

INTRODUCTION

LAW – WHAT IS LAW?

There is no universally accepted definition of Law, but it can be put simply as “a body of rules and regulations that guide human conduct, and accepted as binding by the society which are enforced directly by the State, breach of which exposes the culprit to punishment in form of fines or imprisonment or to redress any wrong done to another by way of damages”.

The definition above tries to focus on Law in the strict sense of it, in that it regards every society whether primitive or civilized as being governed by a body of rules which the members of the society regards to standard of behaviour. In which case, if it involves the idea of obligation in respect of conformity to those set of rules, then the rules can be properly referred to as LAW.

In essence, breach of the provisions of the Law will result in an IMPOSITION OF SANCTIONS: Sanctions serve the purpose of protecting the general community against persons of defiant behaviour. Without sanctions, the continued existence of society would ultimately disintegrate, which in effect makes law to be different from other types of conduct or behaviour which do not attract sanctions, but may be frowned upon by the community and no more.

For instance it may not be too early to state that adultery is not punishable in the Southern Part of Nigeria, although it is

morally wrong to commit adultery. The law therefore seeks to prescribe what constitutes permitted behaviour in our private and social life, in our business transactions, in public life and employment situations, etc. It also defines and prohibits unacceptable conduct, and in the end stipulates punishment or sanctions against unlawful conduct. The law is needed to regulate the relationship between individuals and groups in the community and to create an atmosphere within which a person can enjoy his rights without making it impossible for others to enjoy theirs.

The law may be differentiated from:

MORALITY: This consists of principles relating to the goodness or badness of human conduct. Like the law, moral standards are laid down and developed to guide human behaviour; but are not enforced directly like law. At best an immoral person invites social disapproval but he can only be prosecuted, for instance, if he breaks a law.

Morality is also sectional or restricted to specific groups rather than on the generality of the population. e.g. as stated above, adultery is not a crime in the Southern part of the country, even though it constitutes a breach of morality. Breach of morals do not attract any punishment from the State.

Morality is an appeal to human conscience, but law needs not appeal to human conscience. In law, there is always an earthly authority to sanction these rules; goodness or badness is irrelevant to the existence of law; but law, it has been asserted will be most effective if it conforms with the moral feelings of the members of the community.

In trying to determine what the law of a particular society should be, there are essentially two schools of thought on this postulation. They are:

1. The Positivist school and
2. The Naturalist school

The positivist school believes the law should be separated from the morals of the society. That is the law should not spring from the morals of the society. They should be mutually exclusive.



The naturalist school (or moralist school) however believes that for law to be more effective and obeyed, it must spring from the moral ethos of the society. In other words law and morality should be co-extensive.



If we have this scenario, they believe that its observance will be more honoured than its breach. However, it is beyond the scope of this book to probe into who is right or wrong, but the choice is left for us to determine which school we want to pitch our tent.

See however the following cases:

SHAW VS D.P.P. (1962)

MUHAMMED VS KNOTT (1969)

NATURE OF LAW

There is no doubt that the law affects every aspect of our lives right from the time we were born up till the time we go back to the grave and its scope even extends from before our birth to after our death. We live in a society which has developed a complex body of rules to control the activities of its members.

For instance, there are laws which govern working conditions, (like providing safe working environment) laws which regulate social activities (e.g. paying levies on night parties or outright ban beyond a certain time) and laws which control personal relationships (e.g. by prohibiting marriage between close relatives). There are a number of ways in which the laws may be classified; the most important are as follows:

(1) Public and Private Law: The distinction between public and private law is illustrated graphically in fig. 1.1 (below)

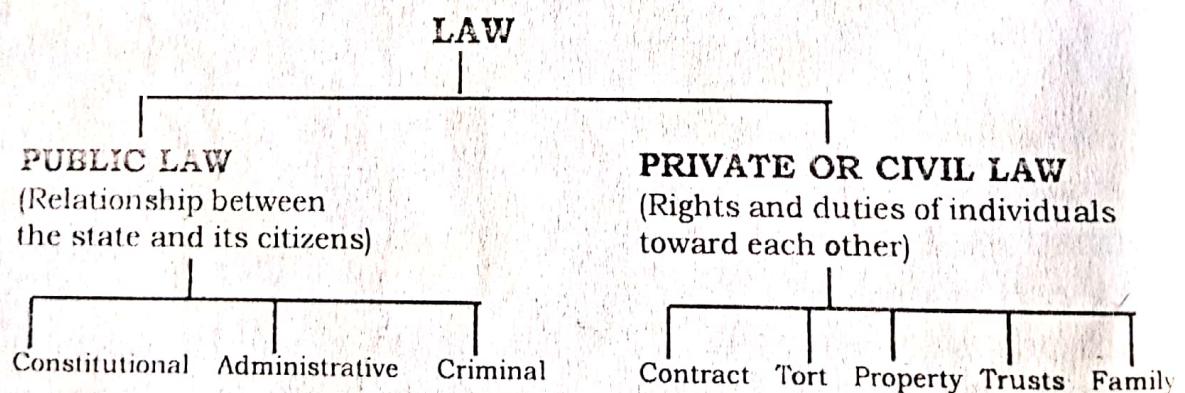


Fig. 1.1. The distinction between public and private law.

- a. **Public law:** Public law is concerned with the relationship between the state and its citizens. This comprises several specialized areas such as:

- i. **Constitutional law:** Constitutional law is concerned with the workings of the Nigerian constitution. It deals essentially with the division of governmental powers among the organs of the state. It covers such matters as the position of the state, the composition and procedures of the parliament, (Lawmakers) the functioning of the Federal, state and local governments, (Executives) citizenship and civil liberties of individual citizens as guaranteed by the courts (Judiciary). It essentially covers the mode of governance by the state.
- ii. **Administrative law:** There has been a surge in the activities of the government in modern times. Administrative law determines the organizations, powers and duties of such administrative authorities and government agencies. Government agencies are involved, for example in the provision of the state retirement pension: Local government and certain specialized bodies have been established to facilitate and improve upon government activities, fixing minimum wages and so on. Internal machineries are set up by such organizations to discipline erring employees. A large number of disputes arise from the administration of these schemes and a body of law - administrative law has developed to deal with the complaint of individuals against the decisions of the administering agency. Administrative law therefore is the supplement of constitutional law. It is constitutional law in action.
- iii. **Criminal law:** Certain kinds of wrongdoing pose such a serious threat to the orderliness of the society that they are considered crimes against the whole society. And if such activities are not curbed, anarchy may reign. The criminal law makes such anti-social behaviour an offence against the state.

and offenders are liable to punishment. The state accepts the responsibility for the detection, prosecution and punishment and even reformation of offenders.

- b. Civil or Private law: Civil law is primarily concerned with rights and duties of individuals toward each other. The state's involvement in this area of law is confined to providing a civilized method of resolving the dispute that has arisen. Thus the legal process is begun by the aggrieved citizen and not by the state, but using the machinery of the state. Civil law is also called private law and is often contrasted with criminal law.

THE SOURCES OF NIGERIAN LAW

The principal sources of Nigerian law today include the following:

- (1) English Law, which consists of:
 - a. The Received English law comprising -
 - i. The Common Law.
 - ii. The doctrines of equity
 - iii. Statutes of general application in force in England up till 1st January, 1900 and
 - iv. Statutes and subsidiary legislation on specified matters.
 - b. English law passed before 1st October, 1960 and extending to Nigeria.
- (2) Nigerian Legislation
- (3) Customary Law
- (4) Judicial Precedent

We shall now discuss the sources of Nigerian Law as listed above in turn.

1. (A) The Received English Law

Common Law and Equity

For a proper understanding, it is logical to discuss these two sources of law together under the received English law as stated above. The distinction between these two systems of law is rooted in history and can only be understood properly by examining the origins of English law. English legal development can be traced back to 1066 when William of Normandy gained the crown of England by defeating King Harold at the battle of Hastings. Before the arrival of the Normans in 1066, there really was no such thing as English law. There was no unified system of law for the whole country. The Anglo-Saxon legal system was based on the local community. Each area had its own courts in which local customs were applied. The Normans conquest did not have

Legal System

no immediate effect on English law; indeed William promised the English that they could keep their customary laws. The Normans were great administrators and they soon embarked on a process of centralization, which created the right climate for the evolution of the uniform system of law for the whole country i.e. the common law.

EVOLUTION OF THE COMMON LAW: The Norman Kings ruled with the help of the most important and powerful men in the land who formed a body known as the Curia Regis (King's Council). This assembly carried out a number of functions: It acted as a primitive legislature, performed administrative tasks and exercised certain judicial powers. The meetings of the Curia Regis came to be of two types: Occasional assemblies attended by the barons and more frequent but smaller meetings of royal officials. These officials began to specialize in certain kinds of work and departments were formed. This trend eventually led to the development of the courts to hear cases of a particular kind. Hence the development of common law can be linked with the spread of the King's Peace. The courts which had emerged by the end of the thirteenth century became known as the courts of common law and they sat at Westminster. The first to appear was the court of 'Exchequer'. It dealt with taxation disputes but later extended its jurisdiction to other civil cases. The court of 'Common Pleas' is the next court to be established. It heard disputes of a civil nature between one citizen and another. The court of 'Kings Bench', which was the last court to appear, became the most important of the three courts because of its close association with the King.

Its jurisdiction included civil and criminal cases and it developed a supervisory function over the activities of inferior courts.

The Normans exercised central control by sending representative of the King from Westminster to all parts of the country to check up on the local administration. At first these royal commissioners performed a number of tasks: they

made records of land and wealth, collected taxes and adjudicated in disputes brought before them. Their judicial powers gradually became more important than their other functions. To begin with, these commissioners (or justices) applied local customary law at the hearings, but in time local customs were replaced by a body of rules applying to the whole country. The whole commissioners were usually referred to as **ITINERANT JUSTICES**. The courts were generally known as **ASSIZES**.

When they had completed their travels round the country, the justices returned to Westminster where they discussed the customs they had encountered. By a gradual process of sifting these customs, rejecting those which were unreasonable and accepting those which were not, they formed a uniform pattern of law throughout England. Thus by selecting certain customs and applying them in all future similar cases, the common law of England was created. Hence the term common law as used here refers to those rules and principles which were developed in England by the regular or common law courts. In other words the common law which was originally based to a large extent on the local customs has developed through the system of judicial precedent.

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

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

EMERGENCE OF EQUITY

Over a period of time the common law became a very rigid system of law, in many cases it was impossible to obtain justice from the courts. The main defects of the law were as follows:

- (a) The common law failed to keep pace with the needs of an increasingly complex society. The writ system was slow to respond to new types of action. If a suitable writ was not available, an injured party could not obtain a remedy, no matter how just his claim.
- (b) The writ system was very complicated, yet trivial mistakes could defeat a claim.
- (c) The only remedy available in the common law courts was an award of damages. This was not always a suitable or adequate remedy.
- (d) Men of wealth and power could overawe the courts and there were complaints of bribery and intimidation of jurors.

In a nutshell, through systematic applications, the common law became formalized, rigid and highly technical. The court of common law failed to give redress in some cases where redress is needed. It then became the practice of aggrieved citizens therefore to petition the King directly for assistance who was then considered as the "Fountain of Justice". As the volume of petitions increased, the King passed them to the Curia Regis and a committee was set up to hear the petition. The hearings were presided over by the Chancellor and at one time petitions were addressed to him alone. By the 15th century the Chancellor had started to hear petitions on his own and the Court of Chancery was Equity. The early Chancellors were drawn from the ranks of the clergy and their decisions reflected their ecclesiastical background.

They examined the consciences of the parties and then ordered what was fair and just. At first, each Chancellor acted as he thought best. Decisions varied from chancellor to chancellor and this resulted in a great deal of uncertainty for petitioners to the extent that Equity was described as 'varying like tides'.

foot of the Chancellor'. Eventually chancellors began to follow previous decisions and a large body of fixed rules grew up. Equity therefore became the doctrines formulated to redress the shortcomings of the common law. Thus Equity in its technical sense is defined as the rules applied by the Chancery Court before the Judicature Acts of 1873-1875.

The courts of Equity followed no established rules in dealing with cases before it. Its intervention was made on the ground of conscience. Equity is therefore a gloss on the common law. It cannot exist without the common law.

The decisions of the court of Chancery were often at odds with those made in the common law courts. This proved to be a source of conflict until the start of the 17th century when King James I ruled that in cases of conflict, Equity was to prevail. For several centuries, the English legal system continued to develop with two distinct sets of rules administered in separate courts. Equity is not a complete system of law. Equitable principles were formulated to remedy specific defects in the common law. They were designed to complement the common law rules and not replace them. Equity has made an important contribution to the development of English law, particularly in the following areas:-

1. Recognition of new rights:

- a. **Trust Concept:** The common law did not recognize the concept of trust. A trust arises where a settlor (S) conveys property to the trustee (T) to hold on trust for a beneficiary (B) who has an equitable interest. The common law treated T as if he were the owner of the property and B's claims were ignored. The court of Chancery would however require T to act according to his conscience and administer the trust on B's behalf. Thus equity recognized and enforced the rights of a beneficiary under a trust.
- b. **Mortgage:** The court of Chancery also came to the aid of the borrowers who had mortgaged their property as security for a loan. If the loan was not repaid by the agreed



date, the common law position was that the lender (Mortgagee) became the owner of the property and the borrower (Mortgagor) was still required to repay the outstanding balance. Equity gave the Mortgagor the right to pay off the loan and recover his property even though the repayment date had passed. This equitable principle is known as the **equity of redemption**.

2. **Introduction of new remedies:** The new equitable rights were enforced by means of new equitable remedies. In the field of Contract law, the court of Chancery developed such remedies as Injunction, Specific Performance, Rescission and Rectification. These remedies were not available as of right like common law remedies: they were discretionary. The court of Chancery could refuse to grant an equitable remedy if, for example, the plaintiff had himself acted unfairly.

Examples of remedies introduced by Equity are:

- (1) Injunction: An order of the court compelling or restraining the performance of some act.
- (2) Specific Performance: An order of the court compelling a person to perform an obligation existing under either a contract or a trust.
- (3) Rectification: The alteration of a document so that it reflects the true intention of the parties.
- (4) Rescission: The restoration of the parties to a contract to their pre-contract state of affairs.
- (5) Promissory Estoppel.
- (6) Doctrine of part performance.
- (7) Estate contract and the burden of restrictive covenant.

By the 19th century, the administration of justice had reached an unhappy state of affairs and was heavily criticized. The existence of separate courts for the administration of common law and equity meant that someone who wanted help from both the common law and equity had to bring two separate cases in two separate courts. If a person started an action in the wrong court, he could not get a remedy until he brought his case to the right court. The proceedings in the court

Chancery had become notorious for their length and expense. Comprehensive reform of many of the deficiencies of the English legal system was effected by several statutes in the 19th century, culminating in the Judicature Acts of 1873 – 1875. The separate common law courts and court of Chancery were replaced by a Supreme Court of Judicature which comprised the Court of Appeal and High Court. Every judge was empowered henceforth to administer both common law and equity in his court. Thus a plaintiff seeking a Common law remedy and an equitable remedy need only pursue one action in court. The Acts also confirmed that where common law and equity conflicts, equity should prevail. These reforms did not have the effect of removing the distinction between the two sets of rules: Common law and equity are still two separate but complementary systems of law today. A judge may draw upon both sets of rules to decide a case.

Maxims of Equity

We have noted that Equity is not a complete system of administration. It came to complement and remedy the injustices prevalent at common law. It is for this reason that Equity till today plays a very prominent role in virtually all the jurisdictions in the world. Hence, Equity can be understood here in the general sense, as judgements of the courts based on fairness, justice and equality.

In fact, this rule of fairness is parallel to all men of conscience the world over and that is why in this modern world, certain standards of behaviour are expected from the people so that a just and equitable society can be modeled if not fully achieved. It is noteworthy that judges apply equity in determination of case. It is for this reason that it is necessary for us to consider the maxims of equity which are forever relevant in the scheme of things, and will be there for us as a reference point till the end of times. In fact, the essence of having the courts is for people to get justice. If the courts cannot give justice, the result is better imagined. For anarchy not to reign, the society should be a just one based on equity. For this reason, we need to learn a lot of lessons from the

development of equity, so that peace and order based on fairness and justice will reign in our society.

MAXIMS

1. Equity does not suffer a wrong to be without a remedy:

This underlies the whole basis of Equity as noted above. Equity ensures that a remedy is created for any wrong done, so that the society would be a just one. Two examples already stated above will suffice.

(i) The doctrine of Trust

(ii) The Equity of Redemption in a mortgage transaction

2. Equity looks at the intent rather than the form: What led to the substantial success of Equity was the fact that the decisions were based on the intention of the parties and not the form it was supposed to take. Undue technicality was therefore played down, hence this maxim can be illustrated as follows – “where an agreed damages clause in a contract is not a genuine pre-estimate of the actual loss that would result from a breach, equity would regard it as a penalty designed to induce performance of the contract. In such a situation, the estimate would be disregarded and the court would award the innocent party his actual loss”. (See further, the Law of Contract, the discussion on Damages. INFRA)

3. He who comes to Equity must come with clean hands: Simply put, if one wants fairness, he himself must have acted fairly. He must have acted properly, in good faith and without any form of undue advantage whatsoever. In the case of **Craig vs Craig (1942)**, a wife petitioned for divorce basing her action on the fact that apart from her husband's cruelty, he had also committed adultery, her petition was refused and the husband's cross-petition granted because evidence was led to show that the lady herself had committed adultery but did not disclose the information/fact in her petition.

See also **D & C. BUILDERS vs REES (1966) (INFRA)**

4. He who seeks equity must do equity: One must be prepared to act fairly if one wants equitable relief. For instance,

mortgagor wishing to exercise his equitable right to redeem must give the mortgagee reasonable notice of his intention.

5. Equality is Equity: This can be explained from this example: the court is not likely to grant a minor an order of specific performance against an adult, since the adult cannot claim such order against an infant.

6. Other maxims of Equity include the following:

- Equity acts in personam but the law acts in rem.
- Equity regards as done that which ought to be done.
- Equity follows the law.
- Delay defeats equity or put in another way, equity aids only the vigilant and not the indolent. This is the whole basis of the doctrine of Laches which states that an equitable right will not be enforceable if the plaintiff delays unreasonably.

Solomon vs Mogaji (1982)

Agaran vs Olushi (1907)

- Where two equities are equal, the first in time prevails.

(c) Statute of General Application in force in England as at 1st January, 1900 (S.O.G.A.)

These were statutes introduced into Nigeria by the colonial government e.g. Sales of Goods Act 1893, Infants Relief Acts 1874, Partnership Act 1890, Fatal Accident Act 1846, Wills Act of 1837, Statutes of Fraud 1677. In 1863, a Supreme Court was set up by virtue of the Supreme Court Ordinance in the colony of Lagos.

The court was empowered to apply the common law of England, doctrines of equity and statutes of general application in force in England on 1st of January, 1863. this date was later changed to July 24, 1874 and subsequently to 1st January, 1900.

No statute had defined this term i.e. Statute of General Application, but **Osborne C.J. in A.G. vs JOHN HOLT & Co. (1910)** laid down two questions which could be asked to determine which statute is of general application in England, First, by what court is the statute applied in England and Second, to what

classes of the community would it apply to in England. If on 1st January, 1900, a statute were applied by both civil and criminal courts as the case may be to all classes of the community, it is likely that it is of general application. But if on the other hand it were applied only by a certain court or by certain classes of the community e.g. a statute regulating a particular trade, then it is probable that it will not be locally applicable.

Also a law that has been repealed or that has been passed after 1st January, 1900 will not apply. It should be noted however, that the former Western Region removed the application of Statute of General Application in the Western Region in 1959 on the matters that fall within its legislative competence.

MODE OF RECEPTION

General Reception Clause: The Supreme Ordinance of 1861 empowered the Supreme Court to apply the Common law of England, Principles of Equity and Statutes of General Application in force in England as at 1st January, 1863. This is otherwise known as the general reception clause, which introduced English law into Nigeria generally.

ENGLISH LAW EXTENDING TO NIGERIA

The British parliament had powers to make laws for Nigeria until the 30th of September, 1960 by virtue of the fact that we were a colony of England. Apart from these direct laws made for Nigeria, the Queen could also make laws for Nigeria by virtue of order-in-council under the powers given to her by the Foreign Jurisdiction Acts of 1890.

NIGERIAN LEGISLATION

This constitutes another source of law. In discussing the sources of law in Nigeria, perhaps one can state without any fear of contradiction that Nigerian legislation is the most important of them all i.e. it is the highest and most potent source of law. It can be understood from a brief historical perspective of the constitutional engineering in Nigeria or better still from the perspective of various types of government that we have had in Nigeria up to the present day.

Government functions generally are divided among three main organs - The Legislature which is responsible for making laws, the Executive which is responsible for executing the laws and the Judiciary which is responsible for interpreting the laws made by the legislature. Such laws are also called statutes or enactments. These legislations are made for Nigerians, hence the coinage Nigerian Legislation.

Nigeria became a British colony with her annexations by Britain from the 18th century with the arrival of the Royal Niger Company and the eventual amalgamation by Lord Lugard in 1914. Then, the Colony of Lagos, the Northern and Southern protectorate became an entity called Nigeria. Legislations were passed by the Secretary of State for the colonies through the Governor or Governor-General for such annexed territories. Such legislations were referred to as **ORDINANCES**. In other words, ordinances are laws passed by British overlords in Nigeria during the colonial era. e.g. The Criminal Procedure Ordinance of 1948. After what appears to be a cosmetic approach to Federalism by the 1946 Richards Constitution and the 1951 Macpherson Constitution; By October 1st, 1954, when Nigeria became a fairly true (through the Lyttleton Constitution) federation, Ordinances gave way to serious Constitutional making process (e.g. The 1957 and 1958 Constitutional Conferences) which eventually culminated in the passing of the Independence Act of 1960. By Independence, Federalism was firmly entrenched with the

federal government and regional government having legislative powers divided between them. At the center, two Houses of parliament were created; one based on equal representation i.e. the House of Representatives. Each region however had its own House of Assembly. These features, have since then become a permanent one in the process of constitutional engineering in Nigeria.

In effect, laws made by parliament during civilian regimes at the center are called ACTS while those made by the regions or states are called LAWS.

Again, it is pertinent to point out here that during civilian regimes Legislative powers are divided into the following:

- Exclusive list – Under this list it is only the Federal Government that can legislate on the matters stated there, i.e. it is the exclusive preserve of the Federal parliament e.g. currency; defence, external affairs, elections into offices, citizenship, etc.
- Concurrent List – Both the central government and the prospective states can legislate on the matters listed there, but the beauty of it is that, where there is conflict between the federal and state legislations, the states legislations would have to give way. In effect it must always be in conformity or consistent with federal laws; e.g. Education, Health, Agriculture, Industry, Commerce, etc.
- Residual List – Any matter not stated in the exclusive and concurrent list and are left for the state to legislate upon probably because of the need to bring government closer to the people, e.g. Chieftancy matters.

Nigeria became an Independent nation on the 1st of October, 1960 and three years after became a Republic on the 1st of October, 1963. The first Republic collapsed on January 15, 1966 when Nigeria had its first military coup.

What appeared to be a cloudy situation soon became clearer with the military firmly entrenching themselves for the next 13 years when the 2nd Republic came into effect on the 1st

of October, 1979 with an Executive Presidency based on the 1979 Constitution.

Under the military, laws that were made by the Federal Military Government (be it by the Supreme Military Council SMC), The Armed Forces Ruling Council (AFRC); or Provisional Ruling Council (PRC) as they are called at different times) are referred to as DECREES while those that are made by the states government are called EDICTS. Where an edict is inconsistent with a decree, it will give way to the extent of its inconsistency. Although during the first military intervention, there appears to be relative stability in respect of the tenures of the Military Governors; but in more recent interventions starting from 1983 December 31, the military has brought their traditions into governance by regarding such appointments as mere military postings and this in effect means that such Governors can be removed as circumstances demand.

Today, Nigeria is being ruled by a military regime and this had been the position since 1983 and more importantly, because of the failure of the Third Republic to take off fully after the Presidential election results held on June 12, 1993 was annulled and an Interim National Government which lasted for about three months came to an abrupt end with the resignation of the Head of the Interim government.

The present government which came into power on November 17, 1993 has the highest ruling body in the Provisional Ruling Council (P.R.C.) which is responsible for making laws for the good governance of the country. And of course they rule by decrees which become valid when it is signed into law by the Head of State.

(See Decree 107 of 1994, Supremacy and Enforcement of Powers Decree).

In effect, the irresistible conclusion that can be drawn from the foregoing and which is obtainable in practice is the fact that legislation can be used to amend, change, exclude, include and even abolish any other sources of law in Nigeria,

Legal System

Nigerian Legislation

c.g. the former Western Region by legislation excluded Statute of General Application and more importantly the reception of English law into Nigeria by legislation.

DELEGATED LEGISLATION: These are laws made by government departments, ministries, local government authorities and persons who have been authorized by the legislature.

Such bodies form part of the Executive arm of government and should not normally exercise legislative powers because of the doctrine of separation of powers. They are known as Bye-laws, Orders, Rules or Statutory Instrument and are made to cope with emergencies and for experts to handle the technical aspects of legislation. They form part of our statutory laws once they are made validly in accordance with the powers delegated by the legislature. The punishment prescribed can therefore be imposed on all those who breach them.

CUSTOMARY LAW

Another source of Nigerian laws is the Customary Law which can be divided into:

1. Ethnic customary law and
2. Islamic customary law.

FEATURES OF CUSTOMARY LAW

- It must have existed from "time immemorial"
- It must have existed by common consent and continued uninterrupted
- It must be certain, consistent and reasonable.
- It must be binding on the particular community: i.e. the element of "obligatory force" must be present, although it must not have existed by force or secrecy.
- It must not be voluntary.

Simply defined, "customary law is a body of customs, traditions and culture accepted by members of a community as binding among them". It can also be described as rules of law which apply in a particular area or ethnic group. It was described by **Bairamin F. J.** in the case of **Omoniyi vs Omotosho (1961)** as a "mirror of accepted usage"

ETHNIC CUSTOMARY LAW

CHARACTERISTICS

It has the following characteristics: ethnic customary law is indigenous and it is largely unwritten and hence flexible i.e. very amenable to changes. It moves with the times, but it must be stated however that a lot of documentary evidence abound today to show the practices and customs of certain communities in Nigeria. Such include written textbooks, video clips of certain events recorded for posterity; and certain drama on the television, video recordings and radio programmes tend to reflect the customs of certain

Legal System

communities.

Customary law applies to members of a particular ethnic group.

Customary law varies from society to society, although sometimes one can find evidence of similarity between one ethnic group and another. This goes a long way to show that most customs produce fair and just results and most of the time it reflects the acceptability of such customs by such groups of people; e.g. on distribution of property on intestacy:

1. The Ori-Ojori i.e. equality of the children and
2. The Idi-igi i.e. distribution according to the number of wives are common features of distribution that run through most communities in Yorubaland.

Customary law concerns mostly personal matters like the issue of marriages, intestacy, guardianship, chieftaincy ascension, worshipping of ancestral cults, shrines, etc. Customary law evolves from practise and it can sometimes be traced or known by consulting elders of the community on how it's being practiced and sometimes traditional priests and seers are also consulted.

VALIDITY TESTS

Before customary law can be applied to any case in point, it is subjected to **three tests of validity**.

WHOSE VALIDITY?

In this connection, the statement of the court in **Esugbayi Eleko vs Officer Administering the Government of Nigeria (1931)** is very instructive. The court asserted - "It is the assent of the native community that gives the customary law its validity, therefore barbarious or mild, it must be shown to be recognized by that native community whose conduct it is supposed to regulate".

Hence the case of **Lewis vs Bankole (1908)** shows that it is not the English standard that will be applied but what is ideal in respect of the standard given or accorded to it by

Nigerians. Hence a custom is not repugnant merely because it is not consistent with the English technical equity. It is the standard of ordinary civilized society that will apply.

(1) REPUGNANCY TEST

The first test is to the effect that, a customary law to be applicable must not be repugnant to natural justice, equity and good conscience.

In essence, its enforcements must be fair and its observance must produce reasonable results. It must not be barbaric.

The following cases were decided under this test:

(a) **Edet vs Essien (1932)** – In this case, the court was faced with the Interpretation of a Calabar custom which provides that “a biological father would not be entitled to a child on the ground of non-refund of dowry to the former husband before cohabiting with the mother”.

The court held that the custom was repugnant to natural justice, equity and good conscience. It was therefore not enforced and subsequently, the custom was declared invalid.

(b) **Re Effiong Okon Atta (1930)** – The court held a custom to be repugnant to natural justice, because it provides that the property of a slave upon his death would be administered by his master to the exclusion of the slave's child.

(c) **Mariyama vs Sadiku Ejo (1961)** – The case shows that the court would not on its own modify a custom or comply, with a certain standard; and hence must reject it wholly as it is, or apply it entirely (i.e. it is either valid or invalid).

In this case, an Ebira custom provides that any child born within 10 months of a divorce is presumed to be that of the former husband of the child's mother. In this particular case, the presumption was rebutted and evidence was led to show that the child actually belongs to the second husband even though the child was born within the 10 month period. The court wholly rejected the presumption, emphasizing that they don't condemn a custom but are more interested in its fairness.

(2) INCOMPATIBILITY TEST: it simply means that a custom which has been abolished by a written law (i.e. statutory regulation) cannot be enforced in a court of law. So long as such legislation is in force, no rule of customary law inconsistent with it will stand. For instance, a person cannot be guilty of customary crime because customary crime has been abolished by Statute.

See the following cases:

(a) **Taiwo Aoko vs Fagbemi (1961)** – The appellant was convicted and sentenced for the offence of adultery in the customary court. On appeal the conviction and sentence were quashed; the reason being that the offence is not defined nor the penalty prescribed in a written law.

(b) **Adesubokan vs Yinusa (1971)** – Here the Supreme Court, overruling Bello J. (as he then was) held valid the act of a Muslim who wrote his will in accordance with the WILLS ACT of 1837, and in the process displaced an Islamic law rule which provides that he could only will one third of his estate to persons who are not his Quoranic heirs, as it is inconsistent with the WILLS ACT of 1837.

Note also the abolition of the Osu caste system in the Igboland area of Nigeria by Statute.

(3) PUBLIC POLICY: It has never been defined but it may be stated as custom which would be frowned upon by the larger community and hence would not be enforced. In the case of **Cole vs Akinyele (1960)** – A rule of customary law which provides that a child born outside wedlock, during the subsistence of the marriage, whose paternity is accepted becomes legitimate was held contrary to public policy on the ground that it would encourage promiscuity.

PROOF OF CUSTOMARY LAW

Customary law is a question of fact, hence to establish customary law one must show **proof** of its existence or it can

(1) PROOF

Proof of customary law can be done in the following ways:

- Calling witnesses who are experts or have special knowledge of the existence of the custom. However, there is no need to prove customary law in a customary court of a particular area as the existence of such custom is presumed by law. There are however two exceptions to this rule:

1. When the parties are not from that area of the customary court.
2. Where none of the judges is from the area of the customary court.

The two exceptions above are very unlikely in practice, since where a party is not from one area of customary court, he must first consent to the applicability of customary law to him; and in the second situation evidence abound to show that it is experts in the customs of a particular area that the appointed to the position of customary court judges.

- Use of textbooks which are authoritative on the customs to be proven, could be consulted as proof.
- Assessors i.e. experts on such customs, can sit with judges to direct them on the question of the fact of the existence of such customs. Such direction however is not binding on the judge.

(2) JUDICIAL NOTICE: This is provided for by S. 14(2) of the Evidence Act of 1946. It states that:

"a custom may be judicially noticed by the court if it is acted upon by a court of superior or co-ordinate jurisdiction to an extent that justifies the court assuming that the persons or class of persons in that area look upon the same customs as binding in relation to circumstances similar to those under consideration".

In effect, once it has been acted upon by the courts or it has been frequently proven in such courts, it is said to be judicially noticed.

ISLAMIC CUSTOMARY LAW:

It is also referred to as Muslim law or Sharia law. This can at best be described as the received customary law introduced into the country as part of Islam. It is therefore a religious law based on the Muslim faith and applicable to members of the faith and unlike ethnic customary law, it is not indigenous. Again, it is largely in written form and it derives its source from the following:

- The Holy Koran
- The practice of the Prophet. (The Sunna)
- The consensus of Scholars and analogical deduction from the Holy Koran and from the practise of the Prophet.

The version in force in Nigeria is the Moslem law of the Maliki school of thought.

It is applicable in the Islamic Northern states of the country; and the Southern states may apply it if they so desire (i.e. it is not compulsory). The Area courts and (on appeal) the Sharia Court of Appeal administer Islamic law and it essentially covers such matters like marriages, intestacies, guardianship, orphanage, etc.

It is only the civil aspects that apply in Nigeria. Its criminal and commercial aspects do not apply in Nigeria.

JUDICIAL PRECEDENT

This constitutes another very important source of laws in Nigeria. Simply defined, it is "the decision of the courts based on the material facts of a case".

It is expressed in the latin maxim as the doctrine of "**stare decisis**". It is also referred to as **case law** and described as the principle or rule of law on which a judicial decision is based. Hence, they are simply noted as laws found in **judicial decisions**.

It is the **ratio decidendi** (i.e. the reason for the decision) of a case. This means in effect that it is not everything stated by a judge in the course of delivering judgement that constitutes a precedent. Once the "**ratio decidendi**" is formed, and a case occurs in future which has the same material facts as the previous one, and it is followed, it is then said that the earlier case constitutes a precedent.

If a precedent is to be binding, then it must satisfy two major requirements. First, it must be a **ratio decidendi** statement that has been efficiently reported by the law reports and second, a well settled hierarchy of courts in which the court must be **superior** (or in some instances co-ordinate jurisdiction) to the court considering the statement at a future date. This means in effect that for a successful operation of judicial precedent, all the courts must stand in a definite or constant relationship to one another.

Once the above requirements are satisfied, and the material facts as found are the same, the court is bound to apply the rule of law stated in the earlier judgement.

From the foregoing, it must be realized (as pointed out above) that not everything said by a judge constitutes a precedent. It is only those based on a material fact before him that constitutes a precedent. Any other pronouncement on law made in the course of his judgement is referred to as "**obiter dictum**" which means statement made by the way and such do not form part of the ratio decidendi. They can however serve as persuasive precedent provided they are made by superior courts to the instant one. The case of **Nwosu vs The State (1990)** supports this position.

Obiter dictum can therefore be described in two ways:

(1) A dissenting (minority) judgement

See Lord Denning in **Chandler vs Crane Christmas (1951)**

(2) Statement made upon hypothetical facts, which may occur in future, although not relevant to the case at hand.

It should also be noted that the ratio decidendi of an inferior court can constitute a persuasive precedent to a superior court and decisions of Foreign courts like House of Lords Judicial Committee of the Privy Council etc. can also serve as a form of persuasive precedent to the Nigerian courts, more importantly, when the statute being considered are the same in all material particular. Precedents can however be overruled either by statute or by superior court. A precedent is overruled when a judge in a present case states that the previous case was wrongly decided. But the point must be stressed that judges are always reluctant to overrule precedents because it reduces the elements of certainty in the law.

Overruling must be distinguished from reversing: A decision is reversed when it is altered on appeal.

If the material fact of the cases are different, the ratio decidendi of the previous case will not constitute a binding precedent to the later case. Hence where the previous case is inadvertently cited as precedent, it is the duty of the court to point out the difference so as to show that the previous

decision is inapplicable to the present one. Where this is done, the court will find it easy to avoid following the previous decision; in this instance the court is said to have **distinguished** both cases. Hence, briefly put, a case is distinguished when the court states that the material facts are sufficiently different to justify applying different rules to the law.

ADVANTAGES OF PRECEDENTS:

1. **Certainty** – It provides for a degree of uniformity upon which individuals can rely. This uniformity allows justice to be achieved.
2. **Development** – It allows for new rules of law to be established or old ones adapted to meet the progressive needs of the society from time to time.
3. **Detail** - It is the most detailed and well documented of all the sources law and it is accessible to all for their benefit and use.
4. **Practicality and Flexibility** - The rules are laid down in the course of dealing with cases that have already happened and not hypothetical or theoretical situations and it can be extended to the variety of factual situations, hence its flexibility.

Donoghue vs Stevenson (1932)

The case establishes the modern common law of negligence based on the principle of "Neighbourliness Test" and this law has been extended to other forms of factual situations.

DISADVANTAGES OF PRECEDENTS

1. **Rigidity** - Once rules are laid down it becomes binding even if it is thought to be wrong.
2. **Danger of illogicality** - Fine distinctions can be drawn by judges who do not wish to follow previous rigid decisions thereby creating artificiality in the law.
3. **Bulk and Complexity** - This leads to overlooking some important aspects of the law.
4. **Slowness of growth** - Since litigation is slow and expensive, case law may not grow quickly enough to meet changing modern needs.

5. **Isolating the ratio decidendi** - Sometimes it may be difficult to find the ratio decidendi and this may take some steam from the element of certainty.

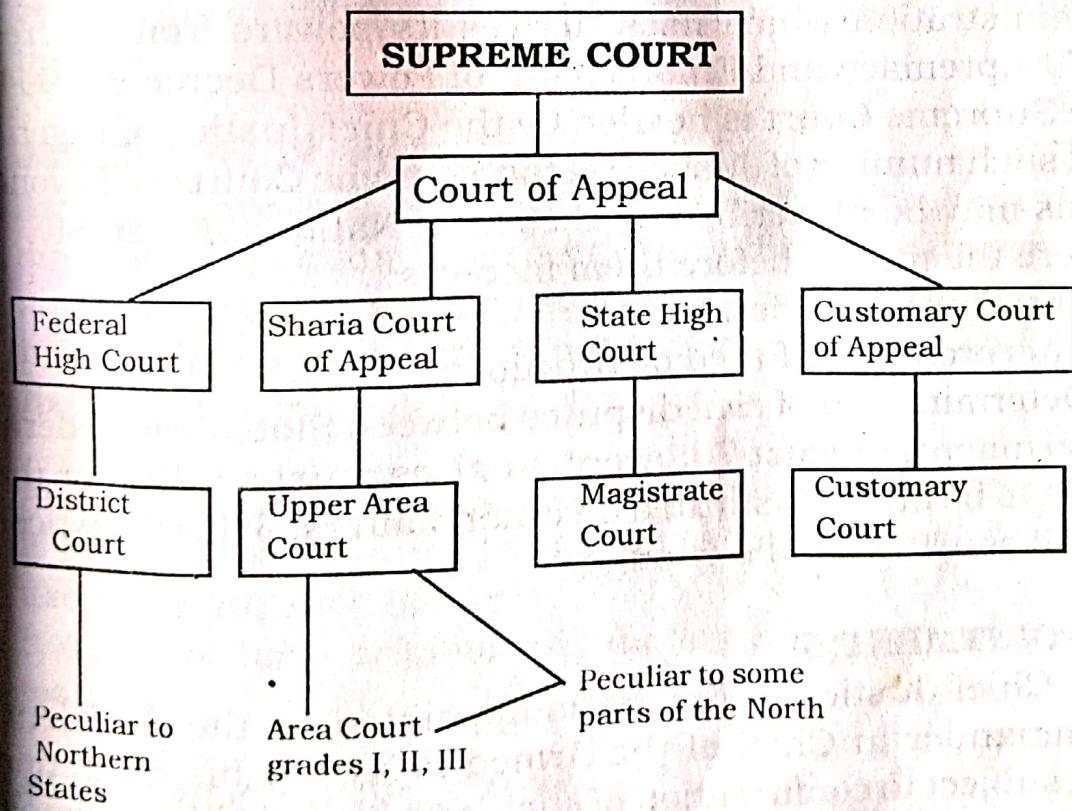
In conclusion, precedents are becoming increasingly important in modern times as a source of law because of the increased volume of legislation by the legislative arm of government and the courts are called upon from time to time to interpret the law.

These laws sometimes deliberately and unavoidably vest wide discretion in courts and the cases of "first impression" where there is no existing precedent or legislation on it, will inevitably lead to creation of new laws by the courts. The importance of court decisions and ultimately "ratio decidendi" therefore as a source of law in Nigeria today is a foregone conclusion. (Fait accompli).

THE COURTS SYSTEM STRUCTURE OF NIGERIAN COURTS

It will be recalled that under the discussion on judicial precedent, it was emphasized that a well settled hierarchy of courts is one of the factors that will ensure a successful operation of judicial precedent.

It is now important for us to take a close look at our courts in respect of how they stand with one another so as to appreciate further the doctrine of judicial precedent. Let us first illustrate our courts graphically.



*Legal System***SUPREME COURT
(SS. 210 - SS. 216)****BACKGROUND**

It was first established in 1963 when Nigeria became a Republic by the republican constitution of that year. Hitherto appeals lie from the Federal Supreme Court to the Judicial Committee of the Privy Council (based in London and created to serve the needs of the commonwealth countries).

With the removal of the word 'Federal' from the Federal Supreme Court, the Supreme Court became the highest court in the land and there was no further appeal to the Judicial Committee of the Privy Council; since the Queen ceased to be the head of government in Nigeria.

COMPOSITION

(SS.210 - 216)

Our reference point will be the 1979 Constitution since this is the Constitution adopted by the present Military Administration which itself derives its powers from Decree 107 Supremacy and Enforcement of Powers Decree of 1994. The Supreme Court is headed by the Chief Justice of Nigeria and such number of Justices of the Supreme Court not beyond 15 as may be prescribed by the Act of National Assembly.

Where the matter before them involves:

1. The question of law
2. Interpretation of the constitution
3. Determination of civil disputes between States and Federal government, at least 7 (Seven) Justices must sit. But for the court to be duly constituted on other matters, 5 (Five) Justices of the court would be enough.

APPOINTMENT(S)

The Chief Justice of Nigeria is appointed by the President, Commander in Chief of the Armed Forces in his discretion and subject to confirmation of such appointment by the simple majority of the Senate.

Under the present Military Administration appointment is at the discretion of the Provisional Ruling Council (P.R.C.)

Legal System

The Court System

In respect of other Justices of the Supreme Court, they are appointed by the President on the advise of the Federal Judicial Service Commission but under the present Military dispensation the appointment is by the Provisional Ruling Council (P.R.C.) on the advise of the joint sitting of the:

1. Chief Justice of Nigeria
2. Attorney General of the Federal and
3. President of the Court of Appeal

And such Justices may be removed on grounds of mental or physical incapability; and also on grounds of misconduct or contravention of code of conduct.

QUALIFICATION: To be qualified for appointment as the Chief Justice or a Justice of the Supreme Court, one must have qualified to practise as a legal practitioner in Nigeria. Such qualification must have spanned a period of not less than 15 years. In other words, a Justice of the Supreme Court must be a legal practitioner of not less than 15 years standing in the bar.

JURISDICTION/PRECEDENT

As stated above it is the highest court in the land. It has original jurisdiction in respect of any dispute between:

- a. the federal and a state government or between states and
- b. any original jurisdiction that may be conferred on it by the National Assembly Act.

Also, since it is the highest court, its decision on any matter is final except of course the Governor or President decides to use its Prerogative of Mercy.

It does not have original jurisdiction in respect of criminal matters.

APPELLATE JURISDICTION

Appeal lie as of right to the Supreme Court from the Court of Appeal under the following circumstances, whether civil or criminal proceedings:

1. questions of law alone
2. interpretation or application of the constitution

Legal System

3. where fundamental human rights has been, is been or is likely to be breached or infringed.
4. where a person has been sentenced to death in a criminal case by the Court of Appeal or the Court of Appeal merely affirmed the death sentence passed by a lower court.
5. other cases as may be prescribed by the National Assembly Act.

PRECEDENT

Supreme Courts' decision is binding on all other courts to which the common law doctrines of Judicial precedent in Nigeria applies.

The Supreme Court however is not bound by its previous decisions:

See **Owunmi vs P-Z (1974)** which was followed in **Shell BP. VS Jamaal Steel Structures Ltd. (1974)**

But the Supreme Court departed from these two cases in:

Bucknor Macleans vs Inlaks (1980)

Also in **Johnson vs Lawanson (1971)**, the Supreme Court overruled three of its previous decisions.

In most cases, the Supreme Court would not depart from its previous decisions because of the need for consistency, so as to sustain the operation of precedent, but would do so where it feels the interest of justice would be served better.

Hence, the Supreme Court is well noted for certain landmark decisions which have been hailed by the majority as serving the interest of justice.

Examples:

1. **Fawehinmi vs Akilu & Anor (1989)**, which gives a private person the right of prosecution where the state is unwilling to.
2. **Uredi vs Dada. (1988)** which re-establishes or recognizes that partnership can be formed informally.

COURT OF APPEAL**SS.217 - 227**

BACKGROUND

Interestingly, this court was originally created by the Constitution (Amendment) Decree No. 42 of 1976, and it resurfaced under the 1979 constitution as a Federal Court of Appeal.

It was also a decree, this time decree No. 1 of 1984 that removed the word "Federal" to re-style it as the "Court of Appeal" so as to reflect its true nature vis-à-vis other courts in the country. In essence what it means is that it is an Appeal Court for every lower court whether State or Federal in the country. It is as the name indicates substantially an Appellate Court.

COMPOSITION

It is headed by:

(i) The President and at least

(ii) 15 justices with at least 3 being learned in Islamic law and at least another 3 being learned in Customary law. This is to ensure that they are not handicapped when appeals come from both Sharia and Customary Court of Appeal of States and that of Federal Capital Territory Abuja.

It sits in panels and we have them in various cities of the Federation e.g. Ibadan, Jos, Kaduna, Enugu, Lagos, Abuja, etc.

It is duly constituted if it consists of not less than 3 justices of the court.

APPOINTMENT(S)

The appointment of the President of the Court of Appeal is made by the President Commander in Chief of the Armed Forces on the advice of the Federal Judicial Service Commission, subject to approval by a majority of the Senate, while that of other justices is made by the President on the recommendation of the Federal Judicial Service Commission. But under the present Military administration, appointments to the Court of Appeal, whether that of the President or other justices are made by the Provisional Ruling Council on the advise of the Advisory Judicial Committee.

QUALIFICATION

To be qualified for appointment as a President or Justice of the Court of Appeal, one must be a legal practitioner of not less than 12 years standing in the bar.

JURISDICTION:

It is an appellate Court hence, it has no original jurisdiction. The Court of Appeal has jurisdiction to the exclusion of all other courts to hear and determine appeals from the following courts:

1. State High Courts
2. Federal High Court (including FHC in F.C.T. Abuja)
3. Sharia Court of Appeal of a State (including Sharia Court of Appeal of the Federal Capital Territory Abuja).
4. Customary Court of Appeal of a State (including Customary Court of Appeal of the Federal Capital Territory, Abuja).

Appeals lie from the Court of Appeal to no other court, but the Supreme Court of Nigeria. An appeal goes to the Court of Appeal from the High Court as of right in the following situations:

- (i) Final decisions of the High Court in any civil or criminal proceedings sitting at the first instance.
- (ii) When the ground of appeal involves question of law alone.
- (iii) Decisions on the interpretation or application of the constitution
- (iv) Where fundamental human rights has been, is being or likely to be infringed.
- (v) Where a death sentence has been imposed on a person by the High Court.
- (vi) Matters relating to elective office or membership of any legislative house.
- (vii) Where the liberty of a person or the custody of an infant is concerned.
- (viii) Where an injunction or the appointment of a receiver is granted or refused.
- (ix) Where companies matters in respect of creditors rights, contributory's liability or officers misfeasance is in focus.
- (x) Decree nisi in a matrimonial cause or a decision in an

- admiralty action determining liability.
- (xi) Such other cases as may be prescribed by any law in force in Nigeria.

In all other cases leave of the Court must be granted before an appeal can lie to the Court of Appeal.

PRECEDENT:

It is naturally bound by the Supreme Court's decision since such decisions are binding on all Nigerian courts. In respects of its own decisions, the question whether or not it is bound by its previous decisions will depend on whether it is a civil or criminal matter.

In criminal cases the Court of Appeal need not follow its own previous decisions where this would cause injustice to the appellant. This is because where human freedom is at stake, the need for justice will outweigh the desire for certainty.

R vs Gould (1968).

In civil cases, **the court** is bound by its own previous decisions unless in the following situations:

1. Where there are two previous conflicting decisions of the court; it may choose which one to follow.
2. Where a previous decision, though not expressly overruled, cannot stand with a later Supreme Court's decision.
3. If the previous decision was given "per incuriam" i.e. through lack of care or inadvertently, because some statute or precedent was not brought before the court for consideration.

Young vs Bristol Aeroplane (1944)

COMPOSITION OF THE ADVISORY JUDICIAL COMMITTEE

- 1) Chief Justice of Nigeria is the Chairman
- 2) The Attorney-General of the Federation and Minister of Justice
- 3) The President of the Court of Appeal
- 4) Chief Judge of the Federal High Court

- (5) The Chief Judge of each State High Court and Federal Capital Territory.
- (6) One (1) Kadi appointed annually on rotation by the Provisional Ruling Council from the states having Sharia Court of Appeal.
- (7) President of the Customary Court of Appeal appointed annually on rotation, by the Provisional Ruling Council from the states having Customary Court of Appeal.

FEDERAL HIGH COURTS SS.228 - 238

BACKGROUND

Originally established in 1973 as a Federal Revenue Court to take care of matters relating to the revenue of the Federation. It resurfaced under the 1979 constitution and was restyled the "Federal High Court".

COMPOSITION: It consists of a Chief Judge and such number of Judges as may be prescribed by an Act of the National Assembly. It is duly constituted by a single Judge on any matter before it.

APPOINTMENT: Appointment to the office of the Chief Judge and other judges of the court is made by the president on the recommendation of the Federal Judicial Service Commission.

QUALIFICATION: To be a Chief Judge or the Judge of the Federal High Court, one must have qualified to practise as a legal practitioner and must have been so qualified for a period of not less than 10 years.

JURISDICTION: It is bound by the decision of the Supreme Court and the Court of Appeal. (It has equal powers with the High Court of a State).

1. It has jurisdiction in all cases relating to the Revenue of the Federation in which the said government or its agents or body is a party.
2. Companies taxation, customs and excise duties, banking, foreign exchange.
3. Other fiscal measures arising from the operations of:

- (i) Companies and Allied Matters Act of 1990 or other relevant statutes in respect of companies operation.
- (ii) Statutory laws, copyright, patents, designs, trade marks, merchandize mark.
- 4. Admiralty matters

NOTE: There is presently a Federal High Court in the Federal Capital Territory, Abuja which apart from having jurisdiction on the above stated matters also has unlimited jurisdiction in any civil or criminal proceedings like that of a State High Court.

PRECEDENT:

It is bound by both the decisions of the Court of Appeal and the Supreme Court. But the decisions of the following court may serve as persuasive precedent because they are courts of equal and co-ordinate jurisdiction in terms of hierarchy of courts.

They are:

High Court of a State

Sharia Court of Appeal: of a State and
Customary Court of Appeal of a State.

HIGH COURT OF A STATE SS. 234 - 239

BACKGROUND

This is provided for under SS. 234 of the 1979 Constitution and is to the effect that every State of the Federation must establish its own High Court. But it is noted that before the 1979 Constitution there had been High Courts in operation which were established by the various High Court Laws.

COMPOSITION: It is headed by a Chief Judge and such number of judges as may be prescribed by legislation. It is duly constituted by a single judge on any matter brought before it. They are sometimes divided for convenience into judicial divisions e.g. in Lagos State we have the High Court divided into:

1. Ikeja judicial division and
2. Lagos judicial division

APPOINTMENT: Appointment of the Chief Judge is made by the Governor of the state in question on the advice of the State Judicial Service Commission and it must be confirmed by the State's legislatures. Other Judges of the State High Court are appointed by the Governor on the recommendation of the State Judicial Service Commission.

QUALIFICATION: To qualify as a judge of the High Court of the State, one must have qualified to practise as a legal practitioner in Nigeria for a period of not less than 10 years.

JURISDICTION: It has unlimited jurisdiction to hear and determine disputes in any civil or criminal matter in respect of State and Federal legislations.

It is the highest court in the hierarchy of states and appeal goes from the High Court to the Court of Appeal. Sometimes the High Court exercises supervisory jurisdiction over tribunals and inferior courts within the State in question. It also hears appeals from such inferior courts within the state. Matters which have been exclusively reserved for certain courts (e.g. Federal Revenue matters for Federal High Court) cannot however be entertained in the High Court of a State.

PRECEDENT:

It is bound by the decisions of the Court of Appeal and the Supreme Court. The High Court of State cannot however be bound by the decision of the High Court of another State; since it does not form part of the hierarchy of the courts of any other state. The State High Courts are of equal and Co-ordinate jurisdiction hence their decisions can serve as a persuasive precedent to one another.

SHARIA COURT OF APPEAL SS. 240 - 244 BACKGROUND

This is one court that has always evoked emotions and deep sentiments in the process of our constitution engineering. Two times the then existing Federal Governments have had course to intervene to prevent a situation where the debate of it would have degenerated into unnecessary rancour. it is no

surprise therefore that the constitution stipulates that it should be created by any state that requires it. This is important in order to preserve the secularism of the nation state of Nigeria.

In essence, it is optional and presently only the 19 northern states have created the Sharia Court of Appeal.

As the name indicates it is an Appellate Court and it hears and determines appeals on matters relating to the civil aspect only, of Islamic personal law. The appeal usually come from the upper area court existing in the area of the court's jurisdiction.

COMPOSITION: It is headed by a Grand Kadi and such number of Kadis as may be prescribed by the legislation. It is duly constituted if it consists of at least 2 Kadis of the court on any matter brought before it.

APPOINTMENT: Appointment of the Grand Kadi is made by the Governor of the state in question on the advice of the State Judicial Service Commission and such appointments must be confirmed by the State legislature. Kadis are however appointed by the Governor based on the recommendation of the State Judicial Service Commission.

QUALIFICATION: To qualify as Grand Kadi or Kadi of a Sharia Court of Appeal, one must satisfy any of the following requirements:

- i) One must first be a legal practitioner of not less than 10 years and in addition obtain a recognized qualification in Islamic law from institution acceptable to the State Judicial Service Commission. **OR**
- ii) Once must have or attended and obtained a recognized qualification for a period of not less than 10 years in Islamic law from an institution approved by the State Judicial Service Commission and in addition must have considerable experience in the practise of Islamic law or (in the alternative) be a distinguished scholar of Islamic law.

Legal System

JURISDICTION: As stated above it exercises appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic law where all the parties are Muslims. Extra jurisdiction may be given to it by legislation.

PRECEDENT: It is bound by the decisions of the Supreme Court and the Court of Appeal. It is however not bound by the decision of the Customary Court of Appeal or High Court because they are courts of equal and co-ordinate jurisdiction. Their decisions can however serve as persuasive precedent but one observes here (however) the fact that their jurisdiction differ from that of the ordinary courts. In fact the proper submission is that in terms of precedent, they do not belong to the ordinary courts, since they are created to take care of certain appellate matters which ordinarily cannot be tried by the High Court.

CUSTOMARY COURT OF APPEAL. SS.245 - 259

BACKGROUND

As the name again indicates, it is an appellate court and also it is optional to states and it hears and determines appeals on questions of customary law relating to the civil proceedings aspects only. The appeal usually comes from the customary court existing in the area of the court's jurisdiction.

COMPOSITION: It is headed by a President and such number of Judges as may be prescribed by legislation. It is duly constituted if it consists of such number of judges as may be prescribed by the law on any matter brought before it.

APPOINTMENT: Appointment of the President is made by the Governor of the state in focus on the advise of the Judicial Service Commission, subject to approval by the State Assembly. Other Judges are however appointed based on recommendation of the State Judicial Service Commission.

QUALIFICATION: Without prejudice to any additional qualification as may be prescribed by law makers, to be a judge of this court, one must in the opinion of the State

Judicial Service Commission have a considerable knowledge of, and experience in, the practice of customary law.

JURISDICTION: As stated above it exercises appellate and supervisory jurisdiction in civil proceedings involving questions of customary law and any jurisdiction as may be conferred on it by the state legislators.

PRECEDENT: It is bound by the decisions of the Supreme Court and Court of Appeal. It is however not bound by the decision of the Sharia Court of Appeal or the High Court because they are courts of equal and co-ordinate jurisdiction. Their decision can however serve as persuasive precedent. Again it is important to point out here that this court does not fall within the discussion on precedent, since it is created for appellate and supervisory matters which do not fall within the purview of the High Court.

OTHER COURTS

These are courts other than courts of record; they are usually referred to as inferior courts. Inferior, not in terms of their judgements, but for the fact that they cannot punish for contempt committed outside the courts and also their decisions do not serve as precedent either to the court itself or to any other court of equal and co-ordinate jurisdiction. They are not mentioned by the constitution but left for the states to establish as far as its circumstances demand for such creation. They also have limited jurisdiction both in terms of matters they can adjudicate upon and in terms of the awards they can make on such matters.

They are the following:

- i. Magistrate courts
- ii. District courts
- iii. Customary courts
- iv. Area Courts.

MAGISTRATE COURT

Presently, this court exists in every state of the Federation with the only difference that its jurisdiction in the Southern

Legal System

part of the country covers both civil and criminal matters, whereas in the North, it can only try criminal matters. The civil matters are heard by the District courts. Appeals from the Highest Grade of Magistrate Court go to the High Court in the State in which the magistrate court is created. Every magistrate has jurisdiction throughout the state, although for administrative convenience the state is divided into magisterial districts. The courts are also divided into grades depending on the needs of the state. There are essentially three grades that can be discovered from various states:

1. Chief Magistrate
2. Senior Magistrate
3. Magistrate

The grade that a Magistrate belongs will determine its jurisdiction and powers. A Magistrate court is duly constituted by a single magistrate and his jurisdiction is limited geographically to his magisterial district.

The only qualification required for appointment as a magistrate is that one must have qualified as a legal practitioner and must have the relevant experience determined by the number of years relevant to the particular grade in question.

Appointments, discipline and removal of magistrate are vested in the Judicial Service Commission of every state.

DISTRICT COURTS: As stated above they can only be found in the Northern part of the country and they exercise only civil jurisdiction. Their jurisdiction like magistrate courts is limited by law depending on grades of courts. Appeals lie from district courts to the High Court in the state.

CUSTOMARY COURTS: Appeals lie from the highest grade of this court to the Customary Court of Appeal. Its jurisdiction is restricted to questions of inheritance to property according to customs, succession, marriage contracted under customary law, etc.

AREA COURTS: They exist only in some parts of the North and deal with matters bothering on Islamic personal law or customary law. They have jurisdiction over civil and criminal cases. They are constituted by the Area Courts Edict of 1967 of the former Northern States. They are divided into grades, the highest being the Upper Area Courts. Appeals lie from High Courts. But such appeals must be heard by three Judges - two (2) from the High Court and one (1) from the Sharia Court of Appeal. Area courts are established by warrant under the hand of the Chief Judge of the state; and every court thus established shall exercise jurisdiction as may be conferred by the warrant establishing it. An Area court is duly constituted when an Area Judge sits with one or more members and sometimes the Area Judge may sit with assessors approved by the Chief Judge.

The Area courts have jurisdiction over any person who is a member of any tribe indigenous to Africa or one whose parents was member of such tribe, but the Governor can exclude any person or class of persons from the Area courts jurisdiction.

Proceedings in Area courts must be in conformity with substantial justice with undue regard to technicalities. In other words, because an Area court fails to comply with all the rules of technicality would not make its proceedings invalid.

FURTHER COMMENTARIES ON THE NIGERIAN LEGAL SYSTEM

INTERPRETATION OF STATUTES

Background

As a general principle, the primary duty of the judges in interpreting legislation is to attempt to ascertain the intention of parliament. The intention is to be discovered from the wordings of the statue to be interpreted. Where the words of a statute are crystal clear and unambiguous, there would be no need for statutory interpretation. It is when there is ambiguity or uncertainty that interpretation becomes necessary. Also because of human limitations, it is not possible for parliament to foresee future events so as to give adequate provision for it when making laws and sometimes vague words may be used in the statute that would result in the Judge trying to find out the context in which it was intended. In order to solve all these problems certain rules of interpretation are adopted by the courts.

JUDICIAL APPROACHES TO STATUTORY INTERPRETATION

There are essentially three recognized judicial approaches to statutory interpretation. They in the main serve as guiding principles for the courts in trying to discover the real intention of the parliament; although they are loosely referred to as "rules", they are not rules in ordinary usage of the word.

They are:

1. The Literal Rule
2. The Golden Rule and
3. The Mischief Rule

1. **THE LITERAL RULE:** The Literal Rule is the basic rule of interpretation and simply put, is to the effect that words must be given their ordinary, literal or grammatical sense and meaning. It does not matter if the result appears to be contrary to the intention of legislature, that is, it is immaterial that hardship would result from such literal interpretation. In other words, if the words used are ambiguous, the literal rule would not be applied, but where the words are clear and unambiguous, the literal approach must be taken no matter how undesirable or unjust the result might be.

In **R vs Bangaza (1960)**, the accused committed murder before he was 17; at the time of conviction he was already 17; the court was faced with the interpretation of a provision of the law which states that:

“where an offender who in the opinion of the court has not attained the age of 17 has been found guilty of murder, such offender shall not be sentenced to death”.

The court found the accused guilty of murder claiming that the relevant age, is the age at the time of conviction and not the age at time of commission of the offence.

In **Fisher vs Bell (1961)**, the Restriction of Offensive Weapons Act of 1959 made it an offence to “offer for sale” certain weapons including “flick knives”. A shopkeeper who displayed these knives in his window was found not guilty of the offence, since although he had displayed the goods, he had not offered them for sale, because it was HELD; that goods on display are not an offer to sell but an invitation to treat; hence he has not committed any offence as stated by the 1959 Act.

Finally, in **Adegbenro vs Akintola (1963)**, the then Constitution of the Western Region of Nigeria allowed the Governor to remove the Premier “if it appears to him” that the Premier no longer command the support of the legislature. The Governor dismissed the Premier and the Premier’s appeal to the Privy Council was disallowed on the ground that his

removal is subject only to the Governor's discretion and no by vote of no confidence being passed by Parliament.

2. **THE GOLDEN RULE:** This rule of interpretation was formulated in the case of **Beck vs Smith (1836)**. It first recognizes the literal rule, but states that the golden rule should be applied where application of literal rule will be -

"...at variance with the intention of legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further".

In other words, to avoid an interpretation that would lead to absurdity, ambiguous words should be interpreted, using the Golden Rule.

In **Re Sigsorth (1935)**, the golden rule was applied to prevent a murderer from inheriting an intestacy of his victim although he was as her son, her only heir on a literal interpretation on the Administration of Estates Act (1925).

In the case of **Awolowo vs Federal Minister of Internal Affairs (1962)**, certain persons charged with criminal offences briefed a leading member of the English bar, who was a non-Nigerian to defend them. He was however prohibited from entering Nigeria by the Minister of Internal Affairs purporting to act under S.13 of the Immigration Act. The accused persons sought declaration that:

- i. they were entitled under S.21 (5) C of the 1960 constitution to defend themselves or be defended by a legal practitioner of their choice.
- ii. the action of the Minister in prohibiting the entry of counsel from England contravenes the constitution and the Minister acted maliciously.

The court held that absolute discretionary power is vested in the Minister hence motive and intention are irrelevant in the

exercise of such power and that the Minister acted within the power that was conferred on him when he refused the counsel, not being a Nigerian entry into Nigeria.

3. THE MISCHIEF RULE: This rule will be applied where the meaning of the statutory provision is uncertain or ambiguous. Thus where an Act is passed to remedy a mischief effect of remedying the mischief in question. In such instance, the court can look outside the Act to find out: What the mischief was before the Act; what cure did the parliament intend for that mischief and what interpretation best gives effect to the cure?

This principle was formulated in a very old case: **The Heydon's case (1584)**. The court in essence would construe the statute in such a manner as to suppress the mischief and advance the remedy.

In **Ajilo vs Savannah Bank (1989)**, the central question was whether the Governor's consent was required for a 'deemed grant' statutory right of occupancy i.e. interest acquired before the Land Use Act of 1978. The court held that consent was required because the aim of the Act was to prevent unwholesome activities of land speculators who sell the same land to many innocent buyers before the Act hence the Act vests management and control of all land in the state to the Governor of that state to act as trustees for the people of the state.

In the case of **Gardiner vs Sevenoaks Rural District Council (1950)**, the local authority served notice on the occupier of a cave in which film was stored ordering him to comply with certain statutory fire regulations. For the purpose of the notice, the cave was described as 'premises' for the purposes of the Act. It was held that, as the purpose of the Act was to protect surrounding property, owners and employers, under the mischief rule the plaintiff should lose his action. A case could be described as premises for the purposes of the Act.

FURTHER GENERAL RULES OF INTERPRETATION AND PRESUMPTIONS

In interpreting the actual words of the Statute before them, judges have also evolved some principles for their own guidance: They are as follows:

1. **The Eiusdem Generis Rule:** This rule is to the effect that where general words follow two or more specific words, the general words must be confined to a meaning of the same kind i.e. eiusdem generis as the specific words.

For instance "Cats, Dogs and other animals". Other animals here, will be construed to mean domestic animals and not wild animals like Tiger, Lion, etc. For example, In **Powell vs Kempton Park Racecourse Co. (1899)** the court had to interpret S.1 of the Betting Act 1853 which prohibited the keeping of "a house, office, room or other place" for betting with persons resorting thereto. The court had to decide whether Tattersall's ring at a racecourse was an 'other place' within the Act. It was held that the general words were limited by specific words (i.e. house, office, etc.) to include only indoor places and therefore a racecourse, being out of doors, was outside the definition.

2. **Expressio Unis Est Exclusio Alterius:** It means that express mention of certain things means the exclusion of all other things not mentioned e.g. bicycle, motor-cycle, here car cannot be included. See *Re Cyclists Touring Club (1907)*.

3. **Ut res magis valeat quam pereat:** Simply put, it means that where a statute is capable of two interpretations, and one of the interpretation would make it valid while the other would make it invalid; the provision ought to be interpreted in such a manner as to make it valid.

In other words it will be construed "Ut res magis" which means - "that it may rather have effect than be destroyed" or "validate if possible".

Rayfield vs Hands (1960).

4. **Internal Aids:** Any statute being interpreted must be read as a whole, and each section must be read in the light of every other section, more especially the interpretation sections of such statute.

5. **External Aids:** External Aids, such as dictionaries may be referred to with a view to discovering the usual meaning of words; External statutory aids may also be referred to e.g. Interpretation Act of 1964 and sometimes the history of a statute is considered when Mischief Rule is being applied.

PRESUMPTIONS

6. Presumption against the alteration of the law unless expressly provided by the Statute.
7. Presumption against ousting the jurisdiction of the courts
8. Presumption against retrospective effect of legislations unless expressly provided for by the statute.
9. Presumption against the imposition of liability without fault.

SPECIALIZED COURTS

Certain courts are created for special areas or functions and can be discussed briefly as follows:

1. NATIONAL INDUSTRIAL COURT:

Established by the Trade Dispute Act of 1976 (now CAP 432 Laws of the Federation of Nigeria 1990). It lays down certain principles or guidelines which must be followed in order to resolve Trade Dispute. The steps are:

- (i) Employer and worker must hold talks, failure of which
- (ii) A mediator should be appointed within 7 days, failure of which
- (iii) The matter will be referred to the Minister of Employment, Labour and Productivity within 14 days.

The Minister will then appoint:

- (a) A mediator or conciliator to resolve the dispute, failure of which
- (b) The matter will be referred to Industrial Arbitration Panel which must make an award within 21 days (This may be extended by the Minister)
- (c) If there is still a disagreement, it shall then be referred to the National Industrial Court whose decision/ruling on the matter would be final.

It has the exclusive jurisdiction on trade disputes. An appeal does not lie to any other court except on constitutional issues e.g. Fundamental Human Rights provisions of the constitution. The court is headed by a president and such other members as Panelists; including an Economist. The position therefore is a bit diluted. The President of the court

must have ten (10) years post-call experience (same as that of the High Court Judge)

2. CORONERS COURT: Strictly speaking this is no court but an administrative inquest into the circumstances surrounding the sudden, violent or unnatural death of a person. Such inquest are also held where a person in police custody dies. The coroner takes evidence on oath as to the identity of the deceased, the time and place and manner of death. When a coroner completes an inquest he sends his findings to the High Court.

3. JUVENILE COURTS: They are special courts established for the trial of young offenders and for their welfare. The Children and Young Persons Law under which these courts are set up, defines a child as a person who has not attained the age of 17. Therefore until the age of 17, children and young persons are dealt with in juvenile courts which sit in rooms different from ordinary court room; admission of members of the public is restricted. The identity of the child is not made known and such words as are ordinarily associated with the courts are not used e.g. Conviction, Sentence; Accused; Imprisonment, etc.

4. TRIBUNALS: The intricacies in running an organized system of courts and the added necessity for a special body of experts on one hand and the cheapness and speed on the other hand creates more room for the continued use of Tribunals.

Though many Tribunals have the features and trappings of ordinary courts, they are developed in an attempt to avoid the crippling formalities and rigidities of normal judicial proceedings. Members of Tribunals are appointed by the Executive in its absolute discretion.

Some Tribunals sit in camera.

Some of the acknowledged advantages of Tribunals include the following:

- a) Informality of proceedings
- b) Expert knowledge of members

Specialized Courts

Legal System

- c) Speedy Trial
- d) Low cost of proceedings
- e) Flexibility of decisions

The major disadvantage is that substantial miscarriage of justice may result as a consequence of non-compliance with legal procedure and rules.

Examples of Tribunals include:

- 1) Recovery of Public Property Tribunal (Special Military Tribunal) established under Decree No. 3 of 1984 (Now repealed)
- 2) Robbery and Fire arms Tribunal
- 3) Miscellaneous Offences Tribunal
- 4) Failed Banks Tribunal
- 5) Drug Offences Tribunal
- 6) Civil Disturbances Tribunal, etc.

These Tribunals exercise jurisdiction over special offences and matters. Appeals from these Tribunals lie only to the Armed Forces Ruling Council (A.F.R.C.) now Provisional Ruling Council (P.R.C.) in some cases; and in other cases their decisions may be final.

CLASSIFICATION OF THE LAW

Recall the classification of law as stated before. It must again be noted that the following broad classification of law exists and may be summarized as follows:

- a) CRIMINAL LAW AND CIVIL LAW
- b) PUBLIC LAW AND PRIVATE LAW
- c) SUBSTANTIVE LAW AND PROCEDURAL LAW
- d) MUNICIPAL LAW AND INTERNATIONAL LAW

Public law deals with the rules and regulations affecting the interaction between persons and the various organs of the state, its administrative bodies and institutions, etc. Private law courses like contract, tort and property law regulate the rights of private legal persons. The actual laws which create rights and obligations are called substantive law; and the rules and procedures for bringing actions before judicial bodies to enforce these substantive laws constitute procedural law.

Finally, the term "municipal law" is used to describe the laws which operate within a country, as contrasted with international law which governs the relationship between or among different nations.

THE DISTINCTION BETWEEN CRIMINAL LAW AND CIVIL LAW

The most fundamental basis of classification is the distinction between criminal law and civil law. Important differences exist between criminal law and civil law.

It should be noted however, that the distinction does not depend on the nature of the conduct or act being described,

Legal System

for it is possible for an act to constitute or involve both civil and criminal law.

If a person for example, drives dangerously whilst under the influence of alcohol and causes an accident in which people are injured, he can be prosecuted under criminal law for dangerous driving and sued for negligence under civil law by all the injured persons.

The distinction between criminal law and civil law rather rests basically on the type of judicial proceedings which can be instituted following a breach of the law.

The judicial proceedings which may be instituted to punish breaches of the criminal law is known as criminal proceedings. That for civil law is known as civil proceedings. Their differences can be summarized as follows:

- 1) Purpose and Scope
- 2) Commencement of proceedings
- 3) The Standard of proof
- 4) Verdicts and Sanctions
- 5) Enforcement of Judgements
- 6) Peculiar Terms and Expressions

1) PURPOSE AND SCOPE:

The key to civil law is said to be that it aims at providing the individual with compensation for his loss. It is a fundamental principle of civil law actions that the person bringing the claim (i.e. the plaintiff) cannot recover more than he has lost. Civil Law deals with disputes between or among individuals, group and institutions. Examples of Civil actions are breach of contract, trespass to another's property or person, defamation, etc.

Criminal Law on the other hand is rarely compensatory but is to punish or to deter wrongdoers and in principle to correct and reform. Punishment or sanctions are meted out to offenders in order to protect the State and the lives and properties of all within it.

Criminal Law consists of offences and crimes like murder, rape, stealing, receiving stolen goods, etc. All these are acts which are prohibited expressly by the state. Such prohibitions are normally made in a written Law like the Criminal Code (for the Southern States) and the Penal Code (for the Northern States).

Serious criminal offences are known as felonies and minor ones are called misdemeanours. Offences may also be classified into indictable offences and non-indictable offences (summary offences) along the same lines.

2. COMMENCEMENT OF PROCEEDINGS

In Civil cases, the party that alleges a breach of his legal rights is the person entitled to institute a civil action or a suit before the courts. He is known as the plaintiff and the person sued is called the defendant.

The parties to a civil case can agree to settle their dispute outside the courts, and the courts often try to assist litigants to settle their differences peacefully.

On the other hand, if a person commits a crime, he is prosecuted before the appropriate court by the Police; any person authorized by the law, or by the Attorney-General or the Director of Public Prosecutions.

All such persons prosecute the accused person on behalf and in the name of the State. A private person may occasionally be permitted by the courts to prosecute an offender if the Attorney-General, who is the Chief Legal Officer of the state, certifies in writing that he is not prepared to prosecute. (The position of Lagos State is different from the other parts of the country. The only offence that a private person can prosecute in Lagos is in respect of Perjury). Once a prosecution is started, it cannot normally be discontinued by the prosecutor without the permission of the court.

3. THE STANDARD OF PROOF

The standard of proof in civil cases is for the plaintiff to prove his case on a balance of probabilities. This he must do by tendering cogent and admissible evidence. He must show the court that his own story is more likely to be true than that of the defendant. Whereas in criminal cases, the prosecutor must prove his case beyond reasonable doubt.

The high standard of proof is required to ensure that justice is done in accordance with the maxim that:

"it is better for ninety-nine guilty persons to escape than to convict one innocent person".

Note that S.33(5) of the 1979 Constitution presumes that every person charged with a criminal offence is innocent until proven guilty.

4. VERDICTS AND SANCTIONS

If the prosecution successfully establishes the guilt of an accused person beyond reasonable doubt, the court usually finds him guilty, convicts him and sentences him to the punishment prescribed by law. This may take the form of imprisonment, fine or both. Capital punishment – that is death, is imposed on persons who are convicted for capital offences like Murder, Armed Robbery and Sedition. Should the prosecution fail to prove the guilt of the accused beyond reasonable doubt, the court will acquit and discharge him. Once he is discharged and acquitted, the Police cannot arrest him and charge him with the same offence on the same facts. The verdict given in his favour constitute **autrefois discharge and acquit**.

If the accused person was however merely discharged by the court, for example, where the prosecution is looking for more evidence, the accused can be re-arrested and charged before a court again.

In civil cases the successful party is normally awarded the remedies claimed once he proves his case successfully. This may take the form of either monetary compensation like the

award of damages or injunction to restrain the loser from a certain course of action.

5. ENFORCEMENT OF JUDGEMENT

It is the duty of the State to enforce or give effect to judgement given against accused persons in criminal trials. The Police and Prison officers ensure, on the State's behalf that an accused serves his term of Imprisonment or is made to comply with any order made by the court e.g. payment of fine.

A guilty offender may however be pardoned by the President or a State Governor through the exercise of their respective Prerogative of Mercy powers.

In civil proceedings however, it is the duty of the successful party to enforce the judgement given by the court in his favour. The court will assist him if he applies for her assistance.

6. PECULIAR TERMS AND EXPRESSIONS

Note clearly that these terms and expressions should not be mixed up or used interchangeably.

In a criminal case, an accused person is charged before a court and is prosecuted by a prosecutor. The action is called a trial and the accused is tried. In most serious crimes it is necessary not only to show that the accused did the act complained of, the 'actus reus' but also that he had a guilty mind, the 'mens rea' e.g.: In a murder case the 'actus reus' is killing someone, the 'mens rea' is 'malice aforethought'.

Both elements must be shown before conviction follows. For this reason, the moral terms guilt and innocence, are only used in a criminal context.

There are many minor crimes where the prosecutor need only show that the actus reus was committed: these are called crimes of strict liability e.g., speeding offences.

Also, his guilt must be proved beyond reasonable doubt or else he will be discharged and acquitted. If however, he is found guilty, he is convicted and sentenced by the court.

Legal System

Classification of the Law

In civil proceedings, a party who alleges that a civil wrong or a civil offence has been committed against him sues the other party. He will be known as the plaintiff and the person sued, as the defendant. He must prove his case on balance of probabilities. If he is successful the defendant will be found by the court to be liable and remedies awarded against him. If the action fails the defendant is said to be not liable. See the table below for an illustration of the above distinction:

	CRIMINAL LAW	CIVIL LAW
Concerns	Offences against the state	Disputes between private individuals
Purpose of the action and scope	To preserve order in the society by punishing offenders and in the process deter others, also to reform the offenders and reduce crime.	To remedy the wrong which had been suffered by the aggrieved or innocent party.
The parties	A prosecutor Prosecutes	A plaintiff sues a defendant
Where the action is heard	The criminal courts i.e. magistrates' court or High Court	The civil courts i.e. High Court, Magistrate court in the South: District court in the North.
Standard of Proof	The prosecutor must prove his case beyond reasonable doubt	The plaintiff must establish his case on the balance of probabilities
Decision	A defendant may be Convicted and sentenced if he is guilty and discharged and acquitted if he is innocent.	A defendant may be found liable or not liable.
Sanctions	Imprisonment, fine, probation, community service.	Damages, injunction, specific performance, rescission, rectification
Examples	Murder, theft, drunken driving, applying a false trade description to goods.	Contract, tort, trusts, property law, partnership, agency.

AN OUTLINE OF PROCEDURES FOR INSTITUTING A CIVIL ACTION

I. JURISDICTION: A civil action for legal redress must be instituted in only the court vested with jurisdiction to entertain the dispute.

A court shall be competent to hear a case where as regards the numbers and qualifications of the members of the bench, nobody is disqualified for one reason or another.

Also where the subject matter of the case is within the jurisdiction of the court and the case comes to court by the due process of law and all the conditions precedent to the exercise of jurisdiction has been fulfilled.

In the case of: OGBUNIYA VS OKUDO (1979)

The Supreme Court held that the learned trial judge, has no jurisdiction to deliver the judgement, even though he was unaware at the time he was delivering the judgement that he had been appointed a justice of the Court of Appeal.

The highest jurisdiction of Magistrate Court (Chief Magistrate Court) in Lagos is ₦24,000.00. In some states it is lower. Hence, any claim above that must be instituted at the High Court; except the plaintiff wants to forego the excess over ₦24,000.00.

II. PARTIES: To be able to sue and be sued, one must be a person recognized in law as a legal entity. In essence, there must be no disability whatsoever.

Hence, those who can sue are Adults, Creation of Statutes; Registered Companies; etc. Minors or infants however cannot sue in their own name. Their 'Next Friend' (that is a father or

guardian) must sue on their behalf.

An action on behalf of a lunatic or persons of unsound mind must also be instituted by their Committee in lunacy (i.e. their legal guardians).

Registered or incorporated companies can sue in their own names.

Partnership are permitted by the rules of court to sue in the firm name. (It is not a separate legal entity of its own. It is regarded as one and the same with those that form it) When suing a firm it is advisable to sue them jointly and severally, so that if one does not pay the other would.

Sole proprietorship also does not enjoy separate legal entity. But if one wants to sue; the writ can be headed like this "Sola Agbaje trading under the name and style of Sola Agbaje Enterprises".

III. COMMENCEMENT: The most popular method of commencing action in the high court is by the issuance of writ of summons. The writ is taken out by the plaintiff (usually through legal representatives) and it must be served on the defendant. This is a document commanding the defendant to indicate his response to a civil claim which has been filed against him before the named court. The writ will indicate the names of the parties, and the nature of the claim against the defendant as well as the period during which he must indicate whether he intends to oppose the claim or not; the writ also informs the defendant that if he fails to satisfy the claim or return the acknowledgement, judgement will be entered against him.

IV. SERVICE OF WRIT: Once the writ of summons or the appropriate document for commencing an action has been filed with the court of competent jurisdiction, it must be served on the defendant with the help of the court's bailiff.

A writ of summons must be served not later than 12 months from the date of issue, but may be renewed for another 6 months.

If the defendant cannot be served personally (because service of writ must be personal) because he is keeping house, then the plaintiff can apply for Substituted Service Order. The following are examples of Substituted Service;

- 1) The agent may be served.
- 2) The document may be advertised in a Newspaper within the Jurisdiction or in the Gazette.
- 3) It may be pasted on a conspicuous place of the court or other places of public resort.
- 4) Conspicuous position at the entrance or door of the defendant.
- 5) Infant may be served should it prove necessary to do so.

V. ENTRY OF APPEARANCE OR ACKNOWLEDGEMENT OF SERVICE:

The defendant must acknowledge service of the writ by informing the court within 8 days whether he intends to oppose the plaintiff's claim totally or only partially. This information is known as Entry of Appearance by the defendant. If the required appearance is not entered the plaintiff may apply to the court for Default Judgement; but must give the defendant at least 6 clear days before the return date.

If the defendant is able to convince the court for his failure to enter an appearance within the prescribed period, the court may agree to set the Default Judgement aside so that the case can be contested on its merits. But costs will be awarded against him for delay.

VI. PLEADINGS:

After entry of appearance, the next stage is the exchange of pleadings. Pleadings are documents prepared usually by counsel, which contain the statements of the material facts in summary form on which the person claiming relies. The purpose of the exchange of pleadings before hearings begin is to prevent a surprise being sprung on each

other, and also to facilitate speedy proceedings, because areas of disagreement are clearly seen.

Parties are bound by their pleadings, any fact not raised in the pleadings will go to no issue. The case of **Emegokwue vs Okadigbo (1973)** illustrates this.

Pleadings are exchanged by the parties in the following order:

- 1) Statement of Claim – Statement by the plaintiff of facts of which he intends to base his case is delivered to the defendant.
- 2) Defendant replies with – Statement of defence plus any counter claim or set-off which the defendant may have against the plaintiff.
- 3) The plaintiff too will send a reply to the defendant with further pleadings
- 4) Defendant sends – Rejoinder with further defences.

Once the parties have completely divulged their facts to each other, pleadings are said to have closed. One can amend his pleadings in the course of proceedings, but costs will be awarded against such person for delay.

VII. TRIAL OR HEARING: After the close of pleadings, either party can in addition demand further and better particulars where the other party does not state this clearly.

There may also be interlocutory stages i.e. proceedings between pleadings and trial. Applications may be made to the court for them to exercise various powers e.g. INTERROGATORIES i.e. questions answerable on oath. The Interlocutory stage comes to an end when the plaintiff takes out a Summons for Direction. The court then decides the type of trial and where the trial will take place. The plaintiff must then set the action down for trial within a specified time. At the trial:

- (1) Plaintiff's counsel opens the case; he outlines the facts and lays the issues before the court. Counsel may call witnesses whom he examines – 'in - Chief'. They may

then be cross-examined by the defence. Plaintiff's counsel may sometimes re-examine witnesses to repair any damage which may have been done as a result of cross-examination by the defence.

- (2) Defence counsel (if there is oral evidence) produces his evidence and calls his witnesses, the plaintiff's counsel may cross-examine.
- (3) Defence's closing address
- (4) Plaintiff's closing address

Note:

(3) & (4) are reversed where the defence counsel has no oral evidence to argue.

(5) Judge gives judgement on the 'balance of probabilities' (i.e. the standard of proof in civil cases).

To enforce a civil judgement, the winner can apply to the court for any of the following depending on the nature of the claim and the judgement given:-

- (a) An order to attach and sell any known property of the loser through a Writ of Fifa.
- (b) An order to compel anybody or institution owing money to the loser to pay or assign the debt to the winner. This is known as Garnishee Order and it is normally employed against banks having the judgement-debtor's money in their custody.
- (c) An order to allow commissioners appointed by the court to enter all immovable properties of the loser to collect rents due and to take possession of goods there until the judgement-creditor is paid in full.
- (d) An order to commit the judgement-debtor to prison for contempt of court (i.e. for disobeying a court judgement).

THE CONSTITUTION

BASIC FEATURES OF THE NIGERIAN CONSTITUTION

Background

In concluding this part on the Nigerian Legal System, it is important to give a brief discussion of the Nigerian Constitution, more especially in an ideal democratic setting which our law makers (and founding fathers) have strived to achieve since Independence.

For our purpose it is the 1979 Constitution that will be discussed for various reasons: First, the 1960 Independence Constitution and the 1963 Republican Constitution were patterned along the Parliamentary system of Government following the British Model (the then Colonial Masters) but with Federalism in picture. With the military incursion from 1966 to 1979, when the opportunity came for another Constitutional Engineering, there was a radical departure from the 1963 Republican Constitution. For the first time, the Presidential Constitution patterned along the United States model was adopted.

Second, although the Third Republic which would have come into effect on August 27, 1993 did not take off before it was aborted, nevertheless it is on record that Presidentialism was adopted. (Based on the 1989 Constitution).

Third, the next attempt at Constitution making in Nigeria took place with the setting up of the Constitutional Conference in 1994 and a constitution eventually came out of that process; but it will be too early to gaze into the crystal ball and analyze the features of this constitution, since it is a future constitution. In fact, it is not in the norms of legal minds to do that; until it is promulgated.

astly, the present Military regime squarely adopted the 1979 Constitution save for those parts suspended by the Constitution Suspension and Modification Decree; and again it is on record that the 1979 Constitution was well tested before the second republic was aborted.

DEFINITION:

What is a Constitution?

Briefly defined a constitution is an agreed fundamental principles of rules by which the people of a state are governed. It states the composition and powers of organs of a nation state and regulate the conduct of various states to one another and to the citizens.

FEATURES AND CHARACTERISTICS OF THE CONSTITUTION

SUPREMACY OF THE CONSTITUTION:

It is the most supreme law in the Nigerian Legal System. It is the most important law in that all the others laws derive their authority from the Constitution. Such other laws must be in agreement with the Constitution, where it conflicts with the Constitution or is contrary to it, the Constitution will prevail. Sovereignty, it is agreed lies in the Constitution.

S.1(1) of the 1979 Constitution confirms the Supremacy of the Constitution; by stating that it is supreme and that its provision have a binding force on all authorities and persons throughout the nation. By S.1(3). Any other law inconsistent with the constitution must give way.

TONY MOMOH AND THE SENATE (1981)

In this case, a writ of summons was issued to be served on an official of the defunct National Assembly to come to give evidence in the case involving Tony Momoh. This official refused to obey the court order and he claimed immunity of service by relying on Legislative Houses (Powers and Privileges) Act 1958. S.31 of the Act provides that no court process shall be served within the chambers of the Legislative House.

Legal System

But this provision appears to run contrary to S.42 of the Constitution which provides for the right of an individual to seek redress where his fundamental human right is violated. It was argued that to deny the service of the writ on the basis of the Legislative Act is to prevent redress for violation of fundamental human rights.

The court held that S.42 of the constitution prevails and the Legislative Act must therefore be null and void to the extent of its inconsistency with the constitution.

See also **SHUGABA DAR MAN VS MINISTER OF INTERNAL AFFAIRS (1981)** where the court again held the Constitution to be Supreme in a case where Shugaba claims to be a Nigerian citizen since his father or mother was a Nigerian in accordance with Constitution; the action of the Minister of Internal Affairs in deporting him on the grounds that he is not a Nigerian was therefore declared void.

(2) SEPARATION OF POWERS

This concept originated from John Locke in the 17th century in England and was developed by the French Philosopher Montesquieu. Simply put, it means that once a government is put in place within a state, and the functions of the organs of government clearly defined, each organ should concentrate on its own powers and functions, and should not interfere with the other organ's powers and functions.

The idea is borne out of the need to promote political liberty and to negate abuse of political power. Therefore, the three organs of government must be separated from each other. There should be no fusion of powers, since concentration of power in a few hands can lead to tyranny. In the words of Lord Acton:

"Power corrupts and absolute power corrupts absolutely"

This principle of separation of powers is firmly entrenched in the 1979 Constitution; but it is also recognized that its strict

application will lead to standstill of government, hence there is the necessary corollary of separation of powers; which is the concept of checks and balances i.e, using power to check power; since the essence of governance is co-operation and co-ordination of efforts of governmental functionaries for the ultimate happiness of the governed. A few examples of these will suffice, but it should be noted that this concept of separation of powers is more concerned with concentration than it is with separation. That is, the aim is to prevent abuse of power.

- (I) President or the Governors can veto bills passed by the Houses; but this veto can be over-ridden by 2/3 votes of the respective Legislatures. President or Governor can be impeached by the Assembly,
- (ii) President's appointment of Ministers and Governor's appointment of Commissioners are subject to the approval of the Legislature; but such ministers or commissioners cannot come from parliament. Presidential treaties with foreign nations must be ratified by the Legislatures.
- (iii) The Chief Justice of Nigeria is appointed by the President subject to confirmation of the Senate.
- (iv) National Assembly can conduct investigation for the purposes of exposing corruption, inefficiency and waste.
- (v) President may attend meetings of the National Assembly to deliver addresses on National Issues. (Ditto for states). Ministers may be invited to the National Assembly to defend policies of their ministries. (Ditto for states).

(3) FEDERALISM

Nigerian Constitution is a Federal Constitution. Federalism is a situation where the powers of government within a nation state, are divided between a central government and two or more regional/state governments in such a way that each is given some competence over certain areas of governance.

Federalism presupposes plurality of government and division or demarcation of powers among the constituent units that make up the federation.

S.2 makes Nigeria a federation with the states (now 36 of them) and a Federal Capital Territory. (Now in Abuja). There is division of powers along legislative lines. We have the Exclusive List, The Concurrent List and the Residual matters

The Exclusive List is meant for the government at the center i.e. the Federal Government. Only the central legislature (which is a combination of the House of Senate and the House of Representatives) could make laws on them e.g. Currency, Foreign Affairs, Armed forces etc. The Concurrent List consists of matters which the Federal and State governments can legislate on. These include Education, Health; Industrial and Commercial matters. But where there is conflict between the legislation of the federal and state; the federal law will prevail and the state law will be null and void to the extent of its inconsistency, with the Federal law. The Residual matters are those not listed in exclusive and concurrent list and the state can legislate on such matters.

There are certain problems that may arise in the running of the Federal System. A few of them can be briefly listed or summarized as follows:

- The problem of Revenue Allocation
- Creation of States
- Military Take over can create the problem of imbalance in the federation
- Structuring the Federation to avoid imbalance
- Duplication of Functions at the federal and state levels
- Federal Character problem to ensure every unit is well represented.

All in all, Federalism is the best for a heterogeneous nation like Nigeria if it is well practiced and the problems encountered in its running are solved with the interest of the nation at

heart. This is because Federalism brings government nearer to the people and it encourages among other advantages healthy competition among the states that constitute the Nation.

(4) RULE OF LAW

This concept which has gone through several meanings from its formulation simply means that government should be run on democratic and regular basis. Things must be done according to law. It means the Supremacy of the ordinary law as administered by the ordinary courts. Individuals must be protected against the tyranny of any ruler or group of rulers; powers given to government must be used in accordance with the law and such government is bound by the law in the same manner as individuals. There should be no special protection for anyone.

The rule of law rests squarely on three main principles as formulated by A.V. DICEY:

- (i) Equality before the law
- (ii) Protection of fundamental freedom which must be guaranteed, preserved, and respected by everybody; especially the government.
- (iii) There should be no secret law and there should be no retrospective legislation. The law must be clearly stated, so that any person who breaches the law will be punished but one cannot be punished on a non-existent law. There should be no arbitrary powers.

To complement the above, it means certain structures must be in place such as: Independence of the Judiciary, Independent Press, Impartial Tribunal, orderly society where basic rules are respected and obeyed.

All the above concepts of the Rule of law run through our Constitution, but the extent to which they are observed in practice is beyond the scope of this discourse.

(5) WRITTEN AND RIGID CONSTITUTION

The 1979 constitution is a written constitution because most of its provisions are embedded in a single document. This can be contrasted with the British Constitution for instance which is described as unwritten because most of its provisions are not in one document. Also the 1979 constitution is rigid because the laid down procedure for amending the constitution is difficult to attain. This is to prevent unnecessary constant change in the constitution and to ensure that a large majority, consent to any change in the Constitution.

Hence by S.9(2), where the constitution is to be altered, it must be supported by the votes of not less than two-thirds majority of the members of the National Assembly and in addition, it must also be supported by the resolution of not less than two-thirds of the Houses of Assembly of all the states.

(6) PRESIDENTIALISM BASED ON REPUBLICANISM .

Another feature of the 1979 constitution is the adoption of the Presidential System of government as opposed to Parliamentarianism. This means that the President has the whole country as his constituency and he combines both the Ceremonial and Executive functions. Hence, he is generally referred to as an Executive President (Commander in Chief of the Armed Forces). It is also a Republican Constitution, because "it is the government of the people, for the people and by the people". In other words sovereignty lies in the people within the political system, and this they do by exercising their free will to elect people of their own choice, periodically through an electoral process in a free and fair manner to govern them. This is seen clearly by the preamble to the Constitution which states as follows:

*"We the people of the Federal Republic of Nigeria
DO HEREBY make, enact and give to ourselves the
following Constitution"*

(See generally the 1979 Constitution).

LAWS THAT MAY AFFECT BUSINESSMEN AND THE BASIC PRINCIPLES GOVERNING THEIR LIABILITY

The discussion here is based on the principles of law that affect businessmen and the circumstances that give rise to liability.

They are largely under the civil law aspects only and cover areas where individuals can bring an action for breach of certain legal rights and duties.

They can be broadly classified into 3 major headings:

1. Law of Contract
2. Law of Tort
3. Law of Property

We shall now discuss them briefly.

1) LAW OF CONTRACT

Simply defined, a contract is an agreement or set of promises between two or more persons which is binding and therefore legally enforceable. It covers transactions like buying and selling, employment of staff, partnership agreement and so on. (This is discussed in detail in part two).

2) LAW OF TORT

Tort is a civil wrong. It simply consists of a breach of duty imposed by law. It seeks to compensate the victims of certain forms of harmful conduct. For instance if a person is slapped by another, he might not be contented with only "sorry". The law of Tort allows such a person to bring an action for "battery" and if he succeeds, he will be compensated.

Examples of Torts include the following:

(1) **TRESPASS:** This is one of the oldest torts. It takes three forms:

- (a) Trespass to the person
- (b) Trespass to goods
- (c) Trespass to land

(A) TRESPASS TO THE PERSON: We have three broad forms of such trespass namely: Assault, Battery and False Imprisonment.

Assault is putting a person in fear of a battery like pointing a gun at someone even if the gun is unloaded. There must be an apprehension of injury.

Battery is direct and intentional application of force against a person. It is assault in practice/action.

False Imprisonment consists of unlawfully restraining a person from going wherever he wants. There must be no alternative route of escape.

(B) TRESPASS TO GOODS: This occurs when a person's possession of goods is wrongfully interfered with by another. Such interference may be through stealing, moving it from one place to another and outright or partial destruction of the goods.

(C) TRESPASS TO LAND: This is when a person's possession of land is unlawfully interfered with.

(2) DEFAMATION:

The tort of defamation is a legal balancing act. Defamation occurs where there is publication of an untrue statement which damages a person's reputation and tends to lower him in the estimation of right-thinking members of the society, or tends to make them shun or avoid that person.

The tort's purpose is to protect a person's reputation but its defences reflect the need for freedom of expression so as to

strike the right balancing act. The tort provides redress for comments and statements which are unfounded with its attendant effect of lowering the good name of the plaintiff.

Defamation takes two essential forms: LIBEL and SLANDER. Libel is defamation in a permanent form such as writing, pictures, cartoons, signs, paintings, films, plays, Radio and Television Broadcasts. It also includes Wax Effigies. Slander however takes the form of a statement in transitory form like speeches or gestures, hissing or other articulate but significant sounds.

To strike a balance between society's freedom of expression and an individuals' right to protect his reputation, the following defences are available to the defendant.

- (1) **Consent:** This is a situation where the plaintiff has himself been the cause of the publication of a defamatory statement.
- (2) **Justifications or truth:** Where the statement is true no matter how maliciously made, it constitutes a complete defence to a defamatory action. The effect of a true statement is to reduce an inflated reputation to its proper levels.
- (3) **Fair Comment:** This protects the expression of public opinion on matters of public interest. This includes the public activities of government officials and the way in which the nation's affairs are conducted politically, economically and culturally. It may also include the conduct of public personalities but not necessarily their private lives. In essence, those who place themselves in the public eye must expect honest and fair criticism of what they do.
- (4) **Privilege:** This is classified into 2 parts:
(a) Absolute privilege and (b) Qualified privilege.

In the case of Absolute privilege the person whose reputation has been injured is deprived of legal redress. This is because the law places more premium on freedom of expression in such situations than an individual reputation. It is irrelevant that the statement was motivated by malice and without any foundation.

Hence it only applies to statements made in Parliament; in Court and communication among Government Ministers on State Matters.

In respect of qualified privilege; the defendant can only rely on it, if he can show that he has a moral, social or legal obligation? to make the statement and that the statement was only published to those who had a similar obligation to receive the statement. But the defence will fail if the defendant is shown to have acted maliciously in making the statement. The defence covers such situations as giving job references, necessary business communications; communications between a solicitor and his client etc.

(3) **NUISANCE:** The tort of Nuisance is basically divided into two: Public Nuisance and Private Nuisance.

Public Nuisance is essentially a crime, and it involves an act or omission which causes discomfort or inconvenience to a class of the State's Subjects. For an individual to succeed he must show that he has suffered over and above what others have suffered. Causing obstruction in the highway may amount to Public Nuisance.

Private Nuisance occurs when the defendant unreasonably interfere with the plaintiffs use or enjoyment of land which may be in the form of things like smoke, smell or noise.

(4) **CONVERSION:** This occurs when the defendant deals with the goods of the plaintiff in a manner inconsistent with the rights of the plaintiff's goods. The wrongful act must constitute a challenge to, or denial of, the plaintiff's title to the goods. Examples of conversion includes stealing; destroying; reselling, etc.

(5) **NEGLIGENCE:** This constitutes the bulk of the law of tort. It has assumed significant development after the case of **DONOGHUE VS STEVENSON (1932)** (popularly referred to as the snail in the bottle's case) which has been regarded as the cornerstone of the modern tort of negligence.

Simply defined, Negligence occurs when a person engages in a careless conduct (or statements) which causes damage or loss to others. Like other torts, the aim of an action in Negligence is to get compensation for the different forms of damage that may have occurred to the plaintiff. To succeed in an action for Negligence, the plaintiff must be able to prove three essential ingredients:

- (a) That the defendant owed him a duty of care.
- (b) That there was a breach of that duty of care by the defendant.
- (c) That as a result the plaintiff suffered damage for which he must be compensated.

It can be discussed under the following headings:

(1) "Product Liability"

In the case of **Donoghue vs Stevenson**, A purchased from a retailer a bottle of ginger beer for consumption by A's friend B. The bottle was opaque so that its contents were not visible. B drank part of the contents of the bottle and topped up her glass with the rest. As she poured it out, the remains of a decomposed snail emerged from the bottle. B became seriously ill. She sued C, the manufacturer who argued that as there was no contact between himself (i.e. privity of contract rule since it was purchased from retailer) and B, he owed her no duty of care and so was not liable to her. The House of Lords held them liable and Lord Atkin in finding the defendant liable laid down the: "Neighbourliness Test based on Forseability of Injury". He asked himself the question, "Who then is my Neighbour?" and answered as follows:

"Persons who are so closely and directly affected by my act that I ought reasonably 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".

Hence, the above case shows that Negligence can be applied to 'product liability' cases and it has been followed in the following cases: **GRANT VS AUSTRALIAN KNITTING MILLS LTD. (1936)**. **OSEMOBOR VS NIGER BISCUIT COY. LTD. (1973)**

(2) Financial Loss

The rule in **Donoghue vs Stevenson** has also been applied to negligent misstatements resulting in financial loss. In **Hedley Bryne vs Heller and Partners (1964)** – The appellants were advertising agents and the respondents were merchant bankers. The appellants had a client called Easipower Ltd. who were customers of the respondents. The appellants had contracted to place orders for advertising Easipowers' products on television and in newspapers and since this involved giving Easipower credit, they asked the respondents who were Easipowers' bankers for a reference as to the credit-worthiness of Easipower. Hellers gave favourable references but stipulated that the information was given 'without responsibility' on their part. Relying on this information the plaintiffs extended credit to Easipower and lost over 17,000.00 pounds when the latter went into liquidation. The plaintiffs sued Easipower's bankers for negligence. Held, in the present case the respondents' disclaimer was adequate to exclude the assumption by them of the legal duty of care, but, in the absence of the disclaimer, the circumstances would have given rise to a duty of care in spite of the absence of a contract or fiduciary relationship.

The House of Lords by this decision overruled the previous case of **Chandler vs Crane Christmas (1951)** and adopted the dissenting judgement of Lord Denning in that case where he stated that:

After the case of Donoghue vs Stevenson it will be fruitless if the courts refuse to take advantage of the wide rule enunciated in the case that once there is foreseeable injury the plaintiff should be able to claim.

This scope of duty of care has been further widened by WOOLF in **JEB Fastners vs Mark Bloom and Co. (1981)** – There the plaintiffs, who had taken over the company, brought an action for damages against the auditors alleging that they had been negligent in preparing the company's accounts in that they had over-valued the stock. HELD: An auditor owes a duty of care to any person whom he ought to have foreseen as relying on the accounts for the purpose of deciding whether or not to take over the company. In the present case however the defendants were not liable since the plaintiffs, although they had seen and considered the accounts, would have acted no differently even if they had known the true position. This decision was subsequently upheld in the Court of Appeal.

See also **Esso Petroleum vs Mardon (1976) (INFRA)**

3) Damage to Property

Where the defendant is in control of those causing damage to other people's property; he will be liable in Negligence for breach of duty of care.

Home Office vs Dorset Yacht Ltd. (1970)

TORT OF STRICT AND VICARIOUS LIABILITY

Generally, for the defendant to be liable to the plaintiff in tort; the plaintiff must prove that the defendant acted negligently or intentionally and was therefore blameworthy. Hence liability in tort is mainly 'fault based'

To this general rule however, are two exceptions in which there is no need for the plaintiffs to prove that the defendant was at fault before he is made liable. They are:

- (1) Tort of Strict liability and
- (2) Vicarious liability.

THE TORT OF STRICT LIABILITY: Develops from the case of **Rylands vs Fletcher (1868)**. Blackburn J in the court of Exchequer Chambers stated the rule as follows:

"...the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his own peril,

and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape".

The defendant according to Lord Cairns in the House of Lords must be making a non-natural use of his land.

In Rylands vs Fletcher, the plaintiff owned and worked a colliery with shafts lying under land adjoining the defendant's land. Unknown to anyone there were some old disused mine shafts which connected the plaintiff's workings with other old workings under the defendant's land. The defendant's who were proprietors of a water mill built a water reservoir on their land. They employed reputable contractors to carry out the work. While constructing the reservoir these contractors saw disused mine shafts but did not fill them properly. When the reservoir was filled, the water burst down the shafts and flooded the plaintiff's mine. Held, the defendant was liable in that he had collected water on his land, the water not being naturally there, and it had escaped and caused damage.

The rule has been widened to include escape of things like electricity, gas, fire, etc. Other examples of tort imposing strict liability apart from the rule in Rylands vs Fletcher are:

- (a) Tort of Conversion.
- (b) Breach of Statutory duty.

TORT OF VICARIOUS LIABILITY: This is a situation where a person (maybe because of their relationship) is held liable for the tort of another person. An example of vicarious liability is seen in the following situations:

- (a) Employer (master) and Employee (servant) relationship so long as the tort is committed when the employee is acting within the scope or in the course of his employment.
- (b) Partners.
- (c) Principal and Agent.

(3) LAW OF PROPERTY

Property law deals with anything that a person can own. It covers both tangible and intangible rights like goods, debts, land, goodwill of a business, etc. There are essentially two types of rights that a person can have in property:

- (1) The rights of Possession
- (2) The rights of Ownership.

Possession

Possession means the right to exercise physical control of a property and the intention to exclude others. e.g. you have possession of the book you are reading. It is a right in personam i.e. it can be enforced against a person who tries to disturb one's enjoyment of for instance one's radio, television, etc. There is a presumption that a person in possession of a property is the owner until the contrary is proved.

OWNERSHIP

This is used to describe the highest rights that a person can have in respect of property. It covers entirely the power to se the dispose of property in accordance with the law of the land. It is called a right in rem i.e. It can be enforced against the whole world. Ownership can be acquired originally, derivatively and by succession.

LAW OF CONTRACT

APPLICABLE LAWS

Background

The law of contract is essentially common law. This means that they are basically the resultant effect of the decisions of the courts. The law has developed for some centuries and it is therefore convenient to place much reliance on case laws, since legislation has not really intervened so much as to disrupt the decisions of the court on this very important aspect of commercial law.

In fact, almost all the principles of the law of contract are derived from the decided cases; but it is important to note that there are two areas where the lawmakers felt it was necessary to intervene probably to reduce the harsh rules formulated at common law or perhaps to protect certain classes of people who because of certain disabilities are deemed deficient or incapable of entering into contract without some assistance, while the Law Reform (Contracts) Act of 1961 falls into the former category (a statute which was passed to improve upon the decision in Fibriosa's case) the Infants Relief Act of 1874 which is a Statute of General Application falls squarely into the latter category.

The full discussion of these statutes will be seen later in this discourse.

We shall now proceed into looking at the law of contract proper; its nature, full discussion of its elements and how it can be brought to an end.

NATURE AND CLASSIFICATION OF CONTRACTS

INTRODUCTION: DEFINITION

Simply defined, "a contract is an agreement between two parties which is intended to give rise to legal relations". It can also be described as: "an agreement which is legally binding on the parties to it and which, if broken may be enforced by action in court against the defaulting party".

While every contract springs from an agreement, not every agreement is a contract. Contracts must involve legal rights or legal duties otherwise there would be no need for recourse to the ordinary law courts in case of breach.

Certain agreements however are not enforceable in the law courts if breached: They are:

- (1) Agreement binding in honour only or not intended to give rise to legal relations or enforcements in court of law popularly referred to as 'gentleman agreement'. This is different from an agreement to oust the jurisdiction of the courts as this would be declared void by law. The parties cannot exclude the courts where there is a breach.
- (2) Agreement arising out of immoral and illegal transactions, or in relation to matters against public policy.
- (3) Agreement arising out of families and social relations.
- (4) Agreement arising out of transactions declared by law not to be enforceable e.g. gaming transactions.

Contracts therefore involve the idea of obligation which is enforceable at law if a party breaches his own part of the agreement.

The law of contract is concerned essentially with three basic questions which are as follows:

- (a) Is there an agreement?
- (b) Is it one which the law should recognise and enforce?

(c) What remedies are available for breaches of the agreement?

The law of contract mainly hangs on two principles:

- (1) The principle of Freedom of contract and that of Sanctity of contract. This moves from the standpoint that there is equality of bargaining power, hence there should be no interference from any quarters. The essence of contract therefore is that there is a bargain, i.e. the terms of the contract must be decided upon by the parties to the contract. There are however some restrictions on this principle:

- (i) Standard Form Contracts (e.g. In Insurance Transactions or Dry-cleaning Industry)
- (ii) Implied terms by Court and Statute ((see S.12-15 of the Sale of Goods Act (S.O.G.A.) 1893 and S.14 of Hire Purchase Act (H.P.A. 1965)) which must be complied with.
- (iii) Prohibitions of clauses excluding liability in certain transactions. (This is usually the approach adopted by the courts).

The agreement of the parties cannot be interfered with either by the parties themselves, the court or the third parties. They must abide by their agreement unless released by the other. The parties may make a good or bad bargain - the courts will not interfere and renegotiate the terms for them, but are there to enforce them.

But again there are also restrictions on this, such as:

- (i) Powers of court to reopen credit bargains that are designed to extort weaker parties
- (ii) Restrictive interpretation placed on exemption clauses in contracts by the courts
- (iii) Lawful excuse for non-performance of contractual obligations i.e. frustration.

For there to be an agreement, which will eventually lead into a valid contract enforceable in the law courts there must be

"consensus ad idem" i.e. meeting of the minds on the same thing. The approach adopted, therefore, is purely an objective one.

DEFINITION OF CERTAIN FUNDAMENTAL CONCEPTS

Two points must quickly be noted from the beginning. The general notion held by many people, (erroneously though) is the fact that Contracts must necessarily be in writing and that where it is an oral contract and there is any hitch in the course of performing the contract, one can easily deny the existence of the contract since it is not in written form.

However, it should be noted from the onset that there is no special formality required when one is entering into contract. It may be oral, written and even be inferred from conduct. In fact, there is not doubt about the fact that majority of contracts entered into are oral contracts.

On the second assumption, it is noted here that denial of facts although may appear easy, but the best thing is to always state the facts as they are (since it is the duty of the courts to ascertain the truth) because if the truth is eventually discovered, it puts the person who has denied the existence of a contract in a difficult position.

CLASSIFICATION OF CONTRACTS

UNILATERAL CONTRACT: This consists of an offer of a promise for an Act e.g. X offers a reward for the doing of a certain thing which being done, he is bound to make good his promise to the doer.

BILATERAL CONTRACT: There is an offer of a promise for promise. When that promise is accepted by the giver of the promise, the contract then consists of an outstanding obligation on both sides.

SIMPLE CONTRACTS: Agreements made either by word of mouth or in writing. It can take any form, but certain contracts have to be in writing to be enforceable. In fact, the bulk of our discussion here is based on simple contracts.

SPECIALTY CONTRACTS: Agreements made under seal or by deed. This depends for its validity on their form rather than on their content. A contract under seal is a contract in writing which is signed, sealed and delivered. Certain agreements are not binding unless they are made by deed. These include gratuitous promises; legal mortgages or interest in land; and leases of land for more than three years.

A valid contract is one that has satisfied all the essential elements of a simple contract and can therefore be enforced at Law and in Equity if the terms are breached. The absence of the essential elements will make the contract to be either void, voidable or unenforceable.

A void contract is one that the law does not recognize as a contract at all and for which no legal effect can arise. A void contract is treated as if it had never been made. Any property which is transferred under a void contract must be handed back to the transferor as he remains the owner of it, if the transferee keeps the goods he could be sued by the real owner for wrongful detention of goods i.e. Conversion or detinue. Where the items have been sold to a third party, they may be recovered back by the real owner.

A Voidable contract is valid and subsisting until it is avoided or rescinded at the option of one of the parties to the contract; usually the innocent party. If this is exercised, the contract is regarded as having been void from the point of termination. If it is not exercised, the contract will be treated as being valid and enforceable. If goods have been resold to a third party before the contract was avoided, the original owner will not be able to reclaim them.

Examples:

- Contracts induced by Undue Influence

(ii) Misrepresentation

(iii) Certain contracts made with infants, insane people and incompetent parties.

An Unenforceable contract is one which though is perfectly valid in all other respects, but lacks some technical requirement e.g. some necessary written evidence. Such contract will not be enforced by the courts unless and until the defect is rectified. Items received under the contract cannot be reclaimed.

Examples:

- (i) Contracts of guarantee are not enforceable unless evidence in writing
- (ii) Contracts for sale or other disposition of land which is not evidenced by written memorandum or note signed by the person to be sued therewith.

An illegal contract is one which contravenes a statute or rule of common law or contrary to public policy.

In general no special formalities are needed to enter into a contract, but the following exceptions must be carefully noted.

(1) Contracts which must be in writing:

- (a) Bills of exchange and promissory notes
- (b) Assignment of copyright
- (c) Transfer of shares in a registered company
- (d) Contracts of marine insurance
- (e) Consumer credit agreement (like hire purchase, credit sales, etc.)

(2) Contracts which must be evidenced in writing

- (a) Contracts of guarantee: S.4 Statute of Frauds 1677
- (b) Contracts for the sale or other disposition of an interest in land.
- (c) Money lending contracts

(3) Contracts which must be by deed

- (a) Contracts made without consideration (gratuitous promises)
- (b) Leases of land for over three years

(c) Legal mortgages

Note: The limitation period in respect of a right of action under a contract by deed is twelve (12) years; whilst under a simple contract it is six (6) years (See the discussion on LIMITATION OF ACTIONS under remedies for breach of contract) (INFRA) pgs. 219 - 220.

ESSENTIAL ELEMENTS OF A VALID CONTRACT

1. There must be an **agreement** between the two parties to the contract. This come in the form of offer (made by the offeror) and acceptance (made by the offeree).
2. There must be **consideration**. In other words the agreement is part of a bargain whereby each party promises to give or do something for the other party.
3. There must be an **intention to create legal relations**. In other words as noted in the definition of the contract above, the parties must have intended their agreement to have legal consequences.
4. The parties must have **capacity** in the eyes of the law.
5. The consent of the parties must be **genuine**. There must have been meeting of the minds, in which the parties have entered into the agreement freely and without any inhibitions known generally in law as vitiating elements e.g. mistake, misrepresentation, fraud, etc.
6. The **formalities** of a contract required sometimes (like writing or deed) must be complied with and of course the contract must be legal. It must not be illegal or contrary to public policy.

We shall now treat in full these elements necessary for a valid and simple contract.

THE CONCEPT OF AGREEMENT

OFFER AND ACCEPTANCE (THE TWIN CONCEPTS)

In order to determine whether, in any given situation, it is reasonable to infer the existence of an agreement, the courts normally apply the concepts of **offer** and **acceptance** to analyze the situation. In other words, the courts examine all the surrounding circumstances to see if one party made an "offer" and the other party "accepted" the offer.

What is an offer?

OFFER: "An offer capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound and provided that certain specified terms are accepted. The offeror must have completed his share in the formation of the contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the options of acceptance or refusal". (See CHESHIRE AND FIFOOT. 10th edition)

Chitty on contract also defined an offer as "expression of willingness to contract made with the intention that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed".

In other words, in an offer, the person making the statement must be willing to agree to the terms stated. It must be certain, clear and final. It must be definite, clear and unambiguous. A definite offer must be made either to a particular person, or to a group of people or to the world at large.

An offer can be made to the world at large, as in the advertisement of rewards for services to be rendered. The case of **Carlill vs Carbolic Smokeball Company (1893)** illustrates

this principle - In this case the company inserted advertisement in a number of newspapers stating that it would pay 100 pounds to any one who caught influenza after using its smokeball as directed for 14 days. The company further stated that to show its sincerity in the matter it had deposited 1000 pounds at the Alliance Bank to meet possible claims. Mrs. Carlill bought one of the smokeballs used it as directed but still caught influenza. She claimed the 100 pounds reward but was refused, so she sued the company for breach of contract.

The company put forward a number of arguments in its search for defences:

- (a) It claimed that it had attempted to contract with the whole world, which was clearly impossible. The Court of Appeal in rejecting this held that the company had made an offer to the whole world and it would be liable to anyone who come forward and performed the required conditions.
- (b) The company further submitted that the advertisement was in the nature of a trade 'puff' and too vague to be a contract. The court dealt with this argument by asking what ordinary members of the public would understand by the advertisement. The court took the view that the details of use were sufficiently definite to constitute the terms of a contract and that the reference to the 1000 pounds deposited at a bank was evidence of an intention to be bound.
- (c) The company further argued that the plaintiff had not provided any consideration in return for its promise. The court held that the inconvenience of using the smokeball as directed was sufficient consideration.
- (d) Finally, the company submitted that there was no notification of acceptance in accordance with the general rule. The court held that in this kind of contract, which is known as unilateral contract, acceptance consists of performing the requested act and notification of acceptance is not necessary.

The court concluded that Mrs. Carlill was entitled to recover the 100 pounds.

OFFER DISTINGUISHED FROM INVITATION TO TREAT

An offer as stated above consists of a definite promise by one party to be bound if the other party accepts certain specified terms. It cannot be vague as in *Gunthing vs Lynn* (1831) where the offeror promised to pay a further sum for a horse if it was "lucky".

Invitation to treat may be described as the preliminary discussion and communication before a definite offer is made. Hence, once an offer is accepted the parties are bound, so long as the other essential elements of a valid contract are present; but invitation to treat can never be accepted, since it is an invitation to another person to make an offer.

EXAMPLES OF INVITATION TO TREAT

i. **AUCTION SALES:** The question normally asked here is whether the Auctioneer's request for bids a definite offer which will be converted into an agreement with the highest bidder, or is it only an attempt to set the ball rolling?

It was established in the case of *Payne vs Cave* (1789) that the customer's bid is the offer: the auctioneer's request being merely an attempt to set the ball rolling. Therefore the auctioneer is free to accept or reject the bid. This principle has been given statutory approval in S.58(2) of the Sale of Goods Act (1893) which provides as follows:

"A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or any other customary manner, until such announcement is made, any bidder may retract his bid".

An advertisement announcing an auction is not an offer. Thus a person cannot sue another for loss of time and expenses

Legal System

incurred in attending advertised sales which is subsequently cancelled. **Harris vs Nickerson (1873)**. An advertisement that an auction sales would be without reserve price constitutes an offer to sell to the highest bidder. **Wallow vs Harrison (1859)**.

2. DISPLAY OF GOODS FOR SALE - With a price ticket attached in a shop window or in a supermarket shelf or where catalogues, circulars, brochures, advertising goods for sales are issued; the courts have constantly held that such circulars or adverts are a mere attempt to induce offers even if as in the case of **SPENCER VS HARDING (1870)** the word "offer" is used.

"When one is dealing with advertisements and circulars unless they indeed come from manufacturers there is business sense in their being construed as invitation to treat and not offer for sale. It seems to me accordingly that not only law but common sense supports it".

Lord Parker in **PATRIDGE VS CRITTENDEN (1965)**. In this case the appellant had inserted in a periodical entitled "Cage and Aviary Birds" a notice Bramble Finch cocks and hens, 25c each". It appeared under the general heading of "classified advertisements" and the words "offer for sale" were not used. He was charged with unlawfully offering for sale a wild live bird contrary to the provisions of the Protection of Birds Act 1954 and was convicted. The appeal was allowed, and the conviction was quashed on the ground that there had been no "offer for sale".

The display of goods in a shop window or inside the shop with the prices attached, is a mere invitation to treat. The customer makes the offer to buy when he presents the goods at the cash desk.

In **Pharmaceutical Society of Great Britain vs Boots Cash Chemists Ltd. (1952)**. The defendants adapted one of their shops to a "self service" system. A customer on entering was given a basket and having selected from the shelves the articles

he required, put them in the basket and took them to the cash desk. Near the desk was a registered pharmacist who was authorized, if necessary to stop a customer from removing any drug from the shop.

The court had to decide whether the defendants had broken the provisions of S.18 of the Pharmacy and Poisons Act 1933, which made it unlawful to sell any listed poison "unless the sale is effected under the supervision of a registered pharmacist".

It was held that the display was only an invitation to treat so that the law had not been broken; an offer was made by the customer when he presented the goods at the cash desk. The customer's offer could be accepted or rejected by the pharmacist whose duty is to supervise the sale.

Also in the case of **Fisher vs Bell (1961)**. Bell displayed in his shop window a flick-knife behind which was a price tag bearing the words "Ejector knife - 45d". He was charged with offering for sale a flick-knife, contrary to the provisions of the Restriction of Offensive Weapons Act 1959.

HELD: the displaying of the flick-knife was merely an invitation to treat. But note situations where advertisement may be regarded as a definite offer like **Carlill's case** (above).

3. TENDERS: Tradesmen could be invited to submit tenders by public authorities, that is to state the lowest price at which they can supply certain specified goods or do a specific piece of work. Such a request in law is not an offer. In general the offer is made by the salesman when he submits his tender, and there is no contract until such public institutions accept one of them.

The fact that the salesman may have incurred some considerable expenses in preparing the tender makes no difference. He does so at his own risk and payment of non-refundable deposit does not alter the decision.

Once a tender is accepted to supply goods for a particular period as at when requested it becomes a '**standing offer**'

and it is accepted when specific orders is placed for the goods and services. At this point, the supplier is bound to supply the goods or tender the services specified. However, he is free to revoke his "standing offer" before an order is placed; since anytime an order is placed, such order constitutes acceptance. Where he therefore fails to fulfill the order, he would be in breach of contract.

Great Northern Railway Company vs Witham (1873)
(INFRA) Pg. 106

Competitive Tendering

In respect of "competitive tendering", the court had the opportunity of making some definite pronouncement in the case of **Harvela Investments Ltd. vs Royal Trust Co. of Canada Ltd. (1985)** - In this case, the first defendants decided to dispose of shares in a company by sealed competitive tender. They sent identical telexes to two prospective purchasers, the plaintiffs and the second defendants, inviting tenders and promising to accept the highest offer. The plaintiffs bid \$2 175 000, while the second defendants bid \$2 100 000 or \$100 000 in excess of any other offer. The first defendants accepted the second defendant's offer. The House of Lords held that the second defendants' 'referential bid' was invalid. The decision was a practical one. The purpose of competitive tendering is to secure a sale at the best possible price. If both parties had submitted a referential bid, it would have been impossible to ascertain an offer and no sale would have resulted from the process.

4. SALES OF SHARES: A prospectus issued by a company in order to invite the public to subscribe for its shares or debentures as a means of raising capital is an invitation to treat so that members of the public make an offer to buy when they apply. Thus since the offer is coming from the applicant, the company acting through the issuing house is free to accept or reject such an offer.

But where a company resolves to make a right issue of shares to his existing members; the letter is an offer. The company by resolution has signified an intention to be bound if the shareholder accepts.

5. SUPPLY OF INFORMATION: This is a frequent occurrence in the course of negotiation for sale of land. In **Harvey vs Facey (1893)** - P telegraphed D; "will you sell us Bumper Hall Pen? Telegraph lowest cash price". D telegraphed the reply "Lowest price for Bumper Hall Pen 900 pounds. P then telegraphed "we agree to buy Bumper Hall Pen for 900 pounds asked by you"

D then decided that he did not wish to sell Bumper Hall Pen to P for 900 pounds, and P claimed that a contract had been made, the second telegraph being an offer. The court held that there was no contract, second telegram being merely an indication of what D would sell for, if and when, he decided to sell. It was supplying of information in response to a question.

In Clifton vs Palumbo (1944) - In the course of negotiations for the sale of a large estate, the plaintiff wrote to the defendant: I am prepared to offer my Lytham estate for £600 000. I also agree that sufficient time shall be given to you to complete a schedule of completion'. The court of Appeal held that these words did not amount to a firm offer to sell, but rather a preliminary statement as to price.

In Gibson vs Manchester City Council (1979) - In 1970 the council adopted a policy of selling its council houses to tenants. The City Treasurer wrote to Mr. Gibson in February 1971 stating that the council 'may be prepared to sell' the freehold of his house to him at a discount price. The letter invited Mr. Gibson to make a formal application which he duly did. In May 1971 control of the council passed from the Conservatives to Labour and the policy of selling council houses was reversed. Only legally binding transactions were allowed to proceed. The council did not proceed with Mr. Gibson's application. The House of Lords held that the City Treasurer's letter was an invitation to treat and not an offer to sell. Mr. Gibson's application was the offer and, this had not been accepted by the council, a binding contract had not been formed.

ACCEPTANCE:

WHAT CONSTITUTES ACCEPTANCE?

"An acceptance is a final expression of assent to the terms of an offer". An offeree in accepting the offer must show a positive evidence to demonstrate to the court his intention to accept the offer or the fact that he has accepted the offer. A mere acknowledgement of the offer is not enough; and cannot be regarded as acceptance. The offeree must know that he has accepted the offer according to its terms.

In the case of **AFOLABI vs POLYMER INDUSTRIES NIGERIA LTD. (1967)**. The defendants letter to the plaintiff reads inter-alia "will you please read, study carefully and sign duplicate copy hereby attached; signify for agreement to all points as listed above and return at your earliest convenience for records".

The plaintiff asserted that he complied with these instructions but had no evidence to support his action. The Supreme Court held that he has failed to show that he accepted the offer made.

Acceptance may be express, which may be oral or written and may be inferred from conduct. Acceptance must be absolute and unqualified or unconditional. The offeree in accepting must not vary the terms of the offer. He is not free to introduce new terms. If he does, his reply is not acceptance but what the law regards as a COUNTER OFFER which the original offeror who may now be regarded as the offeree may now accept or reject. The case of **HYDE vs WRENCH (1840)** laid down the counter offer rule: on 6th June W offered to sell his estate to H for 1000 pounds. Two days later, H offered 950 pounds and W refused this. On June 27, H wrote back purporting to accept the original offer of 1000 pounds. It was held that by his counter offer of June 8, H had rejected the original offer which he could not subsequently revive, and that no contract existed between him and W.

But it is essential to distinguish between a 'counter offer'

which can no longer be revived; and a 'request for further information' which still keeps the original offer alive. In the case of **STEVENSON VS MACLEANS (1880)** the words "please wire whether you accept 40 for delivery over two months, or if not longest limit you would give", was held to be a mere inquiry, which should have been answered and not treated as a rejection of the offer'. Here the defendant offered to sell a quantity of iron to the plaintiffs for cash. The plaintiff asked whether they could have credit terms. When no reply to their enquiry was forthcoming, the plaintiffs accepted the terms of the original offer. Meanwhile the defendant had sold the iron elsewhere. It was held that the enquiry was a request for more information, not a rejection of the offer. The defendant was liable for breach of contract.

A conditional assent does not constitute acceptance. This usually occurs in situations where the terms of offer are generally acceptable but expert guidance is desired and a tentative agreement is made subject to this. There is no binding obligation until this condition is fulfilled. And until then either party can pull out of the transaction that is to say each of them has a '**locus poenitentiae**'. Use of such words as 'subject to contract' or 'subject to a formal contract to be drawn up by the solicitor' have this effect. And this situation is often encountered in the purchase and lease of land. See **Winn vs Bull (1877)**.

But see **Branco vs Cobbaro (1947)** and the recent case of **Alpenstow Ltd. vs Regalian Properties Plc. (1985)** which is to the effect that notwithstanding the use of such customary words like "subject to contract" the court may be prepared to evince that a contract has been concluded if there is clear evidence towards such direction.

The rule that acceptance must be unqualified can face certain difficulties when it comes to "**battle of forms**" cases. This is clearly illustrated in the case of: **Butler Machine Tool Co. vs Ex-Cell-O Corp. (England) (1979)**. Briefly described, "battle of forms" occurs where the offeror makes an offer on

his own pre-printed standard form which contains certain terms, and the offeree accepts on his own standard form which contains conflicting terms. In **Butler's case**, the plaintiff offered to sell a machine tool to the defendants for 75535 pounds. However, the quotation included a term which would entitle the sellers to increase this price (price-variation clause). The defendants accepted the offer on their own standard terms which did not provide for any variation of their quoted price. The plaintiffs acknowledged the order. When the machine was delivered the plaintiffs claimed extra 2892 pounds which the defendants refused to pay. The Court of Appeal held that the defendant had not unconditionally accepted the original offer. They had made a counter offer which had been accepted by the plaintiffs. The plaintiffs action to recover the increase in price, therefore failed.

COMMUNICATION OF ACCEPTANCE

As a basic rule, an acceptance does not become operative until it is communicated to the offeror. The offeror must be notified of the facts of the acceptance by words or acts either directly or through authorized agents.

In the case of **Powell vs Lee (1908)** P applied for the post of headmaster of a school. He was called for interview and the managers (D being one) passed a resolution appointing him, but they did not make any resolution for notifying him. However, one of the managers without authority informed P that he had been appointed. The managers subsequently reopened the matter and appointed another candidate. It was held that P failed in his action for breach of contract since acceptance had not been properly communicated to him. This case was followed in **Ajayi Obe vs Executive Secretary Family Planning Council (1975)**.

The statement of Lord Denning in **Robophone vs Blank (1966)** is very instructive where he said that where a written offer provided that it should become binding only upon its being signed by the offeree no contract arose, until offeree signs the document and notifies the offeror that he had done so

otherwise "the offeree would be able to keep the form in their office unsigned and them play fast and loose as they please. The offeror would not know whether there was a contract binding them to supply or him to take delivery".

The position as regards communication therefore is as follows:

RULE 1:

SILENCE DOES NOT CONSTITUTE ACCEPTANCE.

As a general rule, an offeror cannot proclaim that, silence shall be deemed to be consent. Therefore an offeree who does nothing upon the receipt of an offer which states that it may be accepted by silence is not bound.

In **Felthouse vs Bindley (1862)**. The Plaintiff, Paul Felthouse, wrote to his nephew, John on February 2nd, offering to buy his horse for 30.15 pounds; and adding "if I hear no more about it, I consider the horse mine at that price". The nephew made no reply to this letter, but intimated to the defendant, an auctioneer, who was to sell his stock, that the horse was going to be kept out of the sale. The defendant inadvertently sold the horse to a third party at an auction held on February 25th, and the plaintiff sued him in conversion.

HELD: the action must fail as there had been no acceptance of the plaintiff's offer before February 24th and the plaintiff had therefore, at that date, no title to maintain the conversion. This rule rests on the basis that it is undesirable to put upon the offeree the trouble and expense of rejecting the offer he does not wish to accept.

It should be noted however, that it is not in all cases that the above rule will apply. Occasions may arise where contrary to the above case, a contract is said to have come into being with the silence of the offeree. See **Manco Ltd. vs Atlantic Forests Products Ltd. (1971)** for this position.

ACCEPTANCE BY CONDUCT

Acceptance may also be implied from a persons conduct, as shown in the case of **Brodgen vs Metropolitan Railway (1877)** - Brodgen had supplied the railway company with coal for many years without the benefit of a formal agreement. Eventually the parties decided to put their relationship on a firmer footing. A draft agreement was drawn up by the company's agent and sent to Brodgen. Brodgen filled in some blanks, including the name of an arbitrator, marked it as 'approved' and returned it to the company's agent who put it in his drawer. Coal was ordered and supplied in accordance with the terms of the 'agreement'. However, a dispute arose between the parties and Brodgen refused to supply coal to the company, denying the existence of a binding contract between them. The House of Lords held that a contract had been concluded. Brodgen's amendment to the draft agreement amounted to an offer which was accepted by the company either when the first order was placed under the terms of the agreement or at the latest when the coal was supplied. By their conduct the parties had indicated their approval of the agreement.

RULE II:

COMMUNICATION OF ACCEPTANCE MAY BE WAIVED

An offeror may by the terms of the offer express or implied, waive communication of acceptance and this usually occurs in the case of an offer of a unilateral contract. It may also amount to acceptance by conduct as seen in the case of **Carlill vs Carbolic Smoke Ball Coy.**

RULE III:

PRESCRIBED METHOD OF ACCEPTANCE

The offer may prescribe the method of communicating acceptance and the offeree will normally be expected to follow the prescribed method. In other words the offeror's wishes must be respected. Thus where the offeror states that acceptance should be in writing, he would not be bound by an oral acceptance.

In Yates Building Co. Ltd. vs R. J. Pulley & Sons (York) Ltd. (1975) - The vendors of a piece of land stated that an option to buy it should be exercised by 'notice in writing... to be sent, registered or recorded delivery'. The acceptance was sent by ordinary post. The Court of Appeal held that the vendor's intention was to ensure that they received written notification of acceptance. The requirement to use registered or recorded delivery was more in the nature of a helpful suggestion than a condition of acceptance.

The core question however is whether the offeree must follow the prescribed method so that if he chooses another method which proves faster than the prescribed mode, is the offeror entitled to reject because there has been no strict compliance even though he had actual knowledge of acceptance by the offeree? The case of **TINN VS HOFFMAN AND COY (1873)** suggested that the moment when the faster message is got there appears to be 'consensus ad idem' so that there should be a contract.

In TINN'S case the offer called for acceptance by letter, and acceptance was made by telegram and it was held to constitute a valid acceptance.

Therefore the solution squarely rests on the offeror's objective in prescribing a particular mode:

- (1) Is it to secure a speedy acceptance? or
- (2) Is it to ensure acceptance in a particular form?

If it is (1), then a faster mode than the mode of offer will suffice, but if (2) the offeror would not be liable if he repudiates in case the offeree uses another mode, for obviously the offeree has not complied with the terms of the offer.

RULE IV: **WHERE NO MODE OF COMMUNICATION HAD BEEN PRESCRIBED**

Communication of acceptance will depend upon the nature of the offer and the circumstances in which it is made. Thus if the offer is made orally an oral reply is expected;; if it is written, a written reply is expected. The same applies if some

instantaneous mode of communication is used e.g. telephone or telex.

In all these cases the offeree must ensure that his acceptance is understood by the offeror i.e. that it is actually received by him. This is because almost invariably the offeree would know that his attempt to communicate his acceptance has not been successful. Hence, there would be no contract since acceptance is incomplete until received by the offeror.

In Entores Ltd. vs Miles Far East Corporation (1855) - telex message was used, and it was held that such modes would be construed as if the two parties were in each others presence. The plaintiffs, a London based company, made an offer to the defendants' agents in Amsterdam by means of a telex message. The dutch agents accepted the offer by the same method. The plaintiffs later alleged that the defendants had broken their contract and wished to serve a writ on them, which they could do if the contract was made in England. The Court of Appeal held in favour of the plaintiffs. The decision of the court was expressed by Parker L. J. in the following terms: "So far as telex messages are concerned, though the despatch and release of a message is not completely instantaneous, the parties are to all intents and purposes in each others presence just as if they were in telephonic communication, and I can see no reason for departing from the general rule that there is no binding contract until notice of acceptance is received by the offeror. That being so and since the offer was made by the plaintiffs in London, the contract resulting therefrom was in London." The approach of the Court Appeal was confirmed by the House of Lords in **Brinkibon Ltd. vs Stahag Stahl (1982)**.

RULE V

COMMUNICATION THROUGH THE POST - "THE POSTAL RULE PRINCIPLE"

This applies where no particular method of communication is prescribed, and the parties are not, to all intents and purposes, in each others presence. The rule that an acceptance

speaks only when it is received by the offeror may be impracticable or inconvenient where the negotiations have been conducted through the post.

Therefore where the offeree posts the letter of acceptance in circumstances which justifies that posting is to be the mode of communication. When does acceptance take place? There are at least 4 solutions:

- (1) When the letter is posted
- (2) When it is brought to the actual notice of the offeror
- (3) When it arrives at the offeror's address
- (4) When it should in the ordinary course of post have reached him.

The first solution (i.e. when the letter is posted) was adopted in **Adams vs Lindsell (1818)**. The plaintiffs were woolen manufacturers in Bromsgrove, Worcestershire. The defendants were wool dealers at St. Ives in Huntingdon. On September 2nd, 1817, the defendants wrote to the plaintiffs, offering a quantity of wool on certain terms and requiring an answer "In course of post". The defendants misdirected their letter which did not reach the plaintiffs until the evening of September 5th. The same night the plaintiff posted a letter of acceptance, which was delivered to the defendants on September 9th. If the original offer had been properly addressed, a reply could have been expected on September 7th and meanwhile on September 8th, not having received such reply, the defendants had sold the wool to the third party.

The core question was whether a contract of sale had been made between the parties before September 8th. It was held that there was a valid acceptance when the letter was put into the post: the defendants' sale to third party therefore amounted to breach of contract.

Lord Herschell in **Henthorn vs Fraser (1892)** stated the rule clearly as follows:

"where the circumstances are such that it must have been within the contemplation of the parties that

according to the ordinary usage of mankind the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted".

The rule in **Adams vs Lindsell** which also gained support in **Henthorn's case** was followed in **HouseHold Fire Insurance Company vs Grant (1879)** - where the letter of allotment was never received, but it was held that the contract was made the moment the letter was posted (Grant made an offer to buy shares from the company and the letter of allotment which constitutes acceptance did not reach him).

In 1880, In the case of **Byrne vs Van Tiehoven (1880)** Lindley J treated the question as to when acceptance takes place beyond dispute. He declared: "*it may be taken as now settled that, where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even though it never reached its destination*".

In this case: the defendants posted a letter in Cardiff on October 1st addressed to the plaintiffs in New York, offering to sell 1000 boxes of tinplates. On October 8th, they posted a letter revoking the offer. On October 11th the plaintiffs telegraphed their acceptance and confirmed it in a letter posted on October 15th. On October 20th, the letter of revocation reached the plaintiffs.

It was held that the revocation was inoperative until October 20th, that the offer, therefore continued open up to that date, and it had been accepted by the plaintiff in the interim. Any other conclusion would therefore lead to inconvenience and injustice, hence acceptance takes place after it is posted.

It must however be stressed that:

- (1) The rule applies only where it is reasonable to use the post as a means of communicating an acceptance.

- (2) The letter must have been properly posted, i.e. put in control of the post office. (Properly stamped addressed and posted).
- (3) It is effective even though it may be lost through accident in the post or delayed.
- (4) A posted acceptance, prevails over a withdrawal of the offer which was posted before the acceptance but which had not yet reached the offeree, when acceptance was posted.

However, the rule as to postal acceptance taking effect when posted as noted above is subject to a number of exceptions:

- (i) Where the express term of the offer specified that acceptance must reach the offeror it will not apply.
- (ii) Where its application would produce manifest inconvenience and absurdity.
- (iii) The solution is to be applied only where no particular mode of communication is prescribed by the offeror.

As shown in the case of **Holwell Securities Ltd. vs Hughes (1973)**: Dr. Hughes had agreed to grant Holwell Securities Ltd. an option to buy his premises. The option which would constitute the acceptance, was exercisable 'by notice in writing' to the doctor within six months. The company posted a letter of acceptance but it was never delivered. The Court of Appeal held that no contract had been formed. Since Dr. Hughes had stipulated actual 'notice' of the acceptance, the postal rules did not apply. The acceptance would only be effective when received by the doctor.

Finally, it must be noted that the foregoing communication rule applies only to communication of acceptances; offers and revocation of offers must be communicated to the effective.

TERMINATION OF OFFER REVOCATION

An offer can be terminated where the offeror revokes the offer

before acceptance. The following rules govern revocation.

RULE I

AN OFFER MAY BE REVOKED AT ANY TIME BEFORE ACCEPTANCE. This rule has been established in the case of **Payne vs Cave**. It is irrelevant that the offeror promises to keep the offer open for a given period. Such a promise is part and parcel of the original offer, which must stand or fall as a whole unless the offeree can show that he offered different consideration for the promise to keep the offer open.

In **Routledge vs Grant (1828)**. The defendant offered on March 18th to buy the plaintiff's house for a certain sum, "a definite answer to be given within six weeks of the date."

HELD: the defendant could withdraw at any moment before acceptance, even though the time limit had not expired. The plaintiff could only have held the defendant to his offer throughout the period, if he had bought the option by a separate and binding contract.

RULE II

AN OFFER IS MADE IRREVOCABLE BY ACCEPTANCE. In **Great Northern Railway vs Witham (1873)**: The plaintiffs advertised for tenders for the supply of stores. The defendants made a tender in these words: "I undertake to supply the company for twelve months with such quantities of specified articles as the company may order from time to time". The company replied by letter accepting the tender, and subsequently gave various orders which were executed by the defendant. Ultimately, the company gave an order for goods within the schedule, which the defendant refused to supply.

The company succeeded in an action for breach of contract. The tender was a standing offer, to be converted into a series of contracts by the subsequent acts of the company. The order prevented '**protanto**' the possibility of revocation, and the defendant, though he might regain his liberty of action for the future, was meanwhile bound to supply the goods actually ordered.

RULE III
REVOCATION OF OFFER MUST BE COMMUNICATED TO THE OFFEREE IN ORDER TO BE EFFECTIVE. *Byrhe vs Vantiehoven (supra)*. But in the case of unilateral contracts, the case of Carlill clearly shows that once performance has started it would not be proper to revoke the offer. See further the case of **Errington vs Errington (1952)**: where a father bought a house for his son and daughter-in-law to live in. The father paid a deposit of one third of the purchase price and borrowed the balance from a building society. He told his son and daughter-in-law that if they paid the mortgage he would convey the house to them when all the installments had been paid. The Court of Appeal held that the father's offer could not be revoked provided that the son and daughter-in-law continued to make the mortgage payments.

BUT WHAT CONSTITUTES REVOCATION?

The law requires that the offeror must prove:

- (a) an act manifesting revocation and
- (b) that the offeree has knowledge of the act.

The offeror need not communicate the revocation directly provided he can prove that the offeree knew of such revocation through a trustworthy source. This was clearly illustrated in the case of **Dickinson vs Dodds (1876)**: The defendant, on Wednesday, offered to sell some property to the plaintiff, the offer to be left open until 9am Friday. On Thursday, the plaintiff heard from a Mr. Berry that the defendant had sold the property to someone else.

Nevertheless the plaintiff wrote a letter of acceptance which was handed to the defendant at 7am on Friday morning. The Court of Appeal held that as the plaintiff had heard about the revocation from Berry, who was a reliable source, the offer was no longer available for acceptance. No contract had been formed.

(2) LAPSE

Lapse of an offer also terminates an offer. An offeror may fix a specific time at the expiration of which the offer automatically lapses e.g. promise to keep an offer open for a week; and at the end of the week, the offer lapses. Lapse of time may also be inferred and whether a reasonable time has elapsed will depend upon the circumstances of each case e.g. case of perishable goods will lapse faster than non-perishable goods.

In Ramsgate Victoria Hotel vs Montefiore (1866): The defendant offered to buy shares in the plaintiff's company in June. The shares were eventually allotted in November. The defendant refused to take them up. The Court of Exchequer held that the defendant's offer to take the shares had lapsed through an unreasonable delay in acceptance.

Note: What is reasonable time as stated before in the absence of any specified time in the offer depends on the circumstances of that particular transaction.

(3) BY REJECTION

An offer may also be terminated by rejection. Rejection of an offer takes place when:

- (i) the offeree gives notification to the offeror of his unwillingness to accept the offer
- (ii) the offeree, although interested in the offer gives certain conditions to the offeror.
- (iii) the offeree makes a counter offer **Hyde vs Wrench (1840) (supra)**.

(4) FAILURE OF A CONDITION ATTACHED TO THE OFFER SUBJECT TO WHICH THE OFFER WAS MADE:

An offer may be made subject to a condition and if the condition does not materialize the offer is incapable of being accepted. The condition may be implied by the courts as well as expressed by the offeror. In the case of **Financings Ltd. vs Stimson (1962)**. The defendant saw a car at the promises of a dealer on 16 March. He wished to obtain the car on hire purchase. He signed a form provided by the plaintiff finance

company which stated that the agreement would be binding only when signed by the finance company. The defendant took possession of the car and paid the first installment on March 18. However, being dissatisfied with the car, he returned it to the dealer two days later. On the night of 24-25 March the car was stolen from the dealers premises, but was recovered badly damaged. On 25 March the finance company signed the hire purchase agreement, unaware of what had happened. The defendant refused to pay the installments and was sued for breach of the hire purchase agreement. The Court of Appeal held that the hire purchase agreement was not binding because the defendant's offer to obtain the car on hire purchase was subject to an implied condition that the car would remain in substantially the same state until acceptance. Since the implied condition had not been fulfilled at the time the finance company purported to accept no contract had come into existence.

(5) DEATH:

The effect of death in respect of termination of an offer raises some practical problems. But the following rules are clear:

(I) OFFEROR'S DEATH

An offeree cannot accept an offer after he becomes aware of the offeror's death. But what is the position where he is not aware of the offeror's death?

It is generally accepted that death automatically terminates offer and knowledge is irrelevant - This is the view of Mellish L.J. in **Dickinson vs Dodds (1876)**.

But the case of:

Bradbury vs Morgan (1862) seems to suggest the contrary. In this case the plaintiffs continued to supply goods on credit to one of the customers not knowing that the guarantor of the customers account had died. When the plaintiff became aware of the death, he sued the defendants who were executors of the deceased's estate.

HELD: the plaintiffs succeeded. A continuing contract of guarantee is enforceable against the estate of the deceased's

guarantor where an acceptance of an offer to guarantee fresh credit have been made in ignorance of his death.

Therefore the effect of the offeror's death varies according to the nature of the transaction and this falls into 2 classes:

(A) If the acceptance called for by the offeror and attempted by the offeree consists of something that can be accomplished without the existence of the offeror's personality, then the death of the offeror does not terminate the offer automatically. The contract can still be satisfied out of his estate (by the deceased's personal representatives) until it is notified to the offeree. **Bradbury vs Morgan** supports this position.

(B) Where the acceptance called for consists of something which cannot be accomplished without the existence of the offeror i.e. personality is in issue (personal service or supervision) then the death of the offeror automatically terminates the offer.

(II) OFFEREE'S DEATH:

The death of the offeree puts an end to the offer for the living persons to whom the offer is made can no longer accept.

(6) ACCEPTANCE

Finally, once an offer is accepted by the offeree, there is a binding contract and both parties must perform their part of the contract otherwise liability for breach arises.

Great Northern Railway Coy. vs Witham (1873).