not received or completed the whole period of their primary education have a right to fundamental education, or basic education as defined in World Declaration on Education for all.

Since everyone has the right to the satisfaction of their basic learning needs as understood by the World Declaration, the right to fundamental education is not confined to those “who have not received or completed the whole period of their primary education.” The right to fundamental education extends to all those who have not yet satisfied their basic learning needs.

The enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youths & adults, including older persons. Fundamental education, therefore, is an integral component of adult education and lifelong learning.

Because fundamental education is a right of all age groups, curricula and delivery systems must be devised in a way which is suitable for students of all ages.

#### **ARTICLE 13 (2) (E): A SCHOOL SYSTEM, ADEQUATE FELLOWSHIP SYSTEM, MATERIAL CONDITIONS OF TEACHING STAFF. –**

The requirement that the development of a system of school at all levels shall be actively pursued, means that a state policy is obliged to have an overall development strategy for its school system. The strategy must encompass schooling at all levels, but the covenant requires state parties to prioritize primary education.



The requirement that an “adequate fellowship system shall be established” should be read with the Covenant’s non-discrimination and equality provisions. The fellowship system should enhance quality of educational access for individuals from disadvantaged groups.

While the covenant requires that the material conditions of teaching staff should be continuously improved, in practice the general working conditions of teachers have deteriorated, and reached the unacceptably low levels, in many state parties in recent years. Not only is this inconsistent with the provision, but it is also a major obstacle to the full realization of student’s right to education.

The committee also notes the relationship between **Articles 13 (2) (e), 2 (2), 3 and 6 – 8 of the Covenant**, including the right of teachers to organize and bargain collectively, draws the state parties’ attention to the joint UNESCO – ILO Recommendation concerning the status of teachers (1966) and personnel (1997), and urges state parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.

#### **ARTICLE 13 (3) & (4): THE RIGHT TO EDUCATIONAL FREEDOM –**

Article 13 (3) has two elements, one of which is state parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The committee is of the view that this element of Article 13 (3) permits public school instruction in subjects such as the general history of religions and ethics, if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a particular religion or belief is inconsistent with Article 13 (3) unless provision is made for non-discriminatory exemptions or alternatives that would accumulate the wishes of parents and guardians.

The second element of Article 13 (3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to such “minimum educational standards as may be laid down or approved by the state.” The has to be read with the contemporary provision, Article 13 (4), which affirms the “liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in Article 13 (1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their term, these standards must be consistent with the educational institutions. The liberty also extends to “bodies” i.e. legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the state



has an obligation to ensure that the liberty set out in Article 13 (4) does not lead to extreme disparities of the educational opportunity for some groups in the society.

## **ARTICLE 13: SPECIAL TOPICS OF BROAD APPLICATION NON DISCRIMINATION AND EQUAL TREATMENT**

The prohibition against discrimination enshrined in **Article 2 (2) of the Covenant** is subject to neither progressive realization nor the availability of resources, it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.

The committee interprets Articles 2 (2) and (3) in the light of the UNESCO Convention against discrimination in education, the relevant provisions of the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child and the International Labour Organization, Indigenous and Tribal Peoples Convention, 1989 (Convention no. 169), and wishes to draw attention to the following issues.

- The adoption of temporary special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.
- In some circumstances, separate educational systems or institutions for groups defined by the categories in **Article 2 (2)**, shall be deemed not to constitute a breach of the covenant. In this regard, the committee affirms **Article 2 of the UNESCO Convention against Discrimination in Education (1960)**.
- The committee takes note of **Article 2 of the Convention on the Rights of the Child** and **Article 3 (e) of the UNESCO Convention against Discrimination in Education** and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a state party, including non-nationals, and irrespective of their legal status.
- Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the covenant.
- 

## **ACADEMIC FREEDOM & INSTITUTIONAL AUTONOMY**



In the light of its examination of numerous state parties' reports, the committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in Article 13, it is appropriate and necessary for the committee to make some observations about academic freedom and many of the following observations have general application.

Academic freedom includes the liberty of individuals to express freely, opinions about the institution or system in which they work, to fulfill their functions without discrimination or fear of repression by the state or any other actor, to participate in professional or representative academic bodies and to enjoy all the human rights applicable to other individuals in the same jurisdiction.

The enjoyment of academic freedom requires the autonomy of institutions of a higher education. Autonomy is that degree of self-governance necessary for effective decision making by institutions of higher education in relation to their academic work, standards, management and related activities.

## **DISCIPLINE IN SCHOOLS**

In the committee's view, corporal punishment is inconsistent with the fundamental guiding principle of International Human Rights law enshrined in the Preambles to the **Universal Declaration of Human Rights** and both Covenants: "The dignity of the individual". Other aspects of school discipline may also be inconsistent with the covenant. The committee welcomes initiatives taken by some state parties actively encouraging schools to introduce "positive", non-violent approaches to school discipline.

## **LIMITATIONS ON ARTICLE 13**

The committee wishes to emphasize that the Covenant's limitation clause; **Article 4**, is primarily intended to be the protective rights of individuals rather than permissive of the imposition of limitations of the state. Consequently, a state party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in **Article 4**.



## TOPIC 8

### MODERN THREATS TO CIVIL LIBERTIES

Civil liberties are personal guarantees and freedoms that the government cannot abridge, either by law or by judicial interpretation. Though the term differs amongst various countries, some examples of civil liberties include; the freedom of torture and death, the right to liberty and security, freedom of conscience, freedom of press, freedom of religion, freedom of expression, freedom of assembly, freedom of speech, the right to privacy, the right to equal treatment and due process and the right to a fair trial, and the right to life.

The formal concept of civil liberties dates back to the English legal charter **Magna Carta 1215**, which in turn was based on the pre-existing documents namely the **English Charter of Liberties**, a landmark document in English legal history. Accordingly civil liberties are indeed human rights and human rights are regarded as inherent and universal in the human person.

In looking at civil liberties and their reconciliation with the security of the state, a paradox is presented: is it that acts of terror thrive in the freedom of democracies. Civil



liberties are conducive to the planning and execution of acts of gross violence, designed to destabilize or destroy state structures, and to advance particular ideological ends. Innumerable themes are illustrative of the difficult juxtaposition of civil liberties and national security, in which a delicate balance may be less in evidence than a passion for erosion of civil liberties in response to perceived crises.

Detention without charge for years for suspects and extensive privacy incursions for the ordinary citizen have been considered necessary by states involved in a war on an intangible enemy – terror. But as the enemy is intangible so too are the contours of the front-line. Accordingly states engaged in wars against terrorist groups risk becoming engaged in a permanent state of emergency on their own soil. And so it is that the threat of terrorism in turn can pose a threat to the fundamental rights and freedoms which characterize democracy, the civil liberties and human rights upon which democratic societies are based. The greatest success the terrorist can achieve is to persuade the democratic state to abandon its democratic values.

## **DEROGABLE RIGHTS AND NON-DEROGABLE RIGHTS AND THE TORTURE DEBATE**

Human rights are recognized as intrinsic and universal, as inhering on the human person, but that is not to say that such rights cannot be limited under any circumstances, a pragmatic reality that is recognized by the demarcation of derogable and non-derogable rights. Some rights can be limited or derogated from under certain circumstances. For example, **Article 4** of the **International Covenant on Civil and Political Rights** (ICCPR) outlines the rights which may not be derogated from in any circumstance, irrespective of the existing public emergency. The rights which are more in the civil liberty realm, such as the rights to personal liberty and to trial in due course of law can be derogated from in time of nation-threatening emergency but only to the extent strictly required by the exigencies of the situation. See **Section 45 of the Constitution**. The **European Convention on Human Rights** has a similar opt-out clause in **Article 15**, with the same rights to freedom from torture and from slavery being non-derogable.

The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (UNCAT) states at Article 2:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.



## THE FIGHT AGAINST TERRORISM AND ITS EFFECTS ON PERSONAL LIBERTY

Speaking shortly after the 9/11 terrorist attacks in New York, the American Supreme Court Justice, Sarah D. O'Connor remarked:

“We are likely to experience more restrictions on our personal liberty than has ever been the case in our country.”

Following the terrorist attacks on the twin towers of the world trade center, **CONGRESS** had sanctioned the use by the President of “all necessary and appropriate force” against terrorists and their allies. It is these steps taken by various world leaders to effectively combat terrorism that infringes on civil liberties. It seems as though the government in a bid to make us feel safer, ironically expose us to various human rights violations at the same time. The major talking points in relation to the fight against terrorism and how they in turn threaten civil liberties are thus:

## TORTURE AS AN INTERROGATION TOOL

The torture debate is arguably outside the civil liberties realm. The right not to be tortured is a fundamental right rather than a mere civil liberty. However, against the backdrop of the debate on torture, a more insidious process of civil liberty erosion is occurring, which seems a comparatively lesser evil. But civil liberties lost are soon forgotten, as a process of normalization occurs to blend extraordinary measures into the legal system.

The use of torture as a State – sanctioned tool of interrogation sounds outlandish and improbable; yet it has gained prominence even amongst the so called civilized states. Furthermore, even academics seem to endorse the use of torture, which clearly infringes on human rights; a leading Harvard academic, Alan M. Dershowitz has suggested in his book “Why Terrorism Works” that “torture warrants” could be used to obtain information on potential terrorist attacks. The use of evidence obtained through torture has even been considered by the British government. In **A and Others V. Secretary of State for the Home Department** (No. 2) [2005] 3 WLR 1249, the appellants challenged the finding by the Special Immigration Appeals Commission (SIAC), which in turn had been upheld by the Court of Criminal Appeal, that the fact that evidence had, or might have been, procured by torture inflicted by foreign nationals without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible. The House of Lords rejected this proposition, holding *Per Lord Bingham of Cornwall*:



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“It trivializes the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where or by whom, or on whose authority the torture was inflicted. To question that I would give a very clear negative answer.”

Though the use of evidence obtained through torture was ultimately rejected, the mere fact that the issue advanced to the House of Lords stage, and was not flatly rejected by all concerned as an evidentiary option from the outset, must give pause for thought and reason for concern, as do many of the measures designed for what has been described by former American President, George W. Bush as ‘a new kind of war’.

## **DETENTION WITHOUT CHARGE**

Various statutory provisions around the globe protect a person’s right to fair hearing, which encapsulates the right to a trial within reasonable time in respect to criminal proceedings. One of such provisions is **Section 36 (4) of the 1999 Constitution**.

Clearly, the continued practices of detention of terrorism suspects without charge, violates fundamental rights and civil liberties. In **Rasul V. Bush** 524 US 446 (2004), the court considered whether American courts had jurisdiction to hear the *habeas corpus* applications of foreign nationals who were detained at Guantanamo Bay. This case arose from the holding of two Australian citizens and twelve Kuwaiti citizens, without charge and without access to counsel, in the US Naval Base at Guantanamo Bay in Cuba.

The majority of the Supreme Court held that the legality of the detention of aliens can be examined where such detentions occur in territory over which the US exercises plenary and exclusive jurisdiction but not ultimate sovereignty. The court found that the *habeas* statute creates federal court jurisdiction over the claims of an American citizen held at the base, and the statute draws no distinction between Americans and aliens held in federal custody. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority.

The distinction displays the willingness of the American Supreme Court to examine critically the position adopted by the government on issues of national security, and to assert judicial control over executive and legislative action in this area.

## **STATE POLICY AND ITS EFFECTS ON FUNDAMENTAL RIGHTS AND CIVIL LIBERTIES**

Speaking at a video conference with the Council of Europe, seated in Strasbourg, France, on the 8<sup>th</sup> of April, 2014, renowned whistle blower, Edward Snowden remarked:



“Technology represents the most significant threat to civil liberties in modern times...”

He made this statement in relation to the discoveries he made on the interception of confidential telephone and information exchanges between high level human rights staff by American and British Security Agencies. He laid emphasis on the implications of these practices on the safety and welfare of human rights staff and how data-mining practices violate European Privacy laws. Apart from the UK and the USA, other countries like Belgium, France, Ireland, Italy, Australia, New Zealand, Canada, India, South Africa, Chile, Peru, Turkey, amongst a host of others, equally have anti-terrorism legislations.

It can be convincingly argued that sacrificing privacy rights makes citizens less free without making them more secure, and amounts to destroying freedom in order to defend it. Among the extensive surveillance measures contained in legislation such as the **USA PATRIOT ACT**, are provisions which allow for the tracking of internet usage and for access to educational, business, financial records and private correspondence. The act which is an acronym for, ‘Uniting and Strengthening America by Providing Appropriate Tools Required to intercept and Obstruct Terrorism.’ is among a number of American legislative measures designed to remove the impediments that individual privacy rights pose to investigations. It permits the interception and monitoring of communications and communications records, and searches without notice. These powers are largely exercisable without a warrant. The Act gives relevant law enforcement agents the right to conduct secret searches (Section 213) and increased powers to wiretap communication devices, intercept communications, to employ pen registers and trap devices (Section 216) and to access previously confidential records. The Patriot Act does not allow judicial oversight because it limits or restrains the judiciary’s role as a check on the executive branch.

The only Senator to oppose the Patriot Act, Senator Russ Feingold, made a statement at the Act’s Bill stage in which he referred to the past suspensions of civil liberties in the US, and how the experiences have stained their history.

In Britain, the **Anti-Terrorism Crime and Security Act 2001 (ATCSA)** provided for the detention of non UK nationals if their presence in the UK was believed to be a risk to national security and they were suspected of being terrorists (Section 23). This section of the ATCSA was held by the **Special Immigration Appeals Commission** to be discriminatory on nationality grounds, as suspected terrorists of British nationality could not be detained under the provisions.

The UK case of **A and Others V. Secretary of State for the Home Department** (2004) UKHL 56 (the case should not be confused with of **A and Others V. Secretary of State for the Home Department** (No. 2) [2005] which relates to the use of evidence obtained by torture in British courts) was based on the assertion by the government of the existence of ‘a time of war or other public emergency’ in which derogation from the European



Convention was both permissible and necessary. The House of Lords was of the view that the measures introduced by the government were disproportionate.

The case began with 9 men who challenged a decision of the **Special Immigrations Appeals Commission** to eject them from the country on the basis that there was evidence that they threatened national security. Of the 9 appellants, all except 2 were detained in December 2001; and the others were detained in February and April 2002 respectively. All were detained under the ATCSA. **Part 4** of the Act provided for their indefinite detention without trial and deportation. However, the power was only applied to non-British nationals.

The government proposed derogation (on the basis of a public emergency threatening the life of the nation within the meaning of Article 12 of the ECHR) from the right to personal liberty guaranteed by Article 5 (1) of the ECHR, and with Section 23 of the ATCSA.

The House of Lords held by a majority:

- That the right to liberty was among the most fundamental, and that Section 23 of the ATCSA did not rationally address the threat to security, was a disproportionate response, and was not strictly required by the exigencies of the situation.
- The court further held that there had been no derogation from the prohibition on discrimination, and the appellants were treated differently on nationality grounds from UK nationals suspected of terrorism. The measure, it was found, unjustifiably discriminated against non-national suspects, and such treatment was inconsistent with the UK's international treaty obligations to afford equality before the law and to protect the human rights of all individuals within its territory.
- That whilst their detention was lawful under the ATCSA 2001, Section 23 was incompatible with the articles of the ECHR. As a consequence, the House of Lords made a declaration of incompatibility under Section 4 of the **Human Rights Act 1998**, and allowed the appeals.

The significance of this ruling was that Parliament decided to replace Part 4 of the ATCSA 2001 with the **Prevention of Terrorism Act 2005**. This allows anyone of any nationality to be subjected to a control order.

## CONCLUSION

It is in times of emergencies that civil liberties can be lost, and their absence becomes normalized and accepted as a full-time feature of the legal landscape. It is because of this process of normalization that actions taken in the defense of the security of the state

must be restrained in their application, limited in a way that echoes the derogation provision of the ECHR, no more extensive than demanded by the exigencies of the situation, and which do not go beyond it.

Civil liberties have assumed a new role and shape due to technological changes, e-surveillance and conflict of laws in cyberspace. A new category of civil liberties has emerged that is known as civil liberties protection in cyberspace. Further, securing cyberspace while protecting privacy and civil liberties has also become a challenge for various countries.

The United States Supreme Court has also held that generally, the cell phone of an arrested person cannot be searched without a warrant. The European Court of Justice has also held that individuals have a right to be forgotten in cyberspace. Even the United Nations Human Rights Committee has approved the text titled; 'Right to Privacy in the Digital Age.'

## 300 LEVEL NOTES

### LAW 301

## GENDER AND THE LAW I



## **TOPICS**

- **THEORIES ON ENVIRONMENTAL PROTECTION**
- **NUISANCE**
- **TRESPASS TO LAND**
- **NEGLIGENCE**
- **STRICT LIABILITY RULE IN RYLANDS V. FLETCHER**
- **SCOPE AND PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW**
- **INTERNATIONAL LAW AND ENVIRONMENTAL RIGHT**
- **SOURCES OF INTERNATIONAL ENVIRONMENTAL LAW**
- **SOIL POLLUTION/ LAND CONTAMINATION**
- **STATUTORY CONTROLS**
- **AIR POLLUTION**
- **ENVIRONMENTAL IMPACT ASSESSMENT (EIA)**
- **WASTE MANAGEMENT**

## **MATERIAL SOURCES**

- **CLASS NOTES**
- **ENVIRONMENTAL LAW IN NIGERIA BY AMOKAYE**
- **HANDOUTS**



## INTRODUCTION

Environmental law, unlike other subjects, the principles of which are firmly settled and are applied over time, is an evolving subject in the legal curriculum. Environmental law is relatively recent, the development of the subject in Nigeria could however be broadly classified into 3 distinct periods;

- The first period was the pre-colonial era when traditional people through their customs and culture preserved the environment.
- The second period is characterized by the introduction of common and statutory laws
- The third period referred to the emergence of several statutory environmental laws.

## DEFINITION OF ENVIRONMENTAL LAW

Environmental law represents the body of rules, both from the National and internal perspectives, for the sustainable utilization of resources for the social and economic development of the society.

Although environmental protection preceded from a simple premise – A moral, ethical belief that we should protect those things we all share, the air, water and land. Environmental law is the transformation of those moral principles into legally enforceable norms.

Environmental law embraces the subject matter of several important international agreements and municipal laws, regulations, standards and institutional framework for the equitable and sustainable use of the natural resources.

## WHAT IS “ENVIRONMENT”?

Environment, in ordinary usage is defined as our surroundings, especially material and spiritual influence which affects the growth, development and existence of living beings. This definition is in consonance with that offered by **Wilkinson & Wyman** as all the interesting factors and circumstances that surround, influence and direct the growth and behavior of individual beings, groups, species and communities.

This general definition has been rejected by **BELL** as too sweeping and subjective because it encompasses any relative object within any given surrounding. Environment has also been defined as Man’s understanding and experience of his surrounding, and is perpetually shaped by man’s image and interaction with it.



The **UN General assembly**, in adopting the environment ideals in world charter for nature, emphasized the centrality of man in environment. It declares that mankind is part of nature and its life depends on the uninterrupted functioning of natural system which requires the supply of energy and nutrients.

Scientific explanation contends that environment is the product of a complex ecological system in which human beings and other living and non-living organisms exist.

The holistic definition of environment accords with the one offered by the **IUCN Commission on Environmental Law draft covenant & The sustainable use of Natural Resources**, which perceives environment as the totality of nature and the natural resources, including the cultural heritage and the infrastructure essential for socio-economic activities.

**The Federal Environmental Protection Agency Act (FEPA ACT)**, defines environment as water, air, land, and all plants and human beings or animals living therein and the relationships, which exists among these or, any of them.

**The International Convention on Civil Liability For environmental Damage** includes in its definition of "Environment" natural resources both "biotic" and "abiotic". Thus, extending the scope of environment, not only to natural environment but also to man-made landscapes, buildings and objects which forms part of man's cultural heritage.

From whatever perspective the environment is defined, it is our source of sustenance that we depend on. We look to it for food, fuel, medicines and materials. We look to it also for a realm of beauty and spiritual assistance.

## THEORIES ON ENVIRONMENTAL PROTECTION

There is a mélange of ideas associated with environmental protection. Notwithstanding, the variety of theories proposed about mankind-environment relationship, theories on environmental protection can be summarized in 3 categories:

- (a) The school of economic growth
- (b) The school of deep ecology
- (c) The school of sustainable development.

### (A) THE SCHOOL OF ECONOMIC GROWTH

This category comprises theories of development which simply rephrase the philosophy of economic growth. The theory of economic growth is anthropocentric in nature and has its roots in the biblical concept of human dominion over nature and its exploitation for exclusively human ends. Strong anthropocentrism regards



man as the central unit in the environment. Though it does not deny the value of non-human nature of its need for moral consideration but such considerations are influences primarily for human interests. This dominion principle was further articulated and transplanted to mechanistic view to advance the course of industrial revolution by the earlier philosophers.

**FRANCIS BACON** for instance, maintains that all creation had meaning only in relation to humanity: Man, if we look into final causes, may be regarded as the center of the world in so much that if Man were taken away from the world, the rest would seem to be all astray, without aim or purpose. **FRANCIS BACON** views the earth as a fertile gift ready to be unlocked and exploited by the scientific tapping of its physical and chemical dynamics.

Another 17<sup>th</sup> century thinker, **Thomas Hobbes (1588-1679)** believes in the supremacy of individual interests in the supremacy of individual interests over common interests. He vies life as a short, nasty, brutish affair and argues that human nature is such that every individual is always fighting others to gain advantage over them. For **FOBBES**, there should be no shared resources: Privatization of all resources is the only way to reduce fighting.

Man continues to exercise dominion over the earth by exploiting the natural resources to his own benefit since the existence of man depends partly on the exploration and exploitation of the physical environment. Around him and partly on his way of life as influenced by cultural environment. Consequently, the four basic components of the physical environment are subject to the influence of man, and of institutions of society, in the process of economic growth and development. From that principle, the following views emerged:

- Man who comes from nature is entitled as dominant constructor to transform the lithosphere and biosphere at will into a man-made world that promises an abundance of material goods.
- There is no natural obstacle to this; although the population will stabilize in times to come, it can meanwhile multiply without fear and because the earth can support an unlimited number of people.
- There are sufficient natural resources and in any case technology will discover new ones if the existing ones run out.
- There is no environmental crisis and the alleged dangers are scientific myths; all environmental problems will be dealt with successfully with the aid of technology; and



- Consequently, production and consumption can increase indefinitely and there is no good reason to restrict them.

The economic theory may be considered as too anthropocentric and extreme in approach. Its extreme developmental position has been refuted scientifically. For instance, the ecologist school of thought has argued that man does not dominate nature but is interdependent with it since all man's intervention has a feedback into man-made systems, which affects their stability.

Secondly, all natural resources are finite and measurable and unlimited consumption cannot last for a long time. No matter how developed and sophisticated, technology will always depend on finite resources.

Thirdly, human population explosion is an acknowledged problem, which is already under management by the UN. Finally, the global environmental crisis is a proven fact and its main manifestations (e.g. Ozone depletion, global warming, etc.) are already the same the objects of action plans. Unlimited economic growth is therefore, logically incompatible with finite natural resources.

## **(B) DEEP ECOLOGY**

Another school of thought is that "Pure" or "Deep" ecology which advocates a return to the simple ways of managing nature. They are ecocentric in nature and traditionally concerned about non-human nature and the whole eco-system as opposed, as opposed to humanist concerns. According to this view, nature and ecosystem are bio-ethics in nature having its own intrinsic worth, in its own right, regardless of its utility value to humans. Humans are therefore, morally obliged to respect plants, animals and all nature, which has a right to existence and human treatment. An ecocentric perceives the entire health as living and self-regulating organism and rejects the dualist view of human and nature as separate and distinct. He sees man and his environment as partners in progress rather than nature existing for man's selfish objectives.

The focus of attention and interest of this school are evolution, ecosystem, and in particular, the conservation of species, without placing any special weight on man. It is not man alone who has rights but so do animals, plants and natural inorganic elements also. On the contrary, man owes his respect to nature and all its creatures.

This school of ecology has offered positive service to public policy and environmental law by extending the structuring of the environmental problem, so as to include the ecosystems which had been completely ignored by the school of economic development, immersed as they were in the error of market autonomy.



### (C) SUSTAINABLE DEVELOPMENT

The previous schools discussed could be considered as being too extreme because they are one-sided. The school of economic growth, though purely analytical, isolates man from his environment and examines his economic action in its own right and over a relatively short time. The school of ecology is indeed holistic, but focuses primarily on the ecosystem. It completely ignores the unique qualities that distinguish mankind from all other living things. Though, it has a long term perspective, it does not correctly grasp the dynamics of ecosystems since it rejects a priori, the possibility of harmonizing ecosystems and man-made systems; i.e. the coexistence of natural from cultural development.

Man must survive and such survival is hinged on technological development characterized by the erection of factories, smelters, oil refineries, noisy machinery and blasting, even at the expense of some inconvenience to those in the vicinity or those that may come into contact with such development.

In reality, the co-evolution of man-made systems and ecosystems is attainable and it depends mainly on the harmonization of decisions to achieve a balanced order. This correct and vital perception of the true relationship between man and ecosystem has given birth to the school, which is to prevail and truly remains the bedrock of contemporary environmental protection; In other words, that of sustainable development.

Development is traditionally recognized as the process by which a country provides for its entire population, all the basic needs of life such as life, health, nutrition and housing, and provides everyone with opportunities to contribute to the very process through gainful employment as well as scientific and technologic innovations.

According the **UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT**, right to development involves the interest of developing countries to control and enhance their own development (Including the right to exploit its natural resources), the right of all people to enjoy the right of self-determination and an individual's right to enjoy a minimum quality of life. The declaration describes development as a comprehensive process that involves political freedom and equality for all in their access to basic resources, education, health, food, housing, employment and the fair distribution of income.



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As remarked by **ROBINSON**, "Development must seek to achieve not just GDP growth but society-wide change. The society should foster participation and ownership and should embrace the public and private sectors, the community, families, and the individuals. This approach would place the human person at the center of the development paradigm. Development in a broader international perspective includes at least 4 concepts:

- Peace and security
- Economic development
- Social development
- National Governance that secure peace and development.

Sustainability, on the other hand, is concerned with ensuring that the dynamic equilibrium between man and nature for the co-evolution of both within the earth surface.

According to **BRUNDTLAND**, it is the development that meets the need of the present without compromising the ability of future generations to meet their own needs.

Sustainable development consists of the following:

- (a) Conservation and recovery, where necessary, of the adequate natural capital to support a qualitative development policy and;
- (b) Inclusion of environmental, cultural, social and economic criteria in the planning and implementation of developmental policies in both public and private sectors

Again, sustainable development requires that environmental criteria must be incorporated into the planning and implementation of any public policy. It also allows the values of environment and development to be reconciled by calling for the integration of environmental and developmental concerns at all levels of decision making. The same principle is also safeguarded by the obligation imposed on the private sector to embark on a study of environmental impact analysis before any important technical intervention in the environment.

## PRIVATE LAW AND PUBLIC LAW



A petty controversy arises as to whether private law remedies are best suited for contemporary environmental problems of global warming, ozone layer depletion and major cross-boundary hazardous activities as against those under the public law.

The advocates of the public law regulation of environmental protection challenge the adequacy and competence of the courts to impose higher standards of the well-established principles of law. As LORD GOFF observed, "Parliament is the most competent authority to impose strict liability in respect of a polluter whose activities are risky and dangerous to the public. Any attempt by the courts to expand the rule would amount to usurpation of law making function of the parliament. It is also contrary to the rule of separation of power. This argument has merits and demerits.

One of the major arguments against the continuous usage of the private law remedies is that the usefulness of private law has been constrained by both its primary function and the complexities engendered by technological development.

Private law seeks primarily to protect the proprietary interest in land as against public environmental law which seeks to protect the environment. For instance, the tort of nuisance or rule in **Rylands V. Fletcher** and trespass to land are designed primarily to protect proprietary interest in land. Many environmental amenities are public property and therefore, common law rules can only provide protection for them, in a limited manner.

For example, in **Amakor V. Obiefuna**, the Supreme Court reiterated the fact that trespass to land is actionable at the suit of the person in possession of the land. It is immaterial whether he is the owner or not provided he has exclusive possession. This is because exclusive possession of the land gives the person in possession the right to retain it. This view was confronted by the House of Lords in **Hunter V. Canary Wharf**, where the apex court foreclosed an attempt by the **English Court of Appeal** to expand the categories of people that could institute an action in private nuisance.

According to **Lord Hoffman**, the right to bring an action in private nuisance as the law stands, "is necessarily vested in the person who has exclusive possession of the land." He held this view in **Hunter V. Canary Wharf**

As rightly noted by BELL, "the factors governing the decision to take action against polluters are mainly personal. Potential plaintiffs are more concerned about balancing their own interests against the loss suffered, be that financial or the loss of enjoyment of their property as human interests are contrary to the interest of the environment.

Furthermore, common law tends to embrace the exploitation of natural resources by man to the detriment of other constituent elements of the earth. Since common law is anthropogenic in nature, it operates to the detriment of the environment. Wild animals, for example, may be killed or taken into ownership at the common law, subject only to prior claims of the owner of the land on which they are found. On the other hand, public



control of environment is directly against human inequality and also prevents injustices against other sectors of the environment.

Private law mechanisms have also been criticized for lack of precise standard to protect the environment. Unlike the public law which seeks to set threshold standards and guidelines within which an activity is permitted beyond which it may amount to an offence, private law lacks such standards. Such standards are based on scientific and technical skills whose parameters are used to ensure compliance.

In private law, except for the tort of private nuisance, where the imprecise and ill-defined standard applied by the courts are discretionary and inconsistent, leaving environmental judgment to the ordinary skill and competence of the judges who are unfamiliar with the environmental niceties and technicalities.

To avoid frivolous litigation, the concept of **“Locus Standi”** is invented to shut the gate against those the courts describe as interlopers. Consequently, only proprietary owners (whether actual or constructive) could institute action in private nuisance and trespass while negligence is based on the existence of the nebulous concept of duty of care.

As against the restricted right of access, environmental statutes could empower private individuals to bring actions against individuals and public authorities who violate the law. This could be achieved by two methods:

- (1) By a specific environmental statute conferring specific power of access on private individuals in respect of the enforcement of its provisions
- (2) By the constitution, conferring on every citizen environmental right which by extension, embraces citizen’s participation in the formulation and implementation of environmental laws, guidelines and measures.

## **NUISANCE**

The law of tort of nuisance deals primarily with liability to one’s physical neighbors. Nuisance is of two types:

- Private nuisance
- Public nuisance

### **PRIVATE NUISANCE**

Private nuisance is an unreasonable and unlawful interference with another’s interest in the private use and enjoyment of his land.

A perpetrator in private nuisance, similar to a defendant in public nuisance action, may be liable if the conduct is intentional or unintentional. Private nuisance actions, for example,



have abated noxious odors emitted by human faeces deposit maintained by local authority (**Olutimehin V. Lagos City Council**) and poultry maintained by private individual (**Abiola V. Ijoma**).

Nuisance actions to abate inferences with an owner's interest in land have existed for many decades. The rule is often expressed in the Latin maxim: "**Sic utere tuo ut alienum non laedes**" (One should use his own property in such a manner as not to injure that of another).

It also rejects prima facie utilitarian balancing of the actor's conduct. **Bramwell J** in **Bamford V. Turney** said: A law is bad which, for the public benefit inflicts loss on an individual without compensation."

Increasing industrialization forced the courts to acknowledge the tension between the absolute "**Sic utere tuo**" doctrine and a land owner's right to put his property to beneficial use.

When agriculture dominated, rarely did a use of land affect the property of another: An owner, could, with little difficulty, use her property to full capacity without creating a nuisance.

The shift to mechanism forced the courts to reconsider their conception of property rights in order to resolve the conflicting claim of rights. The conflict between industrial and residential necessitated a judicial choice between plaintiff-centered theory of nuisance.

The plaintiff-centered view assumes that property holders sacrifice a portion of their rights when they enter into society so that all could enjoy their property without unreasonable interference. The defendant-centered view relies on more traditional tort doctrines emphasizing reasonableness in use.

Therefore, the courts have to choose either to focus on the reasonableness of the harm to the plaintiff or the reasonableness of the conduct of the defendant. Either option requires the courts to constrain the previous absoluteness of right.

However, the courts have generally ignored the utilitarian argument that where the defendant's conduct is for the public benefit, it cannot amount to a nuisance; the common law being slow to appropriate private rights in the public interest. The resulting principle, however is that the defendant liability only arises when the conduct of the defendant amounts to an unreasonable use of land in that it causes an unreasonable interference with the claimant's use of land.

The very essence of a private nuisance is the unreasonable use by a man of his land to the detriment of his neighbor – **Lord Denning MR** in **Miller V. Jackson**.

To determine whether interference is significant, the court must balance the gravity of the harms to the utility of the benefit of the questioned act. On the issue of unreasonableness



causing nuisance, "It may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in the society.

Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but by reference to its circumstances. Therefore, whether a conduct amounts to an unreasonable user depends on a number of factors which are:

- (1) The nature and extent of damage suffered by the claimant
- (2) Locality where the alleged nuisance is committed
- (3) The duration of the nuisance
- (4) The use the claimant is making of his land
- (5) The purpose for which the defendant acts.

However, the interference is considered unreasonable if;

- (1) The conduct involved a significant interference with the public health, the public safety, public comfort, or the public convenience; or
- (2) The conduct was of a continuing nature or produced permanent or long lasting effect upon the public right.

Similarly, for an action in private nuisance to be maintained, the plaintiff must establish some degree of damage. In **Seismograph Services Ltd V. Akporuowo**, the plaintiff claimed that the defendant's operation caused damage to building and household goods. The trial court awarded damages to the plaintiff. The Supreme Court reversed the judgment of the trial court because there was conflict evidence as to whether the building was actually damaged since damage must be proved in nuisance; the trial judge should have visited the scene.

Early environmental cases included claims based on foul odors emitted from a poultry farm, noise. The relevance of tort of nuisance to environmental protection could be seen in the area of polluter's actions leading to material injury to the property of the plaintiff such as flooding, depositing poisonous substances on crops (**Adams V. Ursell**) and sensible personal discomfort such as excessive noise pollution and offensive odors.

However, the use of nuisance law to remedy environmental harm from exploration in Niger-Delta area of Nigeria involves many difficulties. The utility of oil to the socio-economic development of Nigeria outweighs the temporary inconvenience to the communities and damage to their farms. Using the defense of utility, the nuisance law has not been successful in remedying environmental harm caused to the inhabitants of the oil producing communities.



## PUBLIC NUISANCE

Public nuisance is criminal in nature. A person is guilty of public nuisance if he commits an act not warranted by law, or omits to discharge a legal duty, where the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public or to obstruct the public in the exercise of his rights common to the citizens.

A defendant in a public nuisance is liable whether his interference with the public right was intentional or not, and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormal dangerous activities. The common law rules on the crime of public nuisance and the statutory law established a means by which government could address and prevent degradation of the environment. Due to the public nature of the offence, public offices or bodies such as Attorney General or local authorities are primarily responsible for enforcement.

However, where a private individual could show that he has suffered damage or loss over and above that suffered by the general public generally as a result of the public nuisance, he may sue to recover damages for this damage or loss thereby dispensing with the requirement at common law to co-join the Attorney General.

Early environmental actions, challenging the industrial pollution has been rebuffed by the courts insistence that the Attorney General must be a necessary party to the action. This has robbed many communities and individuals the opportunity to remedy environmental damage.

In **Amos V. Shell BP Nigeria Ltd**, the plaintiff in his representative capacity claimed that the defendant made a large earth dam across their creek, during their mining operation which resulted in flooding the upstream and drying the downstream of the creek. It also hampered the movement of canoes and negatively affected the economic and agricultural activities within the area. The trial judge ruled that the blocking of the stream was a public nuisance because the creek was a public highway and a representative action could not be maintained because the interest of, and losses suffered by, the victims were separate in character and not communal.

Similarly, in **Lawunmi V. West African Portland Cement Co**, the whole inhabitants of Itori, a village in South West of Nigeria where the defendant, a multi-national organization engaged in cement production business, brought an action against the defendant for the damage allegedly done to their crops, building, streams and other properties as a result of the operation of the defendant company. The court dismissed the plaintiff's action on



the technical ground that the act complained of was a public nuisance that necessitated the joining of the Attorney General of the state was a party to the suit; failure to do so was a total error. But in **Adediran V. Interland**, the Supreme Court held that since the constitution has vested the courts with the powers for the determination of any question as to the civil rights and obligations of a person is in issue, any law which imposes conditions, inconsistent with the free and unrestrained exercise of those rights, and such law is void to the extent of such inconsistency. The restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions of **Section 6(6) (b) of the constitution**, and to the extent is void.

The tort of public nuisance plays only a residual role in the control of the pollution, which is now the subject of extensive statutory control. The principal statutes are the **Public Health Law, Environmental Sanitation Law, and Environmental Pollution Control law**. It is not necessary to prove damage to health from noxious emissions in order to establish a nuisance. It will be sufficient to show that there has been a material interference with the comfort and convenience of life.

The judgment of **Veale J** in **Halsey V. Esso Petroleum Co. Ltd** illustrates the relationship between action in public and private nuisance and action under the rule in **Rylands V. Fletcher**. The plaintiff complained about the operation of the defendant's oil depot. Acid smuts had damaged clothing hung out to dry in his garden, and the paintwork and noise, from both the boilers in the depot and oil tankers arriving and departing during the night, interfered with the plaintiff's sleep. **Veale J** held the defendants liable in public nuisance for the damage to the car and the noise created by the tankers on the night shift. The defendants were liable in private nuisance for the damage to the clothing, the noxious smell and the noise emanating from the depot itself and under **Rylands V. Fletcher** for the escape of the acid smuts in relation to both the car and the clothing.

A central issue in private and public nuisance is whether a public body can grant permit to a private individual or organization (Whether corporate or statutory) to commit nuisance? The right of local authority or state government to grant license and permission is undoubtedly unquestionable. This issue was examined in **Gillingham Borough Council V. Medway Ghatman) Dock Ltd**. Here, the defendant was granted planning permission by the plaintiff to operate a commercial port in the area formerly used as a naval dockyard. As a consequence, the access road to the dock was used 24 hours every day, with the result that the residents of the two nearby roads were adversely affected. At the trial, the defendant conceded to the fact that the conduct, if it was a nuisance, affected a sufficient number of people to be classed a public nuisance. Buckley J, decided that the grant of planning permission for a commercial port was analogous to the defense of statutory authority and that was complete defense to action in public nuisance.



In the subsequent case of **Wheeler V. JJ Saunders Ltd**, the English court of appeal reached a different conclusion. In this case, the plaintiffs bought a farmhouse on the land adjacent to a pig farm operated by the first two defendants. Both the plaintiff's property and the farmland were formerly in common ownership. By a clause in the conveyance, the plaintiff covenanted to:

- (a) Erect and maintain a fence along the whole of the boundary between their property and the farmland; and
- (b) Use the outbuilding on their land only for holding accommodation, for which they had already obtained permission. The defendants also applied for, and obtained, planning permission to build 2 pig housing units on their land. Each unit contained a row of 20 pens which was capable of housing 20 pigs. There was an opening for ventilation and the floor was partly slatted over a channel to contain the pigs' excrement. The second unit was situated only 11 meters from one of the plaintiff's holiday cottages. The plaintiffs brought an action in which they succeeded in obtaining inter alia, damages against the defendant for obstruction and for nuisance in the form of smell from the pigs in the housing units.

The defendants raised the defence of statutory permission and contended that any smell emanating therefrom could not amount to a nuisance in law. The court rejected this defense and held that planning authority has, in general, no power to authorize a nuisance and if it can do so at all, that is only by the exercise of its power to permit a change in the character of the neighborhood. In this case, the nuisance flowed unequivocally, from the activity authorized by planning permission that activity could not be described as a change in the character of neighborhood, therefore the defendant was liable.

## TRESPASS TO LAND

Trespass to land is the unjustifiable, direct and immediate interference by one person with the possession of land of another. It is actionable per se. This tort may be committed either physically by the person or by causing an object to intrude on the land of another. Unlike the tort of nuisance and negligence, the defendant's conduct must be intentional rather than careless or unreasonable and the resultant damage must be direct, rather than indirect consequences on the defendant's activities. The test was whether the injury followed so immediately upon the act of the defendant as to be a direct part of the act as opposed to a consequence of it.

In the prior of **SouthWark's case**, the prior complained because the defendant, a Glover, had made a lime pit in the prior's soil the action ought to be in trespass, but if it was made in the Glover's soil it should be an action on the case. However, a deliberate



entry on the land is sufficient and it is irrelevant that the defendant did not know that he was entering the plaintiff's land, or believed the entry was authorized, or even honestly and reasonably believed that the land was his. Thus, the placing of waste or some noxious substances on the plaintiff's land would be trespass. Similarly, the placing of waste or noxious substances on the boundary so that it falls onto or comes into contact with the plaintiff's land will amount to trespass.

It was held by **Okomah** that the tort of trespass to land has not been effectively utilized by many environmental litigants, especially in Niger-Delta to remedy the environmental problems associated with oil exploration. Trespass to land is actionable per se without the plaintiff proving intention or negligence. The answer is far from being simple, even though the law of trespass offers the advantage of action without proof of damage, and thereby easy for the plaintiff to obtain an injunction in cases where there is no gathering of evidence to prove damage which may be time-consuming or costly, but the requirement of directness may be difficult to overcome because where substances are released into the environment, it may affect a number of persons in different ways as such damage is obviously consequential in nature. Again, the plaintiff may find it difficult to establish the requisite intention to pollute since the tort of trespass is an intentional one. The intention to pollute may be negated by the defence of activity of a 3rd party, which in most cases arises from the sabotage by the third party. Furthermore, it has been said that where the trespass is as a result of an accident, the plaintiff must prove negligence. (**River Water Commissioners V. Adamson**).

## NEGLIGENCE

Negligence is the breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff. The tort of negligence generally entails some form of careless conduct which is usually, although not necessarily, the product of inadvertence. Negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex of duty, breach and damage thereby suffered by the person to whom the duty was owed.

In establishing the tort of negligence, a plaintiff must show:

- (a) The existence of duty of care owed to him by the defendant
- (b) The breach of such duty of care; and
- (c) Damage in law and fact suffered by him

In determining the existence of duty of care, the courts have formulated different tests ranging from "Neighborhood test" to "Reasonable foreseeability of harm test". The result is to reverse the expansion of duty situations by placing an additional hurdle in the way of environmental litigants. The latter requires the plaintiff to show that he falls within



some proximate position such that the defendant ought to have reasonably foreseen that he would be affected by his defendant's actions.

In **Caparo Industries V. Dickham**, the House of Lords laid down 3 criteria for the imposition of a duty of care on a defendant:

- (a) Foreseeability of damage
- (b) Proximity of relationship
- (c) The fairness, justice and reasonableness or otherwise of imposing a duty.

A duty of care is not owed to the whole world but only to an individual within the scope of the risk created, neither could an action in negligence be founded unless it involves the invasion of a legally protected interest or the violation of a right. In determining whether there was a relationship of proximity between the parties, the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than a simple general principle, would determine whether the particular damage suffered was the kind of damage which the defendant was under a duty of care to prevent and whether they were circumstances from which the court could pragmatically include that a duty of care existed. Even where a legal duty of care could be established, the issue of factual duty of care may be impossible, if the court discovers that the plaintiff does not fall within the category of victims reasonably foreseeable as regards the defendant's act.

In **Chief Simon Onajoke V. Seismograph Services Ltd**, the plaintiff brought an action in negligence claiming that the defendant company damaged his building during their blasting operations. The court held that the defendant was liable and damages were awarded against the company because the defendant owed a duty of care to anyone (Including the plaintiff) whose house was likely to be damaged through the said operation.

In **Tutton V. A.D Walter**, the Central government and manufacturers of insecticides advised farmers that the use of insecticides as flowering crops could cause the death of insects such as bees that the insecticide was most effective after flowering had ended. The plaintiff's bees died after feeding on the defendant's flowering crops sprayed with the insecticides and the defendant was held liable in negligence.

Similarly, in **Scott Whitehead V. N.C.B**, a chlorinated solution was discharged into a river by the first defendant and polluted water which was later abstracted by a farmer for use on crops. The crops were damaged, which led to a regional water authority being held negligent for not advising the farmer of the potential danger present within the water.

However, in **Cambridge Water Works V. Eastern Leather County plc**, the defendants escaped liability for pollution of the underground water supply caused by seepage into it of chemicals accidentally split during their leather tanning process, on the ground that such seepage had not been foreseeable. This case involves a tannery company which in the course of its tannery business used a chemical called Perchlroethene (PCE), some of



which was spilt onto the floor of its factors. Over a period of time, the PCE which had been spilt through the ground and was carried by way of an underground water-flow to the plaintiff's borehole several miles away. This resulted in the water from the borehole being polluted to the extent that it failed to satisfy the minimum health requirement, and the plaintiff was forced to find an alternative water supply. The Plaintiff sued the defendant for negligence, nuisance and under the rule in **Rylands V. Fletcher** but allowed its appeal on the tort of nuisance. On further appeal to the House of Lords, the court reversed the decision on nuisance and also dismissed the claim based on Rylands, holding that, as in negligence and nuisance, foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule. (**Lord Goff** emphasized this). For if a plaintiff in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why in common justice, he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage.

However, in the latter cases of **Margerson & Ors V. J.W Roberts Ltd; Hancock V. J.W Roberts Ltd; Hancock V. T & N Plc**, which involve historic polluter, the result was different as the court adopted a singular test of foreseeability to find the defendant liable in negligence. The plaintiffs instituted actions in negligence, public and private nuisance, and strict liability under the rule in **Rylands V. Fletcher** against the defendant's company, successors to **Turner V. Newall Ltd**, who engaged in the processing of asbestos minerals to finished products from 1896 before the factory was closed down in 1971. The plaintiffs suffered from mesothelioma (Cancer of the lung) which they alleged arose from the exposure in their childhoods to asbestos dust within the vicinity of the J.W Roberts factory. Mr. Margerson contended that the condition was caused by environmental exposure to asbestos dust resulting from the company's factory at Leeds. He lived with his family at a house 200yards from the factory. He left there when he joined the army in 1945 after staying there since he was born in 1925. He returned there in 1947 and stayed further for 10 years until shortly after the factory was closed down. In 1990, he began to experience the symptoms of mesothelioma. He died in 1997. Following his death, his widow, Mrs. Evelyn Margerson, adopted the action which he started and subsequently commenced her won proceedings as a defendant. These proceedings were consolidated with the earlier action. In September 1994, Mrs. June Hammock issued a writ similarly claiming damages from the company, having earlier that year contracted mesothelioma. From 1938 (When she was two) until 1951 she lived at addresses just 250yards from the factory and for part of that time, attended local schools. She first experienced the symptoms of mesothelioma in 1992 and finally diagnosed in 1994.

For both plaintiffs, it was conceded by the company that the mesothelioma was due to exposure to the asbestos from the factory and that if the company was found liable,



damages would be paid. Oral evidence and written statement were given as to the dust in the area adjacent to the factory. Mr. Justice Holland found that factory and the vicinity was generally dusty, dirty and significant emissions of the dust was recorded. The illness for which the plaintiff's claimed damages were mesothelioma rather than asbestos and the courts considered the difference between the two as well as their cure. Dust to which is not eliminated by the respiratory system's normal defences has the potential to damage the lungs on their living. Dust may induce irritation or inflammation and this may promote fibrous scarring of the lung tissue. The fibrosis, if progressive, will cause damage to the lungs with consequent breathlessness and can lead eventually to death. The inhalation of asbestos can bring about such fibrosis and this is known as asbestosis.

Factors influencing the development of asbestos are the types of asbestos inhaled, the intensity of the exposure, the length of the exposure and individual susceptibility. The same factors affect the development of mesothelioma with the added factor of time that has elapsed between exposure to dust and outset of the disease; this is at least 12 years and is generally between 15 and 40 years. It is important to note that the level of exposure to asbestos which brings on mesothelioma is much less than the exposure which would be needed for asbestos.

The plaintiff in order to establish the company's liability in negligence relied on the speech of **Lord Lloyd** in **Page V. Smith**, argued that "the test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury. If so, he comes under a duty of care to the plaintiff. If a working definition of personal injury is needed, it can be found in **Section 38(1) of the Limitation Act 1980**. "Personal injuries" includes any disease and any impairment of a person's physical or mental condition. The plaintiffs claimed that the emission of asbestos dust from the defendant's factory over the period of time such that the company could reasonably foresee that the plaintiff would be exposed to the risk of personal injury because the risk was not so far-fetched that a reasonable man would think it to neglect it. They contended that it was not necessary to show that the actual injury (Mesothelioma) was foreseeable, only a personal injury in line with the definition quoted by **LORD LLYOD** is sufficient.

The trial judge, **Holland J**, reflected a two-stage approach consisting of "first... a finding as to whether any risk of personal injury to anyone was foreseeable, and second, if the answer be yes, then : (a) A further finding as to whether the plaintiffs were within the ambit of such foreseeability". It is this guidance that Justice Holland applied to the cases of the two plaintiffs and found for them awarded the sum of 50,000pounds each to the plaintiffs as damage. On appeal by the defendant, the Court of Appeal rejected their appeal and held that the defendant owed a duty of care to the plaintiffs as they fell within the reasonably foreseeable victims as a result of the activities of the defendants.



The remedy of negligence, may in certain circumstances be suitable for the land contamination, particularly the escape of landfill gas. Thus, in the Canadian case of **Gentien V. Municipality of Metropolitan Toronto**, where the defendants, the municipal waste disposal authority and the local borough authority, were found to be negligent in respect of the disposal of household garbage mixed with earth into a ravine in a residential area. The plaintiff purchased the property in 1967 and in 1969 suffered serious injury when an explosion occurred in the same garage. It was held that the defendants knew or ought to have known of the generation of methane gas as a potential danger. Besides from decisions of the English courts on negligence, Nigerian courts have not gone far in the protection of environment. In a series of oil pollution cases, the defendants have been denied justice even in the face of obvious environmental degradation.

### **STRICT LIABILITY RULE IN RYLANDS V. FLETCHER**

The rule in **Rylands V. Fletcher** has been invoked in the past to address environmental hazards inflicted on the victims particularly in water and oil pollution cases.

The rule as developed by Blackburn J is that any person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief, if it escapes, **must keep at his peril**.

The essential requirements for liability under the tort may be seen to be as follows:

- (a) The defendant must bring, collect and keep something, on his land for his own purpose.
- (b) The thing must be not naturally there
- (c) The thing must be known to be likely to harm if it escapes
- (d) The thing must escape; and then;
- (e) The defendant is liable for the natural and anticipated consequences. The House of Lords decision in *Cambridge Water Company V. Eastern Leather Plc*, established that foreseeability of damage of the relevant type is a prerequisite for recovery.

In **Rylands v. Fletcher**, the defendant employed an independent contractor to build him a reservoir and the independent contractor carried out the job till he noticed a sufficiently covered shaft which they felt would amount to no problem, when Ryland opened the plant, the shaft gave away and water flooded Fletcher's land.

It is sometimes said that the principle is limited to situations involving ultra-hazardous substances or activities. For example, water, the substance, which caused the damage in **Rylands V. Fletcher** is not particularly hazardous by itself, although it may easily become so in the event of an escape from storage in large



quantities. In practice, the operation of the rule has been greatly restricted by a growing insistence on the requirement, first mentioned by **Lord Cairns** in the House of Lords, of a non-natural use of Land by the defendant. What constitutes non-natural user is far from being clear, and has given rise to divergent and incongruous interpretation. The term has been misread and misapplied, leading to much confusion in theory and in practice. It seems plain that Lord Cairns meant that in order for the rule to apply, the defendant must bring on to his land something which was not present there in its natural state, but the concept of non-natural use has been gradually distorted to mean an unusual, extraordinary or outlandish use of land. For instance, in **Cambridge Water Works** case, **Lord Goff** stated obiter that the "Storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use. Yet, Lord Moulton in *Rickards V. Lothian* defined non-natural use as an "not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased dangers to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

Would the storage of crude oil amount to non-natural use of the land? Nigerian courts in finding the liability of oil producing companies in environmental litigation arising from oil spillage have invoked the rule in **Rylands V. Fletcher**. In most of the cases, the courts have interpreted the accumulation of crude oil to amount to non-natural use of the land, and where it escapes and causes injury to the plaintiff, the defendant would be liable. In **Shell Petroleum Co. Of Nig. Ltd V. Anaro & Ors**, the Court Of Appeal held that accumulation of crude oil in a waste pit was a non-natural user of land and the defendant appellant was liable for damage caused by it. It is obvious that this principle will continue to avail many environmental litigants now and in the future.

The decision of the House of Lords in **Cambridge Water Works case** has removed the veil of strict liability and undermined the usefulness of the rule to the environmental protection. The case reintegrates **Rylands V. Fletcher** within the mainstream of nuisance law and suggests that industrial use of land is per se natural. In the opinion of **Lord Goff**, " it would lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escape from land.

## STATUTORY CONTROLS



Following the discovery of the first oil well in 1956 and subsequent discoveries which brought about a dramatic change in the status of the environment and extent of environmental regulation, earlier legislative response was directed at oil pollution arising from oil prospecting and explorative activities in the country.

The legislative response began with the promulgation of The Petroleum Act and regulations made thereunder. **The Petroleum Act** was principally enacted to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resources drivable therefrom in the federal government and for all matters incidental thereto.

There was in place an institutional structure for the implementation of the provisions of **the Petroleum Act**. This led to the establishment of a ministry of Petroleum resources, with a department of Petroleum Resources, charged with the responsibility of enforcing the regulations.

The Oil in Navigable Waters Act was another responsive legislation to the post-oil discovery era. The Act, unlike those already examined, has direct impact on environmental protection by prohibiting the discharge of oil into the sea and navigable waters. It is an offence punishable by imprisonment to deposit into the Nigerian territorial waters with attendant criminal sanctions of fine or imprisonment. The power to enforce the provisions of the Act is vested in the Minister of Transport.

**The associated Gas Re-Injection Act** and the regulations made pursuant to the Act represent important legislative concern to address the menace of atmospheric pollution through gas flaring in Nigeria.

**The Minerals Act** was passed as a legislative response to environmental degradation. It sought to amend and consolidate the laws relating to mines and minerals. Under this Act, reference to pollution was defined in **Section 2** as "Contamination with any chemical or substances in such a quantity as to be injurious to animal or vegetable life."

Environmental regulation extended to the industries with the passage of The Factories Act. The Act makes provision for the registration of factories and regulates the safety of workers exposed to occupational hazards by imposing minimum safety and health standards for operators of factories. It also imposes penalty for any breach of its provisions. Although the Act is not directly on



environmental protection, it addresses the occupational standards by imposing minimum safety and health standards for operators of factories. It also imposes penalty for any breach of its provisions. Although the act is not directly on environmental protection, it addresses the occupational hazards at the work place.

### **THE PATTERN OF MODERN ENVIRONMENTAL REGULATION**

The principal source of environmental law is statutory. Initially, environmental legislation was sectoral in nature, but with the passage of time, environmental legislation became more specialized. An example is the ***Endangered Species (Control of International Trade & Traffic) Act***, which is aimed at bio-diversity and wild-life conservation. The Act provides the necessary legal framework for the protection, conservation, and management of Nigeria's wildlife by imposing stringent permit system on persons trading in wildlife. The Act also prohibits international trade in and hunting certain species of animals regarded as being threatened, listed in the ***first schedule of the Act***.

***The Harmful Waste Act*** prohibits the carrying, depositing and dumping of harmful waste on any land and territorial waters of Nigeria. It prohibits and criminalizes activities relating to harmful waste and other related activities. The minister of works and housing was charged with the responsibilities of enforcing the provisions of this Act. Police officers were also conferred with the power of search, seizure and arrest without warrant. The provisions of this Act is deterrent enough to discourage the practice of dumping of such harmful wastes in the country.

***The Land Use Act, Urban and Regional Planning Act, and Town and Country Planning Law*** of each state contain most of the legislation relating to land tenure, land development and compulsory acquisition, whilst the ***National Park Services Act 1999***, deals with in-situ conservation.

The enactment of the ***Environmental Impact Assessment Act in 1992*** is a practical demonstration of the precautionary principle in environmental management in Nigeria. It requires every proponent of project to conduct Environmental Impact Assessment before undertaking an activity and where such environmental damage could be identified, adequate measures must be put in place to address such harm.

Essentially, this new legal regime is resource-oriented legislation aimed at sustainable utilization and conservation of the natural resources and protection of



the National environment. The modern legislative regime also gravitates towards the centralization of environmental management in core institutions.

### **THE EMERGENCE AND METAMORPHOSIS OF THE FEDERAL ENVIRONMENTAL PROTECTION AGENCY (FEPA)**

Prior to the establishment of FEPA, there had been conscious Federal Government efforts to tackle environmental problems, even though on a minimal level.

The promulgation of the Federal Environmental Protection Agency Act brought with it the institutionalization of holistic approach to environmental regulation in Nigeria. The agency has wide powers and extensive functions to regulate the environment and also to make further regulations and set National environmental standards in respect of water quality, noise pollution, hazardous substances in quality and atmospheric protection.

However, in 1999, the Federal Government created a separate Federal Ministry of Environment and by a presidential directive, relevant ministries, departments and units of the federal ministries were drafted into the ministry. The ministry is now responsible for environmental protection activities previously administered by FEPA. Its primary mandate is to achieve the environmental objectives of the state as set out in Section 20 of the 1999 Constitution, which is to "Protect, and improve, water, air and land, forest and wildlife of Nigeria". The ministry is also empowered to coordinate the activities of the 3 tiers of government – federal, state and local governments in respect of environmental protection activities.

### **FUNCTIONS OF FEPA**

1. The Federal Environmental Protection Agency exercises advisory power which involves advising the federal military Governmental policies and priorities and scientific and technological activities affecting the environment.
2. It also prepares periodic master plans for the development of environmental science and technology.
3. It also has wide powers to make grants to suitable authorities and bodies with similar functions for demonstration and for such other purposes and provisions of this Act, to collect and make available through publications and other appropriate means and in cooperation with public or private organizations, basic scientific data and other information pertaining to pollution and environmental protection matters to enter into contracts with public and/or



private organizations and individuals for the purpose of executing and fulfilling its functions.

4. To establish, encourage and promote training programmes for its staff and other appropriate individuals from public or private organizations and to enter into agreements with public or private organizations and individuals to develop, utilize and coordinate and share environmental monitoring programmes, research effects, basic data on chemical, physical and biological effects of various activities on the environment and other environmentally related activities as appropriate.
5. The agency is also empowered to establish advisory bodies composed of administrative, technical or other experts in such environmental areas as the agency may consider useful and appropriate to assist it in carrying out the purposes and provisions of this Act; establish environmental criteria, guidelines, specifications, or standards for the protection of the nation's air and interstate water may be necessary to protect the health and welfare of the population from environmental degradation, establish such procedures for industrial or agricultural activities in order to minimize damage to the environment from such activities; maintain a programme of technical assistance to bodies (Public and private) concerning implementation of environmental criteria, guidelines, regulations and standards thereof; and develop and promote such processes, methods, devices and materials as may be useful or incidental in carrying out the purposes and provisions of this Act.

The functions of FEPA are provided for in **Section 5 Paragraph A-f of The FEPA Act.**

#### **LIMITATIONS OF THE FEPA ACT**

1. The FEPA Act was not in line with International standards. Some of its major challenges was that of the enforcement of regulation.
2. There was no strong link between FEPA and prior existing environmental bodies. There was weak enforcement of existing environmental laws.
3. FEPA's functions were restricted and did not cover all the areas of environment.
4. FEPA's functions were restricted and did not cover all the areas of environment
5. FEPA's policy did not meet international standards and strategies for pollution, prevention and environmental compliance and enforcement.



6. Further, little attention was paid to the principles of sustainable development or the use of economic incentives in promoting the interest of the environment.
7. The Act was low in inter-agency responsibility and environmental protection.

The Act was replaced by the **NESREA Act** i.e the National Environmental Standard and Regulation Enforcement Agency.

The functions of FEPA are summarized below:

**1. Power to inspect:**

Pursuant to its powers to enforce the Act, the Agency may through any of its authorized officers require any person to produce a license, permit, certificate or other documents and examine and take copies of any required document. It may also require to be produced, any acceptance, device or any other item used in relation to environmental protection. Authorized officer for this purpose means any employee of the agency, any police officer not below the rank of an inspector of police, or any customs officer.

**2. Power of Search and seizure:**

Any authorized officer who believes on reasonable ground that an offence has been committed against the Act or any regulations, May without warrant, enter and search any land, building, or any inland water or other structure whatsoever. Any person can be arrested and any item can be seized in the process of such search. However, the authorized officer must issue a written receipt of the items seized and shall state the grounds of the seizure on such receipt.

**3. Power to Make regulations:**

The Act, authorized the minister, on the advice of the agency, to make regulations generally in relation to the provisions of the Act, but in particular with respect to water quality, effluent limitations, air quality, atmospheric protection, ozone protection, noise control and control of hazardous substances and removal methods.

The minister in charge of the ministry of works exercised the power to make regulations on the advice of FEPA.



## THE NESREA ACT

The Act establishing the NESREA provides that the agency is established and charged with the responsibility of for protection and development of the environment in Nigeria and of the environment in Nigeria and of the other related Act.

NESREA is the National Environmental Standard and Regulation Enforcement Agency.

## FUNCTIONS OF THE NESREA

The functions of the agency are stated in **Section 7 of The NESREA Act**. The Act charged the agency with the following responsibilities:

1. To protect and develop the environment.
2. To conserve the biodiversity and to ensure the sustainable development of Nigeria's biodiversity. It has a duty to coordinate and act as a liaison between National and International stakeholders in the enforcement of environmental standards, rules, laws, regulations, guidelines and policies.

## STRATEGIES OF NESREA

1. Collaboration and partnership e.g The UN's agencies
2. Public awareness and education on topical environmental issues
3. Strengthening institutions and capacity building to ensure and monitor compliance.

## THE FUNCTIONS OF NESREA

1. Abatement and prevention of environmental pollution and degradation.
2. The enforcement of guidelines and legislation on the sustainable management of the ecosystem, biodiversity and Nigeria's natural resources.
  - (a) The fisheries Act
  - (b) The inland fisheries Act
  - (c) The endangered species (Control of international trade and traffic Act)



- (d) The National Park Act
- (e) The exclusive economic zone Act
- 3. Enforcement of compliance with importation, exportation, distribution, handling, use and disposal of wastes. This includes the safe use of pesticides.

Regulations here include; The nuclear safety and radiation protection Act; mineral oil safety Regulations and crude oil transportation and shipment regulation and other regulations under the Petroleum Act, the Harmful waste (Special Criminal Provisions) Act; The National Environmental Protection Management of solid/hazardous wastes regulations of 1991.

In order to carry out its functions, **Section 8 of the Act** stipulates the powers of the Agency:

- 1. Powers of prohibition:  
Powers to make proposals on National policies and guidelines on the environment
- 2. To carry out investigation and empirical research on pollution and materials capable of causing pollution.

NB: The Act or agency by virtue of the Act has power on all activities that affect the environment except activities in the Oil and gas sector.

## NESREA REGULATIONS

- 1. National Environmental (Wetland, Riverbank & Lakeshores) – Regulations 2009 – Aimed at creating an inventory and declaring them as specially protected areas and highlighting such areas that are damaged or in other ways degraded, damaged or endangered.
- 2. National Environmental (Water- shed, mountainous, hilly and catchment areas) - This highlights the need for land users to know and respect the carrying capacity of such land. Such places are usually very prone to landslides and erosions.
- 3. National Environmental (Sanitation and wastes control) Regulations 2009 – This aims at the adoption of sustainable and environmentally friendly options in sanitation and waste disposal and management in order to reduce pollution.
- 4. National Environmental (Permitting and licensing system) Regulations 2009.
- 5. National Environmental (Access to genetic resources and benefit sharing) regulations 2009.
- 6. Mining and processing of coal, ores and industrial material regulations of 2009
- 7. National Environmental (Ozone layer protection) Regulations 2009 – Aimed at ozone layer depleting substances. Where the use of such substances is unavoidable



they should be labelled appropriately and instructions should include the use and method of disposal.

8. National Environmental (Food, beverages and Tobacco Sector) Regulations 2009.
9. National Environmental (Textile, weaving, leather and footwear industries regulations 2009
10. National and environmental Chemical, pharmaceutical, soap and detergents, manufacturing industries) regulations 2009.

## SCOPE AND PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

Since the beginning of the 19<sup>th</sup> century, international law has played a significant role in the protection of the environment.

The legal developments of international environmental law could, however, be characterized essentially into 3 main stages: The 1<sup>st</sup> stage occurred in the 1950s, which period witnessed the drafting and adoption of various international legal instruments aimed at regulating diverse sectors of the environment, such as wildlife, air, soil, oceans and inland waterways.

The second stage, which occurred in the 1980s, witnessed international regulation of a diverse nature, such as toxic or dangerous products, physical waste, nuclear wastes, hazardous activities and radioactive substances.

The 3<sup>rd</sup> stage occurred in the 1990s and it witnessed international regulation of a diverse nature, such as global warming, biological diversity, ozone layer depletion and so forth.

International law is the corpus of rules and principles that govern relations among states. It consists of certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with some force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by approximate means in case of infringement.

**Hackworth** described international law as a system of jurisprudence that, for the most part, has evolved out of the experiences and the necessities of situations that have arisen from time to time.

International environmental law deals with the specific functions of protecting the environment or the international environment e.g in trans boundary pollution or pollution that traverses diverse borders.

The **Chenobyl** nuclear plant explosion that blasted radioactive materials into the air and these materials were later carried by North West winds into the European territory.



International regulations, as said earlier, became prominent in the 19<sup>th</sup> century when people came together to protect endangered species. Examples of such international instruments are:

- The conservation of fishing stock convention between France and Great Britain
- The North Sea fisheries overfishing convention of 1882

**NB:** A major challenge in international law is the issue of enforcement as parties involved are sovereign states.

A treaty/Convention becomes operational when the requirement of a number of states as stated by the treaty itself has been met. A major step in international environmental law was taken consequent to the declaration in 1972. Principles for the preservation and the enforcement of the environment.

## SOURCES OF INTERNATIONAL ENVIRONMENTAL LAW

The sources of international environmental law could be gleaned from **Article 38 of the Statute of the International Court of Justice**. It provides:

“The court whose function is to decide, in accordance with international law such as are submitted to it, shall apply:

- (a) International conventions, whether general or particular, establishes rules expressly recognized by the contesting states;
- (b) International custom; as evidence of a general practice accepted by law
- (c) The general principle of law recognized by civilized nations
- (d) Judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

From the above statute, 4 major sources of international law are recognized and described below:

- Treaties
- International Customary law
- Judicial decisions
- Academic writings

## TREATIES

Treaties constitute the most important sources of international environmental law. The terms treaty, convention protocol agreement, accord, cut, statute, covenant of charter are generic terms used interchangeably to define international agreement concluded



between states in written form governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its particular derogation.

A treaty may modify or contradict a rule of customary international law, and will supersede customary intentional law in effect. Whether an international instrument is to be governed by international law depends on the intention of the parties. This can sometimes be ascertained by the language used in the instrument or statements made by the state parties during its regulation or subsequently.

- Prove agreement are usually called treaties.
- Agreement under which unimportant organization are instituted are often called charters, convents or statutes; and
- Agreement unending or complementing an already existing agreement are usually called protocols.

In the field of international environmental law, all types of titles are widely used.

Treaties on environment could either be bilateral, i.e. between two contracting states, or multilateral, among 2 or more state. For example, **the convention to regulate international trade in endangered species of flora and Fauna 1973**, is a treaty of global application. By contrast, **The Baritone convention for the Protection of the Mediterranean Sea Agent Pollution 1976** is a regional convention which applies to maritime waters.

Furthermore, the manner in which a treaty is negotiated may determine the bilateral or multilateral nature of the treaty. Bilateral treaties are often negotiated at a ministerial or government to government level. Multilateral treaties are often negotiated at diplomatic conferences, either covered by an interacting organization such as The UN or one of its agencies.

The duration for the negotiation of a treaty depends in a variety of factors, such as the member of contracting states or the complexity of the subject matter.

The procedure for adoption and entry into force of a treaty can be complex and may vary depending on its type. A bilateral treaty may be agreed upon by mutual consent of the parties. Entry into force may only occur after both parties have signed and ratified. A multilateral treaty can also be adopted by the consent of all states which participated in its drawing up though, a two-third vote may sometimes also be sufficient. In most cases, multilateral treaties may, for a certain period, be open for signature following their concurrence.



Once a treaty has entered into force, it becomes bonding on the contracting parties to perform the obligations of the treaty in good faith as the rule of ***pacta sunt servanda*** (Agreements are to be respected) will apply.

A treaty may be amended under the final procedure provided under **Articles 39-41 of the Vienna convention on the law of treaties**. Nonetheless, many treaties follow the international amendment rule procedures rendering the Vienna convention redundant.

A bilateral treaty is easier to achieve because parties to it are mainly two. Many multilateral treaties contain procedures for their own amendments.

In order to achieve the realization of the treaty's obligation, several bodies may be established depending on the complexity and scope of the treaty. These bodies usually aim at following up the implementation of the treaty by the parties assisting them and further developing or amending it when necessary. These bodies include the plenary, non-standing body, non-plenary, dreary body, standing body and the secretariat. A plenary, non-standing body i.e. the inference of the parties, is usually the highest policy making body of a treaty. It consists of all representatives of all parties to the treaty and convenes on a regular basis to take decisions necessary for the achievement of the objectives of the treaty. A non-plenary, standing body such as standings committee or commission may be established as an organ to implement advisory policies taken by the plenary. It consists of a limited number of members elected by the plenary, non-standing body and meets as often as necessary. The advisory bodies on the other hand may be set up to give technical or scientific advice to the above-mentioned bodies or to the secretariat.

Most treaties establish the treaty secretariat which is treated within the territory of one contracting parties. The duties functions of the secretariat are usually spelt out in the treaty and, in most cases, it plays the role of the repertory and also involves the day-to-day administration of the treaty regimes.

## **INTERNATIONAL CUSTOMARY LAW**

International customary law is the cultural practice of the states which is usually derived from either their mutual understanding on the way to interact in specific area or a board and long recognition and acceptance of rules already elaborated in international legal instruments. Such customs could be gleaned from polished materials such as newspapers, reports of international meetings, states official documents reflecting the action of state and the statement made by the high officials as well as judgment, advisory opinions of the ISJ, arbitral and other



international tribunals. To be established as customary rules, state parliament satisfy the following tests:

- a. Concordant practice by a number of states with reference to a type of situation falling within the domain international relations,
- b. Continuation or repetition of the practice over a condensable period of time
- c. Conception that the practice is required by or constants with, pervading international law.
- d. General acquiescence in the practice by other states.

For a custom to be elevated to the status of international law, it must be constant and uniform in usage and attain the station of notoriety. A single precedent is not enough to establish a customary rule. There must be a degree of repetition are a period of time. Also, the practice should be seen by states as being governed by international law and hat the action is obligation in law.

In **US v. Canada**, The case established the principle that no state may knowingly allow its territory to be used in a manner that would cause serious physical injury to the environment of another state. The rule in the case was derived from an extension of the principle of good neighborhood enunciated in **Corfu channel (u.k. v Alb)**. There, the ICJ noted that principle of sovereignty embeds the obligation on a state “not to allow knowingly its territory to be used for acts contrary to the rights of other states”. The principle was also confirmed in **Spain V. France**. In its 1996 Advisory opinion on the legality of the threat or use of nuclear weapons, the ICJ confirmed that the court recognizes that the environment is not an abstraction but represents the living spine, the quality of life and the very health of human beings, including generation unborn. The existence of the general obligation of the state is to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.

## JUDICIAL DECISIONS

Judicial decisions of courts (both international & domestic tribunals) and other institutions are recognized as being a subsidiary source of international law. The principal international court, which develops international law in the regard, is the ICJ. The decision of the ICJ are only binding on those parties before the court. Also the court is not obliged to decide a



case in academics with previous divisions. However, it usually takes into account previous decisions which are relevant to the issue in question.

The judgment in **US. V Canada** represents an important foundation of international environmental law. The arbitral tribunal stated that no state has the right to use or plan the use of its territory in such a manner as to cause injury by fumes in, or to, the territory of another or to the properties of person there.

## ACADEMIC WRITINGS

Unlike international declarations, judicial decisions and academic writings are not crucial sources of international law per se but are means by which the existence and scope of international law may be determined. The writings apply rules of customary international law to current problems. They, in effect, help to determine when an international practice has become customary law.

## PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

1. **PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES:** The concept of permanent sovereignty over natural resources is a basic constituent of the right to self-determination and an element of state sovereignty principle emanated from the UN resolution which declares that right of the people nation to permanent sovereignty over their natural wealth and resources may be exercised in the interest of their natural wealth and Resources and National development of the well-being of the people concerned.

The principle respects and recognizes the state sovereignty right over their natural resources with a positive obligation to use natural resources in a sustainable manner. The principle reflects the interest and overriding right of a state to control the exploitation and the use of its natural resources.

**Article 21(3) Of The African Charter On Human And Peoples Rights And Articles 1(2) In Both The Civil And Political Rights Covenant And The Economic And Social Right Covenant**, define the parameter with which the natural resources may be exploited; “All people may.. Freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic cooperation based upon the principles of mutual benefit and international law. Although these instruments contain specific rules that states are required to follow in dealing with foreigners on matters pertaining to the exploitation of natural wealth and



resources, it is silent as to such relationship between the states and the people and how this exploitation can be accomplished.

2. **PRECAUTIONARY PRINCIPLE:** This is one of the most important general environmental principles for avoiding environmental damage and achieving sustainable development. It assumes that natural system are vulnerable rather than disposable. The principle prefers prevention to remediation, focuses on the relevance of scientific data to developmental decision making and carries an obligation to take precautionary measures in proportion to potential damage. It has its roots in German concept of “**vorsorge**”, meaning literally, “beforehand” or “prior care” or “prior worry” consisting of overtones of caution, good household management, care for the future and provision for the future. It is akin to the concept of reasonable care or foreseeability of harm in law of tort, and is preventive in nature.

In the content of international environmental law, the principle has its legal basis in **Principle 15 of the Rio Declaration on Environment and Development.**

It reads:

***“The precautionary approach shall be widely accepted by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.***

The precautionary principles, is a broad term and is based on the understanding that it is not always possible, and readily easy, to know environmental consequences. This may be called the principle of uncertainty. The law could require (a) A conation progress until a process is judged (b) ordinary progress until findings of fruit are made, or (c) no progress until inters in reach has been coordinated into a proposed process , it is (d) which mostly and fully represent as precautionary principle in law corresponding to the economic notion of anticipatory action.

The essence of this principle is that rather than wait for scientific certainty, policymakers and regulators must out in anticipation of environmental harm, ensure that this harm does not in fact occur.

The precautionary principle has been accepted in many international treaties. It was endorsed in Articles of the United nation framework convention in climate change, which reads that:



***“The parties should take precautionary measures to anticipate, prevent or minimize the cause of climate change and mitigate its adverse effects.”***

Similarly, the Bamako convention on the ban of the import into Africa and control of trans boundary movement and management of Solid waste requires that each party shall strive to adopt and implement the preventive, precautionary approach to pollution problems.

The implementation of this principle is not without difficulties even at the domestic level. The case of **R. V Secretary of State for Trade and Industry**, demonstrates the gulf between acceptance in principle and implementation in practice. It further demonstrates that although the government may accept the precautionary principle in general, the socio-economic and political factors may render its implementation difficult.

### **3. POLLUTER PAYS PRINCIPLE:**

The polluter pays principle refers to the requirement that the costs of pollution should be borne by person or persons responsible for cause OF the pollution and the consequential costs. The precise meaning of the principle and its application are matters of practical implication, in practical terms, it compares the requirement that the polluter must pay the cost of pollution abatement, cost of environmental rehabilitation, and damages for victims of damage, if any, due to pollution.

The principle is particularly meant for giving remedies appropriately to victims of damage from environmental harmful activities in Nigeria. **SECTION 21 of the FEPA ACT** reiterates this principle by rendering the owner of a vessel who discharges hazardous substances into the air, land & waters of Nigeria liable for the cost of removal, restoration or replacement of natural resources damaged or destroyed on a result of the discharge. The polluter will also be liable to the victims for the cost of reparation, restoration or replacement of natural resources damaged or destroyed on a result of the discharge. The polluter will also be liable to the victims for the costs of reparation, restoration, restitution, or compensation determinable by the Agency. This law enables the government to recover from responsible parties the costs of their pollution entirely and from random polluters reasonable for remedying the harmful condition they created.

### **4. USER PAYS PRINCIPLE:**

This principle requires that the cost of resources to a user must include all the environmental costs associated with their extraction, transformation and use (including the costs of alternative or future users forgone). This requires the



producers to internalize environmental costs in calculating profits and as against the traditional approach of cost and benefits analysis (CBA), which disregards environmental costs. It further requires the producers to select the most appropriate or least damaging environmental alternative for the treatment of waters or pollutants.

#### 5. **PRINCIPLE OF INTER-GENERATIONAL EQUITY:**

The concept of equity touches on the issues of fairness, equality and justice in the distribution of resources and responsibilities. It implies that each generation owes a duty to future ones to avoid impairing the present generation and is under a duty to exercise prudent and austere measures in the management of the natural resources, in order to ensure that it does not pass on to the future generation, an unsinkable environment that does not meet than basic human needs and values. After all, all humans present and future have “equitable right to access to and use of the common patrimony of natural and cultural resources of our planet.

Commenting on this principle, **Weiss** has said that the theory of intergenerational equity includes duties to conserve resources, ensure equitable use, adverse imputes, prevent disasters and mitigate damage and compensation for environmental harm.

The principle has been widely applied in many international treaties. For instance, **the 1979 moon treaty** provides that the exploration and use of the moon shall be the province of all marker to be carried out with due regard” to the need of present and future generation. Also, **the United Nations convention on Biological diversity** defines sustainable use of biological diversity to encompass the potentiality to meet the need and aspiration of present and further generations.

#### 6. **PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITY:**

This principle is an acknowledgment of the fact that although some causes of global environmental changes involve multi state actors and responsibilities, there are disparities in the consecutions to such changes between developed and developing countries. In assigning liability for the environmental damage and responsibility for the clean-up, restoration and other remedial measures, consideration must be given to the level of contribution to global emission. The principle is stated in principle of the **1992 declaration Environment and development**.

The practical expression of this principle is founded in Articles (s) of the climate change convention which requires the state parties to the convention to be guided by the principle that they should protect the climatic system for the benefit of the



present and future generations of human land on the basis of equity and in accordance with their common but differentiated responsibilities.

## 7. THE PRINCIPLE OF COMMON NATURAL HERITAGE:

**Avid Prado** brought this principle to inveigh. Prado was ambassador and delegated to the UN conference on law of the sea.

The principal focus of natural heritage included, the natural monuments, geological and physiographical formations and area which are the habitats of and endangered species and landscapes.

Today, both municipal and international law recognize the need for the natural assets to be preserved intact and not just its original state but in sustainable exploitation and enjoyment of mankind.

Securing the common “National heritage” of man is a primary aim of justice. **Roman law** had recognized that the air, sea, coasts, rivers, lakes, etc. were the common property of all” or for the general enjoyment, and familiarly, the public areas of settlement were recognized as such later.

Also, this principle safeguards an inviolable part of the nature which must not only be conserved but also be exempted from any human intervention, as the sacred forests or grows of ancient time. The inviolable part of nature can be visited, but must be left unchanged.

## INTERNATIONAL LAW AND ENVIRONMENTAL RIGHT

At present, no global human right treaty provides for a right to environmental protection, there are manages of ideas associated traditionally with the concept of environmental rights. Many international human rights scholars and activities have sought to expand and reinterpret the civil and social right in the UPAR and other human rights treaties to justify the existence of environmental rights.

**Article 24 of the African charter on Human and people’s rights:** Provides that “all people have right to a general satisfactory environment favorable to their development. By this derivative Principle, they contend that Rights to life, health and personal liberty as listed in many human right treaties are by extension, an aspect of this right. According to them, a polluted environment will hinder the



people from pursuing their economic activities as most oil pollution activities impair the economic right of the people to earn a living. This view tallies with the environmental approach to the environment.

On the other hand, the denical school of thought reject the elevation of environmental right who sustenance right and argues that there is no justification for the recognition of such right as a generic one. One of the reasons is that the term environment is a vague and imprecision.

Recognition of environmental right in developing countries will potentially affect their development activities as economically warble, dams and factors and oil prospecting activities will have adverse impacts on the annuitant. Consequently, any enforcement of environmental rights, will undoubtedly, cause discomfiture to policymakers and political tension and instability in the polity.

In the face of such diverse opinions, state practices are duded over the issue of recognition and enforce ability of environmental right.

Most national constitutions, however contain express procession than an environment of a specified quality constitutes a human right or that impose environmental duties in the state. For example, **Section 20 of the 1999 constitution of Nigeria** requires state police to be directed to watch the protection and improvement of the environment and safe guard the air, water, forest, and wild-life of Nigeria.

### **SOIL POLLUTION/ LAND CONTAMINATION**

Land is an essential component of the terrestrial ecosystem of the earth. It supports plant growth, and provides a habitat for a large number of animals, microorganism. Land is used as a resource to borrow money from the bank, agricultural uses, etc. Land contamination arises as a result of human activities in producing unwanted by products and their in sequent disposal. It may also the arise when any waste or noxious substances or chemicals are accumulated or deportable or denial on the land in such a state or as to be ungracious to the health of man, animals, plants or vegetation or the aesthetic quality of the physical environment, or when any unlawful out or omission o or thing is destructive to the surface of the land in which renders the land unproductive.

The contamination of land inhibits the prudent use of land and soil resources, particularly by obstructing the recycling previously development land and increasing development pressures on undevelopable area. More significantly, the cost of remediation represents a high burden on individual land owners, companies and the economy as a while.



## CAUSES OF LAND CONTAMINATION

- a. **Spillages:** This arises from industrial activities, including leakage or spillage of materials used in industrial process, the deposition of airborne particles, escape of materials from storage tanks and drums, the storage and disposal of raw materials, and example of materials such as dust and liquor in the course of individual activities
- b. **Deposit of wastes and residues:** This can be as a means of disposing that materials, or in connection with development construction activities. Example are land fill sites tips, lagosis of industrial effluents, depiction of dredging, filling of wetlands with rubble, land fill and dredging, spoil to create more dry land for plant exampling, and the deposit of sewage sludge on agricultural land.
- c. **Munising and oil exploration activities:** This could be as a result of liquid spills and leakages of hydrocarbon solvent and chemicals. The severe adverse effects of oil pollution on soil, crops and marine ecology and the persistence of oil in sediments and organization have been documented.
- d. **Comosir pipes**
- e. **Rylands v. Fletcher (1986)**

## CONSEQUENCES OF LAND CONTAMINATION

- i. Ingestion and inhalation of toxic substances: Much some organic materials may be infested by eating plants which are contained, either through uptake of materials from contaminated soils or by surface contamination in the form of particles of soil or dust not removed by washing, young children playing where contaminants are present may also ingest them
- ii. Uptake of contaminations in food plants: The accumulation of some metals, particularly cadmium and lead, in the edible portions of food plants may make crops unfit for consumption.
- iii. Phytotoxicity: Phytotoxicity is the prevention or inhibition of plant growth. It may be caused by many factors such as chemical contamination, contamination of topsoil or lack of essential fertilizers.
- iv. Contamination of water: This is one of the rigorous and difficult effects of kind contamination. The cause of Cambridge water works v. Eastern Leather countries plc where chemicals percolated into the underground aquifers of the plaintiff applies demonstrates the practical hazard that improper handling of chemicals and toxic substances may cause to underground water.



- v. Chemical Attack on building materials and building service: Acids, only and tarry substances, and other organic compounds may accelerate the corrosion of metals in soils and attack plastic, jointing seal and protective coatings to concrete and metals. They may migrate through plastic pipe without causing structural failure and this contaminate water supplies.
- vi. **Fire and explosion:** Coal, coke particles, oil, tar, pitch, rubber, plastic and domestic waste are combustible in nature. They may become ignited by contact with buried power cables or other sources of heat such as careless disposal of hot or the burning of fire on the ground surface.

## FLOODS AND EROSION

Erosion is an aspect of land degradation and manifests in many forms: sheet, gully, erosion. And coastal and marine erosion.

Erosion is attributable to both natural and human factors. Natural causes of erosion in Nigeria have been observed to be climate, topographic disposition and lithology. Human factors, mostly agricultural practices and other land use activities such as road building, engineering works, and quarry and mining activities are also connected with soil erosion.

Coastal erosion occurs throughout Nigeria in main forms: coastal flooding, river flooding and urban landward migration.

## Wetlands

Wetland is any marsh, peat and water in their natural or artificial parameter with static or flowing waters, it could be fresh, brackish or salty.

In 2009, the national environmental (wetlands, river banks and lakeshores protection) regulation 2009.

Wetlands are areas permanently or seasonally flooded by water where plants and animals have become adapted like swamps, vegetation areas of marsh, river, areas impeded by drainage or brackish salt.

From this definitions, 5 major wetland systems are recognized.

- Marine (coastal wetlands including lagoons, rocky shores and coral reef)
- Estuarine (including deltas, tidal marshes, and mangrove swamps)
- Lacustrine (wetlands associated with lakes)
- Riverine (wetlands along rivers and streams)



- Palestine (meaning “Marshy” –march and bogs)
- Wetlands served many environmental and social purposes.
  - i. They provide environmental economic benefits to mainland through fishery production, maintenance of water tables for agriculture, water surge and flood control, timber production, waste disposal and water purification and recreational opportunities
  - ii. They also provide suitable habitat for a wide variety of plants, animals including many rare and endangered species.
  - iii. Inland wetlands may help control floods by storing water and slowly releasing it to downstream areas after the flood peak
  - iv. They can reduce wave action and less on erosion, filter out toxic pollutants and improving water quality
  - v. They are related to religion and cosmological beliefs, constitute a source of aesthetic enjoyment
  - vi. Provides educational opportunities for nature studies and scientific research.

## COMMON LAW CONTROL OF LAND CONTAMINATION

Many laws have been passed by the government to regulate pollution: **Environmental guidelines for regulations for petroleum industries (2009)** created to regulate the discharge of oil sludges, water, waste disposition that could affect land also.

The common law remedies of trespass, negligence is the rule in **Rylands V. Fletcher** are appropriate private remedies available to owners of wetland whose land is polluted by another party.

Federal regulation over wetland protection is achieved in 2 principal ways. The first way is by extending control and jurisdiction over land within certain foreshore line in respect of land in the territory of a state which include wetlands. The second way is by enacting federal laws that regulate the dumping and disposal of solid, toxic and hazardous waste into the environment which also includes wetlands.

## AIR POLLUTION

This is the introduction of harmful substances into the air that are likely to cause harm.

It is majorly caused by particles or matters released into the atmosphere through various development and industrial activities particular, the burning of fossil fuels and emissions from industries, such matters include smoke, soot, asbestos particles, particulates of heavy metals like lead, zinc etc.



Another major cause of air pollution especially in urban even is emissions from all types of motor vehicles. The various forms of air pollution have major impact on humans and other animals particularly, these pollutants lead to chronic respiratory infections, damage to the eyes and skin.

Pollutants also affect the ecosystem by leading to the death of organisms and the destruction of natural habitats. Thereby varying specie composition and altering food chains.

For instance, the 1952 smog that occurred in the UK caused about 4,000 deaths, made about 20,000 people sick and shortened the life expectancy of many people. Air pollution takes many forms most harmful are the oxides of sulphur and nitrogen. When there are combined on their own, they are harmful but when they combine with water vapor in the atmosphere, they cause and rain harmful to vegetation & humans if excessive. On its own, sulphur dioxide has been found to aggravate bronchitis and asthma.

Land use contributes to the level of pollution in the atmosphere. Urban centres with high traffic, experience a high level of fossil fuel burning or area close to the sahara desert.

Air pollution in Nigeria is highest in industrialized areas followed by high density residential areas. Air pollution is lowest in rural areas or area with large green cover. The implication of this is that air pollution is majorly caused by human activities and land use especially activities that involve the released of anthropogenic substances into the atmosphere e.g. water vapour, chlore fluoro carbons, methane, co2 9carbon nowrde) sulphur and nitrogen oxides.

The implications of air pollution are many and it's linked to:

Respiratory diseases and according to the WHO estimations, cities that exceed the WHO threshold are likely to experience an increase in highs malfunction and respiratory diseases among their citizen.

## **EFFORTS AIMED AT REDUCING AIR POLLUTION**

**Section 20 of the NESREA Act** empowers the agency to make regulations. Setting standards to protect the quality of air and air resources in Nigeria especially regulations to control the concentration of substances in the air likely to harm human, plant or animal life as well as other regulations to control concentration of substances in the air likely to harm human, plant or animal life as well as other regulations to control other form of atmospheric pollution.



Also, there are NESREA regulations on mining and processing of minerals, ores and industrial effluents.

- NESREA regulation on ozone layer protection
- NESREA regulation on the control of bush and forest fires and bush burning
- NESREA regulation on vehicular emissions on petrol and diesel burning
- NESREA regulation on national environmental sanitation and waste control
- Harmful waste (special primary provision) Act cap 811. 2004
- Associated Gas re-injection Act aimed at preventing stopping gas flaring.

## **INTERNATIONAL FRAMEWORK ON AIR POLLUTION**

1. The General convention of long-range Trans boundary air pollution (1979) entered into force in 1983.

This convention came about as a result of a commission in the Uncommission on the protection of the environment. The convention is aimed at controlling and reducing the damage to human health and the environment caused by transboundary air pollution and the convention defined air pollution as. "The introduction by man directly or indirectly of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystem and material property and impair or interfere with amenities and other legitimate uses of the environment.

The Trail Smelter case (An arbitration case between the US and Canada). Trans boundary air pollution is defined in the convention as air pollution whose physical origin is activated within an area under the jurisdiction of another state.

The convention outlines principles aimed at international cooperation for the reduction and abatement of air pollution and creates a link or also translates scientific findings into governmental policies.

## **MEASURES TO COMBAT AIR POLLUTION**

1. The payment of heavy tolls to enter particular areas (Road pricing)
2. Provision of good transport system
3. Introduction of emission standard
4. Introduction of park and ride facilities (A ban on the importation of old vehicles)
5. Putting a stop to gas flooring
6. Environmental education and awareness
7. Pre- evaluation of methods of refuse dispersal and effective urban planning



8. Use of air pollution control by industries helps in the filtering out of substances before other less harmful substances are released in the atmosphere

## ENVIRONMENTAL PROTECTION AT COMMON LAW

Private law in most common law countries is characterized by the torts of nuisance, negligence, trespass and the strict liability rule in **RYLANDS v FLETCHER**. The aforementioned has been traditionally used to remedy earlier environmental degradation arising from individuals and industrial polluting activities.

CLIMATE CHANGE, ACID RAIN, Afforestation - These are problems which we doubt if environmental common law remedies would ever be able to solve.

## CRITICISMS

1. Uncertainty attached to claims in negligence, nuisance and the rule in **Rylands V. Fletcher** because they deal with the polluter's unforeseeable acts, hence the remedies are unreliable and unhelpful
2. Nuisance was originally a tort of strict liability
3. Any attempt to extract principles in these common law principles is an exercise certain to lead to futility/ frustration

## MERITS

Common law remedies help in:

- i. Award of injunction to restrain future acts of nuisances on the part of the defendant
- ii. Unmllngres of the govt. to impose appropriate sanction on individual in recession periods.

## WASTE MANAGEMENT

The general and disposal of waste is an intrinsic part of any developing or industrial society. The percentage of Nigeria's population living in cities and urban area has more than doubled in the last 15 years. The cities and urban area experience continuous growth which contributes to enormous general of social and liquid waste.



The management of waste is a matter of national and international concern. The volume of waste does not actually constitute the problem but the ability or inability of government individuals and waste disposal firms to keep up with the task of managing waste and the environment.

Improper disposal or storage of waste can constitute hazards to the society through the pollution of air, land and especially water.

### **What is Domestic waste?**

Generally, various legislations in several jurisdictions have attempted to describe, define, and delimit what waste is.

Waste has been defined as something that is not or no longer useful and is to be thrown away or disposed of. Again, it has been defined as any materials lacking direct value to the producer and so must be disposed of.

In the European community, waste management licensing regulation 1999 came into force to implement the framework directive on waste. The regulation also implements all the remaining sections of **part 11 of the UK Environmental Protection Act, 1990** which defined waste as:

- a. Any substance which constitutes a scrap material or an effluent or other unwanted surplus substance from the application of any process
- b. Any substance or article which requires to be disposed of on being broken, worked-out, contaminated or otherwise spoiled

Generally, waste is considered to be something which poses a significantly different threat to human health or environment, partly because of the manner in which it may be disposed of and partly because the holder no longer has the same sense of obligation in relation to it.

The circular accompanying the regulations suggests four categories which may be considered dividing whether an object is a waste:

- a. Worn but functioning substances or objects which are still usable (Albert, after repair) for the purpose for which they were made are not to be considered waste.
- b. Substances or objects which can be put to immediate use otherwise than by a specialized waste recovery operation or undertaking are likewise not to be considered waste.
- c. Degenerated substances or objects which can be put to use only by establishments or undertakings specializing.



- d. Distances which the holder does not want and which he has so pay to be taken away are waste, where the holder intends that the objects are to be discarded.

**The Federal environmental protection agency Act of 1988** did not define waste. Only some state statutes attempted to do so. For example, **Section 32 of the Lagos State Environmental Sanitation Edict** has a definition similar to the **UK Environmental protection Act 1990**, as follows:

- a. Waste of all descriptions
- b. Any substance which constitutes a scrap material, an effluent or other unwanted surplus substance arising from the application of any process.

Waste is usually classified according to:

- (a) Its source
- (b) Its harmful effect on humans the environment
- (c) The control which are appropriate to deal with.

With regards to the source classification, it either comes out of the shop (market or office- commercial waste or, out of the factory- industrial waste, or out of the home- household or domestic waste.

Domestic waste includes that from domestic premise, crowd and siles residential home, educational establishments (schools) and morning homes land pub ably hospitals). It can be organize or non-organic organic waste can decay. Waste food from the household can be composited and returned to the soil. Domestic waste such as tin cans and plastic, bottles are inorganic and cannot be treated in the same way.

Domestic waste can pollute the environment and be indirectly damage to humans. It can enter the atmosphere or water supplies causing damage to plants and animals.

### **DOMESTIC WASTE MANAGEMENT- THE PROBLEMS IN NIGERIA**

Waste management simply means the collection, keeping, treatment and disposal of waste in such a way as to render them harmless to human and animal life, the iconology and environment generally.

It could also be said to be the organized and systematic damping and handling of waste through or into landfills or pathways to on are that they are disposed of with attention to acceptable public health and environmental safeguard. Proper waste management will result in the abatement or total elimination of pollution.

It is common sight in Nigeria today to see heaps/ accumulation of festering waste dumps in our urban and commercial cities. All sides of residential apartments, the drains the highways, corners of major and minor streets, undeveloped plots of land



have all become waste dumps for many households. As one Writer puts it: **“Waste increases in a geometrical projection and collection and disposal is at an arithmetic progression”**.

### **THE PROBLEMS OF DOMESTIC WASTE MANAGEMENT**

1. **Lack of adequate funding and excessive population:** Waste management is by nature both capital and economic intensive. This requires huge capital outlay. Many state governments spend a good percentage of their revenues on domestic waste management. For example, Lagos state government spends between 20-25% of its funds in waste management. But what this amount could accomplish is dwarfed by the population it caters for.

Lagos state for instance, has a projected population of 12-18 million prior. It is estimated that the average individual in such mega like as Lagos generates an average of 0.115kg of wasted daily. It is that the funds available or at least earmarked for domestic waste management is grossly inadequate to find the public agencies and other private sector participants involved in collection and disposal of domestic waste. To find the procurement of equipment and materials required for effective domestic waste disposal.

2. **Lack of trained/ professional waste management:** There are just a few sanitation and Environment Engineers in Nigeria. In fact, most private sector operators in waste management are mainly party stalwarts, know little or nothing about waste management
3. **Lack of effective monitoring and control:** The waste require in the UK provides a quintessence of a system that makes for effective monitoring of domestic waste prior to disposal and the steps to be taken on disposal.

Under the region, controlled waste may out be deposited, treated, keep or disposed of without a license. The licensing method issued as a means of controlling waste. **Section 33(1) (a) of the EPA** provides that is an offence to “treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health.

Pollution of the environment is defined in **Section 29** to mean the release or example of the waste into any medium so as to cause harm to any man or any other living organisms supported by the environment.

Harm is further defined to mean “harm to the health of living organisms or other interference with the ecological systems of which they form part and in the cause of man includes offence to any of his sense or harm to his property.



Again, the duty of care principle under the EPA, designed to satisfy the European ideology on the environment that the polluter pays is an impotent form of liability on producers of domestic waste.

The producer is responsible for the proper disposal of the waste. This means that the producer must ensure it is transferred to a responsible carrier. The producer and example liability simply by passing the waste on to any one also who could include the fly tipper.

This unbanked chain of waste transmission ensue that indiscriminate dumping and disposal is eliminated. The waste management regime in Nigeria is far from what is stated above, so that the house- holder producer of domestic waste is not deterred by any form of sanctions, because mostly, waste management agencies or contractors hardly exist in many places in Nigeria nor is monitoring and monitory authorities effective.

**4. PECULIARITY OF THE NIGERIAN ATTITUDE:** The government does everything philosophy of many Nigerians contributes to the domestic waste management problems in Nigeria. A careless attitude permeates the thinking especially, those living in cities and towns. Self-help methods of domestic waste disposal are available and would be explored by individuals

**5. Ineffective Penalties and sanctions:** Institutions. Domestic incineration, landfill system practicable, but most Nigerians would take to the easy way of depositing waste along the highway and corers of street for government to pick up. Some have founded this attitude on illiteracy but this would be a fallacy.

Traditionally, as is still apparent in some of our villages, where a good number of individual are still illiterate, residents are very conscious of the importance of having a clean environment and this is evidenced by the sanitation arrangements in force in these societies.

## **WASTE MANAGEMENT OPTIONS**

**6. LACK OF MODERN TECHNOLOGY /LETHARGY ON IMPLEMENTING EFFICIENCY WASTE MANAGEMENT METHODS**

Different efficient ways of domestic waste management have been in use in many developed counties.

Recycling waste is one of the commonest ways of managing waste in developed countries. It involves the production of useful martial from waste gar bagel almost always enough value to justly reaching parts of it. There are essential textures of recycling which some countries as disadvantages. The fact is that to produce a



useful material out of the waste one uses up another useful material. Any process reaching will have this effect.

The concept of recycling has acquired a moral tone and government across Europe have succumbed to the political pressure by intruding policies on recycling which require progressively more materials to be dealt with in this way.

Financial instruments are used to encourage recycling and this supported by environmentalists. In UK for instance, in keeping with the philosophy of introducing market forest into environment regulation a system of financial credits was introduced by **Section 52 of The EPA**. It involves the waste disposal authority (the body responsible for collecting the waste), making payments to the waste collection authority, in respect of waste they have collected for recycles. This means that they would harvester waste to take to the landfill site or to the incinerator if a 3<sup>rd</sup> party, e.g. a Charity collects waste for recycling, they are to receive a payment.

### **LANDFILL**

Is currently the most common method of disposing waste in many developed countries It accounts for the bull of waste disposal in the UK (90%). At its most basic, it involve digging a hole in the ground and filling it with rubbish. The practice usually is to bust different types of waste in the same land fill site.

In the UK, legislation makes it possible for waste regulation authorities to grant licenses subject to conditions relating to the area of the site after it has been filled.

### **INCINERATION**

This means burring waste in an incinerator. In many areas of Japan, France, Germany, Italy and Scotland such how value recyclable waste (mostly paper and plastics) are incinerated. The reality is that much domestic waste in these form i.e. paper and plastics is a major contributor to the waste stream and to problem of litter. Incineration could reduce the domestic waste volume by 95%.

### **PNEUMATIC COLLECTION SYSTEM FOR DOMESTIC WASTES**

This is a new technology for domestic waste collection. This pneumatic collection system coveys waste without the need for trucks driving through thorns and is operational 24hr per day every day of the year. The system is especially suited to the development of new urban areas and for renovation of historic centers. Pneumatic collection is a break away from conventional turn of collecting in that it avoids the need to place waste on the public highway and does away with movement if trucks and all the associated nuances.



Running entirely underground, the system contributes to protection of the environment by creating cleaner urban area that function better and are more environmentally friendly.

Prismatic collection has many economic advantages: designed to last for 50 years, the installation and operating costs are optimized by a high level of automation and energy efficient processes.

There is legislation in Nigeria that should installed their technologies. The present writer does not know of any functional incinerator, landfill systems, or recycling centres in Nigeria. In the few places where they exists, such as Lagos and Aba, they are private centres with their attendant commercial orientation and profit making disposition, otherwise there is no serious maintenance cultures and control formula.

Laudable provisions exist in Local legislation for environmental protection. All state has environmental salutation laws or church which ought to enable proper disposal of domestic waste. For instances, in Lagos, the Environmental Sanitation Edict mandated every landlord occupier of a house to keep free and clear drains, gutters, clear the street of all rubbish or refuse of any sort, to prove trash can and generally prohibit any indiscriminate disposal of refuse into such gutter sand channels.

The provisions are many times honored in the breach and there is no serous enforcement machinery. Domestic waste, sometime human excreta are usually implied in into gutters. Where the board provides waste bins at all, they are almost always not cleared, spilling their content on to the streets. When cleared, it is transported in open vehicles though residential and busy commercial area, with the under helping to blow it in all directions. This often result in waste dispersal and not disposal.

Disposal sometimes consists merely in shifting the refuse from one part of town to another without any plans for its management. The bilious conclusion is that Nigeria is far from having solved its domestic waste management problems.

### **CONCLUSION: ANY REPRESSIONS?**

Much of the efforts at domestic waste management are by state government local authorities. These may be direct (as in some states) or through government - private sector partnership or wholly though privatized schemes.

A couple of NGO's have sprung up in recent times identifying these problems and attempting to solve them. Their efforts at tacking this menace have including



sourcing funds from international organizations, other international non-governmental organizations, wealthy individuals across the world.

Sadly, the corruption cankerworm, sometimes, has not aimed the funds made available to them to see the light of the day.

At other times, the funds are misdirected at organizing sanitation seminars and conferences (such as talk shows instead of being utilized in practical ways. Be that as it may much could still be done.

- Improved funding of government departments or sanitation boards responsible for domestic waste management would go a long way at assisting them to procure better and more equipment for domestic waste collection and disposal. More funds in their hands will also make for the training of their staff and better staff motivation. Again, better contacts with private participations would be entered into.
- The ministers of environment and their agencies, local authorities should strengthen their training programmes for the managerial staff generally and inspect / monitor staff particularly taking them to task to their job. This would enhance accountability and control of waste from collection to disposal
- The European ideology that the producer should pay, introduce may reorientate Nigerians' attitude towards their environment. Environmental tax or levy on households who use the bins at collection points/centers would give them the legal basis and moral conscience to raise a clamor when waste dispersal agents do not do their job
- Competitive tendering for waste collection and disposal countries should ensure that the technically qualified contractors are taken on. The present dispensation is that the private sector participants on hand are political cronies of those in power to compensate them for their efforts during election campaigns. Thus, there is no sense of commitment or responsibility in the execution of these contracts.
- Sanitation/ Environmental protection centers should be established too by all environmental pollution cause as obtainable in other. This would require serious policy in the neighborhood but would go a long way reduce or eliminate indeterminate dumping of refuse by householders.

## **WASTE DISPOSAL**

The **NESREA Act** does not give a definition of waste. Waste has been defined as something that is no longer useful. As long as there's an economy waste is inevitable. Each time something is discarded, it can be discounted as waste. It is also defined as any material which constitutes a material or an effluent, or other unwanted substance.



Lagos State Environmental Sanitation Law defines waste as any materials substance which constitutes scrap materials and effluences other unwanted substances arising from the application of any process. Further, the same law defines refuse as garbage and other discarded solid materials from Agricultural operations and from community activities and induces solid and scrap materials.

**Waste is further categorized as:**

1. Materials worn but still functional and usable perhaps after repair
2. Materials which can still be put to an immediate use
3. Degenerated substances or materials which can be put to use only by a specialized process
4. Materials which can no longer be put to any use and which are generally unwanted.

**Wastes can be classified according to:**

1. Its source
2. According to the harmful effect on humans and the enrolment
3. The applicable means of control and management

**The source of waste differ**

1. Municipal waste: Waste from home, domestic waster, markets, etc. commercial waste from offices etc.
2. Industrial waste
3. Commercial waste

**SOLID WASTE MANAGEMENT**

The survival of man, animal and plants on the planet earth depends substantially on a clean and healthy environment. No nation can afford to be indifferent to the nature surroundings it, for to do so is to die instalmentally. Though no nation is great without consistent, economical and technological advancement. Such development must be pursued within permissible and healthy environmental consideration. It is on the light of this that the state must ensure adequate management of waste generated as a result of exploitation and use of resources in the country.

A comprehensive legislative and enforcement machinery must be put in place to ensure a dean and friendly neighborhood and environment.



**The NESREA ACT** did not define waste in its interpretation section. Human waste as the term implies is any solid, liquid or gaseous substance or materials which being a scrap or being superglues, refuse or rejected material is disposed of or required to be disposed of an unwanted waste

**Section 32 of environmental sanitation edict of Lagos date, 1985** defines waste to include waste of all description any substance which constitutes scrap material, wan effluence or other unwanted substance arising from the application of any process.

**Section 75 (2), Environmental protection Act, UK, 1990** from the definition, it is obvious that waste could be solid, liquid, or gas and it could be domestic, commercial or industrial waste. Our focus however, is on solid waste management, whether solid domestic, commercial or industrial.

## **WASTE MANAGEMENT**

According to **ARENE**, waste management means that organized and systematic dumping and channeling of waste through or into landfills or partway to ensure that they are disposed of with an attention to acceptable public health and environmental safe guard. This definition is defective are principal respect for it defines waste management only in terms of landfills and Dumping of Waste, without considering other waste management options.

Waste management could also mean the collection, keeping treatment and disposal of waste in such a way as to render them harmless to human and Animal life, the ecology and the environment generally.

The needed for the proper management of waste cannot be over. Not only does of contribute to healthy environment, it can also be a great asset to agricultural and manifesting industries, this enhancing the economic wellbeing of the nation e.g.

## **RECYCLING OF WASTE**

The primary arm of the state entrusted with the management of waste in Nigeria is Nigeria is the Local Govt. **section 7 (schedule 4) of the 1999 constitution** as amended.

In Lagos state, the state Waste Management authority is entrusted among other things with the management of waste generated in the state. (see the Lagos State Waste Management Authority Law, 1994). A commentator has poeticized the establishment of this authority as being unconstitutional. In as much as it seeks to take over waste management from the local government and vests it in the state authority.



However, a disproportionate analysis of reveals that rather than take over the functions of the local government in this regard the laws seeks to coordinate the activities and healthy environment.

Under the law, the day-to-day management authority is rested in the General Manager of the authority, appointed by the branch composing of all the chairmen of all LGs in Lagos State, the General Management, and a representative of the deputy Governor (**Section 2 of the law**). The chairmanship of the board is held on a rotational basis among the LG chairmen.

The functions of the authority is provided in **Section 3 of the law** and it includes:

1. Removal, collection, and disposal of domestic, commercial, and industrial waste.
2. Clean and maintain public drainage facilities, streets
3. Remove and dispose all abandoned and scrap vehicles
4. Do all such acts as appears to it to be required, or convenient in connection with carrying out of its function, or to be incidental to their proper discharge.
5. To prepare an update from time to time. Master plans for waste collection and disposal in the state
6. In **section 9**, the board is empowered to collect and charge for services rendered under the law

The regulation, control and management of private waste collection schemes is also rested in the board under **sections 14,15,16,17 of the law**.

In order to control indiscriminate dumping of domestic waste, **section 18** provides that every occupier/owner of a tenement shall provide a cover Dustbin outside the tenement to be used for depositing waste. **Section 21, subsection 1 of environmental sanitation law of Lagos state 1998**.

**Section 22** provides that vehicles used for transporting waste must be covered to prevent waste littering the highway while the provision of this law is broad enough, it is not adequate as it fails to address the issue of waste generation by road users and in public places.

The provision of **section 21** prohibiting dumping of waste except at site designated by the authority does not seem to cover waste generated in this situation as it relates to unauthorized dumping on road and sidewalks.

**Section 17** of environment pollution control law of Lagos State cap 46, 1994.

Another defect in the law, is found in its penalty provision of **section 23 of the law** which provides that any person that contravenes any of the provisions of this law is guilty and on conviction shall be liable to a fine of N50 or 3 months imprisonment and of a corporation, a fine of N1000 and incarceration of the operating license



issued to the corporation under **section 14 (2)**. This penalty provision is so grossly inadequate to deter any offender or perspective offender and courioring the environmental effects of indiscriminate dumping of water on Human health, it is suggested that a upward review of the penalty position be put in place.

Another limitation of the law is the restrictive provision on the management of waste. Under **section 24**, the state government is empowered to designate a place as sanitary land fill are where the waste collected the users shall be dumped. The literal interpretation of this provision rainier the impression that waste management shall be dumping at land filled sites alone. However, waste management could take other form apart from land filling, e.g. it could be a process of sorting and recycling or burning and insinuation.

Though the land filling option seems to be the cheapest among the options. It is not relatively and environmentally friendly especially where the waste is not treated before being dumped at the land fill sites. Not only are these land-fill sites contaminated and causes land pollution, but the land subsequently become incapable of being developed for beneficial use. There is also the danger of explosions caused by the build-up of gases from decaying matter within the site, furthermore, there is the like lord of water pollution occurring when water drains through the contaminated soil, cadging contaminates with it, to the water causal below.

### **ENVIRONMENTAL IMPACT ASSESSMENT (EIA)**

EIA is one of the techniques in the management of the environment. It has no general definition but it has been seen in sustainable development. It is the examination, planning and of planned activities for sustainable development.

It is the process of analyzing beneficial and non-beneficial activities in order to maximize privative impact and alienate or reduce negative impacts. The EIA serves as a form of precautionary step in order to avert future harm. It is an important document in seeking for approval.

**Section 1** states that wherever any signification activity's likely to take place, than an EIA report must be prepared.

A project is defined to mean any physical work that is proponent proposes to construct, operate, modify with the condition or abandon or the carrying out of any physical activity on the land, the water, or air.

Environmental impact will only be necessary of the proposed project will have in impact on the environment.

**Section 6(1)** it also includes any change on health and economic state. The physical environment should also be put in consideration.



**When EIA is significant:** Any proposed project that is likely to have significant or serious effects on the environment compulsorily or mandatorily requires EIA report. There is no provision in the Act that seeks to tell us the meaning of the expression “Significantly affects the environment”, again, there is no known Nigerian authority this has defined the expression (except recently in Lagos).

## **CLASSIFICATION**

Under the EIA, as to mandatory list and non-mandatory list any proposed activity that falls within mandatory lists are significant. For the purpose of EIA Act, the professional look at mandatory A & B.

Two tests have been derived in determining a significant:

1. The extent to which an action may cause a great degree of adverse environmental impact in a particular area.
2. The quantitative effect of the action on the environment including the cumulative harm of the proposed action, added to the existing adverse situation.

There are 2 categories of project that are recognized under the EIA Act (i) mandatory Project (ii) discretionary project.

Every project that falls with category (i) or (2) as defined in **section 1(3) of the Act** is mandatory for the project proponent to compulsorily undertake EIA. Some of the project include agriculture, fisheries, tobacco processing, resorts and recreation development

What is the appropriate time to undertake EIA? Who determines when to undertake the Act?

Generally, it is not an easy decision. It is at the discretion of the proponent. There is a lot done at first instance. It is multi-disciplinary and experience.

The Federal Ministry of Environment grants EIA permit. Section 4 of the EIA Act, after the scoping stage of EIA is submitted to the ministry.

## **Requirements of the environmental impact assessment reports**

The law requires necessary in the report:

1. The work one wants to do (desires the project)
2. The significance to the economy
3. The effect of the environmental impact on the economy human
4. The mitigation measures



It is in the represent of section 17 that an EIA report to be subjected to public scrutiny. It is not however an opportunity to criticize the project personally or politically. It has to be critical with strong severity principle or constructive criticism. Where an EIA is approved without public participation, it can be challenged. If an EIPA report is submitted, the government will do an internal review before final approval is done. In grating point the ministry must have considered the environmental effect of the project.

## **REMEDIES AVAILABLE TO VICTIMS OF ENVIRONMENTAL POLLUTION**

Victims of environmental pollution have various option, the common law position on the statutory framework or both.

### **Claim of damages**

Damages are compensatory remedies at common law, it is a monetary compensation to a person. Damages is a form of monetary compensation a awarded by the court to somebody who has complained about the violation of his right. There are different kinds of damage the court can award:

- (i) general damages,
- (ii) Nominal damages
- (iii) Exemplary or punitive damage,
- (iv) Aggravated damages and
- (v) Special damages.

When one goes to court to claim special damages, the person must particularize on the special kind of damage.

Minimal damages are awarded for more infraction of legal rights (awarding amount of money to show that what the other part had done wrong). It is not always sufficient because it cannot be strictly proved. General damages are implied by the law into every infringement of right.

The problem is proof of damage in litigation. One must be able to show that the pollution activity led to the damages suffered, also, the damage must not be remote. In most environmental litigation, because it takes a long time from the environmental act to manifest, the timing will be long. **(R V Malcareri)**

**Shell Petroleum Development Company V Counselor**, the courts have changed their attitude towards environmental harm and are ready to award substantial damages. In the above case awarded damage of 2 million naira.

**SPPC V. Adarkwe**- The court awarded 245 million naira

**Mobil V Morolkpo** – The court awarded 4 billion naira



Exemplary damages are rarely awarded except in special circumstances this is because it is punitive in nature and it deters the offender from committing the prohibited act

- (i) The court will grant exemplary damages where the plaintiff shows he has suffered.
- (ii) The defendant's tortious act is outrageous or scandalous.

# **300LEVEL NOTES**

## **LAW 301**

### **GENDER AND THE LAW I**



## **GENDER AND THE LAW – LAW 301**

### **COURSE OUTLINE**

#### **1. LAW AND GENDER IN PERSPECTIVE**

#### **2. THE EVOLUTION OF GENDER AND ITS BASIC CONCEPTS**

#### **3. GENDER THEORIES AND ITS CONTRIBUTION TO UNDERSTANDING RELATIONS**

#### **4. FEMINIST LEGAL THEORY: ITS EVOLUTION AND BASIC CONCEPTS**

#### **5. FEMINIST LEGAL THEORY AND ITS DIVERGENCE**

#### **6. CASE STUDIES SUCH AS: FEMALE GENITAL MUTILATION, SEX WORKERS/PROSTITUTION, HOMOSEXUALITY AND TRANSGENDER.**

#### **7. GENDER AND CONSTITUTIONALISM**

##### **- GENDER AND CONSTITUTIONALISM**

##### **- GENDER AND CONSTITUTIONAL MAKING**

##### **- GENDER AND CITIZENSHIP**

##### **- GENDER AND CONSTITUTIONAL RIGHTS**

##### **-EQUALITY OF LEGAL STATUS**

##### **- EQUALITY OF ACCESS TO OPPORTUNITIES AND RESOURCES**

#### **8. DEMOCRACY AND HUMAN RIGHTS**

##### **- THE RIGHT TO LIFE**

##### **- THE RIGHT TO HEALTH**

##### **- THE RIGHT TO HUMAN DIGNITY**

##### **- THE RIGHT TO EQUALITY**

#### **9. GENDER AND THE CRIMINAL JUSTICE SYSTEM**



## **AIM OF THE COURSE**

The course aims to offer an understanding of the role of law in regulating relations between sexes, and in constructing notions of masculinity and femininity. The law is not a neutral body of rules and legal categories; it often excludes groups or reinforces their disadvantage.

Gender discrimination along with other forms of discrimination is embedded throughout the legal system, often in ways that are not immediately obvious. This course will look at gender: Its evolution and basic concepts, it will examine gender theories; it will look at the body of feminist legal theory and identify its major insights into the ways in which law is gendered and how it contributes to the construction of inequality.

Feminist analysis of law provides some of the most significant and challenging explanatory frameworks for understanding the practice and organization of law and legal institutions.

## **GENDER: BASIC CONCEPTS**

As a discipline, gender studies have developed certain terms and concepts which are used while studying the phenomenon of gender. An understanding of their meaning and implications allow us to see and connect various aspects of it.

## **SEX VS. GENDER**

Understanding the social construction of gender starts with explaining the two concepts, that is, GENDER and SEX. Often these two terms are used interchangeably. However, they bear different meaning as concepts.

**SEX** refers to the biological and physiological characteristics that define men and women. It is defined as the anatomical and physiological characteristics that signify the biological maleness and femaleness of an individual.

**GENDER** refers to the socially constructed roles, behaviours, Activities and attributes that a given society considers appropriate for men and women. Gender recognizes that masculinity and femininity are products of social, historical, cultural and physiological factors and are acquired by an individual in the process of becoming a man or woman. The biological sex are redefined, represented, valued and channeled into different roles in various culturally dependent roles.

NB: Sex is what differentiates males and females biologically. Gender allows us to see the dimensions of woman roles and personalities as not based on nature but on social



factors. It must allow us address the issues like subordination and discrimination as issues where change is possible. (Significance of the concept of Gender).

**SEX** emerges from anatomical and physiological characteristics that differentiates males and females biologically whereas gender can be seen as social construct manifested by masculine and feminine roles prevalent in a culture or a society. Thus gender can be seen as an artifact of social, cultural and physiological factors which are attained during the process of socialization of an individual.

**GENDER** is simply a tool of analysis. It gives us another tool of analysis, just like law in its raw form is a tool of analysis.

### **GENDER AS A SOCIAL CONSTRUCT**

Gender can be defined as a notion through which the social and ideological construction and representation between the sexes can be understood.

Gender refers to culturally constructed roles that are played by men and women in society. Further, gender is used as a concept to analyze the shaping of men's and women's behavior according to the normative order of a society. Gender as a conceptual tool is used to analyse the structural relationships of inequality existing between women and men, as reflected in various aspects of life such as the household, the labour market, education and political institutions.

Sex, on the other hand, refers to the biological differences between females and males which are seen as uniform across time and space.

Gender is a complex phenomenon which is socially and culturally constructed. An individual acquires gender through a process of socialization. The construction of femininity and masculinity plays an important role in shaping various institutions like the family. Understanding gender in relation to society leads to reflection of the existing power relations between men and women.

### **GENDER STEREOTYPES**

Gender stereotypes are simplistic generalizations about the gender attributes, differences, and the roles of individuals and/or groups.

Stereotypes can be positive or negative, but they rarely communicate accurate information about others. The commonest female stereotypical role that is prevalent is of the homemaker. It is imperative for her to put her family's welfare before her own; she is loving, compassionate, caring, nurturing, emotional and sympathetic. The man's



role on the other hand is to be the provider. He is also to be assertive, competitive, independent, aggressive, courageous, rational, career-oriented and pragmatic.

These sorts of stereotypes are quite damaging and can hinder an individual's personal and professional growth as well as expression and creativity.

**NB:** Gender stereotypes significantly attribute to the status quo in terms of women's and men's roles. They are one of the most persistent causes of inequality between women and men in all spheres and at all stages of life, influencing their choices in education, professional and private life.

## **GENDER ROLES AND RELATION**

Gender roles are the social roles that a person is expected to fulfill based upon his or her gender. These vary in social, cultural and historical contexts. They vary among different societies and cultures, classes, ages and during different periods in history.

Gender-specific roles and responsibilities are often conditioned by household structure, access to resources, specific impacts of the global economy, and other locally relevant factors such as ecological conditions.

Gender relations are the ways in which a culture or society defines rights, responsibilities, and the identities of men and women in relation to one another.

Ever since humans started living in societies, the differentiation between the male and female gender and implicated specific lifestyle, duties and functional areas for each of these genders began. In many societies across the globe, a differentiation is seen between the roles and relations of men and women.

The socio-cultural norms of a society are instrumental in demarcating the gender setting and subsequently led to the display of gender-based power. This develops from the expected and general roles assumed by men and women and the impact of their interactions.

Gender roles are societal, cultural and personal. They regulate how males should think, speak, dress and interact within the context of society. The way in which gender roles are absorbed and assimilated by a group of people describes the influence of society.



## **PATRIARCHY**

Literally means '**The rule of the father**'. Within gender studies, the term refers to a social system wherein men dominate over women.

Patriarchy takes different forms because patriarchy is a system which interacts with other systems in the society and operates differently in different communities, economic systems and countries.

A patriarchal society is a society controlled and run by men. Men devise the rules and hold dominating positions at home, in community, business and government. They hold the privilege to list out rules and dominate in all forms both inside and outside the home.

Feminists used the concept of patriarchy in early 20<sup>th</sup> century to expound the social agreement of male dominance over women.

The underlying ideology of a patriarchal society is all about women possessing superior qualities or typical attitudes and traits like virility, strong will power, authority, dominance, etc. In a patriarchal social structure, men acquire a dominant status quo not in terms of numbers or strength but by means of having a more prominent and powerful social position and having almost absolute access to decision making powers.

**NB:** In contrast, matriarchal societies honor women as key decision makers and they hold the privileged positions as community leaders, where they can play a central role in the family, community leaders, where they can play a central role in the family, community and in the society. In the few matriarchal societies that exist today, women's rights are central; women are given space to express their creativity and participate in society.

## **THEORIES OF GENDER**

### **1. STRUCTURAL FUNCTIONALISM**

Society is measured by the functions that operate them. Structure is order, functionalism is how things function. What this theory espouses is that the way man is ranked higher or is more dominating than women stems from the primitive times where men were hunters and gatherers thereby making them the providers as opposed to women who care for the home.

This theory focuses on the function of men as providers which explains the inequality of the society. It generated a lot of criticism from critics who claimed that structural functionalism cannot be the only reason why men dominate over women, there are other factors like class, race, etc.



## 2. CONFLICT THEORY

This theory was propounded by **Karl Marx** and **Frederick Engels**. They believed the way the society is structured is economic. There is a conflict between the Bourgeoisie (The owners) and the proletariat. They submitted that there exists a class divide in society and a fight to wield power and since the men wield power in any economy women tend to be sidelined.

According to them, the economics of the society is the driving force of the inequalities. Their theories of gender is based on economics, they are looking forward to a classless society where the means of production should be with the state. Until then, there would continue to be inequality.

This theory has also been criticized on the ground that it does not answer the question of gender inequality. It takes only economics into context, there are other indices that determine inequality, like politics, race.

## 3. SYMBOLIC INTERACTION

This is not different from structural functionalism but it says that it is our interactions with one another that determine the gender imbalance. The question often raised is what is symbolic interaction all about? It has thus been posited that it is the way we relate with each other that determines the gender imbalance.

**NB:** There is not one theory that explains the issues. There must be conglomerate of all these theories when doing an analysis of issues of gender inequality.

**Note also:** Functionalism is a perspective based on the premise that society is made up of interdependent parts, each of which contributes to the functioning the whole society. They assert that in the face of disruptive social change, society can be restored to equilibrium as long as built-in mechanisms of social control operate effectively and efficiently.

- Unlike functionalists, who believe that social order is maintained through value consensus, conflict theorists assert that it is preserved involuntarily through the exercise of power of social class holds over another.
- Symbolic interactionists explain social interactions as a dynamic process in which people continually modify their behavior as a result of the interaction itself.

**Herbert Blumer** who originated the term **SYMBOLIC INTERACTION** asserted that people do not respond directly to the world around them, but to the meaning they bring to it, that is social reality is bestowed only through human interaction.



## **FEMINISM**

Feminism has been defined in the broadest sense as a set of ideas that recognize that women are faced with certain disadvantages because they are women and the belief that this should not be so.

It refers to the political parties that emerges from these, a practice which is aimed at changing the situation of women who face systemic disadvantages

**Marilyn Fry** describes feminism as a philosophy which can only be measured through her body. The disparities in the social positions of men and women have arisen, over long periods of human history, due to social and cultural factors.

Feminism does not believe that the inequality is based on natural factors. They do not believe that there is anything that men or women lack to make one gender superior or inferior to the other. Feminism seeks to change those dimensions and systems of society which give rise to inequalities between the sexes.

Feminists seek to balance power in the society and to make it more equitable. One of the feminists arguments is that women should be given the same opportunities and resources that men have so they can have the same changes and advantages that men enjoy. It seeks for equal rights and privileges to compete equally with men.

To fully understand the oppression of women, the roots must be sought. One thus has to look at the relationship between men and women with reference to patriarchy.

Patriarchy is a system of oppression by men and the control of the family, property and wealth and women's productive and reproductive capabilities by men.

Patriarchy helps to understand the control that is exercised over women. It points out that the real problem of women is not a lack of access to things or resources but of the presence of an oppressive system.

## **FEMINISM AND ECONOMY**

The economy we cohabit today is undoubtedly gendered. It is shaped by gender and has implications for people based upon their gender.

Feminism has drawn attention to the manner in which it can be seen that the economy is also engendered. For example, women's employment outside the home may be concentrated within certain professions and certain types of work, and they may be less likely to own and/or control economic resources and assets.

Many feminists who look to the economy to further their understanding of the oppression of women argue that the entire economic systems must be transformed in order to truly liberate women and men from various types of economic exploitation.



## FEMINISM AND GENDER STUDIES

Feminism is guided towards understanding society, and also towards changing those aspects and structures in society that are unjust and exploitative. It therefore involves both the growth of knowledge and the betterment of social world.

Women and gender studies have also furthered the cause of feminism by pointing out biases and omissions in various academic disciplines, for example, in the fields of history and sociology. There is then, a close relationship between the field of gender studies and feminism.

## THE EVOLUTION OF FEMINIST JURISPRUDENCE

Western feminism started in Western Europe in the 18<sup>th</sup> century with the writings of **Mary Worlestone Craft** and **John Mills**. Then it was Judeo-Christian rule/society, in which women were subjected to the principles of the bible. It was believe then, that women's brains were not as developed as their male counterparts. Thus agitations began. In North America, there were different struggles of women. New Zealand was the first country to grant women the suffrage to vote.

Feminism in the Western world came in waves. The first wave was in the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> century and it comprises of struggles of women to be relevant. It challenged things like women's participation in politics, etc.

The second wave of feminism started in the 1960s. A lot of women enrolled in the universities and they began to read law and query its provisions. They noticed that most of it was discriminatory against women. They began to talk about the issue of equality and they questioned societal and gender standards.

## LIBERAL FEMINISM

This movement believes in the equality of men and women, but they failed to recognize that in some respects, men and women are equal. They want equal participation in all life's activities, office, work, elective posts, voting suffrage. They want equality with men on all floors.



## **CULTURAL FEMINISM**

The cultural feminists believe in equality, but that the differences between males and females should not be judged as a disadvantage. They also believe that men and women reason differently sometimes or most times.

The cultural feminists are happy to be women and are aware of the existing differences between males and females but they do not want to be disadvantaged or looked down upon.

## **SOCIAL FEMINISM**

Social feminists believe in the **Marxian system** (that is, a state of equality in the state where the oppression is by the Bourgeoisie – The middle class members; a person with capitalist, materialistic or conventional values of the proletariat is prohibited. The only way equality can be achieved is to appreciate the Marxist theory where the government controls the resources and provides for everyone's needs, such that the males who have better economic opportunity don't oppress the females.

Basically, they believed that if the class system is fixed, women issues can be fixed as feminist inequality was entirely a class issue.

The third wave of feminism encompasses the (1) Radical feminists (2) Lesbian feminists (3) Post-Modern Feminists

## **RADICAL FEMINISM**

They believe in dismantling heterosexual relationships. Instead, the only way women can rise from subjugation is when they marry each other.

They believed that patriarchy is the problem of women. And because society places a priority on men, that is where the problem is coming from. They believed in departure from cultural feminism. And that the problem with women was a result of family. That is family should be abolished.

## **LESBIAN FEMINISTS**

From the radical feminists come the lesbian feminists who believed that women should marry women so as to solve the problem of feminism as a result of marriage. They



believed in the abolition of marriage and championed gay, lesbian and transgender relationships.

## GENDER AND CITIZENSHIP

A citizen is a participatory member of a political community who enjoys the rights of a citizen and assumes duties of membership.

Citizenship as a political concept defines who is included or excluded in the membership of a community by the enactments of laws on citizenship.

**NB:** Equality of status of all citizens and their legal rights are a core notion of citizenship.

A textual reading of **Section 29 of the 1999 constitution** connotes that Nigeria's constitutional law of citizenship is not biased in favor or against women. However, there are questionable provisions of the constitution which offend gender rules and norms.

**Section 26 of the 1999 constitution** provides that a foreign woman married to a Nigerian man can be a citizen, but this provision is silent on a Nigerian woman who marries a foreigner. He cannot be a Nigerian by virtue of their marriage.

Thus, the man still remains a foreigner and not a citizen and consequently it would affect their children. This is seen as a constitutional gap.

This provision of the constitution reflects the influence of gender based biases emanating from patriarchal ideas. The assumption in patriarchal societies like Nigeria is that marriage is patriarchal.

Constitutional bias is also reflected in the provisions of **Section 29(3)** which effectively abdicates responsibility towards a Nigerian girl-child by reason only of the fact that she is married. This section states that, for the purpose of renunciation of citizenship a person of "full age" means any one of eighteen years and above and any woman who is married shall be deemed to be of full age. The constitution does not indicate a lower unit below which the presumption of full age would apply. Thus a girl of 11 or 13 years who is married under traditional systems that permit underage marriage is deemed of full age.

In conclusion, the constitution of Nigeria needs a new look in its provisions as it relates to citizenship. The provisions in **Sections 25, 26 and 29** need to be amended so that they can take a progressive step to the achievement of a gender responsive constitution.



## **THE IMPORTANCE OF A GENDER-RESPONSIVE CONSTITUTION**

A constitution is an organic law which embodies the aggregate of the minimum values and aspirations from which all political arrangements and relationship originate.

It also provides overarching principles which define social relationships between people and government.

The underlying values and aspirations of the constitution include the rule of law, equality of all, liberty for all, fair and efficient distribution of access to resources etc and it responds to the past, the now and speaks to the future.

## **NATURE AND FEATURES OF A GENDER RESPONSIVE CONSTITUTION**

### **1. INCLUSIVITY IN THE PROCESS OF ITS MAKING**

**2. SENSITIVITY AND RESPONSIVENESS TO GENDER ISSUES IN ITS MAKING:** A gender responsive constitution responds to challenges posed when gender intersects with other bases of discrimination such as disability, rural/urban divide, sexual orientation, etc.

A gender responsive constitution is a must have for a modern and just society. The greatest contributions of the gender discourse to the understanding of social structures and values are the insights of:

- Unnaturalness of the traditional gender role of ascription
- Inequities and injustice underlying and arising from such ascription
- Inefficiency arising from the consequent sub-optimization of human society's greatest resources.

### **3. A GENDER RESPONSIVE CONSTITUTION MUST ENTRENCH:**

- Rule of law
- Equal citizenship
- Commitment to social equality, equity and justice
- Bill of universal, inalienable, indivisible and interdependent human rights.
- Representativeness of political organs on basis of gender and other identity/statuses
- Accountability organs/institutions and processes



## STRATEGIC GENDER RELATED ISSUES FOR NEW CONSTITUTION

1. Citizenship, indigence, residency status and rights
2. Expanding the spectrum of justiciable human rights in a mode that commits to the value of indivisibility and interdependence of all rights because of its strategic importance as the approach for mitigating/eliminating the gender-based disadvantage many citizens but women especially offer.
3. Clarifying status of customary law vis-à-vis constitutional bill of rights
4. Clarifying and designing more equitable federalism – A necessity for holding different tiers of government accountable for good governance.
5. Entrenching affirmative action
6. Interrogate land use Act
7. Constitution making process – Ensure representatives of process through inclusion and participation.
8. Be strategic in identifying/defining and using political allies
9. Engage at all levels of government
10. Mass mobilization
11. Strategic on how to use gender as a stake in negotiations

NB: According to the **Black's Law Dictionary**, Feminist jurisprudence is a branch of jurisprudence that examines the relationship between women and law, including the history of legal and social biases against women, the elimination of those biases in modern law, and the enhancement of women's legal rights and recognition in society.

**Professor Ann Scales in 1978** first used the phrase Feminist jurisprudence.

The unconstitutionality of discriminatory customary laws and practices against women has been upheld by the courts in the cases of **Ukeje V. Ukeje, Uke . Iro** and **Mojekwu V. Mojekwu**.

Constitutionalism is an ideal which looks at the rule of the constitution which states the values, aspirations and standards of a people and to ensure that all within the polity work to this end.

The constitution of a people is that document that speaks to the aspirations of women and the pursuit of constitutionalism is to give life to those aspirations.



The Nigerian constitutional framework and the constitutionalism it evokes are not as neutral or favourable to women. However, opportunities still exist within the framework, especially in **Section 42** to forge a new jurisprudence of equality and advance progressive constitutionalism and legal feminism has much to contribute to this project.

## RAPE

Rape as an offence is the most serious when considering offences committed against the person or dignity of a woman and how well protected they are under criminal law. It has been argued that rape in reality, debases womanhood as the female victim is exposed to ridicule at the trial of her assailant.

**Section 357 of the Criminal Code** defines rape as an unlawful carnal knowledge of a woman or a girl, with or without consent, or if the consent is obtained by force or by means of threat, intimidation, fear or harm or false and fraudulent misrepresentation as to the nature of the act, or in the case of a married woman impersonating her husband. The offence of rape is punishable with life imprisonment with or without whipping.

From the above, it is evident that rape is a sex-specific offence which can only be committed by men on women with the exception of women being **Section 7** offenders. It has been argued that there exists no reasonable justification for designating rape to protect women because the man is anally or orally sexually attracted does not suffer less mental anguish. These men are entitled to protection against undesired invasion of their persons sexually, even to the uttermost as the woman.

Another issue associated with the offence of rape is **Section 6 of the Criminal Code** which excuses sexual intercourse between spouses from being unlawful. Thus, as succinctly put by **Hale**, "the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself to her husband which she cannot retract".

The offence of rape as shown in its definition is differed from the act of mutual and reciprocal love on the basis of consent, and this is what clearly happens in an act of rape even between spouses. It is thus suggested by **Ayo Oyajobi** that rape should be observed by the law more in terms of its exploitative and humiliating nature especially in a male dominated society in order to intervene to safeguard the dignity the dignity of even the married women. There is as such public interest in this area for the law to be sensitive to abolishing the restrictions. If the law recognizes physical assault suffered by the wife from the husband, why should it be any different simply because the assault in question is of a sexual nature?



## **MARRIAGES (VOIDABLE MARRIAGES)**

### **Section 5 of the Matrimonial Causes Act 1970**

(1) Provides that subject to this Act, a marriage that takes place after the commencement of this Act not being a marriage that is void; shall be voidable in the following cases but not otherwise, that is to say, where at the time of the marriage :

- (a) Either party to the marriage is incapable of consummating the marriage
- (b) Either party to the marriage is;
  - (i) Of unsound mind; or (ii) A mental defective; or (iii) Subject to recurrent attacks of insanity or epilepsy
- (c) Either party to the marriage is suffering from a venereal disease in a communicable form; or
- (d) The wife is pregnant by a person other than the husband.

**Section 5(1) (d)** is undoubtedly a portion of this law on voidable marriages that needs reform. This because, looking at the provisions **Section 5(1) (a)-(c)** it was perfectly equal by using the term “either” to refer to both parties but suddenly, in an area that seems to want to curb sexual infidelity from women, it focuses only on women thereby displaying such intolerance of such situation.

The question is why?

No logical reason can be given as to why a provision is not inserted, making a marriage voidable where the husband impregnates another woman apart from the wife. This just buttresses the patriarchal nature of laws in Nigeria.

## **INDECENT ASSAULT**

Indecent assault can be defined as any offensive and obscene physical sexual attack by someone on another, usually against the person’s will, of which sometimes results in bodily harm.

**Section 360 of the Criminal Code** makes it a misdemeanor to unlawfully and indecently assault a girl or a woman, and renders it punishable with 2 years imprisonment. However, **Section 353 of the Criminal Code** makes an offence defined in the same language (except in so far as this latter section makes the victim of the assault male) a felony punishable with 3 years imprisonment.

A principle of Criminal law is that all person should be equally protected from harm of life degree, thus it is hard to see any justification for creating different offences with different



penalties to cover the same conduct for persons of different sexes. By according indecent assault on males to be a felony, it can be inferred that the law is saying that in spite of the high percentage of female victimization and thus greater likelihood of **Section 360** offence, the offence against women is against women is of less gravity on those against their male counterparts. All these offend against every constitutional intent to guarantee freedom from discrimination. A sex neutral offence should be enacted to cover and criminalize such behavior against all persons of either sex.

Also, a verbose and highly discriminative approach of the Criminal Code is the inclusion of the provision of **Section 360** exclusively of a chapter to deal with assaults on females, when a provision against indecent assault on men is adequately subsumed under the general provisions on assault. The increase in the manifestation of homosexual activities show that males are just as engendered as females and there is nothing in the bio-physical nature of the female that makes her require such peculiar treatment.

Finally, **Section 214(3)** which makes it an unnatural offence for any person to permit a male person to have carnal knowledge of him/her against the order of nature is included under **Chapter 21** which covers offences against morality. It has been argued that such is unjustified and it would be better to recognize a single chapter on sexual assault referable to both sexes as victims and offenders.

## THE IMPORTANCE OF AFFIRMATIVE ACTION FOR GENDER INEQUALITY AND THE BASIC CONTENT OF THE PROPOSED LEGISLATION

### Introduction

Worldwide, gender inequality leads to discrimination, social injustice and deficient democracies. The issue of gender inequality has in recent times, come to the front burner of discussions on women empowerment and emancipation in Nigeria. Despite movements by activists and feminists, the long lasting issues which have arisen from gender inequality have persisted. In other countries of the world, it has been observed that explicit measures of affirmative actions employed in tackling gender equality have succeeded especially in the area of ensuring equal political participation. Therefore, an affirmative action on gender inequality bill has been proposed. This memorandum discusses;

- (i) Why the proposed legislation is important and
- (ii) Why the basic content of the proposed legislation should be



## **GENDER INEQUALITY**

Gender inequality refers to unequal treatment or perception of individuals based on their gender. It arises from differences in socially constructed gender roles as well as biologically through chromosomes, brain structure and hormonal differences. It is found in varying degrees in most societies around the world, and Nigeria is no exception. Just as ethnic stereotyping and prejudice, underlie ethnic inequality, so do stereotypes and false beliefs underlie gender inequality. These stereotypes have not weakened despite activists' moments among other efforts.

## **AFFIRMATIVE ACTION**

Affirmative action is a set of measures adopted by governments and public and private institutions such as political parties, educational establishments, corporations and companies, to address the issue of systemic discrimination and exclusion of certain social groups and to encourage the efforts of particular social groups in the interest of certain development goals (**Dr Dzodzitsitaka**; Affirmative action and the prospects of gender equality in Ghanaian politics). It is an effort that includes the rights of all persons to be accorded full and equal consideration on the basis of merit.

Tom Mullen defines it as attempt to make progress towards substantive rather than merely formal equality of opportunities for those groups that have been disadvantaged in the past. It takes into account under representation and insignificant occupation or positions in the society.

Affirmative actions is intended to promote the opportunities of defined minority groups within a society to give them equal access to that of the privileged majority population. It is often instituted for government and educational settings to ensure that certain designated "Minority groups" within a society are included "all programs". The stated justification for affirmative action by its proponents is that it helps to compensate for past discrimination, prosecution, or exploitation by the ruling class of a culture and to address existing discrimination.

## **WHY IS AFFIRMATIVE ACTION IMPORTANT IN ENSURING GENDER EQUALITY**

The fundamental purpose of the policies, programs, and laws which an affirmative action is to further equal opportunity and counter or prevent current discrimination. Importantly, affirmative action programs, have a positive impact not only on women but all members of our society.



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- Affirmative action has a critical connection to creating diversity in our workforce and in our student communities.
- Affirmative action encourages companies, organizations, and educational institutions to evaluate candidates equally and fairly, i.e. based on their qualifications.
- Affirmative action calls for fairness. Under affirmative action, those who make hiring and admission decisions are only responsible for giving all candidates a fair chance to be evaluated regardless of gender. The essence of affirmative action is opportunities.
- Affirmative action programmees have encouraged women to enter traditionally male dominated fields where it is well documented, the salaries are often higher,
- The rich diversity of our college campuses is due to affirmative action. Affirmative action programmes at higher educational institutions have resulted in great gains in enrollment and graduation rates for women and people of color.
- Affirmative action levels the playing field and eliminates preferences that some have enjoyed by virtue of their race, ethnicity, gender and / of wealth for generations.
- Affirmative action programmes, including recruitments, outreach and training initiatives have played a critical role in providing women with access to educational and professional opportunities. They would otherwise have been denied despite their strong qualifications.

## **BASIC CONTENT OF THE PROPOSED LEGISLATION**

To fulfill the objective of ensuring gender equality, it is humbly submitted that the legislation should have the following as its basic contents:

### **1. EQUALITY OF CITIZENSHIP RIGHTS**

**Sections 25-29 of the 1999 constitution** speaks about citizenship. A critical examination of these sections prevails how the issue of citizenship has contributed to entrenching gender inequality. A citizen is a participatory member of a political community, i.e., he enjoys the rights and assumes the duty of membership. It is both a political and legal concept.

There is a principle that is at the core of the concept of Citizenship which is that citizens shall enjoy equal rights, which translates into equalization of citizens' status and legal rights. Thus, it can be assumed or argues that any direct or indirect denial of full citizenship to any class or group within a political community provides a basis for inequality even under the law. This raises a lot of questions like; if the notion of



inequality may or may not justifiably resort in preferential treatment from the state, and if the Nigerian law of citizenship is in favor or against women. We can assume that a number of women will answer NO emphatically to these questions since **Sections 26-29** would show that there is no preferential treatment and bias in the constitution based on this concept. However, taking a closer look, the non-inclusion of male spouses of Nigeria's citizens to acquire citizenship by registration reflects the influence of gender based bias emanating from Patriarchal ideas as it is assumed in this type of system that marriage is patrilocal and the female acquires the identity of her spouse.

**Section 27** states an additional provision by which citizenship can be acquired which is the only means male spouses of the citizens of Nigeria can acquire citizenship. Thus, this shows the inequality, preferential treatment and bias this provision contains. It provides for foreign female spouses to be illegible for Nigeria's citizenship but is silent on the legibility of their male counterparts.

This bias is again reflected in **Section 29** which permits the renunciation of citizenship of minor female members of the society by reason only of marriage, yet the reality in fact is that this group of citizens who are most vulnerable are the ones that are unprotected. Child marriage is common place in Nigeria, and the idea that a girl child who is married can renounce her citizenship is misplaced. If a boy child is not deemed to be mentally and socially capable of taking decision to renounce his citizenship, why should the same not be deemed fit for a girl child?

Recommendation: There should be an extraction of **Section 29(4) (b)** and spouses of Nigerian citizens should be granted the same opportunity when it comes to attaining Nigeria citizenship.

## 2. PROPER DEFINITION OF THE LAW OF INDIGENESHIP

This is a concept unknown to the modern nation. It is a subnational grouping such as an ethnic group. A good example can be found in the federal character principle which constitutionally legitimizes indigence (**3<sup>rd</sup> Schedule of the Constitution**). The constitution is silent about how the question of a person's indigeneship is to be resolved. For example, to which community does the child of a mixed indigenous marriage belong? Should it be the father's or mothers or both? The dominant position in this is that of patrilocality and patriarchy which vests ownership of a child on the father.

Also, the question as to the indigeneship of women in inter-ethnic marriage has been subject to debate. Some have argued that women retain their separate identities in marriage so that they can also retain their ancestral roots or pre-marital residency –



Residency derived roots after marriage. While others argue that women, upon marriage take on their husband's identities and derive their identities from his. This continued ambiguity about the origin of a woman who marries a man from a different geographical area than hers has led to women being denied their rights to appointive or political positions due to the facts that they can no longer claim indigeneship of their place of origin nor that of their husbands.

### 3. INCREASED POLITICAL PARTICIPATION FOR WOMEN

The low level of political participation of women in Nigeria is alarming and disturbing. This hinders women from contributing their quota to the development and consolidation of democracy in Nigeria. Empirical observations have shown that Nigerian women in positions of responsibility are noted to be hardworking and firm in decision-making and have contributed in no small measure to the development of the country. Despite their enormous contribution in economic and social spheres, they have been marginalized in civil and political participation.

Women in Nigeria constitute/occupy less than 80% in elective positions at all levels of governance, which is as a result of the fact that Nigeria is a male dominated country. Political aspirations are being truncated even before they are manifested as a result of failure on the part of the government to create a fair and level playing ground for women.

#### **Recommendation:**

The National Assembly should accept this affirmative action on Gender equality which will grant all the opportunity to be duly represented and all will participate in politics and render their views as to how the country will be smoothly run. Gender should be included in one of the grounds in which discrimination in membership of political parties shall be permissible.

### 4. IMPROVEMENT ON EMPLOYMENT RIGHTS

Employment is an area where women are discriminated against. According to **Section 55(1) of the Labor Act**, no woman should be employed in night work in a public or private industrial undertaking or in an agricultural undertaking. **Section 55(7)** provides an exception for nurses and women holding responsible positions of management who are not ordinarily engaged in manual labor.

There are cases of unequal pay to women for the same value of work involving me.

#### **Police Act:**



**Regulation 118(g)** provides that a woman desirous of joining the police force must be unmarried. Under Regulation 124 of the Police Act, a female officer desirous of getting married must first apply in writing to the commissioner of police for the state police command in which she serves, requesting for permission to marry, and give the name, address, occupation of the person she intends to marry. It should be noted that there is no equivalent provision for male policemen.

Under **Regulation 127 of the Police Act**, the employment of a police woman is not secured as she is automatically discharged from the force upon getting pregnant. She can only be re-enlisted with the approval of the IGP which is one of the reasons the police force is predominantly filled with men.

### **Maternity Leave:**

**Section 53 of the labour Law** provides for maternity leave and an employed woman has a right to do these if she can produce a medical certificate from a registered medical practitioner stating that her confinement will probably take place 6 weeks and while on such leave she will be entitled to not less than 5% of her wages provided she had worked for not less than 6 months prior to the commencement of maternity leave.

### **NB:**

In most private organizations, maternity leave is granted mostly without pay and this is one of the reasons women prefer to go into small scale businesses as the work conditions in the labour market does not favour them.

Zamfara state has been said to be one with the highest unemployment rate for women.

### **Recommendation:**

There should be a legislative enactment amending the discriminatory provision of women and there should be a body to enforce the law and the body enforcing the law should be proportionate to male and female.

## **5. Amendment of Gender-Selective Laws**

Under the law, there should be better protection of women and children. **Section 42 of the 1999 constitution** confers the right to freedom from discrimination on all citizens, prohibiting the subjection of an individual to discrimination by reason of his place of origin, sex, religion, etc and also prohibits privileges to any citizen based on the same grounds. These provisions though appearing to guarantee equality before the law appear not to take care of actions by Non-governmental agencies or



person and discriminating practices where employers of labour are not in government. Though Nigeria subscribes to various international declarations which aim at eliminating discrimination against women such as the Africa Charter on Human and people's rights whether they in reality protect women, or are merely theoretical is debatable. For this purpose, we shall consider the treatment of women by the laws of the land:

## 1. WOMEN AND SEXUAL OFFENCES

(a) *Section 357 of the criminal code* states that:

***"Rape is any unlawful carnal knowledge of a woman without her consent or with consent where such consent is obtained by threat, fraud, or false."***

From the above, it is obvious that rape is a sex specific offence only committed on men on women. This has provided fertile ground for the persistence of the various myths about women and rape.

It is submitted that the definition of rape as it is should make use of sex neutral language to help in dismantling the structure of the ill-conceived myth for then it will not be possible to categorize sexes and their attributes

(b) *Section 357* which is read with *Section 6* excludes sexual intercourse between spouses from being unlawful. Hence, a husband cannot be guilty of rape committed upon his lawful wife subject only to liability as can be imposed on him by *Section 7*. If rape were seen more in terms of its exploitative and humiliating nature, especially in a male dominated society, the law might be law inclined to intervening to safeguard the dignity of the married woman. What about spousal rape under threat of use of false? Will a potentially violent rapist not be revealed simply because his victim is his wife ?

(c) The words "Threat or intimidation of any kind" may be interpreted to extend to threats or intimidation in relation to jobs, education, etc. Also sexual favors extracted on grounds of conferring on another benefit may not qualify as rape but may still be successfully criminalized under *Chapter 12 of the Criminal Code* which makes it an offence (by a public officer) to ask for or receive benefits of any kind

## 2. INDECENT ASSAULT

*Section 360 of the Criminal code* makes it a misdemeanor to unlawfully assault a girl or woman and renders it punishable with 2 years imprisonment. However, *Section 353* makes an offence defined in the same language, except that the victim of the assault is male, a



felony punishable with 3 years imprisonment. It is hard to see any justification for creating different offences and penalties for similar conduct for persons of different sexes.

### 3. OFFENCES AGAINST MORALITY ; PROSTITUTION

**Section 1 of the Criminal Code** defines prostitution as the offering by the female her body commonly for acts of nudeness for payment. This definition is obviously sex specific excluding men from being laboured prostitutes. There is hardly any moral justification of logical reasoning for such an exemption.

### 4. SPOUSE BATTERING

Until recently, where physical assault occurred in domestic relationship (which usually is acts of wife battering) it was sufficient for the usual redress for criminal liability for assault to take care of the issue. However, it is yet submitted that spousal assault is essentially different in that it is exploitative and abusive of the marriage relationship. A legislation specifically prohibiting spouse battering will emphasize legal and societal abhorrence for this kind of conduct and its exploitative character.

### 5. WOMEN AS SURETIES

There are no legal provisions distinguishing between the rights and capacity of any citizen to stand as surety for another in an application for bail along sexually lines. However, the police maintain a despicable practice of denying women this right. This obviously contradicts every legal provision regulating bail practices and offence against the clear constitutional guarantee of equal rights.

### 6. EQUAL ACCESS TO EDUCATION

The ability of women to empower themselves economically and socially by going to school, or by engaging productive activities is constrained by their responsibilities of every tasks in the household (**CEC Report 2007**). A majority of developing countries are observed as having many girls discriminated against with regards to access to school by the **UNESCO** report. In the report, over 70 developing countries including Nigeria are said to be at risk of not meeting the MDGs target of education for all by 2015 after missing the initial deadline of 2005.

One explanation of the fact that more boys than girls participate in education proffered by Nigerian researcher, **Obasi**, is the Nigerian tradition that attaches



higher value to a man than a woman, whose place is believed to be in the kitchen.

The MDGs serve as pointer to the fact that equal access to education is the foundation of all other MDGs. Until equal numbers of girls and boys are in school, it will be impossible to build the knowledge necessary to eradicate poverty and hunger, combat diseases and ensure environmental sustainability.

## 7. EQUALITY OF LAND RIGHTS

Women in most communities in Nigeria are denied rights to land and the provision in the constitution on the Land Use Act does not guarantee equal access of women and men to land and also adequate compensation for land compulsorily acquired.

According to **National Bureau of Statistics**, although women constitute over 60% of agricultural labor force, and constitutes about 80% of the total food production. Only 14% of women own the land they cultivate. This reinforces discriminatory, customary and cultural practices that deny women access to land. Other basic concepts which must be part of the content of the legislation include:

- Residency status and rights
- Rights relating to health, housing and social security
- Establish an equal opportunities commission, in place of the federal character commission. This is because **Section 14(3) of the constitution**, though entrenching the federal character principle did not affirm the principle of equality and nondiscrimination that should strictly speaking be the basis of composition of government, its agencies, and the conduct of its affairs.

## CONCLUSION

This memorandum has provided an analysis of the reasons why affirmative action is a justified means of entrenching gender equality. It has also examined the basic content which such legislation on gender equality should contain in order to address adequately the issues occasioned by gender inequality. It is therefore submitted that in order to ensure sustainable development in Nigeria, concerted efforts must be made by way of such legislation to ensure that equality of all is entrenched.



## PAST QUESTIONS AND ANSWERS

### 2008/2009 SESSION

1. Asses the significance of the discourse around "Gender and The Law"
2. The quest for equality of men and women (Whether called sex or gender equality) is often befuddled by the fact of varying and competing conceptions of equality.

**Discuss the truth or otherwise of the statement above.**

3. In a multi-ethnic modern Nation, the citizenship of the individual is the most significant identity that he or she bears. Unfortunately, for the Nigerian women, that appears to be the well-defined citizenship status of women is in many wise contradicted by the law and practice relating to the concept of indigeneship.

**Critically examine the above statement.**

4. Rape has been described as a crime that is not comparable to any other form of violent crime. Unlike other crimes against the person, rape not only violates the victim's physical safety, but her sexual and psychological integrity (South African Law Commission, Sexual offence. The substantive law).

In Nigeria, after decades of the stagnancy of the law on rape, there is consensus on the need for urgent reforms. **Critically examine the proposed reform by the Nigerian Law Reform Commission.**

5. The preamble to the Nigerian Constitution stipulates that "We the people of The Federal Republic of Nigeria... do hereby make and give ourselves the following constitution". **In the light of the above, enumerate the gender gaps in the 1999 constitution, proposing legal remedial actions.**
6. Discuss how international law has assisted in the understanding and recognizing women's rights generally.

### 2005/2006 SESSION

1. What difference, if any, exists between the concepts of sex discrimination and gender discrimination? What implications have the paradigm shift from sex discrimination to gender discrimination for the advancement of the right to equality?



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2. Distinguish between formal equality and substantive equality in the context of women's rights discourse.

3. "One in three women will suffer some form of violence in her lifetime. It has become an epidemic that devastates lives, fractures communities, and stalls development. (UNIFEM).

**Examine the adequacy of some of the legal responses adopted at the National and international level to the problem of violence against women, focusing specifically on EITHER harmful traditional practices or sexual violence.**

4. "Numerous strategies have been identified to help advance women's participation in decision making and politics". **Examine some of these strategies and assess the relevance of law to these strategies.**

5. The challenges of modern day existence have largely challenged the traditional approach to women participation in the workforce, as exemplified by the statement of **Justice Bradley** in the U.S case of **Bradwell V. Illinois** (1873).

**Discuss this statement, taking into account the socio-economic realities of present day Nigeria.**

6. Discuss any **THREE** of the following issues in the context of equality laws and policies and the concept of non-discrimination in the workplace:
  - (i) Sex harassment
  - (ii) Maternity protection
  - (iii) Work environment and reproductive health
  - (iv) Discriminatory wages

## **2009/2010 SESSION**

### **SECTION A**

1. The development of law has been guided by legal principles premised on different understandings of what law is and the origins of law. Such principles are couched in terms such as justice, fairness and equality. However, they were applied in ways that respond to pre-law socio-political and economic objectives of society. Discuss the statement in line with the discuss on Gender and the law.



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2. The constitution as the grundnorm addresses the specific vulnerabilities of different groups within society. Its provisions are based on equality and gender neutrality. **Critically examine the validity of this assertion in the 1999 constitution of the Federal republic of Nigeria. Is this position different in other jurisdictions?**
3. In several jurisdictions, the emerging trend is of sexuality within marriage as husbands can now be guilty of raping their wives. However, it has been canvassed that marital rape should not extend to Nigeria. Do you agree? Give reasons for your answer.

## SECTION B

4. Analyze the scope and extent of the various statutory provisions, local and international, arguing against discrimination against women.
5. The rationale for gender and the law as an academic discourse, transcend jurisprudence, international law, public law, health law, and other issues. Examine the reality of this statement using gender as a critical tool of analysis of the operation of law in theory and practice.
6. Trace the historical development of Gender and the law highlighting the history of women struggles against discrimination.

## 2006/2007 SESSION

1. Discuss the contributions of feminist jurisprudence to the concept of gender.
- 2(a) Examine the theories of sexuality  
(b) With aid of decided case, illustrate how Government regulates sexuality and Gender.
3. "The concept of Gender seems opposite to law". "Law has often had uneasy partnership with women's sexuality which reflects the unease with which women's bodies are received socially"- **Gayle MacDonald**. Analyze the role of the law in reinforcing gender stereotypes.
4. The main thesis of women's movements today is to address the recognition of rights on one hand and the enjoyment on the other. Analyze the concept of equality as advocated in women's rights discourse.



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5. Lack of gender sensitivity in the provisions and interpretations of the constitution has create the dichotomy between law and practice (**Prof. C.K. Agomo**). Critically examine the above assertion in the light of the 1999 constitution with a view to proffering solution on the way out.

6. The 4<sup>th</sup> world conference on Women held in Beijing, China in 1995 identified violence against women as one of the critical areas of concern requiring urgent attention and action plan worldwide. Examine the adequacy or otherwise of Nigerian legal responses with particular reference to **EITHER** Trafficking women and girls **OR** sexual violence.

## 2007/2008 SESSION

### SECTION A

1. What is gender? What is sex? How is gender to be differentiated from sex? Arguably, the difference between both is only as much as you will get between six and half a dozen. That said, 'What do we need in fact- gender equality or gender equity? **Critically discuss the concepts of gender and sex, gender equality and gender equity, and what implications they have for the conceptualization of the law as a tool of justice.**
2. "The quintessential value of modern law, it is said, rests on neutrality. However, a critical review of modern law reflects as much bias premised on patriarchy as in found in pre-modern and customary law. Discuss
3. " It has been said that rape is a man's offence but a woman's trial" Do you agree? Critically review the gender-based prejudices of the Criminal Law as evidenced by the law of rape and another **ONE OTHER** area of the Nigerian Criminal law.

### SECTION B

4. Discuss the feminist perspectives on intergenerational rights under the Universal Declaration of Human Rights (UDHR).
5. Distinguish formal or substantive equality and the implications for gender justice.
6. Some feminists believe that parading the banner and fight for gender equality must continue until fully achieved while others see it as complete. **Critically review the arguments of both sides.**

## 2013/2014 SESSION



## SECTION A

1. Feminist theory sees women and their situation as central to political analysis; it asks why it is that in virtually all known societies' men appear to have more power and privilege than women and this can be changed. It is therefore an engaged theory which seeks to understand society in order to challenge and change it. **Valerie Bryson 2003.**

Examine this statement in light of different strands of feminism.

2. Gender is a social construct, gender is not something fixed, but something varies according to time, place and culture. **Harriet Bradley 2007.** Discuss
3. Compare and contrast Liberal Feminism and Radical Feminism

## SECTION B

1. Critically discuss the relevance, if any, of affirmative action in the reconstruction of gender relations in Nigeria.
2. "The constitution of the federal Republic of Nigeria sends out conflicting message as to its stance on gender equality". Discuss the truth or otherwise of this statement in relation to the constitutional provisions on citizenship and indigeneship as well as the application of the concepts in governmental practice.
3. "Arguably, nowhere is the inherent gender bias of law more evident than in criminal Law". Examine the truth or otherwise of this statement with respect to the provisions of the Criminal and Penal Codes.

## ANSWERS

### QUESTION 4 2005/2006

**"Numerous strategies have been identified to help advance women's participation in decision making and politics". Examine some of these strategies and assess the relevance of law to these strategies.**

## SOLUTION

This question is centered on a discussion of the numerous strategies involved in advancing women's participation in decision making and politics. It would also entail a discussion of the obstacles women face in their quest to participate in politics as well as the relevance of law in surmounting these obstacles.



In order to do a thorough discussion on this topic it would first be pertinent to ask the question what is political participation? And why is it necessary that women participate in politics?

Political participation simply implies the right of every citizen to participate in the governance in the governance of his country. This right is the sine qua non of every democracy: Every person in society be given an opportunity to participate in the decision making process in such a society.

Thus, it can be easily deduced from the above that a country which claims to practice democracy must accept it in all its ramifications. This would mean that such a country must provide opportunities for all persons in society to take part in politics and decision making. It would not be far-fetched to assume that all persons include women, who are about fifty percent of the world population.

This does not seem to have been the case as several obstacles have blocked the path to political participation in such countries. This would include family relationships where the man being the head of the family seeks to also be the head in the society and leaves no room for his female counterpart. Secondly, the violent nature of politics is another factor that hampers the participation of women in politics. This is because women are not naturally prone to violence which occurs in the political arena. As a result of these many women have fled the political arena.

Thirdly, ignorance among women of their right to political participation has led to poor participation among women.

Lastly, another factor that prevents women from participation in politics is overzealousness of women appointed to political offices. Often such women may be unwilling to assist their female counterparts in office in their quest for political participation. There are only a few of the factors which prevent women from being involved in politics.

In order to solve these problems, several strategies have been identified to ensure women political participation in Nigeria:

First, education of women on their right to participate in politics. Seminars should be organized by the Ministry of women affairs to enlighten and reorient women on the need to take part in decision making in the society. Such seminars can also be facilitated by lawyers who are knowledgeable in the law and can educate such women on their rights to political participation in the constitution, relevant state laws and so on.

Furthermore, other such strategy is affirmative action. This refers to differentiation on a legal basis in order to ensure that a disadvantaged group of people in some respect are given the opportunity to have the same advantages as other privileged groups.



Affirmative action could be done through quota or setting aside. Accordingly, **The Beijing Declaration of 1996** provides that state parties are to ensure that 30% women participation in political offices. Thus, in order to ensure better women participation in politics, it is necessary that the Beijing plan of Action be enacted and implemented under Nigerian law.

In addition, other relevant international laws which ensure better women participation should be implemented. This would include such provisions of CEDAW which have been ratified by the Nigerian legislature.

Likewise, National laws should in no way be relegated to the background; Chapter 2 of the 1999 constitution should be made justiciable in order to ensure greater participation of women in politics. Also the provisions of National policy on women should be adopted to ensure a greater participation of women in politics.

Finally, from the above, it can be seen that there is a great need for women in politics. It is therefore necessary for Nigeria to implement the international standards relevant in ensuring women political participation and also relevant national law also aimed at ensuring such participation. All these would ensure a greater participation of women in the political arena.

#### **QUESTION 5 2008/2009**

**The preamble to the Nigerian constitution stipulates that “we the people of the federal Republic Of Nigeria... Do thereby make and give ourselves the following constitution”. In the light of the above, enumerate the gender gaps in the 1999 constitution proposing legal remedial actions.**

#### **SOLUTION**

This question is centred on a discussion of the gender gaps in the 1999 constitution. It would also involve a consideration of the methods which could be used by the law to remedy these gaps in the constitution.

In most modern societies, the constitution is usually seen as the basic law (grund norm), that is, the law from which all other laws derive validity. In view of this, it has been postulated by many writers that since the constitution is the grund norm in any legal system, from which all other laws derive validity, it ought to address itself to the specific vulnerabilities of different groups within the society.

According to **Professor Atsenuwa**, the constitution is the embodiment of a people’s spirit, their vision... which as a polity they will in unity aspire. If the constitution speaks to an issue it resonates with the community of interests on the issue most clearly and leaves none in doubt. It can therefore be inferred from the above statement that there is dire need for such a powerful document to reflect and protect the interests of all groups in



society. In order to achieve such a feat it is important that all groups in the society are given the opportunity to be involved in the constitution making process. This would ensure that the needs of each group of society are reflected in the constitution.

Thus in the area of women's interests the story is not much different. In order for women's interests to be addressed in a constitution there is a need for women to be involved in the constitution making process. Accordingly, it has been argued that there are gender gaps in the 1999 constitution it would be necessary to decipher what these gaps may be so as to propose the actions that can be taken by law to remedy these gaps. The next issue to be resolved would be what are the gender gaps in the 1999 constitution?

First, a male dominated constitution making process. On a cursory look at the preamble of the **1999 constitution** it would appear that all groups in society were adequately represented in its making. However, on the contrary, this statement has been criticized by various writers.

According to **Joy Ezeilo**, who are the people gender-less beings? Undoubtedly the Nigerian females are not part of the 'we'. This was because no woman was part of the Armed forces ruling council, how then could women's interests be reflected in the constitution? This is not alien to the 1999 constitution as previous constitutions still show the same report: women have either been partially or totally excluded from the constitution making process.

In addition, gender dominated language is another gender gap present in the 1999 constitution. Language as a vehicle of communication must convey the original meaning of the author. Thus, According to **Professor Atsenuwa**, originally, when in drafting of laws, the word man was used, it only actually included men and excluded women. Language usually has a way of painting pictures in our mind. Thus, where in constitutional provisions the word constantly used is 'he' it affects the psyche of its readers who would naturally interpret it as including male and excluding female. There is a need to use gender sensitive words in the constitution. For example, instead of 'he', what should be used is 'he' or 'she'. According to **Professor Atsenuwa**, with even such a minute change, there will be a total reorientation of the mindsets of persons who interpret the constitution. This has been done by **Article 80 of the Uganda Constitution** which provides that a person can be elected when he or she is a member of a local government council.

Another gap which can be deduced in the **1999 constitution** is the failure to operationalize the constitutional principles of gender equality and non sexism. **The 1999 constitution** did not specifically address historical gender imbalances. The reason for this has of course already been stated above. **Chapter II of the constitution**, which provides for fundamental objectives and principles of state policy and **Chapter IV of the constitution** which provides for human rights geared towards equality. This has been manifested in the interpretation of the rights guaranteed under **Chapter IV**. For example, **Section 34 of the 1999 constitution**



which guarantees every person's right to dignity of the human person is usually represented with respect to police brutality or prison conditions and not with respect to marital rape. In a like manner, **Section 42 of the 1999 constitution** also seeks to prevent women from discrimination but still allows discrimination based on customary practices such as the oil Ekpe Custom in the Eastern states.

Lastly, another gender gap in the **1999 constitution** is the issue of citizenship and indigence rights of the Nigerian women under the **1999 constitution**. Although under the constitution women can as man can, confer citizenship on their children, **Section 26 of the constitution** does not allow women to confer citizenship on their husbands.

Another issue is the problem of indigence for the Nigerian woman. The constitution does not make provisions for the requirements necessary for a person to become an indigene under the constitution. Thus women are faced with the problem of not being indigenes of their home states when they marry and not being allowed to be indigenes in their husband's state. This affects the participation of women in politics because in Nigeria this seems to be a prerequisite for participation in politics.

In view of all these problems, how can the law seek to remedy the gender gaps in the 1999 constitution?

First, by affirmative action. The federal character principle entrenched in the constitution can be extended to other areas of the law. **Article 4 of CEDAW** allows for affirmative action as a temporary means of achieving equality. Similarly, **the Beijing Plan of Action** advocates for 30% participation in governance. Thus Nigeria can incorporate these provisions in to the **1999 constitution**.

Also, gender mainstreaming into provisions of the 1999 constitution will also help to remedy the gender gaps in the constitution. The style adopted by the Ugandan constitution can be adopted here in Nigeria as well.

**Chapter II of the constitution** should be created by women groups concerning such provisions which need gender mainstreaming so that they propose these reforms to the constitutional Amendment Committee.

In conclusion, it can be seen that gender gaps in the 1999 constitution do exist but with the help of the law such gaps can be remedied through all the steps provided as well as other associated steps.

#### QUESTION 4 2009/2010

**4. Male offences, female trials. Critically analyze the gender issues in the law of rape within context of the recent Nigerian Law reform Commission's proposal.**



## SOLUTION

It would seem that there is an increase in the prevalence of rape in most modern societies. The increase in this heinous act caused most societies to criminalize the act of rape and attach grave consequences to its committal. Accordingly, **Section 357 of the Criminal Code** provides that any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman by personating her husband, is guilty of an offence which is called rape. **Section 282 of the Criminal Code** makes a similar provision.

Thus, it would seem that in spite of the protection which the law seemed to accord to women under these provisions, in reality many women still remain unprotected due to the many controversial and unfair areas in the law of rape. This can be easily deduced from the fact that in spite of the gravity of this offence, it still remains one of the under reported offences in Nigeria. It would thus be necessary to critically analyze the issues which remains a clog in wheels of the law of rape.

Many issues have arisen as regards the law of rape in Nigeria. One of such is the definition of the offence of rape by our criminal laws viz the criminal code and the penal code. It has been suggested that the definition of the offence of rape is too narrow. This is because the definitions given by the Criminal Code and the Penal Code exclude the commissions of rape by a woman. It also includes such issues like woman-to-woman rape as well as man to man. Another issue under the definition of the offence is that it excludes recent forms of carnal knowledge like oral penetration by the male organ or any such object as well as anal penetration. These are recent developments in society which should be adequately represented in our laws as has been done in other jurisdictions. These are recent developments in society which should be adequately in our law as has been done in other jurisdictions. For example, the **Rev. of Rape Laws 2000 of India** now defines rape as sexual assault which includes oral penetration by any object and so on. Also, **the international criminal tribunal of Yugoslavia** has an expanded definition of rape which includes oral penetration by the male organ. It has also been argued that the word rape should no longer be used in our laws.

**Professor Okonkwo** has argued against expanding the definition of rape to include such forms of carnal knowledge. He stated that **Section 214 of the Criminal code** already provides for carnal knowledge against the order of nature and should be used to cater for such things as oral penetration.



**The law Reform Commission** has proposed that the definition of rape be expanded to include penile and non-penile penetration. It would also suggest that the offence of rape should continue as named. And that **Section 214 and 284 of the Criminal code** should be retained, while **section 214(3)** should be deleted and "or her" should be added to **Section 214(3)**. They also stated that rape cannot be a gender neutral offence because the law does not permit such.

Another area in the law of rape which is in need of similar attention is the requirement of consent in determining the guilt of a person who commits the offence of rape as provided by the criminal and penal codes.

**Section 357 of the criminal code** states that:

**"Rape is any unlawful carnal knowledge of a woman without her consent or with consent where such consent is obtained by threat, fraud, or false."**

**Section 282 of the penal code** also states that rape is Sexual intercourse against the will of the woman. A joint reading of these two provisions will show that the presence or absence of consent determines whether the offence of rape has been committed.

The relevant question then becomes **"How then can a lack of consent be inferred when the act of rape has been committed?"**. This question has always been decided by the courts who expect that a lack of consent by the woman should be manifested by outwards signs of physical struggle e.g. bodily injury. This is shown by the famous dictum of **Wild J** in the crown courts, **"it is not a question of just saying no, but the way it is shown, there must be marks of false"**. This seems totally unfair to the woman for what happens when a woman submits in fear and shows no outwards sign of the lack of consent.

Another unfair practice by the court is to suggest that provocative dressing displays consent in a woman. With all due respect, this position is unacceptable as it removes from the woman the freedom of choice of clothing granted her.

For this reason, other jurisdictions have either abandoned the consent requirement or have defined it extensively. For example, the **Sexual offences Act England and Wales** provides that in determining whether a person has committed rape, there is a rebuttable presumption of lack of consent if: Violence is used before the act; person was sleeping; drugs were administered or person had physical disabilities. In like manner, the **crimes Act (Jury directions)** states that in rape cases there is a presumption that there was no consent by the victim.

Another issue which arises under the requirement of consent is the withdrawal of consent. This does not only feature in the much debated area of marital rape but also in relationships where in the past consent has been given, but at the time of rape was withdrawn. Neither the criminal nor the penal code makes provision for such withdrawal.



In addition to this, another unfair practice by the courts permitted by **Section 211 of the Evidence Act** is the use of sexual history and immoral character of the woman as a defence to the offence of rape. With all due respect, it is suggested that this is a discriminatory practice geared towards suggesting that women with an active past of sexual history have consented to being raped. Again, this seems to accord with the male perception that women who are promiscuous have asked for such violence to be carried out upon their person. In view of this, the **law Reform Commission**, has proposed that consent should be exhaustively defined in the **Criminal and Penal codes**. This should include exhaustive definitions of instances where lack of consent will be shown. Also, the commission proposed that **Section 211 of the Evidence Act** should be repealed.

The last issue for discussion in the law of rape is the requirement of corroboration in rape cases. This rule is not an express rule but judges seem to have adopted this rule in practice. The common law rule stated in **R V. Baskerville** provides that the jury should not convict an accused on the uncorroborated evidence of the prosecutrix. **The evidence Act** provides for the requirement of corroboration in defilement case. However, the use of this rule in the cases of rape is a matter of practice. Accordingly, in **Iko V. State**, it was held that evidence of penetration without corroborative evidence could not be held to be rape. Likewise, in **Jegade V. State**, where the Medical evidence could not link the condition of the victim or prosecutrix with that of the accused, the court held that a case of rape has not been proved. One argument in favor of the requirement of corroboration is its use as a safeguard against unfair conviction of an innocent party. However, on the other hand, it could also be argued that rape being a private offence may not lend itself to being approved by corroborative evidence.

In Nigeria, this requirement of corroboration has prevented the prosecution of many good rape cases while in other jurisdictions, the requirement of corroboration has been removed. For example, the **international Criminal tribunal of Yugoslavia** has abolished the requirement of corroboration. Thus, the law Reform commission proposed the requirement of corroboration to prove the offence of rape should be disposed of. It is also suggested that **Section 175 of the Evidence Act** should be repealed.

From the foregoing, it can deduced that there is an urgent need for reform of the existing law of rape and this can be done through adoption of the proposals made by the Nigerian Law reform Commission. It is not suggested that this will solve all the gender issues in the law of rape but it is recommended as the way forward at this time for the law of rape.