

CHAPTER ONE

LAW IN SOCIAL CONTEXT

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1.0 INTRODUCTION

1.0.1 Definition of Legal Method

The phrase 'legal method' is made up of two words -'legal' and 'method.' The word "method," in ordinary parlance, means a way of doing something or the quality of being well planned and organized.¹ The word "legal," which is an adjective, connotes something connected with the law.² Law operates in a society based on certain methods, that is, in accordance with certain processes, which must be properly understood for law to be put to best uses as an instrument of social control. Legal method can therefore be defined as an attempt to explain or analyse the technique of 'thinking like a lawyer.'³ In other words, it is learning to study the use and construction of legal rules, with a view to gaining insight into how law is planned and organized to achieve its objectives in a society.

This task, like most tasks, is not as easy as it may seem. This is mainly because everyone approaches the subject of legal analysis from different perspectives based on their background and experiences. In that type of situation, the existence of multiplicity of approaches is inevitable. However, there are some areas of agreement or consensus in virtually all the legal analysis.

According to a writer:

"We cannot see the world as it is because we face it in a 'contaminated' vein. Namely our conceptual scheme (or a certain interpretation of it) and our biological constitution condition certain perspectives of the world and not others. When we face legal orders and legal method, we are placed in a kind of second world that is not possible without the first. Nevertheless, this normative world, let us say second world, has some special features, inter alia, the primacy of practical reason over theoretical reason ..."⁴

This chapter examines the different perspectives and the areas of convergence of jurists and authors on the definition, evolution, functions and objectives of law in the society.

¹ A.S. Hornby, *Oxford Advanced Learner's Dictionary*, Oxford University Press, United Kingdom., 6th ed., 2000, p.740.

² *Ibid*, p.673

³ A. Holland & J.S. Webb, *Learning Legal Rules*, Blackstone Press Ltd., London, 1991, p. xi.

⁴ S. Urbina, *Legal Method and the Role of Law*, Kluwer Law International, United States, 2002, p. ix.

1.0.2 Nature and Importance of Legal Method

When a fresh law undergraduate reads through a legal document, textbook, statute or case law, he or she may initially be perplexed by some legal terminologies, principles and rules of law that pervade the work. Holland and Webb captured the initial feelings of such a student in the preface to their book thus:

"If you are new to studying law as an undergraduate or postgraduate student, the chances are that you are finding it (or will find it) a distinctly different experience from any previous education you have had, if not disconcerting one!"⁵

Such an experience should not discourage any student. The study of law may be fairly compared to the study of a foreign language. It proceeds in an orderly fashion, one step at a time. When studying a language, the student must first master the alphabets, then proceed to acquire a rudimentary vocabulary. Combining the vocabulary with the basic rules of grammar, the students learn to express thoughts in the foreign language. Similarly, in the law school setting, the student must first learn to read, analyse and brief judicial opinions before mastering other skills.⁶

A research conducted in Britain and United States of America, has shown that for many students, learning to 'think like a lawyer' is the most important of legal skills; however, many also feel that it is not sufficiently emphasised in the curriculum.⁷ The research also revealed that "the most common problem a law student faces is not 'what are the rules', but rather 'how do I make use of the rules?'"⁸ Therefore, unless something is done to address the problem, most students may be able recite the principles of law correctly and pass their examinations, yet unable to apply those principles to their daily realities.

Legal method has been introduced into the curriculum of legal education, as part of the response to fill this important gap. The subject is therefore of a recent origin. It is not about learning specific laws or branch of law as in Law of Taxation, Criminal Law, Law of Torts, Law of Contract, Company Law etc, which are called substantive law subjects. The importance of the course can be summarized as follows:

- To give a proper understanding of the nature, functions, breadth and diversities of law;
- To introduce certain fundamental concepts and terms which students are bound to come across in their lectures, statutes, legal treatises or discussion in 'learned' circles.
- To enhance students knowledge and appreciation of the various methods, processes, strategies or techniques which the law has evolved to achieve its objectives;
- To expose students to the reasoning method of lawyers, legislators and judges in the making, execution and interpretation of law;
- To lay a foundation for the ability to construct arguments about the facts of a case and how and why a particular authority should or should not be applied in that case; and
- To deepen students' knowledge, understanding and application of various legal rules.

⁵ J.A. Holland & J.S. Webb, op. cit. p. xi.

⁶ M. A Berch, et al., Introduction to Legal Method and Process West Group, 2002, P.1.

⁷ J.A Holland & J.S. Webb op, cit. p. xi.

⁸ Ibid

After being exposed to the foregoing introductory concepts, students should desire to know more about law as well as develop a sense of humility concerning the nature and extent of their knowledge.⁹ To a certain extent however, they are generally better equipped to analyse a fairly complex problem, arrive at a correct solution and explain it clearly to others without much difficulty. In the words of Ginsburg:

"This approach is not only user friendly, it should also prompt students to take a critical distance from the wielding of the methods. In this way, one hopes, the students may avoid (or at least broaden) the tunnel vision that so often afflicts first year students. They should learn that thinking like a lawyer does not mean letting oneself be seduced by the artifice of enunciating and manipulating categories. Nor does it mean diligently and complacently working one's way through a text without stepping back to inquire whether the resulting interpretation makes any common sense."¹⁰

1.0.3 What is Law?

The question "what is law?" is almost irrelevant to a practising lawyer who is more concerned with a much more specific question: what is the law relating to this particular situation? However, the question is an extremely important one to a fresh law undergraduate because there are different ideas of law, most of which are inadequate to give an accurate account of law.

The word, 'law,' can be used in either a general or technical sense.¹¹For instance, we can talk of the law of a particular club, law of God, law of demand and supply etc. These are instances of law in a general sense. Our main concern in this course is the technical meaning of law, which is provided below. Therefore, the easiest and the most practical way of beginning to define law, is by looking at the institutional sources of law devoid of any associated philosophical problems. In this regard, law can be defined as "a rule or body of rules made by institutions, bodies and persons vested with the power to make such rules which are binding and enforced among the members of a given state or society". Only law so created can be said to be legally binding upon the individual, or even upon the State itself.¹² It should be pointed out that our definition here is ad hoc. At the end of our discussion in this chapter, students should be able to attempt their own definition of law.

1.0.4 Features of Law

⁹ B.D. Fisher, Introduction to the Legal System - Theory, Overview, Business Applications, West Publishing Co.,1977, p. vii.

¹⁰ J.C. Ginsburg, Legal Methods, Cases and Materials, The Foundation Press Inc, New York, 1996, p.iii.

¹¹ A.O. Obiade, The Nigerian Legal System, Spectrum Law Publishing, Ibadan, 1979, p .. 3

¹² I.A. Holland and I.S. Webb, op. cit., pp. 1-2

There are many philosophical questions that may arise from our attempt at defining law such as: what distinguishes law from other social rules? What are the interrelationships between law and other social factors in the society? The answers to these questions will be examined later. It is sufficient at this stage to consider the features, which may be deduced from the definition.

1.0.4.1 Law is a Body of Rules

It is easy to assume that 'law' can be found in one book, which will give answer to every legal question.¹³ If this were true, there would be little need for lawyers! Clearly it is not true.¹⁴ As a matter of fact, law consists of multifarious rules, some of which are contained in several sources such as the Constitution,¹⁵ and several other statutes¹⁶ and cases decided by the courts in disputes involving individuals and individual and government, inter alia ..

1.0.4.2 It is Man-Made

Laws are rules adopted by the society to govern itself. Hence, law within the context of our definition cannot be regarded as God- given as contained in the holy books.¹⁷ Since law is man-made, man has the responsibility to determine to a large extent the content of the law of his society. If the law is bad or ineffective, man must take responsibility for it and cannot blame God or nature. Why some rules were given the force of law while others were not is a philosophical question that we are not concerned with at this stage. It suffices to say however that while many factors including religion, morality, customs and stage of socio-political development of a society usually have some bearing on the selection of the laws by which a society is governed, it must be realized that such values or rules are not laws unless they are traceable to the institutional sources such as the Constitution, statute, case law, delegated legislation among others.

1.0.4.3 It is Normative in Character

Law is rule or system of rules. A rule prescribes what activities may, should or should not be carried out, or refers to activities that should be carried out in a specified way. Because a rule guides us in what we may, ought or ought not to do, it is said to be normative.¹⁸ Law shares this

¹³ For instance, a layman may think that all the laws of a State are contained in the Constitution. This is incorrect. The constitution simply refers to the frame or composition of a government, to the way in which a government is actually structured in terms of its organs, the distribution of powers within it, the relationship of the organs inter se and the procedure for exercising powers. Hence, the laws that govern the day-to-day activities and conduct of individuals are contained in laws made by the legislature such as Sale of Goods Act, Criminal or Penal Code etc and case laws.

¹⁴ J.A. Holland and I.S. Webb, op. cit. p.1.

¹⁵ The current Constitution in Nigeria is the Constitution of the Federal Republic of Nigeria, 1999.

¹⁶ Statutes are laws made by the primary organ of government established by the Constitution to make laws which is the Legislature.

¹⁷ This refers to divine law in the sense of the Biblical and Quranic rules and injunctions.

¹⁸ P. Harris, op. cit. P2

characteristic with all other rules such as religious, moral and customary rules. The major distinguishing factor between legal and other types of rules is considered next.

1.0.4.4 It Has an Element of Coercion

Breach of legal rules is usually enforced by means of sanction or coercion through organized institutions such as the police force, law courts, tribunals, prisons etc. This is best illustrated with criminal law. According to a writer:

"We understand criminal law forbids certain criminal activities, as a set of rules defining the kinds of behaviour which, if indulged in, results in some form of official 'retaliation.'"¹⁹

This is the main distinguishing factor between law and moral or ethical rules which are 'enforced' (if enforced at all) through social opprobrium or loss of integrity in the eyes of the members of the public.

1.0.4.5 Territorial Limitation

Laws are usually made to guide the conduct of the people of a particular society or territory and are binding on the people within that society or territory. A classic example is found in the principle of international law that "no country ever takes notice of the revenue laws of another country." In *Holman v Johnson*,²⁰ the Plaintiff had sold tea to the Defendant in Dunkirk with full knowledge that the tea was to be smuggled into England. In a suit for the recovery of the price, it was objected that the contract was void for illegality. The court rejected this contention based on the above principle. It was held that the seller had no concern in the smuggling scheme and did not violate any English law. To uphold the claims of the Defendant would be tantamount to giving the English law extra territorial effect.

While the law of two or more communities may be similar, there are usually some marked differences depending on their respective needs, objectives, cultures, religion, political and socio-economic values. This is so even between different communities in the same country. For instance, in the area of criminal law and criminal procedure in Nigeria, the *Criminal Code Act*²¹ and the *Criminal Procedure Act*²² apply in the Southern part, while the Penal Code (Northern States) *Federal Provisions Act*²³ and *Criminal Procedure (Northern States) Act*²⁴ is in force in the North. Each of the Criminal Code and Penal Code covers offences committed within the territory to which it applies and only within that territory. As a general rule, a Moslem from the

¹⁹ Ibid.

²⁰ (1775) 1 Cowp. 341, See also *Planche v Fletcher* 1 Dough. K.B. 251 where Lord Mansfield affirmed the dictum in Johnson's case.

²¹ Cap C38 Cap W3 LFN 2004.

²² Cap C41 Cap W3 LFN 2004.

²³ Cap W3 LFN 2004.

²⁴ Cap C42 Cap W3 LFN 2004

North would be safe from prosecution if he came to the South to commit adultery or drink alcohol.²⁵

1.0.4.6 Dynamic in Nature

Law is not static but dynamic. Since law is meant to regulate the behaviour of man in the society, the content of the law of each society usually changes as the social, political and economic world in which he lives changes. We have seen that one of the basic characteristics of law is its dynamic nature. The content of the law of any society is the product of the prevailing social, political, economic and cultural conditions at a particular time. Invariably, changes in the prevailing conditions sometimes occasion changes in the corpus of the law of the society. The contents of the law during the colonial rule were different from the contents after the attainment of independence in 1960. Similarly, the contents of the country's law during the military rule are fundamentally different from what obtained under a democratically elected government. Some changes are little more than passing fads, and make little impact upon the legal structure. But others bring with them more permanent and far-reaching effects.²⁶

1.1 THEORIES OF LAW

There are several generally accepted theories concerning the origin of law. A theory is a comprehensive explanation concerning some aspects of how society works. It directs one's thinking on the subject by offering explanation and allowing predictions to be made concerning the future contingencies. In short, a theoretical viewpoint governs the way that a social phenomenon is seen and understood. Where law came from and why it developed as it did are questions that can be approached by using theoretical perspectives of different writers.²⁷ According to a writer:

"In order to satisfactorily answer the question what is law, one must delve into jurisprudence. Jurisprudence is the study of legal philosophy. Since philosophy consists of one's belief about something, the full answer to the initial question 'what is law?' is provided by examining the belief of distinguished writers to see what they have perceived law to be."²⁸

The various beliefs of writers on law have come to be known as 'philosophies of law,' 'schools of jurisprudence' or 'theories of law.'

Although each legal philosophy is usually treated separately for the sake of simplicity, in reality, the idea of a Jurist may embrace different theories. It is also noteworthy that the theories have been applied in varying degrees by virtually all the legal systems in the world at different times in their legal history. A student should, therefore, not fall into the error of thinking that each

²⁵ C.O. Okonkwo, Okonkwo and Naish, *Criminal Law in Nigeria*, Spectrum, Ibadan, 1990, p. 11.

²⁶ P. Harris, *op. cit.*, p.14.

²⁷ W. Hazou, *The Social and Legal Statute of Women*, A Global Perspective, J 990, Praeger, New York, pp. 29-30.

²⁸ B.D. Fisher, *op. cit.* p.1.

philosophy is relevant for a particular legal system to the exclusion of others. It is also noteworthy that the philosophies are often implicit and not explicit.²⁹ For instance, a person may say, "I believe that the pro-democracy group was wrong to have organized the rally without police permit or the President has the power to introduce a fuel tax or government may increase the prices of petroleum products without informing the people". These statements implicitly espouse the Austinian Command Theory and yet the speaker never mentioned this expressly, and what is more, he may not even know that such philosophy exists.

Some of the important philosophies will now be treated briefly. It should be noted that there are many variants of each legal philosophy, but only the core beliefs will be treated here. Detailed analysis will be deferred to the Jurisprudence Class.

1.1.1 Positivist School

The word "positive law derives from the word "posit" which means "to put" or "to place." Positive law is, therefore, the law put, placed or imposed upon the situations by the rulers.³⁰ Some lawyers are content with the view that laws are the rules promulgated by the sovereign. The chief protagonist of this theory, John Austin propounded his 'Command Theory of Law' in his celebrated but controversial book *The Province of Jurisprudence Determined* where he defines law as, "a command set by a superior being to inferior beings and enforced by sanctions." The superior being is the sovereign, while the inferior beings are his subjects.

The sovereign authority may be vested in one person, a group of persons or many persons. Positive law, in short, is any law made by one legally empowered to make rules having binding effect on the population in general. Positive law, therefore refers to the Constitution, the statutes, enacted by legislature, the case laws made by judges, and the rules and regulations made by administrative agencies.³¹

The Austinian definition of law has the following elements viz: (i) The existence of a definite sovereign; (ii) the sovereign is without legal limitation in the exercise of power, i.e. he is above the law - the 'uncommanded commander' and (iii) the subjects must be in the habit of obeying him because of his coercive power to impose sanction.

The Austinian definition of law has been criticized on many grounds. First, Laws are not always couched in an imperative language such as "shall" or "shall not" as propounded by Austin. While some laws, especially some aspects of Constitutional Law may appear like commands,³² it is not true to say that all laws are command. For instance, rules relating to Wills do not compel a

²⁹ Ibid.

³⁰ Ibid., p. 10.

³¹ Ibid. p. 11.

³² For instance, Constitution of almost every State, if not all, imposes duty on certain office holders in form of command, e.g. S. 130(1) of the Nigerian Constitution, 1999, provides that, "There shall be for the Federation a President".

person to make a Will. The same thing applies to a marriage contract where an individual can choose to marry either under the Marriage Act³³ or under customary law.

Second, the Austinian School says law is what the sovereign says it is. That is, any authoritative lawmaker acting within the scope of its lawmaking powers has to be obeyed.³⁴ It does not examine the goodness or badness of the rules laid down or the political nature of the lawmaker - monarch, oligarch, or democrat or the moral character of the lawmaker, i.e. benevolent dictator, despotic monarch or oligarch. All that the positivists are concerned about is whether the lawmaker is the legally authorised lawmaker. Against this background, it does not require much imagination to realize that the theory can yield to or provide a ready justification for dictatorship or totalitarianism.

Third, the idea of an uncommanded commander is only possible in an absolute dictatorship where the society is governed not by law, but according to the whims and caprices of the dictator. Nobody, including the sovereign, is above the law even under a military government. This is because every exercise of governmental power must be in accordance with the law of the land. Cases abound where the actions of the military government have been declared ultra vires, null and void because of their non-conformity with the provisions of the law.³⁵

Fourth, Austin missed the point when he posited that everybody usually obeys the law because of fear of the sanction by the sovereign. Many obey the law not because of sanction, but because it accords with their normal way of life or because they see it as logical and agree with it in principle. For example, not all smokers refrain from smoking in public because of the existence of a law that prohibits smoking in public places. Similarly, not everyone refrains from committing murder because it is punishable under the law. Irrespective of the existence of law, some, either by natural inclination or belief are not predisposed to smoking in public or killing their fellow human beings.

1.1.2 Pure Theory of Law

Some lawyers are content to view law as a system of rules, leaving it to each legal system to decide for itself which rules its court will recognize. This School of thought is led by Hans Kelson. The pure theory of law postulated by Prof. Hans Kelson³⁶ disagrees with the command theory and describes it as nonsensical. For Kelson, law is a system of norms. A law is valid if it has been created by a norm which itself has been created by a higher norm within the legal order. The logical connection of norms in this order will continue until we arrive at a non-law created entity, which is called the grundnorm. While every other norm is generated from the grundnorm and their validity is traceable to it, the origin or validity of the grundnorm is not traceable to any

³³ Cap M6 LFN 2004.

³⁴ B.D. Fisher, *Ibid*, p. 10.

³⁵ For example, in Nigeria, the Supreme Court in *Lakantni v. A.G. (Western State) and Others* [1971] 1 U.I.L.R. 201 declared Forfeiture of Assets (Validation) Decree, 1968 No. 45 of 1968 null and void.

³⁶ (1881-1973).

norm. Thus, the norm forbidding the killing of another person in certain circumstances (murder) is valid because it is laid down in the Criminal Code.³⁷

The Criminal Code is valid because it was enacted by the legislature;³⁸ the law made by the legislature is valid because the legislature has been constituted and is functioning in accordance with the relevant laws; the constitution is valid because it has been promulgated into law as the Act of the people.³⁹

The main element of Pure Theory of Law is that the legal validity of each rule is determined simply by reference to the question whether it has been laid down, or posited, in accordance with whatever requirements as stipulated by legal systems in question.⁴⁰ Therefore, the theory has been criticised first, on the ground that it stresses the formal validity of law rather than its functions and effects in the society. That is, the theory does not concern itself with the content of the law, whether it is just or right, moral or immoral; any rule that satisfies the formal criterion so selected would be regarded as law. To this extent, it has failed to address issues that touch and concern the existence of human kind and may serve as a ready tool for dictators or totalitarians. Second, it is not easy, if not impossible, to determine the grundnorm in the modern society. The fiction that the Constitution is the grundnorm is only a legal fiction because it can be probed further, who created the Constitution? In the context of the Nigerian experience, is it the Military or the people?

Third, the theory that the Constitution is the grundnorm may hold good when there is abiding faith in the legal order. During a 'revolutionary' change of government, the validity of a norm depends on the effectiveness of a legal order and not the Constitution. As soon as the grundnorm ceases to command the maximum effectiveness, it is no longer the basis of the legal order.⁴¹ This can be illustrated with legal development during a military coup d'état. If the coup succeeds, certain aspects of the Constitution that are incompatible with military rules are usually suspended to pave way for the Command Structure of the Military Government. If the coup fails, the perpetrators may be prosecuted for treason and risk the imposition of death penalty.

1.1.3 Natural Law School

Due to the uncomfortable conclusion of the positivists and pure theories of law that any law which satisfies the appropriate technical criteria is valid, whatever its moral quality may be, many lawyers prefer to look outside the technical, definitional criteria of each legal system when seeking the distinguishing characteristics which mark out a rule as being a law. Historically, many who thought along these lines tended to speak in terms of natural law, against which laws made by humankind could be assessed for validity, and therefore the expression natural lawyers

³⁷ See section 315 of the Criminal Code Cap C38 LFN 2000.

³⁸ Section 4 of the 1999 Constitution vests the legislative power of the federation on the National Assembly.

³⁹ See Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999.

⁴⁰ I. McLeod, *Legal Method*, Macmillan Press Ltd. London, 1993, p. 6.

⁴¹ See *The State v Dossa*, (1968) 2 PSCR 180, *Jilani v Government of Punjab*, Pakistani CD (1972) S.c. 139.

is often used in contradistinction to positivists⁴² The Chief protagonists of the natural law school include Zeno, Thomas Aquinas and Grotius.

Reduced to its simplest term, natural law means what is 'fair', 'just' or 'right'. The protagonists of natural law theory hold that there are certain objective principles in every man, no matter his race or colour telling him what is 'fair, 'just' or 'right'; motivating him to do what is good and abstain from what is evil. Illustrating the natural law theory, Okunniga said:

"If ten men from different countries are put in separate rooms and each of them is asked in the language that he understands, whether it is good to steal, majority will say no."⁴³

These external principles telling man what is fair, good, just or right are referred to as natural law.

The natural law school posits that there are certain generally accepted fundamental principles inherent in human existence and all social groups. These principles emanated from some supernatural force or abstract universal truth and exist irrespective of any human enactment.⁴⁴ The principles can be deduced from nature, that is, from the nature of man, from the nature of society, and even from the nature of things, through reasoning. Hence, by a careful examination of the facts of nature, man can find the just solution to the social problems in his society. In other words, man, if guided by observation and reason, is capable of-making good and just law, which are in line with the law of nature. Man-made law should accord with the natural law otherwise such law should not command the obedience of the people.

The natural law philosophy has served as the basis for the development of the concept of equality, human rights, democracy etc. across the globe. It was invoked by the Americans in their war of independence from Britain;⁴⁵ by the French during the French Revolution; the Africans during their struggle for independence from their colonial masters. The people from the Niger Delta area in Nigeria are currently invoking natural law as the basis of their clamour for a more equitable share of the revenue from the petroleum resources derived from the area, or, in the alternative, the enthronement of a regime of resource control.

Natural law serves as a test for the 'validity' of man-made law. However, natural law philosophy stresses 'what ought to be done' and not necessarily what is done. In practice, the judiciary interprets what the law is and the executive enforces the same as contained in the various sources of law⁴⁶ and not natural law. Unless the principles of natural law are promulgated into law, their violation cannot be legally penalized.

The natural law philosophers looked to right reasoning as a guide for discerning the most perfect form of laws. Right reasoning, it should be pointed out, is a criterion that cannot be verified

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⁴³ A.O. Okunniga, jurisprudence (unpublished)

⁴⁴ W. Hazou, op. cit. p. 30

⁴⁵ See the Preamble to the Constitution of the United States of America

⁴⁶ In Nigeria, these include Statutes, English Common Law and Doctrines of Equity and Customary law.

through empirical scrutiny., and so it lends itself to the interpretation of the most powerful individuals in the society.⁴⁷

Another weakness of the natural law school is what is termed "the multiple conscience problem." That is, different individuals may have different conceptions of 'fairness,' 'rightness,' 'justice' with respect to the same issue. Two equally devout people can both assert that they are acting according to natural law even though they are acting in opposite manner. Consequently, the noble guise of natural law has been used to defend almost every ideology, ranging from absolute tyranny to democracy, slavery; colonialism; apartheid, liberation struggles etc. This is why the philosophy has been described as a harlot. Against this background, the theory could lead to anarchy if everyone is left to act according to the notion of what is "right" or "just" to him as dictated by his reason without any formal sanction. Little wonder that in practice, the courts interpret and enforce only the law that are written or objectively determined by the appropriate bodies in the society.

1.1.4 Historical School

This theory was developed to counter the widespread influence of the natural law school in the 17th and 18th century Europe in overthrowing the monarchs and creating egalitarian societies. Friedrich Carl Von Savigny,⁴⁸ a German aristocrat, played a prominent role in developing this theory. Since Savigny was an Aristocrat, he had an obvious interest in the maintenance of the status quo.

According to this theory, there is what is called the spirit of the people, *volkgeist*, which binds the people of a particular society together and distinguishes them from any other people. For instance, a German has a 'National Spirit', which makes him think that he is a German and not a French, and vice versa. Accordingly, before a law is made for a society, there must be a good understanding of the history of the people. In essence, for a law to be valid, it must accord with the history and the way of life of the people, i.e. their customs.

The historical school favours the evolution of law over a period of time as opposed to the concept of fairness, goodness and justice, etc., as espoused by the natural law school, which can lead to revolution. According to this theory, law should be a formal restatement of the customs prevalent in the society. This is because customs usually evolve over time through informal enforcement processes until they become part of everyday life or folkways.⁴⁹ It is therefore difficult, if not impossible to change the customs of the society except the generality of the people are in tune with the change. Otherwise, most people will either seek creative way to circumvent the law or disregard it.⁵⁰

The historical school tends to give the impression that it is the past and not the will and objectives of a society that determine its law and future. If the theory were to be followed

⁴⁷ W.Hazou, op. cit., p. 31.

⁴⁸ (1779 – 1861). See H. Kantorowicz, "Savigny and the Historical School of Law" (1987) 53 L.Q.R 326.

⁴⁹ W. Hazou, op. cit., p. 32.

⁵⁰ Ibid.

dogmatically, it may hinder the establishment of some desirable radical reforms, which may transform the society for the better.

The theory that law originates or should originate from customs is based on the assumption that the rules of customary law' are rational or fair. This does not necessarily follow in practice. Some customary rules have been used to subject some class of people to the status of servitude, prejudice women in inheritance and labour matters. With increasing diversity and sophistication of the modern society, law based on harmony of generally accepted traditions can no longer be taken for granted. A force that supersedes customs is therefore required to reconcile diverse customs and interests if cooperation and co-ordination are to be achieved.⁵¹ In Nigeria, rules of customary law are applicable if they meet certain tests.

The tests are that the rules must not be:

- (i) repugnant to natural justice, equity and goodconscience; and
- (ii) contrary to public policy; and
- (iii) incompatible directly or by necessary implication with any law for the time being in force.

1.1.5 Sociological School

Sociological jurisprudence rose to prominence from mid- nineteenth century into twentieth century.⁵²Eugene Ehrlich was the most prominent out of the European Sociological Jurisprudents. According to Ehrlich, law is based on what he called "facts of law," meaning how people acted. According to him, there is a relationship between law and conduct and that each affected the other. However, the society's conduct determines the rule laid down in legal sources such as statutes and decided cases. Therefore, it is the society's value and conduct, which determine what the law is and not the rules laid down by the sovereign. If then, law is widely or significantly at valiance with popular conduct and the law is unsupported, it is doomed as an instrument of social control.⁵³ His analysis was that one could not know the law of the society by merely reading through the formal legal sources. Rather, one should go to the society to appraise how that law is obeyed, ignored, executed, modified or supplemented by the society. In his words:

"The centre of gravity of legal development lies not in legislation nor juristic science nor in judicial decisions but the society itself."

The import of the above statement is that it is the living law that reflects the values and dominates the societal life.

⁵¹ Ibid.

⁵² B,D, Fisher, op. cit, p,16.

⁵³ Ibid.

There are many examples of Ehrlich's view that conduct determines the law in Nigeria. For instance, despite the legal and administrative structures established by Federal Government of Nigeria to combat corruption and corrupt practices, there is yet to be a substantial change in the orientation of public officers and an average Nigerian in this regard. Unscrupulous members of the Police Force still openly extort motorists by collecting money from them at several checkpoints. Little surprise therefore that Nigeria was recently rated as the third most corrupt nation in the world.

Similarly, although, the Child Right Act enacted in 2003 espoused beautiful ideas on the protection of the rights of a child in Nigeria, it is doubtful if the law had brought about rapid improvement in the lights of a child in real life. Hence, evidence of child labour and abuse is still prevalent in our big cities where children are used as house helps and aides to beggars.

However, the sociological school is not without its shortcomings. It is not true that conducts inexorably influence the law. There are instances where law influences conduct. For instance, car owners' register their vehicles because of legal requirements to do so and motorists stop at roadblocks because of the obligation imposed by law. There are occasions when the law will move ahead of the society with the aim of educating the society and changing the people's conduct.

Another shortcoming of the sociological school is that it is difficult to determine the extent to which law influences conduct because one would have to prove what would have happened had the law not been made formally which is an obvious impossibility.

Also, the school denies formal sources of law of any creative value. It is risky to some extent to "go with the flow" especially where there is law that penalises a particular conduct. There is always the possibility of being made a scapegoat even in few circumstances. In such circumstance, it will not be an excuse for anyone accused of breaking the law to argue that "everyone else is doing it."

Roscoe Pound, former Dean of Harvard Law School, was the greatest exponent of the school from the western side of the Atlantic.⁵⁴ His writings were mainly in the twentieth century. His sociological view of law was different from that of Ehrlich. His view is predicated on the basic premise that there are competing claims in the society to the limited resources available for the use of the society. He believed in satisfying human wants by balancing competing claims in such a manner that will result in doing the least harm or causing the least disruption to established institutions.⁵⁵ The institutional focus of Pound's theory was the court system, although other arms of government could use his balancing notion.

While the crux of Pound's theory was balancing competing claims against the others, he did not provide a scientific method of doing this. For instance, he did not identify these interests and

⁵⁴ Lloyds, *op. cit.*, p. 548. Other notable sociologists include Auguste Conte (1798 – 1892), Max Weber (1864 – 1920), Emile Durkheim (1858 – 1917), Eugene Ehrlich (1862 – 1922) etc.

⁵⁵ B.D Fisher, *op. cit.* p. 17

assign relative weights to them. In practice, the same competing claims might balance out differently at different times.

Pound places great value on stability, as the notion of balancing suggests. His idea seems to give more weight to the value, which would presumably prevail - rather than what is "right" or "fair."

For example, liberty could give way to security under Pounds' balancing approach. Also, his approach does not seem to encourage long-range planning. Rather, it panders to short-run expediency. Nonetheless, Pound's balancing theory has found favourable reception in the law courts as a means of resolving competing claims.⁵⁶

1.1.6 Utilitarian School

The chief proponent of this school is Jeremy Bentham (1748 - 1832). For him, the task of law is to promote communal utility. Utility in this context means that which affects people's happiness. Government, by making the proper law, should seek to promote the greatest good of the greater number of people.

Bentham identifies four main utilities, viz: security, equality, liberty and abundance, and gives priority to security among the four, puts liberty second and the other two last. In order to achieve its objectives, the law must balance the individual's interest with that of the communal interests. For instance, the law could allow security officers to search the premises of a person who is suspected to be dealing in narcotics or arms. Also, air travellers could be subjected to security checks at the airports as a matter of routine without any suspicion. Although the searches in these instances clearly interfere with the freedom of the individuals concerned, their freedom is sacrificed to achieve greater goal of security for a greater number of people and the society at large.

A major criticism of this school is that it fails to solve the problem of how the balancing of both individual and communal interest can best be achieved.

1.1.7 Functional School

This is an outgrowth of sociological school. The school is founded on pragmatism. The school considers law from the point of view of what the court will do with respect to a particular legal problem. This idea was best expressed by the distinguished United States jurist Oliver Wendell Holmes, Jr., who viewed law from the standpoint of the "bad man," saying that the bad man does not give "two hoots" about legal theories; all he cares about is what courts will do with respect to a particular matter.⁵⁷

It comes as a surprise - sometimes an unpleasant surprise - to lay people to learn that laws passed by legislatures do not address all legal problems. Judges have assumed the roles of making rules

⁵⁶ Ibid. pp. 17-18.

⁵⁷ B.D. Fisher, op. cit., p. 18

where legislatures have not spoken or where legislatures have spoken vaguely.⁵⁸ In short, the functionalist credo is that one has to wait for a court decision on his or her exact legal problems before one can know what the law is.⁵⁹

Notwithstanding what may be contained in the statutes and decided cases, one has to wait for a court's decision in the instant case before one can know what the law is. According to Oliver Wendell Holmes,⁶⁰ the school recognizes the law-making power of the courts, especially in cases where there are no applicable statutes or where the provisions are ambiguous.

One of the shortcomings of this school is that it focuses on the courts alone and neglects legislature and administrative agencies.

Such a limited view of the law is misleading in the sense that the court itself is a creation of the law (i.e. statute).

1.1.8 The Realist School

The realist school is of American origin.⁶¹ The realists in their analysis of the concept of law focused mainly on the court system - particularly trial⁶² courts with the ultimate objective of reforming the judicial system. The realists in their analysis of the concept of law focused mainly on the court system⁶³ - particularly trial courts with the ultimate objective of reforming the judicial system.

Their analysis focused mainly on the court system⁶⁴ - particularly trial courts with the ultimate objective of reforming the judicial system. They were of the view that in analysing law and the legal system, too much attention was often paid to the bare legal rules while enough attention was not paid to the human factors in the application of the rules to specific cases. Hence, they were of the view that the judicial process is not an objective exercise as it may look in the books.⁶⁵ This is because the judge and jury are often influenced by certain extralegal factors more than the evidence adduced at the trial and the arguments of the parties. In deciding cases, it was perceived that judges are unconsciously prejudiced in their decisions by extralegal factors such as their way of life, social and educational backgrounds, basic likes and dislikes, dress, skin, colour and age, the inclination to distinguish, ignore or interpret precedents and the personality of the accused and his lawyer. For example, the attitude of the court to a criminal case involving

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Both in his witness and in his long tenure as a Justice [of the Supreme Court of the US], Holmes played a fundamental part in bringing about a changed attitude to law", Lloyds, op. cit., p. 680.

⁶¹ Some writers are of the view that there is no such thing as a Realist School and that the so called realists are "experimentalists" and "constructive skeptics." Some are also of the view that the realist school is a combination of analytical positivists and sociological approaches to jurisprudence. See *F. Adaramola, Adaramola Basic Jurisprudence*, Nayee Publishing Co. Ltd., 2003, pp.318-9.

⁶² B.D. Fisher, op. cit., p.19.

⁶³ Ibid.

⁶⁴ B.D. Fisher, op. cit., p.19.

⁶⁵ F. Adaramola, op. cit., p.319

a lawyer who is a professional peer of the judge may be quite different from its attitude in a case involving a social miscreant popularly known as an "area boy."

The realists attacked all inequities in legal administration. The exponents of the American realism are Oliver Wendell Holmes, Justice Jerome Frank, John Chipman Gray and Karl Llewellyn.

The School developed in the 1920's and reached its zenith in 1930's. For instance, Justice Jerome Frank developed his view from observing trial courts decisions while serving as a federal appellate court judge. One of their main goals was to make judges conscious of their latent prejudices and there encourage more objectivity in judicial decisions.⁶⁶ The realists did not want the judicial system biased in favour of the "good boys" and against the "bad boys."

1.1.9 Which of these Theories is Best?

The various thinkers who propounded the above theories came from significantly diverse backgrounds and orientations. Some of them were academics of various disciplines such as law, history, philosophy etc., while others were clergymen, judges etc. The differences in their backgrounds and experiences undoubtedly informed their cardinal conceptions of law from different angles. For instance, a judge's conception of law would be different from that of a legislator; and their views would also be different from that of an accused. If a legislator or a judge should find himself in the shoe of an accused, his view of the law might become altered.

A good summary of this aspect of our study could be found in the comical story of five blind men who attempted to describe an elephant. Since they could not see, it then followed that they had to feel it only by touching the animal. One touched the body, the second the tusk, the third the tail, the fourth the leg and the fifth the trunk. When asked differently how the elephant looked like, one replied that it looked like python; another replied confidently that it looked like pillars, another said it looked like a strong rope and yet another said that it looked like a mountain. They were all correct, yet wrong. Their error was that each definition was dictated by the part of the elephant which each was able to touch and feel. Authors and jurists while attempting a definition of law often make this same mistake.⁶⁷

In view of the foregoing, it is preferable to submit that all definitions are arbitrary and ad hoc. No definition is universally accepted. There has not been any definition of law to end all definitions. In the words of Okunniga,⁶⁸

"Nobody including the lawyer has offered, nobody including the law is offering, nobody including the lawyer will ever be able to offer a definition of law to end all definitions."

1.2 THE EVOLUTION OF LAW

⁶⁶ Ibid

⁶⁷ A.O. Okunniga, op. cit.

⁶⁸ Ibid.

A solitary individual, e.g. a hermit, living in complete isolation from other human beings may behave the way he likes and do anything that catches his fancy within the limits of his mental and physical ability in his environment. This cannot be so if he lives with one or more persons regardless of the kind of relationship that exists between them, whether the other person is his wife, servant or family member. The reason is that once there exists a minimum level of socialization between, at least, two persons, some conflict of interests began to manifest.

Moreover, the instinct of self-preservation and egoism would, unless restrained, invariably cause one person to assert his power over another to dominate him. How much more when a number of individuals, families or groups are living together in a society! When socialization got to this level, some of the habits of the people began to crystallize into customs and rules. Initially when rules were broken, people administered justice by self-help through forcible reprisals and family feuds. For instance, the surest remedy for the owner of a stolen good was to overpower the thief and recover his property. If he had no superior power to dispossess the thief, then he would be left without remedy. The rule of force held sway during this period as the weak, the young, the aged and those who were deficient or less privileged in one way or the other, were subjected to all sorts of exploitation and deprivation. It eventually became a necessity for the society to be organized in such a way that the competing interests in the society would be harmoniously balanced.

At the initial stages of development, law consisted mainly of customary rules or practices and ethical values, which were administered by the monarch, or elders gathering at the village square to resolve disputes. Social order was thus maintained through a series of unorganised sanctions such as ostracism, ridicule, avoidance of favour, etc. In certain instances, the punishment inflicted was disproportional to the injury inflicted. The method of maintaining social order at that time had undergone many layers of development and reforms to become what we have today whereby law is administered by government through its agencies and officials such as the judiciary, police force, bureaucracy, etc.

1.3 FUNCTIONS OF LAW

Here, we are concerned with the most basic tasks or functions for law to perform. A particular law may be made with the object of achieving a particular objective such as to provide for the care and supervisions of a child and child justice administration,⁶⁹ to abolish obnoxious customary practices,⁷⁰ to make land for development available to all and promote fast and economic development at all levels,⁷¹ or to establish an institution of a government agency.⁷²

However, the totality of the law of any society can be said to always aim at serving the following broad purposes, among others.

⁶⁹ See Child's Right Act, 2003.

⁷⁰ See Abolition of the Osu System, Law of Eastern Nigeria No. 13 of 1956.

⁷¹ Land Use Act, Cap L5 LFN 2004.

⁷² See Niger-Delta Development Commission (Establishment Act), Cap N86 LFN 2004 and National Agency for Food and Drug Administration and Control Act, Cap N 1 LFN 2004.

1.3.1 Definition and Regulation of Social Relationships

Law plays an important role in the definition and regulation of different kinds of social relationships in the society between individuals and between groups.⁷³ For instance, law defines and protects the institution of marriage. While same sex marriage may be tolerated in some societies, the Nigerian law defines a marriage as an association between a man and a woman.⁷⁴ For a relationship to be legally recognised as such, it must meet certain essential requirements. Hence, a mere prolonged cohabitation between a man and woman does not make them a husband and wife. The rights and obligations of the family, as spouses and parents, are defined through law.⁷⁵ For example, parents have the right to moderately chastise their children or wards in almost all societies. The degree of such chastisement may however vary from one society to another. However, where an excessive or unreasonable application of force is allowed, abuse is inevitable.

In a wider social setting, the law guarantees freedom to associate but defines and regulates the manner of doing so.⁷⁶ For instance, there are certain requirements, which must be met before two, or more persons could operate as a company, a non-governmental organisation (NGO), a social, political and cultural society.⁷⁷ The laws of virtually every community outlaws groups or association formed with the objects of furthering illegal purposes such as terrorism, cultism, sabotage and subversion of government activities. It suffices to say however that there is usually no unanimity in the definition of these terms as what some regard as heroic may be regarded by others as subversive. For instance, it is difficult to define cultism or determine whether certain organisations are cultist organisations.⁷⁸ It is submitted that what is important is not so much what a group of persons profess to be, but the manifestation of their actions and the legal effect. If a group of the most pious men, women or young persons use their organization as a platform to commit arson, murder, raping, looting and other dastardly acts that offend against specific provisions of the law, it should not matter what name such an association is described, the members should be made to face the full wrath of the law.

76. 77.

78. It has generated heated controversy whether associations such as Rosicrucian (AMORC) and National Association of Seadogs (NAS) are cultist groups or not. See *Rosicrucian Order, AMORC (Nig.) v. Henry O. Awoniyi* 70rs (1994) 7 NWLR (Pt.35) 154.

⁷³ P. Harris, *op. cit.*,13

⁷⁴See Marriage Act Cap M6 LFN 2000 and the Marriage Laws of the various States.

⁷⁵ P. Harris, *op. cit.* p.13

⁷⁶Section 40 of the 1999 Constitution guarantees freedom of association.

⁷⁷See Companies and Allied Matter Act, Cap C20 LFN 2004.

⁷⁸ It has generated heated controversy whether associations such as Rosicrucian (AMORC) and National Association of Seadogs (NAS) are cultist groups or not. See *Rosicrucian Order, AMORC (Nig.) v. Henry O. Awoniyi* 70rs (1994) 7 NWLR (Pt. 35) 154.

Also, in a university community, the law defines and regulates the relationships between the institutions and its organs and the academic, non-academic staff, the students' body and members of the public at large. More specifically, there are regulations on the admission, registration, examinations, general conduct of students and the students' union and other social, cultural and political associations.

1.3.2 Identifications and Allocation of Official Authority

The law establishes or recognizes specific institutions, body of persons and individuals and vests in them with authority to exercise certain powers on behalf of the State or institutions. For instance, the Constitution establishes the legislative, executive and judicial arms of government and vests them with legislative, executive and judicial powers respectively.⁷⁹ While, the exercise of these functions may sometimes overlap, each arm of government is mandated to keep within the limits of its powers subject to the limit of the Constitution failing which their action will be *ultra vires, null and void*.

In most educational institutions in Nigeria, perhaps the first task usually undertaken by a class of freshmen is to appoint class representatives who would act on behalf of the class and liaise with the class and the lecturers and the Faculty at large. At a higher level, every department, faculty and the entire student body will also have their own association and officers to act on their behalf.

1.3.3 Dispute Settlement and Remedies

One of the basic functions of law is to establish a formal mechanism for settlement of disputes. Such institutions are usually in the form of law courts, Judicial and administrative tribunals, etc. Law also seeks to provide appropriate remedies where a party has suffered injury due to the action or inaction of the other. For instance, the law provides a civilized method of obtaining remedy where there is a breach of obligation in relation to contractual dealings.⁸⁰ The remedies for a breach of contract may be damages, specific performance, injunction, rescission and indemnity, among others, depending on the facts of each case.

The way a society goes about this task is often a function of the type of the society and the level of development. Societies can be broadly classified as (i) underdeveloped or community based and (ii) developed or complex. In the former, social relations tend to be fairly permanent. Indeed, the continued existence of the community-group depends upon the continued closeness of social ties and, consequently, in such groups the type of dispute settlement is often based on compromise.⁸¹ Since the parties do anticipate future relations, there is always the spirit of give

⁷⁹See sections 4-6 of the 1999 Constitution.

⁸⁰It is crude and criminal for a party to contract to hire assassins to kill the other party.

⁸¹81 P. Harris, op. cit, pp.14-15

and take. This is also true to some extent in the commercial sphere in relation to the settlement of certain commercial disputes.

However, in a modern, complex and stratified society, there are many disputes involving no desire or need by the parties to continue their relationship. For instance, if Mr. A is knocked down by the petroleum tanker belonging to an oil marketing company, and becomes paralysed as a result of injuries suffered in the accident, usually, Mr. A had no prior relationship with the company and anticipates no future relationship. Such cases, especially, where professionals such as lawyers are involved are usually settled on "winner takes all" basis. Hence, the attitude of Mr A may be to recover as much damages as possible from the company.

1.3.4 Change of Law

We have seen that one of the basic characteristics of law is its dynamic nature. The content of the law of any society is the product of the prevailing social, political, economic and cultural conditions at a particular time. Invariably, changes in the prevailing conditions sometimes affects the corpus of the law of the society. The content of the law during the colonial rule was different from the content upon the attainment of independence in 1960. Similarly, the content of the country's law during the military rule is fundamentally different from what obtained under a democratically elected government. Some changes are little more than passing fads, and make little impact upon the legal structure. But others bring with them more permanent and far-reaching effects.⁸² The law must establish the procedure for changing the old rules and provisions of the law. Some may require mere subsidiary legislation such as ministerial order depending on the degree of changes to be effected. Fundamental changes in the law may require new legislations or amendment of the Constitution. Section 9 of the 1999 Constitution contains provisions on the procedure for amending the Constitution, while Section 58 contains provisions for making new legislation. Currently, serious concerns have been expressed about the efficiency or otherwise of the political and fiscal structure of Nigeria culminating in clamour for the convocation of a sovereign national conference.

1.4 OBJECTIVES OF LAW

What does the law seek to achieve by performing the basic functions discussed above? In other words, what are the main objectives of law generally?

1.4. 1 Law and Order

The classical function of any government is to maintain law and order, protect lives and properties within its territory and ward off external aggression. This can be described as the foremost justification for modern government. The opposite of order is anarchy and chaos. Even in times of war, law still has a basic role to play in ensuring that certain minimum standards of rules of behaviour are maintained by the warring parties. For instance, certain rights are accorded

⁸² Ibid, p.14.

to civilian entities such as religious houses and vulnerable groups of people such as the aged, pregnant women, children and members of relief agencies such as the United Nation's Organizations, the Red Cross, etc.⁸³

While the primary aim of law is to maintain order, it suffices to say that this laudable objective may not be achieved unless the law is well administered and enforced without fear or favour. Anarchy or chaos is therefore not due principally to the absence of laws but its ineffectiveness or non-enforcement.

1.4. 2 Law and Justice

In ordinary parlance, law and justice are synonyms. However, justice is the correct application of a law, as opposed to arbitrariness.⁸⁴ Law seeks justice. Law is therefore not an end in itself, but a means to achieving justice.

Notwithstanding the simplicity of the above statement, it would be misleading to assume that the concept of justice means the same thing to everybody at all times. Obviously, the word would mean different things to the employer and the employee; to the university authority and the students' union leaders; to the rich and the poor; to the plaintiff and defendant. This is because many factors contribute to the moulding of one's conception of justice such as - home background, educational qualification, religious belief, enlightened self-interests, personal idiosyncrasies, socio-political affiliation, etc. The problem is further complicated by the fact that the society cannot devise rules of law that will fully satisfy the often competing and conflicting demands of everyone at all times.

Somebody or some group must 'win' and another must 'lose'. The question is the margin of the victory or defeat of the different interest groups. Hence, the society must, through the instrumentality of the law, make a choice as to which of the conflicting interests must prevail and how to balance the conflicting and competing interests.⁸⁵ In doing so, certain interests which may be equally meritorious but regarded as less deserving of priority at a particular time may be sacrificed for some other interests.

There are various theories of justice but only two of them will be considered here.

1.4. 2. 1 Formal Justice

This theory postulates that the court must apply law strictly without any regard to any extra-legal considerations. In other words, the judge is bound to give effect to the law as it is and has no discretionary power to mitigate its harshness. Justice is said to be done when a case is decided

⁸³See generally the Geneva Convention

⁸⁴Ross, quoted from L.B. Curzon, *op.cit.*, p.231.

⁸⁵Roscoe Pound regards individuals claims and interest which exist independently of the law and which are "pressing for recognition and security": R. Pound, *Jurisprudence* vol. 3, pp. 287-291

strictly according to law. Perhaps, a classical example of the application of formal justice could be seen in the case of *Awolowo v. Federal Minister of Internal Affairs*.⁸⁶ In that case, a popular political leader from the old Western Region was charged with the offence of treasonable felony punishable by either death or life imprisonment. The learned trial judge was reported to have said, "my hands are tied" meaning that whatever his sympathies for the accused might be, he was nevertheless constrained by law to convict him.

Many reasons have been adduced to justify this mechanical approach in the exercise of judicial power. Formal justice, it is said, ensures the clarity and certainty of the law. According to Lord Eldon in *Shedden v. Goodich*:⁸⁷

"It is better that law should be certain than that every judge should speculate upon the improvement in it."

The theory has also been justified on the ground that it makes for impartiality and independence in adjudication since a judge is denied the opportunity of showing partiality to either of the parties.

1.4.2.2 Substantive Justice

This theory requires that where the strict application of the law may produce manifest absurdity or injustice, the judge may consider some extra judicial factors in interpreting the law in order to arrive at a just decision. This is the attitude that led to the development of the doctrine of equity. The practice of liberally interpreting the provisions of the law by a judge to advance substantive justice is now commonly known as judicial activism.

1.4.3 Law and Freedom

The desire of man to be free is innate. Man in his quest for freedom has waged relentless war against domination of different kinds through the ages in form of revolution or protests.⁸⁸ Law recognizes the freedom of individuals in the State and seeks to regulate the exercise of that freedom in a way that will advance the interests and objectives of the individuals and the State.⁸⁹ Freedom can be classified into economic, political, social, cultural, religious, intellectual etc.⁹⁰ For instance, it was the efforts of the African nationalists that led to the struggle for the independence of their countries from the colonists in the early and mid-20th century, which eventually led to the political independence of all the African countries.⁹¹ Also, it was the desire

⁸⁶(1962) L.L.R. 177.

⁸⁷(1803) 32 E.R. 441 at p. 447.

⁸⁸For instance, the French Revolution and the American's War of Independence.

⁸⁹See, generally Chapter IV of the Nigerian Constitution, 1999.

⁹⁰See, e.g. the International Convention on Civil and political Rights, 1966 and International Covenants on Economic, Social & Cultural Rights, 1966.

⁹¹For example, Nigeria attained independence on October 1, 1960.

of workers to be free from the economic exploitation of employers that led to the formation of the trade unions⁹² to strengthen their bargaining power.

The promotion and protection of this freedom are fundamental to the normal existence of man.⁹³ It is now beyond doubt that to leave that freedom totally unrestricted would encroach on the freedom of others and lead to a situation of anarchy and chaos. The question, however, is that to what extent should the society attempt to limit the personal liberty of individuals? This will, inter alia, depend on the nature of socio-political structure of the State and its economic policy. For instance, the degree of freedom open to people in a Socialist State will be remarkably different from that of a Capitalist State.

It is however now universally agreed that there ought to exist a certain irreducible minimum area of personal liberty which must be granted to every individual for him to live a normal life,⁹⁴ and such liberty must not be encroached upon by the State⁹⁵ without adequate remedy for the victims.⁹⁶ These rights are now popularly known as fundamental human rights, which usually form one of the key features of most written constitutions across the globe.⁹⁷

We must hasten to say that the fundamental human rights are not absolute, in the sense that they are still restricted in certain ways to ensure the freedom of others or facilitate certain State actions. This is achieved by striking a balance between the competing interests. For instance, the freedom of speech does not include the freedom to speak or write a malicious false statement about another person. Therefore, the freedom of speech must be balanced with another person's right to be free from defamation of character.

We will now examine some aspects of human endeavour to see how the law has struck a harmonious balance to guarantee the freedom of individuals.

1.4.3.1 Freedom of Contract

Generally, a person has the freedom to make any contract he chooses. He can buy or sell at any price, where or when he wants and he can refuse to make a contract if he does not wish to. This is the basis of the free enterprise philosophy, which is regarded as one of the highest values of a developed society capable of accelerating economic growth.

⁹²E.g. the Nigeria Labour Congress in Nigeria and the International Labour Organisation on the international scene.

⁹³In the opinion of a former Chief Justice of Japan, "Functional human rights [freedoms] were not created by the state but are external and universal institutions, common to all mankind and antedating the state and founded on natural law".: (1972) 16 J.A.L. No.2, p. 131, quoted with approval by Dr.T.A. Aguda, The Judiciary in the Government of Nigeria (1983) p. 41.

⁹⁴Universal Declaration of Human Rights, 1948.

⁹⁵Akoklzia v. C.O.P [1984] 5 N.C.L.R., 836.

⁹⁶For instance, S.46 of the 1999 Constitution makes provisions for redress and legal aid.

⁹⁷For instance, the Bill of Rights has been incorporated into the 14th Amendment to the constitution of the U.S., 1987. Fundamental Human Rights provisions are contained in. Chapter IV of the Nigerian Constitution, 1999.

1.4.3.2 Limitation of Freedom of Contract

A number of limitations have been imposed on the freedom of contract. The courts and the legislature have combined to invalidate certain contractual terms, which are considered harmful to other social values in the society or to the interest of other persons. These include the following:

- (i) a contract will be void if it contemplates the commission of a crime or is contrary to public policy;
- (ii) the law sometimes seeks to control the prices of certain goods which are considered essential; and
- (iii) the law may disallow a trader to use a trade name or trademark which closely resembles that of an existing trader. ⁹⁸

1.4.3.3 Political Freedom

Political freedom includes the rights to vote and be voted for; or the right not to vote at all, the right to be member of a political party of one's choice or the right not to join any party. The political rights may be limited in the following ways, among others:

- (i) certain categories of people may be disqualified from voting e.g. infants,⁹⁹ lunatics etc;
- (ii) certain criteria may be stipulated for the registration of political parties,¹⁰⁰ and
- (iii) certain people may be disqualified from seeking election to some offices. ¹⁰¹

1.4. 4 Law and the State

The notion of the 'State' occupies a strategic place in legal theory.

This is partly because the functions, which the State performs in the society often, do not lend themselves to easy answer.¹⁰² What then is a State?

⁹⁸See section 30(l)(d) Companies and Allied Matters Act, Cap C20 L.F.N.2004.

⁹⁹For instance, SS. 77(2) and 117(2) of the Nigerian Constitution, 1999, provides that "every citizen of Nigeria, who has attained the age of eighteen years residing in Nigeria at the time of the registration of voters for purposes of election to a legislative house, shall be entitled to be registered as a voter for that election". The express mention of "every citizen ... who has attained the age of eighteen years" is an exclusion of every citizen who is below the age of eighteen years based on the rule of *expressio unius est exclusio alterius*.

¹⁰⁰See section 222 of the 1999 Constitution.

¹⁰¹Ibid, sections 66,107,137 and 182.

¹⁰²A. Uchegbu, The Jurisprudence of the Nigerian Legal Order, Ecovatch Publication Limited, Lagos, 2004, 197.

Like the concept" of law itself, there are several concepts of a State.¹⁰³ Greg has modified the definition of a State in the Montevideo Convention of 1933 thus.¹⁰⁴

"A State, for the purposes of international law, is a territorial unit, containing a stable population under the authority of its government, and recognised as being capable of entering into relation' with other entities with international personality.¹⁰⁵

A State is, therefore, an organized political community consisting of four basic elements namely (i) a definite territory, (ii) population, (iii) government and (iv) sovereignty.

While many political theories have been developed about the emergence of and how best to organize a State,¹⁰⁶ it is the law that ultimately defines the political structure and organization of a State. For instance, section 2 of the 1999 Constitution established Nigeria as a federal system thus:

"2(1) Nigeria is one indivisible and indissoluble sovereign State to be known by the name of the Federal Republic of Nigeria.

(2) Nigeria shall be a federation consisting of States and a Federal Capital Territory."

It is also the law that defines the extent of the powers of each organ of government and regulates their inter-relationship with each other.¹⁰⁷ If an organ of government exceeds the scope of its power, the purported exercise of power would be declared null and void and of no effect whatsoever. Thus, the State is created by the society through the law. Sovereignty is part of the attributes of a State because it, also through the law, enjoys a near-monopoly of the power to use force to command obedience within its territory and ward off external aggression.

A State is a political entity conferred with certain rights and bearing duties under the law. Being an artificial entity or creation, a State must act through some human agents. The structure through which the human agents act is called "the Government." Government is, therefore, the machinery for the administration of the State. It is platform through which the general policy guidelines of the State are accomplished. The Legislature, Executive and Judiciary and their agencies such as Ministries, parastatals, the Courts, the Armed Forces and Police are component parts of a government. The processes for the emergence, composition and functioning of different arms of government may vary from country to country, just as there are various forms of governments. A State does not lose its personality simply because its government is

¹⁰³. Some see a State as "power system" some as "welfare system" and some as a "warfare system". There is also the concept of a state in international law and in traditional theory. See generally, A. Uchegbu, op. cit. pp.196- 230.

¹⁰⁴The defects contained in the definition contained the Montevideo Convention see M.O.V. Gasiokwu, op. cit., pp.16-21.

¹⁰⁵D.W. Greg, International Law, (1976) Butterworths, 93. Cited by M.O.V. Gasiokwu, op. cit., p.21.

¹⁰⁶Such as Democracy, Feudalism, Capitalism, Socialism and Communism. See for instance, the Social Contract Theories of Thomas Hobbes (1588- 1689), John Locke (1632-1704) and Jean Jacque Rousseau (1712-1777).

¹⁰⁷See A.G. of Ogun State & Ors v. A.G. of the Federation & Ors. [1982] 3. N.C.L.R. 166; (1982) 1-2 S.C. 13.

oppressive, fascist or racist for international law, as a rule, pays deaf ears to the internal affairs of a State, so long as the interests of other States are not affected.¹⁰⁸

Although the law may proclaim the purposes and objectives of the State in laudable terms such as "to promote certain fundamental objectives and do justice to all manners of men,"¹⁰⁹ the reality, in most cases is that a few dominant class(es) often manipulate the machineries of the States for the promotion and perpetuation of their class interests. Therefore, the concept of a State constitutes and will continue to be one of the basic problems of any society.

1.4. 5 Law and Legitimacy

In the early period of legal system, legitimacy was based on charismatic qualities of the particular leaders and traditional rulers. Gradually, it became a matter of law, meaning a thing in accordance with the law or rules.¹¹⁰

It is therefore part of the functions of law to prescribe the lawful and regular ways of exercising powers and functions of the State.

For instance, section 1(2) of the constitution of the Federal Republic of Nigeria, 1999, provides that:

"The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution."

Consequently any unsuccessful coup attempt is treated as treason and is punishable with death.¹¹¹ Experience has, however, shown that this provision by itself cannot prevent the actual occurrence of any *coup d' etat* and neither does it render a successful coup illegal.

In the modern period, legitimacy does not rest on mere legality but what Farrar and Dugdale called "impersonal rational authority."

That is, the rule of law accepted both by those who administer the system and by the population at large."¹¹² This perhaps explains why wide spectrum of the Nigerian society are clamouring for a convocation of Sovereign National Conference to fashion out a new constitutional and political structure for the country notwithstanding that the President had set up series of Constitutional Review Committee. By their agitation, the people are implicitly questioning the legitimacy and credibility of the Constitutional Review Committees and the National Assembly to carry out such exercise. Osipitan put it pungently when he said:

¹⁰⁸A. Uchebu, op. cit. p.197.

¹⁰⁹See generally the Fundamental Objectives and Directive Principles of State Policy of Nigeria in chapter IV of the 1999 Constitution,

¹¹⁰ AS, Hornby, op. cit. p.674.

¹¹¹Sections 37 and 38 of the Nigeria Criminal code.

¹¹²I.H. Farrar and A.M. Dugdale, Introduction to Legal - Method, (1990), Sweet and Maxwell, London: p.II

"If we opt for the corporate existence of Nigeria, an avenue must be provided for dialogue on the terms and conditions of Nigeria's continued existence as a nation. The Constitution Review Committees set up by the President and the National Assembly are definitely not the solution to the nation's constitutional problems. The National Assembly is also not the appropriate forum for these problems to be exhaustively addressed. We need a forum where the representatives of the all stakeholders will convene to address the nation's problems and arrive at a consensus on political restructuring and the terms of the continued corporate existence of Nigeria."¹¹³

1.4. 6 Law and Sovereignty

There was a time in the political history of the world when there were no States such as Nigeria, Ghana, Britain, United State etc., in the sense that we understand it today. What existed at that time were the secular authorities of Princes, Lords, Pope and Bishops.

Dulaure once asserted that Louis XIV interrupted a judge who used the expression, "The king and the state," by saying, "I am the state."¹¹⁴ Also, Kings in African traditional setting were regarded as demi-gods and second to none. During those periods, the rulers wielded absolute powers, basing their authority to rule on divine rights.

In addition, it was Jean Bodin,¹¹⁵ a French writer, who introduced the doctrine of sovereignty into the Western political theory. As the society progresses through civilization, several theories have been developed on how to curtail the power of those in authority. Such theories include the social contract theories, the rule of law,¹¹⁶ separation of powers,¹¹⁷ and principle of legality,¹¹⁸ etc. Through many years of struggle and revolutions, sovereign power in most countries of the world has been wrestled from the hands of few individuals and vested in the people collectively who now express 'their sovereign powers through their representatives in government. At this stage, the doctrine of state sovereignty could be said to have emerged. Section 14(2)(a) of the 1999 Constitution unequivocally vests sovereignty in the people of Nigeria thus;

"Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority."

¹¹³T. Osipitan, "An autochthonous Constitution for Nigeria: Myth or Reality?", University of Lagos Press 2004 Inaugural Lecture Series, p.58. Osipitan however considers a Constitutional Conference as a preferred option to Sovereign National Conference because of the constitutional problems posed by the word. "Sovereign".

¹¹⁴<http://education.yahoo.comlsearch/bfq?lb=q&p=num%3A772.15>, Dulaure, History of Paris, 1863, p. 387.

¹¹⁵*Ibid*

¹¹⁶A.V. Dicey in his Law of the Constitution, 1881

¹¹⁷Originated from John Lock as seen in Second Treatise of Ci vii Government, Chapters 12 & 13; and developed by Montesquieu, The Spirit of the Laws Book XI (1949), Chapter 6

¹¹⁸*Nullum Crimen Sine Lege.*

Law validly made through the representatives of the people in the legislature or their delegates in appropriate circumstances are part of the expression of their sovereignty. The ultimate expression of the sovereignty of the people is their power to change elected leaders either through peaceful means or violent means, where peaceful means is made impossible.

1.5 THEORIES ON THE FUNCTIONS OF LAW

Having examined the major functions and objectives of law, it suffices to say that different people have different views as to the functions and objectives of a particular law or law in general. Some notable theories have been developed on the functions and objectives of law in a given society. Unlike the theories of law which focus on the origin of law, the theories considered in this section focus on the functions of law in the society.

1.5. 1 Consensus Model

This model perceives law as protecting social values to which everyone in the society subscribes.¹¹⁹ The chief protagonist of this model is Talcott Parson. He views the society:

" ... as basically unitary. Parliament represents us all, the executive acts in the common interest, ... the law is equal and just to all and is administered without fear or favour for the common good Conflicts that there are will be on personal level."¹²⁰

To what extent is the above prognosis correct? It does not require much imagination to realise that it is misleading to present any society as having "a monolithic, universally shared value system". If this were true, there would be no dispute either between individuals or a group of individuals on issues. For instance, the current deregulation policy of the Federal Government of Nigeria has been hailed by people and stridently criticised by some others.

There is no rule of law, however altruistic and well thought out it may be, that will keep everyone happy. The very creation of legal rules is an indication that the society recognises the inevitable fact that there will be some people who may not agree with the content of those rules. The consensus theory was led into its conclusion because it concentrated its analysis on those elements within the society where there are obviously the need to maintain order and equilibrium while ignoring elements which tend towards social conflict and disintegration. The approach of the consensus theorists can be likened to that of a political leader in Nigeria who constantly emphasises factors that unite the people at the expense of other equally important factors that distinguish and divide them.

A critical examination of some elements or rules that are presented as areas of consensus may reveal that they are nothing but group, sectional or personal interests, which have been successfully presented as basic interest of all the society.

¹¹⁹P. Harris, *op. cit.*, p.16.

¹²⁰Cited in P. Harris, *op. cit.* pp. 16-17.

Also, other areas of apparent consensus may be the result of complex historical processes whereby certain interests have become embodied in legal and other social institutions because of certain economic, social, historical and political structures of the society.¹²¹ For instance, because oil has been the dominant source of revenue for all the tiers of government, it may seem to have been generally accepted that the ownership of oil should be vested in the Federal Government, while the oil producing states should be entitled to certain extra revenue based on derivation. This however does not mean that this is the optimum constitutional arrangement possible or that there is genuine consensus on the issue. Rather, the majority who are from the non-oil producing areas might have been able to foist the arrangement on the minority from the oil producing areas.

Based on the foregoing reasons, among others, some have rejected the consensus theory as the correct theory of how the society achieves social stability and equilibrium.

1.5.2 Conflict or Pluralist Model

This theory denies that there is 'shared value system' in our society. Rather, the theory accepts the existence of conflicting groups, all of which are assumed to have more or less equal bargaining-power and that the constant interaction and negotiation between the groups help to attain social stability and equilibrium. This theory views the state as a 'neutral arbiter' - taking no side in these conflict situations, but merely providing the machinery of conflict-settlement either through political debate and policy-making by the government.¹²²

This theory has also been faulted on some grounds. First, it is erroneous to assume that the different interest groups in the society possess equal power to influence law-making and implementation of those laws. Rather, the dominant groups are the ones that control the economic or political institutions of the society. According to the Pareto Theory, ten per cent of the people in the society own and control ninety per cent of the resources of the society, while the remaining ninety per cent of the people own just ten per cent of the resources. How feasible is it then for these two broad groups of people to wield the same power and influence in the society when majority of the ninety per cent are poorly fed and clothed?

Also, the structure of the machinery for conflict settlement in a society may be skewed in favour of some than the other with implications for access to justice. For instance, in most common law jurisdictions, including Nigeria, a litigant requires the services of a lawyer to plead his case and such services often do not come cheap. Also, the entire structure, including the language of the judicial institutions, sometimes seem foreign and elitist that few people approach them for the settlement of disputes.

1.5.3 Open Model

¹²¹P. Harris, *op. cit.* p.20

¹²²*Ibid*

This model posits that the consensus and conflict model represent two extreme positions of what obtains in reality and tries to strike a balance between them. According to this model, conflict is expected to continue in different forms between interest groups, but it is assumed that those conflicts can be resolved through a legitimate process. There will be a basic agreement that conflict- resolution can be achieved within a framework of negotiation; arbitration, judicial decision and electoral battle, backed up by strike but without resort to revolution.¹²³

1.5. 4 Marxism

According to Karl Marx, a German Philosopher and social scientist, social stability and equilibrium is achieved in a society through the exploitation of the working class by the capitalist class.

The capitalists occupy their positions in the society through the systematic subjugation of the interests of the working class. Marx proffered answers to the reason why so many people in the working class seemed to have accepted the political and economic domination of a few capitalists. First, the ruling class has control of the instruments of coercion such as the army, the police and the law. Second, the ruling class also controls, through the various public and private institutions, the dominant ideas, opinions, and attitudes about how society operates or should operate. In other words, "the ideas of the ruling class are in every epoch the ruling ideas or ruling intellectual force."¹²⁴ According to Marx, the exploitation would continue as long as bitter revolutionary confrontation could be avoided, and the most effective way of avoiding this is for the capitalist classes to maintain the control of the official state institutions.

A major criticism of the Marxist theory is that there is no guarantee that an overthrow of the ruling class and the enthronement of the working class will really lead to equality or equal treatment as inequality is said to be more natural than equality. If all men were forcibly made to be equal, assuming this is possible; the facts of life will invariably create a new measure of inequality among them. Consequently, the Marxist theory is viewed by some as an invitation to revolution, which may beget further revolutions and ultimately lead to political instability.

1.6 LA W AND MORALITY

Besides law, moral principles and standards are also preconditions for any society. Hence, every society must have its own moral rules and standards. This is why Phil Harris defined morality as "code of beliefs, values, principles and standards of behaviour, some versions of which are found in all social groups."¹²⁵ We must, however, constantly bear it in mind that the concept of morality is a relative term in the sense that different individuals and groups often have different

¹²³ R. Dahrendorf, *Class and Class Conflict in an Industrial Society*, (1959) 'Routledge & Kegan, p. 17. Cited in P. Harris, p.18.

¹²⁴ P. Harris, op. cit., 35.

¹²⁵ Ibid. p. 34.

ideas about the rightness or wrongness of particular forms of behaviour. This is what is called the relativity of moral ideas.

Morality has been defined as the principles concerning rights and wrong or good and bad behaviour. They are principles for describing or evaluating the degree to which something is right or wrong, good or bad.¹²⁶ Morality is the ultimate principle and criterion whereby social behaviour is judged. Usually, the criterion is higher than the standard of behaviour established by the law.

Every social group creates and establishes certain core values and 'standards of behaviour whose infraction is seriously frowned upon through social condemnation, which may take various forms. For instance, virtually every society condemns and penalizes stealing and murder. The social condemnation of the deviant by other members of a community serves to maintain and reinforce the values against which the defiant has offended, and so plays an important part in the maintenance of the social order. Over time, such standards become formally established in the law with the punishment prescribed. Lord Devlin underscored the need for every society to scrupulously preserve its common morality in the following words:

"Society disintegrates from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that the society is justified in taking the same steps to reserve its moral code as it does to preserve its government. .. The suppression of vice is as much the law's business as the suppression of subversive activities."¹²⁷

There are, therefore, moral rules on virtually all aspects of human endeavour including family, business and political lives.

This brings us to the discussion of the idea of relativity of morality further. While the overwhelming majority of the people in the society may agree that murder and stealing are immoral and should be punishable through the formal instrument of law, there are usually some other matters where there is no such "consensus". For instance, disrespect of elders, wearing of 'seductive' dresses, especially by ladies and sale of gun by a single businessman to parties in a fratricidal war. Because of a degree of subjectivity that sometimes surrounds a particular moral rule, the consequences for breach of a moral rule largely depends on the degree to which the idea has gained acceptance in the society.

As the society advances, develops and becomes more diffused, the moral standards on some issues may become gradually lowered or even abandoned. For instance, the concept of respect for elders has become relaxed in large cities like Lagos, Port Harcourt, Warri, Kano and Jos compared to the villages and rural areas where the communities are still relatively simple and compact. This is however not to deny that there are some individuals or group of individuals who still cherish these moral standards and try to live by them.

¹²⁶AS. Hornby, Oxford Advanced Learner's Dictionary, (2000), Oxford: Oxford University Press, 6th ed., p. 761.

¹²⁷Lord Devlin, The Enforcement of Morals Oxford University Press, 1959, p. 4. Quoted from, P. Harris, p.43.

It is important to consider the processes whereby a particular moral value, rule and standard is created, and eventually embodied within the law especially where there is wide divergent views on the morality of a particular issue or matter, for example, on abortion, abolition of capital crime, dress code, etc. On this type of sensitive issues, there are usually groups of people who are passionately involved in articulating and defending their positions. For instance, those who are against abortion equate it with murder and are of the view that liberalizing abortion will lower the moral standards of the society. On the other hand, those in favour of abortion have hinged their argument on the liberty of a woman over her body including the right to choose to have the baby or not. At any particular time, the law may be in favour of one of the views than the other depending on which is the dominant force in the society or strikes a balance between them. Assuming that the law strikes a balance, each of the opposing view will form a pressure group and use their group as a platform to articulate their views and mobilize the support of more people in the society especially the political class to adopt their viewpoints by enacting it into legislation. Eventually, one group succeeds or gains an advantage over the other depending on the current dominant ideas in the society.

1.6.1 Individual Liberty v Public Morality

Inevitably, there is a clash between the advocates of personal liberty and vanguards of protection of public morality, especially on what has been called 'crimes without victims.'¹²⁸ Such crimes include drug addiction, abortion, homosexuality etc. On one hand, some have argued that such crimes do not harm anyone, except the participants themselves and occur through the willing participation of those involved. Consequently, there is no victim of the crimes who goes to lodge a complaint to the Police thereby making the enforcement of such crimes difficult. Some have argued on the other hand that such activities are anti-social and if not checked have the tendency of corrupting other members of the society who may want to go into them. However, the debate between who is right and who is wrong and how to balance the competing interest of individual right and public morality continues.

In Shaw v Director of Public Prosecutions,¹²⁹ Shaw had published a booklet entitled 'The Ladies' Directory in 1962 in which he listed and advertised prostitutes, together with photographs and descriptions of their particular sexual predilections and practice. Shaw was charged with the offence of 'conspiracy to corrupt public morals'. The last time anyone was prosecuted for the offence was in the eighteenth century. Shaw contended that the offence was outdated and urged the court not to enforce it. Shaw was convicted by the Trial Court and unsuccessfully appealed against his conviction to the Court of Appeal and finally to the House of Lords. In upholding his (Shaw's) conviction, Viscount Simonds held that the court had "a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order, but also the moral welfare of the State."

¹²⁸E. Schur, *Crime Without Victims*, 1965, Prentice Hall.

¹²⁹[1962] A.C. 220

It must be noted that what the court frowned at in the case was not act of prostituting itself, but manner of its public advertisement.

According to Viscount Simonds:

"Let it be supposed that at some future, perhaps early date, homosexual practices between adult consenting males are no longer a crime. Would it be an offence if, even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement?"¹³⁰

In 1967, the *Sexual Offences Act* was passed, which provided, among other things, that homosexual acts in private between consenting adults male were no longer a crime. In *Knulier v Director of Public Prosecutions*,¹³¹ the appellants published in their magazine *International Times* in 1973, advertisements placed by readers to contact them for homosexual purposes. Following the reasoning in the *Shaw v DPP*, the House of Lord held that Sexual Offences Act did not grant the publishers the indulgence to publicly encourage homosexuality. The publishers were therefore convicted for the offence of conspiracy to corrupt public morals. According to Lord Reid:

"I find nothing in that Act to indicate that Parliament thought or intended to lay down the indulgence in these practices is not corrupting. I read the Act as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no license is given to others to encourage the practice."

What therefore emerges from the foregoing is that law can be used, to regulate and protect public morals from the corrupting influence of others. The challenge however is to mobilise the public opinion not only in condemnation of such acts but also get it enacted into law by the legislative body. Furthermore, the law when enacted must be enforced; otherwise, we may have a situation where the moral code is observed only in its breach and not its observance.

While the process may look simple enough in theory, it may be Herculean in practice. For instance, although some tertiary institutions have introduced dress code in their institutions, to what extent is the regulation being complied with in practice. Beside the problem of enforcement, some have also expressed concern on the constitutionality of such regulation.

1.7 QUESTIONS AND EXERCISES

1. John, Tade and Haruna are students of the Faculty of Law, Jesse University. John was in part One while Tade was in Part Two. On a particular Saturday night, John and Tade returned from a disco party at about 2.00a.m and put on the light in their room and began a hot argument about events in the Faculty since they resumed. John complained about the nature of legal method saying "the course is too dry and technical." Tade agreed with John and frankly admitted that he was constrained to 'cram' the course when it was giving him too much problem. He however

¹³⁰ *Ibid.*, p. 268

¹³¹ [1973] A.C. 435,

quickly added with a sense of pride that he ultimately scored 60% in the course. Haruna, who was already fast asleep was awakened by the argument of John and Tade. Haruna reminded the duo of the University's regulation that all rooms' lights must be put off by 12.00 midnight to allow the occupants to sleep in peace. When his counsel was ignored, Haruna angrily called them "lawless lawyers". John who was a member of a Karate Club in his secondary school days pulled Haruna out of the bed and beat him to a pulp. Haruna vowed to retaliate. Unknown to John, Haruna is a leader of a campus secret cult. Advise the parties.

Hints

- The question revolves round the nature and usefulness of legal method as a subject and the nature of law.
- Explain "legal method" and why it has been introduced as an introductory course. Tade is better off if he reads and understands it.
- Law is a pre-requisite for any society be it a State or University. John and Tade had breached the norm of the University that "all lights must be out by 12.00 midnight" and liable to the sanction that may be prescribed by the University regulations. Legal sanction is however imposed within a formalised structure.
- Therefore, Haruna ought to have lodged complaint to the University's authority instead of abusing John and Tade.
- Nevertheless, the assault of Haruna by John is condemnable and reminiscent of the primitive theory that might is right.
- In the same vein, Haruna who plans to retaliate ostensibly through the co-operation of members of his gang seems to have the same mentality as John. Haruna is advised to report the incident to the appropriate authority instead of taking law into his own hands.

2. Critically comment on the various theories of law. Which of them do you consider to be a better view?

Hints

- In an attempt to define law, various writers have expressed their opinion on what law is or should be doing in the society. The various beliefs have come to be known as "Philosophies of Law" or "Schools of Jurisprudence."
- Although the theories are usually treated separately in text books for the sake of ensuring clarity, in practice, the idea of a writer may overlap different theories. Also, the philosophies are usually implicit and not explicit.
- Briefly state the main idea of the various theories and dwell more on their shortcomings. This is the heart of the question.
- Conclusion: each of the philosophies has its strength and weaknesses. There is no better view in that none is entirely right or wrong. All the theories have been applied and are still being applied by different legal system in the world depending on the aim of a particular law.

3. Wing Commander Duru, the new Military Administrator of Etsako State has recently commissioned a 50 twin-duplex complex in State's Housing Estate called "Duru Gardens." A duplex was let out a subsidized rate of N200, 000.00. Most of those who applied for and were allocated the houses were "ex- this," "ex-that" money bags" who already owned several houses in different parts of the State. The commissioning was almost marred by protest from about 3,000 poor fishermen who were dislodged by the State's Environmental Task Force from Kakoko, a slum in Etsako State and are yet to be compensated. The group was questioning the rationality of such a huge investment of the taxpayer's money on a tiny few in the State in view of the dire need of the majority. The commissioner of Police who was present at the ceremony blurted out to the leaders "how dare you challenge the authority of His Excellency." When the protesters refused to be pacified the Commissioner read the Riot Act to them and arrested their leaders for staging public rally without police permit. The protesters maintained that they did not require any permit from either the police or anyone to exercise their God given right.

Discuss the various theories of law which are espoused by the foregoing facts.

Hints

- Philosophies of law reflect the beliefs of different distinguished writers on the definition of law or what law is doing or should be doing in the society. The philosophies, which often overlap, are implicit and not explicit.
- The philosophies espoused by the facts of this question are mainly three, viz: utilitarian school, analytical positivist school and natural law school.
- Explain the three legal philosophies in detail and relate them to the facts of the question.
- The protesters are of the view that the resources of the state should be used to promote the greatest good of the greatest number of people. Utilitarian School.
- The Commissioner of Police was of the view that no one can question the power of the Military Administrator to select the State's priority - Austinian Command Theory.
- Also, the Commissioner's demand for the police permit espouses Kelson's Pure Theory of Law that every norm must be traceable to a higher norm within the legal order.
- The protesters' reference to their God given freedom of expression as a higher value of what is right and just espouses the Natural Law Philosophy.
- Conclusion: Note that none of the philosophies is either totally right or wrong. A student will be expected to draw his conclusion based on his own philosophy of law.

4. Jero, aged 42 years is the leader of the Action Delta Youth Movement, which has led many popular agitations against the neglect of the Niger Delta Area by the Federal Government of Bafana Bafana and the oil companies operating in the area. The Movement is also protesting against the unjust present federal structure particularly the constitutional provisions, which vests all the mineral resources in Bafana Bafana in the federal government. Jero's profiles as a courageous fighter has risen in the country and abroad so much that his movement has been assured of the solid support of about 3 countries including United States of America. These developments have emboldened certain members of the movement to suggest that the people of

Delta Area should secede from the federation. Jero on his part insisted that it is better to 'compel' the country to convoke a sovereign national conference to consider the political restructuring of the country among other things.

Discuss the legal issues involved in the above facts within the context of the nature and the functions of law.

Hints

- The facts of the question revolve round the functions of law, and the relationship between law and the state, law and Justice, Law and Freedom, and Law and Sovereignty.
- There are many political theories on how the state can be organized but it is the law, usually through the Constitution that defines the political structure adopted by a state. Bafana Bafana is a federal state vesting, inter alia, all the mineral resources in the country in the Federal Government to the exclusion of the co- ordinate units.
- Law seeks Justice. Therefore whatever political structure adopted by law should be just.
 - Justice is however an elusive concept. It is difficult to devise a rule of law that will please everyone. Law must therefore try to balance all the competing interests in the society.
 - Law grows and changes as man's concept of justice changes. The popularity of the agitation of the Niger Delta Movement both home and abroad could be an indication that time may be ripe to readjust the federal structure of Bafana Bafana.
 - While Jero and members of his group are free to express their displeasure this must be done within the confines of the law. The two options being contemplated within the group are not without legal implications.
 - Secession is a form of revolution which is not envisaged by the ' Constitution and to that extent illegitimate and illegal. Furthermore, the option is fraught with a lot of risks especially if the attempt is unsuccessful.
 - However, if the secession effort is successful and becomes popular at home and abroad as the facts of the question tend to suggest it will, then the issue of legality will have to pave way to the popular demand of the people of Niger Delta.
 - The moment this is done a new legal order will be established in the area displacing the old one by the Federal Government of Bafana Bafana.
 - Jero's view that a sovereign national conference be convoked is tandem with constitutionalism. If this is supported by the Federal Government, it could lead to amicable resolution of most if not all the major controversial issues.

1.8 FURTHER QUESTIONS

1. Identify the theories of law espoused by each of the following statements:-

- A lawyer told his client, a notorious "Area Boy" standing a criminal trial before a High Court to dress responsibly and not to wear his dark glasses when coming to give evidence in his defence.

- "The word of the king is law. Long live the king"
- "Bail is free in theory and not in practice." Also, if bribery is an offence, then why are the police openly collecting bribe from the motorists.
- Mr. A's case may be bad, but it can make a lot of difference if he is defended by Chief Warren, a brilliant and celebrated human right lawyer, and tried by Justice Adeami, who is a born again Christian.

The Council of the University has approved the commercialisation of campus accommodation in line with the Federal Government policy. Students who cannot afford the new rates should seek off-campus accommodation. No form of negotiation will be entertained from any quarters.

2. Compare and contrast the following:

- (a) The command Theory and the pure Theory of Law.
- (b) Sociological School and Historical School.
- (c) Natural Law and Command Theory.
- (d) Functional School and Realists.

3. Law has been described as an all-pervading subjects touching on virtually all aspects of human life and even all other subjects. Examine five non-law subjects and five aspects of human life and describe how they are connected with law.

CHAPTER TWO

ASPECTS OF LAW

Sesan Fabamise & Abiola Sanni

2.0 TYPES OF LAW

Charles Louis de Second and Baron de Montesque in the Spirit of the Law I wrote:

"Laws in the wider possible connotations are any necessary relation arising from a thing nature. In this sense, all beings have their laws; the Deity his laws the material world its laws, the intelligences superior to man his laws, the beasts their laws, man his laws ..."¹³²

From the above, we can see that the use of the word "law" is diverse. It is therefore necessary to consider the various types of law in order to deepen our knowledge of the nature of law within the context of our study.

There are different types of law viz:

- (a) Eternal law.
- (b) Divine law.
- (c) Natural law.

¹³²Montesque The Spirit of Laws, Hafner 2nd ed., 1949, p.2.

- (d) Human or positive law.

2.0.1 Eternal Law

The word "eternal" derives from eternity. It literally means something that has always existed, has never changed and will always exist. Hence, eternal laws are laws that are constant, everlasting and universal.

The Dominican Jurist, St. Thomas Aquinas (1224-1274) defines law as:

"The exemplar of divine wisdom as directing the motions and acts of everything."¹³³

Thus, eternal law is said to be the foundation of all other laws. That is, every rational law derives more or less from the eternal law. According to Aquinas,

"The natural law is nothing but a participation of the eternal law in a rational creature. To him therefore, eternal law comprises God-given rules governing all creation."¹³⁴

2.0.2 Divine Law

The literal meaning of divine law is Law of God or law from God. A perfect example of divine law is the Ten Commandments contained in the Holy Bible.¹³⁵

Divine law is based on the promise that man is incapable of making a valid and just law because he is sinful in nature. Hence, man must turn to God who is the governing authority of the Universe for perfect law.

2.0.3 Natural Law

Simply stated, the concept of "Natural Law" means the "law of nature". But the word "nature" itself is used in several senses and that sometimes create problems relating to the meaning of the concept "Natural Law." We may think of nature as a state of affairs in an original position; the existence of what is unchangeable or universal; inherent quality in a thing or person.

There are various concepts of the natural law theory. Some writers say it is that which accounts for the behaviour of creatures generally, whether human beings, animals and plants. For instance, plants under given circumstances behave in a particular way and it is the law of nature which makes us sleep, angry, hungry or laugh. The law of planetary motion; the law of gravitation; the law of relativity which describes the regularity and uniformity with which things happen under certain conditions are also laws of nature. This is called law of nature in its descriptive sense.¹³⁶

¹³³Summa Theologica, Encyclopaedia Britannica, Chicago, 1955, p.91.

¹³⁴Ibid. 95.2.

¹³⁵Exodus, Chapter 20 verses 1 to 17.

¹³⁶O. N. Ogbu, Modern Nigerian Legal System, (2002), Cidjap Press, Enugu, p.11

The law of nature in its prescriptive sense is a Universal precept or command intended by nature to regulate human behaviour.¹³⁷ We are here concerned with law in its prescriptive sense. Natural law may be regarded as a body of moral rules and principles of human conduct which can be deduced from nature.

Lord Lloyd¹³⁸ has described the expression natural law as a body of objective moral principles based on the nature of the universe and discoverable by reason. Ideas about natural law include the notion that it is a body of moral rules which are discoverable through God. But the predominant idea today and indeed for a long time is that it is discoverable by human reason.

From the foregoing, two main conceptions deducible:

(a) of natural law are

(b) that it is an ideal set of principles serving merely as guide to positive rule; the transcendental perception - it is a higher law or a body of moral principles to which positive law must conform in order to be valid.

Professor Lon Fuller, a natural law theorist contends that there is no separation between law and morals. According to Fuller, law is a purposive exercise involving governance of human beings by rules. It is a purposive exercise of subjecting human conduct to the governance of rules. In Fuller's opinion, law must be purposive, it must contain internal morality, it must be certain and clear. It must not be retroactive.¹³⁹

The most famous summary of the classical natural law doctrine is the following statement of the Stoic position given by Cicero in the 1st Century B.C:

"True law is right reason in agreement with Nature; it is of Universal application, unchanging and everlasting, it summons to duty by its commands, and averts from wrong-doing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its Obligation by Senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations for all times, and there will be one master and one ruler, that is, God over us all, for He is the author of this law, its promulgator, and its enforcing judge." ¹⁴⁰

¹³⁷L.L. Fuller, *The Morality of Law* (rev. ed.) New Haven, 1969, p.15.

¹³⁸Lloyds, *Introduction to Jurisprudence*, ELBS, London, 1985, p. 93.

¹³⁹Lon Fuller, *Supra*

¹⁴⁰Cicero, *De Republica* III, xxii, 33.

The doctrine proclaimed at the Nuremberg war trials - that superior orders constitute no defence to 'crimes against humanity' - can also be understood as moral blue pencil, although there was no explicit appeal to natural law.¹⁴¹

2.0.4 Human or Positive Law

Positive law means the same thing as human law. This is in contrast to natural law which is the law of God. The school of thought on positive law is called legal positivism and it asserts that law is posited and laid down by an authority of the society which provides its sole source of validity. Legal positivism does not concern itself with morality or ethical precepts.

According to Professor HLA Hart, a positivist, "Law is a command and there is no necessary connection between law and morals or law as it is (*lex lata*) and the law as it ought to be (*de lege ferenda*)."¹⁴² This assertion has been acknowledged by the Supreme Court in the case of *A.G. Federation v. Guardian Newspapers Ltd*¹⁴³ where Uwaifo, J.S.c. said:

"Issue 2 refers to some of the observations of Pats - Acholonu, J.C.A. in the present case. It is true that the learned justice devoted some passages in his judgement to the jurisprudential aspect of positive law and natural law, particularly the general precept of natural law which stands for what is good and that if a law at any point departs from natural law, it is no longer law but a perversion of law. In the course of that, the learned Justice seems to want to judge the validity of a law on the basis of ethics, morality and religion. The learned Justice may, admittedly have gone far and away from the real issues. Somehow, I think it must be conceded that proposition is not only wholly irrelevant but it cannot be considered right in the circumstances of this case."¹⁴⁴

Jeremy Bentham is considered the father of legal positivism. Other jurists in this category include John Austin, Joseph Raz, Neil McCormick and Rowland Dworkin.

To Bentham,¹⁴⁵ law is essentially a command issued by a sovereign to his subordinates or by a superior being to his inferiors. Austin¹⁴⁶ sees law as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. To them, the command of the sovereign are backed by sanction.

These theories by the positivists have however been subjected to scathing criticisms. It has been said that these theories can lead to dictatorship, despotism and tyranny.

¹⁴¹J.W. Harris, *Legal Philosophies*, 1997, Butterworths, 2nd ed., p.19.

¹⁴²H.L.A. Hart, "Positivism and the Separation of Law and Morals" 71 *Harvard Law Review* 593 particularly pages 601 and 602.

¹⁴³(2001) NWLR Cpt. 32) 87

¹⁴⁴*Ibid.*, pp. 128-129.

¹⁴⁵J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Burns and Hart (eds.), 1970 Chapters

¹⁴⁶J. Austin, *The Province of Jurisprudence Determined*, Dickenson Publishing Inc., California, 1975, Lectures 2-4.

2.1 CLASSIFICATIONS OF LAW

Law can be classified in multifarious ways. These classifications however overlap in real life. One may study law in a series of subjects such as law of contract, company law, labour law, constitutional law, criminal law, etc.

However, if one comes across a real life problem as a legal practitioner, one may need to combine his knowledge of the different subjects. As an illustration, if a person's contract of employment is terminated as a result of an accident at work which renders the person incapable of performing his job schedule, the solicitor must combine his knowledge of the law of contract, industrial/labour law and the law of tort in bringing a claim in court against the employer.

Law can therefore be classified into:

- (a) Public and Private Law.
- (b) Civil Law and Criminal Law.
- (c) Substantive and Procedural Law.
- (d) Municipal or National or Domestic and International Law.
- (e) Written and Unwritten Law.
- (f) Common Law and Equity

2.1.1 Public and Private Law

Nigerian law could be classified as public law and private law. Public law is concerned with the protection of the state and its organs.¹⁴⁷ It governs the relationship between the state and the citizens hence the name "Public" law. Examples of public law include Constitutional law, Administrative law, Criminal law, International law, inter alia. It also embraces a legal relationship where one of the parties, that is, the State, is 'higher' in legal status than the other that is the citizens.

Private law, on the other hand, is concerned with the relationship between individuals. It deals with the protection of individual rights. Private law include Law of Contract, Torts, Family law, and Succession, Trust, Law of Evidence and so on.

In some countries, such as France, there is a separate body of laws, which govern the relations between private citizens and also a separate system of courts for determining matters of private nature. If the French government or any of its agency is involved in an action, the government will be subject to different rules from the ones applicable to private individuals. The Nigerian Legal-System has neither developed separate and autonomous body of rules and court systems for dealing with matters affecting the State. Litigation between the State and citizens are subject

¹⁴⁷ N. Tobj, *Sources of Nigerian Law*, MIJ Professional Publishers Ltd., Lagos, 1996 p.15.

to the same principles and rules as litigation between private citizens. However, in recent years, a distinction of some sort has emerged in our systems of law.

It is based not on difference between rules of law or court system, but on the procedure to be used where the purpose is to enforce a public duty or duties imposed on State agencies. Examples include cases of enforcement of fundamental human rights¹⁴⁸ or application for judicial review of administrative actions or decisions of an inferior court. Unless the special procedures are followed, the case may be struck out.

2.1.2 Civil Law and Criminal Law

The word "Civil law" has several meanings: It may mean, the law that is not criminal law. It may also mean the law of a State as opposed to other sorts of laws like International law, or it may mean Common law. To those in the armed forces, civil generally means everything which is not peculiar to the military services that is a civil court as contrasted with a court martial. In our context, civil law means the law which defines the rights and duties of persons to one another and provides a system whereby an individual who is injured by the wrongful act of another can be compensated for the damage which he has suffered. Examples of civil laws include law of Contract, Torts, Land law and Family law. Civil wrongs have as their objectives the recovery of money and other property or the enforcement of a right or advantage.

On the other hand, Criminal law is the branch of law which seeks to protect the interest of the public at large by punishing certain conducts which are believed to be harmful to the society to permit such conducts to exist or continue.¹⁴⁹ Punishment is imposed generally by imprisonment or fine or both. Crimes are further classified into serious crimes such as murder, rape, burglary etc which are normally tried in the High Court and lesser offences such as minor traffic offences, minor assault etc which are tried summarily in the Magistrate Court. The entire Criminal law has been codified in the form of the *Criminal Code*¹⁵⁰ of the Southern and the Penal Code¹⁵¹ of the Northern States.

An important distinction between a civil wrong and crime is that, to succeed in a criminal trial, the prosecution must prove its case beyond reasonable doubt, whereas in a civil action, the plaintiff need only prove his case upon the balance of probabilities. The law requires a higher standard of proof in a criminal case in order to protect an accused person from the awesome power of the state and danger of wrongful conviction. In the words of Farrah and Dugdaler.¹⁵²

"...civil trials involve an adversary process in which both sides are treated equally, the alleged facts having to be proved on the balance of probabilities. The criminal trial process differs. To protect an accused person from the danger of wrongful conviction, loss of livelihood and liberty, the rules are weighted in his favour... it is these principles

¹⁴⁸See for example the Fundamental Rights (Enforcement Procedure) Rule Cap C 29 LFN 2004.

¹⁴⁹See Mellor v, Denham (1880) 5 QB d 467.

¹⁵⁰Cap C38 LFN 2004.

¹⁵¹Penal Code (Northern Region) Federal Provisions Act Cap P3 LFN 2004.

¹⁵²J.N. Farrah & A.M, Dugdaler, Introduction to Legal Method, 1990, Sweet & Maxwell, London" p. 39.

which embody the 'presumption of innocence' described memorably by one judge as 'the one golden thread... always to be seen ... throughout the web of the English Criminal Law.'

While important distinctions exist between civil and criminal law, the line between the two is rather more fluid than the above picture tends to show. During the early development of the law, the distinction was hardly drawn at all. As a matter of fact, certain wrongs against the victim entitle him or his next of kin (were he to be dead) to be compensated. Only gradually did the idea that certain wrongs be criminalised become firmly established. Even today, the two systems still overlap. For instance, assault, false imprisonment and defamation are both torts and crimes. There are in addition, several examples of conduct which are both criminal and tortious. For instance, if A steals B's bicycle, he will be guilty of stealing (a criminal offence) and at the same time be liable to B for the tort of conversion (a civil wrong).

2.1.3 Substantive and Procedural or Adjectival law

Substantive law means the rules of law themselves. In other words, it means the body of legal rules. It is the law that prohibits the doing or not the doing of certain things by citizens. It defines a code of conduct and prescribes a penalty for the violation of that code. The citizens have no choice but to obey the law as it is. A breach or violation of substantive law may result in punishment which may be in the form of a fine, term of imprisonment, compensation and so on. Substantive law embraces such subjects such as law of Contract, Torts, Criminal law and Constitutional law which are concerned with Statement of rights, duties and liabilities of individuals. For example, law of Contract consists of a body of rules which will determine whether a contract exist in law; what the terms of the contract are and whether the terms have been performed or discharged or whether there is a breach and the remedies available to the injured party if any. In Criminal law, too, the Criminal Code (of the Southern States of Nigeria) and the Penal Code (applicable to the Northern States of Nigeria) define the different offences and the punishment that follows if one is found guilty of the offence.¹⁵³

Procedural or adjectival law on the other hand deals with methods of proceedings to enforce a certain right or duty and how the litigation or prosecution is conducted. In other words, it is the procedural rules by which the law (that is the Substantive law) is enforced in the courts. The rule of procedural law therefore specifies the way in which an action is to be initiated in court; the mode of proof; the manner of prosecution of evidence; the method of giving evidence at trial; the examination of witnesses; the manner of giving judgement and the enforcement of the judgement of the court.

¹⁵³See for example, S.419 of the Criminal Code which defines the offence of obtaining goods by false pretences and prescribes punishment of terms of imprisonment for anyone found guilty of the offence. See also, S.373 that deals with homicide etc.

The procedural rules are to be found mainly in the various Rules of *Court for Civil Offences*,¹⁵⁴ *the Criminal Procedure Act (CPA)*¹⁵⁵ or *the Criminal Procedure Code (CPC)*¹⁵⁶ for criminal trials in the Southern and Northern States respectively, the Evidence Act, and the Sheriff and *Civil Processes Act*.¹⁵⁷

2.2 MUNICIPAL, NATIONAL OR DOMESTIC LAW AND INTERNATIONAL LAW

The term *Municipal* can be used interchangeably with national, domestic or local law and it denotes the internal law of a particular country. It embodies all the laws of a country that regulate the relationship between the individuals and between the individual and the State.

International law on the other hand, is the law which governs the relationship between States inter se or between States and International Organisations. Some of the sources of international law include treaties, international custom, general principles of law recognised by civilized nations and judicial decisions and teachings of the most highly qualified publicists of the various nations.¹⁵⁸ International law is in itself divided into conflict of laws (or private international law) and public international law (usually just termed international law). The former deals with those cases, within particular legal systems, in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts.¹⁵⁹ For example if two Nigerians make a contract in England to sell goods situated in London, a Nigerian court would apply English law as regards the validity of that contract. By contrast, public international law is not an adjunct of a legal order, but a separate system altogether.¹⁶⁰

2.3 WRITTEN AND UNWRITTEN LAW

Law may either be written and unwritten. The word 'written' here has a technical meaning. It means a rule that has been formally enacted into a legislation or statute by the legislature. Such laws, before their enactment are usually subjected to rigorous debates and serious scrutiny through several stages before they are enacted and signed into law by the chief executive of the state. Written laws are usually found in documents and can be said to be an assemblage of norms in one or more documents. Written laws are called by different names in different jurisdictions and at various times. They may be called Codes, Statutes, Acts, Decrees, Edicts, Laws, Rules or Ordinances.

The term 'unwritten law' means two things. First, it may mean any principle or rule of behaviour that is not written down at all as in the case of Customary law and conventions. Second, it could

¹⁵⁴See for example High Court of Lagos State (Civil Procedure) Rules, Court of Appeal Rules, Supreme Court (Bench and Divisions) Rules, etc.

¹⁵⁵ C41 LFN 2004

¹⁵⁶Cap 42 LFN 2004.

¹⁵⁷Cap S6 LFN 2004.

¹⁵⁸See Article 38(1) of the Statute of International Court of Justice.

¹⁵⁹See e.g. C. Cheshire and P. North, *Private International Law*, 12th edn, London, 1992 and I.O. Agbede, *Themes on Conflict of Laws*, Shaneson. Ibadan, 1989.

¹⁶⁰See Shaw W Malcom, *International Law*, 4th ed. Cambridge University Press, 1997.

also mean an unenacted law even if the principles are reduced into writing as in case law. An example of an unwritten law is the British Constitution, while a greater proportion of unwritten laws of any country are its Customary laws.¹⁶¹

2.4 COMMON LAW AND EQUITY

The term "*Common Law*" is used in several senses but as a division of law, it means the law developed by the Old Common Law Courts of England, namely, the King's Bench, the Court of Common Pleas and the Court of Exchequer.¹⁶²

The history and growth of common law can be traced to the period immediately after the Norman Conquest of 1066 AD. Prior to the Norman Conquest, there were different systems of law operating in the different regions of England. It was the achievement of the Norman Kings to introduce a common system of law applied by Royal Judges through Courts in London supplemented by Assize Courts in the regions at which the Royal Judges presided when they undertook a tour or "circuit" of the country.¹⁶³

Initially, the King's judges were dispensing justice in accordance with the local laws and customs of the different localities. When the Judges converged at the Westminster, they usually made comparative analysis of the various local customs which they came across in the course of administering justice in the various locations. When they went out again on tour, if a case occurred on which the custom of another place within the realm seemed to be more logical and accorded with justice, the judges started disregarding the applicable local custom in place of the custom of another locality. In the course of time, there emerged a collection of uniform rules developed throughout the whole realm as the "common law of the realm". Hence, common law are judges - made laws, which are to be found in prior decided cases.

Common law is strict, formal and full of legalism. Every action at common law was initiated by the issuing of royal writs. The rule was that a plaintiff had no cause of action unless his claim came within the scope of an existing writ. If not, he will be left without any remedy. Even if he was able to obtain a writ to fit his claim, he may not be able to get an effective remedy at common law. Because of the obvious injustice at common law, plaintiffs who failed to obtain redress through lack of a remedy or ineffective remedy started sending petitions to the King to use his prerogative to do justice. It was the Chancellor, as the King's Prime Minister, who dealt with these petitions. Gradually, the Chancellor started determining matters raised in the petitions independently of the King-in-Council, so that, by the end of the fifteenth century, petitions were addressed directly to him, issues were tried in his own court, and decrees were made in his name. This was the beginning of the equitable jurisdiction of the Court of Chancery.

¹⁶¹But see S.36(17) of the 1999 Constitution which provides that 'Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of a law.

¹⁶² Obilade A.O., *The Nigerian Legal System*, Spectrum Law Publishing, Ibadan (1979).

¹⁶³ J.H Farrah & A.M. Dugdale., op., p.34.

Conflict between the Chancellor and the common law judges could not be avoided as the Chancellor extended his jurisdiction. The conflict came into the open in the *Earl of Oxford's case*.¹⁶⁴ In that case, the plaintiff assignee of a lease had built a house on the parcel of land the subject matter of the assignment, and had planted trees in the garden. The defendant/owner forcefully ejected him. The plaintiff sued the defendant in the common law court for wrongful ejection. The court gave judgement for the defendant. The Plaintiff then brought an action in the Court of Chancery praying the court to restrain the Defendant from ejecting him from the house he had built on the leased land. The Chancellor granted the injunction.

Coke, the Chief Justice of the King's Bench (an arm of the common law court), protested that the Chancellor should stop frustrating the rules of common law. The Chancellor denied that he was frustrating common law rules, but maintained that he was only applying his own rules to effect justice.

Basing his argument on the premise that equity and good conscience were in favour of the plaintiff, the Chancellor, Lord Ellesmere said, *inter alia*:

" ... by the law of God, he that builds a house must live in it, yet the defendant in this case would have the house, gardens and orchards which he did not build or plant. .. when a judgement is obtained by oppression, wrong or hard conscience, the chancellor would frustrate and set it aside, not for an error or defect in the judgement, but for the hard conscience of the party."

The conflict was again referred to Lord Bacon who was Attorney General and later Lord Chancellor during the reign of King James I who resolved it in favour of the Chancery and held that if there was a direct clash between the rules of common law and the doctrine of equity the rules of equity, would prevail.

This landmark decision did not remove the problems entirely. The fact that the common law and equity were administered in separate courts caused great inconvenience and expense to litigants. If for instance a litigant wished to establish a common law right but needed an equitable remedy to enforce it, he would have to sue first in a common law court to establish his legal rights, and then in Chancery to obtain his remedy. This was because the common law court had no power to grant equitable remedies such as injunctions or specific performance, or rescission whilst the court of chancery could not award damages.

These anomalies were gradually removed until 1875 when the Judicature Act eventually merged or fused the administration of the two systems. In Nigeria, the same court is also administering both the rules of common law and the doctrine of equity. Gone are the days when we have the Kings court and the court of chancery operating separately.

It must be pointed out that although the Act had fused the administration of the two systems, it did not abolish the distinction between legal and equitable rights. In this context, a legal right is one that is enforceable strictly based on the provisions of the law.

¹⁶⁴(1615) 1 Re. Ch. 1.

For instance, if there is a written agreement between A & B duly signed by both of them transferring B's vehicle to A at a price of ₦500:00 (five hundred naira only). A can enforce this contract as a matter of law against B. But if there is some element of fraud, mistake or misrepresentation, which induced B to transfer the car, the contract may be rescinded based on the doctrine of equity. There are several cases in the various substantive law subjects where the doctrine of equity has been applied to mitigate the harshness of the common law rules.¹⁶⁵

2.5 CONCLUSION

As we can see from the foregoing classification, there is no watertight classification of law. For example, so much of Nigerian land law is now public law with the enactment of the *Land Use Act*,¹⁶⁶ while the law of taxation is as much private law as it is public.¹⁶⁷ Also, the line between civil and criminal law is rather fluid as they overlap. A wrong such as assault is classified both as a crime to be punished by the State and a civil offence entitling the victim to compensation. It may give rise to legal action in both the criminal and civil courts.

2.6 QUESTIONS AND EXERCISES

1. Distinguish between eternal law and divine law. What fundamental change did the evolution of natural law bring about in man's conception of law?

Hints

- Explain in details what is meant by eternal law, divine law and natural law and note the following points in particular.
- Eternal law operates independently of the wishes or objectives of man. The law has existed before the creation of man and will continue to exist during his life and even after his extinction. Whereas divine law is based on the premise that certain persons such as the Pope, Kings are vested with authority to interpret and expound the divine law as representatives of God.
- Eternal law operates impartially to all persons whether kings or servants whereas divine law may be interpreted by the recognized authority for their selfish interest or even in a way to oppress the subjects.

The major contribution of natural law to the conception of law is that it debunks the claim that man is totally incapable of making just law to shape his world. This is because the natural law is based on the premise that man is endowed by God with human nature and

¹⁶⁵See *Alli v Okulaja* (1970) 2 ALL NLR 35.

¹⁶⁶Cap 202 LFN 1990.

¹⁶⁷See Woolf L.J.; "Public Law - Private Law: Why the Divide? A Personal View" [1986] P.L. 220.

reasoning faculty to enable him discover the natural law. At this stage, law was gradually becoming a subject of rationalism and not fatalism.

Also, the concepts of equality, democracy, human rights were inspired by the natural law principle.

2. Although law can be classified in multi-various ways certain classifications are more important and useful to law students and lawyers. Highlight the importance of four of the classifications.

Hints

- Briefly discuss the various classifications Note that eternal law, divine law and natural law are more or less statements of what "ought" to be and not what "is" law.
- Some of the significance of the various classification are as follows:
 - (a) Subject classification: This classification facilitates:
 - (i) a coherent study of related legal principles and rules on a particular subject.
 - (ii) the analysis of the legal issues involved in the facts of a case and determination of the applicable principles or rules
 - (b) Common Law and Equity: These help to:
 - (i) appreciate the evolution of and relationship between the principles of a common law and the doctrines of equity
 - (ii) distinguish between the legal rights and remedies from equitable rights and remedies in order to obtain effective and adequate remedy.
 - (c) Public Law and Private Law
 - (i) Help in a country like France to identify the source of the applicable law and determine the appropriate court to institute an action.
 - (ii) In Nigeria, help to determine the appropriate procedure required by law in some cases such as fundamental rights cases, petition for winding up of companies and applications for judicial review.
 - (d) Civil and Criminal Law
 - (i) Distinguish private injuries and matters pertaining to public order

- (ii) Help in determining the appropriate procedure to obtain redress. For instance whether to institute a civil action or set the criminal machinery in motion or wait till the conclusion of the criminal action before instituting the civil action.

2.7 FURTHER QUESTIONS

1. "Law in the widest possible connotations are any necessary relation arising from a thing nature. In this series, all beings have their laws, the Deity his laws, the material world its laws, the intelligences superior to man his laws, man his law."

Critically discuss.

2. "Distinguishing in practice between one classification of law may not be as clear-cui as it may appear in theory. Hence the various classification should be the Lawyer's servants and not his masters."

Discuss.

3. "An unjust and unreasonable law and one which is repugnant to natural law is not law but a perversion of law."

Discuss.

4. "Law is the corpus of rules of behaviour expressing the will of the ruling class, established by legislation and of customs sanctioned by the state and secured by its coercive power in order to protect, to strengthen and develop such social relations as are favourable to the ruling class." Discuss.

5. To what extent do you agree that Austin's theory of positive law is an adequate explanation of modern Nigerian laws?

6. Do we need a definition of "law" for a proper understanding of the study of law?

7. Law is a science in the same sense as chemistry. Discuss.

8. (a) Briefly trace the events that led to the establishment of the court of chancery.

(b). How was the conflict between the common law courts and the court of chancery finally resolved?

9. (a) Briefly enumerate the various classification of law.

(b) Chief Ologbenla was married to three wives before his death. At his death, Kudiowo, his youngest wife was still 20 years old. Being a ravishing beauty, Paso, Chief Ologbenla's younger brother, took interest in her and pronounced her his wife quoting sections of the Holy books that mandated the surviving brother of a deceased man to take over the wife as inheritance. Kudiowo, who has just graduated as a medical doctor from the University of Lagoon has refused to be bound by such rule quoting sections of the newly promulgated Prohibition of Forced Marriages Act, which renders void any religious or customary rule that encourages marriages without the other party's consent. Paso has argued that the "law of God" is superior to the "law of man" and that Kudiowo should be compelled to marry her as instituted by God. Advise the parties.

CHAPTER THREE

METHODS OF SOCIAL CONTROL THROUGH LAW

John Oluwole Akintayo & Abiola Sanni

1.0 INTRODUCTION

Two of the prominent attributes of a State or a politically organised society are a definite population and a legal system.¹⁶⁸The interaction between these two attributes is aimed at

¹⁶⁸Woodrow Wilson, a former President of the United States gave a short definition of a State as follows: A State is a people organised for law within a definite territory: J.H. Price, Comparative Government, 2nd edition, London, Hutchison, 1975, p.23. From this simple definition four essential attributes of a State have been identified. They are as follows: (i) a definite territory; (ii) a government organised to achieve the purposes

securing social order. The concept of social order appears to be wider than, though closely related, to that of social control. No meaningful development can be undertaken in an atmosphere devoid of orderliness and as it is often said, the first rule in heaven relates to orderliness. The establishment of order in a society is a foundational requirement before the institution of any system of control to regulate the conduct of various groups in a society. It is in an atmosphere of social order that human effort to harness all potentials for development can be rewarded.

The fact that all societies are held together by systems of common rules, norms, ideas and values which are required to guarantee their further existence makes it incumbent on each society to institute a system of common social principles. This entails presenting a common resistance through the common act of reprobation and condemnation of deviations from what are considered to be the fundamental values that bind the society

Methods of Social Control through Law together and giving expression to the means by which deviants who are responsible for cases of more or less serious deviations from these norms of social behaviour, are brought back to line. These values are embodied in law, traditions, religions, morality and customs among others. It is by these means that the fabric that binds the society together is strengthened and each society gives expression to its individuality and identity.

The discipline of law is primarily concerned with human interactions and order in the society. Law seeks to control not only human beings but also human institutions some of which are direct creatures of the law itself. For instance, it is the task of law to ensure that the various institutions of the State relate in such a way to ensure the integrity, security and well being of the State and its members are not jeopardised. It is presumptuous to assume that social control extends to the various State institutions, including constitutional organs and statutory bodies, merely because human beings control them. Notwithstanding the fact that these institutions are accorded separate and distinct status in law, their actions are not usually attributable to a single individual.

3.1 THE IDEA OF SOCIAL CONTROL

Social control may loosely be described as the control of social behaviour, that is, behaviour that affects others.¹⁶⁹ The term "social control" is a technical expression coined by sociologists. It

for which the State was set up; (iii) a system of laws; and (iv) a body of men and women having a common purpose.

¹⁶⁹In its widest connotation it is difficult to conceive of a behaviour that does not in one way or the other affect others since no man is an island. For instance, if someone engages in private drunkenness, though no legal liability may be attached to this form of conduct, it may ultimately impair the person's health as to constitute a drain of the country's human and material resources as exemplified by the use of foreign exchange to purchase drugs for the treatment of ensuing ailments. Also, the time and attention that a doctor will spend to assist the person might be devoted to more productive activities. There are however instances of behaviours that do not directly affect others. This is the case with non-social control. For instance, a person (Mr. A.) has the right to decide whether or not to work under certain conditions. If he

was first used by one of the fathers of American sociology, Edward A. Ross, to refer to certain regulative institutions which function to ensure that individual behaviour is in conformity with group demands - supernatural beliefs, ceremonies, public opinion, morals, art, education, law, etc.¹⁷⁰ William G. Sumner, another of the fathers of American sociology and a contemporary of Edward Ross, also used the term to show how "folkways" (i.e. "habits" and "custom") function to control individual and social undertaking.¹⁷¹ Social control, according to leading Nigerian sociologists, Otite and Ogionwo, refers to those various means (or mechanisms) by which a society exercises its authority over its members and enforces conformity to its norms.¹⁷² The expression "social control" has found favour with sociological jurists in their quest to adopt sociological approaches to the study of law. Roscoe Pound, who could perhaps be described as the most influential exponent of the American sociological school of jurisprudence not only took the phrase "social control" which he employed in his description of law as "social control through the systematic application of the forces of politically organized society,"¹⁷³ from the early sociologist, Edward Ross, he also drew from him in asserting that law should be studied as a social institution.

In modern societies, there is a wide range of mechanisms of social control. Richard Quinney has observed that the control systems vary considerably in the forms of conduct they regulate and the means they employ.¹⁷⁴ There are formal means of social control as well as informal means. The informal means employed by some societies include ridicule, gossip, ostracism and censure. Usually they are spontaneously employed. There seems to be unanimity among jurists that law is the most important one though some sociologists have disputed this claim.¹⁷⁵ Pound in his *Social*

chooses not to work, he cannot be forced by law to do so against his will. This is because nobody except perhaps himself and members of his household, are likely to suffer for his indiscretion. Therefore, Mr. A's decision to work and where to work to a large extent is not socially controlled, at least directly. However, if Mr. A, driven by inordinate ambition attempts to steal the food or money of Mr. B., then it becomes the concern of the society to control his act or tendencies in the overall interest of the society.

¹⁷⁰130 *Social Control*, London, 1910, Macmillan, cited in O. Otite & W. Ogionwo, *Introduction to Sociological Studies*, Ibadan, Heinemann, 1979, at pp. 374-375.

¹⁷¹ W.G. Sumner, *Folkways*, Ginn & Company, 1904 cited in Otite & Ogionwo, *ibid.*, p. 375

¹⁷² O. Otite & W. Ogionwo, *op. cit.*, p. 375. The authors have also identified the following techniques of social control: First, physical sanctions which include the three main forms of (a) physical punishment (b) expulsion and (c) extermination; secondly, economic sanctions; thirdly, psychological sanctions; and fourthly, anticipated sanctions.

¹⁷³R. Quinney, *The Social Reality of Crime*, Little Brown & Co. Inc, 1970, cited in D. Lloyd & M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 5th ed., 1985, London, Stevens & Sons, pp. 618-625; see also R. Pound, *Philosophy of Law*, Rev. ed, 1957, Yale Univ. Press, pp. 42- 47 cited in M.D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, 7th ed., London, Sweet & Maxwell, pp. 721 -723

¹⁷⁴R. Quinney, *The Social Reality of Crime*, *op cit.* ..

¹⁷⁵O. Otite & W. Ogionwo, *Introduction to Sociological Studies*, *op. cit.*, at p. 376. According to Pound: "We must not forget that law is not the only agency of social control. The household, the church, the school, voluntary organizations such as trade associations, professional associations, social clubs and fraternal organizations each with their canons of conduct do a greater or lesser part of the task of social engineering. But the brunt of the task falls on the legal order. The increasing secularization of social control, the disintegration of kin organization, the loosening of the discipline of the household, loss of ground by the church and secularizing of education, have added increasingly to what we expect of the law". See

Control through Law wrote that "in the modern world law has become the paramount agent of social control."¹⁷⁶Quinney also recognized the legal system as the most explicit form of social control.¹⁷⁷He noted that law becomes more important as a system of control as societies increase in complexity, suggesting that the more sophisticated a society becomes, the greater its reliance on law as an instrument of social control.

The position of the sociologists who deny the status of law as the paramount instrument of social control might have been accentuated by a number of factors which include the fact that some laws are noticed in breach more than in enforcement coupled with the incidence of some dead letter laws contained in our statute books. Furthermore, the fact that the enforcement of law does not necessarily prevent the occurrence of some evils which the law intends to prevent and could in fact lead to other problems constitutes an important drawback on the efficacy of law ': The discretion which law enforcement agencies exercise in enforcing laws appears to weaken the hold of law as a veritable instrument of social control in the society. Notwithstanding the above, it cannot be denied that law has the advantages of wealth of detailed rules; explicitness of sanctions; regularised procedure; organised institutions and machinery for enforcement which no other instrument of social control can boast of. The description of law by Ross as "the most specialised and highly finished engine of control employed by the society"¹⁷⁸ is indeed very apposite.

From the above, it is apparent that we can identify both formal and informal means of social control. Law obviously falls under the broad head of formal social control. In view of the fact that the society is organised and administered on the framework of legal rules, it becomes compelling that the instrumentality of law be called in aid in the determination of not only what is the scope of permissible conduct which the society may tolerate, but also the forms of sanctions which may be imposed on persons found to have breached societal rules. It is not intended to go into the. Controversy that surrounds the definition of law. Elias after reviewing and evaluating many definitions of law proffered by writers and jurists described the law of a given community as "the body of rules regulating human conduct regarded as obligatory or binding by its members."¹⁷⁹This definition is highly flexible as not only does it acknowledge customary law as law properly so- called, it equally embraces the positivists' description of the body of rules declared and enforced by a constituted authority, its main plank being recognition by the community.

As it is apparent from the above definition of law, the primary function of law is to regulate human conduct. As pointed out above, law is obviously not the only instrument of social control in the society: there are others like public opinion, religion, morality and custom. Each of these

Contemporary Juristic Theory, 1940, Friends of Claremont Colleges, pp. 79-80 cited in M.D.A Freeman; Lloyd's Introduction to Jurisprudence, 7th ed., pp 724- 727.

¹⁷⁶R. Pound, *Social Control through Law*, New Haven, Yale Univ. Press, 1948 p. 20 cited in Lloyd & Freeman, *Lloyd's Introduction to Jurisprudence*, 5th ed. op. cit

¹⁷⁷R. Quinney, op. cit

¹⁷⁸*Social Control*, Macmillan Company, London 1922, p. 106

¹⁷⁹ T. Olawale Elias, *The Nature of African Customary Law*, Manchester Univ. Press, 1956, p. 55.

instruments adopts a set of particular methods or techniques to regulate human behaviours in the society. Law is unique, both in terms of its procedure and substance. Its prescriptions are usually backed with sanction. Law as an instrument of social control also helps to maintain public order and suppress deviant behaviour. Furthermore, it facilitates co-operative action, constitutes and regulates the principal organs of power; it communicates, regulates and reinforces social values.¹⁸⁰

Social control may be perceived as a means to an end: the end being social justice. Nwabueze whilst trying to reconcile the economic principle of private enterprise and social control, explained the need for social control in the following words:

" ... (It) is indeed necessary for proper and balanced economic growth, the prevention of undue concentration of wealth in a few hands, the minimization of exploitation inherent in a private enterprise system, and generally, to ensure optimum social justice through the redistribution of the nation's wealth. It enables the state to "direct the economy towards a particular pattern of behaviour and a social goal". An unregulated freedom of private enterprise is nothing but social anarchy. For, as has been rightly said, "government cannot exist if the citizen may at will use his property to the detriment of his fellows or exercise his freedom of contract to work them harm."¹⁸¹

3.2 METHODS OR TECHNIQUES OF SOCIAL CONTROL

The expression 'method' can be used interchangeably with 'technique.' Method has been defined as a way of doing something; a procedure for doing something; orderliness in doing, planning etc; an orderly arrangement or system.¹⁸² It is also seen as the mode of operating, or the means of attaining an object.¹⁸³

Techniques or methods of social control are many or varied though there are some common principles. Every instrument of social control has its own method. What we intend to do in this section is to highlight the various approaches or ways and means by which law controls and regulates conduct in the society. Law for our purpose here is not restricted to specialised rules created by the legislature as it will become apparent that some legal techniques of social control are firmly entrenched in the body of rules developed by the courts in the course of resolving disputes brought before them otherwise known as judge-made law.

Robert S. Summers, a leading American jurist, has identified the five basic techniques used in modern law as the following: penal," grievance-remedial, private arranging, administrative-regulatory and public-benefit conferral.¹⁸⁴ Professors John H. Farrar and Anthony Dugdale have added two other techniques to the above: these are the constitutive and fiscal techniques and renamed Summers' last technique as the conferral of social benefits. The following discussion

¹⁸⁰John H. Farrar & Anthony Dugdale, *Legal Method*, Sweet & Maxwell, London, 3rd ed. 1990, pp 4-7.

¹⁸¹B.O. Nwabueze, *Military Rule and Social Justice in Nigeria*, Spectrum, Ibadan, 1993, p 94.

¹⁸²The New Webster Dictionary of the English Language, International Edition.

¹⁸³Black's Law Dictionary, 7th ed., West Group, St. Paul, Minn, 1991, p1005

¹⁸⁴Farrar & Dugdale, *op. cit.*, p.13.

leans heavily on Farrar and Dugdale's presentation but with examples drawn from Nigerian legislation in appropriate cases. In effect we can set out the seven main techniques used in modern law as follows:

- (i) The Penal Techniques,
- (ii) The Grievance - Remedial Technique,
- (iii) The Private Arranging Technique,
- (iv) The Constitutive Technique,
- (v) The Administrative Regulatory Technique,
- (vi) The Fiscal Technique and
- (vii) The Public Benefit Conferral Technique.

These techniques will be examined one after the other. At the same time we shall examine as much as possible, what other legal or social alternatives are available to deal with problems relating to some of the techniques.

3.2.1 The Penal Techniques

Quinney whilst elaborating on why the legal system is the most explicit form of social control wrote: "The law consists of (1) specific rules of conduct, (2) planned use of sanctions to support the rules, and (3) designated officials to interpret and enforce the rules."¹⁸⁵ The primary purpose of law is to secure conformity to its precepts and discourage deviant behaviours. However, deviants cannot be ruled out in any human society. While some people, due to their habit, lifestyle, background and so forth are predisposed to abide by the norms of the society, there are some who are ready to go against them and behave in such a way that will further their selfish and parochial interests. In order to discourage deviant behaviours, the penal technique spells out conducts which are prohibited, the penalty for breach, the procedure for determining the guilt of those who violate the rules and the appropriate punishment. It would appear that the efficacy of the penal technique is noticeable not in its elaborate and comprehensive precepts, but in terms of enforcement. As R. M. Jackson rightly put it:

"It is in relation to criminal offences that we speak of enforcing the law. The general pattern is clear enough: observance of some rules of conduct is regarded as so necessary for society that a breach of such rules is a matter for the intervention by the State."¹⁸⁶

The State plays an active role in the penal technique. The penal technique involves the setting out of acts and omissions which are regarded as violations of the criminal law, the establishment and maintenance of the Police Force and other enforcement agencies to prevent and detect violations of the criminal law and the maintenance of the prisons custody and other approved detention centres. The legal rules and institutions referred to above collectively make up the criminal justice system which is created for the specific purpose of applying the penal technique.

¹⁸⁵Quinney, *op. cit*

¹⁸⁶R. M. Jackson, *Enforcing the Law*, Rev. ed., Penguin Books, Middlesex, 1972, p. 6

A question may be asked, how does the penal technique bring about social control? When a person is alleged to have committed a crime, the matter is reported to the police by the victim instead of resorting to vengeance or self-help. The matter will be investigated by the police¹⁸⁷ and the State either through police authority or the chief law officer¹⁸⁸ will decide whether or not to prosecute depending on the available evidence. In case the police decide to prosecute, the suspect is arraigned in court where he will be given the opportunity to defend himself (fair hearing). If the prosecution succeeds in proving the guilt of the suspect beyond reasonable doubt, the offence depending on the nature, may attract the punishment of fine and or imprisonment or even death sentence, which amounts to a form of elimination from the society.

Because of the revulsion of the society against criminal behaviours and the dangers such acts constitute if allowed to go unchecked, the penal technique is expected to be scrupulously applied to all the citizenry both high and low. Apart from giving every accused "equal" treatment before the law, the statute of limitation does not run against the commission of a crime. By this, it is meant that an accused can be prosecuted and punished for his criminal act no matter how long the offence has been committed. The position is different in a civil matter where an aggrieved party has up to five or six years or ten years, as the case may be¹⁸⁹, to institute an action before the action becomes statute-barred.

The penal technique may look good in theory, but to what extent has it effectively achieved its aim of curbing deviant behaviours in the face of the increasing wave of crime in the country ranging from petty stealing, assassination, robbery, advance fee fraud (419), bribery, corruption, electoral offences, "drug pushing", trafficking in human beings to mention but a few? This brings us to a discussion of the alternatives that the law has provided for dealing with deviant behaviours.

3.2.1.1 Alternatives to the Penal System

3.2.1.1.1 Non Intervention

Even if it is desirable, it is not possible for the society to criminalize or penalise every socially reprehensible or immoral conduct. This brings to the fore once again the intricate relationship between morality and ethics on one hand and the law on the other hand. It is the responsibility of the legislators as the representatives of the people to select which conduct the society wishes to discourage through the application of penal sanction.

However, in some areas of behaviour, it may be thought that the application of penal technique is not morally justified or practicable. For instance, while most societies would not be able to tolerate offences of sexual assault such as rape, the decision whether or not it is expedient and

¹⁸⁷See for the general function of the Police section 4 of the Police Act, Cap. P3, LFN 2004.

¹⁸⁸See sections 174 and 211 of the Constitution of Federal Republic of Nigeria 1999 on the powers of the Attorney-General of the Federation and the Attorney-General of a State respectively.

¹⁸⁹See Parts 2 and 4 of the Limitation Law, Cap. 76 Laws of Osun State, Nigeria 2001; Parts 2 and 4 of the Limitation Law, Cap. 70, Laws of Oyo State of Nigeria 2000.

practicable to apply the penal technique to immoral sexual relationships between two consenting adults as in homosexuality, lesbianism or even prostitution depends on the philosophy underlining each society's criminal law.¹⁹⁰ In the Nigerian case of *Aoko v. Fagbemi*¹⁹¹ adultery was held not to be a criminal offence on the ground that it was not defined as such and its punishment prescribed in any written law. The relevant constitutional provisions thus effectively abolished customary criminal law because of its unwritten character.¹⁹²

The Police actively encourage that recourse be had to some private arranging methods based on the belief that insistence on the penal technique might occasion some dislocation in the interaction of persons who belong to some social organisation which has its own systems of regulating conduct. When members of the same household or other social group are involved in conducts which border on less serious criminal offences, there may be justifiable reason not to intervene.

3.2.1.1.2 Warning or Caution

Warning may be perceived either as an alternative to the penal system or an integral part of it. The latter case is exemplified by instances where an offender is warned in consequence of a trial or the court makes a binding over order. It is not in all cases that the penal system imposes punishment for the breach of the law even in the areas where the system considers it necessary to intervene.

There are categories of offenders who might be better dealt with by a simple warning instead of imposing the full punishment stipulated by the law. This is particularly the case with child offenders¹⁹³ or petty offenders. For instance, a judge may warn or caution a member of the public who makes a noise in a courtroom thereby disturbing the court proceedings instead of committing the person for the offence of contempt of court.

3.2.1.1.3 Reciprocity and Self-Help

Another alternative to the penal system would be to leave the victim or his relatives to obtain their own appropriate redress on the basis of reciprocity, that is, resort to vengeance on the basis of the Mosaic law of "an eye for an eye and a tooth for a tooth." This approach which has been described by Farrar and Dugdale as "a symptom of underdeveloped system"¹⁹⁴ is dangerous and capable of causing total breakdown of law and order. It is unfit for the modern time.

It has become a common occurrence for persons suspected of stealing, kidnapping, charming or some other conduct like alleged disappearance of the sexual organ of another person to be stripped naked, molested, and lynched or burnt alive in major Nigerian cities. In such situations

¹⁹⁰See *DFF v. Shaw* [1962] A.C. 220.

¹⁹¹[1961] 1 All NLR 400

¹⁹²See section 36(12) of the 1999 Nigerian Constitution.

¹⁹³See Part XX of the Child Rights Act 2003 on Child Justice Administration.

¹⁹⁴Farrar & Dugdale, *op cit.*, p. 16.

the mob dispense what they consider as "instant justice" but which is in true sense "jungle justice" without recourse to the law. It is unfortunate that there is recourse to this underdeveloped system even when people know the legal and constitutional steps to seek redress. Self help is however fraught with many dangers one of which is the likelihood of punishing an innocent person without affording him a fair hearing. The perpetrators of self-help in the manner described above render themselves liable for civil and criminal sanctions. We must bear in mind the words of Justice Chukwudifu Oputa who had this to say on the importance of courts in the dispensation of justice:

"The establishment of the court system was a great milestone in the human journey. We are reminded how in a state of savagery and "jungle justice", every man was armed and was a law unto himself. But civilisation means that courts were established and that men lay aside their arms and carried their causes to those courts."¹⁹⁵

3.2.1.1.4 Compounding

Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute someone who has committed a crime.¹⁹⁶ Thus, compounding is an arrangement whereby a victim of a crime undertakes or agrees not to press criminal charges against the wrong doer upon satisfaction of certain conditions. There are some categories of offences whereby the offender and the victim may reach an agreement on how to amicably resolve the problem upon the satisfaction of the agreed payment or appropriate remedies. For instance, the relatives of a victim of a minor accident may not insist on the prosecution of the negligent driver upon the promise that he will pay adequate compensation to the victim(s) of the accident. Also, Mr. A. whose house is burgled may decide not to go on with the prosecution of the case because police investigation revealed that Mr. X. who is Mr. A's cousin was the burglar. Also, an employee who defrauds his employer may be summarily dismissed instead of being prosecuted.

It is doubtful in our view if this private arranging method may successfully restore order in relation to the act and whether it meets the demand of justice in some cases. This can be deduced from the statement of Oputa J.S.C. in the case of *Federal Civil Service Commission v. Laoye*.¹⁹⁷ The facts of this case are highlighted below. Laoye, a senior civil servant in the Ministry of External Affairs was alleged to have conspired with some people to defraud the Government of Nigeria. He was dismissed from the service after he had unsatisfactorily answered a query given to him. Commenting on his summary dismissal the learned Justice of the Supreme Court said:

"The Plaintiff/respondent has been accused of very serious offences of conspiracy and stealing U.S. \$119,000.00 very large sum of hard currency. It is in the interest of justice

¹⁹⁵ C.A. Oputa "Towards Greater Efficiency in the Dispensation of Justice in Nigeria" in Y. Akinseye-George (ed.) Law, Justice and Stability in Nigeria: Essays in Honour of Kayode EsO1. Shalom Mutiserve Bureau, Ibadan, 1993, p.4.

¹⁹⁶Black's Law Dictionary, op. cit., p. 286.

¹⁹⁷[1989] 2 NWLR. (pt. 106), p. 652.

that the truth of the entire transaction be known and that he and all culprits be brought to justice and if the plaintiff really committed the offences charged that he should be imprisoned. After conviction or during or after serving his sentence, the first defendant could then dismiss him. That is justice ... it is true that the court is the temple of justice and the objective is the attainment of justice, now justice is only reached through the ascertainment of the truth and the instrument which our law presents to us for the ascertainment of the truth or falsehood of criminal charge is trial in open court.¹⁹⁸

The specific areas of the law which come into play under the penal system are the substantive and procedural aspects of criminal law.

The Criminal Code and the Penal Code are the two principal penal enactments on substantive criminal law in Nigeria and they are in force in the States in the southern and northern part of Nigeria respectively. However, the Criminal and Penal Codes are not exhaustive in terms of creation and definition of offences as there are other statutes which either incidentally or directly also deal with specific offences. The principal procedural enactments are the Criminal Procedure Act/Law and the Criminal Procedure Code which operate in the States of the southern and northern parts of Nigeria respectively. Dissatisfied with the scope of offences covered by the Penal Code, some States in the North have gone ahead to introduce criminal offences based on the Islamic legal Code, the Sharia, as well as the attendant punishments.

3.2.2. The Grievance Remedial Technique

Unlike the penal technique which involves matters relating to public order or criminal law, the grievance remedial technique is applicable mainly in the area of civil law. Professor Summers has explained this technique as one which "defines remediable grievances, specifies remedies ... and provides for enforcement of remedial awards."¹⁹⁹ This technique establishes some substantive legal rules, principles and standards which create legal rights and duties and remedies to back up those rights which can be invoked in case of breach. It also provides for the enforcement of the rights and duties through the law court. Substantive areas of law like the Law of Contract, Family Law, Commercial Law, Law of Torts, Law of Property, Equity and the Law of Trusts and Labour Law employ the grievance remedial technique. The procedural aspect of this technique involves Civil Procedure, Civil Remedies and Legal Advice, Assistance and Aid. A substantial tract of the areas covered by this technique is found in case law, but there is significant legislative intervention to shape the pattern of their development in deserving cases.

The remedies available to an aggrieved person under this technique are multifarious depending on the nature of the right that is breached and the circumstances of each case. Some of the available remedies are general damages, special damages, specific performance, injunction,

¹⁹⁸ Ibid.

¹⁹⁹ "The Technique Element in Law' 59 California L.R. 733 (1971). Also reproduced in Essays in Honour of Hans Kelsen, ed. by the California Law Review with a Preface by Albert A. Ehrenzweig cited in Farrar & Dugdale, op. cit., p.13. Summers was said to have applied his technique analysis to the legal system as a whole in his anthology, Law, Its Functions and Limits, 2nd ed., 1972, p.122

restitutio in integrum. The logical basis of this technique is that if adequate remedy is granted to the aggrieved person, he is likely to be genuinely pacified and in this way the law would have succeeded in discouraging injustice or discouraging aggrieved people from taking law into their own hands.

3.2.2.1 Alternatives to Grievance Remedial Technique

3.2.2.1.1 Penal Techniques

While there are fundamental differences between criminal and civil liability, there are some conducts that constitute both a crime and a civil wrong. For example, assault, false imprisonment and defamation, are both crimes and civil wrongs. The effect of this is that the wrong doer may be prosecuted for the criminal aspect and at the same time be sued for damages. There is, however, a rule, known as the rule in *Smith v. Selwyn*²⁰⁰ under which, if the wrongful act is a felony, no action in tort can be brought against the Defendant until he has been prosecuted for the felony, or a reasonable excuse has been shown for his not having been prosecuted. There are conflicting opinions on the applicability of this rule in Nigeria. The rule was applied in the case of *Nwankwa v. Ajaegbu*.²⁰¹ In the case of *Tika Tore Press Ltd v. Umar*²⁰² and *Panthinsan v. Edet*,²⁰³ the courts did not follow the rule and therefore refused to stay proceeding in the civil suit pending the completion of criminal cases based on the same factual situations. The rule *Smith v. Selwyn* has been described as being "age - worn", "archaic" and "anachronistic".²⁰⁴

3.2.2.1.2 Private Settlement

The law permits parties to make private arrangement for settlement of disputes, which may arise in the course of their interactions. They might for example insert a liquidated damages clause in a contract, stipulating precisely how much a defaulting party is to pay to the injured party. If the parties faithfully implement the terms of the contract there will be no need for litigation. However, if there is disagreement about the scope and effect of such clause litigation may be inevitable.

3.2.2.1.3 Insurance

The parties might also decide to deal with the matter solely interms of insurance cover. An example here would be a crash between two motor vehicles. Many drivers, especially in

²⁰⁰ [1914] 3 K.B. 98

²⁰¹[1978] 2 L.R.N. 230. At p. 235 Ukattah J. said: "Under this rule, the victim of an assault, for example, cannot sue his assailant for damages in tort unless and until the latter has been criminally prosecuted. But since the decision to prosecute rests with the police, if the plaintiff victim reports the

²⁰² [1968] 2 All NLR 107 at 110

²⁰³ [1968] 2 All NLR 135

²⁰⁴ See G Kodinlinye & O. Aluko, *The Nigerian Law Torts*, Spectrum, Ibadan, 2nd ed. 1999, pp 2-3; see *Rose v. Ford* [1937] 3 All ER 359 at 371 per Lord Wright.

developed countries where the insurance industry is well developed, prefer to handle the matter outside court by referring it to their insurance companies. This however depends on the type of insurance cover taken by the parties.

3.2.2.1.4 Arbitration

The usual trend in commercial contracts nowadays is to make provision that disputes shall be submitted to arbitration. Arbitration is an Alternative Dispute Resolution (A.D.R.) offence to the police and the latter decides not to prosecute, the plaintiff may go ahead with his civil action mechanism. It provides for a private scheme of settling disputes by arbitrators who make awards based on the submissions of the parties. Where there is an arbitration clause in a contract, it will be premature for a party to go to court without first submitting the dispute to arbitration. Where a party is dissatisfied with an award made by the arbitrators, the court can only intervene to set aside the award within narrow confines.²⁰⁵ Arbitration enjoys many advantages over and above the Grievance-Remedial Technique. Harold F. Lusk and others²⁰⁶ have listed the principal advantages of arbitration in the following terms: " (1) disposition of the dispute is usually much quicker-perhaps days instead of months or even years; (2) an arbitrator may be chosen who has considerable familiarity with the technical background of the dispute; (3) since procedure tends to be informal the parties need not employ lawyers to represent them (although they frequently do); and (4) the time required of executives to be witnesses and other costs are likely to be much less than in trial." Other advantages include secrecy, and informality. Experience has shown that arbitration is not necessarily a cheaper procedure, and it might entail an additional cost where there is recourse to court to set aside an award. Perhaps the greatest advantage of arbitration is that it often brings an amicable or friendly resolution of disputes thus maintaining harmony or concord in the society.

3.2.3 The Private Arranging Technique

"Much of the modern law" Jackson has contended, "is concerned with facilities that are available for those who want to secure benefits or conveniences."²⁰⁷ The law grants considerable latitude to individuals to undertake a wide range of activities for as long as such activities are not forbidden. By the private arranging technique, it is meant a system whereby the law provides a framework of rules which will determine the validity of private transactions leaving it to the individual to make an option of arranging his private affairs within that framework. This technique operates essentially in the area of civil law. Examples of private arranging techniques are entering into marriage, settlement of a trust and making of will. Talking about marriage, in the first instance, the decision to go through a ceremony of marriage with another person is entirely a personal one. No one may be compelled to marry. However, where one decides to marry, he must do so within

²⁰⁵See Arbitration and Conciliation Act, Cap. 19, Laws of the Federation of Nigeria 1990 Arbitration Law, Cap 12, Laws of Osun State of Nigeria 2001 and Arbitration Law, Cap. 13, Laws of Oyo State of Nigeria 2000.

²⁰⁶Business Law: Principles and Cases, 3rd D.C.C. ed., R. D. Irwin, Inc, Homewood (Illinois), 1974, p. 29.

²⁰⁷ Jackson, op. cit., p. 2.

the framework of rules stipulated by the law. In the peculiar case of Nigeria, a man and a woman may decide to contract their marriage under the Marriage Act,²⁰⁸ under customary law or under the rules of Islamic law. Although, an individual may exercise freedom of choice in respect of the form of marriage to undergo, once he decides to arrange his affairs in accordance with one system of law, he must comply with the rules which primarily determine the validity of his action otherwise his action will be invalidated. For instance, a person who has contracted a statutory marriage cannot while the marriage subsists validly contract another marriage with any person either under the Marriage Act, customary law or Islamic law.²⁰⁹

Also, whereas an individual exercises freedom of choice in -relation to making of a will, once he decides to make a will, the will must comply with the requirements laid down by the law to be valid. Generally, for a will to be valid, it must be in writing (though no special form is required), be signed by the testator in the presence of at least two witnesses present at the same time who attest and subscribe to the will.²¹⁰ If these requirements are not fulfilled, the will shall be invalid and the person's property will be distributed in accordance with the applicable rules of intestacy.

Farrar and Dugdale have identified the following areas of law as coming under the Private Arranging technique: the Law of Contract, Family Law, Commercial Law, Law of Property, Partnership Law, Company Law and the Law of Trusts.²¹¹

In modern time, some areas hitherto within the domain of private arranging techniques are gravitating towards direct government intervention. It is to be noted that even in some aspects of the areas of law enumerated above, legislative intervention has been significant. For instance, the law now interferes more today in the care and welfare of children to curb child abuse,²¹² the regulation of sale of goods to achieve fair trading and. the area of land transaction to regulate and control the ownership and management of land.²¹³ Before the enactment of the Hire Purchase Act of 1965,²¹⁴ the hirer in a contract of hire purchase was under obligation to pay the agreed instalments as at when due. If he failed to discharge this obligation, the owner could put an end to the hire and retake possession of the goods even if 90-95% of the instalments had been paid. Thus in *Atere v. Amao*²¹⁵ and *Sanyaolu v. Benthworth Finance*²¹⁶ seizure of a motor vehicle by the owner was held to be lawful notwithstanding that in *Atere's case* only £10 out of £1,332 and in *Sanyaolu's case* only £100 out of £5,486 remained unpaid. However, now under section 9 of the Hire Purchase Act, the owner can no longer exercise his right to recover the goods from the hirer except by an action in court if the hirer has paid 3/5 of the hire purchase price. In the area of

²⁰⁸ Cap M 2 LFN 2004.

²⁰⁹The Marriage Act prohibits going through any form of customary marriage with any person (including with one's spouse under statutory marriage) during the subsistence of a marriage under the Marriage Act, sections 33 I and 45 of the Marriage Act..

²¹⁰See generally section 6 of the Wills Law, Cap. 164, Laws of Osun State of Nigeria 2001; and section 6 of the Wills Law, Cap.170, Laws of Oyo State of Nigeria 2000.

²¹¹Farrar & Dugdale, p. 14

²¹²See generally the Child Rights Act 2003.

²¹³See generally sections 1,2,4 and 22 the Land Use Act, Cap L5 LFN 2004.

²¹⁴ Now Cap H4 LFN 2004

²¹⁵ 48 [1957] WRNLR, 176

²¹⁶ [1972] UILR, 431

land transaction, a "land owner" in Nigeria must now obtain the consent of the Governor before he can assign, mortgage or otherwise alienate his interest in the land in favour of another person.²¹⁷

3.2. 4 The Constitutive Technique

This Constitutive Technique is one of the two techniques Farrar and Dugdale have added to Summer's list. In a way, it could be seen as an offshoot of the private arranging technique in the sense that individuals do not have to form a company. However, if they desire to do so they must observe the requirements laid down by law so that their desired limited liability company can come into existence. In this connection, the constitutive technique takes off from where the private arranging technique stops. Through the constitutive technique, the law fosters social order by facilitating cooperative actions like the "pooling of efforts and resources" by a group of people or entities to achieve certain desirable social ends such as promotion of commerce, charitable, social and cultural objectives. This is usually achieved by vesting such a group of people with a legal personality distinct and separate from that of the individual members. In essence, creation of a new legal person is the distinctive characteristic of the constitutive technique. The separate legal personality of incorporated bodies opens the way to other advantages like perpetual succession and limited liability on the part of members who were formed into a company.

The principle of legal personality was established in the famous case of *Salomon v. Salomon*.²¹⁸ The facts of the case are very interesting. Salomon was a leather merchant and boot manufacturer and had carried on the business as a sole proprietorship profitably for many years. In 1892, he formed a public limited company to take over the business. At that time, a minimum of 7 persons were required to form a public company. Salomon, his wife and five children therefore formed Salomon and Co. Ltd. Salomon sold his old business to the new company for £39,000.00. The purchase money was paid to Salomon as follows: £10,000.00 in secured debentures; 20,000 shares of £1 each; and the balance of £9,000 was paid to him in cash. All the transactions were placed before the Board and approved by all the members. The only shareholders were Salomon and members of his family. Out of 2,007 shares issued, Salomon held 2,001 and was appointed the Managing Director. The company soon ran into crisis and went into liquidation. The assets remaining amounted to £10,000, while the total liability was £17,000, £10,000 of which was owed to Salomon. The question was: who should be paid first, Salomon, a secured creditor or the outside unsecured creditors? If Salomon was paid first there would be nothing left to satisfy the outside creditors. The liquidator representing the outside creditors claimed that Salomon & Co. Ltd. was a "sham" or "alias" or "agent" of Salomon to avoid the eyes of equity and that Salomon was the company and could not owe himself.

The trial judge upheld the argument of the liquidator and held that the outside creditors should be paid first. Salomon unsuccessfully appealed to the Court of Appeal, but on further appeal to the

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House of Lords, the House of Lords unanimously reversed the two earlier decisions and held that Salomon & Co. Ltd. was a different person, distinct and separate from Salomon. Salomon, being a secured creditor, was therefore entitled to be paid first. Lord Halsbury L.C. stated emphatically thus:

Either the company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.²¹⁹

Of course the principle of legal personality does not mean that a businessman can use the instrumentality of forming a company to defraud members of the public with impunity. In the Salomon's case, the court detected no fraud in all his dealings, but rather found that Salomon knew and took advantage of secured debentures.

The principle of legal personality forms the bedrock of company law. Without the principle, it would have been difficult, if not impossible, to have large (multinational) companies as we have it today since investors would have been less willing to bear the risk of failure which such ventures might entail.

The constitutive technique is also utilised for the formal establishment of bodies like religious, educational, socio-cultural and other organisations that are constituted into incorporated trustees.²²⁰ This constitutive technique is not only available to private individuals, but it is also employed by government in the establishment of corporate bodies like statutory corporations, universities and other administrative and regulatory agencies. Although the creation of a new legal person is the distinctive characteristic of the constitutive technique, the law now provides a legal framework for recognising certain collective interests or groups without vesting them with legal personality. Examples of such groups include partnership, labour union, political parties, professional bodies etc.

3.2.5 Administrative Regulatory Technique

The increasing role of modern governments in activities which were once considered outside the purview of the State has occasioned an outburst of regulatory legislation and the primary purpose of legislation here is to prescribe minimum standards in the overall interest of the public. The options taken by the government in such situations are either to engage in direct participation by the creation of public utility monopoly enterprises in particular business concerns,²²¹ or to seek to regulate the standards of private operators through administrative regulatory technique. Under this technique, government agencies adopt regulatory standards, communicate them to private operators and take steps to ensure compliance. The steps will usually include systems of licensing, inspection, writing warning letters or revocation of licence before the initiation of administrative proceedings, civil litigation or a criminal prosecution when necessary as the last resort.

²¹⁹Ibid at p.31

²²⁰See Part C of the Companies and Allied Matters Act, Cap C20 LFN 2004

²²¹B. Nwabueze, op cit., p. 222 et seq

For instance, before a private school is established, the proprietor is under a duty to apply to the Ministry of Education for licence/permit, which will in theory be granted only after the proposed school has fulfilled certain standards.²²² If a school falls below the approved standard, the Ministry may first warn the proprietor to upgrade the school or revoke the licence before resorting to court action if need be. The Commissioner is empowered to close down a school, which is operating without the requisite licence. Also, the manufacturer of any consumable item is expected to obtain the approval of the National Agency for Foods and Drugs Administration and Control²²³(NAFDAC) after meeting certain standards before commencing production. NAFDAC has become more determined in recent years in the performance of its statutory functions and this has bodies like the Standards Organisation of Nigeria (S.O.N.);²²⁴ the Department of Petroleum Resources (DPR) and the Weights and Measures Department of the Federal Ministry of Commerce (formerly Trade)²²⁵ to mention a few. It is through the administrative-regulatory technique that the Federal Government has, through the Nigerian Communication Commission (N.C.C),²²⁶regulated the activities of the providers of Mobile Telephone and Wireless communication services.

Administrative regulatory technique can be distinguished from the penal technique on the ground that it is designed to regulate wholesome activities, while the penal technique is designed to prohibit and sanction anti-social forms of behaviour. The Administrative - Regulatory technique can also be distinguished from the grievance- remedial technique mainly on the ground that it is designed to operate preventively; that is before a grievance that would necessitate the invocation of the grievance-remedial technique would arise. For instance, in the manufacturing sector, the technique tries to ensure that consumable goods are manufactured under hygienic and safe conditions in the interest of public health and thus help to prevent breach of the manufacturer's duty to the final consumer. This can be contrasted with a grievance- remedial technique which seeks to ensure that any consumer who suffers a health problem due to the negligence of the manufacturer obtains adequate compensation.

3.2.6 The Fiscal Technique

Although the classical aim of taxation is to raise money, in modern time however, it has been used additionally to achieve other economic goals such as redistribution of income and stimulation of economic growth.²²⁷Also, the fiscal technique has been used in the modern time to discourage certain anti-social behaviours thereby helping to bring about a measure of social order. For instance, the Federal Government in the 1998 budget, in order to check the rate of gas

²²²See Education Law, Cap. 42 Laws of Osun State of Nigeria 2001 and Education Law, Cap 47, Laws of Oyo State of Nigeria 2000 and relevant enactments in other States of the Federation.

²²³See National Agency for Foods and Drugs Administration and Control Act No.15 of 1993, Cap NI LFN 2004.

²²⁴Standards Organisation of Nigeria Act, Cap 412 Laws of the Federation of Nigeria 1990, as amended by Act No. 18 of 1990.

²²⁵Weights and Measures Act, Cap W3 LFN 2004.

²²⁶Nigerian Communications Commission Act No. 75 of 1992 Cap N97 LFN 2004.

²²⁷Nwabueze, op cit., pp.J27 -132.

flaring in Nigeria increased the penalty for gas flaring by 1,900 per cent.²²⁸ It was hoped that this fiscal measure among others would put a stop to the irreversible damaging effect of gas flaring on the immediate environment of the oil-producing communities and their entire eco-system. Also, some taxes have been used ostensibly to redistribute income and bridge the widening social gap between "the haves" and the "have nots" in the country. Such taxes include the income tax and capital transfer tax. The government agencies responsible for the administration of the various taxes are the Federal Board of Inland Revenue (FBIR) and the State Board of Internal Revenue (SBIR) at the Federal and State levels respectively. These bodies are established under the *Personal Income Tax Act*.²²⁹ *The Custom and Excise Management Act*²³⁰ and associated enactments also serve to further the philosophy of the Fiscal Technique.

3.2.7 The Conferral of Social Benefit Technique

In modern times, especially in developing countries like Nigeria, the functions of government far transcend that of maintaining law and order. It is now part of the duties of the government to provide social amenities most of which in earlier times were left to the individual, local community or private organisations such as the church. Examples are good road, education, electricity, housing, health care services and social security. This technique does not seek to directly regulate the conduct of the members of the society. Rather, it recognises that if a government is not committed to improvement in the welfare of the people, this will invariably lead to certain social disharmony and disequilibrium in the society, such as apathy, lack of patriotism and social strife. The technique therefore aims at ensuring improvement in the welfare of the members of the society in the expectation that this will in the final analysis bring about order and peace.

This technique is effectively used by the developing countries because they are always seeking to create more conveniences for their people. For instance, it is generally believed that the government of United States of America can send an airplane to salvage the life of a single American who is trapped in another country in an emergency situation. In Nigeria, many programmes have been introduced in different sectors of the economy with the aim of alleviating the plight of the poor and underprivileged. Such programmes include Nomadic Education Programme, National Mass Literacy Programme; Urban Mass Transit Programme; Low Cost Housing Scheme; National Primary Health Care System, Community Bank Programme, People's Bank, Direct Labour Agency, Better Life for Rural Dwellers Programme; National Directorate of Employment (NDE) Vocational Training Schemes; Family Support Programme (FSP); Family Economic Advancement Programme (FEAP); Oil Minerals Producing Area Development Commission (AMP ADEC); and the Niger Delta Development Commission (NDDC); National Poverty Eradication Programme (NAPEP), National Economic Empowerment Development

²²⁸The move to curb gas flaring began in 1979 with the promulgation of the Associated Gas Re-Injection Act, Cap 26 Laws of the Federation of Nigeria 1990 and Regulations made thereunder starting with the Associated Gas Re-injection (Continued Flaring of Gas) Regulations 1984.

²²⁹Act No. 104 of 1993 Cap P 19 LFN 2004.

²³⁰Cap 84 LFN 2004.

Strategies (NEEDS) etc. In spite of all the above programmes, the poverty and welfare situations in the country still remain dismal. It is regrettable that most of the programmes apart from being poorly implemented have always been hijacked by the elites while only the crumbs reach the target audience. Laws in the area of Social Security, Education, Health, and Industry have been identified as falling within this technique.

3.3 CONCLUSION

From the foregoing discussion, it is apparent that instances of similarities and overlap between the different techniques abound. At times the various techniques are complementary while in some cases, a choice between two alternative methods has to be made. While the differences between each of the techniques should always be kept in mind, it is possible for the law to use more than one technique to achieve a particular objective. When legislation is being considered, the government must choose which technique or combination of techniques will best achieve its desired objectives. The examination of the techniques of the law is illustrative of the two principal sources of modern law, legislation and judge-made law. However, since the role of interpretation of statutes belongs to the court we cannot but have an inevitable marriage in appropriate cases.

3.4 QUESTIONS AND EXERCISES

1. Aga and Baba jointly promoted and formed a company. AGABA Nigeria Limited with the object of manufacturing baby drugs. The new company could not immediately engage the services of a qualified and experienced Pharmacist to head its laboratory unit, hence, it was constrained to engage a newly qualified graduate participating in National Youth Service Corps (NYSC) scheme. Certain mistakes were made by the Pharmacist in the course of compounding the requisite chemicals which made the drug to have a completely different colour from that contemplated. Based on the Pharmacist's assurances that the drugs passed the Quality Control test and the fear of incurring a huge loss, the Company decided to sell the drugs to the public. Within one month, ten children, who have used the drug have died in mysterious circumstances. The parents when interviewed confessed that no doctor had prescribed the drug for them and that they were deceived by the superb radio and television advertisement of the drug. Aga and Baba have disclaimed responsibility saying that they cannot be personally held responsible for the acts of AGABA Nigeria Limited.

What techniques will you suggest to address the problems posed by the question.

Hints

This question revolves mainly on the use of administrative regulatory technique and the constitute technique to achieve social control.

- Explain administrative regulatory technique and give examples;

- Note that the approach of this technique is to try and maintain a minimum standard in certain sectors in the overall interest of the public. From the facts of the case, AGABA Nigeria Limited seemed to have no regard for whatever standards that might have been stipulated and what is paramount in Company's consideration is the prospect of making profits. This can be seen in the area of the calibre of the Pharmacist recruited by the company in terms of professional experience and competence and the decision to go ahead to put the drug to the market in spite of the unusual colour. In the circumstances, it was unreasonable for the company to have relied on the assurances of the Pharmacist after the first blunder.
- The company's lack of regard for the regulatory machineries and standards can be seen in its omission to obtain the approval of NAFDAC. The menace which the company's product constituted to the members of the society would have been avoided if the Company had submitted to the regulatory power of that important agency.
- The defence of Aga and Baba that they cannot be held responsible for the act of the company brings into focus the constitutive technique which operates by vesting a group of people with a distinct separate legal personality. Cite *Salomon v Salomon*.
- Note however that the principle was not formulated to defraud the public or to constitute menace to the society. Rather, it was formulated to facilitate co-operative effort to further the interest of commerce and other worthwhile objectives. In this circumstance, it will be appropriate to hold the two promoters responsible for the consequences of their collective, callous and greedy decisions and be sued or prosecuted. In the case of the young Pharmacist, he may also be subjected to appropriate disciplinary action by his professional body. He may also be sued together with Aga and Baba or be made to face criminal prosecution.
- Administrative Regulatory standards should also be established for the advertisement of products on radio, television and other media.

2. Kunle is a popular environmental activist from the Niger Delta.

Though he belongs to the Yoruba ethnic group, he has lived his entire life in the Niger Delta area and has come to appreciate the magnitude of the problems of the area, which according to him always "pain him to his marrow". There is total lack of social infrastructure; oil spillage has caused permanent serious damage to the environment in the area and the ecosystem at large. Gas flaring has continued unabated notwithstanding the constant appeal from the Government to the oil companies to devise an economic way of utilising the gas being flared. There was an oil spillage recently in one of the villages causing the death of about 1,000 people. Government has unequivocally said that "no compensation will be paid" to the victims. The international communities and several donor agencies moved with passion have been sending relief materials to the victims. A major civil unrest is imminent in the Niger Delta.

You have been asked to advise the Federal Government on what legal techniques can be used to bring about effective social control in the area.

Hints

The question centres on the conferral of social benefit technique and the fiscal technique.

- Explain conferral of social benefits technique and how the technique seeks indirectly to regulate the conduct of the people by ensuring the improvement in the living standard of the inhabitant of the Niger Delta Area.
 - While the technique has been effectively used in most developed countries, corruption and poor implementation have not allowed the benefits of various programmes put in place by Government to get to the people. Give the example of the defunct OMPADEC.
 - Explain fiscal technique and how it can be used to discourage the neglect of the oil producing area by the oil companies. Cite the recent increased penalty for gas flaring.
 - From the facts of the case, the welfare and environmental problems of the area must be monumental for the spillage to have claimed over 1,000 lives. It is remarkable that Kunle, a Yoruba man, out of passion has decided to render a selfless service to be part of the solution.
 - Although fiscal technique can be used, but it may take time before the positive impact is felt by the people. The nature and extent of the recent casualties require an urgent intervention. Government should change its position on the "no compensation stand" and turn out a new leaf from the international communities. Otherwise, the government might be regarded as a distant insensitive formal institution.
3. Titi, a cashier to Gbogbolaye Co-operative Society defrauded the Society of a huge sum of money. Titi who was a first offender immediately tendered the money at the police station and begged for forgi veness. The prosecutor who was moved by Titi's show of remorse advised the Chairman of the Society who carne to report the case to drop the charges. The Chairman however insisted on the prosecution saying that the stolen money belonged to the Society and that the Executive Committee had resolved to press the case to a logical conclusion.

Advise the parties.

Hints

This question centres on the use of penal technique to ensure social control and the alternative option of compounding.

- Explain the penal technique and how the technique brings about social control.
- Because of the dangers constituted by criminal behaviours if allowed to go unchecked, the penal technique is expected to be scrupulously applied without fear or favour.
- However, it is not in all cases that the penal technique imposes punishment. There are instances where child offenders or petty offenders might be better dealt with by a simple warning instead of imposing the full punishment prescribed by the law.

- Also, the offender and the victim may agree to amicably resolve the problem upon certain terms. Also, the complainant may not press the prosecution. Give examples. It is however doubtful if this option can in certain cases successfully meet the demand of Justice. Cite the dictum of Oputa J.S.C. in *Federal Civil Service Commission v. Laoye*.
- Applying the principles to the facts of the case at hand, it is crystal clear that Titi's conduct amounted to a crime of stealing and liable to criminal prosecution. Although the posture of the Executive of the Co-operative Society may appear to be too rigid, perhaps it is such attitude that can further the collective interest of the society in combating crimes. It is in the course of the trial that the whole facts are likely to unfold. If Titi truly deserves mercy, it is the Judge who will be in a better position to know. The question now is whether her open show of remorse, her clean criminal record and the fact that she refunded the whole money allegedly stolen are enough to invoke both or any of the two alternative options discussed above in her favour? The option of compounding can also be successfully utilised where there is a compromise between the accused and the complainant, an essential condition which is lacking in this case because the Committee members of Gbogbolaye Co-operative have resolved to press the case to a logical conclusion.

3.5 FURTHER QUESTIONS

1. Notwithstanding the ineffectiveness of the penal technique in Nigeria, there seems to be no viable option to it in controlling deviant behaviours in the society. From your own observation what do you see as the main reason for the ineffectiveness of this technique? Highlight your recommended solutions.
2. Unlike the penal technique, the grievance remedial technique seems to have a viable alternative option that may be ultimately be beneficial and invaluable to both parties and the society.

Discuss

3. Chief Orji is a wealthy High Chief of Igbodo land. Within the past two months, three innocent children who went to play in his compound have disappeared in mysterious circumstances. The Youth Action Council of Igbodo land suspecting a foul play decided to raid the house of the Chief during the annual egungull festival. During the raid, five human skulls were discovered in the Chief's house. Chief Orji managed to escape from the irate mob and ran to a nearby town. The palatial house of the Chief was set on fire and his four wives and children rendered destitute. Thereafter, the villagers have been avoiding the members of his family like plague by refusing to sell to them or buy from them or allow other children to mix with Chief Orji's children in accordance with the customs of the village.

Critically comment on the treatment meted out to Chief Orji. What alternative techniques of social control would you suggest? Explain the advantages of the techniques over the method adopted by the people of Igbodo land.

4. Mr. Randy is living alone with his aged father in the village. In January, 1998, Randy decided to seek a white collar job in the nearby town. Because of this development, his father was constrained to take another wife called Miss Orekelewa to look after him. During one of his visit to his father in the village, Randy was "electrified" by the elegance and beauty of Orekelewa. Orekelewa on her part greatly admired the youthfulness and vitality of Randy. The two of them soon started having an "affair" which resulted in a pregnancy. When the matter became public knowledge, Randy was disowned and cursed by his father and banished from the village for life. By the tradition of the village, the child when delivered has to be sacrificed to appease the gods. The Pentecostal Churches in the village are planning to organise an inter-denominational crusade for five days on "immorality and forgiveness".

Critically appraise the facts and advise the parties.

CHAPTER FOUR

LEGAL REASONING AND APPROACH TO PROBLEMS

Babafemi Odunsi

4.0 INTRODUCTION

It is important to have a proper grasp of the key phrase in this topic before we go to the heart of the topic itself. In the ordinary sense, "reasoning" means to think persuasively or think in a coordinated, orderly, sensible and logical manner.²³¹ The word 'Legal' on its part means anything or issue connected with or having something to do with law.²³² Legal reasoning can therefore be defined as a systematic, logical, coordinated, convincing or persuasive thinking, argument or presentation of points or issues relating to law.

The discipline of law is so peculiar and multi-perspective that issues have been raised about the reasoning method of lawyers and those connected with the formulation and implementation of law.

At times, it tends towards the derogatory when people quibble that others should not be 'legalistic' about issues. Lawyers are thought of as being inquisitive, argumentative, probing and fond of using words not easily comprehensible to the 'layman.' Against this background, it becomes important to understand in correct perspective the reasoning processes of lawyers, legislators, judges in the making, execution and interpretation of law.²³³

There are several techniques or methods of legal reasoning and approach to problems. However, before we examine the techniques or methods, we shall quickly consider the language in which the law is usually expressed.

4.1 THE LANGUAGE OF THE LAW

Language here does not mean lingua (Latin word for 'tongue'), but rather, the combination of words, phrases etc. for purposes of communication. Language still remains the best invention for verbal or written communication. It is also the vehicle for conveying thoughts and reasoning.

²³¹G.W.S. Friedrichsen, *The Concise Oxford Dictionary*, 5th ed. p. 1030.

²³²*Ibid.* p. 692.

²³³See 1. A. Holland & 1.S. Webb, *Learning Legal Rilles*, Blackstone Press Ltd., London, 1991, pp. 191-192.

'Words' on its part has been defined as 'the components and spare parts of language.'²³⁴ This aspect of our study shall be devoted to the consideration of certain characteristics of legal language which though may not be peculiar to law, but which certainly set it apart from ordinary language.

4. 1.1. Law is expressed in general terms

Law is usually, but not invariably, worded in general language form. The main reason that informed expression of law in general terms is the realization that any law made will apply to a wide spectrum of people in different circumstances. It then becomes a problem how to formulate a law that will not be so specific or restricted in application as to overlook other possibilities or variation of circumstances that may arise in future. For instance, section 316 Criminal Code²³⁵ provides "that any person who unlawfully kills another under any of the following circumstances is guilty of murder.

- (i) If the offender intends to cause the death of the person killed, or that of other person;
- (ii) If the offender intends to cause to the person killed or to some other person some grievous harm;
- (iii) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life;
- (iv) If the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence;
- (v) If death is caused by administering any stupefying or overpowering thing for either of the purpose last aforesaid; and
- (vi) If death is caused by wilfully stopping the breath of any person for either of such purpose.

The above provision is wide enough to cover a situation where a person kills another whether by shooting, stabbing, poisoning or strangulation provided the killing is intentional and without lawful justification.

The same characteristic of legal language can be seen in relation to case law sources. It is possible to regard the famous case of *Donoghue v. Stevenson*²³⁶ as establishing that a manufacturer of ginger beer owes a duty not to allow snails to get into the product, that being the specific facts before the court. But according to Farrah, to express authority in this highly

²³⁴G.W.S. Friedricsen, op. cit. p. 1505.

²³⁵Cap C38 LFN 2004.

²³⁶J.H. Farrar, op. cit., 3rd ed. P. 76

specific way would not be helpful. It would make it difficult to produce future case law decisions. It would hinder the development of broader case law principles. This is because the case could only serve as precedent in cases where the manufacturer of ginger beer has negligently allowed decomposed snails to get into the bottled beer. It will not apply for instance where a manufacturer of milk negligently allowed germs to get into the canned milk. Consequently, the principle in the case has been expressed at a higher level of generality as establishing that a manufacturer of consumer goods owes a duty of care to the final consumers of its goods to ensure that the good is free from all defects that may cause health problems.

J. H. Farrar, op. cit., 3rd ed. p. 76.

It suffices to point out that in making the generalization, effort is usually made to ensure that the law is not so fluid as to lack specific object, focus and scope of application. For instance, for the application of the principle in *Donoghue v. Stevenson*²³⁷ to be sensible, it has to be limited to manufacturers of consumable goods and cases where the defect in the good consumed has resulted in proven health problems. It will be too wide for instance to extend the same principle to manufacturers of steel or cases where the consumption of the goods has simply caused 'mere irritation' or economic loss.

The fact that it has been said that, law is usually expressed in general terms should not be taken to mean that it could not be expressed in specific language. As a matter of fact, law can, when desired, be expressed in highly specific language.²³⁸ This is usually done where the law wants to leave no doubt as to how the law should apply to the facts of a particular case. For instance, section 6(1) of the Constitution of the Federal Republic of Nigeria, 1999 vests the judicial powers of the Federation, "In the courts to which the section relates being courts established for the Federation." Section 6(5) then goes further to provide that, "This section relates to:-

- (a) The Supreme Court of Nigeria.
- (b) The Federal Court of Appeal.
- (c) The Federal High Court.
- (d) A High Court of a State.
- (e) A Sharia Court of Appeal.
- (f) A Customary Court of Appeal

But it would be difficult to express all our statutory rules in such a highly detailed and specific language manner. The sheer volume of the resulting law would be unwieldy and somewhat lacking in coherence. Therefore it is legal reasoning that will guide how law is ultimately expressed in order to achieve the desired objective; whether it should apply to specific circumstance or accommodate varied circumstances without being too fluid as to lack direction, coherence or focus.

²³⁷(1932) A.C. 562.

²³⁸*ibid.*, p. 78.

4. 1.2 Use of abstract concepts

Lawyers are not free to use words anyhow. Unlike the scientist who can give name to what he discovers, the lawyer has to use the words that are already in use. However, where appropriate words do not exist to convey a specific idea or impression, lawyers are known to have invented new words in form of concepts.²³⁹ Even when a particular word exists, legal concepts can still be employed in a totally different sense from the ordinary meaning of the word. Such words include "contract," "company," "law," "rule of law," "legal personality," "ownership," "possession," "fee simple," "fee tail," "principle of legality" etc. These are technical words which have special meaning in law. One obvious advantage of using concepts in law is to achieve economy of words. The use of these technical words or concepts usually obviates the need to list out all the details of the concept or making verbose explanation. For instance, the concept of the rule of law has three main components viz:

- (a) The Supremacy of the law;
- (b) Equality before the law and
- (c) Fundamental Human Rights.²⁴⁰

4.1. 3 Other remarkable features of legal language

Apart from the above, the legal language is remarkable for the following reasons:

- (a) Frequent use of common words with uncommon meaning. For instance while a layman will say he has a case in court, a lawyer will say he has a matter or a law suit. "It is submitted that" instead of saying "the court should hold that."
- (b) Frequent use of Latin and French words and phrases such as 'consensus ad idem,' 'ultra vires,' 'audi alterem partem,' 'nemo dat quod habet.' It should however be noted that Britain has moved away from compulsory use of "latinised" phrases in its forensic practices. It is possible that other jurisdictions will follow suit at one time or the other.
- (c) Frequent use of archaic English words, such as 'hereinbefore,' 'aforementioned,' 'hereinafter' etc.
- (d) Use of argot, "jargon" or "slang" consisting of special vocabularies which are not meant to be understood by those outside the legal profession.

For instance; "my brief has not been perfected" meaning that "I have not been paid my professional fee," or "I am speaking from the bar" meaning that "I am speaking with due sense of honesty and responsibility as an officer of the court."

²³⁹ For instance, concepts such as 'legal personality'.

²⁴⁰ A notable example is the United States of America where the lawyers in the superior courts wear suits instead of wigs and gowns.

- (b) Frequent use of resonant formal words such as "the truth, the whole truth and nothing but the truth."

The reason for using some of these words or expressions is basically due to the nature of the historical development of the law. Apart from the fact of historical accident, it is doubtful if there is any rational justification for some of them in the modern time. The continued usage of some of the words has made the language of the law and lawyers to suffer severe attack and criticism.

Apart from the peculiar nature of the language of the law, lawyers and judges wear dark long robes and wigs and behave formally at public hearings under the protection of the Police. While some of the formalities may be undoubtedly necessary to give the courtroom proceedings some degree of orderliness, seriousness and objectivity, the reality is that they have combined with other factors to unduly mystify the administration of justice and "shut the majority of our "unlearned" populace out of justice. It is however hoped that, among others, the simplified forms of dressing prevailing in some jurisdictions will eventually permeate all jurisdictions²⁴¹ so that non-lawyers would no longer be unduly confounded by lawyers' outward appearances.

4.3 METHODS OF LEGAL REASONING

The laws made by the legislature are to be interpreted by the judiciary in case of disputes.²⁴² Since law is usually expressed in a general language, it means the lawyers of the parties and the judge have to determine through practical reasoning whether the law applies to particular facts. This is not an easy task considering that any decision will one way or the other have implication on the rights, liabilities and obligations of the parties. It therefore becomes necessary to study the various methods of reasoning usually adopted in the legal profession.

4.3.1 Principles and Rules

A principle of law can be defined as an established legal truth or proposition that is so clear that it cannot be reprovved or contradicted unless by a proposition which is clearer.²⁴³ Because of the timelessness of the truth or proposition, it serves as a standard guide in the process of law making, execution and interpretation.

It is an established ideal, value or guidepost by which the quality of legislation, decisions and arguments may be judged and evaluated as either valid or not notwithstanding any good result that such a legislation, decisions and arguments may produce. Some of the well-established principles in Constitutional law are principles of rule of law, separation of powers, supremacy of the Constitution, etc. If a particular line of reasoning or argument is contrary to any of the established principles, such a reasoning or argument immediately becomes suspect and open to legal attack or criticism.

²⁴¹Under the concept of separation of Powers each arm of government has different roles to perform. The judicial arm interprets the law- see sections 4-6 of the 1999 Constitution.

²⁴² J.H. Farrar & Dugdale, op.cit. p. 9; G.W.S. Friedrichsen, op. cit., p. 920

²⁴³ Ibid

A principle is therefore a comprehensive legal proposition or truth which furnishes a basis or origin for the development of legal rules. Legal rules on the other hand are instances of specific application of a legal principle. For instance, the principle of natural justice has two components: (i) a party must not be condemned unheard (*audi alterem partem*) and (ii) one should not be a judge in his own cause (*nemo iudex in causa sua*). The following rules have been developed from the principles:

4. 3.2 Legal Rhetoric

Rhetoric is the art of seeking to convince or persuade another, either through the medium of writing or speech, to accept one's position or view. Plato defined rhetoric as 'the art of winning men's mind with words.' This is why any serious minded law student or lawyer must continuously seek to improve his mastery of language and use of words. In the words of an erudite scholar:

"For the lawyer, language has a special interest. Words are of central importance to him because they are in a very particular way one tool of his trade... other professionals are also concerned in part with words but certainly not to the extent that lawyers are."²⁴⁴

A notable ancient Greek Philosopher, Aristotle, identified and distinguished between forensic rhetoric and deliberative rhetoric and thought that the pursuit of the latter was nobler and more worthy of the statesman. Broadly speaking, lawyers use forensic rhetoric and judges use deliberative rhetoric. Lawyers represent the interest of their clients and their goal therefore is to persuade the court to accept their view points. The judge, on the other hand, is seeking to arrive at a rationalized decision that is justifiable in the overall interests of the parties and the society.²⁴⁵

Although presentations are made in words, the principal rhetorical device used in law is the appeal to authority. This, in other words, means citing or referring to existing laws (judicial or statutory) to back up or justify the position being canvassed. In Nigeria and other common law jurisdictions, appeal to authority entails referring to judicial and statutory authorities which constitutes what is known as primary sources of law. In some instances the opinions, writings, commentaries etc of jurists and learned writers as well as judicial decisions of other jurisdictions can be referred to; however they have only persuasive effect. Opinions, writings, commentaries, among other things, constitute part of what is known as secondary source of law.

It can therefore be deduced that legal rhetoric requires having a sound knowledge of law and skill in the application of the legal principles. Put in another way, one has to know the sources of legal authority, the content of the particular authority and the set of ground rules for using

²⁴⁴ See M. P. Golding, *Legal Reasoning*, pp. 11-17

²⁴⁵ See R. Akinjide, "Advocacy, Ethics and the bar," *Nigerian Law and Practice Journal* vol. 2 No. 1, 1998. Pp. 123-

authorities. In summation, it can be said that legal rhetoric requires or involves the essential know-how of the legal profession. Such legal skills are not acquired naturally or at birth. The skills are acquired through conscious regimented academic and professional training; post call practical experience obtained on the field, also contributes to sharpening of the skills. In this vein, it is submitted that technique of persuasion or legal rhetoric is not a natural gift but an acquired skill. There is nothing like a 'born lawyer'. Lawyers are made by diligence, patience and application of the knowledge of legal techniques.

Manifestly, being adept at legal rhetoric requires hardwork on the part of the lawyer. Alexander aptly captures the scenario of the lawyer in the following words:

"Few people realize under what pressure successful barristers live ... The busy barrister is on the qui vive all the time. In court he has to be on the alert every moment and is watched by a highly trained expert on the side who pounces upon- his slightest mistake. Out of court he had to work far into the night, night after night, working hard and continuously at mass of detail. He cannot, like the head of a big business, delegate to subordinates the actual carrying out of his work. His 'devils' prepare for him note of his material but once he has gone into court he has to take entire responsibility on his own shoulders.²⁴⁶

4.3.3 Legal Logic

It is not enough for a lawyer to master the facts of his case and ascertain the applicable authority, it is important for him to present his position or argument in a logical manner. The value of logic to the lawyer cannot be over-emphasized. Logic will help to reason clearly, express himself precisely and put his thoughts across firmly. Also, it will teach him how to detect bad argument and identify the flaws in it.²⁴⁷

It is therefore paramount for a Lawyer to be on the lookout to prevent certain arguments that might mislead the court to make a wrong decision or form a wrong conclusion.

4.3.4 Syllogism or Deductive Logic

Logic is what readily comes to mind when reference is made to syllogism. Simply, syllogism is a deductive form of argument; it starts from a major premise (assumed basis or previous statement is inferred), and brings in a minor premise and from the two premises one makes or deduces their logical conclusion. In encapsulating the salient features of syllogism, a working definition of it has been given as, a "tried of connected propositions, so related that one of them, called 'The conclusion', necessarily follows from the other two, which are called the Premise", The following is an example of Syllogism.

²⁴⁶ Adapted from G. Williams, Learning the Law, 11th ed., p.189.

²⁴⁷ I. McLeod, Legal Method, op. cit, p.12.

Any man who rapes a woman
will be imprisoned

Mr. Showboy has raped Miss Pelemo).

Mr. Showboy must be imprisoned

Major premise (emanating from
the provisions of the criminal code statute).

Minor premise (based on the facts of the
case)

Conclusion

The foregoing examples of syllogism constitute deductive reasoning or deductive logic because one can deduce or infer the conclusion of a minor premise from the major one. Another way of explaining what deductive logic or deductive reasoning is that it is a process of arguing from the general to the particular.²⁴⁸

A Lawyer giving advice to his client as to the application of a detailed statutory provision will similarly employ deductive logic or reasoning. The statute for enactment is the major premise. The Lawyer identifies his client's case as falling within the scope of the statute and then deduces as the conclusion the way in which the statute applies to the client. As illustration, let us look at the following case where a 50 year old Chief Mukolo wants to incorporate a company together with his 16 year old son, Muda and he has sought advice from his lawyer, Showboy Esq. in respect of the matter. The Lawyer's advice will go thus:

Though Section 18 of the Companies and Allied matters Decree, 1990 (CAMA) provides that at least two persons can form and incorporate a company, but under section 20(1)(b) CAMA any person less than 18 years cannot join the formation of a company - Major premise.

Muda is less than eighteen years of age - Minor premise.

Muda cannot join in formation of a company with Chief Mukolo (or put in another form: Chief Mukolo and his son, Muda cannot form a company with his son because of the son's legal disqualification) - Conclusion.

In the illustration, the conclusion constitutes the Lawyer's advice to the client, Chief Mukolo and the advice is deduced or derived from the provisions of the Companies and Allied Matters Act, 1990 as the major premise.

There are certain limitations to syllogism as a method of legal reasoning. In logic 'truth' and 'validity' are not the same. In a simple language, the word 'true' or 'truth' would mean that a certain fact or situation exists. Validity on its part, in this context, means that the conclusion necessarily follows from the major and minor premises. At times logic does not concern itself with the truth, but with the validity of the statements made and or conclusion drawn.

Another limitation is that once a wrong premise is allowed to be established as "true or "right", then, it is inevitable that a wrong conclusion will be reached. This can be illustrated by considering a syllogism to the effect that:

"Every good man goes to heaven after death	Major premise
John died as good man	Minor premise
Therefore John is in heaven"	Conclusion

The above statement forms a valid syllogism which satisfies logic. But how are we sure that John died a good man or that there is indeed a heaven? Those are matters that belong to the realm of "truth" rather than "validity."

It is crucial and very important for a lawyer to be vigilant and in a position to carefully distinguish between truth and validity. The distinction is highly important in legal practice. For instance, a witness testifying in a case may be logical even though he is lying. A lawyer on the opposite side who is not conversant with the distinction between truth and validity will not be able to discredit or vitiate the evidence of the witness. Neither also would such lawyer be able to point out the defect in the evidence to the judge. Similarly, if a judge cannot or does not advert his mind to the distinction between truth and validity, he may give underserved credibility and weight to evidence of a logical but lying witness.

Another thing to note is that a statement may be logical in a given context and illogical in another context. In mathematics, "things equal to the same thing are equal to one another." Thus if $2 + 2 = 4$ and $3 + 1 = 4$, then $2 + 2$ must be equal to $3 + 1$, A man is a human being, a woman is also a human being therefore a man is a woman."²⁴⁹

4.3.5 Inductive Logic

It should be noted that deductive logic or reasoning is only applicable once a clear major premise has been established. If the source on which the Lawyer wants to base the case or his advice to the client, is not a statute but case law (Judicial precedent or court decision), no major premise may emerge from just one court decision. Rather, it would be necessary for the Lawyer to examine other cases to conclude or discover that an all embracing legal principle (case law) has been established by the court in various decisions; over a period of time this established legal principle will then constitute the major premise. In essence, the Lawyer in this situation reasons from particular court decisions to a general proposition.

Put in another way, the lawyer builds a case from the particular to the general; or from the minor to the major premise. This form of reasoning is referred to as inductive reasoning as opposed to deductive reasoning where the reasoning is from general proposition to the conclusion."²⁵⁰

Thus, if a Lawyer relies on a case law (i.e. cites his authority from the decision of a court in a particular case), he is using inductive logic or reasoning. In doing this he has to examine and analyze his case along with the other cases covered by the major premise and show that they have common features or characteristics. If all the cases have the same features or characteristics,

²⁴⁹See generally I. Mcleod, op. cit pp 13-16.1. A. Holland & 1. S. Webbs, I cit., pp. 192-202.

²⁵⁰Ian Mcleod, op. cit p. 15.

he then submits or argues that they all fall within the major premise or proposition (i.e. an all embracing legal principles had been established).

An illustration of inductive reasoning is a case where one Mr. Showboy through negligence caused injury to Mr. Shinene. Mr. Showboy, 'Mr. Shinene's lawyer in arguing (using judicial decisions as basis) that his client is entitled to damages presents the following argument.

- (a) In the case of *Donoghue v. Stevenson*²⁵¹ a party that suffered injury as a result of the negligence of another person was awarded damages.
- (b) A similar position was held, in the case of *Dulie v. White & Sons, Scarsbrook v. Mason*, among others.
- (c) All these cases have similar features or characteristics with the case at hand and Shogiro should pay damages to Mr. Shinene for causing him injury through negligence in view of foregoing legal authorities.

The use of deductive and inductive logic is not limited to only lawyers in the realm of law. Judges or judicial officers also use deductive and inductive reasoning or logic in deciding cases brought before them.²⁵² Farrah explained the process by which judicial officers use these forms of reasoning in his book, *Introduction to Legal Method* where he cited the case of *Dorset Yacht co. v. The Home Office*, per Lord Diplock. The issue for determination in that case was whether or not Borstal officers owed a duty of care to the public to prevent escapes by those in their custody.

According to the learned judge, the court should start:

" by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care."

(i.e. identify what the particular has in common with the general. In other words; proceed from the minor to the major - or apply inductive reasoning).

The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the conduct and relationship involved in each of the decided cases. But the analyst must know what he is looking for, and this involves his approaching his analysis with some general conception of conduct and relationships, which ought to give, rise to a duty of care. This analysis leads to a proposition which can be stated in the form.

In all the decisions that have been analysed, a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D. etc and has not so far been found to exist when any of these characteristic (A, B, C, D, etc) were absent.

²⁵¹ Supra

²⁵²John H. Farrar, op. cit, pp. 81 - 81.

For the second stage, which is deductive and analytical, that proposition is converted into: "In all cases where the conduct and the relationship possessed each of the characteristics (A, B, C, D, etc) a duty of care arises". The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do, the conclusion follows that a duty of care does arise in the case for decision.

4.3.6 Analogical Reasoning

In the above stated exposition, it would be observed that Lord Diplock has added one element to the model of inductive and deductive reasoning; this is that at the inductive state, the person analysing must have some ideas of what he is looking for. In essence, he must categorize the issue and identify the previous decisions that are closely similar or related to the issue at hand that they can be used as a basis for inducing the relevant proposition of law or the underlying legal principle. This form of reasoning is commonly used by judges and legal advisors in arguing that previous decisions are, or, are not sufficiently similar to be relevant to the issue in question.

It has been opined that analogical reasoning of this nature is not strictly logical but rather a loose form of reasoning which raises broader issues.

4.4 LEGAL REASONING AND PRACTICAL REASONING

Every man is born with what is called "native faculties" which possesses some natural logic. According to Justice Ekundayo, formal study of logic merely improves on ones' natural logic. Practical reasoning in all walks of life is different from formal logic in that practical reasoning is not tied to deduction or induction as discussed under legal logic. Unlike legal logic, practical reasoning makes frequent use of analogy and is primarily concerned with weighing various considerations and before coming to a justifiable conclusion. The link between the premise and conclusion need not be one of formal validity and the question whether the conclusions are good or bad is determined by the prevailing value system of the society - a verdict which may be reversed with time. Against this background, it has been submitted that what makes the common law great is "less reason rather than an endless succession of reason." What is meant here is that it is the constant process of supporting applicable legal rules with reason and modifying or discarding them when their application can no longer be supported that enabled the common law to keep pace with changes and maintain its relevance up till the modern time. This is perhaps what led someone to say that "The life of the law has not been logic but experience." This statement will become clearer when we consider legal reasoning and justification.

4.5 LEGAL REASONING AND JUSTIFICATION

When a case comes before the court, the judge will have to resolve the conflicting interests of the parties and that of the society by coming to a decision in form of a judgement or ruling. In making his decision, the judge will obviously be influenced in varying degrees by factors such as the probative value of the evidence adduced; the rhetoric and logicity of the argument of the

counsel to the parties and how compatible those positions are with established legal standards and principles.²⁵³ In the final analysis, the judge will have to justify his decision in a reasoned judgement.

Until about the last two and a half decades, appeal to authority could be said to be about the strongest justification that a judge can advance in support of his decision. Therefore, once applicable judicial or statutory authorities are cited, the judge will be bound to, adopt the position of the party citing the authorities. However, nowadays judges are more willing to recognize other prevailing factors that can be used to justify their decision. Apart from appeal to authority, other factors usually considered by the judges are:

1. The extent to which a proposed decision will cohere with the existing principles and authorities. The greater the inconsistency with the existing principles and authorities, the less likely it is to be adopted.
2. The consideration of the question whether the consequences of the decision will be acceptable In terms of justice.
3. Judges may refer to common sense and the supposed view of a reasonable man.
4. Public Policy: This involves justification in the larger context of the public good.²⁵⁴

From the above discussion, it can be seen that it may be sometimes difficult to predict how the court will resolve some cases. This is why litigation is sometimes described as "a gamble". There are several instances where a party will lose at the court of first instance (for instance, High Court) and the court of Appeal and eventually win at the Supreme Court. .

Undoubtedly, decision making is a process which can be judged by the tenets of rationality. Rationality as we have seen, means different things. It can mean, logic in the stricter sense of syllogism or in the looser sense of induction. It can mean tested by empirical observation of cause and effect in terms of practical reasoning. It can also mean coherence with public policy, common sense and the view of a reasonable man. Therefore law, logic, public policy among other things are involved in legal reasoning. This is why it has been said that although logic plays an important role in legal reasoning, it is only part of the story.

4.6 RHETORIC, LOGIC AND INTEREST OF JUSTICE

From all that has been said earlier it is safe to conclude that rhetoric and logic constitute the technical components of judicial adjudication. It is fair to point out that in prevailing times, the courts can make departure from strict rhetoric or logic, if interest of justice so demands. The courts are now more poised to achieve justice instead of granting victories flowing from

²⁵³M.P. Golding, *Legal Reasoning*, op. cit, pp. 12 - 13.

²⁵⁴J. A. Holland & J.S. Webs, op. cit. pp. 202 - 205.

technicality. The position has been strongly put, inter-alia, in the case of *Chinwendu v. Mbamali*²⁵⁵ thus:

"Care should be taken by the court always not to sacrifice justice on the alter of technicalities. The time is no more when disputes are dealt with rather on technicalities and not on the merit."

We hold the view that the disposition of the courts to do justice over and above technical victory is commendable. The situation will change the perception of the average person that going to court is a gamble or game where right can be, turned to wrong or vice-versa. In a similar vein we have earlier pointed out that rhetoric and logic largely are not based on truth, but technical applications. The emerging picture is that rhetoric and logic would be operational to the extent that they would not occasion miscarriage of justice. Above all, lawyers, as ministers in the temple of justice are to ensure that justice is done and should always place before the court facts, that would assist the courts in achieving an effective resolution of disputes whether in their favour or not.

4.7 QUESTIONS AND EXERCISES

1. The language of the law and certain behaviour of lawyers and judges have suffered several attacks and criticisms. For instance, the language of the law has been described as being
". .. esoteric and behind the feelings of modern society ... " It has also been suggested that law should "drop its humpty dumpty expression and put on the garment of modernity."

To what extent is the above criticism justifiable?

Hints

This question calls for a critical appraisal of characteristics of legal language and the formal behaviour of lawyers and judges at public sittings.

- There are certain characteristics, which though may not be unique to law, but certainly sets it apart from ordinary language.
- Discuss the following characteristics of legal language and give examples.
 - (a) Law is usually expressed in general terms. This however does not mean that law cannot be expressed in highly specific term when desired.
 - (b) Use of abstract concepts.'
 - (c) Frequent use of common words with uncommon meaning.

²⁵⁵(1980) 3 - 4 Sc 31 at 82 per Eso. Jsc.

- (d) Frequent use of old/archaic English words.
 - (e) Use of argot consisting of special vocabularies.
 - (f) Frequent use of resonant formal words.
- Apart from the remarkable nature of the language of the law, lawyers and judges behave formally at public hearings.
 - The reasons for using some of the words are historical, while some of the characteristics of legal language have been dictated by expediency. For instance, if law is expressed in highly detailed and specific language, "the sheer volume of our statutory laws would be unwieldy and lacking in coherence". Also, it may not be helpful to use prior decided cases to develop the law. Moreover, concerning the use of abstract concepts, lawyers have to be creative where appropriate words do not exist to convey specific idea or impression. Another obvious advantage of the use of concepts in law is to achieve economy of words.
 - Certain behaviours of judges and lawyers such as the dress code, police protection in the court room: a certain degree of orderliness, seriousness and objectivity are not to mystify- the lawyers and court procedures are expected. It should be noted that the foregoing is applicable to proceedings in the High courts and other superior courts of record and not lower courts such as customary courts and to a large extent magistrate courts where the proceedings are simpler.
 - The, above is not to justify "wholesale" the language and behaviour of lawyers. As much as possible the Language of the law should be simplified. French and Latin words should be sparingly used. In certain circumstances, 'the court should be able to dispense with the formal dress code of lawyers and judges, since the hood does not make the monk!

2. Discuss the various methods of reasoning usually adopted in the legal profession and the limitation if any of each method

Hints

The discipline of law is so peculiar that lawyers are thought to be probing, inquisitive and argumentative. These attitudes stem from a sensible unwillingness to accept a point without convincing proof. These perceived traits have raised issues about the reasoning methods of lawyers and those connected with the formulation and implementation of the law.

- Explain what is a legal standard.
- Discuss the following methods of legal reasoning and highlight their limitations.
 - (a) Principles and standards
 - (b) Legal rhetoric
 - (c) Legal logic
 - syllogism
 - inductive logic

- It is the various shortcomings of these methods that have made judges to adopt practical reasoning approach in deciding cases that comes before them.
 - List the various factors which a judge can advance to justify his decisions.
3. "The life of the law has not been logic but experience" critically discuss.

Hints

This question is on the usefulness and limitations of legal logic in legal reasoning and the relationship between legal logic and practical reasoning. What the statement means is that legal reasoning entails legal logic but also something more.

- Logic is one of the methods of reasoning usually adopted in the legal profession. Explain the usefulness of logic.
 - Explain deductive logic (syllogism) and give examples.
 - Discuss the limitations of syllogism.
 - At times it does not concern itself with the truth, but with the validity of the statement.
 - Once a wrong premise is allowed to be established, it will lead to a wrong conclusion.
 - A statement may be logical in a given context and illogical in another context.
 - Explain Deductive logic and give examples.
 - Discuss the limitation.
 - The person analysing must have some ideas about what he is looking for.
 - Though legal logic has its usefulness, what is often used in practice is not so much legal logic but practical reasoning, unlike syllogism, the necessity. Apart from practical reasoning, the court is concerned with weighing various considerations before coming to a justifiable conclusion. Some of the factors which are usually considered by judges are:
 - Coherence with existing legal principles and authorities
 - Justice
 - Consideration of the view of a reasonable policy
 - Public Policy.
 - It is against this background that the above statement has been made meaning that several factors apart from logic usually come into play to determine what the law is or what the decision of the court on any issue will be.
4. General Showboy is standing trial before a special military tribunal for planning a coup d'etat against the government of the Federal Republic of Edet. There is a treasonable Felony Act, 1999, which prescribes death penalty for any person whether military or civilian, who is involved in a coup plot and found guilty. General Showboy's defence is that there was no real coup and that he was set up. He therefore pleaded for clemency. In the 60 years history of the Federal Republic of Edet, coup convicts have only been

pardoned once. Furthermore, there have been clamour by the International community and various organizations that justice should be tempered with mercy.

Assuming you are the judge, how will you decide the matter in view of different options open to you?

Hints

Broadly, the question is concerned with how judges arrive at decisions on cases and how decisions arrived at are, or can be justified.

When cases come before judges, they have to resolve the conflicting interests of the parties and the society at large through the judgements or decisions given. Ultimately, whatever decisions arrived at will have to be justified by the judges in reasoned judgments.

In approaching or addressing the question you will be expected to:

- Explain that it relates to legal reasoning and justification.
- Explain how judges will be influenced by different factors such as probative value of evidence adduced, rhetoric and logicality of counsel's argument.
- Explain how until about thirty years ago, judges used to rely mainly on appeal to authority in justifying decisions.

This can be regarded as a strictly technical approach.

- Explain how there has been a change in attitude of judges from adopting a strictly technical approach to consideration of some other factors, such as public policy, common sense and the supposed view of a reasonable man etc.
- Being a problem question, you will be expected to now relate the foregoing principles to the facts of the imaginary case constituting the question.
- In doing this, you may posit that General Showboy should not be killed, notwithstanding the strict provision of the 'Treasonable Felony' Act 1999. Your justification will be that your decision, as the judge, accord with justice. A capital punishment will put paid to any hope of review of the case under future circumstances.
- In view of the clamour by the members of the international community for leniency, imposing death penalty can make the country incur ill will from both international and domestic fronts. Public policy will manifestly make this undesirable.
- Generally, considering the peculiar nature of the case as earlier state, the judge should fall back on common sense and do what a reasonable man in the circumstances will do i.e. not imposing death penalty.
- One can also make mention of the fact that stated instances where convicts were pardoned could be invoked to further justify or strengthen the option of leniency for General Showboy in this case.

4.8. FURTHER QUESTIONS

1. "There is nothing like a "born lawyer". Lawyers are made through diligence, patience and application of the knowledge of legal techniques".

Discuss.

2. What is the relevance of legal reasoning to legal method? Discuss the different methods of legal reasoning.
3. "A Judge should be free to base his decision on any of his own sense of justice. He need not be required to justify his decision".

Do you agree?

CHAPTER FIVE

FACT FINDING AND DISPUTE RESOLUTION

S.O. Akindipe & Abiola Sanni.

5.0 INTRODUCTION

Disputes are bound to arise, and they do arise in business. The parties to a dispute should always endeavour to find means by which disputes can be addressed, addressed adequately and addressed on time before we all get overwhelmed by them. It must be noted that there is a gulf of difference between "bringing an end" to a dispute and "settling" or "resolving a dispute." A quarrel between two young lads over the ownership of a toy can be summarily brought to an end by the parents removing the toy and permanently depriving both of the lads the use and enjoyment of the toy. Stephen Ofe in his article "Justice in Dispute Settling"²⁵⁶tells a sad tale about how a dispute between two local farmers over the ownership of a land was brought to an end. The farmers appeared before the local chief who summarily ordered that .they should be killed and then took over the land himself. Also, in the

²⁵⁶S. Ofe, "Justice in Dispute Settling", (1998) The Calabar Law Journal, Vol. 2, p. 91.

Middle Ages most disputes or controversies were 'resolved' by subjecting the disputants to terrible ordeals such as burning of their hands in a steaming hot fire or throwing a baby whose legitimacy is in doubt into the river. If the person survived the ordeal unscathed, then God had intervened in his favour and that proved his innocence. This method of resolving disputes is often referred to as that of "proof" as opposed to trial. Trial by ordeal is prohibited by the Criminal Code.²⁵⁷

All the above techniques of 'resolving disputes worked, because they were acceptable to the parties. Today, it would undoubtedly be irrational, absurd and unacceptable to subject disputants to such crude techniques. The judgement or decision of the adjudicator is more likely to be respected and obeyed when it is based on certain objective standards or norms as opposed to his whims and certain unscientific hypothesis. The parties are likely to believe that justice has been done and be pacified when the adjudicator has followed certain standard procedures or methods in resolving the dispute. Law over the years has striven to evolve an efficient means of resolving disputes in modern time. The methods, which the law has evolved, can be broadly divided into two categories namely adjudicatory and non-adjudicatory methods. In this chapter, we shall briefly examine the two methods and their merits and demerits. It suffices to point out that there are varieties of both methods but only their main features will be considered.

5.1 THE ADJUDICATORY METHOD

The adjudicatory method popularly known as Litigation involves the submission of the dispute to a court of law. Indeed it may well be argued that if parties to a dispute wish it to be decided in a binding way, they should normally have recourse to the established courts of law rather than to a specially created arbitral tribunal.²⁵⁸ It has been rightly pointed out that in most cases, an aggrieved Litigant, who files an action in the court of law, initiates the process of Litigation. The other party is called upon to defend the suit and a third party called the Judge, Magistrate or Adjudicator is assigned by the state to preside over the matter and to resolve it in favour of one of the parties. The decision of the court is binding on the parties and unlike non-adjudicatory method, it is self-executing and does not require another tribunal to give it a force of law.²⁵⁹ It is a formal method of resolving disputes. It involves the appearance of parties and their witnesses before formal institutions or authorities such as the law court or tribunal established by law. The method is usually set in motion

Fact Finding and Dispute Resolution through the lawsuit or litigation. It is important to note that a particular event that gives rise to a legal dispute before the court is usually made up of myriads of facts linked together like a chord.

For the judge or adjudicator to resolve the dispute he must first of all ascertain the fact of the case and then apply the law to the facts. How then does the judge or adjudicator discover the fact? In other words, what are the methods employed by the judge or adjudicator in the finding of

²⁵⁷See section - of the Criminal Code, Cap - , Laws of Federation of Nigeria 2004

²⁵⁸See M. Akanbi, "Why Arbitrate?" (2002) *The Jurist*, Vol. 7, p.61. p61.

²⁵⁹ *Ibid* p. 61.

facts of the dispute before him? Two main methods or approaches may be adopted in this regard; namely the adversarial method and inquisitorial method.

5.2 THE ADVERSARIAL METHOD

This method gives each party and his lawyer a great deal of control over the way in which facts are collected and presented. Each party has the obligation to assemble his witnesses and present his evidence in a manner most favourable to his case and adverse to that of other party. The parties apparently appear as adversaries and engage in contentious argument with each other and accusing one another as the cause of the dispute. This is why this method is called "adversarial" or "accusatorial."

Each party calls his witnesses one by one and tries to establish evidence that are material to the success of his case through them. This process is known as examination-in-chief. After the examination-in-chief, the witness will then be cross-examined by the counsel for the opposite party. The objects of cross-examination are to weaken, neutralize and demolish a party's own case by means of his opponents' witnesses. If a witness is not cross-examined, it is implied that the truth of his evidence is admitted by the other party. After the cross-examination of a witness, the party calling him has a right to re-examine him. The object of re-examination is merely to give the witness an opportunity of explaining any seeming inconsistency in his answer and to clear any doubt relating to matters arising from the cross examination.

In the whole scenario of the legal "battle" the role of a judge can be likened to that of an umpire, ensuring that evidence is presented in accordance with certain ground rules of evidence and procedure such as the rules that hearsay evidence is inadmissible that a lawyer must not ask his own witness a leading question and that a party must not take the other side by surprise. On the basis of the evidence adduced, the judge must make up his mind on the balance of probability which version of the facts and legal argument he prefers. The judge may feel that some important evidence is missing or that the lawyer has failed to ask the right questions or call all the relevant witnesses but there is nothing he can do about that. He must make up his mind on the basis of the evidence presented and must not descend to the legal "arena" to search for evidence on behalf of the parties even if the facts are well known to him. He also cannot question a witness himself except to clarify an ambiguity in the witnesses' answers.

The adversarial method presents a classic case of parties who are theoretically on a level playing ground. The parties are bound by the same rules. Neither side is forced to disclose the details of his evidence in advance before the trial to the other. The judge had to decide the case on the balance of probability, which favours neither party. If the imaginary scale of justice tilts 51 % in favour -of a party judgment will be given in his favour. The principle of equality or level playing ground may however be modified due to some policy considerations. Instances where the principle has been modified are:

5.2.1 Criminal Procedure

In criminal procedure while the prosecution has to reveal its evidence to the accused before trial thus enabling the accused to prepare in advance, the accused on his part is not bound to disclose his defence in advance. As a matter of fact, an accused has a right to refuse to answer certain incriminating questions both before his arraignment and during trial. Section 35(2) of the 1999 Constitution of the Federal Republic of Nigeria provides thus:

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"Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner of his choice."²⁶⁰

Also the prosecution must prove the guilt of the accused not on the balance of probability, but beyond reasonable doubt which is a higher standard. Mere suspicion no matter how grave can never ground conviction. The burden remains on the prosecution and never shifts. Thus, section 36(5) of the 1999 Constitution provides that:

"Every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty."

To discharge this burden, the prosecution is obliged to prove not only the ingredients of the offence with which the accused person is charged, but also to negate any defence that might be considered to be available to the accused person except those defences/pieces of evidence which lie within the peculiar providence of the accused person's knowledge. The House of Lords in the case of *Woolmington v. D.P.P.*²⁶¹ aptly summed up the issue thus.

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner, to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury of his innocence."

Also in the *State v. Keji Amusan*,²⁶² it was held that "it is a trite law that suspicion, no matter how grave, can never ground a conviction."

These and other rules of criminal law and procedure favouring the accused at the expense of the prosecution are predicated on the policy that it is better to allow nine guilty persons to go scot-free by demanding irrefutable proof of guilt instead of inadvertently punishing one innocent

²⁶⁰See *Pat Enwere v. c.o.r* (1993) NWLR (Pt. 299) at 333.

²⁶¹ (1932) 25 Cr. APP R. at p.9.

²⁶²Unreported, High Court of Oyo State decision Charge No. HIFIIOc/81 delivered on 22/2/82. See for further reading *Nwokobia v. Nduka Eze* (1962) W.N.L.R. 251.

person. Hence doubts in criminal cases are resolved in the favour of the accused.²⁶³ The presumption of innocence is not simply a legal rule, it is a declaration of social policy.²⁶⁴

5.2.2 Cases of *res ipsa loquitur*.

Res ipsa loquitur means "the facts speak for themselves". It is a rule of evidence affecting the burden of proof aimed at assisting victims of accident. Where an accident or a mishap happens which does not occur in the ordinary course of events unless somebody has been careless, then the law will presume that the defendant had been careless because *res ipsa loquitur*; The most well known definition of *res ipsa loquitur* is that propounded by Erle c.J. in *Scott v. London and St. Katherine Docks Co*,²⁶⁵

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

The rule has been invoked where, for example, an aircraft had crashed mid-air or a scaffolding had collapsed,²⁶⁶ where a swab *Koiki v Nati* was left inside a patient after an abdominal operation,²⁶⁷ where the rule is successfully invoked, the effect among others, is to shift the burden of proof on the Defendant to show either that the accident was due to a specific cause or that he had used reasonable care in the matter. All that the Plaintiff had to prove in the circumstance is that an accident occurred and that he is a victim of the accident. The Plaintiff is relieved of the obligation of proving the exact cause of the accident and the exact person responsible for it because he is not likely to know since the thing, which caused the accident, was not under his management and care.

5.2.3. Advantages of adversarial method

First, it reduces the element of bias in the adjudicator since the judge or adjudicator has to decide the case based on the evidence adduced and argument canvassed by the parties. It is therefore easy to detect where a judge or adjudicator has perverted justice. A judgment if challenged may be reversed on appeal if it is against the weight of evidence.

Second, it gives each party the opportunity to present his case and also discredit the case of the other party to the best of his ability. It is therefore possible for a party with an apparently weaker

²⁶³R. v. Summers (1952) TLR 1164.

²⁶⁴See generally, Article 71 (b) of the African Charter on Human and Peoples Rights, Cap A9 LFN 2004 as well as Sections 35 (1) and Section 41(2) of Constitution of the Federal Republic of Nigeria, 1999. (1865) 159 E .. R. 665.

²⁶⁵ (1865) 156 E.R. 665

²⁶⁶*Koiki v. National Electrical Power Authority* (1972) IICCHCJ 127.

²⁶⁷*Mahon v. Osborne* (1939) 2 K.B. 14.

case to ultimately put forward a better case depending, on the quality, dedication and commitment of his lawyer to the case.

Third, the method seems to be more acceptable to the parties than the inquisitorial method because it gives the parties equal chance to win after exhausting their arsenals.

Fourth, the method may greatly enhance the development of the law. Since the lawyers have a greater degree of control over the conduct of the case, they can come up with certain ingenious legal argument or point, which may be novel to the adjudicator. Such brilliance has in the past assisted the court in the exposition and development of the law.

Fifth, the decision of the court is binding on the parties and it is self-executing and does not require another tribunal to give it a force of law.

5.2.4 Disadvantages of adversarial method

The adversarial method is not without some disadvantages. First, it promotes the "sporting theory" of justice. Those with best lawyer (and often it is the rich who are able to afford them) are the most likely to win.

Second, it is often times acrimonious in character. It is viewed by many (unfortunately including some lawyers) as a way of continuing a legal fight instead of resolving a dispute.

Third, since cases are decided based on the evidence adduced parties and their lawyer may go to any length to produce "admissible" evidence such as procuring witnesses to lie on oath or forging certain documents. For instance, in *Whitehouse v. Jordan*²⁶⁸ the judges strongly criticized the lawyer for the Plaintiff for "doctoring" the experts' evidence along a particular line. It suffices to say that a lawyer is forbidden by the rules of professional ethics from resorting to 'sharp practices' to circumvent the rules.

Fourth, since the method vests the production of evidence in the parties and their lawyers, it allows them a chance of determining the pace of the legal process. A party who has no real defence may resort to all sorts of delay tactics to either frustrate the plaintiff or force him into a settlement. Lawyers in adversarial system are also often indicted of deliberately prolonging a case in order to enhance their fee. While this accusation may not be true in most cases, it suffices to say that the undue delay, which cases usually in court suffer under the system, is a cause for serious concern. In *Ajani v. Giwa*,²⁶⁹ Oputa J.S.C (as he then was) observed as follows:

As of now, this case has been before the courts for 16 years. There is definitely something radically wrong with a system that takes up to 16 years before a claimant can know whether or not he is the owner of a piece of land.

Fifth, long delay may impair the fact-finding efficiency of the system. For instance, witnesses may have died or relocated to another jurisdiction. Where the witnesses are available, they may

²⁶⁸ (1980) All E.R 650

²⁶⁹ (1980) 3 NWLR (Pt. 20 at 797.

not be able to fully recollect the facts of the case after some time. Certain vital piece of evidence might have become lost or destroyed in the course of time. Some rules have however been developed to ensure that parties do not unduly delay the hearing of the case by giving the court more power to control the trial. For instance, a suit may be struck out where the plaintiff in a civil case or prosecutor in a criminal case is absent from the court without any reasonable excuse. Also, judgment could be obtained in the absence of the defendant or cost awarded against him. It is however doubtful, whether these and other rules have significantly helped to overcome the problem of delay in the adversarial method.

5.3 THE INQUISITORIAL METHOD

Trials here are conducted in form of inquiries and not full scale litigation. The main distinguishing feature of this method lies in the fact that the judge or the adjudicating body has considerable control over the way in which the evidence is collected and presented. The judge or the adjudicator here does not stand as an umpire. Rather, he can enter into the "arena" of the trial by investigating facts himself and questioning parties and witnesses. In some cases the body may even appoint its own expert assessors or rely on the opinion of experts who have not appeared personally before it.

The practice of relying on an expert who has not appeared personally before the body has been unsuccessfully challenged in *R v. Deputy Industrial Injury Commissioner, Ex parte. Moore*²⁷⁰ which is fully reported by Farrah. Ms Moore had suffered from a form of slipped disc, which she claimed was due to her bending at work in her job as a crane driver. The tribunal held against her and she took her case to an appeal tribunal. Before this tribunal a consultant surgeon gave evidence on her behalf. Government medical officers gave evidence suggesting that a pre existing condition and not the bending caused the disc problem. The tribunal also heard reports of the opinions of two other doctors given in previous cases as to the likely causes of disc problems. These doctors did not appear before the tribunal and could not therefore be questioned in an adversarial way by Ms. Moore.

Nevertheless the tribunal relied on their opinions and those of the government doctors in concluding that the weight of evidence was against Ms. Moore. Ms. Moore then asked the ordinary courts to overturn the decisions on the grounds that the tribunal acted against the principles of natural justice, which required a fair hearing. The Court of Appeal dismissed her claim. Lord Justice Diplock drew attention to the essentially inquisitorial nature of the tribunal in the following terms:

" ... there is an important distinction between the functions of an insurance tribunal and those of an ordinary court of law, or even those of an arbitrator ... a claim by an insured person to benefit is not strictly analogous to a *Lis Inter Partes* (adversarial litigation). Insurance tribunals form part of the statutory requirements which entitle him to be paid benefit out of the fund. In such an investigation, neither the insurance officer nor the Minister (both of whom are entitled to be represented before the insurance tribunal) is a

²⁷⁰ (1965) 1 Q.B 603.

party adverse to the claimant. If an analogous be sought in ordinary litigious procedure (literally friends of the courts). The insurance tribunal is not restricted to accepting or rejecting the respective contentions of the claimant on the one hand and of the insurance officer or Minister on the other. It is at liberty to form its own view even though this may not coincide with the contentions of either..."

Many tribunals in Nigeria today have a semi-inquisitorial character. The Nigerian courts have embraced the above liberal approach of an inquisitorial body to the investigation of fact. In *Baba v. Nigeria Civil Training Centre*,²⁷¹ the Appellant was employed by the respondent as an Assistant Security Officer. The respondent terminated his appointment with one-month salary in lieu of notice. Before the termination, the Appellant faced an investigating body set-up by the Respondent to investigate the allegation levelled against the Appellant by some of his subordinates. The investigating panel submitted its report. The Respondents gave the Appellant a copy of the findings of the panel, which were adverse against him and invited him to defend himself. The *gravamen* of his complaints was that he was not given a copy of the allegation against him nor was he allowed to cross-examine his accusers. In short, his constitutional right of fair hearing was violated. In dismissing his appeal, the Supreme Court held that:

" ... Refusal to permit cross-examination of witness at an administration hearing will usually be a denial of natural justice. However, deprivation of the opportunity to test evidence by cross-examination is not a violation of natural justice if the tribunal can and does decide merely on the strength of an inspection or oral or written submissions supplemented by its own local or specialized knowledge ... In this case, the appellant was given reasonable opportunity of defending himself ..."

5.3.1 Advantages of inquisitorial method

Inquisitorial method brings about speedy investigation and disposal of cases. In most cases time is prescribed for the body to conclude its activities or a particular case.

The procedure is simpler and less formal. The cost and the formality of commencing an action are usually minimal. In most cases a party simply has to file a prescribed form instead of issuing a writ of summons and filing statement of claims as in the adversarial method.

It promotes equal access to justice. This is because success does not depend so much on the disputants being represented but rather on the efficiency and investigative capability of the adjudicating body.

Also, the decision of the court is binding on the parties and it is self-executing and does not require another tribunal to give it a force of law.

In recognition of the advantages of inquisitorial method, there is a trend among the judges in practice to adopt a more investigative approach in certain cases especially in divorce suits and issues relating to guardianship of children where the welfare of the children is paramount. This

²⁷¹ (1986) 5 NWLR (p.-) 641.

trend is bound to spread rapidly as judges and citizens seek a more efficient means of resolving disputes. It will be a pity if lawyers are not able to change their adversarial attitude.

5.3.2 Disadvantages of inquisitorial method

Miscarriage of justice may result from hasty trial. While "justice delayed is justice denied" "justice rushed is justice crushed". An investigative body may be constrained to ignore certain details in order to meet the deadline set for it to conclude investigation and make recommendations.

The quality of an enquiry may ultimately depend on the ability and effort of the adjudicating body. There may be hidden facts, which the body may not (with all its investigative capacities) be able to draw out which may not escape the attention of the parties and their lawyers. The same goes for certain ingenious legal argument and authorities. These shortcomings pose a great danger especially where the members of the adjudicating body are lazy and lack capacity for details.

Many inquisitions are done in camera and are therefore void in the opportunity of being scrutinized by the public. For instance, the case of the military officers who were convicted by the Abacha regime for phantom coups is a testimony to the dangers inherent in any form of trial in camera.

5.4 NON-ADJUDICATORY METHOD

While it is generally necessary for adjudicators to first of all ascertain the facts leading to a dispute before resolving such dispute, certain exceptional situations do, however exist, in which disputes are resolved without the adjudicator making any discovery of the facts of the disputes. Any dispute, which is resolved in this, or similar way is said to be resolved by the non-adjudicatory method of dispute resolution. This method is also known as Alternative Dispute Resolution (ADR).

The adjudicatory method especially, the adversarial system, when stretched to the limit indeed, when there is *reductio ad absurdum* provides only for the lackadaisical in business. Some of the cases in the trial courts take only five years at the earliest. The same case, when it progresses to the Court of Appeal might take another five years and when it finally finds its way to the Supreme Court, just add another six years.²⁷² This method does not involve the appearance of parties before formal institutions or authorities, the calling of witnesses, the finding of facts and the apportionment of blame. Most industrial relations disputes are resolved by bargaining between the parties or possibly by mediation. Although the non-adjudicatory method may not be done in formal institutions such as the law court, the law recognizes the method and lays down rules for their operations.

²⁷² Justice Eso, Chairman, "Negotiation Conflict Management Group", in The Guardian, Tuesday May 11,2004 at p. 78.

There are four main forms of non-adjudicatory method of dispute resolution viz: (a) Reconciliation (b) Conciliation (c) Mediation and (d) Arbitration.

S.4.1 Reconciliation

This is a process whereby the parties to a dispute confer with each other and reach an agreement on how to restore or bring back cordiality or harmony in their relationship. Here, the only parties to the reconciliation are the disputants themselves.

It is the act of harmonizing differences and settling disputes. Thus under the Matrimonial Causes Act, 1973, under Section 6 provision is made by the rules of court to require a solicitor acting for a petitioner for divorce to certify whether he has discussed with the petitioner the possibility of a reconciliation. Proceedings may be adjourned to enable attempt at reconciliation. A period of six months, or periods of up to six months, during which spouses may resume cohabitation without loss of the chance of subsequent divorce, are known as "reconciliation periods" in divorce proceedings.²⁷³ Reconciliation is however impossible if one party refuses.

5.4.2 Conciliation

This is a form of dispute resolution through the effort of a third party as intermediary. The main distinguishing factor between conciliation and reconciliation is the difference in the number of parties involved.

It involves bringing together disputants to settle their dispute by negotiated settlement. The conciliator unlike the mediator meets with the parties and participates in their negotiations. He helps the parties to reach a negotiated settlement. He does this by:

- (i) discussing the issues in the dispute;
- (ii) making proposal to the parties on the terms of possible compromise settlement;
- (iii) participating in the discussions on the subject of the disputes with the parties present in a meeting with him on possible terms of conciliation;
- (iv) making his proposals on the views of each party available to both side to map out areas of agreement and disagreement.²⁷⁴

Because the third party is not called upon to decide the dispute that he hears, joinder of issue in a strict sense is not a condition of the conciliation process. The terms of settlement may be accepted by the disputants as a final resolution or as a temporary stopgap. It should be borne in mind that the decision of the conciliator is merely a guide and not binding on the parties. A notable exception in this regard is that in contract of employment, the Minister or his Permanent Secretary may appoint a fit person to act as conciliator for the purpose of effecting a settlement

²⁷³L.B. Curzon; Dictionary of Law 3rd ed. 1988 at p. 368.

²⁷⁴M. Akanbi, op. cit.

of a dispute.²⁷⁵ The conciliator must inquire into the causes and circumstances of the dispute and by negotiation with the parties, endeavour to bring about a settlement.²⁷⁶ He has seven days to act. If a settlement is reached within that period, the conciliator must report the fact to the Minister and must forward to him a Memorandum of the terms of the settlement signed by the representatives of the parties.²⁷⁷ The interesting point here is that as from the date the Memorandum of the terms of settlement is signed, the terms become binding on the employers and employees to whom the term relate. A breach of the term by any of the parties thereto is an offence punishable on conviction, with a fine.²⁷⁸

5.4.3 Mediation

In this type of conciliator, the third party called the "mediator" rarely inquires into the facts of the case and does not attempt to apportion blame. Rather, he seeks to provide an acceptable formula for compromise and harmonious co-existence between the parties. He merely offers suggestions on possible terms of settlement between the parties which have no binding force in the sense that the disputants are left to decide whether or not to accept the suggestions.

Mediation is another specie of Alternative Dispute Resolution,²⁷⁹ which though similar to conciliation, is not the same with it. Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as a mediator.²⁸⁰ The whole objective of mediation is the amicable settlement of the dispute by the parties. The mediator has no authority to make any decisions which are binding on the parties.

He merely uses certain procedures, and skills to help them negotiate a resolution of their disputes without recourse to adjudication.²⁸¹ Unlike Conciliation process, the Mediator meets both parties separately. The decision reached by a mediator is not binding on the parties even where there is a trade dispute.²⁸²

5.4.4 Arbitration

Here the third party known as an "arbitrator" probes into the facts of the case in a fair detail and renders a decision on merit. This is the only one of the four in which the third party decides the dispute before him. The arbitrator makes a determination as to who is right and who is in the wrong.²⁸³

²⁷⁵Section 7 (1) Trade Disputes Act Cap 432 Laws of the Federation of Nigeria.

²⁷⁶S. 7 (2) Ibid.

²⁷⁷S. 7 (3).

²⁷⁸S. (7) 4.

²⁷⁹O. O. Olatawura, Mediation, being a research work for the Nuffield Foundation in England between April-June, 1995.

²⁸⁰M. Akanbi, op. cit., p.60.

²⁸¹B. H. Marriot, ADR - Principles and Practice, at 108.

²⁸²S. 3.(2) Trade Dispute Act, Cap T8 LFN 2004.

²⁸³S. Ofei, op. cit., 91.

Arbitration is a term derived from the nomenclature of Roman Law. It is applied to an arrangement for taking and abiding by the judgement of a selected person in some disputed matters instead of carrying it to the established courts of justice.²⁸⁴ Arbitration is a process whereby the parties to a dispute agree to have it settled by an independent third party and to be bound by the decision he makes. The agreement may be entered into after the dispute has arisen or it may be included within a contract by way of a clause; which refers any future dispute, which might arise out of the contract to arbitration. It has been rightly pointed out that there are certain essential elements before a form of dispute resolution can be styled as Arbitration. First, there must be the existence of a dispute or parties should have envisaged the existence of dispute in future. Secondly, the parties must have voluntarily agreed to refer such existing or future dispute to arbitration. Thirdly, the decision of the arbitrator (usually called an award) would be binding on the parties.²⁸⁵

Until accepted, it is opened to any of the parties to arbitration to withdraw, but once accepted, a party will not be permitted to go back on his word.²⁸⁶ In fact in *The Owners of the M. V. Lupex v. Nigerian Overseas Chartering And Shipping Limited*,²⁸⁷ The court held, inter alia that:

"The court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavour. Arbitration, which is a means by which contract disputes are settled by a private procedure agreed by the parties, has become a prime method of settling international commercial disputes. A party generally cannot both approbate and reprobate a contract. A party to an arbitration agreement will in a sense be reprobating the agreement if he commences proceedings in court in respect of any dispute within the purview of the agreement to submit to arbitration .. Where parties have chosen to determine for themselves that they would prefer any of their disputes to arbitration instead of resorting to regular courts a prima facie duty is cast upon the courts to act upon their agreement."

This common law rule was given a statutory basis in Section 9 (3) of the *Trade Dispute Act*.

5.4.5 Advantages of non-adjudicatory method

It avoids the "win-lose" character of the adjudicatory process,' which works against future harmony between the parties.

It saves time and avoids delay and uncertainties of adjudicatory trials.

It enables the parties to control their own fate rather than relinquishing the power to decide their rights to an adjudicator.

²⁸⁴M. Akanbi, op. cit.,

²⁸⁵ Ibid. at p. 58.

²⁸⁶ Larbi v. Kwasi (1950) 13 WACA 81 at 82

²⁸⁷ (2003) 10 SC, 71

Proceedings are free from the formalities of the rules of evidence and concomitant delays, which characterize proceedings in the ordinary courts.

In arbitration proceeding, the arbitrator is an independent professional person who has technical knowledge of the matter at hand. He is usually a specialist in this field and has considerable experience of the arbitral process. He is unlike a judge in court not ignorant of some of the technical aspects of the case at hand.

The non-adjudicatory method is not financed by the State. It is the responsibility of the parties to bear the cost of paying an Arbitrator's fees, for example. Incidental to this responsibility is also cost of the administrative aspect, which must also be borne by the parties to enable the Arbitral Tribunal commence its session. The act of pulling money together to finance the arbitral process gives the parties a sense of belonging capable of ensuring confidence in the system.²⁸⁸

5.4.6 Disadvantages of non-adjudicatory method

It may be necessary to hire rooms for meetings and hearing, rather than making use of the public facilities of the courts of law and the fees will have to be paid jointly by the disputants. The parties must in addition, pay the fees and expenses of the arbitrators. These charges may be substantial especially in matters involving international commercial arbitration.

There are instances whereby decisions reached are subject to the over-riding powers of the court, for example, the courts have an inherent jurisdiction to remit or set aside an award where there was an error of law on the face of the award.

Non-adjudicatory method does not give room for consolidation of actions. It is not possible to bring multi-party disputes together because resort to non-adjudicatory method is a voluntary agreement between parties and parties cannot be compelled to submit to arbitration or conciliation or mediation or reconciliation.

Some of the non-adjudicatory methods especially reconciliation and mediation can be discredited on the ground that they do not punish the wrong doers.

Decisions reached may not be binding especially in cases of reconciliation and mediation proceedings. The decisions are open to the parties to either accept or reject. The terms of settlement are not forced on the parties.

5.5 CONCLUSION

Non-adjudicatory method of dispute resolution has of late gained popularity. The United Kingdom has so imbibed alternative dispute resolution that the Court of Appeal of that country awards punitive costs against litigant's who do not seek this alternative first before coming to the regular courts. In recent years American and New Zealand Courts have encouraged parties to use various forms of Alternative Dispute Resolution (A.D.R.) systems in an effort to produce

²⁸⁸ M. Akanbi, op. cit., p. 63

cheaper and faster settlements. The Lord Chancellor's Department has suggested that A.D.R. systems might also have a role to play in the English System in criminal as well as civil cases involving parties who have some kind of continuing relationship with each other, whether as members of the same family or organization, colleagues or neighbours.

Justice Eso, Chairman, Negotiation Conflict Management Group (NCMG) whilst advocating that Nigerians should imbibe the spirit of ADR demonstrated how it worked in the case involving Mint Company and their ex-workers; numbering about 2,000. The ex-workers had sworn they would not pass by the door of the Mint Company because of the bitterness. A dispute between parties who had fought physically and with forensic expertise for over twelve years was successfully resolved through mediation within one year.²⁸⁹

Finally, to my mind, non-adjudicatory method of dispute resolution otherwise popularly known as ADR, is a laudable development and a welcome relief to the harshness of litigations.²⁹⁰

5.6 QUESTIONS AND EXERCISES

1. A, B, C and D are co-tenants in a "face-me-I-face you" apartment in Ajegunle. All of them are from the same town and enjoy excellent relationship. About two weeks ago, the jewellery box of the wife of Mr. A got missing in mysterious circumstances. There was no evidence of burglary, which made Mr. and Mrs. A to conclude that the box must have been stolen by someone from "within". Mrs. A who is determined to recover her jewellery has decided to resort to the process of "tying the Holy Book with a Key" to find the culprit. By this process, the name of each of the co-tenant will be recounted one after the other in the presence of everyone. According to the general belief, if the Holy Book should "roll" when the name of a particular person is mentioned, then that person is indisputably the culprit. Mrs. C. who is a born again Christian has vowed never to be a party to what she described as a "devilish process". Everybody concluded on this basis that she must be the culprit. Advise Mr. and Mrs. A on the best way to go about the investigation of the theft.

Hints

- The facts of the case raise issues relating to the primitive method of resolving a dispute and the continuous effort of man in the modern time to evolve an efficient means of conflict resolution.
- Disputes were "involved" during the Middle Ages by proofs rather than trials such as trial by ordeal. The Holy Book tying process proposed by Mr. and Mrs. A is similar to the crude, uncivilized methods of the old. Such methods are no longer acceptable and have even been

²⁸⁹Justice Eso, while presenting the case for the Establishment of Oyo State Multi-door Court (OYMDC) to Governor Rashidi Ladoja in Ibadan; The Guardian Tuesday, May 11, 2004.

²⁹⁰See generally M. Akanbi, op. cit.

criminalized. Mrs. C is therefore, justified. To have refused to submit to that process and her refusal cannot be rightly interpreted against her as "proof" of her guilt.

- Dispute in, modern time can be resolved through 'either adjudicatory method or non-adjudicatory method. Briefly explain these methods. "
- The adjudicatory method involves the appearance. Of the parties and their witnesses before formal institutions or authorities such as the law court or tribunal. It is usually set in motion through court action, civil or criminal. Mrs. B, however" can lodge a formal complaint against the suspect.
- The law court usually adopts 'adversarial method of fact finding. The method gives a party the chance to call his witnesses who in the case are like Ijoto be Mr. & Mrs. A and some of the co-tenants, Mrs. C on her part and her witnesses will also give evidence. The parties here appear as adversaries and try to demolish the case of each other.
- Because this is a criminal case, the prosecution has to prove the guilt of Mrs. C beyond reasonable doubt. If there, is any doubt it will be resolved in favour of Mrs. B.
- If the prosecution succeeds in proving his case beyond reasonable doubt, Mrs. B might be convicted and penalized. Even if the case against her is unproved and she is consequently set free, the harmony and good relationship between the parties as neighbours would have been destroyed based on the traditional attitude that "you do not return from court and resume friendship."
- The obvious disadvantage of the adversarial method brings " us to the "adjudicating method where the "win-lose" mentality can be avoided.
- Briefly explain the non-adjudicatory method. Courts in America, New Zealand and some other countries now resort to non-adjudicatory method even in certain criminal cases, especially of parties who have continuing relationship with each other such as in this case.
- It is expedient if members of the household or elders in the community can intervene and resolve the dispute by mediation or arbitration. For instance, Mrs. C could be encouraged to resume business as usual,

In the alternative,

- If the case gets to court, the judge might adopt a similar approach because of the relationship between Mr. & Mrs. A & B or resort to plea bargaining under which Mrs. B might plead guilty in return for a lighter sentence.
2. Titi is a part four student of University of Mount Hebron. She was caught cheating during the last rain semester examination of Phl 402 by Mr. Kogberegbe who has since proceeded a study leave to the United States of America for two years. When Titi was caught, Kogberegbe however recorded the facts of the irregularity in the official irregularity form, which was counter-signed by Titi as representing the truth. Titi was arraigned before an Examination Malpractices Panel and found guilty. Titi is planning to appeal to the High Court on -the following grounds:
- (i) That she was not allowed by the Panel to be defended by Chief SAN it reknown lawyer in the country.

- (ii) That the Tribunal erred in law by relying on the report of Mr. Kogberegbe who was not physically present before the Tribunal to give evidence and be cross-examined.

Comment on the chances of success of Titi's appeal.

Hints

- The question centres on the modern method of dispute resolution and certain features of the adversarial and inquisitorial methods of fact-finding.
 - The law in modern time has evolved two main methods of resolving dispute. These are the adjudicatory and non-adjudicatory methods. Our discussion here will however be restricted to adjudicatory method,
 - Explain the adjudication method. Note that for the adjudicator to resolve a dispute he must first of all ascertain the facts before applying the law to the facts. The adjudicator may adopt either the adversarial method or inquisitorial method in the fact-finding task.
 - Explain in fair details the adversarial and inquisitorial method the advantage and disadvantages.
 - In relating the principles to the facts of the case, the following should be noted:
 - The Examination Malpractices Panel not being a regular court will adopt an inquisitorial fact finding method.
 - Inquisitorial method imposes a limit to which the SAN could have influenced the case in Titi's favour even if he has been allowed to defend her. Success at such trial often does not depend essentially on being represented by a counsel.
 - The adjudicator in an inquisitorial method has a wider power in the way and manner the case is conducted. He can enter the arena by investigating facts himself. He can appoint assessors for the body or even rely on the opinion of experts who have not appeared in person before it. Cite the cases of *Ex Parte Moore* and ... Although Mr. Kogberegbe is not an expert, the principle enunciated in the cases, will apply the fact that he could not be physically present to be cross-examined cannot vitiate the veracity of his recorded evidence. It is noteworthy that the report was contemporaneously recorded in the complaint form, which was countersigned by Titi. And there is no suggestion that Titi was forced to sign the document.
 - Based on the foregoing, Titi's chances of success on appeal appear to be slim.
3. Law over the years has striven to evolve efficient means of resolving disputes in modern time. Briefly narrate some of the old methods and why they are now unacceptable.

Hints

- Explain in detail the Adjudicatory and Non-adjudicatory Method and note the following differences:
 - i) The adjudicatory method involves the appearance of parties and their witnesses before formal institutions such as the law court or tribunal. The non-adjudicatory method on

the other hand is generally an informal method of resolving disputes either between the parties themselves (reconciliation) or with the assistance of a third party who may be a mediator or arbitrator, (conciliation).

- (ii) While the adjudicatory method involves fact finding either by adversarial or inquisitorial procedure, the non-adjudicatory method does not.
 - (iii) While the adjudicatory method involves the apportionment of blame, the non-adjudicatory method does not.
 - (iv) The task of the judge or adjudicator in an adjudicatory method is generally not to reconcile the parties, but rather to look back at the events, which have given rise to the dispute and apply the law. A non-adjudicator on the other hand tries to reconcile the parties by suggesting solutions, which will promote peace and future harmonious relationships.
- The obvious advantages of non-adjudicatory method in promoting genuine reconciliation has made it to gain popularity in recent years so much that certain elements of the method are now being adopted by the law courts even in criminal cases.
4. Critically examine the adversarial and inquisitorial methods of fact-finding. Which of them do you prefer?

Hints

- The question centres on the features, advantages and disadvantages of the adversarial and inquisitorial methods.
- The adversarial and inquisitorial methods relate to the adjudicatory method of dispute resolution through formal institutions. such as the law court or tribunal. For the judge or adjudicator to resolve the dispute, he must first of all ascertain the facts of the case before the law is applied to determine the rights, duties, and liabilities of the parties.
- The judge or adjudicator may in his fact-finding task adopt either the adversarial method or inquisitorial method.
- Discuss the advantages and disadvantages of each method and conclude why you prefer one of the methods. You may however wish to adopt a middle of the way approach by advocating the blending of the two methods to do justice as the facts of each case may require.

5.7 FURTHER QUESTIONS

1. Write a brief memorandum to the Nigerian Law Reform Commission on the need to reform the fact-finding process adopted by the Nigerian Courts towards the challenges of the next millennium.
2. Mallam Salman who has been a customer of Second Bank for over two decades, approached the bank for a loan facility of two million naira only in 1997 and mortgaged his only

building to secure the loan. Unfortunately, Mallam Salman's business suffered some set back and he could not repay the loan on maturity. The Manager of the Bank is determined to sell the house if the money is not paid within 30 days of the final demand. Somebody has introduced Mallam Salman to Loya Smart, a Senior Advocate who has promised to do all within his power to save "Mallam Salman's neck". Loya Smart in the course of preparing for the case has spotted a technical error in the mortgage documents, which he could use to frustrate either the recovery of the money or the sale of the house.

Advise the parties on what you consider as the best approach to resolve the dispute.

3. Distinguish between the adjudicatory and non-adjudicatory methods of dispute resolution.
4. (a) The adversarial method presents a classic case of parties who are theoretically operating on a level-playing ground. The parties are bound by the same rules. The judge has to decide the case on a balance of probability, which favours neither party. Discuss.
- (b) Bassef Orji was caught by the Police with roasted human flesh. He was consequently arrested and arraigned in the court on charges of murder. His defence was that the human parts found in his possession were corpses of victims of motor accidents and that he did not deliberately kill anyone. The prosecution has failed to cross-examine Bassef Orji on his line of defence. The judge also observed that the prosecution had failed to call a vital witness whose evidence would have clearly established the case against Bassef Orji.

Comment on the facts of the case.

5. Advance Argument for and against Alternative Dispute Resolution (ADR) in Nigeria Legal System.

CHAPTER SIX
LEGAL REASONING IN JUDICIAL PROCESS

Emmanuel E. Okon

6.0 INTRODUCTION

As man does not only live in the community of others but in a complex world of complex individuals with complex idiosyncrasies, there is bound to be conflict which in most cases will result in dispute. Private feud and vengeance which men employed in the early days have now virtually disappeared. The expectation and reality of the situation call for an appropriate institutionalised process of settling dispute. The essential function of this process is to resolve actual and potential disputes between individuals or between an individual and the government or between different levels of government in a federation like Nigeria. This institutionalised process of settling dispute is the judiciary which in any ideal democratic society is the third arm of government vested with the responsibility to interpret, construe and apply the law.

Though it is contended that the Judiciary as an institution consists of both the bench and the bar²⁹¹but in strict sense, the" word "judiciary" in legal parlance is known as the "temple of justice" and has been defined as:

“That branch of government invested with the judicial power, the system of courts in a country; the body of judges; the bench. That branch of government which is intended to interpret, and apply the law.”²⁹²

Generally, the word judicial is used to refer to collectively all the judges of the lower and higher Bench.²⁹³ They are seen as minister in the temple of justice with the paramount duty to foster the course of justice. The term Judicature is wider than the term Judicial in that it embraces both the institutions (the Courts) and the Judiciary (the Judges).²⁹⁴ As far as court proceeding is concerned, the Lawyers and the Judge(s) constitute the judicial officers and they are co-worshippers in the temple of justice. Their legal reasoning must be tailored towards ensuring that justice is done to all the parties before the court

6.1 LEGAL REASONING IN JUDICIAL PROCESS

There is no dictionary definition of the phrase "legal reasoning in judicial process," A proper understanding of the phrase will require defining each relevant word in the phrase. The *Longman Dictionary of Contemporary English* defines the word "Legal" thus "of relating to law or falling within the province of Law." "Reasoning" on its part is the process of thinking carefully about something in order to make a judgment. "Judicial" connotes something relating to the law or court or judges or their decisions,²⁹⁵ 'Process' as the proceedings in any action or prosecution.²⁹⁶ From the synthesis of these definitions, the phrase "legal reasoning in judicial process" may be literally defined as the process of careful thinking by a judicial officer in the course of resolving legal issues presented by parties to a legal action before his court for determination.

Legal reasoning in judicial process should be preoccupied with the administration of justice. The concept of Law has generated much controversy but still greater are the doubts and discussions,

²⁹¹Oputa C. "Hands off the Bar" the way out to "The Way Forward," Keynote Address at the Plenary Conference of the Branches and Legal Practitioners of the NBA, Held at Jos 26th- 27th August 1997, p.1

²⁹²Black, H.C.; Black's Law Dictionary with Pronunciations Abridge Sixth Edition, West Group Publisher, US. Centennial Edition (1891 - 1991). p, 593, See also section of the Constitution of the Federal Republic of Nigeria 1979 which vest Judicial Powers of the Federation in the Court.

²⁹³In Nigeria, there are two categories of the Bench namely: the lower Bench and the higher Bench. The lower Bench consist of judges in the Inferior Courts like Magistrate Courts, Customary Courts, Area Courts, District Courts, etc. The Higher Bench consist of judges of High Court of a State, Federal High Court, Customary Court of Appeal, Sharia Court of Appeal, Court of Appeal and the Supreme Court of Nigeria. See Ijalaye, D. A., 'The Legal Profession and the Third Republic' An Address Delivered at the 1991 Annual Bar Conference held at Owerri 26-30 August 1991 p. 1

²⁹⁴Uwais, M. L. (as he then was) " The Position of the Judiciary Structure and Position of the Judiciary" 1989 Judicial Lectures: Continuing Education for the Judiciary, Lagos. MCJ Professional Publishers Ltd. 1991, p.81.

²⁹⁵See Black's Law Dictionary, 7th ed., West Group St. Paul Minnessota, 1999, p. 850.

²⁹⁶Ibid

which surround the concept of justice. Giorgis and Campbell write in their book *Justice - An Historical and Philosophical Essay* thus:

"Justice is sometimes taken to be synonymous with or equivalent to Law, sometimes to be distinct from Law and superior to it. Justice in one of its aspects is held to consist in conformity with Law, but it is also asserted that Law must conform to justice."²⁹⁷

Defining justice, the learned authors wrote:

"Justice in its true and proper sense is a principle of co-ordination between subjective beings."²⁹⁸

Black's Law Dictionary in simple term defined justice as:

"Proper administration of laws in jurisprudence, the constant and perpetual disposition of legal matters or disputes to render every man his due."²⁹⁹

It must be noted that "justice" means different things to different people and groups. Predicated on this, some have seen justice as mere 'Judicature' others have seen it as "fair trial" other still have seen it as "equality", and still others as "morality." Another notion of justice which some people hold is known as "natural justice." This has crystallized into two legal maxims: *audi alterem partem* which means that a judge must hear both sides to the case before coming to any conclusion; and *nemo judex in causa sua* which means that one should not be a judge in his own case.

The fact that legal reasoning in judicial process should be preoccupied with justice was emphasised by Lord Hewart C.J. in *R v. Sussex*, Atkin L.J. in *R v Sussex Justice, Ex Parte McCarthy*³⁰⁰ respectively thus:

"Justice should not only be done but should manifestly and undoubtedly be seen to be done and next to the tribunal being in fact impartial is the importance of its appearing to be so."

Lord Denning echoed the importance of justice as the basis of legal reasoning in judicial process in his book *Road to Justice* thus:

It is no use having just Laws if they are' administered unfairly by bad judges and corrupt lawyers. A country can put up with Laws that are harsh or unjust so long as they are administered by just Judges who mitigate their harshness or alleviate their unfairness.³⁰¹

Apart from language problem which is a serious issue to contend with in sharpening and developing legal reasoning in judicial process; there also exist other problems like personal

²⁹⁷ Giorgis & Campbell; *Justice – An Historical and Philosophical Essay*; University Press, Edinburgh, (1952) 1st ed., p. 1.

²⁹⁸ Ibid p.2

²⁹⁹ Black, UC., op. cit; p.599

³⁰⁰ (1924) 1 k.b. 259

³⁰¹ Okunniga A.A.O *Transplants and Mongrels and the law: The Nigerian Experiment*; inaugural Lecture Series 62; University of Ife Press (1983), p.2.

interest of the judges; religious affiliation; or neutrality of the judges, self-disciplines of the judges; satisfaction of job and most importantly the ability of the judge to defend at all costs the independence of the judiciary in order to do justice to all manners of persons. These are some of the factors that tend to influence and in fact do influence legal reasoning in any judicial process. Detailed discussion of these factors will definitely fall out of the scope of this work which is to serve as reading material for legal method students and not students of jurisprudence. This work shall focus on shift of fact and Law in courts; ratio decidendi and precedents as some of the concepts that affect legal reasoning in judicial process.

6.2 SHIFTING OF FACT AND LAW IN COURT

Section 2(1) of the Evidence Act³⁰² defines a "fact" to include:

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

Both in criminal and civil proceedings, certain facts would have warranted the course of action. For example, if Mr. Okon sells his law textbook to Mr. Sanni for ₦10, and Mr. Sanni made a part payment of ₦5 and promised to pay the balance two weeks later, if after three weeks, Mr. Sanni still has not paid, Mr. Okon may decide to sue Mr. Sanni in the law court for the ₦5 balance and of course claim general damages to recover his expenses for pursuing the matter in court and interest on the ₦5. Briefly, the facts in the above case may be itemised as follows:

- (1) Mr. Okon sold his Law textbook to Mr. Sanni for ₦10
- (2) Mr. Sanni agreed to buy and indeed made part payment of ₦5
- (3) Mr. Sanni promised to pay the balance after two weeks.
- (4) Mr. Sanni did not pay the balance after two weeks

Let us consider another example. Mr. Wax took the cheque book of his roommate, Mr. David without his knowledge and forges his signature on the cheque. Mr. Wax later presented the cheque for payment in Mr. David's bank. The cashier was able to detect the forgery and questioned Mr. Wax who could not give satisfactory answer. The cashier informed his manager who called the Police.

Mr. Wax was arrested and subsequently arraigned before the court for stealing and forgery. In this example, the facts that constitute the case could be listed as follows:

- (1) Mr. Wax took Mr. David's cheque book without his knowledge.
- (2) Mr. Wax appended Mr. David's signature on the cheque without Mr. David's knowledge or authorisation.

³⁰² Cap E4 LFN 2004.

- (3) Mr. Wax presented the forged cheque for payment at Mr. David's bank.
- (4) On interrogation by the Police, Mr. Wax accepted forging the signature of Mr. David and of course stealing Mr. David's cheque book.

In law, parties to any proceedings are expected to prove the existence or non-existence of any fact in issue and facts relevant to a fact in issue. Using the first example, Mr. Okon has to prove that Mr. Sanni actually promised but failed to pay the ₦5 balance in two weeks. Shifting of fact arose out of the obligation to adduce evidence on a particular fact in issue. This evidence in some cases must be sufficient to prove the fact in issue which in others all that is required is for it to be enough to justify a finding on the fact in issue, in favour of the party on whom the burden lies. This burden which is not fixed, especially in civil proceedings, shifts from one party to another depending on their pleadings. What this means is that when a party bearing evidential burden has discharged it by adducing the requisite evidence 'on the particular fact, then his opponent comes under another burden, either to disprove such facts or neutralize it by paying attention to other fact(s).

The principle of shifting of fact is based on a principle that whoever desires any court to give judgement on the existence of facts which he asserts must prove that those facts exists.³⁰³ It must be clearly noted at this juncture that shifting of facts is different from the obligation on a party to persuade the court either by- preponderance of evidence or beyond reasonable doubt in order to have judgement given in- his favour. The latter- is technically referred to as burden of proof. Defining "burden of proof" in its two meaning Nwadialo³⁰⁴ wrote:

The term 'burden of proof' is used- in two different senses. In the first sense it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade the court either by preponderance of evidence or beyond reasonable doubt that the material facts which constitute his whole case are true and consequently to have the case established and judgement given in his favour... The other meaning of the expression "burden of proof" is the obligation to adduce evidence on a particular fact or issue ... It is called "the evidential burden" This is the sense in which the expression is more generally used.³⁰⁵

Shifting of fact is shifting of the burden of proof in the second sense that is "evidential burden."

6.2.1. Shifting of Fact in Civil Cases

It must be stated that in civil proceeding, it is only "facts in issue" that are necessary to be proved. Facts in issue is defined in the Evidence Act as:

³⁰³See Section 134(1) of the Evidence Act Cap 112 Laws of the Federations of Nigeria 1990. Also, see the application of the principle in *Elemo & Others v. Omolade & Others* (1968) NMLR 359.

³⁰⁴Modern Nigerian Law of Evidence, Ethiope Publishing Corp. (1981) p. 161.

³⁰⁵ Ibid.

"All such facts that a plaintiff in a civil case must prove in order to establish his claim. If they are not admitted expressly or by implication by the Defendant.³⁰⁶

In civil action, the party with the burden of proof is generally, but not always, the Plaintiff. The Latin maxim *Affirmanti non neganti incumbit probatio* which means the burden of proof lies on the one who affirms not upon one who denies is applicable in that when the Defendant denies the facts stated in the statement of claim of the Plaintiff, the burden of proving the facts denied is on the Plaintiff. Applying this to our first example, where Mr. Sanni expressly or by implication admits that he had promised to pay the ₦5 balance in two weeks but later failed to pay; Mr. Okon is discharged of the burden of proving such facts. Where Mr. Sanni denies making such promise, then Mr. Okon has the burden of proving that Mr. Sanni made the promise, but failed to fulfil it.

Again, assuming that Mr. Sanni denied making such promise and Mr. Okon produced a memorandum of payment signed by Mr. Sanni, the burden of proving the non-genuineness of the memorandum of payment and indeed that the promise was not made will shift to Mr. Sanni. What this leads to is that in proving a particular fact, it is not abnormal that the burden of proving such fact will sometimes shift from one party to the other until the court is satisfied that the fact has been proved.

Conversely, if in the statement of defence, the Defendant confesses the truth of the allegation but proceeds to supply new facts, which puts a different complexion on the case thereby destroying the effect of the admitted facts, the onus lies on him to prove the new facts. This is called confessing and avoiding the Plaintiff's averment.

Generally speaking, the shifting of facts in a civil case depends on the pleading filed by the parties. In an action for declaration of title to land, the general rule is that the onus lies on the plaintiff throughout to prove the fact as to his title except the defence confesses and avoids the facts alleged by the Plaintiff. The case of *Adenle v. Oyegbade*³⁰⁷ buttresses the exception to the general rule. This was an action for declaration that a piece of land was a family land. Both the plaintiff and defendant were members of this family. It was common ground between them that the land originally belonged to their family even though the defendant had been in occupation for some years. The main question was therefore whether the defendant had been granted the land outright or had been given a limited possession. The trial judge held that the onus lay on the plaintiff particularly in this case where defendant had been in long possession. On appeal, the Supreme Court held that the general rule must be modified where the dispute involves what was accepted by both sides as originally family land. In this case, the Supreme court held that the onus should have been on the person who claims to be exclusively entitled to the family land to prove it.

6.2.2 Shifting of Fact in Criminal Cases

³⁰⁶T.A. Aguda, *The Law of Evidence*, Spectrum Law Publishing, Ibadan, 3rd ed., 1989, p.8

³⁰⁷ (1967) N.M.L.R. 136.

The fact of a case in a criminal matter may run as follows: the accused Mr. Ajibola on the 26th day of January, 1999 in Ile-Ife robbed one Mr. Akpan of his car. Mr. Ajibola was arrested on the 28th January, 1999 by the Police. After Police investigation, Mr. Ajibola was arraigned before the Fire Arms Tribunal for armed robbery. In criminal matters, the general rule is that the burden of proving the fact rests solely on the prosecution.³⁰⁸ The burden of proving such facts does not shift to the accused. This general rule has been given statutory support in section 33(5) of the 1979 *Constitution of the Federal Republic of Nigeria* which is to the effect that "every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty." Also, section 137(2) of the Evidence Act states that, "the burden of proving that any person, has been guilty of a crime or wrongful act is, subject to section 140 of the Evidence Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

In the above example, the burden of proving that Mr. Ajibola "robbed" Mr. Akpan of his car on the 26th of January lies on the prosecution. Prosecution is used here to designate the government (State or Federal) as the prosecutor is one who prosecutes another for a crime in the name of the state or government. This implies that the burden of proving all the facts that will constitute the elements of robbery rests on the prosecution. In the case *Okagbue v Commissioner of Police*,³⁰⁹ the court in support of this general rule held that it is not for the accused to prove his innocence.

There are exceptions to the above general rule. That is, a situation exists where the burden of proving facts in criminal cases will shift to the accused. These situations are:

- (a) Where the accused raises a defense of exemption or qualification from the provision of the law creating the offence with which he is charged.
- (b) Where the onus of proving certain facts is specifically imposed on the accused by statute.
- (c) Where special facts are within the knowledge of the accused.
- (d) Where the accused raises the defence of intoxication or insanity.³¹⁰

Nevertheless, where the prosecution proves the commission of a crime beyond reasonable doubt, the burden of creating a reasonable doubt or proving his innocence shifts to the accused.

6.2.3 Shifting of Law

It is appropriate to begin discussion here with the Latin maxim *Ignorantia facti excusat: Ignorantia juris non excusat* which means that "ignorance of fact excuses; ignorance of the law does not excuse." There is no universally accepted definition of law. Within the purview of this work, law may be defined as a body of rules for regulating human conduct within a community

³⁰⁸ F. Nwadialo, op. cit. p.165.

³⁰⁹ (1965) N.M.L.R. 233.

³¹⁰ For these exceptions see the cases of *Simi Johnson v. Commissioner of Police* (1960) W.N.L.R. 118, *Obinga and Ors. v. Police* (1965) N.M.L.R.172; *Christopher Otti v. Inspector General of Police* (1956) N.R.N.L.R. 1 and *Mathew Onakoya v. R* (1959) 4. FSC. 150.

and which by common consent of this community shall be enforced by external power. External power here refers to any power external to the entity against whom shall law be enforced. Here, law includes basically statutes of all forms and case laws. In practice, any party alleging the existence of a law must specifically and adequately cite the law in court. Nevertheless, shifting of law arises in occasion where a party relied on a law not knowing that such law has either been amended or repealed. The burden of informing the court of the amendment or repeal of such law shifts to the person who has knowledge of the repeal or amendment.

The burden of providing the existence of any law is mitigated by the principle of law expressed in the Latin maxim *Juria novit curia* which means “it is for the court to know the law.” The judge at all material time is expected to know the Law. Hence, where the parties in a case fail to cite a relevant law, the burden shifts to the judge. Ijalaye succinctly expressed the importance of a judge knowing the law thus:

Judges should be able to catch up with the dynamics of our ever changing society and they should therefore recharge courses bearing in mind the famous words in the Justinian institute *Ignorantia judicis est Calamitas Innocentis* (The ignorance of the judge is the calamity of the innocent).³¹¹

The setting into motion of certain facts warrants the application of the law. Law cannot be applied in vacuum. It is therefore not unusual that shift of fact occurs first between the litigants or between the accused person and the prosecution at the hearing or trial stage respectively. Shift of Law occurs at the address stage in any proceeding and it is basically between counsel to the parties. Where they failed to prove any law relied upon or which they ought to have relied upon to support their cases, the burden of applying such law shifts to the judge who is presumed to know the law.

It is important to note at this juncture that judges while performing their roles of interpretation and application of the law, in order to do justice to the parties, consider when there is a shift in fact or law. In doing this, the judge ensures that the burden of proving facts relevant to the fair determination of the cases, is discharged by one having the burden to do so. Shift, whether of fact or Law, is inherent in civil and criminal proceedings. If legal reasoning in judicial process is to enhance justice to the parties, then the judge must be able to determine when shift of fact or law occurs and ensure that the burden of proving such fact or law are discharged. In the case of shift of Law, where the parties failed in proving such Law, the burden shifts and rests permanently on the judge based on the principle expressed in the Latin maxim *Juria novit curia*.

6.3. JUDICIAL PRECEDENT

Expressed in its simplest term the doctrine of judicial precedent also known as *stare decisis* is that a decision of a judge once given on a question of law binds both the judge himself and subsequent judges in a court of lower rank to decide the same question of law in the same way.

³¹¹D.A. Ijalaye, "Justice as Administered by the Nigerian Courts" Justice Idigbe Memorial Lecture Series Five (1992) at p.64

Thus, if the facts of a case are A,B,C, and D and after due consideration, the judge accepts A,B and C as the material fact while discarding D, and gives a judgement Y, the doctrine states that in any other case where the material facts are A, B and C, the judge must also give a decision which must be Y.

According to Farrar,³¹² English case law is the product of practical reasoning emerging from decision-making, and combining the attributes of reasoning by analogy with those of reasoning by rules.³¹³ Analogy is an imperfect form of induction based on a number of points of resemblance of features, attributes or relations between cases. Such analogical process goes beyond the consideration of the relevance and importance of such features, attributes and relations. Whereas analogy in physical science like chemistry serves as a "guide post" as to which further investigation could be carried on, in Law, analogy consists of determined inference based on induction made from the points of resemblance of features, attributes or relations between cases and of course the use of the resemblance as a normative step which implies the application of the old rule to the new case. Analogy in law also involves process of analysis and justification. The analysis process takes place within the framework decision making.

Secondly, case law also involves reasoning by rules. Classification techniques are adopted by the judge for the enunciation of these rules. The process involves moving from the specific to the general and of course the identification of species, concepts or categories.

The identification of species which are members rather than parts lead to the enunciation of concepts or rules to embrace such species. Lastly, as rules or concepts develop broadly, statements of principles are made based on them. These statements of principles in most instances express high values or tradition of the legal system recognised by law. The whole of this process have an inductive character.

Nevertheless, there are instances where a rule or principle established is used in a manner that suggests deductive character and indeed the process of reasoning takes a deductive form which gives room for discretion. Discretion could either be in the selection involved in the formulation of the minor premise.³¹⁴ Conclusion is drawn as matter of choice and not as a matter of logical necessity. This process of choice is predicated on exercising reasoning power. The judge hears arguments from both sides and weighs them up. What is more, policy and value consideration exert pressure on the judge. The judge gives his judgement based on inferences drawn. Deductive process concerns not only with rationalising the inferences drawn, but also inextricably joined to justifying it.

Judicial precedent as a doctrine emanated from case law. At common law, long ago before adequate statutes for the regulation of the activities of man were made, judges through their decisions in cases were already formulating principles and rules of law. Notwithstanding that the volume of legislation has continually increased, there are still large tracts in which no statute has traversed. For instance, the principles that malice is necessary to constitute the crime of murder;

³¹²J.H. Farrar, & A. M Dugdale, Introduction to Legal Method; London Sweet & Maxwell 2nd ed. 1984, p.84.

³¹³Ibid. p. 83.

³¹⁴Ibid. p.84.

that contract must be performed or damages paid in default; that a man must not write of his neighbour words which tend to lower his reputation in the eyes of right-thinking person are creations of judicial decisions. The great writ of *Habeas corpus* had been in common operation for some centuries before parliament thought it pertinent to polish and sharpen its machinery by the *Habeas Corpus Act* of 1697 in England.

The application of the doctrine of judicial precedent once gave rise to the controversy "whether judges do make laws or not." Cross³¹⁵ in his book *Precedent in English Law* gave an elucidating account of this issue. After a careful examination of the notions of people in the calibre of Sir Mathew Hale; Lord Esher; Willes J; Sir George Jessel; Mellish L.J., Bentham and the decision in the case of *Donoghue v. Stevenson*,³¹⁶ Cross concluded-that.

Judges must decide cases as they arise: when the facts are not clearly covered by a statute; when there is room for two views concerning the meaning of statutory word; and when no past decision is clearly in point.... What can our Judges do but make new law.

Indeed" Mellish L.J. expressed the view that the whole of the rules of equity and nine-tenth of the common law have in fact been made by Judges. One must not hesitate to state that today the controversy whether judges do make laws or not has been laid to rest and it is settled law that judges do make law though retrospectively.

Precedents could be binding or persuasive. They are binding when they are given or made by a court of higher rank and all courts of lower rank must follow the reasoning inherent in such decision. They are said to be persuasive when they are given by a court of concurrent or coordinate jurisdiction. For example, the decision of a State high Court remains a persuasive and not a binding precedent for other State High Courts. Foreign judgements are persuasive precedents in Nigerian courts.

In the flux of human existence, it is extremely difficult to find two cases with the same facts. It is the duty of the judges to determine which facts are covered by the previous case and which are not. This is known as "distinguishing".

Before examining the legal implication of distinguishing of cases, it will be pertinent to discuss other concepts that are relevant within the context of judicial precedent.

6.2.1 Ratio Decidendi

It is not the entire "corpus" of a decided case that constitutes a precedent for the determination of subsequent cases. What constitutes a precedent for later judgement is the ratio decidendi meaning the 'reason for the decision' or put in other words, the legal rule upon which the decision is based or negatively the principle without which the court would not have reached its decision.

³¹⁵R. Cross, *Precedent in English Law*, Clarendon Press, Oxford, 3rd ed. 1977, pp 31 - 32. (1932) A.C. 562.

³¹⁶ (1932) A.C. 562.

The relevant question which must be asked here is how do the courts determine the ratio decidendi of a case? The perennial problem faced by the court especially newly appointed members of the lower bench is how to identify and apply the ratio decidendi of a case should be determined.

Goodhart's³¹⁷ approach centred on the fact treated as material by the trial judge. He summarised the rule for determining the ratio *decidendi* of a case as follows:

- (i) The principle of a case is not found in the reasons given in the opinion.
- (ii) The principle is not found in the rule of law set forth in the opinion.
- (iii) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision.
- (iv) The principle of the case is found by taking account of: (a) the facts treated by the judge as material; and (b) his decision as based on them.
- (v) In finding the principle, it is necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on conclusion.³¹⁸ Goodhart's main reasons for these general rules were that as regards (1) the courts often state their reasons widely and sometimes incorrectly, but the cases are nevertheless authoritative; as regards (2), sometimes there is no rule stated; and as regards 3,4 and 5, it is the fact which the trial judge regards as material which are important.

Cross opined that it is necessary to examine the way in which the case was argued and pleaded, the process of reasoning adopted by the judge; and the relationship of the case to other decisions. It is also necessary to consider the status of the court itself since there is an increasing tendency by lower courts to adopt a more elastic view of what binds them when a matter has been fully argued before a higher court.

Stone³¹⁹ disagreed with Goodhart's theory. He started from the premise that Goodhart attempted to produce a prescriptive rather than a descriptive theory; this Stone thinks, is his serious mistake.

The process according to Stone, is basically one of choosing an appropriate level of generality. There is thus implicit in a decided case numbers of potential ratio decidendi. Stone analysed the classical case of *Donoghue v. Stevenson*³²⁰ and showed how the range of facts would be stated at alternative level. He listed them as follows:

- a. Facts as to the agents of harm.

³¹⁷Essays in Jurisprudence and the Common Law, pp 25- 26. See also (1959) 21 M.L.R; pp 123 - 124.

³¹⁸*Ibid.* This test was also applied in *Lupton v. F.A. & A.B. Ltd* (1972) A.C

³¹⁹"The Ratio of the Ratio Decidendi," (1959) 22 M.L.R. 597.

³²⁰(1932) A.C. 562.

- b. Facts as to the vehicle of harm.
- c. Facts as to Defendant identity.
- d. Facts as to potential danger from vehicle of harm.
- e. Facts as to injury of Plaintiff.
- f. Facts as to Plaintiff's identity.
- g. Facts as to Plaintiff's relation to the vehicle of harm.
- h. Facts as to discoverability of agent of harm.
- i. Facts as to time of litigation.³²¹

Stone was convinced that Goodhart's neglect of these levels and his concentration on "material facts" led him into error. Apart from some indications from the earlier case, Stone starts off from the position that a ratio is only prescriptive for a latter case whose facts are 'on all fours'. The presence in the initial case of some facts at some of their level of generality is more relevant to its present decision than is the absence of the rest of them. In Stone's view, this is not a question of 'materiality of facts' to the decision in the earlier case imposing itself on the later court. It is rather, a question of the analogical relevance of the prior holding to the case requiring the later court to choose between possibilities presented by the earlier case.³²²

6.3.2 Finding the Ratio of Decisions in Appeal Courts

It is sometimes difficult to find the ratio decidendi of a case determined by the court consisting of more than one Judge. Obilade³²³ states the rule thus:

Where the court is divided and the majority judgements are consistent with one another even though each majority relies on a legal principle different from that relied upon by another majority, it seems that all the legal principles relied upon in

the majority judgement constitute the ratio decidendi of the case for the lower court to follow.³²⁴

Where the majority judgements are consistent with one another and they are based on the same legal principle, that principle is the ratio decidendi of the case. In the case where the majority concur in the result but the majority judgement are inconsistent with one another, it is difficult to determine the ratio decidendi since there is no majority in support of any grounds of the decision.

Obilade³²⁵ while supporting Cross, suggests that a proposition of law which is not supported by the majority and which is actually rejected by the majority should not be considered as the ratio decidendi. In this instance, the case cannot be cited as a binding authority for any proposition.

Again, the case may be fragmented into a number of different issues and there may be different majorities on different issues. It was held in *Re Harper v. N. CB.*³²⁶ that where there is no

³²¹See the details of this alternative levels in Farrar & Dugdale; op. cit. pp 87 – 88.

³²² Ibid. pp 88 - 89.

³²³The Nigerian Legal System; Spectrum Law Publishing (1990) p.113.

³²⁴Ibid. See also the application of the Principle in *Jacobs v.L. C. C.* (1950) A.C. 361 at 369.

³²⁵ Op. cit. p. 113 - 114.

discernible ratio decidendi common to the majority in the House of Lords, where the Court of Appeal is not bound by the reasoning in those different majorities it is free to adopt any reasoning which appears to be correct provided it supports the actual decision of the House of Lords. Lastly, where the court is equally divided, there is a clear practice in the House of Lords to dismiss the appeal on the principle "*semper praesumitur pro negante*" meaning the presumption is always in favour of the negative. This implies that the ratio of the court from which the appeal came becomes the ratio decidendi of the House of Lords when the House of Lords is equally divided. Considering the uncertain state of law on the determination of ratio decidendi in the Court of Appeal in England, is irrelevant as the Court of Appeal is bound by the decision and indeed the practice of the House of Lords. This principle of practice is also applicable in the Nigerian Supreme Court and Court of Appeal

6.3.3. Per Incuriam

Incuriam literary means "carelessness" but decisions described as reached *per incuriam* are in fact reached *per ignorantium* meaning reached through ignorance. The expression 'through ignorance' is however not preferred because judges are presumed to know the law and it is accordingly regarded as uncomplimentary to describe the wrong decision as having been arrived through ignorance.

The basis of regarding a decision as being reached per incuriam is where a relevant statute or rule which would have effect on the decision was not brought to the attention of the earlier court and the earlier court's judge failed to address his mind to such statute or rule of law in consonance with the general principle that the judge is presumed to know the law. The application of this principle in relation to neglect in the application of statute is illustrated in *Young v Bristol Aeroplane*³²⁷ but it has also been added in *Nicholas v Penny*³²⁸ that the rule applies not only to statutes but also to overlook binding judicial precedent. No court is bound to follow a decision of its own, if it is satisfied that it has given the decision per incuriam. A lower court is bound to follow the decision of a higher court even though such decision was reached per incuriam. In *Board of Customs and Excise v. Bolarinwa*,³²⁹ Thompson J. stated as follows:

A Magistrate is bound by a High Court decision and has no discretion as to whether it ought to follow the decision or not. If the High Court decision is wrong, the Magistrate is still bound with it as it is not within its jurisdiction to condemn a decision of the High Court. If he has any doubt, he may express it but only as an *obiter dictum*

6.3:4. Obiter Dictum

³²⁶(1974) Q.B. 614.

³²⁷ (1944) K.B. 718

³²⁸(1950) 2 K.B. 486

³²⁹ 1973 1 NMLR 179

To a layman, obiter dictum is the statement of law, made by the way in the judgement, which is not relevant to the issue before the court. *Black's Law Dictionary*³³⁰ defines obiter dictum as 'words of an opinion entirely unnecessary for the decision of the case. A remark made, or opinion expressed, by a judge, in his decision upon a case, "by the way" that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the case, or introduced by way of illustration, or analogy or argument.' Goodhart looked at *obiter dictum* from the point of view of the fact and says that an orbiter dictum is a conclusion based on a fact the existence of which has not been determined by the court. Cross³³¹ on the other hand, point out that there is a distinction, which can be drawn between statements based on facts the existence of which had been determined by the court and statements based on facts the existence of which has not been determined by the court. According to him, the latter may arise where the court gives a preliminary ruling on a point of law on assumed facts. In such case, the ruling can be regarded as ratio decidendi whereas in the case where the facts are denied by the courts, the statement is purely *obiter*.

Of importance, is the fact that while ratio gives rise which at times may be worthy of consideration, the weight given to obiter dictum depends on the level of court within the judicial system that the obiter was made and the eruditeness of the judge who made it. Where for an instance, the Supreme Court of Nigeria, in order to settle the state of the law in a particular field asked counsel to address the court on the law and based on such address makes general statement about the law, such statement is regarded as a superior specie of obiter dicta and are likely to be followed by the lower court though not binding.

6.3.5. Distinguishing Cases

The decision of a court in a case is not a binding precedent for any court in any subsequent case if the cases are different from each other in terms of material facts. Where such differences exist, instead of following erroneously or refusing to follow an earlier case, the court may distinguish it. Distinguishing cases means pointing out an essential difference between the present case and the earlier one. Such difference is mostly of facts and not of law.

Distinguishing cases differs from a refusal to follow or over-rule the earlier case cited which are courses open only to a court which is not bound to follow a decision of the earlier court. In distinguishing, certain factual differences are found which justify the court not to follow the earlier case while still accepting that the earlier case is good law.

Distinguishing cases in fact involve more than identifying factual differences. It involves using it as a justification for departing from the ruling in the earlier case. The court's acceptance of the distinction as a basis for departing from the earlier ruling usually rest on some notions such as morality, social policy or common sense. In most cases these are summed up in a general reference to justice, equity or to public policy or just plain policy.

³³⁰See *Black's Law Dictionary*, op. cit. p. 1100

³³¹ R. Cross, op. cit. p.23

Distinguishing of cases has also been considered by Glanville Williams³³² from two broad headings of restrictive and non- restrictive. Non-restrictive distinguishing of cases occurs where the court accepts the expressed ratio decidendi of the earlier case and does not seek to curtail it, but finds that the case before it does not fall within it because of some material difference of facts. Restrictive distinguishing of cases cuts down the ratio decidendi of the earlier case by treating as material. Glanville Williams indeed rejected Goodhart's view that the judge in a case is the arbiter of what are material facts.

Really, the controversy as to what should be the bases of distinguishing cases had left one with the option of reading every case on its own merit in order to determine the way in which each judge adopts in performing this difficult task.

6.4 FACTORS AFFECTING THE WEIGHT OF A PRECEDENT

The factors affecting the weight of a precedent include the following:

- (i) Age: Generally, the greater the age of a precedent, the greater would be the reluctance of the court to disregard it even where the reasoning in it is not sustainable or convincing.
- (ii) The status of a court and its composition are also of essence as to the value of the case as a precedent. In Nigeria, the decisions of Supreme Court Justice are accorded great weight.
- (iii) The adequacy of law report is another factor that affects the weight of precedents. Early cases are often inadequately reported due to lack of modern standards of law reporting. In fact, some law reports concentrate on reporting judgements of certain specific courts thereby indirectly causing greater weight to be attached to such judgements. Example of this can be found in Nigeria where emphasis is concentrated on reporting judgements of only the Court of Appeal and the Supreme Court thereby deliberately omitting reporting sound judgements of State High Courts or Federal High Court.
- (iv) The history of a precedent is also very significant in determining its weight. Firstly, the extent to which such precedent has been applied in later cases and approval of such precedent by jurists will definitely affect the weight attached to it. Secondly, whether the case was fully argued on- the particular point taken or relevant authority cited also affect the weight attached to such precedent. Judgement given on merit of the case is likely to have more weight than judgement devoid of pleading or strict principle of law. Lastly, subsequent courts are responsive to argument based on the unjust or absurd consequences resulting from -a previous case. This factor is often linked with a change in social condition which renders the earlier decision obsolete.
- (v) Where the court is unanimous in giving judgement, more weight is likely to be given to such judgment than where there is a dissenting judgement. The situation becomes complex where circumstances change, making the precedent inappropriate to modern condition.

³³²G. Williams, Learning the Law. Sweet & Maxwell 11th. Ed., 1982, p.175.

6.5 HIERARCHY OF COURTS AND JUDICIAL PRECEDENTS

At common law, the principle on which a court bases its decisions in relation to a material fact before it must be followed in similar cases -by court below it in the hierarchy of courts. It is therefore necessary to have a settled hierarchy of courts and a system of law reporting as a - requirement for proper operation of judicial precedent. In Nigeria, Section 6(5) (a-f) of the 1999 Constitution listed the superior courts of record to include the following:

- (a) the Supreme Court of Nigeria.
- (b) the Federal Court of Appeal.
- (c) the Federal High Court.
- (d) a High Court of a State.
- (e) a Sharia Court of Appeal of a State.
- (j) a Customary Court of Appeal of a State.

It is important to note that section 6(5) (g-h) of the 1999 Constitution makes provision for the establishment of other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws and other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws. These wide provisions are the legal bases for the establishment of courts like Magistrate Courts, Customary Courts, Area Courts, District Court, Juvenile Courts, and Coroners Courts which are regarded as inferior courts of record. It is a settled argument that since foreign courts are not within the hierarchy of courts in Nigeria, their judgements are only of persuasive effect in Nigeria courts.

Discussions here will be limited only to those courts which the common law doctrine of judicial precedent applies to in Nigeria.

6.5.1. The Supreme Court

The decisions of the Supreme Court of Nigeria are binding on all other courts in Nigeria to which the common law doctrine of binding precedent applies. Although the doctrine does not apply to

Customary Courts, Areas Courts or Sharia Court of Appeal, in principle, by virtue of the appellate system whereby decisions of these courts can ultimately reach the Supreme Court, they should follow the decisions of Supreme Court.

In terms of adhering to its own decision, the Supreme Court of Nigeria, in *Bronik Motors Ltd. & Anor v Wema bank*³³³ adopted *intoto* Lord Gardener's Practice Direction in respect of the House

³³³(1983) NSCC P 225.

of Lords. In this case, the Supreme Court held that it would not depart from a precedent unless three conditions are prayed and satisfied:

- (i) there is a breach of justice;
- (ii) on grounds of Public Policy; and
- (iv) a question of legal principle such that the retention of the decision will amount to a perpetuation of injustice.

Predicated on the above principles, the Supreme Court held in *abdulkarim v Incar Nigeria Ltd*³³⁴ that although it will respect its previous decision, as a court of last resort which is not bound by precedent, the court will not hesitate to overrule any decision of its own which she is satisfied was reached on wrong principle, since this is the only way to keep the stream of justice pure.

6.5.2. The Court of Appeal

In Nigeria, there is no express provision in the Court of Appeal Civil Procedure Rules governing precedent. The practice adopted by the Court of Appeal of Nigeria is the practice in England established in the case of *Young v. Bristol Aeroplane Co.*³³⁵ which is to the effect that the Court of Appeal is bound by its previous decision subject to three important exceptions. These exceptions are:

- (i) The Court of Appeal is entitled and bound to decide which of its two conflicting decisions it will follow.
- (ii) The Court of Appeal is bound to refuse to follow a decision, of its own which though not expressly overruled cannot in its own opinion stand with a decision of the House of Lords.
- (iii) The Court of Appeal is not bound to follow a decision of its own if it was given per incuriam e.g. where a statute or rule having statutory effects which would have affected a decision was not brought to the attention of the court.

The direct applications of the above principles by the Court of Appeal of Nigeria could be traced to the case of *Osamade v. Audu*³³⁶ where the West African Court of Appeal, which until its abolition in 1955, occupied a corresponding position in the Nigerian judicial hierarchy as that occupied at the moment by the Court of Appeal adopted the approach of the English Court of Appeal.

In criminal matters, the English Court of Appeal is very reluctant to depart from its own previous ruling. Though it does not regard itself bound by them, but would refuse to apply anyone which it considers to be wrong. This attitude of the English Court of Appeal as expressed in *R v.*

³³⁴ (1992) 7 SCNJ p. 366.

³³⁵ 45 (1944) K.B. P 718

³³⁶ (1948) 12 W.A.CA 437.

*Taylor*³³⁷ was similarly endorsed by West African Court of Appeal in *Motayo v. Commissioner of Police*.³³⁸

To sum up, the Court of Appeal does not deem itself bound by its previous ruling in criminal matters, but feels reluctant to depart from such decisions.

6.5.3. The Federal High Court

This court was formerly known as the Federal Revenue Court. The decision of the Federal High Court binds all Magistrate and District Courts in Nigeria. The Federal High Court is in turn bound by the judgement or precedent of Court of Appeal and Supreme Court.

The Federal High court is apparently of the same rank with the High Court of the State though given exclusive jurisdiction in specific matters.³³⁹

6.5.4. The State High Court

The High Court of a State and the High Court of the Federal Capital are of co-ordinate jurisdiction. Accordingly, the decision of a High Court is only persuasive precedent for another High Court. In *Barclays Bank v. Hassan*³⁴⁰ it was held that a judge of a High Court does not feel himself bound by his own decision or by those of other judges of co-ordinate jurisdiction. Due to the federal character of Nigeria, matters coming before the High Court of a State may be either state matters (within the concurrent list) or federal matters (within the exclusive list). Therefore, where a High Court decides a matter which falls under State jurisdiction such decision is not binding precedent for the Magistrate and District Courts in other State. Such decision is only persuasive precedent. On the other hand, where the High Court of a State adjudicates on matters falling within a federal legislative list, such decision is binding precedent to Magistrate and District Courts within and outside the State.

In Conclusion it can be seen that legal reasoning in judicial process is basically tailored towards the attainment of justice. The concept of "justice" in the common sense means what is fair" or "just" but technically, the concept is pregnant with meanings. Language, personal interest of the judge, socio-cultural background of the judge, satisfaction of job, self discipline of the judge and the ability of the judge to defend at all costs the independence of the judiciary in order to do justice to all manner of persons are some of the factors that shape legal reasoning in judicial process. Whatever is the reasoning of the judge in determining a particular case, the judge has to know when the burden of proof of facts and law shifts between the parties and himself especially where shift of law is involved. Also, the application of the doctrine of precedents requires the judge to ensure uniformity in judgements while justice has to be done to the parties. There is no doubt that legal reasoning is curtailed by the concept of precedent but the lower court judge has a

³³⁷ (1950) 2 K.B. 368.

³³⁸ (1950) 13 W.A.C.A. 114

³³⁹ See Decree No. 107 of 1993.

³⁴⁰ 1961 W.N.L.R. 293

way out of this predicament by carefully distinguishing between the facts of the cases. Generally, the court that made the precedent can depart from its previous judgement based on justice, public policy and avoiding conflicts with judgements of superior courts.

6.6. QUESTIONS AND EXERCISES

1. What is shift of facts? Discuss the principles governing shift of facts in any superior courts of record in Nigeria.

Hints

- This question is basically on shift of facts and the principles governing shift of facts in superior courts of record in Nigeria. The Evidence Act defined what a fact is and indeed specify principles governing shift of facts. The 1979 Constitution list the superior courts of records in Nigeria. There is no doubt that case law and opinion of jurist like Nwadialo, Aguda etc. have contributed immensely in this area.
- Meaning of "fact" - Section 2(1) of Evidence Act
- Bases of shift of fact.
 - Whoever desires any court to give judgement on the existence of facts which he asserts must prove that those facts exist. - Section 134(1) of Evidence Act - *Elemo & Ors v. Omolade & Ors.*
- Distinguish between shift of facts and the standard or obligation on a party to persuade a court to give judgement in his or her favour
- Nwadialo's definition of burden of proof;
- Shift of fact implies evidential burden
- Shift of fact in civil cases
 - The burden of proof lies on the one who affirms not upon one who denies.
 - Refer to the Latin maxim *Affirmanti non neganti incumbit probatio.*
 - Generally, shift of facts in a civil case depends on the pleading filed by parties.
- Shift the general principle that proof of facts in criminal cases rest on the prosecution.
 - See section 33(5) of 1979 constitution
 - See section 137(2) of the Evidence Act
 - See the case *Okagbue v. C.O.P.*
- State the four exceptions to the above principle e.g.
 - i. defence of intoxication or insanity.
 - ii facts within the knowledge of the accused.
 - See sections 137,140 and 141 of Evidence Act. See the cases of *Simi Johnson v. C.O.P. and Otti v. L.G. P.* etc.
- In this question, attempt has been made to examine the meaning of shift of fact and the principles regulating shift of fact in a State High Court. In Nigeria, basically shift of facts is governed by the provisions of Evidence Act and the 1979 constitution. There is no doubt that over the years case law has developed to compliment the provision of statute. It is now

settled law that in civil cases, shift of facts depends on the pleading filed by parties whereas in criminal case proof of facts rest on the prosecution except where the accused, for example, raises the defence of intoxication or insanity or certain facts which are within the knowledge of the accused.

2. On the 25th day of February, 1999, Barrister Emmanuel Johnson, counsel to the Plaintiff in a matter before the High Court 1, Ife, addressed Justice Pox Blue on a preliminary objection raised by counsel to the defendant. In his address, Barrister Johnson made references to the cases of *Otti v. Inspector General of Police* and *John v. John*. The latter being an English case decided by the House of Lords in England. Justice Fox rejected the Supreme Court decision which it believes was erroneously given. Also, Justice Fox accepted as binding on him the judgement in *John v. John* which is contradictory with the Nigerian Supreme Court decision in *Otti v. Inspector General of Police*. Barrister John intends to appeal against the judgement of Justice Fox. Advise him.

Hints

- This problem question is principally on the doctrine of judicial precedent. The major issues raised in the question are (1) Mr. Justice Fox of Ife High Court rejected the decision of the Supreme Court in *Otti v. I.G.P.* on the grounds that the decision of the Supreme Court was erroneously given and (2) Justice Fox accepted as binding *John v. John* which is contradictory with the decision of Nigerian Supreme Court in *Otti v. I.G.P.* Apart from opinion of learned writers, this area of the law is basically governed by case law principles.
- Brief general discussion on judicial precedent or *stare decisis*.
- Issue No.1: Mr. Justice Fox of Ife High Court rejected the decision of the Supreme Court in *Otti v. I.G.P.* on the grounds that the decision was erroneously given.
- The general rule is derived from the common law doctrine of *stare decisis*. This doctrine is to the effect that a decision of a judge once given on a question of law binds both the judge himself and subsequent judges in courts of lower rank to decide the same question of law in the same way. See the decision of Thompson J in *Board of Customs and Excise v. Bolarinwa* where the general rule was applied.

Exceptions to the general rule exist:

- (i) where the lower court can distinguish the fact of the cases. Here the lower court will not apply the precedent laid by the higher court, but at the same time does not say the precedent is bad law.
 - (ii) Courts that do not apply adjective law such as Customary Courts, Area Courts.
- Apply the fact of the case in the problem question to the general rule or the exception where necessary. State your opinion which in this case is that Mr. Justice Fox had erred in law to rule that the judgement of Supreme Court in *Otti v. I.G.P.* was erroneously given.

- Issue No.2. Mr. Justice Fox accepted as binding on him the judgement of House of Lords in *John v. John* which is contradictory with the decision of Nigerian Supreme Court in *Otti v. I.G.P.*
- The general rule is that the doctrine of judicial precedent applies only to courts that have hierarchical relationship within a particular legal system.
- Exception to the general rule are:
 - (i) Application of judgement of court in a different legal system is only persuasive. Applying the fact of the case in the problem question to the general rule, Mr. Justice Fox had erred in law to have accepted as binding on him a judgement of the House of Lords in *John v. John*. Such judgements, at best, are of persuasive precedents in all Nigerian courts. See the case of *Maurice Geualin Ltd. v. Aminu*.
 - (ii) In conclusion, First, Justice Fox erred in rejecting the Supreme Court's decision in *Otti v. I.G.P.* on grounds discussed above. Second, Justice Fox erred in accepting the judgement in *John v. John* based on grounds discussed above. Barrister Johnson is advised to go on appeal.

6.7 FURTHER QUESTIONS

1. Discussion on shift of law in Nigerian courts rest on the Latin maxims *Juria Novit curia and Ignorantia judicis est calamitas innocentis*.
Discuss.
2. Over the years, Jurist have accepted the contention that English case law is the product of practical reasoning emerging from decision making and combining the attributes of reasoning by analogy with those of reasoning by rules. Discuss.
3. Discuss the process of finding the ratio decidendi in Appeal Court.
4. Write short notes on the following:
 - a. *Per incuriam*,
 - b. *Obiter dictum*,
 - c. Distinguishing of cases.

CHAPTER SEVEN

LEGAL REASONING IN LEGISLATION

Akorede O. Yusuff

7.0 INTRODUCTION

The main aim of this Chapter is to gain insight into the dynamics of law making processes and legal reasoning, which determine the contents and interpretation of legislation.

Generally speaking, law may be made through many agencies such as ministries, local government councils, government institutions such as corporations, universities, etc. to mention a few. However, legislation strictly speaking, as a source of law, refers to the law made by the body whose primary duty is to make law, that is, the legislature.³⁴¹ The legislature is to make laws, otherwise called legislations, for "the peace, order and good government of the Federation or any part thereof ..." ³⁴² Legislations or laws are therefore the formal and express promulgation or declaration of legal rules, proscriptions and or directions into statutes in the fields or subjects to which they relate.

7.1 REASONS FOR NEW LEGISLATION

Legislations are mostly instigated by the demands and suggestions of the citizens, interest groups, a community, private persons or governmental institutions or departments in form of proposals to the legislature or relevant government department.³⁴³ Before we examine the method of making legislative proposals, we shall briefly highlight the reasons which may necessitate the making of such proposals. The following are some of the reasons why new legislations may be made or old ones changed.

7.1.1 The Dynamic Nature of the Society

The subject of law is human being and the target of its specification is human conduct. Human beings by nature are dynamic, hence law must be dynamic. As the society develops and embraces new attitudes, values and ideas, its legal system also reacts to bring its law into conformity with the changing attitudes, values and ideas. Many of our customs, previously adhered to strictly, have been invalidated on the ground that they are repugnant to natural justice, equity and good conscience, or incompatible with any law then in force.³⁴⁴ In some cases, new attitudes have been enacted into law to encourage the people to move along with the society. For instance, it has become necessary for the government of the day to enact laws regulating the

³⁴¹Section 4(1) of the 1999 Constitution of the Federal Republic of Nigeria (1999 Constitution) provides: "The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation ... "

³⁴²See Section 4(2) of the 1999 Constitution.

³⁴³For instance, the general outcry on the inefficiencies and failure of Local Government Councils in the country led the Obasanjo Administration to set up a Committee to consider its restructuring.

³⁴⁴The following cases among others, are relevant in this regard: *Guri v. Hadejia Native Authority* (1959) 4 FSC 44; *Edet v. Essien* (1932) 11 NLR 47; *Kodieh v. Affram* (1930) 1 WACA 12.; *Ekpan v. Henshaw: Re Effiong Okon Ata* (1930) 10 NLR 65.

dumping of refuse and wastes in public places or the indiscriminate slaughtering of animals for food in manners that constitute health hazard to the populace.³⁴⁵

7.1.2 Change in Political and Economic Ideologies of Government

Law is an instrument of political or social or economic change. Therefore, whenever the baton of governance changes in a country, political goals and ideologies change, and changes in law becomes inevitable. Atiyah puts it thus:

"A change of government must bring new changes in the law because a new government wants to aim in different directions."³⁴⁶

For example, transition from a military regime to a civilian regime or vice versa will inevitably necessitate the abrogation of certain Decrees and edicts and the promulgation of new ones to establish a new legal order and establish the policies of the government. For instance the abolition of Petroleum Trust Fund (PTF) at the inception of the present civilian regime.³⁴⁷

7.1.3 Global Shifts in Value

Legislation may be made to embrace community, as well as global shifts in value systems and incorporate international standards in certain areas of our domestic law. "Change," says Atiyah P.S., "in the community's value system; in the sense of justice itself, is and has been for centuries, a cause of legal change which is both widespread and deep."³⁴⁸ There are now legislations in Nigeria on Women's rights and the rights of children;³⁴⁹ Conservation and preservation of nature, the environment and the protection of endangered species of animals, birds and fishes among others;³⁵⁰ as well as other laws reflecting global changes in value systems. Most of the policy shifts in these areas and consequently new legislations can be traced to the country's membership of several international organisations and Non-governmental Organisations (NGOs) with global coverage.

7.1.4 Scientific and Technological Breakthroughs

³⁴⁵Another example is the abolition of Osu Caste system in the Eastern Nigeria by law. See D.A. Ijalaye, "The Sociological School of Jurisprudence and the Nigerian Legal Order, Nigerian and The Challenge of Knowledge," Essays in Honour of Jonathan Olusesan Dipeolu, 1992.

³⁴⁶Atiyah, P.S., Law and Modern Society, Oxford University Press, 1983 (1992 - Reprint) p.116.

³⁴⁷See Kayode E., "The Rule of Law, The Roles of The Executive, The Legislature and The Judiciary in a Democracy, The Advocate, Vol. 20, 2000, pg. 59 at p.69.

³⁴⁸ Ibid. p.117.

³⁴⁹President Olusegun Obasanjo recently signed into law a bill to control women trafficking and child labour to control what he termed: "Modern Day Slave Trade" - See: The Vanguard Newspaper of 15th July 2003; p.10 and The Punch, Tuesday 15th July, 2003 p.3.

³⁵⁰See generally the Federal Environmental Protection Act, Cap F10 LFN, 2004.

Proposals for legislation may be made to cope with the scientific and technological breakthroughs in order to maintain law and order in the society. For instance, the advent of satellite communications and the use of computers have made access to information throughout the world easy at the touch of a button. Likewise the Internet described as the "information superhighway," has also brought about a new set of problems, rights, duties and liabilities which now necessitate the development of information technology laws. Atiyah captured the point we are making here succinctly in the following words:

“... technological changes ... have led to a demand for much legal change... The computer brings new dangers about private information being disseminated to all and sundry, so demands for legal regulation arise, ... , the widespread availability of private tape recorders brings the need for changes in copyright laws concerning rights in broadcast music; an so on.”³⁵¹

7.1.5 Arrest of Anti-Social Behaviour

Governments exist to preserve order in the society as well as to provide and guarantee life, property and security of the populace and protect them from acts or omissions of individuals or groups, which are against public good. Legislations may be made therefore, to arrest deplorable, reckless or anti-social behaviours or practices of the people. Such behaviours may be injurious to the interest of the populace or the overseas image of the country. For instance, in order to curb unconventional banking practices leading to distress and failures in the Nigerian banking industry, the Nigerian government has enacted, inter alia, Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994.³⁵² Also, Advance Fee Fraud Decree was enacted in order to arrest the menace of the crime of obtaining under false pretences popularly known as '419', it was for similar reasons that the government made the Money Laundering Act and established the National Drug Law Enforcement Agency NDLEA, via Act No. 48, 1989.³⁵³

Apart from the above factors, legislation may be made on a matter at the instance of a government ministry or parastatal,³⁵⁴ corporate body; a legislator, private citizen or an NGO.³⁵⁵ Instances of these can be given; the making of a legal instrument granting state pardon to certain convicted persons or re-vesting certain properties earlier confiscated on him; the conversion of merchant banks in the country to commercial banks and upward increase in the share capital of commercial banks at the request of some merchant banks and the Central Bank of Nigeria respectively, are instances of legislations initiated by private bodies. The Petroleum Ministry, as a government department, may request that laws be made to control illegal dealings in petroleum products. Communities may also call for legislation on matters affecting them, for instance, the clamour by the populace that they are subjected to unfair and illegitimate multiple taxations led

³⁵¹ P.S. Atiyah, op cit., pp. 115-116.

³⁵² As amended by Decree 18 of 1995.

³⁵³ See also Corrupt Practices and Other Related Offences Act, Cap C31 LFN, 2004 a law to prohibit and prescribe punishment for corrupt practices and other related offences

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the government to legislate on lists of approved taxes collectible by every tier of government in the country.

We have discussed above the major reasons for making or changing laws on any particular subject matter. The initiation or instigation of such laws may come by way of suggestions and proposals from concerned individuals and interest groups like Women Trafficking and Child Labour Eradication Foundation (WOTCLEF). In democracies, proposals for legislation concerning specific issues are articulated, aggregated and tabled before the legislative house or houses³⁵⁶ in the form of memoranda or bills where they undergo certain processes and critical analysis before they can become Laws or Acts of Parliament. This process will be examined in details later.

7.2 LEGISLATIVE PROPOSAL

Whatever the source or whoever the sponsor may be, legislative proposals need not assume a particular stereotyped form. It makes sense however, that such proposal should be logically and structurally presented, specifying the subject matter or specific area it relates to. If for instance one is to make a proposal on making law in respect of cultism among Nigerian students or the problem of multiple taxation, it can be headed or titled thus:

(a) Secret Cultism: The Menace of Cultism in Institutions of Learning in Nigeria.

(b) Government Public Tax Authorities: A Proposal on Multiple Taxation and Collecting Authorities in Nigeria.

The proposal may highlight the present position of things with regard to the subject matter and specify the anomalies or problems arising from it. Next, suggestions for changes and of means of bringing the situation under control may be made and, lastly, more concrete proposals and framework for the law expected to be made on the subject area should be made. Legislative proposals are normally expressed in memoranda submitted to the government or any of its relevant department or agency or directly to the legislature or its relevant Committee or the Law Reform Commission.³⁵⁷ Legislative proposals may also be contained in opinions expressed in the electronic and print media and they may be channelled through concerned professional, socio-cultural, economic, political and such other pressure groups.³⁵⁸

7.3 HINTS ON LEGISLATIVE DRAFTING

³⁵⁶By their sponsors or through the relevant government ministry or department

³⁵⁷For instance, proposals and memoranda are expected from members of the public and concerned stakeholders on the planned restructuring of local government Councils in the country for which the federal Government had set up a Committee headed by Etsu Nupe Alhaji Umaru Sanda Ndayako.

³⁵⁸The NUT (Nigerian Union of Teachers) spearheaded the proposals for the professionalization of teaching in Nigeria.

Legislation as contained in statute books are the finished products of what started as proposals at one time or the other but has passed through certain formal processes in its evolution into law. Legislative proposals mature (if ever) into bills from where the bureaucratic and intricate legislative procedures take over. Bills are required to be articulate, ordered and exhaustive statement of what is expected to be passed by the Parliament and signed into law by the President. The drafting of bills require a serious technical input or expertise by the legal draftsman.³⁵⁹ What is eventually passed into law, more often than not, is not radically different from but rather a modified version of the bill. If a bill is inelegant either in form, content, structure, coverage or language, it stands a risk of being thrown out at the very first reading if it is ever considered worthy of being put before the legislature in the first instance. This is because the legislature does not always have the time to waste on fruitless or inconsequential exercises. It is therefore incumbent on the sponsor(s) of the bill or the draftsman to do his homework properly and put a carefully, technically processed legislative draft or bill before the legislature.

Legislations are expressed or couched in a somehow unique structure. It is universally recognized that the language of the law must pass some tests and avoid some common burdens imposed by the imperfections inherent in languages. Equally, legislations must have an ordered structural arrangement and format for it to be worth its appellation as legislation.³⁶⁰

Legislative drafting is an art and a draftsman must have a natural flair for his career. As he is not free to draft without restraints, he must be of high intellectual competence, he must be highly imaginative, analytical and of a diagnostic mind. He must possess a quick and retentive memory and the foresight of a sage. He must be patient, sensitive, careful, flexible and multi-dimensional as well as multidisciplinary in perspective; pay attention to details and have a curious, inquisitive and prying mind. There is no doubt too, that apart from a high mastery of language and its technicalities, a good legislative draftsman must be amenable to corrections, suggestions and criticisms. He must be very organized and familiar with the socio-cultural and political peculiarities of the country or region the laws of which he is to draft because he has to draft a bill which aims at different readers members of parliament, lawyers, professionals, judicial officers and even ordinary citizens.³⁶¹ Really, we can hardly exhaust what ought to be the qualities of a good draftsman, but the qualities mentioned above are salient enough and this will become more evident in the course of this section.

As a preliminary step, the draftsman will be required to get a detailed instruction from his client and "he must produce a bill which substantially complies with his instructions."³⁶²The instruction must contain the object of the legislation; the background information; what mischief or need the law is required to cure or meet; the implementation bodies (if need be); the procedures and instruments and possible exemptions, all these must be stated. Since clarity of thought result in clarity of expression, the instruction must be clear and further questions and consultations should

³⁵⁹Who is usually a specialist in the field, may be government employed or be in private practice.

³⁶⁰The overall implications of this becomes apparent when the courts labour to interpret statutory provisions in the determination of civil rights and duties as well as criminal culpability of parties in judicial proceedings.

³⁶¹See P.S. Atiyah, *op. cit.*, p.126.

³⁶²*Ibid.* p. 127.

be taken where the instruction was not properly understood by the draftsman. In addition, he should request for relevant official reports and policy statements, if any, that can aid the drafting of a detailed and appropriate legislative bill.

The ultimate style and shape of most legislations today, noted Atiyah,³⁶³ is increasingly unsatisfactory with many statutes emerging from legislative process obscure, turgid and quite literally unintelligible without a guide or commentary. This is inevitable if the proposal leading to the draft bill for the statute or legislation is itself devoid of style or shape. Legislative proposals are normally couched in legalese, that is, legal language but they are meant ultimately to have relevance not only to the legally trained in the society, but to be of general application to all or to a stated class. Without due care and conscious effort, the draft legislation may suffer from some language defects that seems to be hereditary to legislations from the colonial era up to the post independence period in Nigeria. For good legislative drafting, the following, among others, should be carefully noted:

7.3.1 Mastery and Familiarity of Language

Notwithstanding the provisions of section 55 of the 1999 Constitution of the Federal Republic of Nigeria that, "The business of the National Assembly shall be conducted in English, and in Hausa, Ibo and Yoruba ...," it was sufficiently recognized that legislative debate and other house businesses can, from a practical point of view, hardly be conducted in any other language apart from English language in a multi-ethnic, multi-lingual setting like Nigeria. English language is therefore the language of the law in Nigeria.³⁶⁴ The draftsman must avoid any expression, words or phrases peculiar to any tribe in Nigeria or foreign to Nigeria, which have not been integrated and assimilated into English language.³⁶⁵ Even some Latin words or phrases like, *inter alia*, *pari passu*, *ditto*, *ultimo*, *promimo*, *caveat emptor*, etc. which would seem to have been assimilated into mainstream English language and consequently legal language are no longer fashionable and should therefore be avoided or at least used sparingly where no appropriate English equivalent could be found. The draftsman should therefore stick to common and familiar words and expressions so that those to whom the law will apply need not be legally aided nor require a consultant linguist before they know what the law says.

7.3.2 Direct and Explicit Expression

A legislation should be direct and not winding. As such, clumsy, intricate and complex expressions should not be used as these tend to make it difficult for people to easily understand the exact meaning the draftsman seeks to pass across. The reader of a draft should not be made to

³⁶³*Ibid.*

³⁶⁴At least till "adequate arrangements are made" for the use of any of the Nigerian indigenous languages as envisaged in the latter part of S.55, 1999 Constitution of the FRN.

³⁶⁵Where this is unavoidable, there must be a direct and comprehensible explanation or commentary on the expression, word or phrase within the - draft bill.

struggle or turn back to get the meaning of what is being put across. He may skip instead, scared, so to say, and certainly confused by the intricate metaphors and verbal fireworks.³⁶⁶ As an illustration, it is rather winding and clumsy to draft: "It shall be lawful for a person under attack, by an individual or a group, whether armed with any kind of weapon or instrument with which harm could be inflicted or by bare hands, whether the attacker is physically stronger or otherwise, to defend himself with such force as is commensurate with the attacked offered;" the same meaning is conveyed by simply stating: "Every person has a right to defend himself when attacked."

7.3.2 Economy of Language

The queer style of the early legal practitioners, particularly in drafting, is an indulgence in verbosity. Undue repetition of synonyms is so peculiar to legal drafting that it not only bores but leads to confusion. Words that add no meaning to the text of the draft should not be used. Drafts should be brief and redundant terms or words avoided, otherwise the reader may be fatigued and in consonance with the words of Yakubu:

"Each sentence should be brief, direct and free of words that fail to advance the meaning of the issue you wish to put across. It must offer more thought than words, characterize rather than catalogue..."³⁶⁷

This makes brevity to merge into brilliance. For instance, it is not uncommon to read drafts in this form: "where the borrower fails, refuses, neglects, omits or avoids repayment within a period of six months when the loan shall fall due in breach of his obligation, undertaking, agreement, or promise under the loan contract ... " The words - fails, refuses, neglects, omits, avoid on the one hand, and obligation, undertaking, agreement and promise on the other, are all doing the same work and anyone of them would have been sufficient for the purpose of the draft. It is no longer fashionable or profitable for legal writings to occupy pages when one or two paragraphs would suffice. It is quite true that if 20 pages of precise and relevant write-up can convince a man, he cannot be more convinced by 100.³⁶⁸

7.3.4 Orderliness

There is no hard and fast rule as to how the import of a statute or its subject matter is introduced or arranged. However, the draft must be logically arranged. Proper delineation of provisions into well-trimmed sections and paragraphs make the law easy to follow and its scope of applicability determined. An ordered piece of work is always beautiful and attractive to readers; a patchwork of a writing, more so a legal draft, will be like a misarranged puzzle or skeleton lacking in

³⁶⁶See Yakubu, J.A.; Press Law in Nigeria, Malthouse Press Limited, 1999, p.38.

³⁶⁷Ibid., p.35-36.

³⁶⁸Ibid., p,35.

aesthetic or intellectual self-commendation. Orderliness will give the writing logical sequence and a clear landscape.³⁶⁹

7.3.5 Archaism

It was the practice in the olden days for legal draftsmen and lawyers to overwhelm the laymen at large with big complicated language with little meaning. Ready example of such words are - hereinafter, hereinbefore, foregoing, first above written, above mentioned, aforelisted, whosoever, herein, thereat, etc. It seems evident that when these words are left out of the draft no damage is done to the sense or meaning of the text. Take for instance, "Only courts specified in section 6 above shall exercise the powers hereinafter contained in this Section," one would not see any damage done to the draft if the words, "above" and "hereinafter" are removed. A draftsman should not form the habit of using archaic or vague words, which have been made trite by overuse and with no content value in a draft.

7.3.6 Consistency of Terms

The draftsman has a wide range of words, tenses and writing styles to choose from. He must however stick to the particular word or tense with which he started the draft throughout. Several words have identical meanings, either grammatical or legal meanings. Whichever the draftsman chooses to use in the draft must be used all through the statute. Gibson in his piece, *Elements of Style*,³⁷⁰ suggested some pitfalls, which writers must avoid. He advised that writers should:

- (i) be wary of metaphors;
- (ii) use the same word always for the same idea since variations, no matter how elegant, are confusing and in poor taste;
- (iii) avoid repetitions and duplications.

Legislations are not artistic or literary masterpieces and a lot of confusion is avoided when the statute is not turned to an experimentation in synonyms or clumsier with puns. For instance, either "lessor" or "landlord" should be used and they should not be interchangeably used in the same draft except reference is to different persons. So also should anyone of "sell," "convey," "alienate," "pass," "grant," be adopted and used in a statute except where a separate meaning is intended or spelt out for any other one used.

7.3.7 Use of Connective and Definitive Words

These terms are very sensitive and the draftsman must know the implication of using them and the meanings attributable to them in law, particularly by the law courts. Some of them assume more than their ordinary meaning in everyday language when they form an active part of a legal

³⁶⁹Ibid, p.37.

³⁷⁰Referred to by J.A. Yakubu, op. cit., pp.38-39.

text. For instance, "will" and "shall," depending on their context may indicate a discretion, an obligation or command by one person or body to do certain things. The words, "or" and "and" may join two separate things or provide one' as an alternative to the other. "From" and "to" may include or exclude stated periods. It is therefore imperative for the draftsman to aver his mind to these possibilities and carefully pick and use the words to bear out his desired intention.

7.4 AMBIGUITY, VAGUENESS AND OPEN TEXTURE

Our preoccupation with what makes for a good legislative drafting is borne out of the calamity that can befall a legal system inundated with defective statutes. Statutes may not only be defective in form, they can be defective in content and texture. The latter defect may be inherent ambiguity or vagueness of the draft or the legislation. The statute is ambiguous when its language or provision affords two or more mutually exclusive meanings or is capable of multiple interpretations each of which is deducible from the text of the draft. Ambiguity is oftentimes classified into three: lexical, syntactic and contextual ambiguities.³⁷¹

A statute or specific part of it is vague when its meaning is cloudy, indeterminate and confusing. Vagueness of a statute is worse than its ambiguity because, unlike the latter, a vague statute can hardly be resolved by reference to the context of the statute.

When a provision is vague, it creates borderline cases where there is no definite answer as to whether the provision applies or not, it is therefore a case of 'constructive uncertainty'.³⁷²

In spite of the above realization, legislation cannot be so good as to entirely be free from what is usually termed open texture. Farrar and Dugdale observed that the drafter of legislation is faced with a dilemma of making a proposed rule to be general enough to cover all foreseeable instances falling within the policy of the statute and making it sufficiently detailed and clear in meaning. They noted that Breadth of scope and precision are not always compatible objectives.³⁷³ No matter how detailed a statute is made, it cannot anticipate and settle in advance all future possibilities and occasions in which they will be due for application. Statutes 'are meant to regulate human conduct and affairs which are seriously incapable of accurate prediction, provision must therefore be made for future settlement of issues when they arise, this provision is made by building some flexibilities into the statute. This flexibility or open texture style may lead to some measure of vagueness but this is permissible especially in some areas of the law such as Tax, Criminal Law, Evidence, Corporate Practice etc. where detail is required in the interest of persons subject to the law.³⁷⁴

³⁷¹See J.H. Farrar & A.M. Dugdale; Introduction to Legal Method, 1990, Sweet and Maxwell (London) 3rd ed, pp.142-143.

³⁷²Farrar I.H. and Dugdale A.M" op. cit., p.143.

³⁷³Ibid., p.142.

³⁷⁴See also, Farrar and Dugdale, Ibid, p.142.

7.5 EXTERNAL STRUCTURE AND FORM OF LEGISLATION

So far, we have examined what should guide the legislative draftsman in the internal composition and choice of diction, in other words, the mechanics of legislative draftings. We will now briefly consider some guide on the external structure and form of a good legislation.

7.5.1 Punctuation

A good draftsman must pay particular attention to punctuation in his drafting. The overall effects of punctuations in writings is so far reaching that the meaning of a paragraph or even an entire passage can be altered at will by tinkering with punctuations without any change of words. It is therefore imperative that the draftsman use punctuations as carpenters will use small nails and glue to put his structure in a better shape. This is even more so because it is accepted at common law and generally now by judicial authorities that punctuation form part of statutes and are to be taken into consideration when construing an enactment.³⁷⁵They go a long way' in aiding accuracy and clarity in legal drafting.

7.5.2 Marginal Notes, Schedules etc.

Also imperative, is the inclusion of marginal notes directing attention to places or clauses sought in statutes, more like a bookmark for ease of reference in a statute that may run into volume of pages; brackets (parenthesis) are also to be used to amplify, qualify or explain words or phrases used in a writing or to separate less important statements from the main thrust of the statute. Schedules are also to be used for more elaborate technical or more explicit information, which could not conveniently be included if} the main text of the legislation.

7.5.3 Technical Design/Structure

A good technical design should also be worked out for the legislation by the draftsman bearing in mind the necessity for an ordered and well arranged parts and provisions of the legislation. Certain formalities are peculiar to legal drafting all over the Commonwealth and they are as follows in the order they usually appear.³⁷⁶

- (a). Preliminary Parts - which comprises the Long Title, the Preamble (usually but not always), Short Title or Citation, the Enacting Clause and the Commencement Clause.
- (b). Principal Parts - which contain the substantive provisions (the primary preoccupation of the whole legislation) and the administrative provisions (stating the enforcing instruments and agencies).

³⁷⁵See section 3(1) Interpretation Act Cap 123 LFN 2004. *Associated Artists v I.R.C.* [1956] 2 All E.R. 9, *Houston v Burns* [1981] A.C. 337.

³⁷⁶J.H. Farrar and A.M. Dugdale, *op. cit.*, pp. 140-141.

- (c) Miscellaneous Parts - comprising offences or wrongs in respect of the legislation and other supplementary provisions.
- (d) Final Parts - These provide for savings (of earlier similar statutes or provisions), transitional provisions, repeals, schedules and possibly Interpretation section for explanations of words used in the statute.
- (e) Executive Endorsement Part - this is where the President or Prime Minister or other designated authority signs the bill as passed by the parliament into law.³⁷⁷

This structure is common in Nigerian statutes but the order of arrangement can be slightly altered/" It is evident from our discussion that legal drafting in general and legislative drafting in particular is an art and a craft to be mastered and perfected by a patient and gifted draftsman.

7.6 LEGISLATIVE PROCESS

The process leading to the enactment of statutes on any subject whatever is quite onerous, especially in civil and organized democracies. As noted earlier in this work, legislations start from being proposals and it can originate from private individuals or groups and processed through their representative in parliament or appropriate house committee the subject matter of the proposal. It may also be introduced by the executive or any of its agencies. Whatever the source of the proposal, it will, at the preliminary stage, pass through governmental departments in the Ministry of Justice and other relevant Ministry as well as network of civil servants at the National Assembly, who will do a great deal of work on it. Unless there is a particular need for confidentiality,³⁷⁸ there will often be far and wide consultations with outside interests which is imperative anyway for legislations on technical issues or subject areas, for instance, Aerospace, Information and Communication Technology (ICT), Nuclear Power Utilisation or Control, etc. There will "often also be consultation with other government departments which may have an indirect interest in, or responsibility for, areas of administration on which the bill may impinge."³⁷⁹

Under the 1999 Constitution of the Federal Republic of Nigeria, Nigeria operates a bi-cameral legislature at the federal level consisting of both a Senate and House of Representatives, which collectively make up the National Assembly.³⁸⁰ Thus, a proposed legislation called a bill, except a money bill, can be introduced in either of the two houses and sent to the other house after it had been passed in the originating house.³⁸¹

The procedure for the passage of a bill to law is, except in very few cases, cumbersome and extensive."Every new bill," observed Atiyah, P.S., "of any complexity will be contiguous in a

³⁷⁷See Corrupt Practices (and Other Related Offences) Act No.5, 2000. See Cap C31 LFN 2004.

³⁷⁸ P.S. Atiyah, Op. cit., p. 124 - 125

³⁷⁹Section 47 1999 Constitution.

³⁸⁰See Sections 58 and 59, 1999 Constitution

³⁸¹P.S. Atiyah, Op. cit., p.126

hundred different places to the remainder of the vast body of the law which will be unchanged. Each of these points of contact has to be thought through, and a decision made as to the way in which the two bits of law are to be cemented together.”³⁸² This fact in itself necessitates a painstaking consideration of every legislative proposal and every draft bill. This consideration starts with the introduction of the bill in the House where it originated after it must have been listed in accordance with the House Rules. The bill then undergoes its first reading in the whole House by the Clerk of the House or such designated person. This reading is just to intimate the legislators with the subject matter of the proposed law, it is not subjected to any question at this stage. The bill is thereafter printed and distributed to the legislators and a time is then fixed for its second reading. At this stage, the general principles and imports of the bill are discussed and questions are asked on it. Alterations may be proposed to the bill before it is sent to the relevant Standing Committee for a more detailed debate and painstaking consideration.

The Houses sit separately³⁸³ and each has a Committee system by which members are divided into different Committees" on different subject matters where they have a measure of expertise, special interest or knowledge and or experience. For 'instance, there are permanent House Committees which are called Standing Committees on different subjects such as education, health, agriculture, tourism, telecommunication, judiciary, budget and finance, science and technology, security and armed forces, national and international boundaries, foreign policy etc. Other ad hoc committees may be set up from time to time to look into specific issues and be dissolved after completing their assignments. There are instances when the two legislative Houses or their joint Committee may sit together to consider some matters.³⁸⁴

At the Committee stage, the bill may witness a more drastic amendment. The function of the Committee, it has been noted, is to go through the text of the bill clause by clause and, if necessary, word by word, with a view to making such amendments in it as may seem likely to render it more generally acceptable.

After the Committee stage comes the Report stage when the bill is put before the House in its amended or revised form for further considerations. The success or failure of the bill will have become evident at this stage. The bill is thereafter read for the third and last time in its final draft form and a vote is called and passed into law by a simple majority or by a two third majority of the votes depending on the subject matter of the bill. The bill is defeated if it is not supported by the required number of yes votes. If it succeeds, the bill is then passed to the second legislative House and be subjected to a similar procedure as discussed above and presented to the President for his assent. If the President vetoed the bill, that is, refused his assent, it does not become law except it is re-passed by a two third majority votes of the two legislative Houses after which it automatically becomes law without the need for the assent of the President again.³⁸⁵ The power

³⁸²Except in cases of non-concurrence of the two Houses over a money bill when a joint committee of the two Houses on finance sit together or indeed the entire National Assembly, See: S.59(1), (2) & (3) 1999 Constitution of the FRN.

³⁸³See section 62 of the 1999 Constitution.

³⁸⁴ See note 46 above.

³⁸⁵See sections 58(1)(3)(4) and (5) and 59(3) and (4),1999 Constitution of the FRN and National Assembly v President FRN [2003] 9NWLR (pt. 824)

wielded by the legislators to pass bills into law³⁸⁶ may be used as an effective control of the powers of the executive. However, the legislative process is not only cumbersome and time consuming; it is also complex and demanding. An ill-considered or hurriedly passed bill will sooner or later run into problems of implementation or the impracticality of enforcement.³⁸⁷ While members of parliament are not expected to be technocrats or know-all, they must be in tune with the realities of the time,³⁸⁸ the global move in respect of certain issues or subjects³⁸⁹ and enlightened in current trends in legislative reasoning and drafting. One would therefore advocate regular convening and attendance by members of state and National Assemblies of symposia, workshops, seminars and retreats³⁹⁰ with the aim of setting a common agenda, getting in tune with the policy thrust or direction of the government, instructing members in the ways and means of effective legislative bill and proposal scrutinization, sharing useful tips on efficient drafting techniques and generally discussing issues on legal reasoning in legislation.

7.7 LEGISLATIVE PROCESS IN A MILITARY REGIME

Nigeria has had a chequered history in military regimes since independence and though presently, global opinion is against military regimes in any part of the world, it does no harm for us to mention law-making procedures during military regimes.

In military regimes, there is the fusion of the legislative and executive bodies. Legislative process or law making procedure is therefore a relatively easy exercise. It does not require the long procedures of readings, debates and strict rules of voting applicable under a civilian regime. All it takes for a Decree to be made is the typing on a sheet of paper and the signing of the paper by the Head of the Federal Military government and an Edict is made when the text of it is signed by the military administrator or governor of a State.³⁹¹ Though a Decree may have been, prior to its being signed by the Head of State, discussed by the Military Ruling Council, the Federal Executive Council, the Council of States or a combination of these bodies, yet the ease with which Decrees and Edicts are made betrays the lack of subjection of same to rigorous criticism, scrutiny or examination and also accounts for several shortcomings often found in military legislations.³⁹² This major fault in Decrees always necessitates endless amendments to the substantive one and also calls to question the drafting procedures adopted for them in the first instance.

³⁸⁶And scrutinize or approve governmental policies.

³⁸⁷Consider for instance the law with respect to Bigamy (S.370 Criminal Code Act Cap.C38 LFN 2004, Burial in Houses (S.246 c.t.: Act) etc.

³⁸⁸For instance with respect to global warming and environmental Impact of seemingly harmless corporate or individual activities.

³⁸⁹In Information and Communication Technology or Internet Issues for example.

³⁹⁰Which is becoming fashionable in the current civilian regime by both the executive and the legislature at the State and federal levels.

³⁹¹See sections 3 and 4 of Decree 107 of 1993 which was the Law by which Nigeria was governed prior to the making and coming into force of the 1999 Constitution.

³⁹²Majority of which forms part of existing or applicable laws in Nigeria up till now even though deemed as Acts of the National Assembly or Laws of State Assemblies - See: S.315(1) & (2) 1999 Constitution of the FRN.

7.8 TYPES OF LEGISLATION

The following types of legislation can be identified:

7.8.1 Public General Act

This applies to everyone and everywhere within the State. Examples of such legislation include the Criminal Code, the Penal Code, Matrimonial Causes Act, Copyright Act etc.

7.8.2 Local Act

This applies to a particular locality or community. For instance, law imposing a curfew or declaring a state of emergency in any State or part of the federation, or law made to combat environmental/ecological problems or economic underdevelopment in a particular region of Nigeria³⁹³ or one establishing a particular University.

7.8.3 Private Act

This is even more restricted in its scope and application. A private Act is one made in respect of a particular person or body of persons including individuals, local authorities and statutory bodies. For example, a statute granting a state pardon to convicted person or proscribing a particular Union; Club or Society or confiscating certain properties and vice versa.

7.8.4 Consolidating Act

This is a newly passed statute which re-enacts the content of earlier statute or related statutes with such modifications, additions and or alterations as are necessary to serve a particular purpose and produce a coherent whole.

7.8.5 A Code

This is a statute which attempts to put together in one document the provisions of the existing legislations, the principles of Common law and doctrines of equity which have evolved over a period of time on a stated subject. Examples include the Criminal Code, Penal Code and Companies and Allied Matters Act 1990.

7.9 SEMANTICS IN LAW

The problems of semantics or language in law and the preoccupation of lawyers with words stem from the fact that many legal disputes are due to the imperfections of language. Case law emanates from requirements of specific situations and how the court resolves them, legislations

³⁹³For example the Niger Delta Development Commission (Establishment, etc.) Act Cap N86LFN, 2004.

on the other hand, speaks in general terms. The drafter of legislation, it was noted, is faced with a dilemma; not only must a proposed rule be general enough to cover all foreseeable instances falling within the policy of the statute, it must contain sufficient detail to ensure that its meaning is clear.³⁹⁴ This places the drafter of legislations in a somewhat 'tight corner; words, or specifically English language, is not. An instrument of mathematical precision, if it were so our literature will be the worse for it.³⁹⁵ This is further borne out by the fact that' no one debates the meaning of such terms as 'liquid', 'fluid', 'vapour,' 'magnetic,' 'electrically changed,' and so on, because these words relate to the physical sciences and are often used by scientists. If and whenever they occur in statutes or other legal settings, no one can be sure of what 'liquid,' 'fluid,' 'vapour,' 'magnetic,' 'electrically changed' would be dissected or stretched to mean. Why is this the case with law? Are lawyers afflicted with an incurable flair for controversies and deadlocks as to insist on the fine details of words? The answer is that, in law, words could produce far-reaching consequences for the parties to an agreement or people affected by the law.

It is therefore imperative for the lawyer to treat words as fragile as medical doctors would treat life. Whether a man will spend the rest of his life in jail for rape or a lesser term for attempted rape or indecent assault may turn on whether there was "consent" (what is consent?), whether or not he was the "husband" (who is a husband?) of the victim and whether or not there was "penetration" (when is there penetration?).³⁹⁶ Also, whether a person will be adjudged liable for defamation may hang on whether the offending words were 'published,' 'malicious' and actually 'defamatory' and whether another person will be held liable for malicious prosecution may depend on whether the prosecution was "set in motion" by the defendant, actuated by 'malice' and lacks a "probable and reasonable cause." Furthermore, whether the defence of mistake of fact under section 25 of the Criminal Code will avail an accused depends on how "honest and reasonable" his mistaken belief was. In the case of *Akintola v. Adegbenro*,³⁹⁷ the dispute as to whether the Premier was rightly or wrongly removed by the Governor (of the then Western region) hinged on the interpretation given to the words, "if it appears" in the provision that the Premier may be removed "if it appears to the Governor that the Premier no longer commands majority support in the House."

Coupled with the above problem of semantics or language in law is the fact that some words generally and legal words in particular, not only have multiple meanings, but have also changed their meanings in the course of time. Such words include, 'rights', 'property,' 'person,' 'ownership,' 'possession,' 'estate,' 'animal,' 'conveyance,' 'consent,' 'reasonable,' 'fair,' 'vehicle,' 'purpose,' 'intention,' 'voluntary,' etc., the legal use of such words in legislative drafting may therefore result in vagueness, ambiguity or equivocation.³⁹⁸

How then has the law fared and how has the problem of semantics in law been surmounted? "In practice," wrote Farrar and Dugdale, "different legal systems employ different styles of drafting

³⁹⁴See: J.H. Farrar and A.M. Dugdale, op. cit., pp. 141-142.

³⁹⁵An idea credited to late Lord Denning M.R.

³⁹⁶See SS.357-360, S.4 and S.6 of the Criminal Code Act, Cap. C38LFN 2004. 59. (1962) 1 All NLR 465.

³⁹⁷ (1962) 1 All NLR 465.

³⁹⁸J.B. Farrar and A.M. Dugdale, op. cit., p.142

to attempt to cope with the problem.”³⁹⁹ The French, for example, often prefer to use general principles, whereas in the past, English drafting has tended to err on the side of detail. This expectedly leads to emergence of "labyrinths of rules, definitions, amplifications and cross-references"⁴⁰⁰ which may indeed be necessary to avoid a greater harm. To this end, legal drafting has institutionalized the practice of isolating words and concepts from others similar to them in such a way that the words and concepts used become quite distinct from others. This is achieved by the use of definitions identifying what the statute meant by particular words and the sense in which the meaning should be taken. The definitions are either contained in the very section in which the word or concept in question occurs or in a separate section at the beginning or end of the statute itself.⁴⁰¹

Also, attempt may be made to water down the complexity of language by providing an Interpretation Clause in the legislation in which certain keywords and expressions used in the legislation are explained. This is similar to the use of definitions to explain words and concepts as stated above. The use of these two identical devices may be directed at delimiting, extending or narrowing the ordinary meaning of words, concepts or other common expressions. For instance, it may be provided in an Act or legal document that:

- (a) In this Act, "computer dealer" means a person who by way of commerce or occupation (i) sells computer or any component part of it; (ii) lets computer or any part of it on hire or hire purchase; (iii) organizes computer or any part of it to be sold or let by another computer dealer or (iv) present himself as prepared to engage in any of the foregoing activities on behalf of himself or any other person.
- (b) In this Act, "a sergeant" includes a police officer of any rank or file.
- (c) 'Money' in this Act means paper currency (notes) only.

Additionally, Section 318 of the 1999 Constitution of the Federal Republic of Nigeria provides interpretations of some key words and expressions and defines their context as used in the Constitution. There is also the Interpretation Act⁴⁰² to fall back on where a particular Statute does not provide its own definitions.

There is no doubt that it will be an illusion to think that the devices enumerated above have the effect of eliminating or are sufficient to eliminate the perennial problems of semantics in law. Any device that relies on the use of words to explain words cannot but be somehow inherently inadequate. This is why courts will always be called upon to determine the meaning, scope and application of certain words, phrases and sentences in legislations and other legal documents and the means by which courts do this is our next concern.

³⁹⁹Ibid.

⁴⁰⁰Ibid.

⁴⁰¹For example, See 5.1 Criminal Code Act of Nigeria Cap C38 LFN 2004 and S.39 Copyright Act Cap. C28 LFN 2004 respectively.

⁴⁰²See Cap 192, LFN 1990; See also S.318(4) 1999 Constitution.

7.10 CONSTRUCTION OF STATUTES

The judiciary is the organ vested with the duty of settling duties between individuals and between the state and other persons.⁴⁰³ In the course of discharging its functions, courts are always called upon to interpret documents, construe the meaning of statutes⁴⁰⁴ and determine the liabilities, rights, duties and obligations of parties to a suit whether civil or criminal. Earlier in this Chapter, we stated that Legislations/Statutes are not always clear and direct in their import and where they are, questions may arise as to the competence of a person or body of persons to do certain acts within the letters of a legislation or a supposedly enabling statute and as to whether certain things come within the application of its provisions or exceptions created by it. These questions have no undisputable answers and courts over the years have evolved certain aids or guides in the interpretation or construction of statutes or legal writings in general.⁴⁰⁵ The task of judges is nonetheless compounded by the fact that they seek to discover the intention of the legislature as contained in particular statutes and to give effect to it⁴⁰⁶ even though they were not there when the statutes were made. Some of these guides are as follows:

7.10.1 The Literal Rule

The intention of the law must be deductible on its face and notwithstanding the implications; the courts must apply the natural, ordinary or literal meaning of the words.⁴⁰⁷ This approach is usually called the 'plain meaning rule or the Literal Rule.'⁴⁰⁸

In the *Sussex Peerage case*, Tindal C.J. said:

"The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the parliaments which passed the Act. If the words of the Statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the law giver."⁴⁰⁹

There is a heavy presumption in this rule, that words do have ordinary, natural and literal meanings. The truth however is that word has no ordinary meaning except in the context in which they are used. This is the main shortcoming of this canon of interpretation. The possibility of adopting the literal meaning of words, if ever there is one, may lead to some inconvenient or absurd conclusions. This was the situation in the celebrated 12^{2/3}case of *Chief Obafemi Awolowo*

⁴⁰³See Section 6(6)(b) 1999 Constitution.

⁴⁰⁴See A.O. Obilade, *The Nigerian Legal System*, 1979, Sweet and Maxwell (London), p.56.

⁴⁰⁵These guides cannot be called rules or principles, strictly so called, but rather maxims or canons to aid in construction of statutes, see also Farrar and Dugdale, *op. cit.*, p.145.

⁴⁰⁶ *Ibid.*

⁴⁰⁷See Obi lade, A.O.; *op. cit.*, p.56-57.

⁴⁰⁸Dias, R. W.M, *Jurisprudence*, Butterworths (London) 5th ed., 1985, p.171.

⁴⁰⁹ (1884) 11 Cl & Fin. 85; See also, Farrar and Dugdale, *op. cit.*, p.145-146.

*v. Alhaji Sheu Shagari and Other*⁴¹⁰ where justices of the Supreme Court of Nigeria after adopting the literal rule of interpretation reached opposing conclusions. Similarly, in *Adegbenro v. Akintola*,⁴¹¹ the Judicial Committee of the Privy Council in interpreting S.33(10) of the 1963 Constitution of Western Nigeria which empowered the Governor to remove the Premier if "it appears to him that the Premier no longer commands the support of a majority of the House of Assembly" held that the Governor could reach that conclusion without any limitation as to the material on which he was to base his judgment, it might even appear to him in a dream! The canon is therefore useful only if using it does not lead to absurdity, which the parliament could not have intended.⁴¹² Dias is also of the opinion that:

"The plain meaning canon of interpretation is ill- suited to modern social legislation ... it requires that words are given their ordinary meaning at the time of enactment. If this were rigidly adhered to, it would stand in the way of interpreting statutes so as to adapt them to the changing needs of a developing society."⁴¹³

7.10.2 The Golden Rule

The literal rule of interpretation as discussed above pointed at the consequences of its application.⁴¹⁴ the expression used in a statute may be vague and so faulty that no sense can be made of it, it may rather lead to outright absurdity. It may also be that its application is so unreasonable in the context of the particular text that it cannot possibly be considered as being in accord with the lawmaker's intention. It may in fact be repugnant to the lawmaker's will. It is for these realizations that a further development was made to the rule in which the ordinary meaning of words will be departed from where adopting them will lead to absurdity, inconsistency or create

"It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the 'words used, and to the grammatical construction unless that is at variance with the intention of the legislature to be collected from the statute itself, or it 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."⁴¹⁵

This canon is sometimes referred to as the 'Golden Rule' and is resorted to when there is a clear and gross anomaly and if the language of the statute is susceptible of the modifications' required to obviate the anomaly.⁴¹⁶ An example of this could be seen in the case of Council of the *University of Ibadan v. Adamolekun*.⁴¹⁷ where the Supreme Court was faced

⁴¹⁰(1979) 6-9 S.C. 51.

⁴¹¹(1962) 1 All NLR 465.

⁴¹²See also, A.O. Obilade, op. cit., p.57-58.

⁴¹³Op. cit., p.173.

⁴¹⁴For further discussion of the lapses of this canon, See, Farrar and Dugdale, op. cit., pp. 146-148.

⁴¹⁵(1836) 2 M & W at p.195.

⁴¹⁶See Farrar and Dugdale, op. cit., p.149.

⁴¹⁷(1967) 1 All NLR p.213.

with a" jurisdictional issue, whether it has the power to declare an Edict of the Western Nigeria Military Governor void for its inconsistency I with a Federal Military Government Decree. I The Edict being inconsistent with a Decree was void by virtue of s.3(4) of the; Constitution (Suspension and Modification) Decree No.1, 1966, but S.6 of the same Decree ousted the court's jurisdiction to entertain any matter as to the validity or otherwise of Edict and Decrees. It was argued that by the (literal) interpretation of S.6, the Supreme Court could not declare the Edict void, but the court held that it could not have been intended that an inconsistent and therefore void law will be permitted to coexist with the superior. .I law as this will not only be absurd but be legally anomalous as well I and it therefore declared the Edict void by reason of its inconsistency with a Decree.⁴¹⁸

7.10.3 The Mischief Rule

The third canon of statutory interpretation is what is termed the Mischief Rule, also referred to as "Interpretation by Reference to the Statutory Purpose."⁴¹⁹ This is the rule that considers the statutory purpose and the historical antecedent of a statute to discover the intention of the parliament in making the statute. Court's opinion is that no meaning should be given to a statute which is contrary to the intention of the legislature in enacting the law. Reference is therefore made to the state of the law prior to the enactment of the statute to discern what shortcomings in the old law the new law has come to cure.⁴²⁰ This method was laid down in Heydon's case.⁴²¹ It is the basic assumption of this rule that legislations are made to correct existing errors or defects in the law and fill the gap created by common law or other sources of law or '- prior legislation. However, a number, of modem legislations are not made to cure any error or defect but in response to social, economic and political needs of the time or to keep up with and provide for technological advancement in various fields the world over. Here lies the limitation of this rule. Its premise starts on a false note and fails to lay down any clear test of construing actual words used by the Parliament. For instance, how far can the court go on this voyage of discovery and what internal or external materials can the court consult to aid the discovery by reference to which statutes are to be interpreted, bearing in mind that, in our legal system, courts are not permitted to have access or make reference to evidence of the proceedings of the Parliament in the course of passing statute.⁴²² Even if such can be used in the court, it will presuppose that situation remain at the time of making a decision as it was when the law was passed in the Parliament. As stated by Farrar and Dugdale, this approach is in need of modification and it implies that legislation is only designed to deal with some evil and not further positive social goals.⁴²³

The canons discussed above are not principles of law. Rather, they are convenient rules of practice designed over time to assist courts in interpretation of statutes. Besides, the degree of

⁴¹⁸See also Farrar and Dugdale, op. cit., p.148-150 for further reading.

⁴¹⁹[*ibid.* p.150.

⁴²⁰See Obilade, A.O., op. cit., p.60.

⁴²¹(1584) 3 Co. Rep. 7a at 7b. For a discussion of this case See, Farrar and Dugdale,op. cit., page 150-153.

⁴²² Also called the Hansard.

⁴²³Farrar and Dugdale, op. cit., p.151

their helpfulness is subject to doubt. According to an eminent Judge, Justice Fatayi- Williams CJN (as he then was) in *Awolowo v. Shagari & Ors. (supra)*:

"Some of these canons of interpretation take the form of broad general principles only. Consequently, a common feature of most of them is that they are of little practical assistance in settling doubts about interpretation in particular cases."⁴²⁴

The canons were in fact denied when Francis Bennion wrote:

"Alas! Alas! There is no golden rule nor is there a mischief rule or a literal rule or any other rule at all, instead, there are a thousand and one interpretative criteria."

The question now is, if these rules are not so helpful, what other aids exist to guide the courts in the construction of statutes and other legal texts that come before them? To this end, additional aids will now be considered.

7.10.4 Other Interpretation Aids

7.10.4.1 Context

An Act must be read as a whole. Words derive their meanings from the context in which they are used and they must be interpreted with reference to that context and not in isolation.⁴²⁵

7.10.4.2 Intrinsic Materials

Legislations may provide intrinsic materials that may guide in the interpretation of its major provisions or specific words used in it.

Such materials includes the Preamble, the Long title, definition sections, Interpretation Clause or Sections, Schedules contained in the Act or Appendixes may jointly and severally provide some guide to the courts in construing a Statute.⁴²⁶

7.10.4.3 Extrinsic Materials

Some words and phrases used in statutes are the subject of general definitions in the Interpretation Acts. Section 318(4) of 1999 Constitution provides:

"The Interpretation Act shall apply for the purposes of interpreting the provisions of this Constitution."

This will usually be followed unless the context otherwise requires.⁴²⁷ The main purpose of an Interpretation Act, among others, is to avoid needless and burdensome repetition in legislations.

⁴²⁴Supra p. 51.

⁴²⁵See also Farrar and Dugdale, op. cit., p.154-155; A.O. Obilade, op. cit ..p.60-61.

⁴²⁶Ibid, p.155-156; p.62.

⁴²⁷See Farrar and Dugdale, op. cit., p.158; See also, Obilade, A.O., op. cit., page 63.

Courts may also refer to Dictionaries, either language dictionaries or law dictionaries such as Black's Law Dictionary for meaning of English words or legal terms or expressions.

Textbooks of leading and recognized authors in their various fields can also be referred to by the courts to assist in construction of statutes.

7.10.4.4 Presumption of Intention

There are some presumptions which the courts employ as indicators of Parliamentary intention and they accordingly reckon that legislation will not, except in clear and express terms, be made contrary to these presumptions. Some of these presumptions are:

- (a) The enactment of an Act does not alter existing one except it expressly declare the former law altered.
- (b) Presumption against interference with vested right and against operation of statutes in retrospect.
- (c) At least in the realm of criminal law, there is a presumption against imposing liability without fault though express provision of statutes may make an offence one of strict liability.
- (d) There is also a presumption against ousting the jurisdiction of courts. Individuals cannot by contract exclude the jurisdiction of courts and where even the parliament, for whatever reason, decides to make law with such effect the provisions must be clear and unambiguous as they will be construed strictly.⁴²⁸

7.10.4.5 Common Interpretation Maxims

There are some common principles or presumptions usually expressed in Latin maxims which are resorted to in interpreting words in the context in which they appear:

- (a) The *ejusdem generis* principle is to the effect that where there is a list of particular species which fall under an identical class followed by general words, the scope of the general words is restricted to things belonging to the class to which all the -specific or particulars fall. For example, where a statute provides: "It shall not be lawful for makers of bread, meat pie 1 cake, doughnut, sausage and other snacks to display such 'I j except in places provided ... " The principle of *ejusdem generis* means that the interpretation of the general word "snacks" will include anything that is a confectionary (or pastry) and will not include anything which is main food item or drinks.⁴²⁹

⁴²⁸ As Fatayi Williams JSC held in *Barclays Bank of Nig. Ltd. v. CB.N. (1976) 1 All NLR 409 at 421*: A statute ousting the ordinary jurisdiction of the court must be construed strictly. This means that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the jurisdiction of the courts.

⁴²⁹ Farrar and Dugdale, op. cit., p.156; Obi lade, A.O. op. cit., p.61.

(b) *Expressio unis est exclusio alterius* is a similar principle to the effect that the express mention of one thing results in the exclusion of others.⁴³⁰ Where a statute provides that:

If at any time within the approved working hours, the Principal and or Vice-Principal of any school under the supervision of this unit is absent from office without due excuse or justification ... ," the interpretation of this provision shall not be extended to cover teachers or other staff of the school not being the Principal or the Vice-Principal. This is because the provision has specifically mentioned those who come under it.

(c) *Nositur a sociis*: This principle simply means that a word takes its meaning from other words with which it is associated. This is no more than saying words should be interpreted in the context in which they appear.⁴³¹

(d) *Lex non cogit ad impossibilia*: The principle is that a statute is to be construed in such a manner as not to command the doing of what is humanly impossible⁴³² because the law does not compel the doing of impossibilities.

(e) Construction of statutes *ut res magis valet quam pareat*, that is, that it may have effect rather than be destroyed. Where a provision, for instance, is capable of two mutually exclusive interpretations one of which will make the provision valid and effective while the other will make it invalid and ineffective; the provision ought to be interpreted in such a manner as to make it valid.⁴³³

7.10.4.6 Judicial Precedents

Judicial Precedent or case law consists of law found in judicial decisions, or the principle of law on which a judicial decision is based⁴³⁴ This doctrine is also known as stare decisis and by it, "the principle of law on which a court bases its decision in relation to the material facts before it must be followed in similar cases by courts below it in the hierarchy of courts."⁴³⁵ Generally therefore, decisions (and this may well include interpretations) by a superior court binds an inferior court which is later faced with a similar case. Provided that good grounds for distinguishing a decision of a higher court does not exist, a lower court will usually be urged and must follow such earlier decision as precedent in the interpretation of texts and provisions which it is called to decide.⁴³⁶ Lord Diplock has cautioned on the limitation of precedents in construction of statutes when he stated in *Carter v. Bradbeer* that: A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application. The ratio decidendi of a judgment as to the meaning of particular words or combinations of

⁴³⁰Ibid., p.157

⁴³¹ Ibid.

⁴³²A.O. Obilade, op. cit., p.60.

⁴³³ Ibid.

⁴³⁴Ibid., p. 111.

⁴³⁵ Ibid.

⁴³⁶ R.W.M. Dias, op. cit., p.126-132, See also K.O Fayokun, "A Re-Examination of the Doctrine of Precedent In Nigerian Courts," Essays in Honour of Prof. D.A Ijalaye, O.A.U., Law Faculty, 200.

words used in a particular statutory provision can have not more than a persuasive influence on a court which is called on to interpret the same word or combination of words appearing in some other statutory provision. It is not determinative of the meaning of that other provision...⁴³⁷

Similarly, it has been submitted that the doctrine of stare decisis should not be applied to statute interpretation,⁴³⁸ as Lord Upjohn stated in *Ogden Industries Pty Ltd. v. Lucas* that:

It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must be aware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the Act itself.⁴³⁹

Without doubt, only a combination of the canons of and aids to statutory interpretations identified above would be appropriate rather than an adoption of any particular one. That interpretation that will give effect to the ordinary, natural and contextual meaning of the statute should be used in the background of the legislative purpose underlying the provision, if and when it is clearly deducible. Courts, in their dispute settling roles, and interpretation of statutes attempt to find out the intention of the Parliament and to carry it out by filling in the gaps and making sense of the enactment.⁴⁴⁰ This has not gone down well with some judges. Courts must stick to their constitutional roles and not engage in naked usurpation of the legislative function under the thin disguise of interpretation.⁴⁴¹ Courts must therefore expose whatever shortcomings are in the law as they cannot extend clear meanings of statutes or take liberties in filling alleged gaps in legislations. Such an attempt destroys the certainty of the law and when the certainty of the law is destroyed, even the judiciary will lose its foothold and esteem.

The principles which should guide statutory construction have been laid down in several cases in Nigeria. For instance, *Nafiu Rabiu v. State*⁴⁴² and *A. G. Bendel State v. A. G. Federation and Ors.*⁴⁴³

7.11 CODIFICATION

A code is a species of statute which attempts to sum up the provisions of the existing legislation, the principles of common law and doctrines of equity on a particular subject to make a single comprehensive statute on the subject. The code is conceived as a detailed compilation of applicable laws blended and aligned with the practices, custom, the common law and rules of

⁴³⁷ (1975) 3 All E.R. 158 at 161.

⁴³⁸ R.W.M Dias, op. cit., p. 184.

⁴³⁹ (1969) 1 All E.R. 121 at 126.

⁴⁴⁰The sentiment expressed by Lord Denning L.J. (as he then was) in *Magor and St. Mellons RDC v. Newport Corporation* (1950) 2 All ER 406 at 414

⁴⁴¹Per Lord Viscount Simonds in response to Lord Denning's statement referred to in note 103 above when the case went on appeal to the House of Lords, see: (1952) AC 189 at 191.

⁴⁴²(1981) 2 NCLR 293.

⁴⁴³ (1982) 3 NCLR 1...

equity in a particular field of human endeavour regulated by law.⁴⁴⁴ The code will then be enacted as a complete reference to what is law and what is enforceable as law in the realm of the subject it deals with.

An argument in support of codification is the great expense and unwieldiness of law on some subject matters to the effect that references can be made to several sources and materials as argument or support for the authority, validity or justification of an act. It is thought that codification will pull together in one source what is to be reckoned as law on a particular matter. How practicable this can be is open to question. Such a step will restructure the law beyond all recognition. Existing categories of law on a subject, for instance, Commercial law, Agency, Hire Purchase, Contract, Sale of Goods, would disappear and this may reach an extent when the ordinary distinction between Civil and Criminal laws would acquire an unfamiliar appearance.⁴⁴⁵

Another example is issues bothering on transactions in land in Nigeria. There is no single law that can be referred to as a complete provision governing land. There are different sets of statutes or legislation from where relevant laws in respect of sale, mortgage, registration, state acquisition, lease and so on of land can be garnered. These statutes are different in years of enactment and mode or agency of enforcement. There are, in this regard; The Lands Instrument Registration Law; the Land Use Act; the Property and Conveyancing Law; Customary or Traditional Land Tenure system, etc., all severally or in combination governing transactions and dealings in land in Nigeria. Proponents of codification will rather have all these instruments reconciled and aggregated to produce a single code that will contain all that is law with respect to dealings in land anywhere in Nigeria. It is argued that a Code will replace the wilderness of assorted and overlapping provisions of law available to the public and make the applicable law more intelligible to them.⁴⁴⁶

Codification has also been suggested in Nigeria for the various systems of customary and native law, so as to articulate and reconcile the differences and reflect the common practices of the people of Nigeria or some part of it. Such code will have the effect of legislation in whatever field the customary law relates to. While this may have its benefits, for instance, removing the uncertainty and difficulty of proof of customary law, it is submitted that codifying rules of customary law will be impracticable in Nigeria due to the ethnic diversities in Nigeria,⁴⁴⁷ the near irreconcilable differences in customary practices and the threat codification poses to the flexibility and adaptability qualities of customary law which are its strength.⁴⁴⁸

Von Savigny is opposed to codification for many reason.⁴⁴⁹ He believes in an unconscious and evolutionary growth of law rather than a drastic and revolutionary change, which is the bedrock

⁴⁴⁴Farrar and Dugdale, op. cit., 190

⁴⁴⁵There are debates whether rules, evolved in case law, should be included in the Code. See: Dias R.M.W., op. cit., p. 325-326.

⁴⁴⁶Ibid., p. 325.

⁴⁴⁷As a sort of 'complete answer to any legal problem within the conceptual framework of the code,' see Farrar and Dugdale, op. cit., p.192.

⁴⁴⁸There are several customary law systems in the country, each ethnic group having its own separate system, see: Obilade A.a., op. cit., p.83.

⁴⁴⁹Lewis v. Bankole (1908) 1 NLR 81; PER Osborne C.J. at page 100-101.

of codification. To him, a code, being a sum of what is intended to be the only law on its subject matter is grossly unrealistic as there are no limits to the varieties of actual combination of circumstances that may arise. The argument here is that a code cannot be made to provide in advance for all future cases and it is therefore wasteful, legislation will still have to be made from time to time to cover new situations.

An attack on codification was also launched on the ground that it will destroy continuity in legal development.⁴⁵⁰ It is said that the most remarkable characteristics of customary law in Nigeria, which is also true for the English rules of equity is its flexibility, being a mirror of accepted usage.⁴⁵¹ It is remarkably adaptable to altered circumstances without losing its character, it permits changes to reflect changing social, economic and cultural conditions. These qualities will be lost if customary law is codified in addition to losing its validity from the assent of the community to which it relates.

It is still believed that our law needs codification so as to bring in the several loose ends and eliminate overlapping provisions in different sources of the law on a particular field. It may not be on such a grand scale as codification is strictly understood to entail but to such an extent that undue duplication or contradiction in different provisions of the law with respect to same field or subject can be drastically reduced, if not eliminated. It is advocated that the law with respect to landlord and tenant, family law and matrimonial causes, land law and so on can benefit from comprehensive codification as was the case with regards to the law on Sale of Goods in Nigeria⁴⁵² and Company Law and Practice in Nigeria.⁴⁵³ Laws in these regards in Nigeria have codified,⁴⁵⁴ so to and say, much of what were in different statutes prior to their enactment equity which had evolved over a long period of time. Other areas of law can benefit from this practice as well.

Codification also encourages reform; as archaic provisions will be dropped in the course of codification, while the code will take cognizance of the developments in the area of the law being codified. If this is to be the case, there has to be a standing provision that the code will be revised in, say, every Ten (10) or Twenty (20) years. This will enable reform to take place in line with changing times and practices of the people or such other socio-political or economic development effecting the area governed by the Code, otherwise the fear will be justified that codification stultifies the growth of legal rules and principles by fossilization of legal development and over-simplification.⁴⁵⁵

Codification also greatly simplifies the works of the judges as much of the uncertainty and confusion about the applicable laws would have been settled in the code though it is conceded

⁴⁵⁰Farrar and Dugdale, op. cit., p.191; See also, Dias, op. cit., p.326.

⁴⁵¹Ibid. p.194-195.

⁴⁵²Owonyin v. Omotosho (1961) 1 All NLR 304 at 309.

⁴⁵³See Sale of Goods Act.

⁴⁵⁴See Companies and Allied Matters Act Cap C20 LFN 2004.

⁴⁵⁵ Or 'Restated', in another parlance.

that a code cannot always anticipate varieties of circumstances in which it will have to be used.⁴⁵⁶

It would seem therefore that the advantages of codification far outweigh its perceived or real disadvantages. The truth of the matter is actually that much of what have been advanced as disadvantages or criticisms of codification can be alleviated if not eliminated with the benefit of hindsight. As said earlier, Parliament may be mandated to review the Codes from time to time, say in every ten or twenty years to keep it abreast of legal developments or to make it conform to changes in values, philosophy or beliefs of the people to which it relates. It must be conceded though that codification is an expensive exercise and not only that, it will definitely be intellectually tasking and time consuming.

In view of the foregoing, it is appropriate in my view to end this discussion on this aspect with the word of P.S. Atiyah that:

"The law is an immensely complex social machine. It is continually in need of patching, repairing and from time to time overhauling in this or that area. Much of this repairing, and patching goes on all the time ... The work is unceasing, and we must not look for perfection or for finality."⁴⁵⁷

7.12 QUESTIONS AND EXERCISES

1. The Chairman of Imototo Local Government Council believes that a graduate of any discipline in the Arts and Humanities field is qualified to fill the Council's post of a legislative draftsman. Write to him, stating your opinion about the qualities of a good legislative draftsman.

Hints

- Law making procedure under a civilian regime is a complex and time consuming exercise. Legislation usually starts as proposal and translates to a bill which is put before the legislative house.
- Legislative draftsmen act on specific instructions to make legislation in line with what is to be put before the legislative house for discussions or what come out of its deliberations. Legislations are couched in unique words which must consciously avoid some pitfalls in language imperfections and be quite intelligible.
- It takes a legally qualified person to understand the instructions and appreciate the intricacies involved in fashioning out legislation free from ambiguity, vagueness and textual defects.
- Much more however, a legislative draftsman must possess additional qualities which will determine his success as a lawyer specialized in legislative drafting. Some include:

⁴⁵⁶ See Farrar and Dugdale, op. cit., p. 197.

⁴⁵⁷A contrary opinion is expressed by Farrar and Dugdale, op. cit., p.193, that codification may actually limit the development of case law by limiting the intellectual input of individual judges in expounding the law and making them merely authoritative interpreters of the Code.

- (i) a natural interest in his duties;
 - (ii) an analytical mind and intellectual soundness;
 - (iii) good memory, foresight and being abreast of developments in the legal world; familiarity with the country or locality where the proposed legislation will apply and in particular with its legal system; must be technically sound in the use of words and be organized and amenable to criticisms and corrections; must have knowledge of different fields of law and their inter-relationship etc.
- The Local Government should engage a lawyer who possesses all the foregoing qualities. Knowledge of law is an indispensable quality of a draftsman. The drafting of bills require a serious technical input or expertise which only a lawyer has, by virtue of his legal training, orientation and experience.
2. Discuss any two general principles of interpretation adopted by the Courts in statutory interpretation and assess their usefulness in this regard.

Hints

- The judicial arm of government is constitutionally empowered to settle disputes and exercise all the powers of a court of law S.6(6) 1999 Constitution.
 - Dispute resolution most times necessitates construction or interpretation of words and expressions in documents and statutes. This is not an easy exercise.
 - Literal rule of interpretation prescribes giving effect to the ordinary, natural and surface meaning of statutes notwithstanding the consequence(s) of doing so. See: *Adegbenro v. Akintola (supra)*, *Awolowo v. Shagari (supra)*.
 - The golden rule enjoins departure from the ordinary meaning of words where giving effect to same will lead to some absurdity, unreasonableness, repugnancy or conflict with the intention of the lawmaker. See: *Council of U.I v. Adamolekun (supra)*.
 - The mischief rule prescribes a search for the state of the law prior to the enactment of the statute in order to discover what defects it has come to cure and to interpret the provisions in a way that will give effect to that purpose. See: *Bank of England v. Vagliano Bros. (1891) A.C. 107*.
 - These principles are not always of practical usefulness and may lead to different conclusions on the same statute.
 - There are additional aids usually relied upon in construction of statutes, for instance, internal and external aids to interpretation of statutes, some presumptions about legislative intention, judicial precedent etc.
 - Only a combination of these can really assist the court in interpreting statutes.
3. Codification benefits neither the law nor the people. Discuss.

Hints

- What is codification?
 - Legislation is a major source of law but other sources like case law, common law and doctrines of equity, customary law also exist. Codification is a combination of the existing sources of law in respect of a subject matter and compilation of same into one comprehensive code of reference as law on the subject area.
 - Codification has been criticized as an inadequate and a wasteful exercise in that it stops short of providing for application of the law in various combinable circumstances in the future.
 - Codification is also said to be expensive and a clog to continuity in legal development.
 - Codification of customary law has been advocated in Nigeria, but this has the potential of destroying the flexibility and source of validity of customary law.
 - Codification is also said to amount to duplication of efforts since legal textbooks perform similar functions as a code.
 - Codification, despite the great trouble it entails, does not rule out constant review and enactment of legislation to cushion it up (which calls to question the need for it in the first instance).
 - Codification is however seen as highly beneficial in some respects. It reconciles diverse and scattered sources of law in respect of a single subject area; it eliminates overlapping provisions of the different sources of law on a subject area, encourages reform, simplifies the works of judges and makes the law accessible and intelligible to the common people.
 - Codification would seem to have more advantages than disadvantages hence it is advocated for some fields of law in Nigeria.
4. Various circumstances necessitate the making of laws, they equally give birth to legislative proposals. Discuss the circumstances.

Hints

- Who may push for the making of laws or sponsor proposals for legislation and why?
- Some of the circumstances that can give birth to proposals for new laws or change of existing ones include: New incidents unprovided for in the existing law; need to arrest a deplorable anti-social situation - cultism in schools; need to coordinate and prescribe guidelines for the existence of particular legal relationship or to govern legal transactions between persons, economic, political and social change may necessitate the making of new laws; technological advancement, globalization and scientific developments may create needs to be abreast with happening in other parts of the world and consequently the intervention of the law; shifts in political ideology or governmental personnel may necessitate the making of new laws in line with the manifesto or ideology of the new government; need to comply with international standard or requirement in specific subject area may also necessitate the making of new laws; legislation may also be made simply as a means of repairs and or maintenance of the old law.
- Human society is dynamic. As advancement come to human beings so must the law move forward, hence, there will continually be proposal for the improvement of the law.

5. Suggest tips or aids to good legislative drafting with particular regard to legal diction.

Hints

- Legislations are couched in open texture style so as to make allowance for application of the law to a variety of circumstances which might not be foreseen by the lawmaker at the time of making the law.
- English language, in which the law is usually drafted in Nigeria has its imperfections and is subject, except due care is taken, to imprecision, vagueness, ambiguities or even at times, absurdities.
- Legal language is no doubt peculiar, but with good use of some aids to good drafting, some of the identified pitfalls of old style legislative drafting can be avoided. These include:
 - (a) Mastery and familiarity with language, common and familiar expressions should be used to draft the law.
 - (b) Economy of language: good legislative drafting should be brief and cut out mere and useless repetitions (verbiages or deadwoods).
 - (c) Orderliness: The draft must be well arranged and ordered in a logical sequence with provisions well delineated into sections, paragraphs and chapters, where necessary.
 - (d) Avoidance of archaic words peculiar to early century legal documents particularly where the archaic words can be left out without doing any damage to the context or meaning of the provisions.
 - (e) Consistency of terms: A good legislative drafting must be consistent in its choice of words, tenses and phrases. It must not be experimentation in synonyms or puns.
 - (f) Careful use of words like: Will, Shall, Till, And, Or, from, and other expressions relating to time.
 - (g) A good legislative drafting must make good use of punctuation marks in order to convey the correct meaning to the words and expressions. Wrong use of punctuation can give some meanings contrary to the intention of the legislative draftsman.
- The above should guide the legislative draftsman in the internal composition and choice of words in a legislative drafting.

7.13. FURTHER QUESTIONS

- 1 Write a sketch of legislative proposal for the eradication of the menace of cultism in Nigeria tertiary institutions.
- 2 What is the importance of the *ejusdem generis* rule and the expression *expressio unis est exclusio alterius* as aids to interpretation of statutes? Illustrate these principles.
- 3 Distinguish between and discuss internal and external aids to construction (or interpretation) of statutes.

- 4 Explain the meaning, nature and importance of Legislation.
- 5 What is peculiar about legal reasoning and how does it affect or reflect in legislation?
- 6 Trace and examine the essence and problem of words or language as an instrument of conveying legal messages.

How has law fared in the face of language complexities?

- 7 Discuss the process of passing a bill into law in a civilian regime in Nigeria.
- 8 The Military may be a forceful government, but Nigeria has witnessed more legislation in their regimes than in any other. Do you agree? Give reasons for your answer.
- 9 Create a technical format or design for a legislation establishing a University in Nigeria.
- 10 What is the difference between Codification, Consolidation and Restatement of law? What patterns or models can codification take?
- 11 Identify the drafting error(s) contained in the underlisted and give alternative drafting to each:
 - (a) No man, woman, whether alien in Nigeria or a Nigerian citizen or a company incorporated in Nigeria or deemed to be so incorporated shall be authorized, permitted, licensed, allowed, sanctioned or approved to export commodities in contravention of this Act.
 - (b) Every ordinary and preference shares, inter alia, subscribed to at the incorporation of the company shall rank *parri passu* with newly issued shares, *ditto* for charges created on the company fixed assets at different times.
 - (c) Every student in every institution of learning who passed out of such institution is mandated to undertake six months military training at the expense of the federal government of Nigeria.
 - (d) The landlord, hereinbefore mentioned, shall have the power to vary the rent henceforth agreed provided the said owner takes into cognizance the range of rent prescribed in the schedules hereinafter contained in this Act.
 - (e) Notwithstanding anything to the contrary contained in any custom or tradition or culture and without regard to any prior agreements, oral or written or any concession or understanding, forbearance or waiver from a woman; it is hereby declared lawful and an inalienable right of a wife to own property alone or jointly with her husband and to, in case the husband predeceased her, inherit the properties of her deceased husband, it being immaterial that she had no formal or documented marriage with the man or had no issue for him, provided they cohabited for nothing less than two continuous years and the woman is not a common prostitute.

CHAPTER EIGHT
SOURCES OF LA W IN NIGERIA
Dejo Olowu & Foluke Lasebikan

8.0 INTRODUCTION

The essence of this chapter is to assist the budding law student and lawyer to identify how and where to locate information on which law applies or what the position of the law is in relation to any legal problem that may confront him. In other words, the expression "sources of Nigerian law" refers to the materials through which a legal practitioner or a court or judge would find reliable authorities for a particular legal question.

We can classify the sources of Nigerian law into two aspects, namely, primary sources and secondary sources. The primary sources include English Law (consisting of the received English law as well the extended English law); Nigerian legislation and subsidiary enactments; Nigerian case law or judicial precedent; and customary law rules, including the Islamic law where applicable. The secondary sources of Nigerian law comprise of law reports; textbooks; legal periodicals; law digests; legal dictionaries; newspapers, among others. We must quickly point out here that only the primary sources could have binding force on a court of law in Nigeria whereas the mentioned secondary sources can merely serve persuasive purposes, and are usually relied upon where no primary source is available or applicable. We shall attempt a detailed discussion of each of these sources one after the other.

8.1 PRIMARY SOURCES

8.1.1 The English law

Any study of the Nigerian legal system will be incomplete without a consideration of the impact of English law. The received English law remains a veritable source of Nigerian law. This is understandably so because of Nigeria's colonial heritage as English law was introduced into different parts of this country following the establishment of British colonial administration in the nineteenth century.⁴⁵⁸The various legislatures in Nigeria have thereafter made enactments which received English law directly, into their jurisdictions or extended the force of English statutes into Nigeria. The relevant provisions in such statutes were usually written in general terms without specifying the particular topics on which English statutes are received. As an

⁴⁵⁸ See N. Tobi, *Source of Nigerian Law*, 1996, MIJ Publishers Ltd, Lagos. P 6.

illustration, the *Interpretation Act*⁴⁵⁹ was one of such enactments. Section 45 of the Act provided as follows:

"(1) Subject to the provisions of this section and in so far as other provision is made by any federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 15th of January, 1900, shall be in force in Lagos and, i] so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation."

The "statutes of general application (commonly referred to among law students as SOGA) which were in force in England on the 15th day of January 1900" have been received into all the jurisdictions in Nigeria with the exception of Edo; Delta; Ekiti; Osun; Ondo; and . Ogun States of Nigeria where these statutes have not been received in so far as such statutes deal with matters within the legislative competence of those States.

Similarly, section 14 of the Supreme Court Ordinance, 1914, provides that:

"(1) Subject to the terms of this or any other Ordinance, the common law, the doctrines of equity and statutes of general application which were in force in England on the 15th of January 1900, shall be in force within the jurisdiction of this court."

Such statutes of general application are still in force in Nigeria even if they have been repealed in England. Since the phrase 'statutes of general application' is so pivotal in this discussion, it is appropriate here to elaborate on it.

8.1.1.1 What is a 'statute of general application'?

It is important to note that no problem is usually associated with the question of the applicability of common law and doctrines of equity in Nigeria since Nigerian courts have continued to recognise and apply common law principles and rules of equity to cases coming before them for adjudication as such principles and rules stand in England on' the day of their application in Nigeria. What we are saying here is that the application of English common law and principles of equity are not barred or limited by time in Nigeria.⁴⁶⁰

The Supreme Court Ordinance, the Interpretation Act and other enactments on the subject of the statutes of general application do not define what constitutes a statute of general application. We are therefore compelled to rely on case law, that is, what the courts have declared in their judgments, to determine what is meant by *statute of general application*.

In *Dede v African Association Ltd*,⁴⁶¹ the court held that although section 14 of the Supreme Court Ordinance speaks of statutes of general application which were in force in England, nevertheless, all such statutes must be taken to apply to the United Kingdom. Weber, J, ruled that

⁴⁵⁹ Cap 123 LFN 2004

⁴⁶⁰J.O. Asein, (1998) Introduction to Nigerian Legal System, Sam Bookman Publishers, Ibadan, p 102.

⁴⁶¹ (1910) I All NLR 130.

'statutes of general application' must mean those statutes applicable throughout the United Kingdom and not those in force in England only. This would have been an unfortunate decision had the judge not said that the Supreme Court Ordinance expressly mentioned "the statutes of general application that were in force in England" and not the United Kingdom.

Osborne, CJ defined the phrase by applying "a rough but not infallible test" in *Attorney General v John Holt & Co Limited*⁴⁶² where His Lordship stated as follows:

“... two preliminary questions, can however be put by way of a rough but not infallible test, viz: (1) by what courts is the statute applied in England? and (2) to what classes of community in England does it apply? If on the 1st January, 1900, an Act of Parliament were applied by all civil and criminal courts, as the case may be, to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If on the other hand, it were applied only by certain courts (e.g a statute regulating procedure), or only to certain classes of the community (e.g an Act regulating a particular trade), the probability is that it would not be held to be locally applicable.”

Perhaps following the propositions of Osborne, CJ in the foregoing case, the then Federal Supreme Court, in *Lawal v Younan*,⁴⁶³ held that the Fatal Accidents Act, 1846 and the Fatal Accidents Act, 1864, both of which applied to all classes of the community in England, were statutes of general application. Similarly, in *Braithwaite v Folarin*,⁴⁶⁴ the West African Court of Appeal, in holding that the Fraudulent Conveyances Act, 1571, was a statute of general application said inter alia (among other things) that the statute of general application, applying as it does quite generally to ordinary affairs and dealings of men without any qualification or specialty restricting its application.

In the same vein, the West African Court of Appeal in *Young v Abina*⁴⁶⁵ asserted in respect of the Land Transfer Act, 1897 as follows:

"The Land Transfer Act of 1897 applied quite generally to all establishments in England of persons dying after 1st January 1898. It is difficult to see how a statute could be of more 'general application' in England than that, and it was in force in England on 1 SI January 1900."

The following English statutes have been held to be statutes of general application with reference to Nigeria:

- (a) *Infant Relief Act, 1874, in Labinjob v Abake.*⁴⁶⁶
- (b) *Trustees Act, 1888, in Taylor v Taylor;*⁴⁶⁷

⁴⁶²(1910) 2 NLR 1 at 21.

⁴⁶³(1961) All NLR 1.

⁴⁶⁴ (1938) 4 WACA 76.

⁴⁶⁵ (1940) 6 WACA 180.

⁴⁶⁶ (1924) 5 NLR 33.

⁴⁶⁷ (1934) 2 WACA 126.

(c) *Limitations Act (Real Property), 1874, in Thomas v De Souza;*⁴⁶⁸

(d) *Statute of Frauds, 1677, in Malomo v Olusola.*⁴⁶⁹

From all that we have discussed, it is obvious that the English law remains a very important source of Nigerian law. We must however quickly add that by virtue of Nigeria being an independent and sovereign nation, foreign laws, including the English law, do not have any binding force on our courts but may only serve as persuasive authorities.⁴⁷⁰

8.1. 2 Nigerian legislation

Nigerian legislation consists of statutes and subsidiary legislation. Statutes are laws enacted by the legislative arm of government. These are variously called Ordinances, Acts, Decrees, Laws or Edicts depending on when and by who or under which form of government they were made. Subsidiary legislation is law enacted under the powers conferred by a statute. Another name for subsidiary legislation is delegated legislation. Examples of these are the bye-laws of local governments, regulations of public corporations, statutory instruments by ministers and so on. A statute under which a subsidiary legislation is made is known as an *enabling statute*.

Ordinances are laws passed by the Nigerian central legislature before 151 October 1954 when federalism became a constitutional phenomenon in Nigeria.⁴⁷¹ Any statute enacted by the elected federal legislature, in a civilian regime, otherwise known as the National Assembly, comprising of both the senate and the House of Representatives is known as an *Act*.

An enactment made by the elected state legislature, in a civilian regime, otherwise known as House of Assembly is known as Law.

However, in a military regime, an enactment made by the Federal Military Government is known as a Decree, while an enactment made by the Military Governor/Administrator of a State during military regime is known as Edict.

It is important to note that all federal statutes in Nigeria up to 31st January 1990 were revised and consolidated in what is now known as Laws of the Federation of Nigeria (LPN) 1990.⁴⁷² The Laws of the Federation of Nigeria (LFN) 1990 has been revised up till 2002 and now published as Laws of Federation of Nigeria in June 2004. The revised Laws of Federation of Nigeria is printed in loose-leaf format ostensibly to ensure easy incorporation of future published amendments or revision of the present laws.

⁴⁶⁸ (1929) 9 NLR 81.

⁴⁶⁹ (1954) 21 NLR 1.

⁴⁷⁰ Nigeria became an independent state on 1st October 1960 and attained a republican status on 1st October 1963.

⁴⁷¹ "Federalism" as a constitutional concept was introduced into Nigeria by the Lyttleton Constitution which came into force on 1st October 1954. The constitution was named after Sir Oliver Lyttleton, then Governor-General of Nigeria.

⁴⁷² The LFN, 1990 consists of 491 chapters in 21 volumes.

Without doubt, legislation is the most important source of law in any nation of the modern world. It has an overwhelming influence on all other sources of law and can indeed be referred to as the measuring scale for the efficacy of any other legal source and can indeed alter their content. In Nigeria today, the Constitution of the Federal Republic of Nigeria which came into force on 29th May 1999 is the highest law of the land and from which all other laws derive their validity.⁴⁷³ This document is also a form of statute.

8. 1. 3 Delegated or subsidiary legislation

Closely related to the above are delegated or subsidiary legislation. These are the enactments made by persons or bodies other than the legislature pursuant to express powers conferred on such persons or bodies by the competent legislature. The use of these species of legislation has become inevitable as a result of the dynamics involved in modern day governance. It is practically impossible for the legislature to make laws for every aspect of human life, more so as there can be unforeseeable variations in patterns of events and human conducts. It must also be recognised that there are numerous areas of public affairs that would require technical expertise with which the legislature may not be able to cope. It thus becomes reasonable and necessary that the legislature should merely provide the general framework of principles that would regulate human conducts and administration of public affairs, leaving specialists, technocrats and those who are involved in specific activities to deal with particular and subjective cases. This is why the various professional bodies or institutions in Nigeria have statutes which empowers them to provide for the, regulation of the day-to-day activities of their members or staff as the case may be.⁴⁷⁴

Any legislation made pursuant to a delegated power must not exceed the limits of the power so granted otherwise the wrongful exercise of power may render it ultra vires (beyond power) null and void.⁴⁷⁵

It must also be noted that any legislation made, pursuant (to delegated power is also an integral part of sources of law. In fact, all the delegated legislation made pursuant to federal statutes were also consolidated with their principal statutes under, the LFN 1990.

8.1. 4 Nigerian customary law

Another important source of law in Nigeria is customary law. Customary law consists of the customs accepted by members of a community as binding among them. Nigerian customary law is usually classified into ethnic/non-Moslem customary law and Moslem (Islamic) law.⁴⁷⁶ Ethnic customary law is indigenous, unwritten and diverse from one ethnic group to the, other, The

⁴⁷³For instance, section 1 of the 1999 Constitution proclaims its supremacy over all other laws, authorities and persons in Nigeria and goes further to render null and void any other law which is inconsistent with its provisions.

⁴⁷⁴See for example, the town Planners (Registration, etc) Act; Cap 17 LFN 2004; University College Hospital Act, Cap1450, LFN; 1990;" and the 'Legal Practitioners Act, Cap L11 LFN, 2004.

⁴⁷⁵See Owoade, 1'.0 (2001) Jurisdiction in Administrative Law, (Ibadan: Caltop Press) p 44 et seq.

⁴⁷⁶See A.O. Obilade, The Nigerian Legal System, 1979, Sweet & .Maxwell, London, p 83.

diversity of customary law systems is a major obstacle to uniformity of customary law systems in each State.

Moslem law is however in largely written form The sources of Moslem law are the Holy Quran, the practice of the prophet (the sunna), the consensus of Islamic scholars, and analogical deductions from the holy writ. This is also known as the Sharia i.e the sacred law of Islam. The predominant version of Islamic law in Nigeria is that of the Maliki School.

One of the main features of customary law is its acceptance as an obligation by the community. Another striking feature is its flexibility and adaptability to changing social trends. According to Oshame, CJ in *Lewis v Bankole*.⁴⁷⁷

"One of the most striking features of West African native custom...is its flexibility; it appears to have been' always subject to motives of expediency, and It shows unquestionable adaptability to altered circumstances without entirely losing its character.

It must be noted that rules of customary law are subject to tests of validity prescribed by statute. Before a customary law rule is applied by Nigerian courts, it must have passed the three prescribed tests of validity. The various High Court Laws of all the 36 States of Nigeria as well as the Federal Capital Territory direct the observance and enforcement of a customary law by the courts if such law is not:

- (a) repugnant to natural justice, equity and good conscience;
- (b) contrary to public policy; and
- (c) incompatible directly or by implication with any law for the time being in force.⁴⁷⁸

The meaning of the repugnancy clause has not received a detailed and settled explanation by Nigerian courts. However, some notable judicial decisions may shed some light on its meaning and purpose. In *Esugbayi Eleko v Officer Administering the Government of Nigeria*,⁴⁷⁹ Lord Atkin held that a barbarous custom must be rejected on the ground of repugnancy to natural justice, equity and good conscience. It must however be borne in mind that the fact that a rule of customary law is inconsistent with the principles of English law does not render it invalid. Thus, in *Dawodu v Danmole*,⁴⁸⁰ the Judicial Committee of the Privy Council (the highest appellate court for Nigeria at that time) rejected the view of Jibowu, J, that the idi-igi custom on succession was repugnant to natural justice, equity and good conscience. The learned judge was, of the opinion that the custom, by stating that the property of the deceased was to be distributed among his children per stirpes ("idi- igi") rather than per capita ("ori-ojori") was inconsistent with the modem idea of equality among the children of the deceased. The Privy Council stated, inter alia, that the principles of natural justice, equity and good conscience applicable in a

⁴⁷⁷ (1908) 1 NLR 81 at pp.100-101.

⁴⁷⁸ See for example, section 44 High Court Law, Oyo State, 1978; and section 34 (1) High Court Law, Plateau State, 1981.

⁴⁷⁹(1931) AC 662.

⁴⁸⁰(1958) 3 FSC46.

country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy.⁴⁸¹

At various times, Nigerian courts have had cause to invalidate certain rules of customary law on the ground of repugnancy. In *Re Effiong Okon Atta*,⁴⁸² the court held that a custom whereby the former owner of a slave was entitled to administer the personal estate of the slave after the death of the slave was repugnant.

Similarly, in *Guri v Hadejia Native Authority*⁴⁸³ the court rejected a rule of customary law as repugnant on the ground that it denies a person accused of highway robbery (*hiraba*) the right to defend himself at trial.

Apart from the above test, a rule of customary law can be declared invalid if it is incompatible, either directly or by necessary implication, with any law in force in Nigeria. Furthermore, a customary law rule can be invalidated if it is contrary to public policy. Thus, in *Cole v Akinyele*,⁴⁸⁴ the Federal Supreme Court, Per Brett, FJ, held that a rule of customary law which provides that if the paternity of a child born out of wedlock is accepted by the biological father, the child becomes legitimate and shares equally with the children born of a marriage contracted under the Marriage Ordinance, was invalid on the ground of public policy.

It follows from all the above that customary law, as far as it passes the validity tests, is a veritable source of Nigerian law.

8. 1. 5 Case law or judicial precedent

One of the most striking characteristics of the common law which Nigeria has imbibed is the doctrine of judicial precedent. By this, we mean the practice whereby the earlier decision of a court is followed in subsequent similar cases.

When a judge makes a decision in a case before him, he disposes of the immediate problem and also lays down a legal principle which other judges may have to consider. In the event of the later courts or judges being lower in status to the status of the earlier court, the lower courts must follow that earlier decision given by a higher court. The principle explained here is known as the doctrine of *judicial precedent*. Although judges are said not to make laws but to interpret the law, the principles of interpretation that a court brings to bear in deciding a case at hand can become a focal point of reference in determining future cases. What the judges and the courts make therefore is what we call case law, i.e., legal principles developed through the cases. The rule that makes it obligatory for a lower court to follow the earlier decision of a higher court is expressed in the Latin maxim *stare decisis* (let the decision stand).

⁴⁸¹(1962) 1 WLR 1053 at 1060.

⁴⁸²(1930) 10 NLR 65

⁴⁸³(1959) 4 FSC 44.

⁴⁸⁴(1960) 5 FSC 84.

Case law or judicial precedent is a cardinal source of law in Nigeria. Its continued relevance lies in its provision of ready solutions to legal problems at hand. It makes for substantial uniformity, consistency and certainty in the law because it enables lawyers, litigants and members of the public to anticipate and predict the outcome of disputes involving the law. The use of judicial precedent

and case law ensures that settled expectations are not unduly disrupted through default, mischief, or ignorance.

8.1.6 International law

The history of mankind shows that no nation can exist in isolation from others. This is the basis of the branch of law known as *jus gentium* (the law of nations). Because of the growing interactions among States' of the modern world, various instruments have been put in place to regulate the inter-relationships and activities of states among themselves. Beyond this, certain agreements also exist which create obligations for States which are parties to such agreements to do or refrain from doing certain acts. Such agreements are variously known as conventions, covenants, treaties, standards, declaration etc.

It must however be noted that by virtue of the constitutional system in Nigeria, Nigeria is one of the nations where a treaty does not become operative until the National Assembly has enacted it into law. An illustration that readily comes to mind here is the African Charter on Human and People's Rights, 1981, which has been incorporated into the laws of Nigeria. By the Supreme Court decision in *Sani Abacha v Gani Fawehinmi*,⁴⁸⁵ that African treaty is to all intent and purposes enforceable in Nigerian courts.

8.2 SECONDARY SOURCES

Apart from the various primary sources already discussed, there exists a plethora of other sources of Nigerian law. These are mainly in documentary form. They are important because it is in book form that written laws are stated. Some of these sources are law reports; textbooks; periodicals; journals and law digests; and law dictionaries. We shall attempt to discuss these in turn.

8. 2.1 Law reports

Law reports as well as an efficient law reporting system are essential for a smooth system of judicial administration. This is because in any nation where the principle of judicial precedent is operational, like Nigeria, it is only by reference to reported cases that courts and lawyers would be able to ascertain the position of law in their areas of jurisdiction.

⁴⁸⁵(2000) 4 FWLR 533. Note however that *jus cogens* (non-derogable rules of international law) are enforceable in any nation of the world whether such has been incorporated into local law or not.

The oldest species of law reports are the *Year Books* (1282-1537). They are regarded as the most comprehensive reports but are criticised to have been mere notes taken by students and practitioners of law for educational or professional purposes.

The first form of law reports in Nigeria was the Nigerian Law Reports which emerged in 1881 but today they have become extinct. One regrettable trend in the law reporting system in Nigeria is the lack of sustainability. This has been the experience with most government and private initiatives in this regard.⁴⁸⁶

In Nigeria today, we have quite a number of law reports in circulation, among which are the following:

- (i) *Nigerian Weekly Law Reports (NWLR) published since 1985;*
- (ii) *Supreme Court of Nigeria Judgements (SCNJ);*
- (iii) *Law Reports of the Courts of Nigeria (LRCN);*
- (iv) *All Nigerian Law Reports (All NLR)*
- (v) *Federation Weekly Law Reports.*

These, and many others, are also serving as sources of Nigerian law.

8.2.2 Law texts, books and treatises

A textbook or treatise written by learned scholars and jurists constitute a very important source of Nigerian law. It is the same experience in virtually all legal systems.

Classical authors of outstanding textbooks on the English law include Bracton; Coke and Blackstone. Others like Dicey; Cheshire; Hood Phillips; Wade have continued to emerge over the years.

In Nigeria, legal textbooks of reputable standards have been written by Obilade; Nwogwugwu; Okonkwo; Kodilinye; Aguda, among many others. Professor Sagay has written extensively on international law. All these present a potent source of Nigerian law and can be authority where there is scanty or absence of judicial decisions, in which situation they could be of persuasive authorities. Where such works are cited, the weight to be attached to them will depend on the personality of the author and the significance of the subject covered.

8. 2. 3 Periodicals, journals and legal digests

These are produced in various forms and colours in Nigeria. Some are professional while some are academic, and yet some are an admixture of both. For instance, in Nigeria, there exist learned journals published by different law faculties as well as private law publishers.

⁴⁸⁶N. Tobi, op cit, 96.

Digests are equally available for example, the Digest of Supreme Court Cases. Digests are abridgements of cases, that is, they are useful summaries, of the facts, issues, arguments and decisions in judicial proceedings.

Some foreign legal dictionaries are also available in Nigeria. Some of these are Jowitt's Dictionary of English Law, Stroud's Judicial Dictionary, etc.

All the above provide helpful guidance in interpreting Nigerian law.

8.3 QUESTIONS AND EXERCISES

1. The issue of whether an English statute is one of general application to be applied in Nigeria is uncertain and controversial." Discuss.

Hints

- The legislative mode of received English law e.g section 45(1) Interpretation Act; section 14 Supreme Court Ordinance 1914, etc
 - Difficulty in ascertaining which English statutes are applicable within the phrase.
 - Reference to case law *Dede v African Association Ltd; Attorney General v John Holt & Co Ltd* - the test by Osborne, CJ. Comments on other cases generally. Conclude with the two conditions for qualification.
2. Afar is a native of Agbor in Delta State of Nigeria. He was arrested and charged with committing robbery along the Benin - Asaba expressway road. At the close of the case for the prosecution before the Delta State High Court, the trial judge adjourned the case for judgement and consequently convicted

Afar as charged, stating that under the customary law of Agbor, the robbery accused was not entitled to be heard in his own defence. Advise Afar as regards the validity of that customary rule.

Hints

- Briefly discuss the importance of customs to societies.
 - Legislative provisions for the enforcement of customary laws in states; tests prescribed for the validity of such laws.
 - The "repugnancy" test and its uncertainty in definition. The trend in Nigerian courts - *Guri v Hadejia* NA discussed.
 - Conclude.
3. Eluvia is a first year law student in a Nigerian university and has been invited to speak on "The Validity of Customary Laws in Nigeria" at a seminar. Suggest an outline for Eluvia.

Hints

- General nature of Nigerian customary law system.
 - Classifications of customary law in Nigeria.
 - Legislative provisions for the application and enforcement of customary laws in Nigeria; the three validity tests.
 - Discuss each test extensively supporting them with decided cases.
4. Dede is an High Court judge in Kogi State of Nigeria. He has consistently held in virtually all the cases that came before him that any rule of customary law which is inconsistent with English legal principles must be invalidated. What is your reaction?

Hints

- Customary law as an essential source of Nigerian law
 - Discuss enactments which give basis to the application and observance of customary law rules in Nigeria
 - Highlight and discuss the three tests for validity Inconsistency of customary law rule with English law principles not an automatic ground for invalidity
 - Discuss *Dawodu v Dantnole* (JCPC) Conclude with reference to the facts supplied.
5. Gboga is a newly qualified Nigerian lawyer. He is to address the court on a knotty issue relating to a novel area of Nigerian law and there exists no reported judicial decision on the issue but only a textbook written by a frontline professor in that area. Advise Gboga.

Hints

- Mention sources of Nigerian law generally (primary and secondary)
- Discuss the referential value of the primary sources
- Discuss textbooks as valuable source of Nigerian law; mention conditions for citation - scarcity or non-availability of reported judicial decisions; authored by eminent scholars of high repute; textbook of acceptable standards
- Cite one or two examples
- Conclude with reference to the facts supplied.

8.4 FURTHER QUESTIONS

1. Discuss the value of customary law as a source of Nigerian law.
2. Write short explanatory notes on the following:
 - (a) Ordinances
 - (b) Acts

- (c) Laws
- (d) Decrees
- (e) Edicts

3. What is the rationale for delegated legislation? What do you consider to be the arguments in favour and against its usage?

CHAPTER NINE

LEGAL RESEARCH AND THE USE OF SOURCE MATERIALS

Olatokunbo Ogunfolu

9.0 INTRODUCTION

When a lawyer is confronted with a legal problem, it may be difficult if not impossible for him to fully analyse the facts and determine all the applicable laws immediately. He has to undertake a careful study of the facts and law in order to decide the course of action to take and verify his conclusion through a process called research.⁴⁸⁷ The word "research" is used in this context to mean the use of library materials to seek recorded information on a particular legal problem in order to authoritatively determine the rights, duties and liabilities of the parties. King George II is reputed to have said that lawyers do not know much more law than other people, but they know better where to find it.

9.0.1 Why Research?

Law is not static; rather, it is dynamic and developing.⁴⁸⁸ It is the lawyer's task to determine through the proper use of source materials in the library, what the current rules are on a given subject. When a lawyer is researching, he is certainly looking for something that will throw more light on a certain legal problem in order to enable him determine the position of his client vis-a-vis the law. Based on his research findings, a lawyer may persuade the Court to adopt his own reasoning or interpretation.

If our laws were perfect, there may probably be no need for research. Research is essential for the continuous development of the law towards the achievement of its objectives. A lawyer through a diligent research and advocacy can persuade the court to adopt a new position and even reverse its prior decision(s). This is why continuous study is a necessity for all the members of the legal profession.

Research also takes us to the primary source of legal materials. A law student who wants to become a lawyer and not merely pass law examinations (which is not the same thing) must learn to use the primary source of legal materials.⁴⁸⁹ The library is to a Lawyer what the laboratory is to a scientist. A law student should therefore supplement his lecture notes with textbooks of local

⁴⁸⁷M. B. Ray and J. J. Ramisfield, *Legal writing: Getting it Right and Getting it Written*, 1993, West Publishing Co, 2nd ed, pp.258-268

⁴⁸⁸H. J. Berman, "The Crisis of Legal Education in America", *Boston College Law Review*, Volume xxvi No.2 March 1985 p. 347 at 349

⁴⁸⁹A. Bradney, et al, 1991, *How to Study Law*, Sweet & Maxwell, London, 2nd ed, pp. 3 - 16

and foreign authors, statutes, case law materials, journals, articles, and other relevant materials.⁴⁹⁰ Glanville emphasises the crucial role of law reports and statutes in his advice to all students of law as follows:

The great disadvantage of confining oneself to textbooks and lecture notes is that it means taking all one's law at second hand. The law is ... contained in statutes and judicial decisions,⁴⁹¹ what the text writer thinks is not, in itself, law. He may have misinterpreted the authorities and the reader who goes to them goes to the fountain head. Besides familiarising himself with the law reports and statute books, the lawyer-to-be should get to know his way about the library as a whole together with its apparatus of catalogues and books of reference.

9.1 THE LIBRARY.

When most people think of a library, they think of books alone; but a Library contains much more than books. A library is a storehouse of information. Just as the items in a store come in various forms, so does the information in a library. It can be in printed forms as in books, or periodicals or other printed materials, but it can also be in the form of films, recordings, video and sound tapes or almost any format. Our discussion here will however be limited to printed materials. Since law is multidisciplinary in nature, our discussion of printed materials will however not be limited to legal materials.

9.1.1 The Role of the Librarian

A good legal practitioner spends a surprising amount of time in a law library looking up the law on a particular point.⁴⁹² Here, the importance of the librarian as a very important research source can never be over-emphasised. The law librarian is constantly looked upon as a specialist in giving information on what sources are relevant on specific subjects. It is an added advantage if a law librarian, is legally trained. Once a researcher has a competent law librarian as aid, his work of researching is simplified in that once the subject area of his research has been identified, he can wait for the librarian to assemble both primary and secondary sources of materials for his use; Unfortunately, librarians of the type described above are not common in many of our libraries in the country. The researcher, apart from the assistance from a good librarian must himself have a good knowledge of how to use the library effectively.

9.1.2 Identification of books

⁴⁹⁰The Hon. Dame Mary Arden (Chairman of the Law Commission) 'Modernizing Legislation', Spring 1988 Public Law p. 65 at p.70.

⁴⁹¹See generally. R. Cross & J.W. Harris, *Precedent in English Law*, Clarendon Press, Oxford, 4th ed, 1991, pp. 165 - 206

⁴⁹²J, H. Farrar & A. Dugdale, *Introduction to Legal Method*, 1977, Sweet & Maxwell, London, pp. 199-233

Most books are identified by at least six elements viz:

- i. the cover;
- ii. the author's name';
- iii. the publisher;
- iv. the title;
- v. the place of publication and;
- vi. the date of publication.

Apart from (i) information about all the other elements are written on the title page, which is the first important printed page of the book.

When a researcher is looking for relevant books in the Library, there are many ways he can go about it. One way is to browse around the shelf with the hope of getting some relevant books. This may take him a great deal of time if ever he is able to find any. Books are not arranged by the colours of their covers or sizes. Rather, they are arranged in a logical way, which enables a researcher to locate relevant books with minimum problem in good time.

Most of the books have at least one thing in common - they do have a subject; that is, they are written to explain or illustrate something. In libraries, books are arranged according to a classification system. In a classification system, all books on the same, subject are placed together in the same shelf, section or reading room.⁴⁹³ The two commonest classification systems are the Library of Congress classification and the Dewey decimal classification. A quick way to find out which of the classification a library uses is to pull any of the books from the shelf and check how the call mark (the identification number) on the book is written. If the call mark begins with a letter such as K108.7 it is the library of Congress classification. If the call mark begins with numbers such as 642.13 it is the Dewey Decimal System. The basic difference between the two is that one uses letters to classify books into major subject classes (the Library of Congress) while the other uses number (the Dewey Decimal). Most libraries in Nigeria are using the Library of Congress Classification hence our discussion will be limited to this classification.

Under the Library of Congress Classification, all the books on the same subject are placed together under letters of the alphabets, 21 are used to indicate broad subject areas of classes viz:

A	General works	L	Education
B	philosophy	M	Music
C	History (General)	N	Fine Art

⁴⁹³J. Dane & P. A. Thomas, How to use a Law Library, An Introduction to Legal Skills, Sweet & Maxwell, London, 3rd ed 1996, pp. 2-5.

D	History (old world)	P	Language and Literature
E	American History (General)	Q	Science
F	American History (Local & Latin America)	R	Medicine
G	Geography	S	Agriculture
H	Social Science	T	Technology
J	Political Science	U	Military Science
K	Law	V	Naval Science
		Z	Bibliography

9.1.3 Tracing a Particular Book

Each book on the shelf is given a call number.⁴⁹⁴The call number identifies a book the same way a fingerprint identifies a person. No two books in a library have the same call number. The call number of a book consists of the letter(s) representing the broad subject area (or sub-topic) of the book and a series of numbers and letters that further identify the book. Let us assume that a book written by John Cyprian has B358.C54 as the call number. B tells us that the book is on the subject of philosophy of religion. 358. C57 is the unique book number, which identifies that particular book.

B identifies the broad subject area in this case philosophy.

358 - further identifies the subject e.g. meta-physics or ethics.

C - the first letter of the author's last name.

57 - a number, which further identifies the author.

After a book has been given a call number, it is placed on the shelf first alphabetically by the broad subject area letter and numerically by the subjects' numbers, then alphabetically and numerically again by the author's letter and number. A book with the call No.B200. A 18 would be shelved before B.200 CS7.

In looking up a particular book on the shelf, one has to use common sense. If you are looking for a book with call No. K 146 or 62 after locating the K shelf where books written by authors whose last name begin with are shelved, if you have seen a book with K146 or 02 you do not have to check the book one by one again. It should now be apparent that to find any book in the library, you need only know its call number. You then trace it on the shelves alphabetically by the first letter in the call number and numerically by the remaining numbers and letters.

⁴⁹⁴ Ibid. 1-2.

9.1.4 How to Find Materials in the Catalogue

We have said that one of the ways a researcher can go about his research is to browse around the shelves looking for the books he needs. Maybe he will find them and maybe he will not. This may take a great deal of time and very often he may not have a great deal of time to spare. Here is where the library catalogue helps him.⁴⁹⁵ The catalogue tells a researcher about all the books in the library.

The catalogue becomes even more important with libraries that have closed stacks (i.e. where students are not allowed to go directly to the catalogue books). Even where the stacks are open and may be used by anyone, the library catalogue offers the best approach. While it is true that a browse sees all the books on the shelf, he may miss those that have been borrowed, those waiting to be reserved or perhaps those on the reserve. The catalogue is usually located near the entrance to the library or any other conspicuous place where it may be freely accessed.

Library catalogues come in several forms. There are book catalogues produced from computer printout. The catalogues may be in micro- film or microfiche.⁴⁹⁶ The most common form, though, is the card catalogue; the information is printed or typed on 3"x5" card which are filed alphabetically in trays in a central cabinet. Regardless of its form, all library catalogues have one thing in common in the sense that materials may be located in them by knowing the author, the title or the subject. In a card catalogue, there will be one card for the author (the author's entry), one card for the title entry and at least one card for the subject (subject entry) - all for the same book. Literary works are often an exception; they are not entered in the library catalogue under their subjects. If you know the author of the book you want but you are not sure of the title, you should check the author's entry. Subject entries on its part tell what books a library has on a subject. The author's entry is however the main entry. It has all the information found on the title page such as the author's complete name and the full title; the publisher's name and address, place and year of publication. You can see that finding the author's entry is really like seeing the title page of the book.⁴⁹⁷ But that is not all that author entry does for you. It is called the main entry because it describes the other elements of the book such as how many pages it has and whether it is part of a series of books. Finally, it tells you that the book has subject entry, a joint-author entry and title entry in the library catalogue. For the above reasons, the author's main entry is to be preferred where the researcher knows the author's name it is therefore advisable for a student to familiarize himself with the various academic writers on different subjects.

9.2 STATUTES

Nigeria is a Federation presently consisting of a Federal Capital Territory and 36 States. Each of the States has its own separate system of law and court. The Federal Capital Territory and the Federal Government also have their own separate systems. Hence we have the Laws of Kano

⁴⁹⁵Ibid.,p.2.

⁴⁹⁶Ibid., P 3

⁴⁹⁷Ibid. 3-5.

State; Laws of Lagos State; Laws of the Federal Capital Territory; and Laws of the Federation. Before the further fragmentation of Nigeria into splinter States, there were laws of the Western Nigeria, Northern Nigeria; Eastern Nigeria etc.

If for instance, a lawyer is applying for the bail of an accused in a State High Court, the application will be brought pursuant to the provisions of the law of that State. Also, if a motorist commits a traffic offence on a federal high way, he will be prosecuted under the law of the State.

The fact that each State has its own law makes it possible for there to be some differences between the States' laws. For instance, the limit of the jurisdiction of the Chief Magistrate Court in Osun State has been recently increased to N30,000.00, while it is N 7,000.00 or N5,000.00 in some other States. This is why it is advisable for a lawyer to consult the relevant laws of other States outside his jurisdiction anytime the need arises and check whether there is any dichotomy in the applicable laws.

The Federal Government and the States Governments usually publish copies of each of their own Acts or Laws respectively. Sometimes, the Ministry of Justice may co-ordinate a comprehensive review and publication of all the existing Acts or Laws. One of such compilation was done in 1990 at the federal level when the 1990 Laws of the Federation were compiled. All the existing Federal statutes and the delegated legislation with amendments in Nigeria up till 1990 have now been consolidated in the Laws of the Federation of Nigeria, 1990.

9.3 LAW REPORTS

A modern law report gives the name of the case, its date, the court and the judges who sat in it, a head note, an outline of the facts, the name of counsel, sometimes a summary of their argument and always a verbatim copy of the judgement. A case is usually cited by mentioning the names of the parties; the year or month of the case, the volume and the name of the law report and the page where the case is reported.

Before we consider the list of law reports in Nigeria, it may be useful to know a little of the history of some foreign law reports which include the following:

"The history of the law reports falls into three main periods: the period of the 'Yearbooks', the period of private reporting and the modern period. The year books... were originally written in Anglo-French (the court language of the middle ages) and they cover the period from 1283 - 1535".⁴⁹⁸

In the real sense of the word, law reporting commenced with 'Private' reporting with individuals like Sir James Dyer who started his reports in 1537. He was a Chief Justice of the Court of Common Pleas. By the end of the eighteenth century, this mode of law reporting almost approximated the relevancy and accuracy of reports of the modern era. The most outstanding of them were the ones authored by Sir Edward Coke between 1572-1616" and are to this day accorded the distinction of being referred to as the "The Reports" by reason of their author's

⁴⁹⁸ P.S. James, *Introduction to English Law*, 1989, Butterworths, London 12th ed, p.20

unrivalled eminence. Sir George Burrow's Reports (1756-1772) are also held in high esteem?"⁴⁹⁹

The present reports in the United Kingdom include:

1. Appeal cases covering the House of Lords and Judicial Committee of the Privy Council cited as A.C .;
2. Reports of the Divisions: Queen's Bench Division(Q.B.), Chancery Division cited as (Ch) and formerly the Probate, Divorce and Admiralty Division cited as (Fam). Court of Appeal cases are not reported in Appeal cases but in the reports of the Division from which the case came.
3. Weekly Law Reports cited as W.L.R This started as Counsel published Weekly Notes (W.N.) in 1866 which contained summary reports of recent cases before it was elevated to a law report in 1953.
4. The All England Law Reports which commenced in (1936) and cited mostly as All E.R. or A.E.R
5. The Times Law Reports (1884-1952.).

In addition, there are specialist reports such as the industrial Court Reports (I.C.R), Tax cases (T.C), Reports of Restrictive Practices Cases (RP.). Commercial firms also produce specialist reports such as Lloyd's list Law Reports now cited as Lloyd's Rep.; and Criminal Appeal Reports. Cited as Cr. App. R

The history of law reporting in Nigeria has been highlighted by Popoola in his review of the Nigerian Revenue Law Reports (N.R.L.R) thus:

"Law reporting started in Nigeria around 1874 with the publication of a series called the Renners Series which is a mere collection of private reports containing decisions of the Supreme Court of the Gold Coast Colony given during the period 1874 to 1886 when Lagos was administered as part of the colony. However, it was in the year 1916 that regular law reporting began in Nigeria with the establishment of the Nigerian Law Reports series (NLR) by the judicial department. While it lasted, the series covered selected decisions of the Divisional Court of the former Supreme Court and those of the Full Court together with a few decisions given during the period 1881 to 1955. Since then many official law reports have made Probate, Divorce and Admiralty Division cited as (Fam). Court of Appeal cases are not reported in Appeal cases but in the reports of the Division from which the case came.

- (i) Selected Judgments of the West African Court of Appeal (1930-1955).
- (ii) Selected Judgments of the Federal Supreme Courts of Nigeria (1956-1961).
- (iii) All Nigerian Law Reports (from 1961).

⁴⁹⁹Ibid., p.21.

- (iv) Law Reports of High Court of the Federal Territory of Lagos (1955-1966).
- (v) Law Reports of the High Court of Lagos State (from 1967).
- (vi) Western Region of Nigerian Law Reports from (1960).
- (viii) Law Report of Eastern Region of Nigeria (1956-1958).
- (viii) Law Report of the Eastern Nigeria (1959- 1967).
- (ix) Law Report of the East Central State (from 1970).
- (x) Law Reports of the Northern Region of the Federation of Nigeria (1956-1961).
- (xi) Law Reports of the Northern Nigeria (from 1962).
- (xii) Mid Western Nigeria Law Reports (from 1963-1966).
- (xiii) Mid Western State of Nigeria Law Reports (from 1967).
- (xiv) Judgments of the High Court of Mid Western State- Annual Law Reports (from 1970).
- (xv) Law Report of Rivers State of Nigeria (from 1970).
- (xvi) Judgments of the Supreme Court of Nigeria (from 1972).
- (xvii) Selected Judgments of the High Court of Lagos State (from 1972).
- (xviii) Judgments of the Court of Appeal Western State (19783-1975)
- (xix) Loose-leaf cyclostyled Reports, published in some States of the Federation ..."

Apart from the above official law reports, virtually all of which have died a natural death, there are also, the Nigerian Monthly Law Reports (NMLR), which started in 1964, the University of Ife Law Reports which started in 1971. The Nigerian Weekly Law Reports (N. W.L.R), which emerged on October 1st 1985, Supreme Court of Nigerian judgment (S.C.N.J), the Nigerian Supreme Court Cases, the Supreme Court. Digest of Cases and the Federation Weekly Law Reports started on 5th June year 2000.

There are also specialised law reports, some of which include the African Law Reports (Commercial) (ALR), the Nigeria Constitutional Law Reports (N.C.L.R), Nigerian Commercial Law reports (N.Comm. L.R.) and the Nigerian Revenue Law Reports (N.R.L.R.)". There are also casebooks which extract and comment on salient points and issues of law involved in selected cases in book form for easy reference. For example, Itse Sagay's Casebook on Contract; Kiser Barne's Cases and Materials on Company Law; as well as Tony 'Weir's cases and materials on Torts and Professor Lens Sealy's Cases and Materials on Company Law, among others.

9.3.1 Locating a case law

The pertinent question now, is how can a researcher locate a particular case? There are several possibilities. The first possibility is where he has the citation.⁵⁰⁰ The citation usually serves as a key to how to locate a particular reported case.⁵⁰¹ When the year accompanying the title is enclosed in square brackets, it connotes the fact that the year is important in tracing the case. For example,

Name of parties	Year of the report 1964	Volume	Name of the report	Page
F.B.I.R. v. Nasr	1964	1	All N.L.R.	408

But where the year is enclosed by round brackets, the year is not essential in locating the case. For example:

Name of Parties	Year	Law Report	Page
<i>Ademolekun v Council of U.I</i>	(1967)	All N.L.R	40

The citation approach adopted by the Nigerian Weekly Law Reports (N.W.L.R) is slightly different. Although the Nigerian Weekly Law Reports adopts a square bracket style it goes further to identify a particular volume by giving it a part. For instance, a case decided in 1986 was cited as follows:

Marina Nominees Ltd. v. F.B.I.R. [1986] 2 N.W.L.R. (Pt 20) 40.

Here, 2 means volume, pt 20 means part 20, while 40 means page 40. As far as the N.W.L.R. is concerned, the part and page are more important in tracing reported cases. While many cases are reported in a year, the part is never duplicated. For instance, there has only been one part 20 since the publication of the law reports till date.

Where the researcher already has the citation, all he needs to do is to find out the shelf where the volume of the particular report is shelved and trace it by either the year or volume plus the part in case of the Nigerian Law Reports.⁵⁰²

The other possibility is where the researcher knows the title of the case but does not know the citation, In such a case, he might flip through any standard book on the subject and check the list of cases referred to in the book on the preliminary pages or check through the index and note the citation. In addition, cases decided in England from 1947 onwards would have their citations stated in the Current Law Case Citators and older English cases would have their citation in the English Digest.⁵⁰³

Cases index provides the best option where a researcher wants to check all the case authorities on a particular subject or issue.

⁵⁰⁰"The Bluebook: A Uniform System of Citation", Harvard Law Review 16th ed., 1999,55.

⁵⁰¹McLeod and P. Cooling, Law for Librarians : A Handbook for librarians in England and Wales Library Association, London, 1990 133 - 138

⁵⁰²J. Dane and P. A.Thomas, op. cit. 13-27

⁵⁰³ibid. 27 - 38.

Indexes are produced periodically to provide a highlight of all the reported cases on different subjects or issues. Each law report usually has its own index. An Index is arranged alphabetically. For instance, cases relating to Administrative Law or Agency will be listed first under A before cases relating to Company Law under C. If a researcher is interested in cases on *locus standi* all he has to do is flip to the L column. Where he wants to check the judicial interpretation of certain words, phrases or expression such as "and" "reasonable cause" beyond reasonable doubt" among others that have been judicially defined he should flip to the column on "Words and phrases"

Where the index is in arrears, it is important to keep abreast of developments through new cases. The Nigerian Weekly Law Reports as the name suggests comes out every week and reports cases of the Court of Appeal and Supreme Court, while the Nigerian Supreme Court Judgment which reports only Supreme Courts case comes out usually every month or two. If a case is recent and has not been included in the index, the researcher should look at the list of cases printed at either the front page or back page of each issue and note if the case has been reported in that particular issue.

9.4 PERIODICALS

Apart from textbooks, another secondary source of material is the periodical, perhaps better known as the journal. One good reason why one needs a periodical is that there may not be any book on the area that one is researching into. A topic or aspect of knowledge can be so recent that no book has been written on it. Even where there are books, periodicals differ from books in the following ways:-

- (a) It usually appears at intervals: weekly, monthly, bi-monthly, quarterly, bi-annual etc. Whereas the author of a book discusses his subject in one complete issue or edition.
- (b) Its articles are briefer than books and one can get to the essential facts quicker.
- (c) It contains articles written by different writers.

There are two basic types of law journals. The first is the general law journal, with articles on different fields of law. The second type is the specialized journal that is devoted to a particular aspect of law such as business law, property law, taxation, banking etc.

Examples of Nigerian Law Journals are:-

- Nigerian Current Law Review;
- Nigerian Law Journal;
- Journal of Islamic and Comparative Law;
- Nigerian Journal of Private and Property Law;
- Gravitas Review of Business and Property;

- Justice; and
- Modern Practice Journal of Finance and Investment Law.

Most Faculties of Law in the country also have journals, which may be general or specialized. It is also useful to mention a few foreign journals such as the:

- Cambridge Law Journal
- Harvard Law Review
- Oxford Journal of Legal Studies
- Yale Law Journal
- British Tax Review
- American Bar Journal
- Michigan Law Review

The pertinent question now is how can a researcher locate a particular periodical. The first thing is to locate and get to the journal section of the law library. One of the options is to start picking the journal one by one with the hope of finding something on your subject. This takes a lot of time and may prove futile.

Another option is by using the citation. Journals are normally cited using abbreviations and are arranged according to the year and volume.

Where the citation of a particular article contained in a journal is not known, or one is even ignorant of the existence of such an article and other articles on the subject, the best approach in such a situation is to use a periodical index.⁵⁰⁴ The periodical index performs much the same functions for periodical articles as the library catalogue does for books. The index gives a list of all existing published articles in various Journals containing the subject of his interest and trace the different authors in alphabetical order. All you have to do is to flip to the page containing the subject of your interest and trace the particular article (s) and note the citation.

9.5 REFERENCE BOOKS

There are times when a researcher requires brief and concise information such as meaning of a word, date of events, quotation, location of places etc. Such information can be quickly looked up in a reference book without reading a book from cover to cover. Reference books differ from regular books because they do not circulate. Hence they can only be used in the reference section or room. They are easily recognized because right above the call number will be the letter "R" or the letters "REF"

⁵⁰⁴Ibid. p. 80.

There are two types of reference books. The first class include the general reference books such as general dictionaries, encyclopedias, year-books, atlases, directories etc. The second class of reference books includes the subject references books.

These are books on particular subjects; such as Black's Law Dictionary, Bar and Bench in Nigeria by Chief Gani Fawehinmi (S.A.N.). Other law dictionaries are *Stroud's Judicial Dictionary*, *Jowitt's Dictionary of English Law*, *Mosley and Whiteley Law Dictionary* and *Osborn's Concise Law Dictionary*.

Legal Encyclopedias are a source of current information on the law and they are more current than textbooks. The most comprehensive one is the *Halsbury's laws of England* and it covers all areas of English law and it should be the take off point for any legal research.⁵⁰⁵

9.6 INFORMATION TECHNOLOGY AND THE LAW

What would take a manual search of hours, days or even months, could be unravelled by a computer within .seconds; hence the legal profession has no choice but to tap the huge time saving option information technology otherwise known as (IT) has to offer. In Britain Universities are linked together on computers through the Joint Academic Network (JANET) having at their disposal a massive data base which is a minute fraction of the worldwide computer network called the internet.⁵⁰⁶ There are numerous legal databases but two of them will be mentioned here. They are the Lexis and the Westlaw, which make available recent judicial decisions and legislations in the Commonwealth, Europe and the United States of America.

Some journals are also available on websites and chapters of books recently updated can also be accessed via the internet, through some publishing houses internet addresses.⁵⁰⁷

There is no better example of the usage of information technology than the recent Bloody Sunday inquiry in the United Kingdom where 100 million Pound Sterling is being spent using the best in information technology to collate the evidence of over one thousand witnesses relating to the killing of 13 people by English Soldiers in Northern Ireland on Sunday January 30th 1972.²²

9.7 QUESTIONS AND EXERCISES

1. "A good lawyer is the one who knows the law, a better lawyer is the one who knows where to find the law while the best lawyer is the one who knows the law and where and how to find the law".

Discuss.

⁵⁰⁵Halsbury's Laws of England, Issue 246 December 1993, Butterworths , London, which updates the 4th edition of Halsbury's laws and contains the Monthly Reviews from November 1992 to December 1993 and it is separately bound

⁵⁰⁶Jean Dane, Philip. A. Thomas Op cit. 147.

⁵⁰⁷Newsletter of the Commonwealth Legal Education Association Number 87, June 2001

Hints

- The above statement is a modification of the statement credited to King George III that lawyers do not know much law than other people. But they know where to find it. The statement underscores the essence of research and the effective use of source materials to a lawyer.
- Explain the meaning of the word "research" and why it is necessary to research.
- The help of a law librarian may make research very easy. However, the fact that a good law librarian is not easy to come by makes it imperative for lawyers to have good knowledge of how to use the library.

When a lawyer is confronted with a legal problem even if he seems to have a clear idea about the solutions he must verify his conclusion by checking through some source materials. It is therefore better as the statement suggests that a lawyer should not only know the law but also where and how to find it. There is however no objection where the lawyer cannot immediately determine the law but is nevertheless determined to search for the applicable law through a diligent research.

QUESTION

2. Jumar is a part IV Law student of Ahor University she has come to your University on a research trip. His supervisor had given her certain authorities to check and make photocopy.

The authorities include:

- (i) *Adeolu v Mabamiye* (1985) 2 N.W.L.R. p.5
- (ii) A book on Law of Contract by a new author Koko Ada Phid

In addition, Jumar desires to make a photocopy of recent articles on the topic of her research, if she is able to locate some. She has very limited time to spend before the library closes for the day.

Assuming that Jumar has a free access to your library, advise her on how to go about her work.

HINTS

- This question centers on the quickest method of checking (1) a case law authority reported in the Nigerian Weekly Law Reports where the part is omitted, a look through either the author's entry or subject entry through the catalogue and periodicals through the periodical index.
- The citation of a case serves as a key to how to locate the case. Explain the two methods of citing a case. Note that the approach adopted by the Nigerian Weekly Law Reports is slightly different: although it adopts a square bracket style it goes further to identify a particular

volume by giving it a part. Here, it is noteworthy that the part is omitted. This may undoubtedly create some problems which are still surmountable by adopting any of these options:

- (i) checking through all the 1995 volumes,
 - (ii) checking the full citation in the list of cases usually provided in a preliminary page of a standard textbook on the subject or index.
- Considering the limited time available to Jumar using the browsing method is ill advised.
 - The best approach is to go to the catalogue to find out the call mark of the book. The book on contract according to the information available to her can be located either through the author's entry or subject entry. Explain why it is however advisable to go by the author's entry.
 - Articles are usually contained in periodicals which are popularly known as Journals. Since Jumar neither has a particular article in mind nor has the citation of any, her best option is to consult the periodical index.
 - Explain what a periodical index is and how to use it.

9.8 FURTHER QUESTIONS

1. The modus operandi for locating a source material depends largely on the material being traced and the circumstances of each case.
2. Distinguish fully between how to locate a book and how to locate a case law authority.
3. Write a brief note on atiy-3- of the following:

[a] A catalogue

[b] Classification systems

[c] Periodicals

[d] An Index

[e] The History of Law Reports in Nigeria.

CHAPTER TEN

LEGAL WRITING AND APPROACH IN ESSAY WRITING

Jlde Ogunsakin & Abiola Sanni

10.0 INTRODUCTION

Writing has for long been reckoned as fundamental to the exposition of law.⁵⁰⁸ It is a means by which expression is given to thoughts, ideas, convictions and other fruits of research⁵⁰⁹ in lettered prints.

Most of what we do or will do either by way of study in the process of learning or through actual practice of law in the courts, depend in many ways? on writing or written material.⁵¹⁰ The constant feature of Articles, Essay, Project work, Legal Opinions, a brief of argument, memo and other forms of writing in the routine of lawyers and students proves writing critical as a factor in the analysis and understanding of legal issues.

Since man is not born with inherent or automatic ability to write, some form of exertion involving the conscious effort of mind and hand is required to get started. Every writer must learn to put pen to paper through repeated application of self to study and the art of writing to achieve optimal end.

Although we each must work out our own procedures and rituals in this matter, the task in this chapter is to discuss techniques of legal writing as they relate to essay writing and the steps that must be followed in the process.

10.1 MEANING AND TYPES OF ESSAY

10.1.1 Meaning of an Essay

An essay is a short piece of writing on a given subject. It is a literary composition written usually in prose to reflect a writer's personal thoughts, ideas, opinions and viewpoints on a particular issue. Both the relevance and currency of an essay and the manner in which such ideas and points are presented are essential to understanding and should be clear to the reader.

⁵⁰⁸The foremost of jurists - Bracton, Coke, Blackstone and Pollock have contributed in no small measure to the development of law through written works and commentaries. See J.H. Farrar and A.Dugdale, Introduction to Legal Method, 1990, Sweet & Maxwell, London, 3 ed., pp. 200-4

⁵⁰⁹See the view of R. Megarry in *Cordell v. Second Clan field Property Ltd* (1968) 2 Ch, 9,16.

⁵¹⁰To illustrate examinations are conducted in most cases by means of writing in the various institutions of higher learning just as writs and other processes must exist in writing.

10.1.2 Types of essay

An essay may be Descriptive, Narrative, Expository or Argumentative in nature. The identifying feature or mark of each type of essay is found in peculiarities attached to it. They are basically and essentially different but not necessarily kept in watertight compartment.⁵¹¹ The following discussion is designed to provide insight into aspects of the classification.

10.1.2.1 Descriptive Essay

An essay is descriptive when it seeks to reconstruct a situation, event or circumstance as to how it looks or feels. It captures the picture of the object being described and the writer's feeling or opinion about it. The experience of a political detainee who writes a description of his privations and deplorable state of affairs while his detention lasted, may create impression of hardship and is a good example of a descriptive essay.⁵¹²

10.1.2.2 Narrative Essay

A narrative essay usually takes the form of presentation of details about events in the order in which they occurred. Such exactitude as to order lends itself peculiarly to narrations, though reasons may exist for variation in the original sequence and overall arrangement of thoughts in the course of writing.⁵¹³

10.1.2.3 Expository Essay

The thrust of an expository essay is the explanation, clarification and provision of information about a thing. It involves the use of illustrations and analogies that help in the explanation of things or in their definition.

10.1.2.4 Argumentative Essay

The distinguishing features of an argumentative essay is a clear indication of a leaning by the writer who is required to either support or oppose a position in his writing. The approach requires that a stand be taken on an issue even as a writer is expected to convince or persuade the reader to accept his view points.

Reasons for claims made in the essay must not only be advanced and articulated, the use advanced in support of opposing views must be demolished. A good example of an

⁵¹¹This implies that in terms of classification an essay may overlap depending on the circumstances.

⁵¹²Chief Obafemi Awolowo 1909-1987 wrote his book *My March Through Prison* to recount the indignities he suffered when he was detained in the 1960's.

⁵¹³An essay about constitutional development in Nigeria is most likely to be narrative, as it will trace events from 1914 to date.

argumentative essay may be: The Abolition of the death penalty: To be or not to be?⁵¹⁴Or legalization of Abortion in Nigeria - a shield or a sword.⁵¹⁵

Although the classification and/or categorization of essay is important for convenience and ease of reference, a writer may be constrained into adopting a writing method or style that will accommodate two or more classifications if that is the pragmatic thing to do. This will be particularly so where there is an overlap. The writer may see the need to do a bit of exposition in a narrative. Where this is the case, a combination of approaches to achieve the set objective will be in order. The writer must be careful to ensure a balance between such objective and the necessity of combination.

Without prejudice to the freedom to combine any two or more of the classification above however, a writer does well to strive for a clearly defined focus in the preparation and writing of an essay where this is possible.

10.2 METHODS/APPROACHES IN ESSAY WRITING

The complexity of tasks involved in essay writing has often been cited as reason for the mediocrity that has come to pervade the art of writing. This is especially so among students who must express themselves in writing from time to time in the course of training.

Although the need to start and finish writing may be compelling, "the end justifies the means" or "If you can't beat them join them"⁵¹⁶should not be sought as alternatives to the settled methods and approaches to essay writing familiarizing yourself with the steps and guidelines involved facilitates understanding and makes essay writing less daunting.

As we discuss the methods, endeavour to see where and how they are instrumental to your objective of writing a good essay.

10.2.1 Choosing a Topic

In some cases students among other writers are given the free hand to choose or select topics on which to write.⁵¹⁷ In such cases, the challenge is not in looking for subject to write about, but how to go about developing the subject. This part of essay writing requires careful consideration and thoughtfulness if the most is to be made of it. As you give the required attention to topic therefore, put the following questions clearly in focus.

⁵¹⁴There is an ongoing debate as to whether to abolish the death penalty or not. Amnesty International has been in the fore front for its abolition for some years. The Supreme Court had an opportunity to look into the matter recently. This was at the instance of Olisa Agbakoba, SAN who argued that the death penalty violated the right to freedom to the dignity of the human person. That argument was rejected.

⁵¹⁵Many have called for the legalization of abortion in the country, while others, especially the Catholic church, have frowned at it.

⁵¹⁶These expressions signify plagiarism and they seek to justify it.

⁵¹⁷In many institutions of higher learning students have the liberty to choose project topics in the final year. This is however subject to approval by the appropriate authority.

- (a) Do I really desire insight into the topic? Can I learn from writing about it? Since writing is usually preceded by reading, it should do more than merely transmit information. The writer should be able to learn as well. When research into the topic affords understanding of something new, it broadens the scope of the writer and makes the writing that follows naturally appealing.
- (b) Am I likely to find the requisite source material? If a few or none of the sources of information can be found, you should consider choosing another topic or at least modify the one you have. This should suit the present situation and your personal circumstances in view of changes that may occur in the process of writing⁵¹⁸ for example an essay on the Right to freedom of expression under Nigeria law will not be complete if the freedom of information bill⁵¹⁹ is not taken into consideration. A writer will accordingly have to review his work to accommodate provisions of the bill as it may eventually become law in the process of writing.
- (c) Is the scope of work reasonably manageable? Should some details be left out? Does the topic reflect the tenor of the essay? You must be both reasonable and realistic in the amount of research you do within the time available to you. This is because you may be inundated by more materials than you can use at the particular time.⁵²⁰ Search for specific points on which to write rather than settle for generalities.⁵²¹
 - (i) It has been said that a good topic must possess the following attributes:
 - (ii) It is correct because it provides adequate information about the subject. It is complete because it is clearly understandable to everyone in that field and
 - (iii) Concise because it expresses content of writing in the shortest but most efficient way.⁵²²

10.2.2. Preliminary Reading

Reading about the topic you have chosen is a good way of exploring it.⁵²³ This is because any reading done at the preliminary stage gives you a steady and continuous supply of information. The information in turn prepares you for the challenge that writing eventually presents and how best to go about it. Although writing from your own knowledge and experience may be

⁵¹⁸A writer must realize that topics are subject to the vicissitude of time and place and may change from time to time. The possibility of obtaining materials when such changes occur must be considered before the choice of topic is made in the first place.

⁵¹⁹This bill is before the National Assembly but is yet to be passed into law.

⁵²⁰See Benefit from Theocratic Ministry School education published by the Watchtower Bible & Tract Society of Pennsylvania 2001, p. 40.

⁵²¹Ibid.

⁵²²Brevity as will be shown presently is a must in essay writing. An unwieldy essay is unattractive and a good writer must avoid verbosity and repetitions that add nothing to the substance of work.

⁵²³16 See Heffernan & Lincoln, Writing a College Handbook, 2nd ed. W.W. Norton & Co. P. 21.

productive, reading remains one of the best ways to source ideas for an essay or to enrich the ideas you already have about the essay.⁵²⁴

10.2.3 Reviewing or Rethinking the Topic

It has been suggested that good writing is good thinking.⁵²⁵ You must ensure that you have done enough of the second before you start the first.⁵²⁶ Once therefore you have chosen a topic on which to write, you can open it up with questions.⁵²⁷ This will require thinking clearly and reflectively about the topic possibly with your pen and other writing materials in hand. "The crucial thing about this stage of the pre-writing process is to hit your topic with every question you can think of.⁵²⁸Entertain no concern about whether you are able to provide answer to any or some of these questions, as some of them may not even have answers. The more questions you raise however, the more likely you are to penetrate and understand the topic. If you have difficulty raising questions on your own, the words what? who? where? when? how? and why? will suffice to beam a search light on the topic and make it more comprehensible.⁵²⁹ As you do this, the topic generates other ideas and opens your mind's eye to other possibilities and perspectives.

10.2.4 Identifying the Basic Question

When you have made a list of questions with which to develop the topic, find out which among them stands out as the most important, most instructive, most interesting and most appropriate. It may just be one of the questions you have listed or a new one arising from them. Either way, the question you chose becomes the basic question you will seek to answer in your essay when you arrive at the writing stage.

10.2.5 Formulate Research Problem/Thesis

Your strategy in the formulation of a research thesis should serve to turn the basic question you have chosen to basic answer. A clear sense of direction and an announcement of the major points are all you need to prove ready. You will be deemed to have made a definite choice of your thesis when it makes a restricted and organized assertion about the topic and reveal clearly your attitude towards it.⁵³⁰

⁵²⁴See Heffernan & Lincoln Op. cit. 196.

⁵²⁵See Ray & Ramsfield, "Legal Writing: Getting it Right and Getting it Written, 1993, West publishing Co., p. 235

⁵²⁶ Ibid.

⁵²⁷Heffernan & Lincoln, op. cit. p. 18.

⁵²⁸ Ibid.

⁵²⁹Concerning your topic you may raise such questions as what happened?Who caused it? Where did it happen? When did it take place? How did it occur and why did it happen? These will provide insight into your work.

⁵³⁰See Heffernan & Lincoln op. cit. p. 26.

10.2.6 Testing the Idea

Every writer must be concerned about the viability of his idea and research of his idea and research problem before he begins to write.

This is why the time must be taken to test the idea thoroughly and dispassionately. You will be able to tell whether your idea is what it should be when you subject it to the following preliminary tests:

10.2.6.1 Writing Test

Putting your idea into writing is unavoidable in essay writing. The reason is that writing gives you time to think, to try out your idea on paper, to choose your words, to read what you have written, to re-think, revise and re-arrange it as you wish. Writing also gives you time to find the best possible way of stating what you mean.⁵³¹ When your idea passes the writing test, it becomes clear and amenable to both direction and form, affording a fruitful writing time in the process.

10.2.6.2 Credibility Test

The essential issue here is the currency of the idea and - its plausibility. Can it stand the test of time? Will it get obsolete? Are my views and observations accurate? There is a test of credibility in each of these questions and they must be pondered as you write:

10.2.6.3. Friendly Colleague Test

Although writing is usually personally done, you need not keep thoughts about it completely to yourself. Finding someone⁵³² to do critique of the idea will bring the best out of it. This is because the reaction you get gives you an alternative or completely new understanding of the subject under review.⁵³³ Ensure that the critique is as ruthless as it can be. Do not hesitate to accept inputs from others if this will serve your purpose. The important thing is to have a thoroughly 'Sieved' idea before you start writing.

10.2.6.4 Possibility Test

The prospect of completing the task within the shortest possible time should be considered early in your pre-writing arrangements. Can you get things done within the time available to you? Can you handle the issues? Will consultation suit your purpose and be the decision factor? Your attitude to these questions will determine the content of your essay and what it will look like when you eventually begin to write.

⁵³¹Ibid.p. 94.

⁵³²Probably a person that has researched the topic

⁵³³Some writers do not consult because they do not want their inadequacies exposed to others. Two however is always better than one. Consultation is essential to success in writing.

10.3 PREPARING THE OUTLINE

An outline is important in shaping your work. It should help you recall and focus on ideas. Its purpose in essay writing is to make the points you plan to use stand out.⁵³⁴ Making you see major division of your work and the ground to cover. Preparing an outline helps you to organize and analyse your thoughts and the process of analysing and refining is essential to shaping good material into an effective essay.⁵³⁵

Outline can help a writer before or after writing a draft. They take the form of lists, scratching flowcharts, etc⁵³⁶

10.4 CHOOSING MATERIALS

When you have done your preliminary reading, you may find that you have a deluge of materials to work with. Some of these may not necessarily be suitable for use and you do not have to read them all. . The limited time you have should be used optimally working on the main idea. Do not dissipate energy on information that does not fit any of your main points even if you think it is interesting. Keep to the best material. If you try to cover too much, your writing may become directionless and your coverage shallow.⁵³⁷

Consequently, it is better to convey a few points that are-of real value to the reader⁵³⁸ than to have a bite of the whole. You must accordingly look for the following in your search for materials.

10.4.1 Mistake relevant to your topic

Once your topic is settled, you must proceed to locate books specifically written on the topic. This will aid your research and, reduce the burden that comes with gleaning thoughts from unrelated sources.

10.4.2 Materials Related to the Subject

Apart from the use to be made of books and articles you have selected for the subject, you can avail yourself of opportunities that indexes, tables, charts and illustrations from the same source offers. This should be coupled with references cited by the writer of such book or article for the best effect.

⁵³⁴You may achieve this by writing them in capital letters, underscoring the points or making them in colour. See Benefit from theocratic ministry school education op. cit. p. 168.

⁵³⁵See Benefit from Theocratic ministry education op. cit. p. 42.

⁵³⁶See Ray & Ramsfield, op. cit. p. 200.

⁵³⁷See Benefit from Theocratic Ministry School Education, op. cit. P41..

⁵³⁸Ibid.

10.4.3 Materials Published in Current Books and Journals

The use of the latest edition of a book or journal ensures the supply of current and up to date information on issues. Aside books, the position of law and the attitude of the courts should be considered on currency of material. It is vital and inevitable in legal writing.

10.4.4 Materials Listed as Classic in their Field

Though old and antiquated, some materials and authorities will always be relevant on the subject as guidepost to the development of law in that area. For example, Elias' work on land law is an authority often cited though about forty-one years old. Obilade's *Nigerian Legal System*⁵³⁹ is always relevant on the subject despite developments in the area. You can accordingly take the liberty to cite such materials in your writing in view of the impact they have made over time.

10.5 EXAMINING YOUR SOURCES

After you have decided on your sources and have gathered them, you need to examine them more closely. In this way, you will discover their utility and relevance to your work.

The following are prescriptions on how to carry out your examination.

10.5.1 Organize your reading time

Make a list of the materials and authorities you want to use in order of importance and resolve to do daily reading. Follow this schedule closely and stick to it. Strive in between to assimilate your reading and get the sense as far as you can. It is important as you approach the writing stage that you be productive in the use of reading time, leaving nothing at all to chance.

10.5.2 Read Selectively

With limited time and a horde of matters at your disposal, you must read selectively. Read wide but not beyond scope. Only materials that will be used in writing the essay need be studied. Others may be read generally as long as there is time for it.

10.5.3 Read Responsibly

There should be method in your reading. Reading in order to write is not so much about covering one page after another in the material at your disposal. Doing contextual reading is essential if you must understand all you are reading before you begin to write.

⁵³⁹First published in 1977.

10.5.4 Read Critically

When you read, take time to analyse the exercise. Decide whether what you are reading will command respect when cited. Examine the arguments and evidence of the writer and test them for relevance. Are the conclusion drawn by the writer justified on the basis of evidence supplied? Has he written all there is on the subject? Is the reasoning process faulty? Have the best of techniques been employed in writing? These questions should help you determine whether you want to continue to read the material or look for a better one.

10.6 WRITING STAGE

Writing is deemed to have commenced when you translate your ideas into first draft.⁵⁴⁰ Until you have refined this draft into other drafts and then a finished product, you must continue to work on it. Although opinions have not been the same on the number of draft you need to prepare, a minimum of four is required.

10.6.1 First Draft

Try at this stage of the writing process to write the whole paper without stopping to correct anything. Don't get it right, get it written.⁵⁴¹ Your idea need to be translated unencumbered by revision concerns⁵⁴² until you are through, you have nothing to revise or work at, leave matters as they are.

10.6.2 Second Draft

This is where you revisit your draft, with a view to adding words that you probably left out in the first draft. Supply details you need to explain and add words of expression to details that are not clear. Although the draft at this stage is now a handful, let time, even if a moment pass before you go back to it.

10.6.3 Third Draft

The purpose of the third draft is to cut off dead woods of repetition and verbosity from your essay. Minimize the number of words, by trimming them down to a size you can manage. You only have to retain basic expressions.

You need to address content, organization logic and coherence at this stage. Your text must have moved from a writer-oriented draft, towards a finished reader oriented, work. Examine the

⁵⁴⁰See Ray & Ramsfield op. cit, p. 352.

⁵⁴¹Ibid.

⁵⁴²Ibid.

structural order of your essay by giving attention to sentence structure, transitions, paragraphing grammar and punctuation.⁵⁴³

Keep reviewing what you have written until you are satisfied with the overall flow of thought and idea expressed in the work.

10.7 SUGGESTIONS AND HINTS ON GOOD WRITING

The following general hints should be considered in every essay.

10.7.1 Introduction

First impressions are lasting impressions. This is why your opening words should be taken seriously. Your introduction prefaces your work. It is a summary of what the essay is about and the objective of writing. It also influences the attitude of the reader as to whether to accept the views expressed or not. For an introduction to be effective, it must identify subject, arouse interest and be brief. It may come by way of questions, a problem to be solved or an illustration.

Although the introduction is usually presented first, its writing may be deferred until the body of the essay has been well organized. This will allow you to know what to introduce and how to introduce it.

10.7.2 Originality

Although you may rely on the idea and works of other writers in the process of writing care should be taken not to plagiarise.⁵⁴⁴ You must endeavour to express independent views and opinion on issues. This presents your readers with a fresh perspective and stands your work out as different.

10.7.3 Clarity

When you speak face to face with a listener, you can communicate in many different ways. You can raise or lower the pitch or volume of your voice to emphasize a point or use your hands to shape out a meaning when you don't have the words to do it.⁵⁴⁵ This is very much unlike writing in which you have to communicate without facial expressions and gestures. All you can do is to speak with words and punctuations alone.⁵⁴⁶ Because you do writing exclusively alone, you must anticipate the reactions of the reader who is not there to raise questions or point out whether or not you are making yourself clear. The more grasp you have of the idea you want to express, the clearer your thoughts and the impression you are able to make on the reader.

⁵⁴³See Ray & Ramsfield, op. cit, p. 263.

⁵⁴⁴Plagiarism is the use of thoughts and ideas belonging to others without acknowledgement.

⁵⁴⁵See Heffernan & Lincoln op. cit. p. 3.

⁵⁴⁶Ibid.

10.7.4 Brevity

"This implies saying much in not so many words. You must endeavour to be concise and precise in your expressions. Verbosity and the abundance of words makes the work unwieldy, even complex. Brevity on the other hand is at a premium in legal writing. It must be achieved whenever possible but never at the expense of substance.⁵⁴⁷ Although facts and law that do not bear on the topic must be eliminated, no relevant detail should be omitted at any point in the writing process.

10.7.5 Grammatical Expression

Words are tools of trade in the legal profession. The mastery of the English language is a prerequisite in essay writing. Good writing requires a working grasp of grammar and a sound knowledge of language. You can enhance the quality and aesthetic value of your writing by choosing expressive words. Use Simile, Metaphor and Idioms with as much latitude as the situation requires to achieve your objective.⁵⁴⁸

10.7.6 Accuracy

A statement of fact must not miss the mark. In every sense and in every way, views expressed must be carefully and correctly represented. They must be devoid of understatements, exaggerations, bias and embellishments of all kinds. You need above all to be wary of guesswork, presumption and supposition in your writing⁵⁴⁹ if the reader is not to be misguided or misled.

10.7.7 Organization

Effective organization guides the reader through the text, just as a map guides a traveller through the country.⁵⁵⁰ Although not easy to achieve, organization of thoughts and ideas into a coherent whole is worth the effort. This is because a clear and logical organization distinguishes one essay from the other as to whether it is excellent or mediocre.⁵⁵¹

10.7.8 Use of Paragraphs

Effective essays are made with paragraphs, blocks of sentences that help the reader follow the stages of the writer's thought.⁵⁵² The use of paragraphs in an essay is indicative of facts and ideas that must be logically presented. You must learn both how to relate separate sentences contained

⁵⁴⁷See Ray & Ramsfield op. cit. p. 70.

⁵⁴⁸In using grammatical expressions, you must not presume to know the meaning of every word. A dictionary must be at your service to ensure that no word is taken for granted in terms of its meaning.

⁵⁴⁹Such expressions as "I think" or "It seems" may suggest uncertainty and they must be sparingly used.

⁵⁵⁰See Ray & Ramsfield op. cit, p.194

⁵⁵¹ Ibid.

⁵⁵²See Heffernan & Lincoln op. cit. p. 144.

in a paragraph and the relation between one paragraph and another where they occur more than once in your writing.⁵⁵³

10.7.9 Mechanical Accuracy

Be determined not to succumb to common mistakes that may occur in the use of tenses. Capital letters, composition, preposition and spellings are "little things" that matter in essay writing, and are reflective of the writer's attitude.⁵⁵⁴

10.7.10 Conclusion

This is the final word in every essay. It completes your task proceeding on the strength and substance of arguments advanced in the course of writing. A good conclusion points unambiguously to the writer's disposition and leaves the reader with a fair idea of the position.

It is best to have a conclusion that bears wholly on the essay so that any impression creating doubts and mis-apprehension are not created. Your conclusion may take the form of anyone or more of the following:

- (i) *The Reflective Conclusion:* Where your conclusion mirrors comment that highlight related issues and question that may require further inquiry in future, it is said to be reflective.
- (ii) *The Looking Ahead Conclusion:* Your conclusion looks ahead when it makes a prediction or sounds a note of warning on the possibility of what the case may be with the subject under discussion in future.
- (iii) *The Straight Forward Conclusion:* Here, the writer specifies that he has come to the end of the work and proceeds to make suggestions and recommendations.

10.8 ANALYSIS OF SOCIO-LEGAL ISSUES

When you set out to write, it must be with a view to making a contribution, to economic, social, political, cultural, medical, educational and environmental issues which offer opportunities for such contributions as often as they arise. An essay in legal writing is an analytical composition of issues and problems that are best examined in the light of social realities. The more important an issue is in the society⁵⁵⁵ the more the interest it generates when polemics and agitations arise on the basis of such questions. The circumstances and peculiarities of society will determine the

⁵⁵³Though not common, it is possible to have one-paragraph essay, especially, for those who are just learning to write.

⁵⁵⁴Some of the mistakes made are borne out of carelessness towards the work and indifferences to proper use of expression. If the reason for mistakes is ignorance or lack of knowledge, it calls into question the qualification of the essay 1st and the quality, of his essay.

⁵⁵⁵For example the welfare and well being of all is always an important question. This is why most Nigerians have kicked repeatedly against the upward review of prices of petroleum products.

appropriate course of action. This is how best to make law effective and meaningful. Your writing must therefore picture the socio-political and economic situation of the society if it is to make an impression.

Although you will be writing from the standpoint of a legal mind, you must be careful not to ignore other relevant considerations and possibilities as you address issues. For example, it will amount to putting "something on nothing"⁵⁵⁶ where you attempt to proffer legal solution to the menace of cultism in our institutions of higher learning if you do not have knowledge of the psychological, social, economic and political factors behind the problem. A multidimensional approach not a strictly legal solution is required to put things in perspective and this is always better.

10.9 DIVISION OF TOPIC INTO CHAPTERS, SECTIONS AND SUB- SECTIONS

Whereas an essay is described as a continuous piece of writing, it will be most difficult to follow if it is written from the beginning to the end without division into convenient parts and segments. Accordingly, a writer may break his work into chapters, sections and subsection. In doing this, simplicity, orderliness, clarity and effectiveness should be uppermost in the writer's mind. The use to which these different parts may be put in order to achieve this objective is briefly discussed below.

10.9.1 Chapters

These essentially are main divisions into which your work may be classified. They are categories into which issues that are closely related are kept and treated. If for example you are to write an essay on "Federalism in the Nigerian State," your work may be divided into chapters as follows:

- Chapter 1: Concept of Federalism
- Chapter 2: Origin and Historical Evolution of the Federal System in Nigeria
- Chapter 3: Overview and Dimensions of the Federal System under Nigerian Law.
- Chapter 4: Future and Prospect of Federalism in Nigeria.
- Chapter 5: Conclusion and Recommendations.

Although the pattern provided here may be followed, there is nothing sacrosanct about it. Therefore, no firm rule can be as to the number of chapters into which an essay is to be divided. The circumstances of the writer and the scope of work are relevant considerations in the determination of number and arrangement of chapters.

⁵⁵⁶ See Denning, M.R. in *UAC v. Mcfoy* (19620) AC.

10.9.2 Sections

Once you have divided your work into chapters, they may be further subdivided into sections of allied, closely related issues. The chapter in the example given above may be divided into sections for example Chapter 2 may be divided as follows:

Chapter 2: Origin and Historical Evolution of the Federal System in Nigeria.

2.1: The Quasi-Federal System under the McPherson Constitution of 1951.

2.2: Federalism under the Lyttleton Constitution of 1954

2.3: The Federal System under Military Rule 1966-1979

2.4: Nigerian Federalism under the 1999 Constitution

2.5: The Federal Principle and the 1999 Constitution

The division of the Chapters into sections will simplify your outline and make it easy for the reader to understand at a glance.

10.9.3 Sub-sections

With subsections an issue discussed in a section of a chapter is further subdivided into smaller units. Going back to our example the section on the federal principle and the 1999 Constitution may be subdivided into the following units of subsections.

Chapter 2.5: Federal Principle and the 1999 Constitution.

2.5.1: Division of power between Federal and State Governments.

2.5.2: Exclusive legislative powers of the Federal Government.

2.5.3: The Concurrent powers of Federal and State Governments.

2.5.4: Role of court in Conflict Resolution.

The argument as to the advantage of making use of chapters and sections in writing applies with equal force to subdivision into subsections. There is no doubt that they are essential in essay writing.

It must be noted from our examples that a marked difference exists in the numbering of chapters, sections and subsections. While a whole number (1-5) is assigned chapters, a section is given a sub-number for example 1.1, 1.2, 1.3 etc. In the case of subsection, two sub-number is assigned for instance 1.1.1, 1.1.2, 1.1.3 etc.

You have the alternative of letters or Roman figures to distinguish between a chapter, section and subsection depending on the situation. What is most essential is clarity and propriety.

As has been stated, writing is literally as good as your research and personal skills. Tenacity and close attention to details also play a part as you seek to make a good impression. Ultimately, a good writing skill empowers you to express yourself on paper for any purpose you may choose. The more you write, the better you will write. And the more different kinds of writing you do, the more you will discover what writing can do for you.⁵⁵⁷

If you pay close attention to details and follow suggestions about the processes involved in writing,⁵⁵⁸ your technique will eventually work out into a smooth process that becomes your style.⁵⁵⁹ In turn, you will make an impression that is both lasting and helpful on your reader. Although the content and quality of research matters, very few things count as much as the ability to put your thoughts and feelings into words,⁵⁶⁰ and so if you care about writing, you will continually strive to refine and develop your skills,⁵⁶¹ learning the ropes as it were, in the intricate art of writing.

10.10 QUESTIONS AND EXERCISES

- 1 Write short notes on the following:
 - (a) Descriptive essay
 - (b) Narrative essay
 - (c) Expository essay
 - (d) Argumentative essay

Hints

- It is appropriate to begin with a clear definition of an essay. This has been described as a composition of moderate length written in prose to reflect the writer's thoughts, ideas and viewpoints.

An essay may be in any of the following forms:

- (a) **Descriptive Essay:** An essay is descriptive when it provides insight into how a thing looks, feels, sounds, smells or tastes. It presents a vivid picture of the subject matter of the work, giving as much impression of it as possible.
- A fitting illustration such as the deplorable condition of a...

⁵⁵⁷See Heffernan & Lincoln op. cit. p. 662.

⁵⁵⁸The writing process incorporates pre-writing, writing, Re-writing, revising and publishing. See Ray & Ramsfield op. cit. p. 354.

⁵⁵⁹Ibid.

⁵⁶⁰See Heffernan & Lincoln, op. cit. p. 662.

⁵⁶¹Ibid.

- (b) Narrative Essay: A narrative essay traces events through the stages. In most cases, the writer seeks the preservation of the original order of events to give effect to his narration. However, he may choose to vary the order of event to achieve his goal.

- A most fitting example of a narration is the constitutional development of Nigeria from 1922 to 1999.

- (c) Expository Essay: This type of essay is designed to explain, clarify and provide information about a thing under examination. This may occur by means of examples, analogies contrasts and comparisons. The determination of the scope and operation of such concepts as separation of powers, rule of law and natural justice, will require the expository approach in essay writing.

- (d) Argumentative Essay: When a writer is called upon to take a definite stand on an issue, that is usually controversial, he must be involved in writing an argumentative essay. He must endeavor to convince his readers by advancing cogent reasons for his claims while trying to demolish the argument that may be advanced in support of the other position.

- For Example, topics such as "Death Penalty under Nigerian Law: To be or not to be" and "Privatization of Refineries in Nigeria: A Blessing or a Curse?" cannot, but, be treated in the form of Argumentative essay.

2 The Federal Ministry of Education is organizing a Seminar on "Writing and Social Development" as part of steps towards reviving writing culture among youths in Nigeria. You have been invited as a resource person to deliver a paper on "The Guiding Principles of Legal Writing" at the Seminar. Outline the content of your paper.

Hints

- You are basically required to examine the place and tenor of writing. Specifically, you are to discuss the steps to be followed while writing an essay. These are: Introduction, which provides brief background information as to what the writer, intends to achieve.
- Originality, that calls on the writer to express his own opinion(s) as opposed to reference(s) to others.
- Clarity, which implies the use of unambiguous words to ensure easy understanding.
- Brevity, which means saying much in not so many words. .
- Grammatical expression, which is the vehicle of thoughts and the beauty of writing;
- Accuracy, the touchstone and the verifier of truth. Organization, which connotes logic and sequence in writing;
- Use of paragraphs, to effect smooth transition of thoughts and ideas. Mechanical accuracy and
- Conclusion

3 Daphine, a final year student of the Faculty of Law, John Johnson University, Papilo Island has approached you for advise on steps that ought to be taken as she prepares to write and submit her long essay to the Faculty. She is particularly interested in the methods and approaches involved in essay writing.

Advice Daphine.

Hints

In advising Daphine, the following outline must be care followed:

- Where Daphine is free to do so, she is advised to c a topic is sufficiently interested in. She must concerned about to possibility of finding source information that will enable complete the work on starts.
- Following the above, Daphine must a preliminary reading that will enable her to know how to go about writing on the basis of the topic.
- Questions such as what, who, when, how, why and where must be answered to explore and possibly rethinks the topic.
- To be must effective, Daphine must identify the basic question, that is, the thrust of the essay before proceeding to formulate her research problems or thesis.
- After this, Daphine should proceed to test her idea conducting the writing, credibility, friendly colleague an possibility tests.
- This should be followed by the preparation of outline and the selection of the most useful material for the task.
- At the writing stage, Daphine must decide the number of drafts to prepare before the final one. Although no hard fast rule exists, Daphine may take the pains to prepare as many as four drafts to get the best results.
- In order to afford understanding and flow of thought, Daphine should divide the essay to be submitted to the Faulty into chapters, sections and subsections. These must be properly lettered. Headings and sub-headings must also be employed where and when appropriate.
- After observing the general hints on writing.

All of these must go into the work, if Daphine must make an impression in her essay.