Globethics Repository



Modern Nigerian Legal System

This page was generated automatically upon download from the Globethics Repository. More information on Globethics see https://www.globethics.net. Data and content policy of Globethics Repository see https://repository.globethics.net/pages/policy.

Item Type	Book
Authors	Ogbu, Osita Nnamani
Publisher	CIDJAP Press
Rights	With permission of the license/copyright holder
Download date	2026-11-08 22:50:29
Link to Item	http://hdl.handle.net/20.500.12424/166569

MODERN NIGERIAN LEGAL SYSTEM

OSITA NNAMANI OGBU
Senior Lecturer, Faculty Of Law,
Anambra State University, Uli



© Osita Nnamani Ogbu, 2007

MODERN NIGERIA LEGAL SYSTEM

ISBN: 978-8062-60-1

All rights reserved No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the copyright owner

Cover Design
Iyke Azoronye

Published by:
CIDJAP PRESS
1-3 Ikwuato Street,
Uwani, Enugu, Nigeria.
Tel: 042-66 00 122

DEDICATION

This work is dedicated to the memory of my late cousin and friend, Ikechukwu Oha.

TABLE OF CONTENTS

	Page
Foreword	i
Preface	iv
Table of Cases	vii
Table of Statutes	xxv
Table of Abbreviations	xxviii
Chapter 1	
The Nature, Meaning and Functions of Law	1
Law and Society	1
Functions of Law	8
The Meaning of Law	11
Natural Law	12
Characteristics of the Nigerian Legal System	33
Chapter 2	
Classifications of Nigerian Law	35
Chapter 3	
Sources of Nigerian Law	49
English Law	50
Nigerian Legislation	77
Nigerian Case Law	83
Customary Law	84
International Law	85
Chapter 4	
Customary Law	86
Characteristics of Customary Law	87
Ascertainment of Customary Law	92
Validity of Customary Law	106
Codification of Customary Law	126

Chapter 5	
Judicial Precedent	130
Ratio Decidendi	136
Obiter dictum	155
Distinguishing	156
The Doctrine of Judicial Precedent and the Hierarchy of Courts	158
Chapter 6	
Statutory Interpretation	173
The Literal Rule	175
The Golden Rule	179
The Mischief Rule	185
Ejusdem Generis Rule	187
Noscitur A Sociis Rule	189
Parts of Statutes and their Uses	194
Chapter 7	
The Nigerian Judiciary in Historical Perspectives	199
The Meaning of Court	202
Classifications of Courts	203
The Traditional System for Dispute Resolution	213
Historical Development of Courts in Nigeria	216
Chapter 8	
The Nigerian Judiciary Today	222
Courts in Nigeria	222
Jurisdictional Conflict Between the Federal and State High Courts	244
Tribunals	299
Judicial Personnel; appointment and tenure	302
Chapter 9	
Internal Conflict of Laws	306
Conflict Between English Law and Customary Law	306

Conflict Between Different Systems of Customary Law 316

Chapter 10

Outline of Civil Procedure 326
Parties 326
Commencement of Action 329
Service of Processes 331
Appearance 335
Pleadings 336
Preliminary Objections 341
Interlocutory Applications 347
The Undefended List Procedure 348
Order 10 Procedure 349
Judgments and Orders 359
Execution of Judgment 362

Chapter 11

Outline of Criminal Procedure 364
Modes of Instituting Criminal Proceedings 367
Processes to Compel Appearance of an Accused Person in Court 369
Charges 374
Trials generally 374

Chapter 12

The Legal Profession, Legal Aid and Advice 382
Right to Practice 383
Duties of a Lawyer 388
Professional Negligence 396
Discipline 398
Legal Education 403
Legal Aid and Advice 405
Bibliography 412
Index 415

FOREWORD

One of the happy features of Nigerian legal and forensic scholarships is that Nigerian lawyers have ventured into, and produced, well researched texts in many areas of law. Any Nigerian lawyer, like my humble self, who studied in Britain and got called to the English bar will tell you in a moment that the English legal system comprised the following areas of law – types and hierarchy of courts and administration of justice, the laws of contract and tort, equity and trusts, law of property, real and personal, law of companies and commercial law, succession, and international law – private and public. There were well-written textbooks on each of them – published mainly by Sweet and Maxwell or Butterworths. And every Nigerian called to the English Bar tried to acquire them before commencing his homeward journey. As he was usually well-received by members of his tribe, kith and kin, he could have cases in court soon after his arrival home, and could swing into active professional legal practice shortly after his arrival. As the rules of practice and procedure in our local courts derived so much from the English Supreme Court Practice (White Book) and Archbold, he would usually not suffer any embarrassment from the rules of procedure.

But after a number of years, though our received law was English law in practice as at the 1st of January 1900, the local law soon acquired a lot of accretions, mutations, and changes due to local circumstances and legislations. Our eminent scholars and jurists were prompt in reacting to these different situations. Dr. T.O. Elias, a distinguished scholar who later became the Attorney General and later the Chief Justice of Nigeria and much later a World Court Judge, published his *Groundwork of Nigerian Law* (1954) and his *Nigerian Land Law and Custom*. Professor B.O. Nwabueze wrote not only *The Nigerian Land Law* but also some five books, including *Nigerian Presidential Constitution*, in the area of constitutional law. Professor C.O. Okonkwo wrote not only his *Nigerian Criminal Law* but also was joined by other eminent

scholars and jurists, including Professor D.I.O. Ewelukwa, to produce *Introduction To Nigerian Law*. I had myself published my *Elements of Brief Writing in the Supreme Court and The Court of Appeal of Nigeria*, which is a prescribed text book by the Nigerian Law School and *Fair Hearing the Cornerstone of Our Adjudicative Process* but also made my humble contributions to many published works on aspects of law, including: *African Indigenous Laws* (U.N.N,1975) Law Development And Administration (1989), Essays In Honour of Judge Elias {in two volumes – By Martinus Publishers (Dordrecht/Boston/London), *Nigerian Essays In Jurisprudence* (M. I. J. Publishers), *Developing International Human Rights Jurisprudence* Vols. 3,4,5, and 6 (Commonwealth Secretariat & Interights). Justice Obi Okoye published his book on the Judiciary plus four excellent works on practice and procedure. It can be said that from 1954, Nigerian lawyers and jurists have written widely on many aspects of law. Obilade published his work on *The Nigerian Legal System* in 1979. Somehow reluctantly, the National Universities Commission recognized *The Nigerian Legal System* in its exercise of harmonization of curricula for Nigerian Universities in 1989.

So, apart from the *Groundwork of Nigerian Law* (Elias) *Introduction To Nigerian Law* (Okonkwo) and Obilade's *Nigerian Legal System*, much as so many books have been published on some aspects and subjects of law, not sufficient attention has been paid to a comprehensive and compendious treatment of the Nigerian Legal System. This is why I consider the work by Osita Nnamani Ogbu on *Modern Nigerian Legal System* as a treasurable desideratum. We owe so much to our received English Law. But the local accretions, mutations and changes to these since 1900 demand that we should give ample scope to our own laws to develop their own identity, even as we should not jettison the received contents of the laws.

A careful reading of the twelve chapters contained in Ogbu's *Modern Nigerian Legal System* and the subjects treated by him therein shows that it is dead on the target. After considering

the meaning of the subject-matter, he deals with the classification and then the sources of Nigerian Law. This has enabled him to give ample and deserved treatment to its place and import in our system of laws. Then he also treats other sources of our law – Nigerian Legislation, Nigerian case law and Nigerian customary law, each of which he treats in some detail. Then he considers the ancillary issues of *stare decisis*, statutory interpretation and the Nigerian Judiciary, past and present. Then he considers the vexed issue of conflict of laws. The laws of civil and criminal procedures then come next and are given their deserved treatment. Finally, he cocks it all up by considering the legal profession in Nigeria, its import, functions, position, and qualifications.

It may some times happen that a legal practitioner qualified to practice law in another commonwealth or common law country has the need to advise on, or practice, law in Nigeria. Then after he has satisfied the legal and preliminary requirements, he needs to be reasonably informed not only about the branch of law in which he is to practice, or advise on, but also the whole corpus of the Nigerian legal system. This is where the perusal of a work like that of Obilade or Ogbu which compendiates the system becomes a very useful weapon – much better than a collection of essays on different subjects in Okonkwo's work or a mere introduction in that of Elias. With my experience spread over more than forty three years in all possible situations in the legal profession, I very much commend the impressive and scholarly efforts of Mr. Ogbu in this regard to not only such a stranger but also any Nigerian who wants to inform himself on the present *Nigerian Legal System*.

Dr. Justice P. Nnaemeka-Agu
Chief the Hon. Justice Emeritus
Member National Judicial Council
Formerly Legal Consultant To The Commonwealth.

PREFACE

The National Universities Commission in 1989 sought to harmonize the curricula of all the law faculties in the nation's Universities. To this effect, the Commission published its approved Minimum Academic Standards in Law wherein it defined the minimum content of the respective law courses. Nigerian Legal System, being one of the compulsory law courses, also got the deserved attention.

Incidentally, the general works on the subject, Nigerian Legal System, were written several years before the NUC Minimum Academic Standards in Law, and there has not been any new edition of the books. These general textbooks on the subject include: *The Nigerian Legal System* by T.O. Elias (2nd edition published in 1963); *The Machinery of Justice in Nigeria* by B.O. Nwabueze (published in 1963); *The Nigerian Legal System* by A.O. Obilade (published in 1979); *Introduction to Nigerian Law* edited by C.O. Okonkwo (published in 1980). Other relevant works on aspects of the subject are: *The Sources of Nigerian Law* by A.E.W. Park (published in 1963), and *Sources of Nigerian Law* by Niki Tobi (published in 1996). Thus the only recent work on the subject, known to the author, is Justice Niki Tobi's *Sources of Nigerian Law*, which however treats only some aspects of the course.

Law is dynamic, not static. There have been changes in the law brought about by both subsequent statutory provisions and judicial decisions which make a general review of the subject of the Nigerian Legal System not only desirable but imperative.

This book is designed to initiate the reader into the rudiments of the contemporary Nigerian Legal System. It covers all the topics in the NUC approved Minimum Academic Standards in Law as regards the course. Recent judicial decisions and juridical opinions on the relevant topics are incorporated in the book and critically analyzed.

Chapter one of the book examines the nature, meaning, and functions of law. Chapter two discusses the classifications of the Nigerian law while chapter three is on the Sources of Nigerian Law. Chapter four considers in detail customary law as one of the sources of Nigerian law. Judicial precedent is the subject of Chapter five, while Chapter six is on interpretation of statutes. In Chapters seven and eight, the author examines the Nigerian Judiciary in historical perspective and elucidates the judicial process.

Chapter nine is on internal conflict of laws. Chapters ten and eleven provide an outline of civil and criminal procedures, respectively. Chapter twelve, which is the last chapter, is on the Legal Profession, Legal Aid and Advice. The author is indebted to the authors of the aforementioned books on the subject.

The first edition of this book was published in 2002. Since then a lot of changes have taken place in Nigerian law necessitating this second edition. The rule in *Smith v Selwyn* was given cursory treatment in the first edition because by then the author had taken it for granted that it was generally agreed that the rule is no longer applicable in Nigeria. However, the rule has continued to be applied in Nigeria. And the controversy over the continued application of the rule still persists. The author has therefore given the rule a more detailed critical analysis in this edition of the book.

In chapter four the author has elaborated more on the human rights criterion as one of the criteria for the evaluation of customary law. Furthermore, the author examined the pros and cons of codification of customary law. In chapter five, the author examined some recent Supreme Court decisions on the issue of finding the *ratio decidendi* of an appellate court.

There are several new Supreme Court decisions that called for a re-examination of some postulations in chapter eight of the first edition. The controversy over the extent of the jurisdiction of the Federal High Court vis-à-vis the jurisdiction of State High Courts, instead of abating, rather exacerbated. The author critically

examined the new decisions on the subject. The jurisdiction of the High Court of the Federal Capital Territory, Abuja, the National Industrial Court, and Election Tribunals, which was not considered in the first edition was examined in this edition. The Lagos State High Court (Civil Procedure) Rules 2004 blazed the trail in making far-reaching innovations in civil procedure. The Lagos state example has been followed by many other states, with some modifications. Account of the innovations was taken in chapter 10 which is on the outline of civil procedure.

A new Rules of Professional Conduct for Legal Practitioners came into effect in 2007. The provisions of the new Rules were taken into consideration in revising the aspect of chapter 12 dealing with the legal profession.

The encouragement of my former colleagues in the Law Faculty of Enugu State University of Science and Technology, Ifeanyi Okoli and K.C. Ezeugwu, deserves mention. Professors R.A.C.E. Achara, D.I.O. Ewelukwa, E. I. Nwogugu and Ernest Ojukwu, are sources of inspiration to me. I admire not only their academic excellence but their very high integrity.

Osita Nnamani Ogbu

TABLE OF CASES

A.G. Abia State & 35 Ors v A.G. Federation (2002)6 NWLR (pt. 809) 228
A.G. Abia State & 35 Ors v A.G. Federation (2002)6 NWLR (pt. 763) 228,229
A.G. Adamawa State & Ors. V A.G. Federation & 8 Ors (2005) 18 NWLR (pt. 958) 581... 228
A.G. Anambra State v A.G. Federation (1993) 9 KLR 158 197,344
A.G. Bendel v A.G. Federation (1981) 10 S.C.I. 227
A.G. Bendel State v A.G. Federation and 22 Ors (1982) 3 SCNLR 1 20,157193
A.G. Bendel State v A.G. Federation & 18 Ors (1983) 1 SCNLR 239 138,186,223
A.G. Bendel v Aideyan (1989) 4 NWLR (pt 11) 646 S.C...152,193
A.G. Eastern Nigeria v A.G. Federation (1964) 1 ALL NLR 224 226,227
A.G. Federation v A.G. Abia State and 35 Ors (2001) F.W.L.R. (pt 64) 202 223,328,341,343
A.G Federation v A.G. Imo State & 2 Ors (1982)12 S.C. 274 225
A.G. Federation v Guardian Newspapers (2001) FWLR (pt 32) 87 14
A.G. Federation v Isong (1986) 1 QLRN 75 368
A.G. for Canada v Hallet Carey Ltd. (1952) A.C. 427 at p.449 181
A.G. Ogun State v A.G. Federation (1982)3 SNCLR 166 227
A.G. Ondo State v A.G. Ekiti State (2000)2 SCNQR 990 ... 181
A.G. Ondo State v A.G. Federation (1983)2 SCNLR 269 146,175,188,212,225
A.G. Ondo State v A.G. Federation (2002)9 NWLR (pt. 772) 222 228
A.G. Oyo State v NLC (2003) 8 NWLR (pt. 821) 1 ... 242,294
A.G. v John Holt Ltd (1940) A.C. 231 68,71
A.G. v Lockwood (1842)9 M & W 378 at 398 ... 146,181
A.I.C. Ltd. v NNPC (2005) 11 NWLR (pt. 937) 563 at 589 ... 155

Ababio v Nsemfoo (1947)12 WACA 127 ... 95
Abachia v Fawehinmi (2000)6 NWLR (pt 660) 228 42,83,85145,146,147,149,155,184,193
Abaye v Ofili (1986) 1 NWLR (pt 15) 134 308
Abiola v Federal Republic of Nigeria (1998) 4 HRLR 333... 372
Achiakpa v Nduka (2001) 14 NWLR (pt 734) 623 ... 162,358
Adah v NYSC (2002) ALL FWLR (pt. 223) 1850 264
Adedibu v Adewoyin (1951) 13 WACA 191 ... 101
Adegbenro v Akintola (1963) 3 All E.R. 544... ... 146,181
Adegoke Motors Ltd v Adesanya (1989)3 NWLR (pt 109) 250 162,233,333,334
Adegoke Motors Ltd v Babatunde Odesanya & Ors CA/L/218/87 130
Adeline Njideka Megwalu v Justin Obidi Megwalu (1996)2 NWLR (pt 428) 104 C.A. 164
Ademolekun v The Council of the University of Ibadan (1958) NMLR 253 147,182
Adeniji v Adeniji (1972)1 All NLR 298 106
Adenuga & Ors v Odumeru & Ors (2001)5 NSCQR 148 at 160 61
Adesanoye v Adewole (2000)2 SCNQR 834 146,181
Adesanya v The President (1981) S.C. 112 142,342
Adeseye v Taiwo (1956)1 FSC 84 101
Adetoun Oladeji (Nig.) Ltdv Nigerian Breweries Plc. (2007)2 NWLR (pt 1027) 415 157,171
Adewunmi v Plastex Nig. Ltd. (1986) NSCC 852 ... 322
Adeyemi v Opeyori (1976)9 and 10 SC 31 238
Adio v A.G. Oyo State & Ors (2000)2 SCNQR 752 at 782-783 319
Adisa v Oyinwola (2000) 10 NWLR 116 ... 156,161,240,281
Afegbai v A.G. Edo State & Anor (2001) 7 NSCQR 549 at 568. 359
Afribank Plc. V Kokatex Commerce General (Nig.) Ltd (2001) 8 NWLR (pt. 714) 87 254
Afrotech Technical Services Nigerian Limited v M.I.A. & Sons Ltd (2000)15 NWLR (pt 692) 730 S.C. ... 77
Agbabiaka v Saibu (1998)10 NWLR (pt 571) 534 ... 105

Agbai v Okagbue (1991)7 NWLR (pt 204) 391 86,98,105,119,137,138
Ahmed v COP (1971) N.M.L.R. 376
Ajayi v White (1946) 18 NKR 41 310
Ajibola v Ajadi (2004) ALL FWLR 1273 at 1289 139
Akintola v Solano (1986) NWLR (pt 24) 598 339
Akpalakpa v Igbaibo (1996)8 NWLR (pt 468) 537 ... 118
Akpan v Henshaw (1932)11 NLR 47 109
Akpapuna v Nzeka (1983)2 SCNLR 1 358
Aku v Aneku (1991)8 NWLR (pt 209) 280 86
Alade v Alemuloke & 2 Ors (1988)2 S.C. (pt.1) p.1 at p.10 172,209
Alajemba Uke & Anor v Albert Iro (2001)1 NWLR (pt 723)196 117,120
Alake v Pratt (1955)15 WACA 20 104,105
Alao v A.C.B. (2002)2 SCNQR 1067 344
Alawode v Semoh (1959) 4 F.S.C. 27 266,331
Alhaji Sheu Adbul Gafar v The Government of Kwara State & 2 Ors (2007) 4 NWLR (pt. 1024) 375 271
Aliu Bello v A.G. Oyo (1986) 5 NWLR 528; (1986) 12 S.C. 28,40,57,84
Amachree v Kalio (1914)2 N.L.R 108 125
American International Insurance Co. v Ceekay Traders Ltd (1981) 5 S.C. 81 160
Amodu Tijani v Southern Nigeria Secretary (1921)2 A.C. 399 89
Amokeodo v I.G.P. & 3 Ors (1996) 6 NWLR (pt 607)) 467 S.C. 144 144,178
Angu v Attah (196015 WACA 20 104
Aoko v Fagbemi (1963)1 All NLR 400 42,292
Apatira v Akanke (1944)17 N.L.R. 149 315
Aqua Ltd v Ondo State Sports Council (1988) 4 NWLR (pt. 91)625 190,232
Archibong v Archibong 8 N.L.R. 117 327
Aremu v Board of Customs and Excise (1965) NWLR 258 at 262 167
Ariori v Elemo (1983)1 SCNLR1 42
Arinze v F.B.N. Ltd (2004) 12 NWLR (pt.888)663 ... 141
Aro v Lagos Island Local Government Council (2001) 32

WRN 72 54
Asiata v Goncallo (1900)1 N.L.R. 41 322
Atiku Abunbakar v A.G. Federation (2007) 6 NWLR (pt. 1031) 626 298
Attorney General of Lagos State v EKO (2007) 18 NWLR (pt. 1011) 378 255
Attorney General v John Holt & Co. (1910) NLR 1 ... 70
Attorney General v Dawodu (1995) NWLR (pt 80) 712.....36,38,42
Awolowo & Ors v Federal Minister of Internal Affairs & Anor (1966) All NLR 178 147,181
Awolowo v Shagari (1979)FNLR vol 2 P.60 at 82 140,142,174,175,177,179,195
B. Zee Bee Hotels Ltd v Allied Bank (Nig) Ltd (1996) 8 NWLR (pt 465) 176 C.A. 254
Babajide v AISA (1966) 1 ALL NLR 254 362
Baćejo v Minister of Education (1990) 2 WBRN 48 C.A. 342
Baker v Bolton (1808) 1 Camp. 493 40
Balogun v Labiran (1989)3 NWLR (pt 80) 66 ... 98
Bamaiyi v The State & 4 Others (2001)6 NSCQR Vol.6 (pt 1)156 373
Becke v Smith (1836)12 M & W 199 144,179
Braithwaite and Anor v Folarin (1938) 4 W.A.C.A. 76 70
Broad Bank of Nig. Ltd. V S.Olayiwola & Sons Ltd. & Anor (2005) 3 NWLR (pt. 912) 434 334
Bronik Motors Ltd v Wema Bank Ltd (1983) 1 SCNLR 144,153,160 296...154,155,163,178,188,190,191,200 174,196,200,201,212,244,248,249,267 214
Bucknor-Mclean v Inlaks Ltd (1980) 8-11 S.C. 11 ... 160
Cardoso v Daniel (1986) 2 NWLR (pt. 20) 1 171
Cental Asbestos Co. Ltd. V Dodd (1971) 2 All ER 135 .. 151,152
C.C.B. (Nig) Ltd PLC v Okpala (1997)8 NWLR (pt 578) 673 362
C.G.G. (Nig.) Ltd v Ogu (2005)8 NWLR (pt. 927)366 255
Chief Adam v Duke (1927) 8 NLR 88 71
Chief John Chukwu & Ors v N.C. Ezulike (1986)5 NWLR (pt 45) p.892 160
Chief Ogbu & Ors v Chief Ogboru Urom (1984) 4 S.C. 1 160

Chief Young Dede v The African Association (1910) 1 NLR 69
Chief Mene Kenon & ors v Chief Albert Takan & 5 ors (2001) 14 NWLR (pt. 732) 45 at 89 156
Chime v Chime (2001) 5 NSCQR 275... 320
Chukwuma v Shell Petroleum Development Company of Nigeria Limited (1993) 4 NWLR (pt. 289) 512 150
Harper & ors v National Coal Board (1974) 2 ALL ER 441 ... 151
Clark and Anor v The State (1986)4 NWLR (pt 35) 381 72
Clayton v Kearsey (1935) 79 SJI 180 328
Clement v Iwuanyanwu (1989)3 NWLR 54 130,140
Coker v Animashawun (1960) L.L.R. 71 167
Cole v Akinyele (1960)15 WACA 20 104,122
Cole v Cole (1935) 12 N.L.R. 31 321
Coleshill and District Investment & Co. Ltd v Minister of Housing and Local Government & Anor (1968)1 W.L.R. 600 at 605 154,189
Commissioner for Finance & Anor v Ukpong (2000)4 NWLR (pt 656) 363 161,197
Comptel Intl. SPA v Dexson Ltd (1996)7 NWLR (pt 459) 170 C.A. 132
Coop Development Bank Plc v Joe Golday Co. (2000)4 NWLR (pt. 688) p. 506 at 548 – 549 254
Cotia Commercio v Sanusi Bros Ltd (2000) 2 SCNQR 1515 350
Dalhatu v Turaki (2003) 42 WRN 15 at 43 171
Dang Pam v Sale Dang Gwom (2000)1 WRN 51 at 58 87,278
Danmole v Dawodu (1958)3 F.S.C. 46 106
Department of Customs & Excise v Barau (1982)10 S.C. 48 147,181
Donoghue v Stephenson (1932) A.C. 562 84
Doherty v Doherty (1968) NMLR 241 330
Dr. M.T.A. Liman v Alhaji Shehu Mohammed (1999) 9 NWLR (pt 617) 116 64
Dr. Okoroma v Chief Christian Uba (1999) 1 NWLR (pt. 587)359 269,270
Dyktrade Ltd v Omnia Nig. Ltd (2000) 3 NSCQR 155 61
Earl of Oxford Case (1615) 63
Ededem Archibong v Ntoe Asim Ita 162

Edet v Essien (1932)11 N.L.R. 47 110
Edokpolor v Idehen (1961) WNLR 11 96
Egbe v Adefarasin (1985)1 NWLR (pt 3) 549 at 563... 168,205,341,345
Egbo v Laguma (1988) 3 NWLR (pt 80) 109 ... 195,243
Ehigie v Ehigie (1961) 1 All NLR 842 87,94
Ekang v State (2001) 11 NWLR (pt 723) 1 374
Eke v Okwaranyia (2000)6 NSCQR 239 358,359
Ekem v Nerba (1947) 12 W.A.C.A. 258 318
Ekpe v M.N. Dev. Corp (1967) NMLR 407 357
Elijah Idise & 5 Ors v Williams International Limited (1995)1 NWLR (pt 370) 142 147
Emegokwe v Okadigbo (1973) 4 S.C.113 338
Emeka Nwana v Federal Capital Development authority & 5 ors (2004) All FWLR 1243 149
Eshugbayi Eleko v Government of Nigeria (1931) A.C. 662 88,109
Esiago v University of Calabar (2004) All FWLR (pt. 203) 381 141
Eugene Meribe v Joshua Egwu (1976)6 ECSLR 208 ... 114
Eze v Republic (1987) 1 NWLR (pt. 51) 506... ... 249
Ezomo v Oyakhire (1985) 2 S.C. 260 162
F.B.N. Ltd v Owie (1997) NWLR (pt 484) 744 C.A.
Falaju v Amos (1983) 2 S.C. 209 377
Falobi v Falobi (1976) 9 10 S.C.1 348
Fasakin Foods (Nig.) Ltd v Sho sanya (2006)10 NWLR (pt. 987) 126 272
Fawehinmi v NBA (No.1) (1989) 2 NWLR (pt 105) 494 261,318,319,331,326
Fawehinmi v NBA (No.2) (1989)2 NWLR (pt 105) 558 261,263
FDB Financial Services Ltd & 6 ors v Ambassador O.O. Adesola & 2 Ors (2000) 8 NWLR (pt 668) 170 C.A. 66
Federal Civil Service Commission & 2 ors v J.O. Laoye (1989) NWLR (pt. 106) 652 at 702 ... ... 34, 161,183,192,197
Federal Minister of Internal Affairs v Shugaba (1982) 3 NCLR 915 199,214,247,268

Federal Mortgage Bank of Nigeria v Nigeria Deposit Insurance Corporation (1992) 2 NWLR (pt 591) 333 S.C. 253,254,266
Federal Mortgage Bank of Nig,. V Olloh (1997) 4 NWLR (pt. 498) 192 C.A. 258
Federal Republic of Nigeria v George Osahon (2006) 5 NWLR (pt. 973) 365
Felix Olajumo Lawal v Edmund A.E. Ejidike & Anor (1997)2 NWLR (pt 487) 319 C.A. 68,72,73
Fijabi v Odumola (1955-56) WRNLR 13 94
Fisher v Raven (1964) A.C. 210 159
F.O.M. Atake v Chief N.S. Afejuku (1994) 9 NWLR (pt 368) 379 318
Folami & 3 Ors v Cole & 2 Ors (1990) 2 NWLR (pt 133) ... 105
Gambo v Tukuji (1997) 10 NWLR (pt 526) 591 275,290,292
Garba v Dogon Yaro (1991)1 NWLR (pt 165) 102 275
Garba v University of Maiduguri (1986) 4 NWLR (pt. 34) 162... 141
General Electric Company v Harry Ayode Akande & 5 Ors (1999) 1 NWLR (pt.588) 532 C.A. 161
Ghamson & Ors v Wobill (1947) 12 W.A.C.A. 181 317,319,320
Giwa v Erinmilokun (1961)1 All NLR 294 104
Giwa Amu v Dikpe Olu (1968) MNLR 59 332
Global Transport Oceanico S.A. & Anor v Free Enterprises Nig. Ltd. (2001) 5 SCQLR 487 at 506 115,319
Green v Green (1987)NWLR (pt. 61)480 328
Green v Owo (1936) 13 N.L.R.43 313
Gregory Obi Ude v Clement Nwara (1993) 2 NWLR (pt 278) 638 68,70,121
Griffin v Talabi (1948) 12 W.A.C. 371 314
Guardian Newspapers Ltd v A.G. Federation (1995) 5 NWLR (pt 398) 703 at 735-736 15,19
Guri v Hadejia Native Authority (1959)4 F.S.C.44 ... 101,109
Haco Limited v Udeh (1959) NNLR 61 33,40
Haji Hamma Maishanu & Anor v Isa Ardo Manu & Anor. (2007)7 NWLR (pt. 1032) 42 277
Harper & ors v National Coal Board (1974) 2 ALL ER 441 ... 151

Haruna v Ladende (1987) NWLR (pt 67) 941 ... 361
Henshaw v Henshaw (1927)5 NLR 77 103
Heydon's Case (1584)3 Co. Rep. 76 185
Huddart Parker & Co. Proprietary Ltd v Moorehead (1909) 8 C.L.R. 330 at 383 163,200
Ibekwe v Pearce (1960) NWLR 12 40
Ibeziako v COP (1963) 1 All NLR 378
Ibidapo v Lufthansa Airlines (1997) 4 NWLR (pt 498)124 51,52,82
Ibrahim v Barde (1996)9 NWLR (pt 474)513 ... 106,101
Ibrahim v State (2979) 3 LRN 110 376
IBWA Ltd v Imano (Nig) Ltd (1988) 3 NWLR 633..144,151,176,186
ICAN v Federation (2003) 42 NRN 49 136
Idehen v Idehen (1991) 6 NWLR (pt 198) 382 141,150,156,176,184,185,192
Idun'un & Ors v Okumagba & Ors (1976) 9-10 S.C. 220 101,162
Ifezue v Mbadugha (1984)1 SCNLR 427... ... 27,160,186
Ige v Olunloye (1984) 1 SCNCR 158 at 165 ... 147
IGP v Kamara (1934) 2 WACA 185 71
IGP v Marke (1957) 2 F.S.C.5 378
I.G.P. v Ojo (1958) W.N.L.R. 161 167
Ihenacho v Uzochukwu (1997) 2 KLR 169,206
Ikpeazu v A.C.B. Ltd. (1965) All NLR 374 329
Inah v Ukei (2002)9 NWLR (pt. 773) p. 563 269
Jack v University of Agriculture, Makurdi (2004)5 NWLR (pt. 865) 208 265,271
Jalo Isamiya v Bauchi N.A. (1957) NRNLR,73 at pp.82-83 161
Jammal Limited v MISR (Nig) Ltd (1972) 4 S.C. 79 361
Jammal Steel Structures Ltd v A.C.B. Ltd (1973)2 S.C.77 ... ...152,153,188,190 155,198,205,246
Jov v Dom (2001) FWLR (pt 62) 2026 105
Kalango v Dokubo (2003)15 NWLR 32 295
Kalu Anya v A.G. Borno Suit No.FCA/K/141/82 ... 304
Kimdey and Ors v Military Governor of Plateau State (1988)2 NWLR (pt 77) 445 87,89
Kodieh v Affram (1930) 12 WACA 109

Koney v Union Trading Co. Ltd (1934)2 W.A.C.A. 188 310
Kossen (Nig) Ltd & Anor v Savannah Bank of Nig. Ltd. (1995)12 SCNJ 29 336
Kotoye v Central Bank of Nigeria (2000) 16 W.R.N. 71 61,347
Kugbai v Odunjo (1926) 7 N.L.R. 51 167
Kuti v A.G. Federation (1985)8 NWLR 623 13
L.P.D.C. v Fawehinmi (1985) 2 NWLR (pt 7) 300 299,300
Labiyi v Anretiola (1992)6 NWLR (pt 370) 142 ... 83
Lakanmi v A.G. (West) (1971) U.I.L.R. 28,171,181
Lasisi Fadare v A.G. Oyo 281,347
Labinjo v Abake (1924) 5 N.L.R. 33... 72,247,312
Laoye v Oyetunde (1934) A.C. 170 109
Lariande v Afikpo (1940)6 WACA 108 104
Lawal v Younan (1961) All NLR 245 70,75
Lewis v Bankole (1908)1 NCR 81 88,89,107
London Street Tramways Co. v L.C.C. 1898 A.C. 375 159
Macaulay v NAL Merchant Bank Ltd (1990) 4 NWLR (pt) 283 349
Madukolu & Ors v Nkemdilim & Ors (1962) All NLR 587 344
Magor & St. Mellons R.D.C. v Newport Corpn (1952) A.C. 189... 139,145,146,173,180,181
Maida v Modu (2000) 4 NWLR (pt 651)1 C.A. 275,290
Makwe v Nwukor (2001)7 NSCQR 435 337,338
Mandara v A.G. Federation (1984)1 SCNLR 311 ...174,201,212,248
Mariyama v Sadiku Ejo (1961) N.R.N.L.R. 81 ... 321
Menakaya v Menakaya (2001)7 NSCQR 685 at 732 ... 360
Meenakshi V Manmandi (India) 1915 mad 63,67 col. 1 ... 123
Miliangos v George Frank (Textiles) Ltd (1975)3 W.L.R. 758 161
Miller v Seare (1777)2 WMBI 1141 at 1145 167,205
Military Administrator of Benue State v Abayilo (2001) FWLR (pt 45) 607 256
Military Administrator of Kwara State & 4 Ors v Lafiagi (1998)7 NWLR (pt 557)202 C.A. ... 256

Military Governor of Imo State & Anor v Chief B.A.E. Nwauwa (1997) 2 NWLR (pt. 490) 675 141
Mohammed v State (2007) NWLR (pt. 1032)152 378
Mohammed Mubarak Ali v CBN (1997)4 NWLR (pt 498)192 C.A. 259
Montriou v Jeffreys (1825) C & P.113 at 116 ... 327
Muninga v Muninga (1997)11 NWLR (pt 527)1 ... 275,290,292
Mojekwu v Mojekwu (1997)7 NWLR (pt 512) 283 ... 114,117
Moujekwu v Ejikeme (2001)1 CHR 179 ... 107,108,112,118,120
Mojekwu v Iwuchukwu (2004) 1 NWLR (pt. 883) 196 114,107,109,322
M.S.C. Ezemba v S.O. Ibeneme & Anor (2004) ALL F.W.L.R 1786 337
Myres v Elman (1940) A.C. 282 at 307 323
Nafiu Rabiu v The State (1980) 2 NCR 117 170,181,183
Nasr v Bouari (1969) 1 All NCR 427 153,189
National Orthopaedic Hospital Board & Anor v Godfrey Ajogwu (2002)12 NWLR (pt 682) 626 C.A. 257
NDIC v FMB (9197) 2 NWLR (pt 490) 735 253,262
Ndibe v Ndibe (1998) 5 NWLR (pt. 551) 632 at 648 ... 36,39,42
Ndili v Akinsumade (2000) 8 NWLR (pt. 668) 306 ... 171
Nelson v Nelson (1959) NRNLR 39 310
NEPA V Edegbenro (2002)18 NWLR (pt. 798)79 263,265,266,267
NEPA v Onah (1997)1 NWLR (pt 484) 680 333
Newton v Cammel Laird & Co. 152
Ngwo & Ors v Monye (1970)1 ANLR 9 160
Nigerian Industrial Development Bank Ltd v Fembol (Nig) Ltd. (1997)2 NWLR (pt 489) 543 C.A. 253,257
Nishizawa v S.M. Jethwani Ltd (1984) 12 S.C. 234 ... 351
Nkuma v Odili (2006)6 NWLR (pt. 977)587 255
Nkwocha v Governor of Anambra State (1984)1 SCNLR 634 143,177
Nneji v Chukwu (1998)8 NWLR (pt.184) 191,233
Noaeyo v Ogunnaya (1977)1 S.C. 11 196
Nsemfoo v Ababio (1947)12 W.A.C.A. 127 93
NV. Scheep v MV S. Araz (2002)15 NWLR (pt. 691)622 ... 260

Nwabueze v Okoye (1988)4 NWLR (pt 91) 664 322,333
Nwafia v Ububa (1966) NWLR 219 238
Nwako v Governor of Rivers State (1989)2 NWLR 470 161
Nwangwu v Ukachukwu (2000) 6 NWLR (pt. 662) 685 163
Nwobodo v Onoh (1984) 1 SCNLR 1; (1983)10 S.C.65....27,195,243
Nwosu v Imo State Environmental Sanitation Authority (1990)2 NWLR (pt. 135)688 at 723 193
Nzekwu & Ors v Nzekwu & Ors (1989)2 NWLR (pt 104) 373 S.C. 105,117
Obeya Memorial Specialist Hospital & Anor v A.G. Federation & Anor (1987)2 NSCC 961 61
Obimiami Brick & Stone Nig Ltd v ACB (1992)3 NWLR 260 161,198
Ode v Trustees of Ibadan Diocese (1966)1 All NLR 28 ... 358
Odofin & Anor v Oni (2001)5 NSCQR 67 282,284
Odua Investment Co. Ltd v Talabi (1997)20 NWLR (pt 523) 333
Odufuye v Fatoke (1977)4 S.C. 11 97
Odusete v Odusete (1971) 1 ALL NLR 219SC ... 136
Oduola v Coker (1981)5 S.C. 197 357
Ogbonna v A.G. Imo State (1992) 1 NWLR (pt 220) 657... 159,195,341
Ogbuinyinya & Ors v Okudo & Ors (1979)6-9 S.C.32... 156,191
Ogele v Nuhu (1997) 10 NWLR (pt 523) 109 at 123...170,224,208,282
Oguigo v Oguigo (1999)14 NWLR (pt 638)283 ... 88
Ogunlowo v Ogundare (1993) 7 NWLR (pt 307) 610 C.A. ... 84,141,176
Ohuka v The State (1988) 1 NWLR (pt 72) 539 27,147,157,182,192
Oil Mineral Producing Area Development Commission (OMPADEC) & 2 Ors v Wonodic C. Ajoku (2001)8 NWLR (pt. 715)379 C.A. 211,259
Ojikutu v A.C.B. 1968 1 All NLR 40 33
Ojisua v Aiyebelehin (2001) 11 NWLR (pt 723) p.44 at 53 ... ... 86,87,88 277,297
Ojokolomba v Alamu (1987) 3 NWLR (pt. 61) 377 ... 13
Okafor v Igbo (1991) 8 NWLR (pt 210) at 47 ... 33
Oke v Odolofin (1961) W.N.L.R. 151 16
Okegbe & Ors v Chikere & Ors (2000) 3 NSCQR 191,286,23

223 at 268 355,357,358
Okenwa v Okenwa Suit No. E/7D/2001 Ruling Delivered on 12/2/2003 238
Oko v Ntukidem (1993)2 NWLR (pt 274) 124 S.C. ... 105
Okoduwa v State (1998) 1 ACLR 319 at 344 ... 33
Okolie v Ibo (1958) N.R.N.L.R. 89 247,249
Okonu Oil Palm Co. Ltd. V Iserhienrhien (2001)6 NWLR 660 at 668 266
Okon v The State (1988) 1 NWLR (pt. 77) 172 ... 170,377
Okonjo v Council of Legal Education (1979) Digest of Appeal Cases 28 316
Okonkwo v Okagbue (1994)9 NWLR (pt 368) 301 ... 99,100,101 107,109,111
Okolie v Ibo (1958) N.R.N.L.R. 89 313,314
Okorie v Onyejuluwa (2000)2 WRN 114 173,211
Okoya v Santilli (1990)2 NWLR (pt 130) 172 ... 362
Okpaloka v Umeh (1976) 9-10 S.C. 269 358
Okpe Jacob Oyeyikpo v Chief Oyinloye (1987)1 NWLR (pt.50) p.356 129
Olagbemiro v Ajagungbade III (1990)3 NWLR (pt 136)34 93
Olawole v Attorney General (1971)1 All NLR 313 ... 338
Olowu & 2 Ors v Olowu & Anor (1985)3 NWLR (pt 13) 372 S.C. 316,317,319,321
Omoboriowo v Ajasin (1983)10 S.C. 196 25
Omodion v Fasoro (1960) NWLR 27 238
Omosowon v Chiedozie (1998)9 NWLR (pt. 566) 477 263
Ona & Anor v Alhaji Diga Romani Atenda (2000)5 NWLR (pt 656) 244 C.A. ... 141,159,160,176,195,196
Onagoruwa v IGP (1991)5 NWLR (pt 193)593 C.A. ... 65
Onuorah v K.R.P.C. (Ltd.) (2005)6 NWLR (pt. 921)392 ... 263,265
Onwuchekwa v N.D.I.C. (2002)5 NWLR (pt. 760) 371 at 392 ... 187
Onwuka v Ediala (1989)1 NWLR (pt 96) 186 ... 130,131
Orizu v Anyaegbunam (1978)5 S.C. 21 337
Oshodi & 2 Ors v Eyifunmi (2000)3 NSCQR 320 at 377 80,125
Osuagwu v Soldier (1959) N.R.N.L.R.39 324
Oyefelu v Durosinmi (2001)7 NSCQR 67 91
Oyewunmi v Ogunesan (1990)3 NWLR (pt 137)137 ... 78,80
Owoniyi v Omotosho (1961) All NLR 304 79

Oyeyipo v Oyinloye (1987)1 NWLR (pt 50)356 ... 129,233
Paul Odi & Anor v Gbaniyi Osafile & Anor (1985)1 S.C. 37... 129
Peter Onwumelu v Ezeanya Duru (1997)10 NWLR (pt 525) 377 130,131
Peterside v I.M.B. (Nig) Ltd (1993) 2 NWLR (pt 278) 712 C.A. 340
Plateau State of Nig. & Anor v Attorney General of the Federation & Anor. (2006)3 NWLR (pt. 967) 346 229,230
Police Authority of Huddersfield v Watson (1947) K.B. 842 133
Progress Bank of Nigeria & Anor v O.K. Contact Point Holdings Ltd (2001)32 W.R.N. 109 349
R. v Abuah (1963)1 All NLR 279 330
R v Bangaza (1949) 2 K.B: 481... 176
R. v City of London Court Judge (1892)1 Q.B. 273 at p.290..... 146,181
R. v Coker (1927)8 NLR 7 59
R. v Ilorin N.A. Ex Parte Aremu (1950)2 N.L.R. 44 ... 322
R. v Northumberland Compensation Appeal Tribunal, ex P. Shaw (1952)1 K.B. 338 166,170,204,208
R. v Sagoe (1973) All 290 330
R. v Sedgley Inhabitants (1831)3 B and Ad 65 ... 165,191
R v St. Edmundsbury (Chancellor) (1947)2 A.E.R 170,172.. 167,204
R. v Taylor (1950)2 K.B. 368 132
R. v Uzodinma (1982)1 NCR 27 306
Re-Abuah (1973) All NLR 165 330
Re-Adedevoh (1951)13 WACA 304 109,111
Re-Applicants for Licence Case 143 N.C.I. 21 ... 316
Re-Estate of Sholu (1932)11 NLR 37 60
Re-Haper v N.C.B. (1974)Q.B.614 121
Re-Public Lands Ordinance, Lawan Bole, Claimant Ex parte Joseph (1910) NLR 1 60,61
Re-Wykes (1961) Ch.229 at 242 159
Rex v Electricity Commissioners (1924) 1 K.B. 171 ... 203,205
Ribeiro v Chahin (1954)14 WCA 476 62
Rondel v Worsley (1966)3 All E.R. 657 320,321,327
Rossek v A.C.B. (1993)8 NWLR (pt 312) 382 ... 129
Rotibi v Savage (1944)17 N.L.R.77 109,248,314

Rufai v Igbirra N.A. (1957) NRLR 178 99
Salau v Aderibigbe (1963) W.N.L.R.80 315
Salf Alli v Sydney Mitchelol & Co. (1980) A.C. ... 328
Santos v Okosi Industries Ltd & Anor (1942)8 WACA 89 94
Sanusi Aiyeriyina Alade v Olalere Akanji Alemuloke & 2 Ors (1988)2 SC 191,234
Savage v Mcfoy (1909) Ren 504 312
Savannah Bank of Nigeria Ltd v Pan Atlantic Shipping & Transport Agencies Ltd & Anor (1987)1 SC 1981 94,237,248,263
Schroder v Major (1989)2 NWLR (pt 101) S.C. 157,193
Seaford Court Estates Ltd v Asher (1949)2 K.B. 481 145,174,179,180
Senate of the National Assembly v Tony Momoh ... 268
Shell Co. of Australia v Federal Commissioner of Taxation (1931) A.C. 275 at 295 and 297 163,164,165,200,202,203
Shitta-Bey v A.G. Federation & Anor (1998)7 SCNJ 264 at 266 345
Skenconsult (Nig) Ltd. v Ukey (1981)1 S.C. 6 ... 129,268,269,333
Smith v Selwyn (1914)3 k.B. 98 33
Sokoto State Govt. & 2 Ors v Kamdex Nigeria Ltd. (2007)7 NWLR (pt. 1034) 234
Solomon v Ogbodo (1974)4 ECSLR 457 106
State v Commissioner of Police, A.G. Oyo State and DPP, Oyo State (1982)1 NCR 209 365
State v Gwonto (1983) 1 SCNLR 142 365
State v S.A. Ilori (1983)1 S.C.N.L.R. 94 365
Stowell v Lordzouch (1569) 1 Plowd 369 195
Suberu v Sunmonu (1957)2 FSC 92
Surakatu v Nigerian Housing Development Society (1981) 4 S.C. 26 128
Tapa v Kuka 18 NLR 5. 316,319
Temile v Awani (2001) FWLR (pt 62) 1937 91
The Norfolk Peerage Case (1907) A.C. 10 114
The State v NTN Pty and NBN Ltd (1988) CLB 43 ... 162,199
Thomas v Olufosoye (1986)1 NWLR (pt 18)669 S.C. 342
Thompson v Goold & Co. (1919) A.C. 409 at ... 146,181,185
Tony Momoh v The Senate (1983)4 NCLR 269 ... 247

Trans Bridge Co. Ltd. v Survey International Ltd (1986)4 NWLR (pt 37) 576 S .C. 54
Tukur v Government of Gongola State (1989) 4 NWLR (pt 117) 517 268,272,365
UAC (Tech) Ltd v Anglo-Canadian Cement Ltd (1966) NMLR 349 ... ... ,349
UBN v Ozigi (1994)3 NWLR (pt 333) 142,176
Udechukwu v Okwuka (1956) 1 F.S.C. 70 339
Udoh v Orthopaedic Hospital Management Board (1993) 7 NWLR 304 156,191
Ugwu & Anor v Agbo (1977)10 S.C. 27 328
Ukpai v Okoro (1983) 2 SCNLR 380 at 390 195,243
Umukoro v NPA (1997) 4 NWLR (pt 502) 656 338,343,345
Unilag v Olaniyan (1985) 1 NWLR (pt 15) p.156 ... 129
United Engineering Worker' Union v Deanayam (1967)3 WLR 451 at 419 201
University of Abuja v Ologe (1996)4 NWLR (pt. 445) 706 257
Usman v Kareem (1995)2 NWLR (pt 379) 537 ... 87,290
Usman Waziri v Musa Ugye & Ors (1977) NNLR 129 87
UTC (Nig) Ltd v Pamotei (1989)2 NWLR (pt 103) 244 ... 349
Vaacher Ltd v London Society 1913 A.C. 107,128...159,160,195,196
Veritas Insurance Company Ltd v City Trust Investment (1993)2 NWLR (pt 281) 349... ... 33
Vestry v Inland Revenue Commissioners (1979) 3 WLR 915 128
Virginia v Tennesse 148 US 503 155,190
Vulcan Gases Ltd v Gesellschaft Furn Industry (2001) 6 NSCQR 481 191,233
Western Steel Works Ltd. & Anor v Iron & Steel Workers Union of Nig. & Anor. (1987)1 NWLR (pt. 49)284 294
Williams v Akintunde (1995) 3 NWLR (pt.381) p.101 324
Wilson v A.G. Bendel State (1985) 1 NWLR (pt 4) 572 ... 157,193
Wiri v Wuche (1980) 1-2 S.C.1 339
Yaktor v Governor of Plateau State (1997)4 NWLR (pt 498) 216 78,108,308
Yar Adua v Baida (1999) 3 NWLR (pt. 231) 638 336
Yesufu v State (1972) 12 S.C. 143 376

Young and Another v Abina and others (1940) 6 WACA 180 60,64,65
Young v Bristol Aeroplane Co. Ltd. (1944) K.B. 718... 131,132
Yusuf v Egbe (1987) 2 NWLR (pt 28) p.265 129
Yusuf v Egbe (1987) 2 NWLR (pt 56) p.341... ... 157,193
Yusuf v Okhia (1976)6 E.L.S.L.R. 104,113

TABLE OF STATUTES

Admiralty Decree No. 59 1991 – 260 7) 260
African Charter on Human & People's Right (Article 7) 42
Allocation of Revenue (Ahelition of Dichetomy etc) Act 2004..... 228
Area Court Edict 1967 s.28..... 375
Area Court Edicts of different States of Northern Nigeria s.28..... 324
Area Court Law 1967 of Northern Nigeria S.20(1) (a) 324
Area Court Law 1967 s.21..... 96, 324
Area Courts Law 1968 s.21(2)..... 322
Area Courts Edict (No.4) 1968 of Benue Plateau State s.3(2)..... 284
Area Court Edict (No. 4) Kwara State 1967 284
Banker's Books Evidence Act, 1879..... 75
British Companies Act 1900..... 72
Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953..... 52
Children and Young Persons Ordinance 1943..... 285
Colonial Laws Validity Act 1865... 51
Constitution (Amendment) Decree (No.2) 1976..... 234
Constitution of Nigeria, 1963, s.43..... 226
Constitution of Nigeria 1979.....
S.6 212,248
S.6(6)..... 38
S.33(1).....268,300
S.38(1) 247,269
S.39(2) 120
S.40 269
S.42..... 268
S.42(1) 269,271
S.42(2)..... 248
S.42(3)..... 268
S.212(1) 225,226
S.228..... 245
S.230...230,237,248,249,250
212 253,253,254,
.....258,259,262
S.236... 38, 210,240,294
S.240..... 274
S.242..... 275
S.251 237
S.256(2) 388
S.258(1)..... 28
S.274 52
S.277 248,259,274
Constitution of Nigeria 1999.....
Chapter II .....20 Item 23, Pt 1, second

schedule ... .93
S.1 20
S.1(3).... 243
S.4..... ... .291
S.6 291
S.6(1) 211
S.6(2) 211
6(3) & (5).....207,293
S.6(4) 292
S.6(6)(a) 242,209
S.6(6)(d) 243
S.12(1) 85
S.17..... 307
S.25 309
S.34 381
S.35(5)(a) 372
S.35(7) 372
S.36..... 374,375
S.36(1)..... 42
S.36(2).....300
S.36(3).....355
S.36(6)(b)..... 318
S.36(6)(c). 306
S.36(9).....292,42
S.38 291
S.42..... 247
S.42(3) 123
S.46..... 267
S.150(2) 386
S.162(2) 223
S.174(1).....365
S.188(10) 242
S.195(2) 386
S.197(1) 303
S.214 27
S 228..... 245
S.230..... 223,245,263
S.232(1) 187
S.232(2) 231,233
S.237.....234
S.239... 235,242,299
S.240..... 235
S.241..... 236
S.242... 236
S.244(1) 236
S.245..... 235,236
S.246..... 235,236
S.247..... 234,235
S.251..... 241,242,255,
.....262,263,267,269,270,295
S.255..... 272
S.260..... 257,272
S.262(2) 275
S.271(2) 303
S.272.....242,243,241,294,295
S.275..... 272
S.277 275,276,277
S.277(1) 219
S.277(2) 226
S.280.....277
S.285 241
S.292(1)(a)(ii) 304
S.292(2) 388
S.294(1) 379,362
S.294(3) 147
S.294(5) 380
S.299..... 272,273
S.301 273
S.315..... 52
S.316 293,299
Constitution of Northern Region 1963 s.56..... 183
Constitution (Suspension and Modification) Decree No.1
of 1984 234

Conveyancing Acts 1881 and 1892 70
Corrupt Practices & Related Offences Act 2000 239,366
Court Legislation Series Law of Anambra State vol. 4 1996 121
Court of Resolution Law 1960 Ss.2 & 3..... 278
Criminal Code Act, 1958 37,38
Criminal Code (Laws of the old Anambra State Cap 36)
1986 s.3..... 43
Criminal Law Act 1967 358
Criminal Procedure Act
s.1..... 368
s.3..... 371
s.4 371
s.10(1) 371
s.12..... 371
s.13..... 371
s.15..... 371
s.25..... 371
s.25(2) 380
s.26..... 380
s.27..... 370
s.28(2) 371
s.59(1) 297
s.72..... 369
s..77(a) 368
s.77(b) 368,369
s.100.....375
s.118.....375
s.143(e).....297
s.161(3) 376
s.187.....376
s.188.....376
s.210.....375
s.218.....376
s.220.....376
s.223(2) 375
s.310 378
s.342.....297
s.387.....381

Criminal Procedure Code
S.1 368
S.26..... 371
S.28..... 371
S.30 371
S.37..... 371
S.62..... 371
S.153.....375
S.154(2) 375
S.185..... 368,369
S.185(b) 368
S.191(5) 378
S.231 380
Criminal Procedure Law (Cap 37)Laws of Anambra State1986
S.2..... 43
S.7 371
S.73(1) 373
S.77 368
S.167.....375
S.237.....68
S.233-241..... 368
S.382(1) 380
Companies Decree 1968 244

Custom and Excise Management Act s.157..... 366
Customary Court Edict 1984 of Anambra State s.2.....
.... 97,280,281,282
Customary Court Edict (Cap.33) Laws of Lagos State
1973 Ss.19 & 20..... 323,324
Customary Courts Edict 1966 (No.29) M.W.N. Ss.22,23..... 322
Customary Court Edict (Lagos Laws 1973 cap.33)..... 322
Customary Courts Edict No.6 of 1984 s.15..... 87,97,322
Customary Courts Edict No.9 of 1969 (S.E.S s.15(a)..... 322
Customary Courts No.2 Edict No.38 of 1966 (Rivers State)s.15(a) 323
Customary Court Law 1956 of Eastern Region..... 220,168
Customary Court Law 1957 of Western Region..... 220
Customary Court Law of Western Nigeria 1957 s.20(2) 319,324
Customary Courts Law of Ogun, Ondo and Oyo States..... 316
Customary Court Rules 1978 97
Customary Courts Rule of Bendel State 1978..... 97
Decree 13 of 1973 188
Decree 26 of 1966 188,190,245
Decree No. 15 1975 385
Decree No.28 of 1970..... 28,172
Decree 26 of 1986 s.275,290,291..... 218,232
Decree No.9 of 1992 355,382,257,258,259
Decree No. 5 1989 365
Decree 107 of 1993 s.165... 224,238,250,253,254,260,262,263,264
S.230(1) (c)..... 266,267,271
Decree No.22 of 1994 408
Delhi Declaration of 1959 8
Designation of Ordinances Act 1961..... 80
Eastern Nigeria High Court Law Cap. 60, s.3 53
Eastern Nigeria Local Government Law (Cap 79) s.90..... 90
Economic and Financial Crimes Act 2004 200
English Common Law Procedure Act 1852 Ss.210-212..... 71
English Libel Act 1843..... 68
Evidence Act (Cap 62) Laws of Nigeria 1958 s.1 (4) (c)...
S.14..... 93
Evidence Act (Cap 112) Laws of the Federation) 1990.....
S.2(1)..... 86 S.14(1)..... 93
S.1(4)(c)..... 93 S.14(1)...93,98,100,120

S.14(2)..... 102,103,104 S.75 339
S.14(3)..... 106 S.137... ... 44
S.57(1)..... 99 S.179 377
S.57(2) 102 181 377
S.59.....99,100,101 S.182 377
S.73..... 99 S.188(i)..... 355
S.74..... 99 S.195..... 355
S.74(1)(a).. 102
Evidence Act (Amendment) Decree 61 of 1991..... 93
Fatal Accidents Act 1846..... 70
Federal Revenue Court Decree (No.13) of 1973.....
S.7(1)..... 249
Federal Court of Appeal Decree No.43 1976..... 234
Federal Revenue Court Act 1973 S.7(1).....221,244,246,249,250
Federal Territory Law (Miscellaneous Provisions) Act 1964..... 53
S.7(2) .....250 S.7(3).....250
Foreign Jurisdiction Act 1843 51
Foreign Jurisdiction Acts 1890 51
Foreign Jurisdiction Acts 1913 51
Fraudulent Conveyances Act 1571 70
High Court Civil Procedure Rule of Enugu State, 2006..... 46
High Court Edict 1987 of Anambra State s.18..... 106,118,204,205
S.22..... 166
High Court Law Western Nigeria 1959..... 110,307,310
High Court Law, Eastern Nigeria Cap 60 s.3..... 307
High Court Law, Eastern Nigeria s.20..... 205,307,309
High Court Law, Northern Nigeria 1963 307,310
High Court of Lagos Act s.27(2) 307,310
Infants Relief Act 1874..... 72
Insurance Commission Decree No. 2 1997 266
Interpretation Law, Lagos State 1973..... 307
Interpretation Act (Cap 89) s.28..... 53
Interpretation Act 1964..... 37,38,53,68
Interpretation Law, Lagos State 1993 307
Judicature Act 1873-75..... 56,58,63
Lagos State (Applicable Laws) Edict 1968..... 82
Land Transfer Act 1891..... 69
Land Transfer Act, 1897..... 70,73

Land Use Act s.39..... 178,281
Law (Miscellaneous Provisions) Act 1964 s.23..... 44
Law of Treaties of 1969 85
Laws of Anambra State, 1986 37,39,57
Leases Act 1845 70
Legal Aid Act 1976 408
Legal Aid Act 1990 408
Legal Education Act 1962..... 404
Legal Practitioners Act 1962..... 382
Legal Practitioner's Act Cap 207 Laws of the Federation 1990..... 382
S.2 ..... 315 S.9(3) 398
S.2(2)... ..... 385 S.13(1) 333
S.2(3) ..... 386 S.13(2)..... 400
S.5(8) 387
Legal Practitioner's (Consolidation) Act 1976.....382
Limitation Act 1963 151
Magistrate's Court Law Lagos State s.6(1) 278
Magistrate's Court Ordinance 1943.....219
Mid-Western Region (Transitional Provision) Act No. 19 of 1963 80
Moslem Court of Appeal Law 1956 220
Moslem Court of Appeal Law 1957 220
National Drugs Law Enforcement Act s.7(2) 297
National Human Rights Commission Act 1995 410
National Industrial Court Act 2006 293,295
Native Authority Ordinance (Cap 140) 1948 s.30..... 90
Native Courts Law (N/R) (Cap 78) s.23..... 168
Native Courts Law Northern Nigeria 220,315
Native Court Law Northern Nigeria, 1956 320
S.2 92
Nigerian (Constitution) Order-in-Council 1960 80
Nigerian Independence Act 1960... 52
Nigerian Local Governmenr Law (Cap 68) 90
Nigerian Ports Authority Act Cap 361 Laws of Federation 1990 343,345
Northern Nigeria Native Authority Law (Cap 77) s.48..... 90
Northern Nigeria High Court Law, Cap 49, N.N.L. 1963 53,54

Oba and Chief Law of Lagos State 1981..... 100
Ordinance No. 3 of 1863 53
Ordinance Act 1961 80
S.14(2) ..... 93 S.14(3) 97
Offences Against the Person Act 1837 of England..... 190
Police (Miscellaneous Provision) Decree No.5 of 1989..... 365
Police Act 1967 s.19..... 367
Public Order Act 1979, S. 274 274
Rent Control (Lagos) Amendment Act 1965 S.1(1)..... 189
Revised Edition (Laws of Lagos State of Nigeria) Edict 1970..... 82
Revised Edition Laws of the Federation Act 1990..... 82
Revised Laws of Lagos State 1974..... 82
Sale of Goods Edict No.15 of 1990 (Kaduna State) 77
Sharia Courts (Administration of Justice and Certain Consequential Changes) Law 1999 of Zamfara State 291
s.3..... 222 s.42..... 222
S.4(1)..... 286 S.43..... 276
s.41..... 222
Sharia Court of Appeal Law 1960 s.12..... 273
Sheriff & Civil Process Act S.96 (2) 332
s.94... ..... 333 s. 99..... 332,333
s.97... 332
States (Creation and Transitional Provisions) Decree 1967 81
Summary Jurisdiction Act 1848..... 71
Supreme Court Act 1960 s.12..... 192
s.31..... 27,182
Supreme Court Act (Cap. 424) Laws of the Federation. 1990, S. 20 229
Supreme Court Ordinance 1876..... 217
Supreme Court Rules, 1961 76
Supreme Court Ordinance 1914 218
Territorial Waters Act (Cap 428) Law of the Federation 1990 223
The Native Courts Ordinance 1933..... 181
Trade Dispute Amendment Decree 47 of 1992 S.1(a) 293,294
Trade Disputes Act 1973 294
Trade Disputes Decree No. 7 of 1976 293

Westerns Nigeria-Laws 1959..... 53
Westerns Nigeria-Laws of England (Application) Law, Cap 60.....53

TABLE OF ABBREVIATIONS

AC	Appeal Cases (Law Reports)
AER	All England Law Reports
AG	Attorney General
All CLR	All Criminal Law Reports
All NLR	All Nigeria Law Report
BPS	Benue Plateau State
CA	Court of Appeal
CJ	Chief Judge
CDHR	Committee for the Defence of Human Rights
CJN	Chief Justice of Nigeria
CLO	Civil Liberties Organisation
CRP	Constitutional Rights Project
ECSLR	East Central State Law Report
EN	Eastern Nigeria
ENL	Eastern Nigeria Law
FCSC	Federal Civil Service Commission
FIDA	International Federation of Women Lawyers
FSC	Federal Supreme Court
FWLR	Federation Weekly Law Report
HCRR	High Court Rules
HRLRA	Human Rights Law Reports of Africa
ICJ	International Commission of Jurists
IGP	Inspector General of Police
JCA	Justice of the Court of Appeal
JCLP	Journal of Contemporary Legal Problems
JCNALJL	Journal of Contemporary Nigerian and African Laws, Justice and Legality
JSC	Justice of the Supreme Court
KB	King's Bench
KLR	King's Law Report
LLR	Lagos Law Report
LRN	Law Report of Nigeria

MWN	Mid-Western Nigeria
NCR	Nigerian Commercial Report
NJR	Nigerian Juridical Review
NLR	Nigeria Law Report
NMLR	Nigerian Monthly Law Report
NNL	Northern Nigeria Law
NNLR	Northern Nigeria Law Report
NRNLR	Northern Region of Nigeria Law Report
NSCC	Nigerian Supreme Court Cases
NSCQR	Nigerian Supreme Court Quarterly Law Report
NWLR	Nigerian Weekly Law Report
S	Section
SC	Supreme Court
SCNLR	Supreme Court of Nigeria Law Report
SES	South Eastern State
SS	Sections
UILR	University of Ife Law Report
WACA	West African Court of Appeal
WACOL	woman's aid Collective
WLR	Weekly Law Report
WRN	Weekly Report of Nigeria
WRN	Western Region of Nigeria
WRNLR	Western Region of Nigeria Law Report

CHAPTER 1

THE NATURE, MEANING AND FUNCTIONS OF LAW

Law and Society

All societies develop rules to govern the inter-relationship of their members. Any society in which human beings associate for any length of time requires some mechanism to secure its collective stability. Among other things, the mechanism must assure a predictable degree of conformity by the members of the group to some coherent rules of conduct. Such rules are normative in the sense that they call on the members of the group to do some things, and to refrain from doing others.[1]

An erudite commentator has observed that even the lower animals, the so-called brutes, have some rules to live with. There is some kind of system, or codes of cohabitation that regulate the conduct and relations between individuals and groups within the communities of bees, ants, geese or fishes.[2] The need for law will not arise if every man resides in an island of his own. But that has not been the case. Aristotle wrote in his masterpiece, *Politics*, that only a beast or a god could live outside a political community, without the protective shelter of government for "man is by nature a political animal".[3] Man is not only a political animal but also a social animal. He lives in society never in isolation. He is not only rational but also gregarious. A society consists of individuals who

[1] Sieghart, Paul *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) p. 3

[2] Soyinka, Wole "Constitution and Continuity" in *Path to People's Constitution* (Lagos: Committee for the Defence of Human Rights (CDHR, 2000) p.13

[3] Aristotle *Politics* (translated by Benjamin Jowett) (New York: Random House, 1943) p. 54.

as of necessity have to interact for the purpose of achieving individual aspiration within the society as well as the society's commonly shared values and aspirations. "The consequence of such interaction also means and implies the emergence and existence of rights and benefits, as well as duties and obligations. Thus very early in life, man becomes aware that he is living in a world of laws. He becomes aware that to live in any society, he has to abide by the law of that society - laws that regulate and govern the various relationships demanded by society. He also discovers that obedience to these laws is essential for the harmonious existence of the society as a whole and for the preservation of the individual"[4]. Law is thus a phenomenon that exists in every human society for the regulation of human conduct (*ubi societes ibi ius*). Law is a synthesis of order and justice and serves the purpose of resolving conflicts and protecting interests of human aggregation in an orderly manner thus obviating the need for recourse to self help or other illegal procedure which may give rise to insecurity and chaos. In the words of Kayode Eso, J.S.C. law acts as a social modulator in advancement of justice; it regulates the domestic life of the individual, his liberty, his moral nature, his stature, his economic growth, his interrelationship with others.[5] Law defines and adjusts relations in social and commercial life.

To maintain peace and secure that disputes shall be settled on the basis of rights as opposed to might, it is necessary to establish the rule of law; that is to establish order and then to maintain peace through settlement of disputes in accordance with law. The rule of law in this sense implies, therefore, simply the existence of public order. It does not rest entirely or even primarily upon force. From time immemorial ordinary people have been

[4] Oputa, C.A. "Toward Justice with a Human Face" (1987), J.C.N.A.L.J.L Vol. 1, No.2, p.11

[5] Eso, K. "Concept of Law and Justice under the Nigerian Constitution" 1991 Judicial Lectures: Continuing Education for the Judiciary (Lagos: MIJ Professional Publishers Ltd, 1991) p.3.

content to follow the laws and customs of their fathers. Few have, however, delighted in trouble. The coercion of political authority is therefore necessary for those comparatively few for whom example, precept, and the unorganized sanction of public opinion are not enough. The lawless few can destroy the peace of his community if not checked.[6]

There are however some schools of thought who, on various grounds, advocate the antithesis of legal order. An idealistic picture of a state without law was painted by Plato. His *Republic* was based on the substitution for law of a philosopher king, whose knowledge, akin to that of the gods will be such as to know what is good for man. Plato pitis his faith upon a system of education which will not only produce adequate rulers but will also serve to condition the rest of the population to the appropriate state of obedience. The reasons for Plato's unfavourable attitude towards law as stated in his dialogue, *The Statesman*, is that laws can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each community at any one time. The difference of human personality, the variety of men's activities, and the restless inconstancy of all human affairs make it impossible for any art whatsoever tc issue unqualified rules holding good on all questions at all time.

Aristotle, who was a former student of Plato, disagreed with him and opined that "the rule of law is preferable to the rule of any individual".[7] To him, law being the pure voice of God and reason is itself reason free from all passion. Therefore, he who commands that law should rule commands that God and reason should rule; he who commands that man should rule adds the

[6] Jennings, I. *The Law and the Constitution* (London: University of London Press, 1957) pp. 42 – 61.

[7] Politics, II, 16 (Jowett's translation, Davis ed., 1916) p.139. See Generally, Barker, E., *The Political Thought of Plato and Aristotle* (London, 1906) p.5 – 11.

character of a beast. Appetite for material things and other self-centred desires tend to pervert holders of office. According to Aristotle, the supremacy of law is a mark of a good state and not merely an unfortunate necessity. Even the wisest ruler cannot dispense with law because the law has an impersonal quality that no man, however good, can attain. The political relationship, if it is to permit of freedom must be of such a kind that the subject does not wholly resign his judgment and responsibility, and this is possible provided both the ruler and the ruled have legal status. "Man when perfected," said Aristotle, "is the best of animals but when separated from law and justice, is the worst of all". While acknowledging that situations may arise where the universality and rigidity of legal rules may cause hardship in an individual case, Aristotle, proposed to cure such hardship by means of equity. In his later life, and after his experimentation of the concept of philosopher-king in the city of Syracuse, Plato said: "without laws man differ not at all from the most savage beasts". He consequently sent the following words of caution to the city of Cicily:

> Let not Cicily, nor any city anywhere be subject to human masters – such is my doctrine – but to laws. Subjection is bad both for masters and for subjects, for themselves, for their children's children, and for all their posterity.[8]

To Plato, the state ruled by law is not the ideal state, but is a concession to the frailty of human nature. He therefore modified his ideas and came to the conclusion that as the ideally best state ruled by a philosopher-king is impossible of attainment, then the second best state, and the practicable one, is a state ruled by law.

Karl Marx and other proponents of the Marxist theory predicted the disappearance of law sometime in the future. They see law as an instrument of oppression employed by the capitalist class of the society to exploit and suppress the commoners and

[8] Sabine, *A History of Political Theory* (New York: Dryden Press, 1973) p.78.

maintain their dominance over them. They predicted that the inevitable clash between the two classes would ultimately lead to the attainment of the utopian classless society which will have no need for such instruments of oppression and repression such as law and state. However, the introduction of Marxist socialism, which was to be a road to the utopian classless communist society, could not bring about the abolition of law. Rather, it entailed more and more law and legal repression.[9]

Another group of thinkers who see law as an unnecessary evil are the anarchists. Philosophers of the anarchist persuasion denounce the existence of legal order. Anarchism is a social philosophy that rejects authoritarian government and maintains that voluntary institutions are best suited to express man's natural social tendencies. The thorough-going anarchist believes that the root of evil in society is the existence of legal governments and that if government can be abolished will human beings be their natural good selves, give mutual aid to one another without being under any obligation to do so. Peace or harmony, according to them, is achieved not by submission to law or by obedience to any authority but by free agreements concluded between the various groups and voluntary associations which of necessity exist so as to cover all the fields of human activity and, thus substitute themselves for the state in all its functions. They look upon all laws and government as the twin sources from which flow nearly all the evils existing in society in so far as laws constricted or distorted the natural development of the economy and society.[10] The theory of anarchism is similar to the Marxist economic theory, however while the anarchists preach voluntarism the Marxists preach economic determinism.

The theory of anarchism is based on some extravagant and unrealistic assumptions. Even if it is assumed that the majority of

[9] Lloyd, D. The Idea of Law (London: Penguin Books, 1987) p.22.
[10] *Ibid*, pp. 19 – 20.

men are by nature reasonable, benign and social minded, there is bound to be unreasonable, non-co-operative and aggressive minority against whom force may have to be used. And no reasonable man can be presumed to be necessarily reasonable at all times when free from organized restraint, which is provided by law. As Freeman wrote:

> Fiction provides us with numerous examples of utopian societies where congruence of norm and ideal is such that there is perfect social harmony and no need for law or lawyers to emerge. History teaches us the unhappy truth that no such society has ever existed. In all societies, socialization is an unequal process, there is always deviance and conflict, and law can be seen to emerge as a norm asserting authority with the coercive power to sanction those guilty of violating the norm. It is difficult to escape the fact that law is necessary. If a society should ever come about where it is not, it may be predicted with certainty that it will be a society different from anything we have known.[11]

Legal order presupposes some power or institutional mechanism for the promulgation, application and enforcement of law. However, such power must be exercised under the law. The extreme opposite of anarchy in social life is a political system in which one man holds an unlimited power over his fellow man. Such a power is exercisable arbitrarily and capriciously. In such a situation we are confronted with the phenomenon of despotism. Thomas Jefferson has even contended that the mere accumulation of all powers – legislative, executive, and judiciary – in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may just be pronounced the very definition of tyranny or despotism.[12]

[11] The Legal Structure (London: Longman, 1974) p.1

[12] Thomas Jefferson, Notes on the State of Virginia. Cited in *The Federalist* (p.324).

The pure despot issues his commands and prohibitions in accordance with his free and unrestricted will and in response to his casual whims or passing moods. Thus undivided and unrestricted power is as much evil as anarchism, hence the need for legal restraint. The need for power to protect liberty and the need for legal restraint on power by law was demonstrated by J.S. Mill in his picturesque and lucid language. He said:

> To prevent the weaker members of the community from being preyed upon by innumerable vultures, it was needful that there should be an animal of prey stronger than the rest, commissioned to keep them down. But as the king of the vultures would be no less bent upon preying on the flock than any of the minor harpies, it was indispensable to be in a perpetual attitude of defence against his beak and claws.[13]

It is the function of the law to regulate the conducts of the flock and also set a limit on the powers of the king of the flock. Law takes a middle position between anarchism and despotism. As Professor Cowen has put it,

> Although there is a deep chasm between unfettered power and law, power must be reconciled with law; for there can be neither government nor law without the exercise of power. And freedom, too, must be under law; for otherwise it degenerates into licence and confusion. In short, unfettered power is despotism or tyranny; unfettered freedom is licence or anarchy. But between these two extremes there is a middle way, where power tamed by law guarantees true freedom.[14]

It must be noted, however, that law has its own capacity for tyranny. Many tyrannical regimes still rule by law. Law can only be a servant of liberty when a society is under the rule of law. The

[13] Mill, J.S. *On Liberty, Representative Government and Subjection of Women* (World Classics No. 170) (London: Oxford University Press, 1969) p.2

[14] The Foundations of Freedom 1961 p.197 quoted in Nwabueze, B.O. *Constitutionalism in the Emergent States* (London: C. Hurst & Co., 1973) p.21.

International Commission of Jurists in the Delhi Declaration of 1959 concluded that two ideals underlie the conception of the rule of law. In the first place, it implies without regard to the content of the law, that all power in the state should be derived from and exercised in accordance with law. Secondly, it assumes that the law itself is based on respect for the supreme value of human personality. In the words of Chukwudifu Oputa, J.S.C., the rule of law is a shield and a fortress against tyranny and oppression. It is the defender and custodian of individual rights and the liberties of the citizen. It is an asylum and comfort to the oppressed and a guarantee of hope for the innocent. The rule of law is also a chilling terror to the oppressor, the vile, and the malignant.[15]

When the law keeps everyone – both the government and the citizens – under control; when right and not might is the basis of society; when the law curbs the excesses of the strong and balances rights with duties as well as powers with safeguards, so that neither rights nor power shall be exceeded or abused; when the law exercises sway and has a decisive influence over the rights, duties and obligations of every citizen of the state, then we have the dominion of law.[16] However, if the rule of law is forced to abdicate, then the rule of man, the rule of naked force, usurps the vacant throne.

The fact that an oppressive and tyrannical regime may enact and apply oppressive laws raises the question whether freedom must always be under the law and the further question of civil disobedience. However, these questions are outside the scope of the present work.

Functions of Law

Law as an instrument of social control performs very important functions in society.

[15] Oputa, Chukwudifu O. *The Law and the Twin Pillars of Justice* (Owerri: Government Printer, 1981) p. 4

[16] Oputa *op cit* (referring to footnote 4).

In the first place, law is the foundation of social order. Law is normative in character in that it serves, and is meant to serve, as a guide for human behaviour and obedience to law is ultimately secured by the use of force. Deviant behaviour is suppressed through the law; right, and not might, becomes the true basis of society and disputes are settled on the basis of legal right. Historically, law has evolved as an alternative to private feud and vengeance, and as a supplement to the informal social processes by which men and groups deal with disputes. It provides an institutionalized means of settling disputes on the basis of legal rights. Nnaemeka-Agu, JSC[17] has aptly observed that "without the institutionalized means of settling dispute through the judiciary, citizens who have grievances against their fellow citizens will have to resort to brute force to settle them; villages will rise against villages; communities against communities; towns against towns; tribes against tribes; brigandage, arson, robbery, murder, and mayhem will have free reign and rule the day. It will be anarchy and brute force par excellence."

Closely related to its function as the foundation of social order is the function of law as an instrument of social cohesion or social harmony. Law defines relationships among the members of a society to assert what activities are permitted and what are ruled out, so as to maintain at least minimal integration between the activities of individuals and groups within the society. It sets the expectations of man to man and group to group so that each knows the focus and the limitations of its rights and duties. Law thus orders the fundamentals of living together.[18] It prescribes functions, duties and obligations to every citizen and also allocates benefits, rights and privileges in a commensurate manner. It acts

[17] Amucheazi E. et al. ed. *The Judiciary and Democracy in Nigeria* (Abuja: National Orientation Agency, 1998) p.13.

[18] Hoebel, E.A. "Functions of Law" in Lloyd *et al Introduction to Jurisprudence* (London: ESLBS, 1985) pp. 898 – 904.

as a check on individual tendencies to achieve a socially harmonious society. It is the cement of society.

Law also serves the function of facilitating and protecting private voluntary arrangements in which individuals, groups, and institutions establish what might be considered small private legal systems governing their interrelations within the framework of the fundamental law of the society. Law sets the general boundaries within which these arrangements must be kept.

Law is also an instrument of economic, political and social change. It is a veritable tool in bringing about innovations into a given society. A smooth transition from one stage of development to another for the good of the society is achieved through the instrumentality of the law. Law is part of the social machinery used to enable planned changes and improvements in the organization of society to take place in an ordered fashion. The redefinition of relations between individuals and groups as the conditions of life change and the maintenance of adaptability are achieved through the instrumentality of the law. The problem of reorienting conduct and redirecting it through the law when new issues emerge is always tied to the demand of basic organization and the minimal maintenance of order and regularity and the achievement of smoothness in social relations.[19]

Law also constitutes and regulates the principal organs of power. This function of law is derived from the necessity of taming naked force and directing force to the maintenance of order. It is the allocation of authority and the determination of who may exercise physical coercion as a socially recognized privilege right, along with the selection of the most effective forms of physical sanction to achieve the social ends that the law serves. It provides for succession to power and defines who has the right to exercise what kind of power in society. Through the law power is institutionalized and transpersonalized.[20] It resides in the office

[19] *Ibid*

[20] It must be admitted that the personal still obtrudes. An office although

created by law rather than in the man. Law delimits and circumscribes political authority.

Law conserves, communicates and reinforces the values of the society; and provides a framework of interpretation of those values.

Lastly, law protects fundamental liberties and freedoms. Though the naturalists will contend, and rightly too, that positive law is not the source of natural rights, there is no gainsaying the fact that these rights must be acknowledged and protected by law; and at the same time, law must provide a means of enforcement of these rights in order to give them efficacy.

The Meaning of Law

There is yet no generally accepted definition of law. Thurman Arnold has asserted unequivocally that law can never be defined.[21] Law is a complex phenomenon that covers all aspects of life. Furthermore, the basis of law, the source of law and the relationship of law to justice and morality are questions of abiding interest to legal theory. Various postulates and ideas on law have been advanced in response to these questions. In the words of H.L.A. Hart,[22] we see law in different light but the light is usually so bright that it blinds us to the remainder and so leaves us without a clear view of the whole. The divergent views on the meaning of law have crystallized into what has become generally known as the schools of jurisprudence or schools of thought as to the meaning of law. These schools include the natural law school, the positivist school, the sociological school, the historical school, the realist movement; the Marxist economic theory of law, and the transcendental idealists. However, the two dominant streams of legal thought are the natural law school and the positivist school.

culturally defined is, after all, exercised by an individual. And who that individual is at any moment certainly makes a difference.

[21] The Symbols of Government (1935) p.36.

[22] Hart, H.L.A. *Concept of Law* (Oxford: Oxford University Press, 1961).

Natural Law

The term "natural law" or "law of nature" is used in two senses – that is the descriptive and prescriptive senses. Law of nature in the descriptive or scientific sense is simply a formulation of the regularity with which certain things happen uniformly all over the world under certain conditions. All the laws – the law of planetary motion, the law of gravitation, the law of relativity, etc. - which describe the regularity and uniformity with which things happen under certain conditions in the world are laws of nature in the descriptive sense of the term. On the other hand, in its prescriptive sense, the law of nature is a universal precept or command intended by nature to regulate human behaviour.[23]

It is in the latter sense that the term "law of nature" or "natural law" will be used in this work. Natural law is predicated on the assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason.[24] In other words, the theory of natural law is based on the reasoning that the rule of human conduct is a deduction from the nature of man as it reveals itself in reason and independent of any man-made enactment. As a prominent proponent of natural law, Cicero, puts it:

> True law is right reason in agreement with nature. It is of universal application, unchanging and everlasting. It summons to duty by its command, and if it is from wrongdoing, by its prohibition .... It is impossible to abolish it entirely. We cannot be free from its application 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 external and unchanging law will be valid for all nations and for all times. And there will be one master and one ruler – i.e. God, author of all authority. He is the author of all laws which is promulgated and which is judged.[25]

[23] Omoregbe J.I. *Philosophy of Law: An Introduction to Philosophical Jurisprudence* (Lagos: Joja Educational Research and Publishers Ltd., 1997) pp. x – xi.

[24] Lloyd, *et al. Introduction to Jurisprudence* (London: ELBS, 1985) p.22a.

Thus, in this view, there is a moral order in the universe, which is perceptible to man through his rational faculty. The theory of natural law draws its inspiration from nature. It proceeds from the premise that there is a law of nature according to which tenets and principles all things, including man himself, ought to behave. As human nature is identical in all men and does not vary, its precepts have universal and immutable validity, notwithstanding the diversity of individual conditions, historical and geographical environments, civilizations and cultures. As Paton pointed out, the fundamental thinking in the natural law school is that law is an essential foundation for the life of man in society, based on the needs of man as reasonable being and not on the arbitrary whim of the ruler.[26] The dominant task of natural law is to attune man-made law to the demand of universal conception of moral standard (justice).

Though natural law has witnessed ups and downs in its life, one agrees with Dias that no other firmament of legal or political theory is so bejeweled with stars as that of natural law, which scintillates with contributions from ages.[27] This school recognizes the fact that law must serve the end of justice and humanity and not the arbitrary whim of the ruler. Natural law has had and continues to have a refining influence on positive law. The doctrines of equity sprang up from the felt necessity of an appeal to the court of conscience. Natural law is the foundation of fundamental liberties. In the view of natural law, nature ascribes to the individual a status, a dignity and certain fundamental rights. These rights ante date civil government and as such serve as

[25] Cicero, *The Republic, Chapter 3 Section 33.*

[26] Paton, G.W. *A Textbook f Jurisprudence* (Oxford: Clarendon Press, 1946) p.100

[27] Dias, *Jurisprudence* 5th edn (London: Butterworths, 1985) p.471

morally valid limitations on the power of government, which primarily exists to safeguard those rights. This proposition has judicial assent in the case of *Ransome Kuti v A. G. Federation*[28] where Kayode Eso J.S.C. said:

> It is a right which stands above the ordinary laws of the land and is antecedent to the political society itself. It is a primary condition for civilized existence.

The universal declarations of human right, the other international bills of right and human rights instruments, and the fundamental rights provisions in almost all constitutions of modern nations are part of the indelible footprint of natural law. The natural law school provides the intellectual weapon for combating despotism and tyranny.

There have, however, been several objections to the concept of natural law. It is asserted that though law and morality are synonymous, they are not coterminous. Law often satisfies certain demands of morality, yet it is not necessary for its validity that it should be so. The validity of law is not determined today by reference to morality, reason, rationality or natural law. This point was acknowledged by the Supreme Court in the recent case of *A.G Federation v Guardian Newspapers Ltd*[29] where Uwaifo JSC said:

> Issue 2 refers to some of the observations of Pats-Acholonu, J.C.A. in the present case. It is true the learned Justice devoted some passages in his judgment 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

[28] (1985)8 NWLR 623
[29] (201) FWLR (pt. 32)87

> that proposition is not only wholly irrelevant but it cannot be considered right in the circumstances of this case.[30]

The Court of Appeal had held in that case that "A statute is inherently irrational and an assault to the psyche of the citizens when it is extra-ordinarily in conflict with reason, is offensive and utterly hostile to rationality and so emptied of substance that it should be rejected by the people to whom it is directed (or made for) and to people of other nations who condemn it for its inhumanness. Such a law should not and ought not to be enforced ... To hide under the Austinian theory to enforce such a law is sheer timidity and an abdication by the court of its responsibility."[31]

Secondly, if law must conform to moral rules, law will be static and will no longer function as an instrument of social, political and economic change. Law will in such circumstances be unable to meet the exigencies of modern complex and welfarist states. This is because moral rules do not admit of changes.

From the legal positivist point of view, the search for an ideal law or for an external criterion for the evaluation of law is not a scientific study. The human mind, legal positivists maintain, cannot go beyond man's empirical experience to discover an absolute norm or an ideal law, which lies beyond man's empirical experience. In other words, the position of legal positivism is that a law is that which is actually enacted as law irrespective of whether or not it conforms to any standard. There is no external standard which law must conform to in order to be valid.

Legal realists also contend that there is nothing like natural law. To say that a person has a legal duty to do anything means, according to Oliver Wendel Holmes, to predict that if he fails to do

[30] at pp.128 – 129.
[31] *Guardian Newspapers Ltd. v A.G. Federation* (1995)5 NWLR (pt. 398) 703 at 735 – 736.

it, he will be made to suffer in this or that way by judgment of the court.[32]

Another criticism of the natural law theory is that its content is shifting, imprecise and revolutionary.

Legal Positivism

Legal positivism is a school of jurisprudence that claims that law is characteristically created and posited or laid down by an authority of the society who provides its sole source of validity. This school of thought conceives of law or legal order as consisting in certain institutional arrangements. Their concern with law is morally, politically, ideologically and evaluatively neutral. They are wont on divorcing law from ethical precepts. They are concerned with form rather than content of law. But legal positivism is not a homogenous school. All the members of the school do not have exactly the same concept of law. They conceive law somewhat differently. Some conceive law as essentially a command backed by sanction. Others conceive law as a set of normative propositions or system of rule. We shall consider here the imperative theory and the normative or pure theory of legal positivism.

The Imperative Theory

The imperative or command theory of legal positivism as represented by Jeremy Bentham and John Austin canvasses the point that law should be considered from an imperative angle, that is, as commands from the political superior to the political inferior and which command is backed by sanction.

Jeremy Bentham is considered the father of legal positivism. Law, to Bentham, is essentially a command issued by a sovereign to his subordinates, or by a superior to his inferiors. His faithful disciple, John Austin said that the term law is a rule laid

[32] Holmes, The Path of the Law in Harvard Law Review, vol. X, 189, No.8, p.459.

down for the guidance of an intelligent being by an intelligent having power over him." In other words, they are the command of the sovereign, backed by sanction.

To Austin, positive laws are species of command. If a superior expresses or intimates a wish that an inferior shall do or forbear from some act and if the superior visits the inferior with an evil if he fails to comply with that wish, the expression or intimation of the wish is a command. The evil, which will be incurred if a command is disobeyed, is called a sanction.

Commands entail a purpose and a power to impose sanction upon those who disobey. A command is an expression of desire that obliges a person or persons to a course of conduct. Being a command it must issue from a determinate person or group of persons with a threat of displeasure if the rule be not obeyed. A command is distinguished from other significations of desire, not by the style in which the desire is signified; but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command although you utter your wish in imperative phrase.[33] Austin distinguished between a general command which is law from an occasional or specific command which is not law. Where a command obliges generally to acts or forbearances of a class, a command is a law or rule. But where it obliges to a specific act or forbearance, or to acts or forbearances, which it determines specifically or individually, the command is occasional or particular.

For a command to qualify as law, the determinate person or persons from whom it issues must be a political superior or sovereign and the person to whom it is addressed must be an inferior. A sovereign is any person or body of persons in the

[33] See generally *The Province of Jurisprudence Determined.* Selections from Lectures I and VI. First published in 1832. Excerpt in Feinberg J. *et al Philosophy of Law* (California: Dickenson Publishing, Inc., 1975) pp.17 – 27.

political society who the bulk of the community in that society habitually obeys (i.e. no internal rival) and who does not himself habitually obey some other person or persons (i.e. no external subordination).[34] The sovereign, according to Austin, enjoys some essential attributes and they are: essentiality, indivisibility, continuity, and illimitability. Essentiality means that within every independent society there must be some person or group of persons whose will ultimately prevails within that community. In other words, there must be a sovereign within every independent state. By indivisibility, Austin means that there is one person or defined group, which is politically supreme, and one only. This supreme, sovereign person or body does not share powers with any body. Illimitability implies that the authority of the sovereign is free and uncontrolled, and infinite in extent. It is not limited by any rival power.

Austin's theory, no doubt, has some merits. It is consistent and gives a clear-cut and simple test about the meaning of law, shedding law of its metaphysical attributes. It also solves in an easy manner conflict between the authorities of a state and other bodies within the state. In the late middle ages, there were intercinne and protracted civil wars arising from power struggles between the church, the king and the nobles. By Austin's theory, if only the state can create positive law, then other competing powers within the state must be subject to the laws of the state. His theory, also, gives an easy answer to the problem of validity of law, since law is valid for the simple reason that it has been laid down by the sovereign.

Austin's theory has however been visited with scathing criticisms. In the first place, the imperative theory can lead to despotism, tyranny and great iniquities. A ready example is Nazi Germany where grave iniquities, inhumanity, and cruelty were

[34] *Ibid*

perpetrated under state ordained laws. As Professor Ogwurike[35] said:

> Without close interconnection between the people, their culture, their political and economic outlook and aspirations on the one hand, and law and order and legality on the other, legal obedience will cease to be a dutiful submission to authority. Compulsion or force will continue to be a very strong and necessary feature of law, with the resultant civil commotions and political instability. Justice would lose its ethical or moral meaning, and sink to mere charitable treatment of the enslaved and the oppressed by those in power, without the involvement of the people in designing their legal system. The law-giver will continue to stand above the law which he manipulates to entrench himself and fortify his position.

Secondly, Austin's insistence on sanction as a definitional element of law is objectionable since it distorts the real functioning of law in a community. Sanctions do not explain why laws are obeyed. The essence of a legal system is the inherent fact, based on various psychological factors that law is accepted by the community as a whole as binding and the elements of sanction is not an essential or even perhaps an important element in that functioning of the system. According to Prof. Goodhart, "it is because a rule is regarded as obligatory, that a measure of coercion is attached to it; it is not obligatory because there is coercion". Legal positivism has made it abundantly clear that it is unable to account for the ultimate justification of the obligation to obey law because it is unable to account for the ultimate foundation of law.

Furthermore, Austin took a very narrow view of law. His imperative theory appears to have focused only on criminal law whose provisions could be regarded as commands. Many aspects of the civil law do not command anything but merely show how

[35] Quoted with approval by Pats-Acholonu J.C.A. in *Guardian Newspapers Ltd v A.G. Federation* (1995)5 NWLR (Pt 398) 703

things are to be done. The laws that regulate the making of contracts, wills, marriage etc. cannot be said to be commanding anybody to do anything. There are laws that impose duties without corresponding sanction for the breach of the duties (for instance, the fundamental objectives and directive principles of state policy under chapter Ii of the 1999 constitution).

Again, the sovereign in Austin's eye will be very difficult to find in a federal system where power is shared between the central government and the federating units, nor can it be found in a political system based on the principle of separation of powers. In *A.G. Bendel State v A.G. Federation and 22 others,*[36] Fatayi Williams, J.S.C. said:

> What is this doctrine of separation of powers? The object of the Constitution was to establish three great departments of government – the legislative, the executive, and the judiciary. The first was to pass the laws, the second to approve and execute them, and the third to expound and enforce them. ... Each of the three departments of government should be kept completely independent of the others so that the acts of each shall not be controlled or subjected directly or indirectly to the coercive influence of either of the others.

In such a situation, where lies the Austin's sovereign?

Moreover, in a society based on the rule of law, both the ruler and the ruled are subject to law. Law limits the power of the law-giver also. For instance, section 1 of the 1999 Constitution of Nigeria enacts the supremacy of the Constitution, which means that the powers of the governor and the governed are limited by the Constitution. In this circumstance, can it still be contended that the authority of the sovereign is illimitable or unlimited?

On the continuity of the sovereign Austin fails to appreciate that there is always succession in respect of the political sovereign. Furthermore, a successful revolution represents a break in

[36] (1982) 3 SCNLR 1

sovereignty. Again, a successful revolution implies the absence of habitual obedience to the sovereign.

The imperative theory also fails to account for the foundation of international law, which is derived from the fundamental principles of the law of nature. Hence, like the law of nature itself, international law has no human legislature and no proper sanction. In fact legal positivism excludes international law along with the law of nature from its concept of law. Similarly, customary law is today widely accepted in most societies as one of the sources of law yet Austin denies it the quality of law on the ground that it was not enacted by a sovereign.

The Normative or Pure Theory

Han Kelson is the chief exponent of the pure theory. To Kelson, a theory of law must deal with law as it is, not as it ought to be. A theory of law must be pure in the sense that it is free from, or not contaminated by politics, history, sociology, ethics moral considerations or other adulterants. A legal system, according to him, consists in a hierarchy of norms in which inferior norms derive their validity from a higher norm. For a legal system to survive, he asserts, it must be a dynamic one in which fresh norms are continuously created on the authority of an original norm. The validity of a norm must be based on a higher norm, which itself must be validated by yet another higher norm until we get to the ultimate or basic norm. The source from which the basic law derives its validity is the grundnorm.

The validity of each individual norm in the system, except the grundnorm, does not depend on its effectiveness or whether it is observed or not. An individual norm will only cease to be valid if the legal order to which it belongs ceases being by and large effective.

The basic norm or grundnorm is not created in a legal procedure by a law-creating organ. It is not, as a positive legal norm, valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid and without this

supposition no human act could be interpreted as legal. In other words, the grundnorm is not law in the positive sense but has legal consequences. It is the fountain and origin of legality. It imparts life and vitality to positive law.

Kelson saw law generally as a means of ordering human behaviour, as a specific technique of social organization. He admitted, however, that other systems of norms (such as morality and religion) also seek to regulate human behaviour. But he identified a specific characteristic of the legal method of ordering human behaviour that both religion and morality lack: the element of physical force. He thus defined law as "a coercive order of human behaviour." The essence of law is the organization of force, and law thus rests on a coercive order designed to bring about certain social conduct. Sanctions are the key characteristics of law because they stipulate that coercion ought to be applied by officials where delicts (illegal acts) are committed.

Kelson summarizes his theory of law as 'a structural analysis, as exact as possible, of the positive law, an analysis free of all ethical or political judgments of value. Because it is concerned only with the actual and not with the ideal law, it is described as positivistic. Because it claims to strip the law of all illusions and distractions, it styles itself realistic. And because it strives to purge juristic theory of many elements that it believes to be mere adulterants, it claims to be pure'.[37]

Kelson's pure theory has been criticized on several grounds. In the first place, the sanctionist view, whether of Austin or Kelson, blurs the distinction between criminal law and civil law. While sanction is an essential element of the former, the same cannot be said of the latter a good proportion of which merely prescribes how things are to be done. Insistence on a sanction as essential characteristic of law underplays the significance of duties. There are many public authorities which have obligations imposed

[37] Quoted in Allen, C.K. *Law in the Making* 7th edn (Oxford: Clarendon Press, 1964) p.55

on them but where no sanctions follow from defaults, yet such defaults are termed to be flouting the law. The absence of sanction may make law ineffective but this is not the same as its being invalid.

His theory's principle of effectiveness of the legal order can only be determined by involving theorists in sociological inquiry that will result in contamination of the pure theory.

Kelson's theory, which seeks to separate law from such concepts as justice, morality, ethics etc., will reduce positive law to an arbitrary body of rules, which can serve any end.

In tracing the validity of law, Kelson stops at the grundnorm. He was not prepared to carry his inquiry beyond the question: whether the grundnorm has secured a minimum of effectiveness. Thus his theory is unable to account for the ultimate validity of law.

The Marxist Economic Theory of Law

Karl Marx, a German Jew and materialist philosopher, propounded propounded the theory of economic realism in 1859. He was the most influential representative of the economic espousal of jurisprudence.

The Marxist theory of law is generally identified with the following three underlying assumptions: that law is a product of evolving economic forces; that law is a tool used by a ruling class to maintain its power over the lower classes; that in the communist society of the future law as an instrument of social control will wither away and finally disappear. Marx distinguished between the economic structure of society (the "base" or "infrastructure") and the "superstructure" which rose upon the real foundation. Law, according to him, is one of the superstructures on an economic base. Marx wrote that a capitalist society will eventually be made up of two classes – the bourgeoisie and the proletariat. Their common economic interests and roles in the processes of production and exchange define these classes and the opposed interests of the two classes produce conflict. Law, to Marx,

represents the interests of the dominants class and is a prominent instrument of class repression. The bourgeoisie are but expropriators, who have seized control of the public property, including the means of production, and having accomplished this, they proceeded to construct and impose the law to safeguard their position – to sustain their dominance over the lower class. The state and the law are the instruments of oppression instituted for the purpose of facilitating and entrenching the exploitation of one class by another. Law is perceived by him as one of the means whereby the capitalist minority seeks to preserve and increase its power, while those who have property sought to protect it against those who have not. One of the main functions of law is to obscure power relationships. Thus it is usually said that there is freedom of contract, but in the absence of equality of bargaining power this freedom is illusory. Marx predicted that both the state and law will wither away on the achievement of a classless society and on the socialization of the means of production.

The most important contribution made by the Marxist theory, wittingly or unwittingly, appears to be that law cannot be indifferent to the material conditions of man. The state and the law must recognize that material conditions of a good, decent life are indispensable to the development of human personality and the enjoyment of fundamental liberties recognized and protected by law. In the words of a great Nigerian jurist, Akinola Aguda:

> What Hegel, Marx, Lennin and others have succeeded in doing ... is to call attention to the indisputable fact that our definition of justice must encompass social and economic justice based upon at least even distribution of the economic resources of the society and a just ordering of the social order.

The economic approach to law raises fundamental issues relating to the eradication of economic imbalance in society and the exploitation and oppression of the masses by the rulers.

The Marxist economic theory of law exposed the existence of strong economic influence on law to which previous legal theories had not paid adequate attention.

The first objection to the Marxist theory is that it elevates social and economic rights into a supreme object in the pursuit of which individual liberty must be sacrificed or suppressed. The Marxist economic theory of law also over-emphasized only the stratification of society into economic classes while ignoring other dimensions of stratification like race, sex, place of origin, religion, language, colour etc. Marx's view of law is also over-simplified. Even if some laws do exist to exploit the workers and to promote the interests of the ruling class, it can be argued that law has many other functions as well. Indeed some laws restrain oppression. There are also some laws, which are targeted against the interest of the ruling class. A ready example is the Failed Bank Act the provisions of which can only catch up with the bank-owning class. Contrary to the postulations of the Marxist economic theory of law, it is not feasible that at any moment in time society will exist without law. Marx also approbated and reprobated when he asserted that on attainment of communism, law and state will disappear but went further to say that there will be only an administration of things.

The Marxist theory of law has also been criticized as unnecessarily iconoclastic, anti-religion and amoral. It is asserted that it tries to substitute its own "gospel according to St. Marx" for religion and morality.[38] Lastly, the Marxist economic theory of law is based on the general principles of Marxist economic theory, which is not only utopian and chimaeric but is based on unrealistic and extravagant assumptions.

[38] Adaramola, Funso *Basic Jurisprudence* 2nd edn (Illinois: University of Illinois Printing Services, 2001) pp 332-3.

Legal Realism

This school of thought is particularly influential in America and Sweden. Hence, we have American legal realism and Scandinavian realism. But we shall discuss only American realism here. American realism is a combination of the analytical positivist and sociological approaches. It is positivist in that it first considers the law as it is. On the other hand, they share with sociologists an interest in the effects of social conditions on law as well as the effect of law on society, but they emphasize the need for a prior revelation of the actual behaviour of lawyers.[39] This school set out to remove the myth shrouding law and to show what law really is in terms of its practical function in society. Proponents of this school contend that the law in practice is what the judges decide. This is because until a case is decided, no one may be able to foretell what the position of the law is. Oliver Wendell Holmes, a one time Judge of the American Supreme Court, who is considered the father of American realist school, opined: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law".[40] His followers, J.C. Gray and Karl Llewellyn, agree with him. Gray asserted that law is only what the judges decide. Everything else, including statutes, are only "sources of law" until they have been interpreted by the court.[41] In similar vein, Llewellyn said, "what these officials (mainly judges) do about disputes, is, to my mind the law itself".[42] In other words, to understand what "law" is, one should be able to predict how judges decide cases. The decision of judges is not simply a mechanical application of law or rules to the facts of particular case. The decision of judges according to the realists is the product of ascertainable factors. Included among these are their personalities, their social and political environment, the economic

[39] Dias *op cit* p.448
[40] Holmes, O.W., "The Path of the Law" (1887)10 Harvard Law Review 457.
[41] Gray, J.C. *The Nature and Sources of Law* (1921) 2nd ed. p.84
[42] Llewellyn, K. *The Bramble Bush* 1930) p.3.

conditions in which they have been brought up, business interests, trends and movements of thought, emotions, psychology and so forth. The realists concentrate on a psycho-analytical approach to the judge's role in adjudication – his personality, his sympathies and antipathies as the sole determinants of his decisions which he then proceeds to rationalize with convenient legal doctrines, rules and principles.

There is, no doubt, some truth in what they are saying. Different decisions were rendered by the Nigerian Supreme Court in the cases of *Nwobodo v Onoh*[43] *and Omoboriowo v Ajasin*[44], which have similar facts, within a space of less than two weeks. The difference in the decisions can only be explained on the basis of political considerations.

This school highlights the gap between the law as promulgated and the law as interpreted by the courts. For instance, in *Ohuka v The State*,[45] section 31(2) (b) of the Supreme Court Act 1960 provides:

> 32(2) – The periods for the giving of notice of application for leave to appeal are:
> (b) in an appeal in a criminal case thirty days from the date of the decision appealed against.
> (3) The Supreme Court may extend the periods prescribed in sub section (2) except in the case of conviction involving sentence of death.

In the instant case, the Supreme Court construed the thirty days to mean thirty days after the Appellant had knowledge of the decision. There are canons of interpretation, which will give new dimension to an existing rule. In *Ifezue v. Mbadugha*[46] the word

[43] (1983) 10 S.C. 65
[44] (1983) 10 S.C. 196
[45] (1988)1 NWLR 539
[46] (1984)1 SC NLR 427

'shall' in Section 258(1) of the 1979 constitution was construed by the majority of the Supreme Court to be 'mandatory' on the one hand and 'directory' on the other.

The realist school emphasizes the fact that law is a process; that it is not a series of particular commands, but rather a body of principles slowly evolved by the decision of concrete cases. Furthermore, the realist view emphasizes the creative role of judges in applying law to new situations or in interpreting statutory law. In *Bello v A.G. Oyo*[47] one Nosiru Bello was sentenced to death by the Armed Robbery and Firearms Tribunal of Oyo State. He appealed to the Court of Appeal, but before the appeal was heard he was executed. His family sued. The Supreme Court was faced with a situation where there was injury but there was no remedy under existing law. Based on the principle of *ubi jus ibi remedium* the Supreme Court provided a remedy for the plaintiff.

The legal realists emphasized vigorously the need to think about the judicial process with a view to improving its methodology.

The realist approach has however be criticized on several grounds. In a presidential system of government, adherence to the realist viewpoint will be subversive of the principle of separation of power because the judge will be both the law maker and the interpreter of the law. Furthermore, there are some laws that could not go to court because the jurisdiction of the court in respect of them is ousted. Such laws do not cease to be law. It must also be pointed out that a statute made in accordance with the procedure for law making becomes a law without waiting for judicial interpretation. A good proportion of laws do not go to court except there is a dispute. This does not diminish their status as laws.

There are also instances where judicial decisions have been abrogated by legislation. The decision of the Supreme Court in *Lakanmi v A.G. (West)* was abrogated by Decree 28 of 1970. The question that should be addressed to the realists is whether the

[47] (1986)5 NWLR 528

court decision or the subsequent legislation in such circumstance constitutes the law.

The realists are unwarrantedly dismissive of the reality of bindingness of precedents.

The Historical School

While the positivists preach that law is made by a human legislator, the historical school direct attention to the evolutionary nature of law. The historical school believes that however far back one goes into the past of a people, one will always find some law governing them. Von Savigny, who is considered the father of this school, has given the most comprehensive account of its tenets. He said:

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their manners, language and constitution. Nay, these phenomena have no separable existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view[48]

In the words of T.O. Elias, "Savigny does not give a strictly formal definition of law but merely describes it as an aspect of the total common life of a nation, not something made by the nation as a matter of choice or convention, but, like its manners and language bound up with its existence and indeed helping to make the nation what it is."[49] To Savigny, law reflects the spirit and common consciousness of a people. He took custom to be superior to legislation and therefore the latter should always conform to popular consciousness. The greatest contribution of the historical school lies in its recognition of the fact that law is not just an

[48] Quoted in Allen, C.K. *Law in the Making* 7th edn. (Oxford: Clarendon Press, 1964) p.16

[49] Elias, T.O. *et al.* (ed) Nigerian Essays in Jurisprudence (Lagos: M.I.J. Publishers Ltd, 1993) p.16

abstract set of rules imposed on society but it is an integral part of that society deeply rooted in the social and economic order in which it functions and embodying traditional value systems which confer meaning and purpose upon the given society.[50] Thus, in almost all societies, custom is a source of law.

There are some objections to the historical school. In the first place, this theory cannot account for the transplanting of law from one nation to another. For instance, English law has been successfully received in some parts of Africa, America and India. Secondly, subordination of legislation to custom by this school is not true of modern states where custom must be energized by legislation in order to be valid.

Another criticism of Savigny is that if law is the popular consciousness of the community, what of the individual who breaks the law? He is a member of the people, but what of his consciousness? Professor Elias adequately answered this objection when he said that since law is parallel to language, an individual who misuses language does not thereby cease to be one of the people whose consciousness that language, like the law he breaks, represents.[51]

Lastly, Savigny postulated that legislation should always conform to the popular consciousness and that the Volkgeist itself cannot be criticized; rather it is the standard by which laws themselves are to be judged. Elegido pertinently observed that some customs permit human sacrifices, killing of twins, or slavery etc. In the circumstance, is it necessarily wrong to use law in order to deliberately change such practices and ideas?[52]

[50] Lloyd, D. *The Idea of Law* (London: Penguin Books 1987) p.252.
[51] Elias, *op.cit.* p.16.
[52] Dias *op.cit.* 420.

The Sociological School

Sociology means, broadly the study of society of which law is but a part.[53] The sociological approach focuses on the function of law in communal existence. Sociological jurisprudence, according to its chief proponent, Dean Roscoe Pound, should ensure that the making, interpretation and application of laws take account of social facts. Law, according to this school, is a method of social engineering and a means of balancing conflicting interests in the society. In this view, there are many conflicting interests in the society to be satisfied. Law as a method of achieving peace and harmony should be formulated in such a way that peaceful co-existence will continue notwithstanding the impossibility of satisfying all wants. Thus, both the making and interpretation of law should take account of various interests in society and find a way of satisfying them.

Conclusion

The different theories of law have clearly shown that no single concept of law has all the answers to the question of the underlying basis of law, the source of law, and the relationship of law to justice and morality. None of the ideas can be said to be completely right, or completely wrong. These divergent views are illuminating and call attention to various dimensions of legal problems. The function of the law maker is to distill what is good in each point of view and to join them into an amalgam for the good of society. It is therefore necessary that in the making of the law the various ideas of the rival schools of thought be explored and harnessed in order that the law will ensure social order and justice in all its ramifications[54].

[53] *Ibid*
[54] Chukwurah A.O. "Law and Society" in Okonkwo, (ed) *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) p.424

The Nigerian Legal System

The use of the word 'system' here implies that a legal system consists of coordinated activities.[55] Thus the phrase 'Nigerian legal system' embraces those rules, institutions and activities whose main functions are: achievement of justice; provision of framework within which people conduct their affairs; and shaping of people's ideas.[56] The fact that a society is governed by rules does not mean that we should describe it as having a legal system. Its rules system may be based on informal custom alone. Anthropological research has shown that small tribal societies can function perfectly well without anyformal legal sysem. However, such tribal societies had a cohesive structure and simple economy. Once a society develops economically, politically and socially it loses the cohesion that supported the simpler rules system. It will therefore, require a more complex rule. The people of such a society will no longer know all the necessary rules. Hence to avoid uncertainty the society will need to develop rules which will enable its members to recognize the rules that govern the society. Professor H.L.A. Hart calls these rules rules of recognition. It will also need to be able to respond to economic, political and social developments by introducing new rules of conduct. To do this it will require rules of change specifying who has the authority to change the existing rules of conduct. As the degree of cohesion necessary to support informal methods of settling disputes no longer exists, the society will need to develop rules of adjudication defining the procedures to be followed in cases of disputes, for instance, a court that will adjudicate after hearing the parties.
The legal framework shapes many daily activities.

[55] Dias, R.W.M. *Jurisprudence 5th edn* (London: Butterworths, *1985) p . 62*
[56] *Ibid*

The characteristics of The Nigerian Legal System The main features of the Nigerian legal system include:

- ( ) institutions for the promulgation, interpretations, application and enforcement of laws;
- ( ) rules constituting the main organs of government, and defining their relationship inter se, and their relationship with private individuals;
- ( ) rules aimed at maintaining the social equilibrium by forbidding or enjoining certain behaviour and prescribing penal sanctions for their breach;
- ( ) rules which provide the framework for private transactions;
- ( ) rules governing the relationship of the country with other nations or international agencies;
- ( ) the profession that produces the major actors in the legal system.[57]

Another feature of the Nigerian legal system is the strong presence of English law, which is part of the vestiges of colonialism. However, English law is received or sustained by our local legislations. English law forms a substantial part of Nigerian law. The Nigerian legal system is thus a complex one where there is interaction between local customs, English law, international law, Nigerian case law, and Nigerian legislations. The federal structure of Nigeria adds another dimension to the complexity of the Nigerian legal system and thus implies that the 36 federating units (states) have their own legal systems within the framework of the constitution, which is the fundamental and organic law of the country.

Lastly, another characteristic of the Nigerian legal system is that we operate the adversary, and not the inquisitorial, system of judicial administration. This was explained by Nnaemeka-Agu JSC in *Okoduwa v The State*.[58] His Lordship said:

[57] Chukwurah A.O. *op cit* p.410
[58] *Okoduwa v State* (1998) 1 ACLR 319 at 344

> There are certain fundamental norms in the system of administration of justice we operate. That system is the adversary system, in contradistinction to the inquisitorial system. In that adversary system, parties with their counsel and the judge have their respective roles to play. Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides and in accordance with the rules of the particular court and the procedure and practice chosen by the parties in accordance with these rules. Under no circumstance must a Judge under the system do anything which can give the impression that he has descended into the arena as obviously his sense of justice will be obscured.

Similarly, in *Federal Civil Service Commission & 2 Ors v J. O. Laoye*[59] Oputa, J.S.C. said:

> Justice has two scales and the case of either party is put in one or other of the scales and weighed. Justice is also depicted as blind. It neither sees nor recognizes who is a government functionary and who is not. It is not a respecter of persons or institutions, no matter how highly placed these are. One aspect of our much vaunted equality before the law is that all litigants, be they private persons or government functionaries, approach the seat of justice openly and without any inhibitions or handicap. Each wins solely and wholly by, and because of, the strength of his case – its weight on the scale of justice. . . .

[59] (1989) NWLR (pt 106) 652 at 702

CHAPTER 2

CLASSIFICATIONS OF NIGERIAN LAW

The term "Nigerian Law" is used to mean laws that operate in Nigeria and necessarily includes the received English law. Law is a complex phenomenon that touches on all aspects of life. Every human activity is carried on within the framework of the law. Thus, law deals with a variety of situations and circumstances. Consequently, there are several schemes of classification of law. However, the most important scheme of classification is the broad categorization of law into criminal law and civil law.

Criminal Law

The distinction between criminal law and civil law does not lie in the nature of the act. An eminent Professor of Criminal Law, C.O. Okonkwo, observed that "there is no special intrinsic characteristics of criminal conduct distinguishing it from non-criminal conduct. We can only say that it is a crime if after first having enquired whether it is prohibited by law, it is also attended by the requisite legal procedure".[1] The only distinguishing attribute of a crime is that it is punishable at the instance of the state. Thus the true distinction between a crime and a civil wrong does not reside in the nature of the wrongful act but in the legal consequences that may follow it. If the wrongful act (or omission) is capable of being followed by criminal proceedings, that means that it is regarded as a crime (otherwise called an offence). If it is capable of being followed by civil proceedings that means that it is regarded as civil wrong. If it is capable of being followed by both, it is both a crime and civil wrong.[2] Where a conduct amounts to

[1] Okonkwo, C.O. and Nash *Criminal Law in Nigeria*,(2nd edn.) (London: Sweet and Maxwell, 1980) p.2

[2] Williams, Glanville, *Learning the Law* 11th edn. (London: Stevens and Sons, 1982) p.3

both a crime and a civil wrong, the victim of the wrongful conduct can pursue the criminal aspect and his civil remedy concurrently or in the alternative. There is, however, an old rule of English law known as the rule in *Smith v Selwyn*[3] which needs a detailed examination in the light of the persisting controversy about whether it is still applicable in Nigeria.[4] According to the Court of Appeal in *Attorney General of the Federation & 4 Ors v Mrs Idowu Dawodu & 7 Ors*[5] in its undiluted form, the rule in *Smith v Selwyn* says that an action for damages based upon a felonious act on the part of the defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted, and the proper course for the court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted. There are recognized exceptions to the rule. If the party bringing the civil action had reported the criminal aspect to the police and the police decide not to prosecute or fail to prosecute within a reasonable time, the rule will not apply. The rule will not apply where the claim is based on a misdemeanour or simple offence. It does not apply where it is possible that the facts forming the basis of the claim could support a felony but the claim itself is not founded on the felonious offence. Where an allegation of felony is raised by the defendant in his defence, the principle does not apply in such a case for if such were the case, it would always be open to a defendant to gain time by making allegation of felony.[6]

The rule was applicable in southern Nigeria by virtue of various High Court enactments which provide in general for the application of the rules of practice and procedure for the time

[3] (1914)3 K.B. 98

[4] For an incisive discussion on the topic see Ilochi A. Okafor "The Rule in Smith v Selwyn – extinct or extant?" (1998) ABSU L.J.Vol. 5 No. 1, 56.

[5] (1995)2 NWLR (pt 380) 712

[6] See *Ndibe v Ndibe* (1998) 5 NWLR (pt 551) 632 at 648

being of the High Court of Justice in England (in the case of the states created out of the old Western Region) or rules of practice and procedure observed in the High Court of Justice in England on September 30, 1960 (in the case of the states created out of the old Eastern Region).[7] The rule was abolished in England by section 1 of the Criminal Law Act 1967. Consequently, the rule is no longer applicable in Western Nigeria. In some states carved out of the former Eastern Nigeria, the statement of the rule has been enacted in some statutes. In the case of the old Anambra State, the rule was enacted in section 5(1) of the Torts Law Cap. 135, Laws of Anambra State, 1986 and Section 9(1) of the Actions Law Cap. 3, Laws of Anambra State, 1986. The pertinent question is whether the rule is still applicable even in those states where it has received statutory sanction. The issue came up in the case of *Veritas Insurance Co. Ltd v Citi Trust Investments Limited*[8]. The issue in that case was whether in view of the alleged violation of section 15 of the Money Lender's Law, which breach constitutes a crime, the civil action against the appellant must be stayed until the crime has been prosecuted. In his leading judgment, Niki Tobi, J.C.A. held that the decisions to the effect that the rule applies in Nigeria were made per incuriam. According to his Lordship, the rule is not applicable in Nigeria in view of very clear two local statutory provisions – section 5 of the Criminal Code Act 1958 and Section 8 of the Interpretation Act, 1964. Section 5 of the Criminal Code Act 1958 provides that the Criminal Code "shall not affect any right to action which any person would have had against another if the act had not been passed". Section 8 of the Interpretation Act, 1964 provides: "An enactment shall not be construed as preventing the recovery of damages in respect of injury attributable to any act by reason only of the fact that the enactment provides for a penalty, forfeiture or punishment in respect of the act". According

[7] See Akintunde O. Obilade *The Nigerian Legal System* (Ibadan: Spectrum Books, 1979) pp. 6-7.

[8] (1993) 3 NWLR (pt 281) 349

to His Lordship, the combined effect of the two enactments is that the rule in *Smith v Selwyn* is no longer applicable in Nigeria.
One must, however, observe that the two enactments are Federal enactments which cannot abolish the rule in relation to the states.
The question of the validity of the rule in *Smith v Selwyn* also arose in the case of *Attorney General of the Federation & 4 Ors v Mrs Idowu Dawodu & 7 Ors*[9]. The facts of the case are as follows. The respondents as plaintiffs, jointly and severally sued and claimed against the appellants and the 4th defendant, as defendants, the sum of five million Naira being damages for the unconstitutional and wrongful killing of Mr. Sule Dawodu of Anikantamo Square, Lagos by the 4th defendant who is a police constable and the husband of the 1st and 2nd respondents. At the close of pleadings and before evidence was led on behalf of both parties, the appellants brought an application pursuant to section 316 of the Criminal Code Act and section 6(6) of the 1979 constitution praying for an order to stay further proceedings in the suit until the determination of the criminal charge instituted against the 4th defendant, Constable Eze Ibe in line with the principle in *Smith v Selwyn*. The trial judge in dismissing the application held that the principle in *Smith v Selwyn* is no longer tenable in our courts. On appeal to the Court of Appeal, the Court of Appeal held that by virtue of section 5 of the Criminal Code Act 1958 and section 8 of the Interpretation Act Cap. 192 of 1964, the rule is no longer applicable in Nigeria. The Court of Appeal also held that the decisions of Nigerian Courts in which the rule had been applied were given per incuriam. The Court further held that an attempt to apply the principle would amount to an infraction of section 236 of the 1979 constitution which confers unlimited jurisdiction on the High Courts. One does not, however, see how the application of the rule will be in conflict with the unlimited jurisdiction granted to the State High Court under the 1979 constitution since it does not exclude the jurisdiction of the court.

[9] (1995)2 NWLR (Pt 380) 712

The validity of the rule was also in issue in the case of *Gabriel Ndibe & 3 Ors v Patrick Sunday Ndibe*[10]. The respondent sued the appellants claiming damages of N2,000,000.00 against them jointly and severally for assault and battery committed on him on the 1st May 1991. When the respondent had closed his case and it was for the appellants to open their case, the appellants applied for stay of proceedings pending the outcome of the three separate charges filed at the Chief Magistrate's Court against the appellants. The trial high court refused the application for stay. On appeal, the Court of Appeal held that the rule applies in Anambra State by virtue of section 5(1) of the Torts Law Cap. 135, Laws of Anambra State, 1986 and section 9(1) of the Actions Law Cap 3, Laws of Anambra State, 1986. The statement of the rule is re-enacted in the provisions of the two legislations. The Court, however, further held that the basis of the respondent's claim in that suit was not felony but a misdemeanour and that the respondent had done all he was expected to do under the rule by reporting the matter to the police. Niki, J.C.A. (as he then was) also tried to rationalize the extinction of the rule on the ground that the aforementioned Federal legislations have covered the field and therefore the state legislations on the same matter have become inapplicable.
A learned writer of eminence, Professor Ilochi Okafor, made a scathing criticism of the decisions in the above three cases.[11] On the *Dawodu's* case he submitted that resort to the English rule of practice and procedure was misplaced. According to him, this is because the said section 12 of the High Court Law enacted what is generally called the "safety valve provision", which allows for resort to the English rule when there is lacuna in the local rule. He observed that there was no lacuna at all, as the rule in Smith v *Selwyn* was already in force at the time the High Court Law was enacted in 1973. He also criticized the decision in the case on the ground that it interpreted the phrase "the practice and procedure for

[10] (1998)5 NWLR (pt 551) 632
[11] Okafor, I. *Op. cit*

the time being in force" to mean the practice and procedure in force not at the time the enactment was made, but at the time the cause of action arose.[12] Continuing with his criticisms of the decisions in the case, Professor Okafor contended held that the Court of Appeal being a court of co-ordinate jurisdiction with the former West African Court of Appeal (WACA), the Court of Appeal could not purport to disapprove the earlier decisions of the WACA in *U.A.C. v Taylor*[13], *Ibekwe v Pearce*[14], *Haco Limited v Udeh*[15].

Professor Okafor further submitted that the application of the rule has received the authoritative sanction of the Supreme Court in *Aliu Bello & 13 Ors v A.G. Oyo State* [16] where Karibi-Whyte, J.S.C. said:

> Where a tort amounts to a felony, the injured person cannot sue the tortfeasor for damages unless he has been prosecuted. This is known as the rule in *Smith v Selwyn* . . .. This rule has now been considerably modified following realities of the facts to require a mere report to the prosecuting authority as sufficient.

It would appear, however, that these criticisms are largely misplaced. In the *Aliu Bello* case the application of the rule in *Smith v Selwyn* was not in issue. The rule was merely mentioned in a passing remark by Justice Karibi-Whyte in his concurring judgment. What was in issue in that case was the rule in *Baker v Bolton*[17] to the effect that "In civil court the death of a human being cannot be complained of as an injury". It was in consideration of the rule that His Lordship, Karibi-Whyte, J.S.C. said:

[12] at p. 58
[13] (1937)2 WACA 67
[14] (1960) NRNLR 12
[15] (1959) NNLR 61
[16] (1986) 12 S.C. 1 at 75
[17] (1808)1 Camp. 493

> This principle was based on the prior claim of the king to that of the citizen, to the person and goods of the felon if convicted of the offence. This was at the time advantageous to the king. The claim of the king in the result of the prosecution of an offence would appear to be the source of two rules, namely (a) where a tort amounts to a felony the injured person cannot sue the tortfeasor for damages unless he has been prosecuted. This is known as the rule in Smith v Selwyn. ... This rule has now been considerably modified following realities of the facts to require a mere report to the prosecuting authority as sufficient.

The above opinion of Karibi-Whyte, J.S.C. being an obiter, the Court of Appeal is not bound to follow it.

Secondly, Professor Okafor was not right in contending that the Court of Appeal could not disapprove of the decision of the former West African Court of Appeal. The decision of WACA ranks as the decision of the Court of Appeal. The Court of Appeal is not bound to follow its earlier decision which was given per incurim.[18] On the Ndibe case, Professor Okafor contended that the opinion of Hon. Justice Niki Tobi that the rule no longer applies in Nigeria is an obiter as the court had found that the rule in Smith v Selwyn did not apply.

It may be pertinent to point out that Professor Okafor failed to address the question of the constitutionality of the rule in *Smith v Selwyn* which was considered by the Court of Appeal in the *Dawodu* case.

It is submitted that the present position is that since the Court of Appeal has held that the rule in *Smith v Selwyn* is unconstitutional in the case of *Attorney General of the Federation v Dawodu*, while the same Court apparently considered the rule

[18] See *Megwalu v Megwalu* (1996)7 NWLR (Pt 459)170 C.A. See also *Comptel Intl SPA v Dexson Ltd* (1996)7 NWLR (PT 459) 170 C.A.

applicable in the subsequent case of *Ndibe v Ndibe*, there is now two conflicting Court of Appeal decisions on the matter. The better view, it is submitted, is that the rule is unconstitutional, not because of the reason given in the *Dawodu* case but because the rule violates section 36(1) of the 1999 constitution which provides for the right to fair hearing within a reasonable time. In the case of Ariori v Elemo[19] Anthony Aniagolu, J.S.C. observed that speedy trial is one of the factors that go to make a trial fair. Secondly, the rule violates Article 7 of the African Charter on Human and People's Rights which guarantees the right to have your cause heard. Any legislation that seeks to inhibit a plaintiff from having his cause heard because the felony arising from the same facts have not been prosecuted will violate the right to have your cause heard and the right to fair hearing within a reasonable time. It was held by the Supreme Court in *Abacha v Fawehinmi*[20] that the provisions of the African Charter are superior to ordinary legislations. In *Attorney General v Dawodu*[21] the Court of Appeal pertinently observed that the rule has turned out to be a clog in the wheel of the proper administration of justice and has been manifestly invoked for the purpose of defeating the aims of justice and the civil rights of the affected individual.

In Nigeria, a person cannot be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law.[22] In *Aoko v Fagbemi*[23] the conviction of an accused for adultery was set aside because adultery is no offence under any written law in Southern Nigeria.

Criminal offences are classified in Southern Nigeria in terms of their seriousness into felony, misdemeanour and simple offences. A felony is an offence, which is declared by law to be a

[19] (1983) 1 SCNLR 1
[20] (2000)6 NWLR (pt 660) 228
[21] (1995)2 NWLR (Pt 380) 712
[22] S. 36(12) 1999 Constitution
[23] (1963, All NLR 400

felony, or is punishable, without proof of previous conviction, with death or by imprisonment for three years or more. A misdemeanor is an offence which is declared by law to be a misdemeanor, or is punishable by imprisonment for not less than six months, but less than three years. An offence is a simple offence if it is neither a felony nor a misdemeanour.[24]

In terms of procedure, crimes are also classified in the Southern States of Nigeria into indictable and non-indictable offences. An indictable offence is an offence

(a) which on conviction may be punished with a term of imprisonment exceeding two years; or
(b) which on conviction may be punished by imposition of a fine exceeding ₦400 Naira; and
(c) which is not declared by the written law creating it to be punishable on summary conviction.[25]

In Southern Nigeria, both the High Courts and the Magistrate Courts try indictable and non-indictable offences but the High Courts follow more elaborate procedure. And an accused must have elected summary trial before a Magistrate can try an indictable offence.

Criminal proceedings differ from civil proceedings not only in the outcome but also in procedure and in terminology. Usually, criminal proceedings are instituted by the state, though a private person can undertake criminal prosecution if he obtains the fiat of the attorney general. On the other hand, the injured party institutes civil proceedings and he can withdraw it at his discretion. While the main object of a criminal trial is punishment or correction after a finding of guilt, the main purpose of a civil trial is compensation to the victim. And while civil actions can be statute barred, generally there is no time limit for prosecuting a crime.

[24] S.3 Criminal Code (Laws of the Old Anambra State Cap. 36, 1986). Equivalent provisions exist in the laws of other states in Southern Nigeria.
[25] S.2 Criminal Procedure Law

In criminal proceedings the terminologies are as follows. The party who brings criminal proceedings is called the *prosecutor*. Since a crime is an offence against the state, the prosecutor is normally the attorney general or officers of his department, (for instance, the Director of Public Prosecutions), or the Police. The Police conduct most prosecutions in the magistrate's Courts, while the attorney general or officers of his department conduct most prosecutions in the High Court. The party against whom a criminal charge is brought is called the *accused* or *defendant*. A person who is arrested for a criminal office but is still under investigation by the police is called a *suspect*. The accused may plead *guilty or not guilty*. The result of a successful prosecution is *conviction*. Where the defendant is convicted a *sentence* (punishment) will be imposed on him.

The accused may be *discharged* where for instance, the court lacks jurisdiction, or the prosecution is brought under a wrong law, or the complainant is absent in court, or the prosecution is not diligently prosecuting the case. Where an accused is merely discharged, he can be tried again on the same facts. An accused may, on the other hand, be *discharged and acquitted*. Acquittal follows where a case has been tried on its merit but the prosecution was not able to establish the guilt of the accused with the required standard of proof. In criminal trial, the standard of proof is *proof beyond reasonable doubt*.[26] Where an accused is *discharged and acquitted* he cannot be arrested or charged or tried again on the same facts. If he is charged again on the same facts he will raise the defence of *autrefois acquit*. A person who shows that he has been convicted of a criminal offence cannot be tried again for that same offence; if he is tried again for the same offence he will rely on the defence of *autrefois convict*.

The common law doctrines of *autrefois acquit* and *autrefois convict* have now been codified in section 36(9) of the 1999 Constitution.

[26] S. 137 of the Evidence Act

The terminologies used in criminal proceedings cannot be transferred to civil proceedings and vice verse. The party who appeals in a criminal case is called the *appellant* while the opposing party is called the *respondent*. The name of the party who instituted criminal proceedings (the State, the Attorney General or the Police) usually appears first, followed by the word 'versus' (usually abbreviated to 'v' 'but pronounced against') before the name of the defendant or accused. For instance, *State v Okon*.

Civil Law

Civil law in this context may be defined negatively as the law that is not criminal.[27] Thus, all legal situations outside the ambit of criminal law are within the ambit of civil law. As mentioned earlier, the distinction between a crime and a civil wrong does not depend upon the nature of the conduct but on the legal consequences and the attendant procedure. Thus the same conduct may amount to a crime as well as a civil wrong.

Classifications of Civil Wrong

The more common types of civil wrong are: breach of contract; tortuous act; breach of trust.

Contract is an agreement, which is enforceable in law. The elements of a valid contract are offer, acceptance, consideration and intention to create legal relations. Breach of contract arises where a party defaults in his contractual obligation. Another civil wrong is a tort. In the course of human relationships one person may injure another. The injury may affect his person, property, reputation, domestic or business relationships. The purpose of the law of tort is to prescribe the circumstances in which a person may or may not recover compensation from another for such losses and to make necessary adjustments by providing redress in the form of

[27] The phrase 'civil law' has other meanings. It may mean the law of a state as opposed to other sorts of law like international law. It may also mean Roman Law. See Williams, Glanville *op.cit.* p.2.

compensation or some other remedy for the injured party.[28] While duty in contract arises out of the agreement of parties, duty in tort is imposed by the operation of law.

A trust arises where a person called the settlor, gives property to another person called the trustee, to manage on behalf of, and in the interest of, another person called the beneficiary. A breach of trust will arise if the trustee deals with the property in an unauthorized manner.

As earlier state, civil law has its own terminologies. The word 'suit' means a case in which there is a plaintiff who sues, and a defendant who is sued, in respect of some cause of action, and includes a counterclaim and an interpleader.."Action" means every legal proceedings in the court. "Cause" means a civil action in original proceedings. "Matter" means an action other than a cause. "Court Process" or "Process" includes writ of summons, originating summons, originating process, notices, petitions, pleadings, orders, motions, summons, warrants and all documents or written communication whether or not service of such document is required in any legal proceedings. "Originating Process" means any court process by which a suit is initiated. "Probate action' means an action for the grant of probate of a will, or letters of administration of the estate of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will. Generally, the party who brought a civil suit is called the *plaintiff* while the party against whom it is brought is called the *defendant*. Under the High Court Civil Procedure Rules of Enugu State, 2006, the word 'plaintiff' is defined to include a claimant in a counterclaim. However, some categories of proceedings within the ambit of civil law have their own peculiar terminologies for parties to the action. In matrimonial proceedings the party who brings the action is called the *petitioner* while the other party is called the *respondent*.

[28] Okonkwo, C.O. ed. *Introduction to Nigerian Law (London; Sweet & Maxwell, 1980) p.254.*

In action for enforcement of fundamental rights or motions for bail, the party who brings the action is called the *applicant* while the other party is called the *respondent*. Parties to proceedings before the Industrial Arbitration Panel are called *first party* and *second party* etc. Where a case goes on appeal, the party who brought the appeal is called the *appellant* while the other party is called the *respondent*. The name of the party that brings a civil action comes first in the title of the case followed by the word 'versus' (usually abbreviated to 'v' and pronounced 'and') before the name of the party against whom the action is brought. A civil proceeding may be called a *suit* or *action* or *matter*. Where the plaintiff succeeds in proving his case in a civil action, he will get *judgment*, which may be *executed* against the defendant.

Other Classifications of Nigerian Law

Public Law and Private Law

Public law is that aspect of law that regulates the relationship between various organs of the state inter se and or the relationship of the state with the individual. Examples of public law are constitutional law, administrative law, criminal law, and human rights law.

Private law, on the other hand, deals essentially with the relationship of private persons or business associations. Examples of private law are family law, commercial law, law of intellectual property, law of banking and insurance, law of contract, law of tort, law of trust, company law, law of succession.

Municipal Law and International Law

The term 'municipal law' denotes the domestic law of a particular country. International law on the other hand, is the law which governs the relationship of nations or between nations and international institutions.

Statute Law and Case Law

A statute (legislation) is a law made by a law-making body (the legislature) while case law is judge-made law – that is the principles of law that are discovered in decided cases. In the Nigerian situation, statutes include laws made by the legislature in a democratic dispensation and military decrees and edicts made during military regimes.

Common Law and Equity

Common law means the law developed from the general customs of English people by the old common law courts. Equity, on the other hand, is a type of law that evolved from the decisions of the old chancery courts of England aimed at mitigating the hardship, hardness or technicality of the common law.

Customary Law

Customary law means the local customs and usages of the various peoples of Nigeria, which have acquired the force of law.

CHAPTER 3

SOURCES OF NIGERIAN LAW

The phrase 'source of law' is used in different senses. First, there is the literary source, the original documentary source of our information concerning the existence of a rule of law. In this sense the law reports and statute books are sources of law. Secondly, there are the historical sources of law, the sources from which rules of law derive their content as a matter of legal history. In this sense the writings of Bracton and Coke and the works of other great exponents of English law are sources of law, for they enunciate rules, which are now embodied in judicial decisions and legislations. In the third sense, the phrase means the ultimate origin of the whole body of a legal system – the origin from which the system derives its validity, be it the electorate, a special body, or the will of a dictator.[1] The term is used in a fourth sense to mean the legal source, the origin from which a rule derives its validity as a rule of law.[2] It is the means through which a rule of law forms part of the body of law (corpus juris). It is in this sense that the term, 'source of law' is used in the context of this work.

The sources of Nigerian law may be categorized as follows:

1. English law
   a. English enactments extended to Nigeria before her independence.
   b. Received English Law
      i. The common law
      ii. The doctrines of equity
      iii. Statutes of general application in force in England on the 1st day of January, 1900.

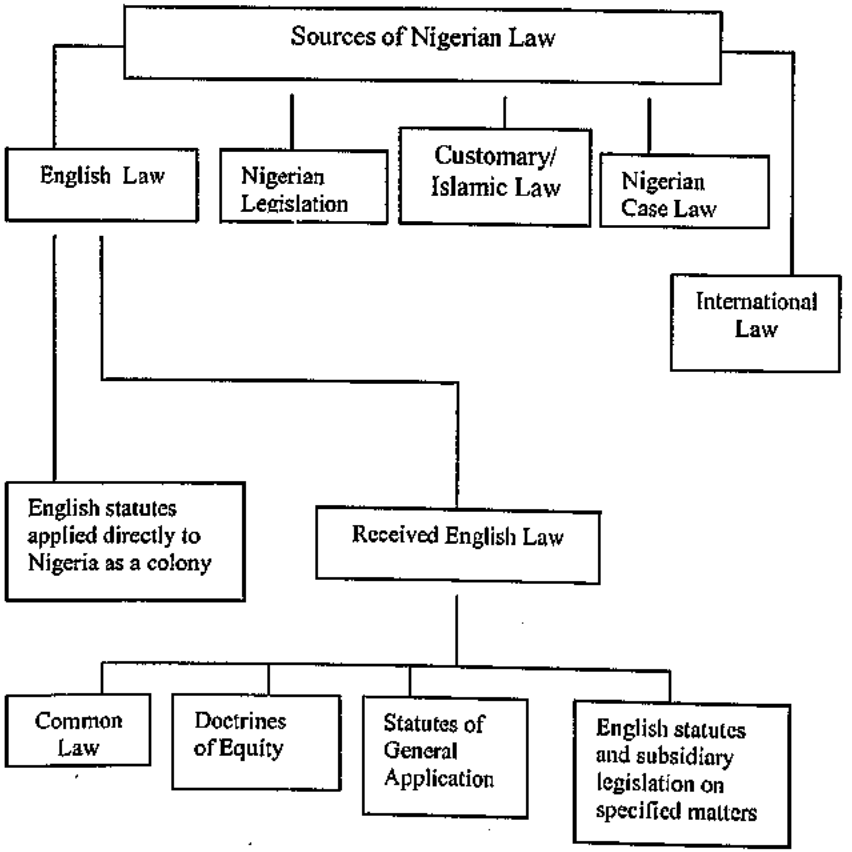
[1] Obilade, A. O. *The Nigerian Legal System* (London: Sweet & Maxwell, 1981) p. 55

[2] Cross, R. *Precedent in English Law* (Oxford: Clarendon Press, 1961) p.147

iv. Statutes and subsidiary legislation on specified matters.

2. Nigerian legislation
3. Nigerian case law
4. Nigerian customary law/Islamic law
5. International law

This information can be graphically represented as follows:



English Law

By virtue of Nigerian's experience as one time colonial territory under British rule, English law forms a large portion of Nigerian law. These laws include those enacted directly by the Crown or her agents for Nigeria as a colonial territory some of which were retained after Nigeria's independence. The second category is the English law received through the instrumentality of our own local legislations after independence.

English Statutes made to Apply Directly to Nigeria

The geographical area known as Nigeria today was once a colony and protectorate of Britain. A colony is a part of Her Majesty's dominions and therefore comes under the full legislative authority of the British Parliament. In practice, however, the British Parliament does not normally legislate for parts of Her Majesty's dominions outside the United Kingdom. Such enactments as are occasionally made to apply directly to colonial territories are those making uniform regulations on matters of general concern throughout the British Empire.[3] A protectorate, on the other hand, is a country which is not within the British dominions, but as regards its foreign relations, is under the exclusive control of the King.[4] The exercise of jurisdiction in the field of foreign affairs and relations is, under English law, within the prerogative power of the Crown.[5] The British Crown could legislate by Order-in-Council for any colony, protectorate or trust territory under the Crown. The Foreign Jurisdiction Acts 1890 and 1913 and the Colonial Laws Validity Act 1865 gave this power to the Crown.[6] In practice, however the Crown does not employ the

[3] Ezejiofor, G. "Sources of Nigerian Law" in Okonkwo (ed.) *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) p.3.
[4] Sir Henry Jenkyns, British Rule and Jurisdiction Beyond the Seas (1902) p.165 quoted in Nwabueze, B.O. *A Constitutional History of Nigeria* (London: Longman, 1982) p.11
[5] See the Foreign Jurisdiction Act 1843 and 1890.
[6] *Ibadapo v Lufthansa Airlines* (1997)4 NWLR (Pt 498) 124.

full amplitude of his power to legislate for the overseas territories. The Crown normally constitutes a machinery in the dependent territory and invest it with legislative powers in respect of the territory, though subject to varying decrees of imperial control.[7] Nevertheless, the Crown almost always specifically reserves the power to also legislate for the dependent territory concurrently with the local legislature. When Nigeria was a dependent territory, therefore, a number of laws were made for her by the local legislature and the British Crown. In *Joseph Ibidapo v Lufthansa Airlines,*[8] the Supreme Court affirmed the observation of the President of the Court of Appeal in that case, that once an enactment is extended to a colony or protectorate by an Order-in-Council, that enactment to all intents and purposes becomes not only part and parcel of the law of the colony, but also self-executing and requires no further legislative act to implement it. When Nigeria became independent in 1960, section 3(1) of the Nigerian (Constitution) Order-in-Council 1960 preserved and protected existing laws, including such enactments, as if they were made pursuant to the said Order. The 1963 Constitution, which repealed the Nigerian Independence Act 1960, and the Nigerian (Constitution) Order-in-Council 1960 preserved all existing laws subject to the Constitution. Subsequent Nigerian Constitutions of 1979 and 1999 similarly preserved existing laws.[9] In *Ibidapo v Lufthansa Airlines*[10] the Supreme Court held that from 1960 to date, all the English laws, multilateral and bilateral agreements concluded and extended to Nigeria, unless expressly repealed or declared invalid by a Court of law or tribunal established by law, remain in force subject to the provisions of the prevailing Nigerian Constitution. Accordingly, the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953 through which the

[7] Ezejiofor, *op.cit* p.2
[8] (1997)4 NWLR (Pt 498) 124
[9] See sections 274 and 315 of the 1979 and 1999 Constitutions respectively.
[10] (1997)4 NWLR (Pt 498) 124

Warsaw Convention Regulating International Carriage by Air was made applicable to Nigeria, still subsists as an existing law.

The Received English Law

By received English law we mean those aspects of English law that forms part of our *corpus juris* through the instrumentality of our local enactments, as opposed to the English laws that applied to Nigeria with their own force and vigour. Lagos became a British colony in 1861. Ordinance No.3 of 1863 introduced English law into the colony of Lagos. Subsequently, other local legislations received English into various Regions and the Federal Capital Territory.[11] Section 45 of the Interpretation Acts,[12] which received English law into the Federal Capital Territory, for instance, provides as follows:

> S. 45(1) – Subject to the provisions of this section, and except 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 1st day of January, 1990, shall be in force in Lagos and, in 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.
>
> (2) Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law.

[11] Federal Territory – Law (Miscellaneous Provisions) Act 1964, S.23 (originally known as Interpretation Act Cap. 89 S.28); Eastern Nigeria – High Court Law Cap. 60 S.3; Western Nigeria – Law of England (Application) Law, Cap 60 S.3, Western Nigeria Laws, 1959; Northern Nigeria – High Court Law, Cap 49, N.N.L. 1963, ss.28, 29 and 35.
[12] Now re-enacted as S.32 of the Interpretation Act Cap.192 Laws of the Federation 1990.

(3) For the purpose of facilitating the application of the said imperial laws, they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

The reception provisions in the regional laws were similar to the above. The only significant difference is that the Western Region did not receive the Statutes of General Application. The Region received only the common law and equity. In 1959, the Government of the Western Region collated all English Statutes, which they considered suitable for the Region and re-enacted them into laws of the Western Region.

Some of the reception provisions simply mentioned "the common law" or "the doctrines of equity"[13] The question that may arise is whether some other brands of equity or common law other than the English common law or doctrines of equity were received. It is submitted that notwithstanding the omission of the words "of England" in relation to the common law or the doctrines of equity, it is still the common law and the doctrines of equity of England that were received.

Prof. Allot has suggested that the cut off date of "1st January 1900" applies not only to the statutes of general application but also to the other classes of the received English law – the common law and the doctrines of equity.[14] This proposition has judicial support in the recent case of *Aro v Lagos Island Local Government Council*[15] where Onnoghen, J.C.A., in his leading

[13] The High Court Law, Cap 49, Northern Nigerian Law 1963, ss.28, 29 and 35 mentioned the received common as "the common law", and "the doctrines of equity".
The Eastern Nigeria High Court Law Cap. 61 (E.N.L. 1963) S.15 mentioned simply "the doctrines of equity".

[14] *New Essays in African Law* pp.55-61

[15] (2001) 32 WRN 72

judgment expressed the opinion that 1900 is the cut off date for application of, inter alia, the common law and the statutes of general application in force in England to Lagos. It is submitted with due respect that the cut of date of 1st January 1900 applies only to the statutes of general application and not the common law and equity, which are applied in their current form. This position finds support in the fact that in Western Nigeria where the statutes of general application were not received, the cut off-date of 1st January 1900 was not mentioned. Furthermore, the phraseology of the reception clauses, their punctuation etc, leaves no one in doubt that the cut off date applies only to statutes of general application. The matter is even made clearer in section 28 of the Northern Region High Court law, which lists all the three as follows: (a) the common law; (b) the doctrines of equity, and (c) the statutes of general application which were in force in England on the 1st day of January 1900.

In 1963, the Mid-Western Region was carved out of the Western Region. Presently, we have 36 States carved out of the former regions. The position is that when a state or region is carved out of a region or another state, the new state or region will by a transition device continue to apply the laws of the parent region or state. In any case, some of the new states have made their own High Court laws and other laws. However, the provisions of these laws relating to the reception of English law are substantially similar to the original reception clauses contained in the Regional laws and the Interpretation Act. We shall now briefly examine each category of the received English laws.

The Common Law

The term "common law" is used in different senses. Professor Granville Williams[16] has identified the following four senses in which the term "common law" has been used. Originally, it meant the law that was not local but common to the whole of

[16] Williams, Granville *Learning the Law* (London: Stevens and Sons, 1982) p.25

England. The phrase will also signify the law that is not the result of legislation, that is, the law created by the custom of the people and decisions of the judges. The phrase may also mean the law that is not equity. It may also mean the legal system of countries that have adopted the English law as opposed to countries that have adopted the Roman law or the French law. In any case, it is in the second sense that the phrase is used in the context of this work. Thus, by the term "common law of England" is meant the basic law of the land, which was developed by the old common law courts out of the general and local customs prevailing among the various English communities in the early centuries.[17] The courts of common law before the passing of the Judicature Acts 1873-75, were the three royal courts of King's Bench, Common Pleas or Common Bench, and Exchequer, which had emerged from the King's Council (Curia Regis) as separate courts by the end of the thirteenth century.[18] These courts were enjoined to apply the local and general customs of the realm. When a particular custom is applied to a given case, the principles of law established in that case will be a precedent to a future court handling a case of similar or the same facts. This process continued, and in the course of time a body of law evolved through this process and is known as the common law. It follows from the legislative supremacy of Parliament that where common law and statute are in conflict, the latter prevails.

The common law has the following characteristics. The common law is judge made law. It is not codified. Rather its principles are to be discovered in previous cases. For this reason, the common law has been described as judge-made law. Judges do not make law in the sense in which the legislators do. They do not sit together to receive a bill, debate it and possibly pass it into law. No. Judges are said to make law in the sense that they apply the

[17] Ezejiofor, *op.cit* p.7

[18] Philips, O.Hood *A First Book of English Law*(London: Sweet & Maxwell, 1970) p.8

law to ever changing combination of facts and circumstances to which the law has never been previously applied and in the course of doing so, the judge must have to decide between two or more possible interpretations of which the law might be capable. Also, there may be a gap or lacuna in the law which has to be filled by the judge. There may be a situation where there is no law governing a situation. For instance, in the Nigerian case of *Bello v A.G. Oyo*[19] a person condemned for armed robbery whose appeal was pending was executed by the Oyo State Government. The Supreme Court, confronted with the absence of a remedy under the law, created one based on the principle of *ibi jus ubi remedium*. The decision in such a case will stand as law for future cases on similar facts.

It must be noted however that some principles of the common law are continuously being modified by statute. Furthermore, some common law principles have been codified in some States. For instance, pursuant to the provisions of the Revised Edition (Laws of Anambra State of Nigeria) Edict 1986,[20] the laws of contract, tort and the principles of equity and trust were codified. These codified laws are now applied in the States carved out of the old Anambra State – present Anambra, and Enugu States.

Another characteristic of the common law is that its principles are highly rigid and technical. For instance, no action could be brought in the royal courts unless a writ was first obtained. A writ was a sealed document issued in the name of the king addressed to the defendant, stating briefly, the nature of complaint against him e.g. trespass, debt, covenant etc.[21] Each writ gave rise to "a form of action". A form of action included, besides

[19] (1986)12 S.C.I

[20] Edict No.27. Volume 3 of the Revised Laws of Anambra State contains the codified laws of contract and tort. Volume 4 contains the codified laws of equity and trust.

[21] G.C. Cheshire *Stephen's Commentaries on the Laws of England*, 19th edn. (London: Butterworth, 1928) p.42.

a particular writ for commencing the action, particular rule of pleading and proof, a particular form of judgment and a particular method of executing judgment. To bring an action to a common law court, the case must fit into any existing writ, which is limited, otherwise the plaintiff will have no remedy. Furthermore, if the plaintiff brought the wrong form of action and was non-suited before the jury had given their verdict, he could begin again at the expense of time and money; but if the verdict had been given, the action was irretrievably lost.[22]

The Judicature Act of 1873-75 abolished the forms of action. Since the abolition of forms of action, a litigant is only required merely to state the substance of his complaint without necessarily calling it by the name it is known. If his complaint is justiciable and could be remedied by law, a writ of summons is issued for him against the defendant for the matter to go for trial.[23]

Common law remedies follow as of rights. Once a common law right is shown to exist, there must be a remedy. There is no discretion on the court whether or not to award the remedy once a right has been proved.

The principal remedy of the common law is the award of damages. There was no general remedy by which the courts could compel the performance of acts, the fulfillment of obligations or the prevention of wrongs.[24] Thus the machinery of the common law was defective.

Another characteristic of the common law is that common law rights are rights in rem - rights over or in relation to things. As such common law rights are good against the whole world.

The common law was all in all rigid, technical, and defective. This was partly due to lack of remedy, and partly due to the method by which remedy could be obtained coupled with its

[22] Philips, O.H. *op.cit.* p.10.
[23] See the Nigerian Case of *F.B.N. Ltd. V Owie* (1997)NWLR (Pt 484) 744 C.A.
[24] Kiralfy, A.K.R. *Potter's Historical Introduction to English Law and Its Institutions 4th edn (London: Sweet & Maxwell Ltd, 1958) p.582*

defective machinery. In the end, many people with genuine injury could not obtain redress in the common law courts. This situation gave rise to the equity jurisdiction.

Equity

The term "equity" in the technical sense means a kind of law developed by the Chancery Courts in England for the purpose of mitigation of the hardship and injustice arising from the rigidity, high technicality, and defects of the common law. By the end of the 13th century the kinds of available writs and their appropriate forms of action had become fixed. For instance, there was no writ of trust. A beneficiary had no remedy in the common law courts if his trustee refused to fulfill his undertaking. Moreover, the common law had very few remedies. Apart from the remedy of restoring land of which plaintiff had been unlawfully deprived, damages were almost their universal remedy. But there are many cases in which an award of damages is very imperfect remedy even if the damages are actually paid. The increasing complexity of social and commercial life created an urgent need for new remedies.[25] The common law was also unnecessarily concerned with form. For instance, the common law courts, in a case of mortgage, hold a borrower strictly to his bargain; and, if the money was not ready exactly on the day it is due, it treated the mortgaged property as forfeited. Furthermore, the machinery of the common law was inadequate to enable them to enforce judgment by the effective method of personal constraint.

Quite naturally, the discontented suitors petitioned the King in great numbers, alleging that their grievances were unredressed, and praying the King of his "grace and charity" to afford them relief.[26] The King's Council gradually got into the habit of handing over such petitions to the Chancellor, who as an ecclesiastic and

[25] Philips, O.H. *op.cit.* p.11
[26] Cheshire, G.C. *op.cit.* p.44

the keeper of the King's conscience would be peculiarly able to advise the king as to matters of 'grace' and 'charity'. The Chancellor acted on the petitions based on conscience, fairness and justice. The medieval Chancellor was peculiarly well fitted to relieve hard cases: he was always an ecclesiastic, generally a bishop, and learned in the civil and canon law. The Chancellor could give or withhold relief, not according to any precedent, but according to the effect produced on his own individual sense of right and wrong by the merits of the particular case before him, as viewed in the light of his innate ideas, prompted by morality, honesty, conscience or knowledge of good and evil.[27]

The King, through his Chancellor, eventually set up a special court, the Court of Chancery, to deal with these petitions. From the decisions of the Chancery Courts arose a body of equitable principles supplementing the deficiencies of the common law. The reliance on chancery precedents and practice led to the formation of equitable doctrine as definite or rigid as the common law.

The Chancery Courts did not only recognize new causes of action but also created new remedies. The law of trust was a creation of the Chancellor. The Chancellor also developed the concept of equity of redemption by which the Chancellors compelled the mortgagee (lender) to release the property at any reasonable time, on being paid the principal, interest to date and costs.[28] In relation to bonds or sealed acknowledgements of indebtedness, where it was usually stipulated that the bond should be cancelled on payment of double the amount due, the Chancellors established the principle that relief should be given against all penalties i.e. punishments, as distinct from making good the real loss.

[27] Hanbury, H.G Modern Equity: *The Principles of Equity* (London: Stevens & Sons Ltd. 1962) p.4.
[28] Cheshire, G.C. *op.cit.* pp. 49-50.

In circumstances where the remedy of part-performance will be found inadequate equity adopted the remedy of specific performance, which will order a party to specifically perform his bargain. Other remedies of equity are injunction, rectification and rescission.

In *Adenuga & Ors v Odumeru & Ors*,[29] Karibi-Whyte, J.S.C. defined an injunction as an equitable order restraining the person to whom it is directed from doing the things specified in the order or requiring in exceptional situations the performance of a specified act. An injunction could be mandatory, prohibitive, interim, interlocutory or perpetual. A mandatory injunction compels the doing of an act while a prohibitive injunction restrains the doing of things. An interim injunction[30] is normally granted for a short period to preserve the status quo or the subject matter of litigation until a named date or until further order or until an application on notice could be heard. An interlocutory injunction, on the other hand, means an injunction granted after hearing both parties, and made to last till the final determination of the main case and the purpose is to protect a plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the case is resolved in his favour.[31] A perpetual injunction is a final relief granted as part of the final judgment of the court. Rectification of a written document will be ordered if the parties were in agreement on the terms of their contract but by mistake wrote them down wrongly. Where a contract was induced by innocent or fraudulent misrepresentation, the party who has been misled may rescind the contract either by his own act or by bringing an action for rescission.

[29] (2001) 5 NSCQR 148 at 160
[30] *Dyktrade Ltd v Omnia Nig. Ltd.* (2000)3 NSIQR 155; *Obeya Memorial Specialist Hospital & Anor v A.G. Federation & Anor* (1987)2 NSCC 961.
[31] *Kotoye v CBN* (2000) 16 WRN 71

While the common law remedies follow as of right where a plaintiff has established his case, equitable remedies are discretionary, in that the court has a discretion to exercise, whether to award a particular remedy or not.

The common law acts in rem while equity acts in personam. In ordinary civil actions at common law execution may be by putting the plaintiff in possession of the land to which he had been adjudged entitled, or if the judgment was for damages, he might sell so much of the defendant's property as would make up the award. In either case, the execution was against the property of the defendant. But the Chancellor, although he often brought pressure to bear on the defendant, normally enforced conformity to his decrees by imprisoning a recalcitrant defendant for contempt. Thus the execution was not against the defendant's property but against his person. This is the meaning of the maxim 'Equity acts in personam'. Strict application of this principle allowed the court of Chancery to deal with matters that arise outside the area of common law jurisdiction.[32]

Equity is not a self-sufficient system but presupposes the existence of the common law. As observed by Hood Philips,[33] "If all Equity were abolished we should still have a coherent though inequitable common law, but if the common law were abolished we should be left with a number of unrelated principles suspended in mid-air".

Equity does not only supplement the common law but overrides it in case of conflict. It has not always been so. Equity and the common law had for sometime been engulfed in rivalry. Where a party had insisted on pursuing his legal rights in a common law court, the Chancellor, where appropriate, would grant an 'injunction' against him, forbidding him to proceed with his common law action, and if he disobeyed, would put him in prison. Such a state of affairs led to bitter quarrel between the common

[32] Cheshire, G.C. *op.cit.* p.48.
[33] *op.cit.* p.11

law courts and the chancery at the beginning of the 17th century when Sir Edward Coke was the Chief Justice of the Common Pleas and Lord Ellesmere, the Chancellor. In the *Earl of Oxford* case (1615) King James I resolved the dispute in favour of the Chancery. The Judicature Act of 1873–75, reaffirmed this position. The Judicature Act abolished the competing jurisdictions and merged them. Since the Judicature Acts of 1873–75, which brought about the fusion of law and equity, there had been an amalgam of the superior courts in England into one Supreme Court of Judicature. The Courts of King's Bench, Exchequer, and Common Pleas, and the Court of Chancery, together with the Court of Exchequer Chamber, and the Court of Appeal in Chancery, were all replaced by the Supreme Court. The Supreme Court, consisting of the Court of Appeal and the High Court (with five divisions, but later three divisions), was directed to administer both law and equity.

Though equity will override the common law when both are in conflict, equity has not come to displace the common law but to rectify its imperfection. Kayode Eso JSC has pertinently observed that though it has always been a 'catechism' that where law and equity are in conflict, equity prevails, there have always been limits to the rule. The clause enacting that the rules of equity shall prevail was not intended to sweep away altogether the principles of the common law.[34] In *Trans Bridge Company Ltd v Survey International Ltd,*[35] the promoters of the Appellant Company had entered into negotiations with the Respondent for the purchase of a piece of property before the Appellant company was incorporated. Facts showed that although both parties agreed on the terms of the contract, the contract was not fully concluded owing to delay on the part of the promoters of Appellant company and the offer therefore lapsed. Thereafter, further negotiations

[34] Trans Bridge Company Ltd. V Survey International Ltd (1986)4 NWLR (Pt 37) 576 J.C.
[35] *Ibid*

continued but the Respondent had then changed its mind about the sale. Upon formation, the Appellant Company sought to enforce the agreement relying on the principles of equity. The trial court found that there was a valid contract capable of being enforced by the appellant company. The Court of Appeal, however, reversed the trial court's judgment. The Appellant appealed to the Supreme Court. In unanimously dismissing the appeal, the Supreme Court held that a company cannot be bound by, or seek to ratify a contract entered into on its behalf before it was incorporated, either under the principles of the common law or the doctrines of equity. The Court observed that the legal right in a contractual obligation cannot be abolished by equity, neither can equity create a legal or contractual right where none exists. Kayode Eso JSC, who read the leading judgment said:

> Upon what facts then will equity be invoked in this case? Surely equity should not be treated as a tyrannous phenomenon threatening the law. It does not exist in vaccuo or supposedly to roam about pouring water on the fire of the law. Equity is not a warlord, determined to do battle with the law. It is part of a legal system, which has been mixed with the law, and the admixture is for the purpose of achieving justice.[36]

Equity does not imply arbitrariness on the part of the judge. It does not mean that judges can dispense with the law and decide cases based on their intuitive sense of right and wrong. This point was borne out by the decision of the Court of Appeal in *Dr. M.T.A. Liman v Alhaji Shehu Mohammed*[37] The facts of the case are as follows. The appellant had sometime in 1979, sold a plot of land to the respondent for N7000.00, and after payment handed over to the respondent the receipt for the payment and the letter of allocation. The respondent subsequently collected a certificate of occupancy

[36] at p. 597
[37] (1999)9 NWLR (Pt 617) 116

in respect of the land. In 1981 there was a riot in Kano resulting in the Ministry of Lands and Survey building being burnt. The Ministry subsequently called on members of the public who had certificates of occupancy yet to be collected to come forward for re-certification of their documents. The appellant took advantage of this situation and, on the pretext that the certificate of occupancy in respect of the land in question had not been issued, applied for a re-certification and another certificate of occupancy was issued to him. The appellant instituted an action in the High Court of Kano State claiming declaration of title to the land and damages. The respondent counterclaimed for damages. At the conclusion of trial, the trial court dismissed the appellant's claim. However, without considering the respondent's counterclaim for damages, the trial court granted an order of specific performance in favour of the respondent, which relief the respondent did not claim. The appellant having appealed unsuccessfully against the decision to the Court of Appeal further appealed to the Supreme Court. In allowing the appeal and ordering a retrial, the Supreme Court held, inter alia, as follows. Although, it is true that the court of law is also a court of equity, that is only to the extent that a modern court generally can exercise and award both legal and equitable reliefs, but in no other sense. Thus that statement of law, which facilitates the administration of justice in one court, based on law and equity does not enable the very same court to arbitrarily exercise its legal and equitable jurisdiction. Being a court established under one statute, those two jurisdictions remain inviolate and compartmentalized and can only be exercised where the existing rules and practice of law and equity so permit, but not otherwise. The legal and equitable jurisdictions of a court do not permit the court to act on grounds of sympathy or arbitrariness, no matter the compelling circumstances. In other words, there is no third arm of jurisdiction (outside law and equity), which permits the court to act on the basis of sentiment. "Sentiment or passion", the Supreme Court went on, "is an ever present element in human minds, but law is an embodiment of justice and fairness". Law is invariably

divorced from element of passion. Consequently, the adjudication in the competing interests of the parties in litigation must be left unmuddled by the element of passion. Thus, the order of specific performance, when it was not asked for, based on the sentiment to do substantial justice between the parties is legally indefensible and cannot be allowed to stand.

Thus, equity has not abolished the law. It is a correction of the law in part where the law is defective. The recent Nigerian case of *FDB Financial Services Ltd. & 6 Ors v Ambassador O.O. Adesola & two others*[38] provides a good example of cases where the principles of equity were properly invoked to prevent injustice. In that case, the respondents entered into an agreement in which the respondents (plaintiffs) fixed two sets of money each worth N2 million with the appellants whereby the latter, in particular the 1st appellant, a finance house, was to hold the money until a fixed period and thereafter on the date of maturity turn over the said sum together with the accrued interest to the respondents. The first N2 million was to mature on 9th August, 1993. However, on 3rd August, 1993, before the maturity of the investment, the respondents instituted an action at the High Court claiming against the appellants a refund of the N4 million investment and interest. The High Court entered final judgment for the plaintiffs and ordered the appellants to deposit a certified bank cheque for N4 million within 3 days in the High Court. On appeal to the Court of Appeal, the Court of Appeal noted that the action of the respondents was pre-mature because the condition precedent to bringing the action was that the investment must have matured. In any case, the Court noted that the action was taken out on 3rd August, 1993. To strike it out in the year 2000 would mean that the aggrieved plaintiffs will be caught by time bar in starting a fresh action and consequently, the defendants/appellants would appropriate the sums which the plaintiffs/respondent invested. The Court of Appeal therefore dismissed the appeal.

[38] (2000)8 NWLR (Pt 668)170 C.A.

Aderemi J.C.A, pertinently, observed:

> The case in my view provides such occasions when equity wades in to water down the harshness of the law. Indeed equity is a correction of the law in the part where it is defective. Equity, as it were favours true equality both of rights and liabilities dividing the burden and the benefits in equal shares. Equity always inclines itself to conscience, reason and good faith and it implies a system of law imposed for just regulation of mutual rights and duties of man in a civilized society... It does not envisage sharp practice and undue advantage of a situation and a refusal to honour reciprocal liability arising therefrom... It is because equity frowns at the unconscionable use of a person's rights that it generally acts on conscience ...[39]

Statutes Of General Application

The statutes through which English laws were received in Eastern and Northern Nigeria and the Federal Capital territory of Lagos (now Abuja) provided, inter alia, for the application of the "statutes of general application that were in force in England on the 1st day of January, 1900." It has earlier been mentioned that this category of the received English law was not received in the old Western Region (including the then Bendel State) because the Western Regional Government in 1959 re-enacted English statutes which they considered applicable to the Region into Western regional laws.

The reception statutes made no attempt to identify the particular topics on which English statutes are being received. It has therefore not been easy to find out the statutes within this category. For ease of analysis, the reception provisions will be split and considered under the following three headings: 'statute'; 'of

[39] at 182 - 3

General Application'; 'that were in force in England on the 1st day of January, 1900'[40]

'Statute'

The important point here is that a whole statute or a part of a statute may be received. In *R. v Coker*[41] it was held that whilst most of the English Libel Act 1843 generally called Lord Campbell's Act had ceased to be part of Nigerian law, having been incorporated into the Nigerian Criminal Code, Section 6 of the Act which was not so incorporated into the Criminal Code still applied to Nigeria as a statute of general application. In *Gregory Obi Ude v Clement Nwara*[42] *the* Supreme Court held that where a local legislation does not go far enough on an issue, the court may and ought to fill the gap from applicable English law.

'Of General Application'

Perhaps, the greatest difficulty with regard to this category of the received English law is to ascertain whether a statute is of general application in England. In *A.G. v John Holt Ltd*[43] counsel had suggested that the phrase "of general application" should mean that the statute should be generally applied to all the colonies. The Court rightly rejected this proposition. It would have been preposterous to accept such a proposition. This is because a statute which had never been applied in all the colonies would have become altogether inapplicable to any colony since it cannot be

[40] This Approach was adopted by Park, A.E.W. *Sources of Nigerian Law (London: Sweet & Maxwell*, 1963) p.24. Adopting a similar approach Niki Tobi JCA in *Felix Olajumo Lawal v Edmund A.E. Ejidike & Anor* (1997)2 NWLR (Pt 487)319 C.A., said: The courts are expected to consider and apply a number of tests in the light of the circumstances of each case. The major ones are the "general application" test, the "nature of statute" test, the in force "in England date" test, the "Limits of local jurisdiction" test and the "formal verbal alterations" test. The above tests cover the three subsections of section 45 of the Interpretation Act.

[41] (1927)8 N.L.R. 7

[42] (1993)2 NWLR (Pt 278) 638

[43] (1940) A.C. 231

shown that it is generally applicable in all colonies. Another proposed test which was equally rejected is that of Webber J., who held in *Re-estate of Sholu*[44] that for a statute to be of general application it must apply throughout the United Kingdom. On this premise, his Lordship held that the Land Transfer Act of 1891, which is restricted in its application to England and did not extend to Scotland or Ireland, could not be considered to be a statute of general application. England is a smaller unit than the United Kingdom. The latter is a parliamentary union that supplies England with her legislature, and which is the state for international and most constitutional matters and is made up of England, Wales, Ireland and Scotland. In any case, none of the reception provisions mentioned the United Kingdom but England. The West African Court of Appeal in *Young and Another v Abina and others*[45] held that the *Sholu* case wrongly decided and accepted a statute that applied only to England as a statute of general application.

The search for an appropriate test continued. In *Re Public Lands Ordinance, Lawani Bole, Claimant – Ex parte Joseph* the Court said:

> No definition has been attempted of what is a statute of general application within the meaning of section 14, and each case has to be decided on the merits of the particular statute sought to be enforced. 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 class of the community in England does it apply?

[44] (1932)11 NLR 37 His Lordship reached the same conclusion in *Chief Young Dede v African Association* (1910)1 NLR.

[45] (1940)6 WACA 180

> 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 a particular trade), the probability is that it would not be held to be locally applicable.

This passage was adopted and quoted with approval by Osborne C.J. in *Attorney-General v John Holt and Co.*[46] Ever since Osborne C.J. adopted this passage, it has been approved in several subsequent cases. And so far, a better test has not been propounded. In *Braithwaite* and *Anor v Folarin*[47] the West African Court of Appeal held that the Fraudulent Conveyances Act 1571 is a statute of general application in that it applies generally to ordinary affairs and dealings of men without any qualification or specialty restricting its application. In *Young and Another v Abina and Others*[48] the West African Court of Appeal held that the Land Transfer Act of 1897 which applied generally to all estates of persons dying after 1st January 1898 in England, is a statute of general application. In *Lawal v Younan*[49] the Federal Supreme Court held that the Fatal Accidents Acts 1846 were statutes of general application because they applied to all classes of the community.

In a number of cases, some statutes have been judicially accepted or rejected as a statute of general application without the court going into the principle on which the decision is based. In *Gregory Obi Ude v Clement Nwara*[50] the Supreme Court held, obiter, that the Leases Act of 1845 and the Conveyancing Acts of

[46] Unreported judgment delivered on 26th January, 1910 45(1910) NLR 1
[47] (1938)4 W.A.C.A. 76
[48] (1940)6 WACA 180
[49] (1961)1 All NLR 245
[50] (1993)2 NWLR (Pt 278) p.638

1881 and 1892, are applicable in the States which have been carved out of the former Eastern Region of Nigeria as statutes of general application. No attempt was made to explain the grounds on which the assertion was based. In *Chief Adam v Duke,*[51] Webber J., held that the Chancery Procedure Act 1852 applies to Nigeria as a statute of general application. Although Webber J. did not make reference to the test of Osborne C.J. in *A.G. v John Holt*[52] it has been contended by a learned writer[53] that he relied on the applicability of the statutes to all the courts in England test. Unfortunately, Webber J. in the instant case applied a statute that was already repealed in England in 1883. The decision was thus given per incuriam.

The test adopted by Osborne C.J. in the *John Holt* case though sound and useful has its own pitfalls. The test has been criticized by Park as unnecessarily restrictive and if strictly adhered to, would have excluded some statutes that were subsequently held to be statutes of general application.[54] Thus in *Ribeiro v Chahin,*[55] the West African Court of Appeal held that sections 210–212 of the English Common Law Procedure Act 1852, a statute regulating procedure which applied only in he common law courts, was applicable in Ghana as a statute of general application. The court also held in *IGP v Kamara*[56] that the Summary Jurisdiction Act, 1848 that applied only to Magistrate's Court in England, is a state of general application.

On the question of applicability to all classes of the community, an English statute may directly apply to a particular class of persons and yet be held to be a statute of general

[51] (1927)8 NLR 88
[52] (1910)2 NLR 1
[53] Tobi, Niki *Sources of Nigerian Law* (Lagos: MIJ Professional Publishers Ltd, 1996) p.48
[54] Park, A.E.W. *The Sources of Nigerian Law* (Lagos: African University Press, 1963) p.26.
[55] (1954)14 WACA 476
[56] (1934)2 WACA 185

application in Nigeria. Thus in *Labinjoh v Abake*[57] a decision of the Full Court relating to the Infants Relief Act 1874, the statute did not apply to all classes of the English community, but only to infants though in their selective dealings with the rest of the community, but it was accepted as a statute of general application.

In the light of the above shortcomings of the test adopted by Osborne C.J. in the John Holts case, A.E.W. Park has proposed the modification of the test. The learned author suggested that a statute qualifies if it applies either to all classes of the community or to all members of any one or more classes, and if the statute is generally applied geographically throughout England.[58] This is a sound proposition aimed at rectifying the defects in the Osborne, C.J.'s test. In any case, the test has not been expressly approved judicially.

'That Were in Force in England on the 1st Day of January 1900.'

In *Felix Olajumo Lawal v Edmund A. Ejidike*[59] Niki Tobi JCA said that for a statute to be applicable it must be one of general application in England on the 1st day of January 1900, and not merely a pre- 1st January 1900 English statute. In other words, a statute which is enacted in England before January 1900 but was repealed before January 1900 does not qualify for application as a statute of general application. So also a statute which was enacted after the 1st day of January 1900. In *Clark and Anor v the State*[60] the Court of Appeal held that the British Companies Act of 1948 is not a statute of general application because it was not enacted on or before 1st January 1900. But what is the position where a statute was in force in England on the 1st day of January, 1900 but

[57] (1924)5 N.L.R. 33
[58] Park *op.cit. p.68*
[59] (1997)2 NWLR Pt 487) 319 C.A.
[60] (1986)4 NWLR (pt 35)381

subsequently repealed in England after that date. Opinions are divided on the matter. A.E.W. Park[61] has expressed the view that the fact that a statute, which has been found suitable, was subsequently repealed in England by an English statute has no effect upon its continued operation in Nigeria. He supported his contention with the case of *Young v Abina*[62] where the West African Court of Appeal in 1940 held applicable in Nigeria, the Land Transfer Act, 1897 which was repealed in England in 1925. On the other hand, Niki, Tobi J.C.A. (as he then was) has expressed the opinion, judicially and juridically, that an otherwise applicable statute ceases to be so applicable if it is subsequently repealed in England. In his book, *Sources of Nigerian Law*,[63] the erudite Justice of the Court of Appeal said:

> Could the legislature have intended Nigeria to make use of English statutes which have been repealed in England? A statute which has been repealed has no life. The law assumes from the date of repeal that it has no statutory life. Therefore, it will be absurd to hold that a repealed English statute will continue to operate in a former colony merely because of the technical phraseology of a so-called reception clause which was the direct and exclusive production of the colonialists.

In *Lawal v Ejidike & Anor*,[64] his Lordship (Niki Tobi, J.C.A. as he then was) said:

> It is common knowledge that some of the so-called statutes of general application in England have been either abrogated or abolished. In such situation, it will be ridiculous for courts in Nigeria to enforce such statutes in the name and style of statutes of general application

[61] *op.cit* p.29
[62] (1940)6 W.A.C.A. 180
[63] (Lagos: M.I.J. Professional Publishes Ltd., 1996) p.51
[64] (1997)2 NWLR (pt. 487) 317 C.A.

> on the 1st day of January 1900 (sic). With the death of the statute in England, there will be no legal tests for its continuous application in Nigeria.

This opinion is no doubt an obiter since the question of the continued application of a statute of general application that was subsequently repealed in England was not in issue in that case. While one agrees with Justice Tobi that the situation is quite ridiculous, sad and embarrassing, it is submitted with respect that the opinion of Park is preferable. First, it is manifestly in accord with the plain words of the law. Secondly, it has received judicial approval. In the third place, the opinion of Justice Tobi, if accepted, will lead to great inconvenience. It will mean that to apply any statute of general application in any court in Nigeria, one has to undertake the time-wasting and difficult task of enquiring whether the particular statute has not been repealed in England.

'The Nature and Matter of the Statute'

This test was recognized by the West African Court of Appeal in *Young and Anor v Abina & Ors*[65] and the Court of Appeal in *Onagoruwa v IGP*[66] In the latter case, the Court of Appeal said:

> The determination of a statute as one of general application will depend upon the matter and general content of the particular statute vis-à-vis its contextual application. If from the nature of the statute it is not capable of general application vis-à-vis the circumstances of the case, the statute cannot be held to be one of general application. In determining the nature of the statute test, the court must examine the generality of the wordings of the particular statute.

[65] (1940)6 WACA 180
[66] (1991)5 NWLR (Pt 193)593 C.A.

The Court of Appeal in that case held that the Banker's Books Evidence Act, 1879 is a statute of general application. In the *Young case*, the West African Court of Appeal said "... it seems to us that the words of general application" are used with reference to the matter of the statutes and not only geographically".

"As the Limits of Local Jurisdiction and Local Circumstances will Permit."

This is not a test for determining whether a statute is of general application but a qualification to, or condition for, the application of statutes found to be of general application. Thus a statute, which has been found to be of general application in England, can only be applied in Nigeria "so far only as the limits of local jurisdiction and local circumstances permit". The meaning of the phrase "the limits of local jurisdiction" cannot be stated with much confidence. Park suggested that it may be that when Nigeria was a dependent territory it was a reference to the supposed incompetence of a dependent legislature to enact laws having extra-territorial effect, so that an Act of the United Kingdom Parliament incorporated into Nigerian law by an enactment of a dependent legislature could only apply to persons and situations within Nigeria, and not elsewhere in the world. Now that Nigeria is independent, there is no longer a jurisdictional limit of that sort.[67]

The second arm of the provision i.e. as the limits of local circumstances will permit, recognizes the fact that environmental variables may make a statute enacted for a given environment unsuitable for another. On this premise, Brett, F.J. in *Lawal and others v Younan and others*[68] said:

> I think the court would be free to hold that local circumstances did not permit a statute to be in force if it

[67] Park *op.cit.*p.30
[68] (1961) All NLR 245

produced results which were manifestly unreasonable or contrary to the intention of the statute.[69]

Statute to be Read with Formal Verbal Alteration

The import of this provision is clear. The statutes of general application were enacted for a different country and therefore could only be applied to another country, m*utatis mutandis* in the names of offices, institutions, localities etc.

English Statutes And Subsidiary Legislations On Specified Matters

The fourth and last class of received English law is statutes and subsidiary legislations received by reference to their subject matter. Where such reception has been made, it operates in relation to the subject matter concerned as a source additional to the three other types of received English law. For example, in the law relating to probate (i.e. wills) in all states except in the three former Western States and Bendel State, the three types of received English Law already discussed apply. But in addition, English Law and practice governing the jurisdiction of the High Court in probate cases and proceedings have also been received in these States.[70] The reception of English subsidiary legislation is usually in the area of rules of court. For example, Order VII, Rule 36 of the Supreme Court Rules 1961 provides with respect to civil appeals that where no other provision is made by the Supreme Court Rules, the rules of procedure and practice "for the time being in force" in the Court of Appeal in England are to apply.[71]

This topic cannot be concluded without asking the question, why do we still apply in Nigeria statutes of general

[69] *Ibid* at p.257
[70] Ezejiofor *op cit*
[71] *Ibid*

application in force in England more than forty years after Nigeria's independence? Why can't the legislative houses in Nigeria collate the statutes they consider necessary for Nigeria and enact them into Nigerian? Kutigi, J.S.C. shares much the same view. In *Afrotech Technical Services Nigerian Limited v M.I.A. & Sons Ltd,* his Lordship said:

> It is noteworthy to observe here now that the Act, hitherto a received English statute of general application in Kaduna State, has since been Nigerianised vide the Sale of Goods Edict No. 15 of 1990. This is as it should be. All such laws should be Nigerianised as soon as possible to enable us know what laws actually govern us without having to travel all the way to England for the purpose.[72]

Nigerian Legislation

Legislation is the most important source of law. It is largely through legislation that law performs its function as an instrument of social, economic and political change. Legislation also has serious impact on other sources of law. Legislation can restrict or expand other sources of law. It can modify or repeal existing laws. It can also revive a repealed law. It is the only source of law whose rules prima facie apply to all matters within the jurisdiction, and to all persons, whatever their tribe, nationality or race.

Nigerian legislation consists of the Nigerian Constitution, Ordinances, Acts, Laws, Decrees, Edicts and Subsidiary Legislations. The Nigerian Constitution is the fundamental law of the land by reference to which the constitutionality of other laws is tested. Ordinances are laws passed by the Nigerian central legislature before 1st October, 1954. When federalism was introduced in Nigeria in 1954, the enactments of the central legislature retained the name, "ordinances", while those of the

[72] (2000)15 NWLR (Pt 692)730 S.C.

regional legislatures were designated "laws". On attainment of independence in 1960, the laws of the Federal Government were re-named "Acts" while those of the regions continued to be referred to as "laws". Presently, laws of the Federal Government still retain the nomenclature, "Acts", while laws of the various states are called "laws". On the intervention of the military in Nigerian political life, enactments made by the Federal Military Government became known as "Decrees" while laws made by State Military Governors or Administrators are known as "Edicts." The Ordinances, Acts, Laws, Decrees and Edicts are known as statutes.

Another category of Nigerian legislations is subsidiary or delegated legislations. Subsidiary or delegated legislations are laws enacted in the exercise of powers given by a primary law making body. It includes rules, orders, and regulations made by Ministers, Commissioners etc. Subordinate legislations include bye-laws. By laws are made by local authorities, and public corporations.[73]

History of Nigerian Legislation

From 1st January, 1900 the Southern (excluding Lagos) portion of the River Niger formerly under the control of the Royal Niger Company was amalgamated with the Niger Coast Protectorate, and became known as the Protectorate of Southern Nigeria. The Charter of the Royal Niger Company was abolished. A High Commissioner was appointed for the administration of the territory. As High Commissioner of the Protectorate of Southern Nigeria, the incumbent was empowered to legislate by proclamation. Similarly, in 1900, after the revocation of the Charter of the Royal Niger Company, Lord Lugard was appointed a High Commissioner for the Protectorate of Northern Nigeria with power to legislate by proclamation.

Northern and Southern Nigeria were amalgamated into one political and administrative entity in 1914. In consequence, the

[73] Garner, J.F. *Administrative Law* (London: Butterworths, 1985) p.53

legal system of the two units were amalgamated and in 1916 all the pre-existing enactments in the respective units were brought together, revised and re-enacted as "ordinances". A legislative body, the Nigerian Council, was also set up for the whole country in 1916. In 1923, the first edition of the laws of Nigeria was prepared and enacted. The second edition, which was in twelve volumes, came into being in 1948.

The Federal principle was introduced in Nigeria in 1954. From 1st October 1954 Nigeria became a federation of three Regions. Federalism involves the distribution of power between the central government and the federating units. The following scheme for distribution of power between the Federal Government and the Regions was ordained by the 1954 Constitution. There was an exclusive legislative list in respect of which only the Federal Government had powers to make law. There was also the concurrent legislative list. Both the Federal and the Regional Governments had powers to make law on any item on the concurrent list. However, where any regional law is in conflict or inconsistent with the law of the Federal Government, the Regional law will become void to the extent of the inconsistency. Matters outside the concurrent and the exclusive lists were residual matters in respect of which only the Regional Governments had powers to make law. For the Federal Capital Territory of Lagos, the Federal Government was empowered to legislate on all matters. Nigeria became a federation by disaggregation – federation from a unitary structure. It therefore became necessary to distribute existing laws of the country on the introduction of the federal principle. The following arrangement for the distribution of existing laws were adopted when the federal system was adopted.

(i) All existing laws were deemed to have been enacted by the Federal legislature in so far as they relate to matters within its exclusive legislative competence or in so far as they relate to Lagos.

(ii) All existing laws relating to matters within the concurrent legislative list were deemed to have been

enacted by the Regional legislatures, except in so far as the Governor-General may have otherwise declared.

(iii) All exist laws relating to matters outside the exclusive and concurrent legislative lists were deemed to have been enacted by the regional legislature.[74]

The federal laws retained the name "Ordinances" while regional laws were called "laws". In 1958, the Federal Government enacted a revised and new set of laws of the Federation in twelve volumes, consisting of 224 chapters of ordinances, numerous subsidiary legislations, some imperial statutes and orders-in-council.[75] The enactments were designated as Laws of the Federation of Nigeria and Lagos. The Western Region followed suit in 1959 when it enacted the Laws of Western Nigeria. The seven volumes of Laws of Western Nigeria contain all the laws enacted or deemed to have been enacted by the Western Regional Legislature on or before January 31, 1959. The edition also contains subsidiary legislation as well as imperial statutes, Orders-in-Council and Letters Patent, applicable to the Region. When the Mid-Western Region was carved out of the former Western Region, in 1963, it adopted the Laws of Western Region.[76]

Under the Nigeria (Constitution) Order-in-Council 1960 (S.1) all Ordinances dealing with matters within the exclusive legislative competence of the Federal Legislature were deemed to be enactments of the Federal Legislature and, in general, all Ordinances within the legislative competence of the Regional Legislature were deemed Regional Laws. Pursuant to the Designation of Ordinances Act 1961 (which was made retrospective to 1960), all Ordinances enacted by the Federal

[74] Nwabueze, B.O. *The Machinery of Justice in Nigeria* p.12 quoted in Ezejiofor, *op.cit.* p.9.
[75] Tobi, Niki *op.cit.* p.60.
[76] Mid-Western Region (Transitional Provisions) Act No. 19 of 1963.

Legislature within its legislative competence became known as 'Acts' while regional laws continued to be known as 'laws'.

In 1963, both the Eastern and the Northern Regions followed the example of the Western Region and produced the first editions of the revised edition of the laws of the Regions. For the Eastern Region this edition entitled Laws of Eastern Nigeria is in seven volumes and contains all laws of Eastern Nigeria having effect on 1st October, 1963, including important subsidiary legislations. With respect to the Northern Region the edition is designated Laws of Northern Nigeria and is published in six volumes and contains the statutes and the more important subsidiary legislations of Northern Nigeria having effect on October 1, 1963.[77]

There was a military coup in the country on the 15th of January 1966. The military coup resulted in the overthrow of both the civilian government and the 1963 Republican Constitution. The law making power of the Military Government was exercised through the promulgation of Decrees and Edicts.

In 1967 twelve States were created out of the four Regions. Among the twelve States is Lagos State which was a merger of the former Federal Territory of Lagos with the Colony Province of the former Western Nigeria. There was a transition device by which laws which had applied in each Region continued to apply in States created out of it subject to subsequent amendments or repeal by the State concerned. For Lagos State, the States (Creation and Transitional Provisions) Decree 1967 provided that in relation to Lagos State, existing law shall include any enactment in force in the former Federal Territory (not being an enactment of general application throughout the Federation) and any law of the Legislature of the former Colony Province of Western Nigeria which now forms part of Lagos State. In a number of cases the two sets of laws duplicated or conflicted with one another. A committee was thus appointed to look into the matter and make

[77] Ezejiofor, *op.cit* p.12.

recommendations. On the basis of its recommendations the Lagos State (Applicable Laws) Edict was promulgated[78] to remove cases of duplication or conflict. It was later decided to further tidy up the laws of the state by producing a statute book. The Revised Edition (Laws of Lagos State of Nigeria) Edict 1970 was thus promulgated. Another edition of the Revised Laws of Lagos State was promulgated in 1974, which contains those laws enacted on or before 1st April 1973.

The Federal Military Government regularly produced annual volumes of Laws of the Federation, which consisted of Decrees and subsidiary legislation from 1966 to 1979, when a civilian regime took over the government of the country. The State Military Governments undertook similar exercise within their legislative competence.

The Second Republic commenced from 1st October 1979 and lasted till 31st December 1983. During this period, the National Assembly enacted Federal Acts while State Houses of Assembly enacted State Laws. However, there were no printed volumes of Laws and Acts during this period. The military struck again on 31st December 1983. The Federal Military Government and the State Military Governments exercised both the executive and legislative powers of the Federation and the States respectively. The Military Government of Ibrahim Babangida in 1990 enacted the Revised Editions (Laws of the Federation Act, 1990). In *Ibidapo v Lufthansa Airlines,*[79] the Supreme Court held that although section 3(1) of the Revised Edition (Laws of the Federation of Nigeria) Acts, 1990 confers on the Attorney-General of the Federation power to specify by order, a schedule of enactments to be omitted from the Revised Edition of the Laws of the Federation of Nigeria, 1990, (for reasons that such enactments are: obsolescent; or of temporary nature; or under revision with a view to replacement; or of restricted or personal application),

[78] No. 2 of 1968
[79] (1997)4 NWLR (Pt 498)124

subsection (2) of the same section goes on to save such omitted enactments by providing that enactments omitted in accordance with subsection (1) of the section, shall have the same force and validity as if they had not been omitted in the revised edition.

Prior to the coming into effect of the 1999 Constitution the hierarchy of Nigerian statutes had been as follows:

(a) Constitution (suspension and modification) Decree.
(b) Decrees of the Federal Military Government
(c) Unsuspended provisions of the Constitution
(d) Laws made by the National Assembly
(e) Edicts of the Governors of a State
(f) Laws made by the Houses of Assembly of States[80]

A civilian regime came on board in Nigeria again on 29th May 1999. The 1999 Constitution came into effect on that date. The Constitution empowers the National Assembly to enact Acts for the Federation while State Houses of Assembly are empowered to enact laws for their respective States. The Constitution as the fundamental law of the land is Supreme.

The principles of interpretation of statutes and parts of statutes and their uses will be considered in another chapter.[81]

Nigerian Case Law

Case law is otherwise called judge made law. The phrase "judge made law" sounds paradoxical. This is because traditionally the function of the judge is jus dicere, not jus dare – to state or declare the law not to give law. This is more so in a political system based on the principle of separation of powers where the legislature is vested with law making function while the judiciary interprets the law. The truth, however, is that judges make law but

[80] *Labiyi v Anretiola* (1992)6 NWLR (Pt 370) 142; *Abacha v Fawehinmi* (2000)6 NWLR (Pt 660)228.
[81] Chapter 6

not in the sense that legislators do. As pertinently observed by Professor C.K. Allen, [82]

> By no possible extension of his office can a judge introduce new rules for the compensation of injured employee, for national health insurance, for the rate of taxation, for appropriation of public money. The legislature can project into the future, a rule of law which has never before existed. The courts can do nothing of the kind.[83]

Judges make law in various other senses. For instance, where there is a lacuna in the law by filling the gap. Also, where there is no law previously governing the situation before the court, the judge may create some principles of law for the situation.[84] Furthermore, judges have to apply the law to ever changing combination of facts and circumstances to which the law has never been previously applied and in the course of doing so, the judge must have to decide between two or more possible interpretations of which the law might be capable. Where a court declares a rule in order to decide a particular case before the court, the blackboard is not wiped clean, for it will remain as a precedent for future cases on similar facts. Judicial precedent is therefore one of the main sources of law in Nigeria. The doctrine of judicial precedent is the subject of another chapter.[85]

Customary Law

"Customary law is one of the sources of Nigerian law. Customary law is a body of rules regulating rights and imposing

[82] *Ogunlowo v Ogundare* (1993)7 NWLR (Pt 307)610 C.A.

[83] Allen, C.K. *Law in the Making* 7th edn (London: Clarendon Press, 1964) p.294

[84] In *Bello v A.G. Oyo* (1986)5 NWLR 528 the Supreme Court faced with a situation where there was no remedy for a wrongful act created a remedy. The 'neighbour principle' in Tort was the creation of Lord Atkin in *Donoghue v Stephenson* (1932) A.C. 562

[85] Chapter 5

correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question."

International Law

International law is one of the sources of Nigerian law. A validly concluded treaty is binding on the parties thereto. The Vienna Convention on the Law of Treaties of 1969, defines "treaty" as an international agreement or by whatever name called e.g. Act, Charter, Concordant, Convention, Covenant, Declaration, Protocol or Statute, concluded between states in written form and governed by International law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[86] A treaty derives its force and effect from international law. Nigeria is bound in international law by any international treaty ratified by it. However, an international treaty entered by the Government of Nigeria does not become enforceable in Nigerian domestic courts until it is enacted into law by the National Assembly. Before its enactment into law by the National Assembly, it has no such force of law as to make its provisions justiciable in Nigerian courts.[87]

[86] *Abacha v Fawehinmi* (2000)6 NWLR (Pt 660)228

[87] Section 12(1) of the 1999 Constitution provides "No treaty between The Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."

CHAPTER 4

CUSTOMARY LAW

Custom means the established or common usage of a particular people. The Evidence Act in section 2(1) defines custom as a "rule which in a particular district has from long usage, obtained the force of law". This definition was adopted by Nwokedi JSC in *Agbai v Okagbue*[1]. The Court of Appeal in *Aku v Aneku*[2] defined custom or usage as:

> The unrecorded tradition and history of the people which has "grown" with the "growth" of the people to stability and eventually become an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or the subject matter to which it relates.

By these definitions the word 'custom' and the phrase 'customary law' are not only synonymous but coterminous. In the ordinary parlance, it is not so. The word 'custom' may simply refer to the established usages of a people, whether or not they have acquired the character of law. Thus, Niki Tobi J.C.A, has noted that there is a clear difference or cleavage between the two. In *Ojisua v Aiyebelehin*[3] the erudite Justice of the Court of Appeal said:

> The word "custom" may only reflect the common usage and practice of the people in a particular matter without necessarily carrying with it the force of law. In other words a custom may exist without the element of coercion or sanction. John Austin had this in mind when he defined "custom" as positive morality, as long as it does not receive judicial pronouncement. The element of law is important because it is that which in reality carries sanction in the event of breach.

In other words, it is those customs that the people consider obligatory that have the character of law.

In *Oyewunmi v Ogunesan,*[4] Andrew Obaseki, JSC defined customary law as "the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is regulatory in that it controls the lives and transactions of the community subject to it". This definition has been quoted with approval in many subsequent cases[5]. However, a more comprehensive definition of customary law is contained in section 2 of the Customary Court Edict (1984) of the old Anambra State. The Edict defines customary law as "a body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question".

Characteristic of Customary Law

In *Ojisua v Aiyebelehin*[6], Niki Tobi J.C.A summarized the characteristics of customary law as follows: it must be in existence; it must be custom as well as law; it must be acceptable; it is largely unwritten and related to its unwritten nature is its flexibility; and it should be universally applicable within the area of acceptability.

In *Kimdey and Ors v Military Governor of Plateau State*[7], *Karibi-Nwyte,* J.S.C. said: "It is one of the characteristics of customary law that it be in existence at the material time". At the time a particular rule of custom is sought to be relied upon, it must be shown that the people of the particular area accept it as their

[1] (1991) NWLR (pt 204) 391 at 416
[2] (1991) 8 NWLR (pt 209) 280
[3] (2001) 11 NWLR (pt 723) 44 at 52
[4] (1990) 3 NWLR (pt 137) 137
[5] For instance, it was quoted with approval by Ogwuegbu, JSC in *Dang Pam v Sale Dang Gwom* (2000)1 WRN 51 at 63 and Edozie, J.C.A. in *Yaktor v Governor of Plateau State* (1997)4 NWLR (Pt 498)216 at 228-9.
[6] (2001)11 NWLR (Pt 723)44
[7] (1988)2 NWLR (Pt 77) 445

custom and acknowledge its existence or continued existence. BAIRAMIAN F.J. underscored the indispensability of the fact of acceptance in *Owoniyi v Omotosho*[8] when he said that customary law is "a mirror of accepted usage". Because of the flexibility of customary law, it is not sufficient to show that it was once in existence. Its continued existence at the material it is sought to be relied upon must be proved. In acknowledgement of this fact, Speed Ag. C.J. in *Lewis v Bankole*[9] said: it must be "existing native law and custom and not that of bygone days". This position was reinforced by the following illuminating words of Lord Atkin in *Eshugbayi Eleko v Government of Nigeria.*

> Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influence of civilization become milder without losing their essential character as custom. It would however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community inter se ... It is the assent of the native community that gives a custom its validity and therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate[10].

Customary law therefore derives its strength and vitality from its acceptance by members of the community as obligatory on them. It is not sufficient if a custom is shown to be in existence. In the words of Niki Tobi J.C.A, it must be custom as well as law. It is the element of law that gives the custom a binding character[11] W.A.E. Park[12] also agrees with this view when he said: ". . . The practice in question should not only be 'customary'; it must also

[8] (1961)1 All NLR 304 at 309
[9] (1908)1 NCR 81 at 83
[10] (1931) A.C. 662 at 673
[11] *Ojisua v Ainyebelehin* (2001)11 NWLR (Pt 723) 44 at 52
[12] Park, W.A.E. *Source of Nigeria Law* (London: Sweet & Maxwell (1968) p.68.

'be law'. . . It is clear without authority that habitual observance of the practice by the community is not alone sufficient. The observance must be a matter of obligation which will if necessary be enforced . . ."

Customary law is not rigid. It is flexible in response to the dynamic character of society and culture. This dynamic character of customary law is encapsulated in the judgment of Osborne, C.J in *Lewis v Bankole.* His Lordship said:

> 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 circumstance without entirely losing its character[13].

An example of the flexible character of customary law will suffice. Initially, customary law did not know out and out alienation of land except to members of the family[14]. This rule of customary law subsequently gave way and land became freely alienable[15] The dynamic or organic character of customary law was underscored by Obaseki JSC in *Oyenwumi v Ogunesan*[16]. His Lordship said:

> Customary law is the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static; it is regulatory in that it controls the lives and transactions of the community subject to it.

Another feature of customary law is that it is largely unwritten. In terms of origin, customary law is evolutionary rather than a product of conscious human effort. Its source is essentially the recollection of elders and others whose traditional roles enable them to have special knowledge of the customs and traditions of their people. There are provisions in our law according to which

[13] (1909)1 N.L.R. at 100-101. See also *Kimdey v Military Governor of Gongola State and others (1988)2* NWLR (Pt 77) 445.
[14] *Amodu Tijani v Southern Nigeria (Secretary)* (1921)2 A.C. 399
[15] *Oshodi v Balogun* (1936)2 A.E.R. 1632).
[16] (1990)3 NWLR (Pt 137) 182 at 207

definitive statement of the customary law rules could be reduced into a written form[17].

The Ministry of Justice of the old Anambra State published a Customary Law Manual, which it described as an authentic statement of the customary laws of communities in both Anambra and Imo States and is expected to guide the courts in their judicial functions. However, the manual was never infused with the force of law through legislation or otherwise. It therefore has no binding effect.

The unwritten character of customary law initially gave rise to the idea that any transaction evidenced in writing was beyond the province of customary law. The position was however, clarified in *Rotibi v Savage*[18] by Waddington, J. who said that the existence of written documents does not necessarily preclude the operation of customary law, especially where the document merely serves to evidence a money transaction.

There is also no uniform body of customary law for all communities in Nigeria. The diversity of the people of Nigeria also implies the diversity of their customs. Customary law varies from place to place. There may, indeed, be as many customary law as there are independent communities in the country. This diversity of customary law system is a major obstacle to uniformity of customary law systems in each state. It should, however, be noted that in many respects the ethnic customary law of an area is similar to that of another area where the indigenous people in both areas belong to the same tribe.

Lastly, a rule of custom that has the force of law must be universally applicable within the area of acceptability. It should not be a rule applicable to only a section of the people within the area.

[17] Native Authority Ordinance Cap. 140 of 1948 Laws, s. 30; s. 78 Western Nigerian Local Government Law (cap 68); Northern Nigeria Native Authority Law (cap. 77) s. 48; Eastern Nigeria Local Government Law (cap. 79) s.90.
[18] (1944)17 N.L.R. 77.

Is Moslem Law Customary Law?

A pertinent question is whether Moslem or Islamic law is customary law. The foregoing discourse on the meaning, characteristics or attributes of customary law will obviously reveal that Islamic law is not customary law. In the first place, Islamic law is not indigenous to Nigeria. Its history in Nigeria is related to the history of Islamic religion in the country. Islamic law, unlike customary law, is largely written and rigid. Though the Sharia legal system has many varieties, the brand which is practised in Nigeria (the Maliki school) is almost uniformly applied in the areas governed by Islamic law, though with some local variations. The difference between Sharia law and customary law was acknowledged by the Supreme Court in *Usman v Umaru*[19] where Bello, C.J.N. said:

> Definition of 'Customary law' in section 2 of the Customary Court of Appeal law which means the rules of conduct... as established by custom and usage is incapable of including 'Moslem law'. Since the decision in Lewis v Bankole ... customary law has been stated to be unwritten customary law recognized as law by the members of an ethnic group and it is a mirror of accepted usage' ... On the other hand, it is a notorious fact that Moslem law is written in the Holy Koran, in the numerous books of the Hadith . . ..

On the other hand, some authorities have contended that the term 'customary law' includes Islamic law. A.E.W. Park who shares this view said:

> But tribal laws are not the only systems covered by the term "customary law" for throughout the Federation it includes Islamic law also. . .. Thus for practical purposes Islamic and the various tribal laws are treated alike, though there are many theoretical distinctions between them[20].

[19] (1992)7 NWLR (Pt 254) 277
[20] Park, W.A.E. op. cit P. 65

Another adherent of this view is Professor Obilade[21] who maintained that customary law in Nigeria may be divided in terms of nature into two classes, namely, ethnic or non-Moslem customary law and Moslem law. To be noted is section 2 of the Native Courts law of the former Northern Nigeria, which provides that "native law and custom includes Moslem law".

There is no gainsaying the fact that going by the nature and characteristics of customary law, Islamic law is not customary law. The fact, however, remains that in several parts of Northern Nigeria, the Islamic way of life has supplanted their local customs. In these areas, Islamic law should be seen not as the customary law of the area but as their equivalent of customary law, the indigenous custom having disappeared or been suppressed.

Ascertainment or Establishment of Customary Law

We have earlier noted that customary law is unwritten; is flexible; and varies from area to area. Furthermore, rules of custom may not necessarily have the force of law. It is only those usages the people consider as obligatory that have the force of law. These features of customary law present us with the problem of ascertainment or establishment of customary law.

There are two broad methods of establishment of customary law – by proof or by judicial notice.

Proof of Customary Law

In considering the question of proof of customary law, it must be pointed out that ascertainment of customary law before British-type courts and ascertainment of customary law before

[21] Obilade, A. O. *Nigeria Legal System* (London: Sweet and Maxwell, 1979) p. 83. See also Ezejiofor, G. "Source of Nigeria Law" in Okonkwo (ed) *Introduction to Nigeria Law* (London: Sweet & Maxwell, 1980) P.14. He said: it is relevant to recall that Moslem law is customary law because the Native Courts law provides that "native law and custom include Moslem law"

customary courts present different kettles of fish and therefore should be considered under different headings.

Proof of Customary Law before Customary Courts

Section 14(1) of the Evidence Act provides that a custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. However, by section 1(4)(c) of the Act, the Evidence Act does not apply to judicial proceedings in or before a native court unless the Governor-in-Council shall by order confer upon any or all native courts ... jurisdiction to enforce any or all of the provisions of the Act. To the knowledge of the author, no State in the country has extended the application of the Evidence Act to customary and area courts. Consequently, the modes of establishment of customary law prescribed by the Evidence Act do not apply to customary courts. Section 1(4)(c) of the Evidence Act (Cap 62) 1958 Laws of Nigeria was omitted in the Evidence Act (Cap 112) Laws of the Federation 1990. However, the equivalent of that section (section 1(2)(c)) was inserted as amendment, by the Evidence Act (Amendment) Decree 61 of 1991 with retrospective effect to 1st January 1990.

Some States like Lagos State have purported to enact their own Evidence law. Such enactments are clearly ultra vires the States and consequently null and void and of no effect whatsoever. Evidence is a matter within the exclusive legislative list under the 1999 Constitution[22]. Consequently only the National Assembly can legislate on it.

Judges of customary and area courts are assumed to know the custom of their people. Therefore, generally, customary law is not required to be proved before customary or area courts. In *Nsemfoo v Ababio II*[23] the West African Court of Appeal held that it is not obligatory for a native court to require a custom to be

[22] item 23, Part 1, Second Schedule to the 1999 Constitution
[23] (1947)12 W.A.C.A.127

proved through witnesses if the members of such court are familiar with the custom. The customary court in question in this case was the Asantehene's "A" Court, the Court of one of the paramount rulers of the Gold Coast. The relevant customary law was that of the area of jurisdiction of the court and the members of the court were versed in the custom of the area. The High Court of Western Region of Nigeria took a contrary position in *Fijabi v Odumola*[24] when it set aside the decision of a customary court on the ground that a rule of customary law was applied by the customary court without proof. This decision was however, turned down by the Supreme Court on further appeal to it. The Supreme Court was of the view that if the defendant/respondent wished to challenge the President's ruling on specific point of customary law, he ought to have given notice that he would apply to call evidence on the point and it was for the judge to decide whether or not to allow it.

The case of *Ehigie v Ehigie*[25] took a different course. The Respondent was the eldest son and the Appellant the eldest daughter of one Ehigie Edise, who died intestate. The question before the Customary Court was which of the two children of the deceased – his eldest son or eldest daughter – was entitled to succeed to his property according to Benin native law and custom. No evidence was laid before the Court by either party to the dispute, as to what the Benin customary law of inheritance was. The President of the Customary Court, Grade A, entered judgment in favour of the Respondent. The Court said that it was a fundamental principle of Benin customary law of inheritance that the eldest surviving, male child of the deceased who performed all the customary funeral ceremonies should inherit all his properties except such as his father gave away before his death and that no child other than the eldest surviving male child of the deceased who had performed the funeral ceremonies had a right of inheritance. On appeal to the High Court, Fatayi Williams, J (as he

[24] (1955 – 56) W.R.N.L.R. 13
[25] (1961)1 All N.L.R. 842

then was) held that the ends of justice would be better served if a customary law which has not been "so frequently before the courts as to be well established and notorious" is proved by evidence in Customary Courts. The learned judge distinguished the case of *Ababio v Nsemfoo*[26] from the one in hand. According to him, the Customary Court which decided the former case was Asentehene's 'A' Court, a Court of one of the paramount chiefs of the Gold Coast, the members of which are familiar with their own native customary law. That being the case, it was not necessary to prove the customary law of the community before the Court. In Western Nigeria, on the other hand, the only statutory qualification of a President of a Grade A Customary Court is that he must be a legal practitioner. He does not need to come from the area of the court and does not need to have any special knowledge of the customary law of the area. Consequently, the judge held that rules of customary law must be proved to the court.

This decision must be criticized. In the first place, there was no evidence before the Court that the President of the Customary Court did not come from the area of jurisdiction of the court. Secondly, the decision would seem to rest on the presumption that a legal practitioner as a President of a customary law does not know what the customary law is except where the law prescribes as a condition for his appointment that he must be versed in the customary law of the area of the court. The presumption should rather be that where members of a customary court are from the area of jurisdiction of the court, whether they are legal practitioner's or not, the members are presumed to know the customary law. The presumption is rebuttable by calling evidence to prove to the contrary. A scathing criticism of the decision in the *Ehigie* case was made by Hon. Justice G.G.I. Ojiako[27], who said:

[26] (1947)12 W.A.C.A. 127
[27] "The Application of Customary Law in the Superior Courts of Nigeria" 1991 Judicial Lecture: Continuing Education for the Judiciary (Lagos: M.I.J.

> First and foremost, the court being a customary court, there was that presumption that the customary court judge was versed in the Benin Customary law – the law was embedded in his breasts and he needed no evidence to establish before him customary law which he is presumed to know. What was really wrong was . . . the undisclosed irresistible urge by the superior courts that whenever and wherever customary law was in dispute evidence must be led to prove it.

In *Usman Waziri v Musa Ugye & Ors*[28], Belgore, C.J. (as he then was) who adopted a different attitude, said:

> The Area Court of the area of action is presumed to know the native law and custom of that area; it is rebuttable presumption and until it is rebutted its statement of the law must not be interfered with.

A similar decision was reached in *Edokpolor v Idehen*[29] where the plaintiff brought an action for trespass against the defendant before the Benin Grade A Customary Court. The President of the Court prevented the defendant from adducing evidence of custom which he alleged and which was different from that pleaded by the plaintiff. According to the President, as evidence of English law is not required in English courts, so also evidence of customary law is not required in customary courts. In the relatively recent case of *Usman v Kareem*[30] Onu, J.S.C., speaking for the Supreme Court, said:

> The Area Court Edict, 1967 of Kwara State empowers an Area Court in civil cases to administer the native law and custom prevailing in the area of jurisdiction of the Court or binding between the parties. Thus the Local Area Court is presumed to know the local law and custom. Although the presumption is rebuttable, until it is rebutted, the Area Court's pronouncement is valid.

Professional Publishers Ltd, 1991) P. 207

[28] (1977) N.N.L.R. 129 at 130

[29] (1961) W.N.L.R. 11

[30] (1995)2 NWLR (Pt 379) 537 at 553

However, this opinion is really an obiter since the question of whether customary law should be proved before a customary or area court was not in issue in that case. In *Odufuye v Fatoke*[31] the Supreme Court endorsed the procedure of the trial Customary Court which had relied on an earlier decision of a customary court reported in a textbook to established a rule of customary law. The court further held that customary courts have the duty to declare customary law and that they are not required to adopt any procedure in doing so.

The following propositions can be inferred from decided cases on the matter. Before customary courts, customary law is a question of law and need not be proved to the court. However, this is only a rebuttable presumption. The presumption can be rebutted by showing: that the law of the court is not the law prevailing in the area of jurisdiction of the court; that the members of the court are from an area different from the area of jurisdiction of the court; that the area of jurisdiction of the court is so wide that the members of the court will not be expected to know all the customs of the constituent areas; that the members of the customary court are for other reasons not versed in the custom sought to be relied upon.

In the old Bendel State, it has now been statutorily provided that a customary court is presumed to know the appropriate customary law of the area within its jurisdiction[32]. In *Ogiugo v Oguigo*[33] the issues were whether the Court of Appeal was right in affirming the judgment of the Customary Court of Appeal which reversed the findings and statement of what is the appropriate customary law in relation to this case, having regard to the provisions of section 25(6) of the Customary Court Edict of 1984 as well as the provision of Order x Rule 6(3), (5) and (6) of the Customary Court Rules, 1978; and whether the evidence given

[31] (1977) 4 S.C. 11

[32] Order 10 Rule 6(3) Customary Courts Rule of Bendel State 1978

[33] (1999 14 NWLR (Pt 638) 283

by the Oba settled the issues in dispute between the parties, to wit, the customary procedures for the selection or appointment of the Enogie in the peculiar circumstance of this case. In unanimously allowing the appeal, the Supreme Court held as follows. According to the applicable law in Edo State, the Area Customary Court has the power to declare the customary law of the area within its jurisdiction in any particular case before it. If it did so, as in this case, then the customary law so declared, is presumed to be correct unless the contrary can be proved in either of the following two cases:

( ) if the declared custom is shown to be in conflict with any previous subsisting judgment of the High Court, Court of Appeal, or the Supreme Court; or

( ) if additional evidence is called on appeal in the Customary Court of Appeal and the evidence contradicts the custom so declared.

If neither (i) nor (ii) is available, the declaration by the Area Customary Court of the appropriate custom of the area concerned, is presumed to be correct and final.

The two broad methods of establishment of customary law before non-customary courts is by proof or by judicial notice

Proof of Customary Law in Non-Customary Courts

Before,English-type courts customary law is a question of fact to be proved by evidence. A party who alleges the existence of a particular custom must adduce sufficient evidence in support and establish its existence to the satisfaction of the court[34]. Section 14 of the Evidence Act that governs the matter provides as follows:

> 14(1) – A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence.

[34] *Balogun v Labiran* (1989)3 NWLR (Pt 80) 66; *Agbai v Okogbue* (1991)7 NWLR (Pt 204) 391

> The burden of proving a custom shall lie upon the person alleging its existence.
>
> (3) Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstance by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them.

The requirement of proof of customary law to non-customary courts is predicated on the assumption that the judges of English-type courts are not versed in customary law. Ordinarily, only facts, and not law, are required to be proved before a court. A court is required under sections 73 and 74 of the Evidence Act to take judicial notice of a law. However, these provisions do not extend to rules of customary law. The modes of proof of customary law include testimonies of witnesses, expert opinions, use of assessors, use of textbooks or manuscripts.

Witnesses

By section 76 of the Evidence Act[35], all facts except the contents of documents may be proved by oral evidence. And in relation to proof of customary law other relevant provisions of the Evidence At are as follows:

> 57(1) - when the court has to form an opinion upon a point of . . . native law or custom … the opinions upon that point of persons specially skilled in such native law or custom … are relevant facts … (2) such persons are called experts.
>
> 59 – In deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognized by natives as legal authority are relevant.

[35] Cap 112 Law of the Federation 1990.

62(1) when the court has to form an opinion as to the existence of any general customs or right, the opinions as to the existence of such custom or right, of persons who would be likely to know of its existence if it exists are relevant.

By virtue of section 14(1) of the Evidence Act, the burden of proof of custom is on the person alleging its existence. In other words, the onus is on the party who claims the existence of a particular customary law that is applicable to the situation, to call evidence to establish the custom[36]. In *Ibrahim v Barde*[37] it was held that by virtue of section 59 of the Evidence Act, the court in deciding questions of native law and custom, the opinions of native chiefs or other persons having special knowledge of native law and custom are relevant. Evidence in proof of customary law need not necessarily be oral. In *Oyefelu v Durosinmi*[38], the Supreme Court held that it is trite law that a registered chieftancy declaration made pursuant to section II of the Obas and Chief Law of Lagos State 1981 provides proof of customary law in relation to the chieftancy for which the declaration is made and registered. Such registered chieftaincy declaration is declaratory of the tradition, customary law and usages relating to the selection and appointment to a particular chieftaincy stool and obviates the necessity of proof by oral evidence of such tradition, custom and usages on each occasion that the issue arises for determination by the courts.

Use of Books and Manuscripts

Generally, opinions in accepted authoritative books can be cited in support of a submission in court[39]. In relation to proof of customary law section 59 of the Evidence Act provides that in deciding questions of native law and custom any book or manuscript recognized by the natives as a legal authority is

[36] *Temile v Awani* (2001) F.W.L.R. (Pt 62) 1937
[37] (1996) 9 NWLR (Pt 474) 513
[38] (2001) 7 NSCQR 67
[39] *Registered Trustees of Amorc v Awoniyi* (1994) 7 NWLR (Pt 355) 154 S.C

relevant. In *Ibrahim v Barde*[40] the Supreme Court held admissible, a book called the *Abuja Chronicle*, which according to some witnesses, is regarded in Suleja as authentic account of the history and culture of the people of the area. For a book to satisfy the requirement of section 59 of the Evidence Act such book must have gained sufficient eminence to warrant its citation to the court. Secondly, the parties should have introduced it into evidence. In *Adedibu v Adewoyin*[41], the plaintiff had asked for a declaration that the defendant was not entitled to be appointed the Mogaji of the house of which they were both members. The evidence adduced before the trial judge on this matter of custom was conflicting and were all rejected. The judge instead relied on the book of Ward Price, entitled *The Memorandum of Land Tenure in Yoruba Provinces*. The book was never introduced in evidence by either of the parties. On appeal, the West African Court of Appeal held that the book was not of sufficient eminence to warrant its citation to the court as an authority. It was also held that section 59 of the Evidence Act requires that a book which could be relied on, should form part of the evidence before the court, or the court itself should call for it and admit it in evidence. There are, however, other subsequent cases where the courts considered books not previously introduced into evidence[42].

Assessors

The use of assessor is common in Northern Nigeria but uncommon in Southern Nigeria. Assessors sit with the judges in order to assist the judges with their expert knowledge of the matter

[40] (1996)9 NWLR (Pt 474) 513
[41] (1951)13 WACA 191. See *Idundun & Ors v Okumagba & Ors* (1976)9-10 S. C. 220 where the Supreme Court said that no book shall be accepted in aid of proof of traditional history of ownership of land except if such book is proved to be generally acknowledged either in Nigeria or elsewhere as a standard work or as appropriate authority on the relevant traditional history.
[42] *Suberu v Sunmonu* (1957) 2 FSC 33 and *Adeseye v Taiwo* (1956) 1 FSC 84

under consideration. They can be considered as experts within the meaning of section 57(2) of the Evidence Act. The use of assessor is normally provided for by law. Assessors are neither part of the court nor witnesses. They cannot testify before the court. They merely sit with the judges and proffer opinion when the court seeks for their opinions. Such opinions are normally given in chambers, not in the open court.

Judicial Notice of Customary Law (Before British-Type Courts)

Laws are not required to be proved to English-type courts. These courts are required to take judicial notice of them[43]. However, to English type courts customary law is initially a question of fact, which must be proved with evidence[44]. In any case, there are circumstances in which customary law may not be proved again but may be taken judicial notice of. The position is governed by section 14(2) of the Evidence Act, which provides:

> A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of person concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

This provision has many components. The custom must have been acted upon by a court of superior or co-ordinate jurisdiction; the earlier court and the subsequent one must be in the same area; the custom should have been so acted upon to such extent as would justify the inference that the persons or class of persons concerned

[43] See S. 74(1)(a) of the Evidence Act which provides: (1) "The Court shall take judicial notice of the following facts – (a) all law or enactments thereunder having the force of law now or heretofore in force, or hereafter to be in force, in any part of Nigeria;

[44] *Olagbemiro v Ajagungbade III* (1990)3 NWLR (Pt 136) 34

in that area look upon the same as binding in relation to circumstances similar to those under consideration.

A court superior in hierarchy is not under obligation to take judicial notice of a custom proved before an inferior court. A court can only take judicial notice of a custom acted upon by a superior court or a court of co-ordinate jurisdiction. However, Prof. Obilade has observed, rightly in my view, that since a court of appeal is entitled to apply the law which the lower court is empowered to apply, the court of appeal puts itself in the position of the lower court in respect of establishing customary law by judicial notice. Therefore, if the lower court is entitled under customary law to take judicial notice of a custom, the court of appeal is also entitled to take judicial notice of the custom under consideration even though if the court of appeal had sat as a court of first instance proof by evidence would have been required in the circumstance[45].

A court can only taken judicial notice of a rule of customary law where the custom had been previously acted upon by a court in the same area. This provision underscores the absence of uniformity of customary law. In *Santos v Okosi Industries Ltd & Anr*[46] it was held that the mere fact that a custom was held proved before a Calabar Court in *Henshaw v Henshaw*[47] does not necessarily make it applicable to the people of Epe in Lagos State, in a case brought before the court in that area. Professor Obilade[48] has expressed the view that the words "the same area" in the context of section 14(2) of the Evidence Act mean in the ethnic-group area or Moslem-community area within which it is contended that the custom applies. With due respect, it is submitted that the words "the same area" cannot mean the same ethnic-group area because the custom of the communities within the same

[45] Obilade, A.O. *The Nigeria Legal System* (London: Sweet & Maxwell, 1979) P. 97.

[46] (1942)8 WACA 89

[47] (1927)5 N.L.R. 77

[48] Obilade *Op. Cit.* P. 94

ethnic group area may differ. The Supreme Court has in *Taiwo v Dosumu*[49] interpreted the phrase "the same area" in section 14(2) of the Evidence Act to mean an area in which some grounds appear for supposing the customs to be uniform.

As noted earlier, for a custom to be judiciary noticed, it should have been acted upon to such extent as would justify the inference that the persons or class of persons concerned in that area regard it as binding in relation to circumstances similar to those under consideration. The pertinent question is, how often should a particular custom have been successfully invoked in court before it can be judicially noticed. Before the Evidence Act was enacted in 1945, the Privy Council had in the Gold Coast case of *Angu v Attah*[50] held that the common law doctrine of judicial notice, in its application to customary law as a fact, requires frequent proof in the courts as a pre-requisite of judicial notice. This principle was followed in a number of subsequent cases, including those given after the introduction of the Evidence Act[51]. However, in *Cole v Akinyele*[52] judicial notice was taken of a custom on the basis of a single previous decision. In that case, the issue was whether children born outside wedlock to the deceased who died intestate and who was married under the Ordinance could share the estate of the deceased with the children of the Ordinance marriage. It was contended that they could because according to the native law and custom of the Yorubas legitimacy depends on acknowledgement of paternity by the father and the deceased while alive acknowledged the children as his. In support of the contention reliance was placed only upon the case of *Alake v Pratt*[53] and no other evidence was adduced to prove this particular rule of customary law. Brett F. J. accepted to judicially notice the custom because there was massive

[49] (1966) NMLR 94
[50] P. C. 1874 – 1928 P. 43;
[51] *Lorinde v Afiko* (1940) 6 WACA 108; *Giwa v Erinmilokun* (1961) 1 All N.L.R. 294 at 296.
[52] (1960) 15 WACA 20
[53] (1955) 15 WACA 20

evidence to prove it in *Alake v Pratt*. Of recent, the Supreme Court has been singing discordant tunes in their pronouncements on the matter. In a number of cases the Supreme Court held that a single decision is sufficient for a custom to be judicially noticed[54]. In *Nzekwu & Ors v Nzekwu & Ors*[55] Nnamani JSC who read the leading judgment said:

> A custom, if it has been well established in a decision of the superior courts need not be pleaded and proved, but it would be necessary, however, to plead facts and lead evidence to bring the suit in question within the ambit of the judicially noticed custom.

His Lordship was specific about establishment of the custom in a previous decision of a superior court.

On the other hand, the Supreme Court has held in a number of other cases that a solitary instance of the application of a rule of custom to the facts of a particular case is not sufficient to confer the requisite notoriety on such a case[56]. Unfortunately, no counsel has in any of the cases drawn the attention of the Supreme Court to the conflicting decisions. It is hoped that the Supreme Court will at the earliest opportunity overrule any line of the conflicting authorities. It is hereby, suggested that a single decision of a court on a point of customary law, which is sufficiently cogent and authoritative, should be enough to enable a court take judicial notice of its existence without further proof.

Since customary law is dynamic, the question is whether evidence can be led to show that a rule of customary law already judicially noticed is no longer accepted by the people of the area as their custom or has been modified. The answer seems to be in the

[54] *Folami & 3 Ors v Cole & 2 Ors* (1990) 2 NWLR (Pt 133) 445 at 457; *Agbai v Okogbue* (1991) 7 NWLR (Pt 204) 391;
[55] (1989) 2 NWLR (Pt 104) 373 S. C.
[56] *Oko v Ntukidem* (1993) 2 NWLR (Pt 274) 124 S. C. *Agbaniwe v Ibeh* (1998) 10 NWLR (Pt 571) 534; *Olagbemiro v Ajagungbade II* (1990) 3 NWLR (Pt 136) 37; *Temile Awani v* NWLR (Pt 2001) FWLR (Pt 62) 1937; *Jov v Dom (2001) FWLR (Pt 62) 2026.*

affirmative. In the old case of *Danmole v Dawodu*[57] the Federal Supreme Court admitted evidence for the purpose of showing that in Lagos the judicially-noticed custom on succession, idi-igi (distribution of estate per stirpes) had ceased to be the prevailing custom and had been replaced by ori-ojori (distribution of estate per capita). The Court held that idi-igi was still the applicable custom. Subsequently in *Adeniji v Adeniji*[58] it was held that ori-ojori is an alternative applicable custom on the matter.

Validity Of Customary Law

Ascertainment of customary law is not conclusive of its validity. The various statutes empowering the courts to apply customary law prescribe some criteria for determining the validity of any particular rule of customary law sought to be applied and enforced. The High Court Laws of the various States direct the courts to observe and enforce the observance of native law and custom, but only if the particular rule is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force[59]. The proviso to section 14(3) of the Evidence Act further provides that "in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience". The combined effect of these two provisions is that the courts cannot enforce a rule of customary law unless the following three criteria are met. In the first place, the custom should not be repugnant to natural justice, equity and good conscience; it should not be incompatible either directly or by implication with any law for the time being in force; and the custom should not be contrary to public policy. The customary rule

[57] (1958) 3 F.S.C. 46
[58] (1972) 1 All NRL 298
[59] See for instance s.18 High Court Edict No. 16 of 1987 of the old Anambra State;

may be offensive in three possible areas: in the field of substantive law; in the field of procedure; in the degree of punishment. We shall now examine how the courts have interpreted the validating criteria.

The Repugnancy Test

A rule of customary law, which is repugnant to natural justice, equity and good conscience, cannot be enforced and applied by the courts. But the question is, what do we mean by the phrase "natural justice, equity and good conscience"? In *Lewis v Bankole*[60], Speed, J. attempted to interpret the phrase disjunctively and give separate meanings to "natural justice", "equity", and "good conscience" but the interpretation was rejected on appeal. The phrase was examined by Niki Tobi, J.C.A. in the recent case of *Mojekwu v Ejikeme*[61]. According to his Lordship, "the word 'repugnant' ordinarily means offensive, distasteful, inconsistent or contrary to. The expression 'natural justice' generally means justice according to or pertaining to nature and therefore inborn . . . Although the expression is fluid, vague, generic and nebulous, mostly incapable of a precise legal meaning, and a fortiori legal definition, the above law creates a situation where the High Courts of Anambra State are statutorily enjoined not to observe or enforce customary law which is inconsistent with natural justice". With due respect, it is submitted that the above exposition still leaves us with the question, what do we mean by the phrase "natural justices," in this context? In *Okonkwo v Okagbue*[62] the Supreme Court maintained that the phrase "repugnant to natural justice, equity and good conscience" has not been interpreted disjunctively by the courts. Equity according to the Court, in its broad sense, as used in the repugnancy doctrine is equivalent to the meaning of "natural justice" and embraces almost all, if not all, the concept of

[60] (1908) 1 N.L.R. 81
[61] (2001) 1 CHR 179 at 208
[62] (1994)9 NWLR (Part 368) 301

"good conscience". Equity is not used here in its technical sense but in its broad sense. Also natural justice is not used in its modern technical sense, but synonymously with natural law. One agrees with Prof. G. Ezejiofor that "The cases show that the phrase is interpreted to mean fair and just or conscionable[63]". In other words, a rule of customary law that is unjust, unfair or unconscionable is repugnant to natural justice, equity, and good conscience.

It must be noted that conformity to the standard of behaviour acceptable in advanced communities e.g. the English community does not appear to be the test of repugnancy. Nor will a rule be declared void merely because it is inconsistent with the principles of English law[64]. Niki Tobi, J.C.A., made the point more forcefully in *Mojekwu v Ejikeme*[65]. He said:

> The point should however be made that in the determination of whether a customary law is repugnant to natural justice . . . the standard is not the principles of English law or English statute. On the contrary, the courts must have an inward look, inward in the sense of Nigeria jurisprudence. Such an indigenous approach, if I may use that expression vaguely, will certainly reduce the usual pet expression of the English Judge, "barbaric" in the description of our traditional jurisprudence, an expression, Speed, Ag. C.J. freely used in *Bankole.*

In similar vein, the Supreme Court in *Okonkwo v Okagbue*[66] held that the fact that a rule of customary law denies a person a right to which he would be entitled under English law is not in itself sufficient to invalidate that rule. Prior to Nigerian independence, most judges in Nigeria were foreigners imbued with self-righteous indignation towards a strange culture that they considered not only

[63] Ezejiofor, G. "Sources of Nigerian Law" in Okonkwo (ed) *Introduction to Nigeria Law* (London: Sweet & Maxwell, 1980) P.43.
[64] Rufai v Igbrra N.A. (1957) N. R. L. R. 178
[65] (2001) 1 C.H.R 179 at 209
[66] (1994) 9 NWLR (Pt 368) 301

inferior but also generally barbarous as evident in the following pronouncements of English Judges. In *Laoye v Oyetunde*[67] Lord Wright expressed the view that the repugnancy test was intended to invalidate "barbarous" customs. Lord Atkin in *Eshugbayi Eleko v Government of Nigeria*[68] said that a barbarous custom must be rejected on the ground of repugnancy to natural justice, equity, and good conscience. There is, however, no doubt that some of the customs of yesteryears are obnoxious and inhuman and cannot be sustained in modern civilized societies. One cannot therefore accept the views of Professor Abiola Ojo on the matter, which appears to go to the extreme. He said:

> If it is admitted that rules of custom are a reflection of the behavourism of a people in a particular area, and I see no escape from admitting this, would it not then be fairer to judge its validity by the local sentiments of right and wrong rather than indulge in speculations on some less specific factor which is not derived from any individual legal or social system, but rather from general notions . . .[69].

The courts have not developed any general theory on the basis of which rules of customary law are being tested. Rather, they have adopted a flexible approach and have, on an ad hoc manner, invalidated or sanctioned a rule sought to be applied on the basis of their notion of what is fair and just. In *Guri v Hadejia Native Authority*[70] the Federal Supreme Court declared invalid a rule of Maliki law which debarred a person accused of highway robbery from testifying in his own defence. In *Akpan v Henshaw*[71]

[67] (1934) A.C. 170
[68] (1931) A.C. 662
[69] Ojo, A. "Judicial Approach to Customary Law" Journal of Islamic and Comparative Law" Vol. 3 1969 P.44
[70] (1959) 4 F.S.C. 44
[71] (1932)11 NLR 47. Similar to this case is *Kodieh v Affram* (1930)12 WACA where the Plaintiff, the Omanhene of Kumawu, based his claim on the fact that the deceased had been his ceremonial servant.

a claim by a former slave on the property of the slave was struck down on repugnancy ground.

Based on the repugnancy principle, the courts have consistently found for the biological father as opposed to the sociological father in contests for issues of a union or their custody. In *Edet v Essien*[72] the Plaintiff had paid dowry for a woman whom he married. The woman left him and entered into a union with another man, by whom she had two children. The Plaintiff at the court alleged that under a rule of customary law, he was entitled to the custody of these children until his dowry is repaid. It was held that such a rule of customary law is repugnant to natural justice, equity and good conscience. In *Okonkwo v Okagbue*[73], the appellant, as Plaintiff, brought a representative action on behalf of himself and his four brothers against the respondents, as defendants, in the High Court of Onitsha. The appellant together with four others on behalf of whom he instituted the action namely (1) Nebolisa Okonkwo (2) Obiese Okonkwo (3) John Okonkwo and (4) Chinyelugu Ikechukwu Okonkwo were the surviving sons of late Nnanyelugo Nnebuchi Okonkwo of Ogboetu Village, Onitsha, who died in 1931. The deceased had two sisters, the 1st and 2nd respondents who survived him. But, neither of them had any child by their husbands or anyone else. On or about 1968, the 1st and 2nd respondents purportedly married the 3rd respondent for and on behalf of their late brother, without the knowledge and consent of the appellant and his said four brothers. As a result of this marriage, the 3rd respondent gave birth to six children who all bore the surname of the late Nnanyelugo Nnebuchi Okonkwo and parade themselves as his children. The 1st and 2nd respondents also held them out as the children of their late brother. The appellant had repeatedly made demands and representation to the 1st and 2nd respondents to return the children

[72] (1932)11 N.L.R. 47
[73] (1994)9 NWLR (Pt 368) 301

of the 3rd respondent to the people of late Okagbue and late Obiozo who by the native law and custom of Onitsha should be the fathers of the late children, but to no avail. The appellant claimed as follows. (1)(a) A declaration that under Onitsha native law and custom, the 1st and 2nd defendants by themselves cannot marry the 3rd defendant for their late brother, Nnanyelugo Okonkwo and that the alleged marriage is null and void. (b) That the 3rd defendant is not the wife of late Nnanyelugo Okonkwo. (2) An order of court that all the children of the defendants namely: Izuchukwu, Okwudi, Uju, Victor Okechukwu, Obiageli, are not the issues of late Nnanyelugo Okonkwo. (3) A declaration that the children (aforesaid) cannot inherit both the real or personal property of the late Okonkwo or succeed to any seat temporal or spiritual in Ogbotu village, through Nnanyelugo Okonkwo lineage, and or in the alternative, that the children of the aforesaid marriage are the children of Okagbue and Obiozo and belong to Ogbeodogwu and Ogboli families according to Onitsha native law and custom. At the conclusion of the hearing, the learned trial Judge dismissed the appellant's (plaintiff's) claim. The appellant was dissatisfied with the judgment and appealed to the Court of Appeal, which affirmed the decision of the trial court. The appellant (plaintiff) further appealed to the Supreme Court. The Supreme Court unanimously allowed the appeal. The Supreme Court held that marriage, as it is commonly known, is a union of a man and a woman. That is to say, between two living persons. Therefore, for a marriage to be meaningful, it is necessary for the husband to physically exist so that the marriage can be consummated. A custom that allows a woman to be marriage to a deceased man as in the instant case cannot be said to be in good conscience or in accord with public policy. In the words of Ogundare J.S.C.,

> To claim further that the children the 3rd Defendant had by other man or men are children of Okonkwo (deceased) is nothing but an encouragement of promiscuity. It cannot be contested that Okonkwo

(deceased) could not be the natural father of those children. Yet 1st and 2nd defendants would want to integrate them into his family. A custom that permits of such a situation gives licence to immorality and cannot be said to be in consonance with public policy and good conscience . . . It is in the interest of 3rd Defendant's children to let them know who their true fathers are (were) and not to allow them to live for the rest of their lives under the myth that they are children of a man who had died many decades before they were born[74].

In *Muojekwu v Ejikeme*[75], the issue was whether the Nnewi custom or ceremony of *Nrachi* whereby a father "plants" his unmarried daughter in his house for the purpose of raising issues for him and which further forbids a widow from inheriting or succeeding to the husband's estate, is repugnant to natural justice, equity and good conscience[76]. The Court of Appeal held that a custom that denies the natural or biological father of his child is certainly repugnant to natural justice, equity and good conscience. Fabiyi, J.C.A. who read the leading judgment, in a very forceful and illuminating language, said:

> I must express the point here by which I will continue to stand that human nature, in its most 'exuberant prime and infinite telepathy' cannot support the idea that a woman can take the place of a man and be procreating for her father via a mundane custom. She stays in the father's house and cannot marry for the rest of her life even if she sees an honest man who loves her. I cannot, and do not, believe that the society, as it is presently constituted, will for long acquiesce in a conclusion so ludicrous, ridiculous, unrealistic and merciless more especially as we march on into the next millenium. The polity, as presently constituted, cannot, in my view, contain what Nrachi custom stands for. It is not neat. It

[74] at PP 343 - 344
[75] (2001)1 C.H.R. 179
[76] (2001)1 C.H.R 179

> is an antithesis to that which is wholesome and forward looking . ... The custom is perfidious and the petrifying odour smell to high heavens . ... I have no hesitation in declaring that Nrachi custom is against the dictates of equity. It is no doubt repugnant and contrary to natural justice, equity and good conscience[77].

Much as one agrees with the decision that a natural father should not be denied of his children, the court must not be seen as promoting promiscuity. Thus, where a natural father seeks to have his children when he had not performed his obligations for marriage under customary law, while he should have his children, the court should compel him to perform those obligations where they are reasonable. The facts of *Yusufu v Okhia*[78] present a different picture. In that case, the relations of the deceased wanted to "inherit" the widow but she refused. The widow moved out of the matrimonial home and had a relationship with the appellant. She did not perform the funeral rites for her deceased husband. The respondent, a brother of the deceased, obtained judgment in the lower court against the appellant for adultery and enticement. He alleged that the marriage between the deceased and the widow was subsisting until the wife performs the funeral rites for her late husband. The learned judge on appeal held that a rule of customary law, which permits action for adultery and enticement after the death of the husband, was repugnant to natural justice. One agrees with *Yomi Dinakin*[79] that the decision in this case seems to have ignored the cultural values and the essential nature of customary law. While it is conceded that it will not be proper to force a woman to be "inherited" by her deceased husband's relations, the same thing cannot be said of requiring her to perform her obligations to her deceased husband except where the obligations are onerous or her refusal to do so is on religious or other

[77] at pp 195 – 196
[78] (1976)6 E.L.S.L.R.
[79] "The Repugnancy Clause: A reappraisal" in Agbede, I.O. et al. (ed), *Current Themes in Nigeria Law* (Lagos: Faculty of Law, UNLAG, 1997) P.145

justifiable grounds. In *Eugene Meribe v Joshua Egwu*[80] the Supreme Court held that where there was proof that a custom permitted marriage of a woman to another woman, such custom must be regarded as repugnant. The Supreme Court, however, sanctioned the custom whereby a barren woman had procured another woman for her husband.

In *Mojekwu v Mojekwu*[81] Niki Tobi, J.C.A. (as he then was), had this to say on a custom that allegedly discriminated against women:

> We need not to travel all the way to Beijing to know that some of our customs including the Nnewi "Oli Ekpe" custom relied upon by the appellant are not consistent with our civilized world in which we all live today, including the appellant. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God, the Creator of human beings, is also the final authority on who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront to the Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the "Oli–Ekpe" custom of Nnewi, is repugnant to natural justice, equity and good conscience.

The matter got to the Supreme Court under the title *Mojekwu v Iwuchukwu*[82] following the substitution of one of the parties. The facts of the case are as follows. At the High Court Onitsha, the appellant sued one Mrs Caroline Mgbafor Mojekwu who, having died, was substituted by the respondent, her daughter. The appellant claimed, inter alia, a declaration that he was entitled to the statutory right of occupancy of the property situate at and known as No. 61 Venn Road, South, Onitsha in accordance with Nnewi native law and custom; a declaration that he,

[80] (1976)6 ECSLR 208
[81] (1997)7 NWLR (Pt 512) 283
[82] (2004) 11 NWLR (pt. 883) 196

being the recognized kola tenant of the Mgbelekeke family of Onitsha was entitled to the statutory right of occupancy of the property in accordance with the Mgbelekeke family of Onitsha kola tenancy. According to the appellant, his only Uncle, Okechukwu Mojekwu acquired a parcel of land from the Mgbelekeke family of Onitsha under kola tenancy and built a house on it. The man died in 1944 and was survived by two daughters and a son called Patrick Adina Okechukwu Mojekwu. The appellant averred that his own father, the only brother of Okechukwu Mojekwu died in 1963 while Patrick, the only son of his said uncle, died during the Nigerian civil war without any child. The appellant claimed that by virtue of Nnewi native law and custom, he succeeded to the estate of his late uncle, Okechukwu Mojekwu, and was the head of the Mojekwu family. The mother of late Patrick was the defendant at the High Court. The respondent who was substituted for the defendant at the Supreme Court was one of her two daughters. The defendant's case was that the property in dispute had passed to late Patrick and that it later passed to Chukwuemeka Okechukwu, the alleged infant son of late Patrick. The defendant averred that the appellant misrepresented facts to the Mgbelekeke family to recognize him as the person entitled to continue the kola tenancy; that the recognition of the appellant where the male and female issues of the deceased kola tenant are living is contrary to the Onitsha customary kola tenancy system of devolution of property on death; and that the native law and custom of inheritance of Onitsha where the land in dispute is situate applied to the case and not the native law and custom of Nnewi.

At the conclusion of the trial, the High Court dismissed the suit. It held that there was no evidence in support of the relief sought by the appellant that under the Onitsha kola tenancy he is entitled to the land in dispute. Aggrieved by the decision of the trial court, the appellant appealed to the Court of Appeal. The Court of Appeal came to the conclusion that the applicable law was the lex situs and that the lex situs was the kola tenancy law and not the personal law of the parties, which was the Nnewi custom of "oli-ekpe". The Court of Appeal also declared the "oli-ekpe" custom to be repugnant to natural justice, equity and good conscience. On further appeal to the Supreme Court, the Supreme Court held that the custom of the lex situs applied and that under that custom the respondents who are the only surviving children of Okechukwu Mojekwu, though women, are entitled to inherit the kola tenancy.

On the issue of the repugnancy of the "oli-ekpe" custom, Uwaifo, J.S.C. who delivered the leading judgment with which all the other four Justices on the panel concurred, said:

> In the present case, because of the circumstances in which it was done, I cannot see any justification for the court below to pronounce that the Nnewi native custom of 'oli-ekpe' was repugnant to natural justice, equity and good conscience. First, the issue that 'oli-ekpe' in question (sic) was repugnant was not joined by the parties. Second, the court below having felt strongly about its repugnancy, as can be seen from the emotive and highly homilized pronouncement, was obliged to draw the attention of the parties to it, raise it suo motu and invite them to address the court on the point. Third, the court below itself had reached a conclusion that the applicable custom was that of the kola tenancy of the lex situs. This was said twice in the leading judgment, as recorded: once before the pronouncement in question and one after. The pronouncement which was not necessary for deciding the suit can thus be assessed upon the scenario in which it was made. Fourth, the learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities. It would appear, for these reasons, that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.[83]

In *Nzekwu & 2Ors v Nzekwu & 2 Ors*[84] the Supreme Court held that any Onitsha custom which postulates that an Okpala has the right to alienate the property of a deceased person in the life time of his widow is a barbarous and uncivilized custom which should be regarded as repugnant to equity and good conscience and therefore unacceptable. In the recent case of *Alajamba Uke & Anor v Albert Iro*[85] the appellants at the Court of Appeal sought to rely on a purported custom of Nneato Nnewi under which a woman could not give evidence in land matters. The Court of Appeal held that a custom that strives to deprive a woman of constitutionally guaranteed rights is otiose. It offends all decent norms as applicable in a civilized society. Pats-Acholonu, J.C.A, pungently and poignantly, remarked:

> Any customary law which flies against decency and is not consonant with notions, beliefs or practices of what is acceptable in a court where the rule of law is the order of the day shall not find its way in our jurisdiction and should be disregarded, discarded and dismissed as amounting to nothing.

It would appear that the Court of Appeal struck down the particular custom, on the ground, inter alia, of repugnancy without saying so expressly. The Court quoted with approval the decision of the Court of Appeal in *Mojekwu v Mojekwu*[86] to the effect that a rule of customary law, which discriminates against a particular sex, is repugnant to natural justice, equity and good conscience. In *Solomon v Ogbodo*[87] it was held that a custom whereby the husband could divorce his wife at will but the wife could not

---

[83] at 216
[84] (2002)11 NWLR (Pt 723) 196
[85] (1989)2 NWLR (Pt 104) 373 S.C.
[86] (1997)7 NWLR (Pt 512) 283
[87] (1974)4 E CSLR 457

obtain a divorce unless the husband consented was contrary to natural justice.

In *Akpalakpa v Igbaibo*[88] the Court of Appeal held that a custom which does not permit the economic, social and political growth of a people is contrary to natural justice, equity and good conscience.

From the foregoing, it is evident that the courts have not adopted a general theory of repugnancy. The Courts adopted a flexible and case by case approach to achieve fairness and justice as dictated by time and circumstances.

It ought to be noted that the question whether a particular custom is repugnant is a matter of law and not fact. It is therefore not necessary to plead that a custom is repugnant. In *Okonkwo v Okagbue*[89] the Supreme Court held, inter alia, that the issue of repugnancy can be raised by counsel in his address to court or the court itself may raise the point suo motu since it is enjoined to take the law into consideration and apply it in determining whether a particular custom is applicable.

Incompatibility of Customary Law with any Law for the Time Being in Force.

As mentioned earlier, various High Court Laws enabling the application of customary law, state that a rule of customary law which is incompatible, either directly or by necessary implication, with any law for the time being in force cannot be observed or enforced by the courts[90]. The word "incompatible" was judicially interpreted by Niki Tobi, J.C.A. in *Moujekwu v Ejikeme*[91]. His Lordship said: "Incompatible is a word which means not compatible, not consistent and contradictory". His Lordship said

[88] (1996)8 NWLR (Pt 468) 537 (J)
[89] (1994)9 NWLR (Pt 368) 301 at 321.
[90] See for instance s.18 High Court Edict No. 16 of 1987 of the old Anambra State.
[91] (2001)1 C.H.R 179 at 208.

further that the courts are compelled not to observe or enforce any customary law which is not consistent with any written law in force. While it is easy to determine when customary law is incompatible directly with any written law in force, it is not that easy to determine when such law is by implication incompatible with a written law. It is however, a matter of hard law based on the construction of the provisions of the enabling laws. Written law in this context necessarily includes all local laws, and, a fortiori, the provisions of the constitution, which is the fundamental law of the land. In *Agbai v Okogbue*[92] the plaintiff/respondent was a tailor by profession and carried on business at Aba. The defendants were members of Aba branch of Umunkalu Age Group of Alayi. On 22nd April 1978, the defendants/appellants broke and entered the plaintiff's shop and seized and carried away his butterfly sewing machine. It was the contention of the defendants that the plaintiff, being a native of Umunkalu Alayi, was by custom, obliged to join an age group and that he could not opt out. He was also obliged by custom to pay all development levies imposed on members by the age group. The plaintiff's sowing machine was seized because he failed to pay the development levy for the purpose of building a health centre in their village. The plaintiff contended that he was not a member of the age grade association because his religion forbids him to join. The Supreme Court held that any customary law that is contrary to any statute or the Constitution of the Federation or incompatible with an existing law in force cannot be enforced by the courts. In the instant case, the plaintiff/respondent is entitled to hold to the tenet of his religion, thought and conscience, which prohibit him from joining the age grade. Any custom that holds otherwise is contrary to the constitution and therefore null and void to that extent. It has also been held that an existing native law and custom may be altered or entirely abrogated by a valid legislation, which is in conflict with it[93]. In

[92] (1991)7 NWLR (Pt 204) 391
[93] *Yaktor v Governor of Plateau State* (1997) 4 NWLR (Pt 98) 216

the *Moujekwu v Ejikeme*[94] case the Court of Appeal held that a rule of customary law which denies women the right of inheritance of the estate of the deceased is a violation of section 39(2) of the 1979 Constitution which prohibits discrimination on the ground of sex. Such a custom is therefore void. Similarly, in *Alajemba Uke & Anor v Albert Iro*[95] a custom of Nneato Nnewi under which a woman could not give evidence in land matters was in issue. The Court of Appeal held that a custom that strives to deprive woman of constitutionally guaranteed rights is otiose and offends the provisions that guarantee equal protection under the law.

However, the thorny issue with regard to the incompatibility test is whether the phrase "any law for the time being in force" includes the received English law. In *Re Adedevoh*[96], WACA expressed the view, obiter, that any law in force included "the rules of common law". On the contrary, in *Rotibi v Savage*[97], Waddington, J. submitted, in an obiter dictum, that if a rule of customary law would be declared inapplicable and void if it is found to be inconsistent with an English rule of common law, a principle of equity or a provision of a statute of general application, then it means that there will hardly be any valid rule of customary law left. In the recent case of *Muojekwu v Ejikeme*[98], Niki Tobi, J.C.A. expressed the opinion obiter that in the determination whether a customary law is repugnant to natural justice or incompatible with any written law, the standard is not the principles of English law. A similar opinion was expressed in *Okwonkwo v Okagbue*[99] where the Supreme Court, in an obiter, maintained that by the provisions of section 14 of the Evidence Act and section 20 of the High Court Law as well as similar provisions in other legislations, the courts have come to recognize the fact that

[94] (2001)1 C.H.R. 179.
[95] (2001)11 NWLR (Pt 723) 196
[96] (1951)13 WACA 304
[97] (1944)17 NLR 77
[98] (2001)1 C.H.R. 179 at 209
[99] (1994)9 NWLR (Pt 368) 301 at 323

a rule of customary law which denies a person a right to which he would be entitled under English law is not in itself sufficient to invalidate that rule. This accords yet with another obiter in *Gregory Obi Ude v Clement Nwara & Anor*[100] where Nnemeka-Agu JSC said that the common law, doctrines of equity and statutes of general application in force in England on the 1st day of January 1900 ought to apply in the States carved out of the former Eastern Region of Nigeria save in so far as they have been excluded or modified by local legislation or local customary law. If rules of our customary law can modify the received English law, then the validity of the former cannot be tested by reference to the latter.

Some recent statutes, have, however, to some extent, eliminated the doubt in this matter. The Customary Court Edict of Anambra State directs the Courts it established to apply customary law so far as it is not incompatible with any written law in force. Similar enactments in the former Western and Northern Nigeria and the Western Nigeria High Court Law also used the term "written law" in relation to the question of incompatibility. The common law or equity is no doubt not written law. However, where the principles of equity or common law have been codified, as is the case in the old Anambra State,[101] they will qualify as written law. These legislations, in any case, have failed to clarify the issue of whether "written law" in this context includes English statutes. It is evident from the foregoing judicial opinions that the phrase "any law for the time being in force" in the context of the incompatibility test does not include the received English law, except where such received English law has been re-enacted as a local law or codified.

[100] (1993)2 NWLR (Pt 278) 638 at 658 - 659
[101] See Court Legislation Series Law of Anambra State Vol. 4 1986.

The Public Policy Test

The criterion of public policy was introduced in 1945 when the Evidence Act was first enacted. The Evidence Act, however, failed to define the phrase "public policy". In Moreover, there may be issues which may be considered under the repugnancy and public policy tests but which cannot be considered in relation to human rights. Such issues include woman-to-woman marriage, or marriage to a deceased person [102], the Supreme Court maintained that the phrase "public policy" means the ideas in vogue for the time being in a community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally regarded as injurious to the public interest. The Supreme Court also observed that public policy is not fixed and stable. It must, therefore, fluctuate with the circumstances of the time. Thus, new heads of public policy come into being and old heads undergo modification. In the instant case, the Supreme Court held that to claim that the children the 3rd Defendant had by another man or other men are the children of Okonkwo (the deceased) is nothing but an encouragement of promiscuity. A custom that permits of such a situation gives licence to immorality and cannot be said to be in consonance with public policy.

In the old case of *Re Adadevoh*[103] verity C.J. stated that if a suggested rule of customary law was found to encourage promiscuous intercourse it would be contrary to public policy, and therefore void, but he did not refer to the Evidence Act. In *Cole v Akinyele*[104]. Brett F. J, delivering the judgment of the Federal Supreme Court, held invalid, on ground of public policy (though without reference to the Evidence Act) a rule of customary law which provides that if the paternity of a child born out of wedlock is accepted, he becomes legitimate and shares equally with children born of a marriage contracted under the Marriage

[102] (1994)9 NWLR (Pt 368) 301 at 335, 336
[103] (1951)13 W.A.C.A. 804
[104] (1960)5 F.S.C. 84.

Ordinance. It may be pertinent to mention that the effect of this decision has been nullified by section 42(3) of the 1999 Constitution, which has the effect of assimilating fully into the family, children that might otherwise have been considered illegitimate.

The Search For More Appropriate Criteria for the Evaluation of Customary Law

There is no doubt that the above three criteria for the evaluation of customary law are unsatisfactory. Law ought to be stable and certain. It has been stated that the expression, "repugnant to natural justice, equity and good conscience" is a nice and comfortable formula meaning as much or as little as the judges for the time-being care to make it mean.[105] It has therefore on occasion produced contradictory results. The expression has been invoked to uphold the claim of an illegitimate child on the ground that natural justice favours claims by natural relations as opposed to the claim of the state by escheat.[106] On the other hand, it has also been relied on to reject the claim of such a child on the ground that to uphold such a claim would render nugatory the need for legitimacy and valid marriage between parents.[107] The rule is therefore lacking in precision.

The public policy test is equally unsatisfactory. It creates the same problem of uncertainty and unpredictability. The expression, "public policy" is fluid. The recent definition of the

[105] J.D.D. Derret "Justice, Equity and Good Conscience" *Changing Law in Developing Countries* (Ed. J.N.D. Anderson) 1961, p. 114 cited in I. O. Agbede "Repugnancy Clause as Instrument of Legal Development: Myth or Substance" in T. O. Elias *et al* ed *Nigerian Essays in Jurisprudence* ((Lagos: MIJ Professional Publishers Ltd, 1993) p 409
[106] See the Indian case of *Jaganneth Gin Shar* (1934) 57 AU 85, 1004 cited by Agbede, *Ibid*.
[107] In Re *Adadevoh* 13 W.A.C.A. 304. See also *Meenakshi v Manniandi* (India) 1915 Mad 63, 67 Col. 1

expression in *Okonkwo v Okagbue*[108] as the ideas presently in vogue exposes the vagueness of the phrase. The incompatibility test has its own problems as it requires knowledge of all written laws in force before a person is expected to know whether a particular rule of customary law is incompatible with a written law in force. Thus, an ideal criterion for the evaluation of customary law is still a desideratum. The human rights criterion suggested by a writer, therefore, deserves serious consideration.

The Human Right Criterion

A learned commentator has suggested a new criterion for evaluating customary law, which according to him, is more encompassing and premised on universal legal and moral axioms[109]. The suggested criterion is the human rights and fundamental freedoms paradigm as a criterion for the determination of the validity of customary law. Modern human rights encompass virtually all fields of human endeavour, and have extended from the traditional civil and political liberties to the second generation economic, social and cultural rights; the third generation solidarity rights; the fourth generation rights relating to peace, the environment, and rights of the vulnerable stratum of society and the fifth generation human rights relating to democracy and democratic representation. He maintains that the human rights approach has the advantages of easy ascertainability, promotion of the general welfare and inherent dignity of man, and creation of awareness of human rights and fundamental freedoms. The human rights criteria will solve the problem of certainty and predictability in the application of customary law as human rights principles are fairly settled and their standard of interpretation are clearly spelt

[108] supra

[109] Onyekpere, Eze, *Justice for sale: A Report of the Administration of Justice in the Magistrates and Customary Courts of Southern Nigeria* (Lagos: Civil Liberties Organisation, 1996) pp. 46 – 47.

out. Furthermore, there is an impressive body of local and international case law on human rights provisions.

Furthermore, the application of the human rights criteria will preclude conflicting interpretations, and interpretations that can contravene human rights provisions. However, there may be issues which may be considered under the repugnancy and public policy tests but which cannot be considered in relation to human rights. One of such issues is the issue of a custom permitting marriage between a living person and a deceased person. In the circumstance, the other criteria may be retained as the residuary criteria to meet such situations.

Effect of Invalidity of Customary Law Rule

The pertinent question here is what law should apply where the customary law, which should otherwise have applied, fails any of the evaluating criteria. Park[110] has made some suggestions in this regard, which are apt and apposite. According to the learned author, where a native law and custom is invalid because of incompatibility with local enactment, then the rule in the latter will apply. If a native law and custom is however void for repugnancy and there is an alternative customary rule not so repugnant, this alternative custom will apply. On the other hand, if there does not exist another local custom or a local statute, then the English common law, as the residual law of the land will apply. Thus in *Amachree v Kalio*[111] the plaintiff community claimed under customary law to be entitled to the exclusive fishing rights in the Kalabari river and that the defendant community could only fish in that river if they paid acceptable tribute. The court held that the existence of such a customary rule was not proved and that even if it existed it was void by the repugnancy rule. Since there was no rival native law and custom on the point, the common law ru...

[110] Park, A.E.W. *op cit* pp 80-81.

[111] (1914)2 N.L.R. 108.

the use of a navigable river for fishing purposes was a public or communal right was applied.

Codification of Customary Laws

There is on going debate on the desirability or otherwise of codifying customary laws in Nigeria. It is intended here to examine briefly the arguments for and against codification of customary laws.[112]

Codification simply means setting down the rules of customary law in the form of a written law. Codification may take any of the following two forms:[113]

a) codification which sets out all the different rules of customary law as they exist in each ethnic group (and other sub-cultural areas) throughout the country;.

b) codification which sets out a uniform set of rules for all communities. This may mean either adopting the rules found in one particular ethnic group or community, or may mean having to formulate a set of rules, which is different from all customary laws existing in the country and not based on any of them.

[112] See generally on this topic Dikko, A. B. "The Possibilities of Codifying the Major Systems of Customary Laws in Nigeria" in Ajibola, B. ed Towards a Restatement of Nigerian Customary Law (Lagos: Federal Ministry of Justice, 1991) 322.

[113] See the report of the Committee set up in 1976 by the Federal Military Government to examine all existing customary courts laws and consider whether customary laws and usages should be codified and to what extent and what basis.

In considering the arguments in favour of, and against codification, codification is in this context understood in the former sense.

Merits of Codification of Customary Law

One of the arguments in favour of codification is the need to have a compact and accessible law as opposed to the present law, which is unwieldy.[114] Codification will make customary law easily assessable to both litigants and judges. Though some judges of customary courts are presumed to know the customs of the area within his jurisdiction, there are situations where particular judges may not know the applicable custom. For judges of British-type courts, they rely on evidence for the establishment of customary law. Codification will remove the need to prove customary law in courts.[115]

Another argument is that codification will promote certainty in the law. Since customary law is not codified, it has to be ascertained through human memory. But human memory is very unreliable and there may be deliberate distortions of the law to suit certain interests. Codification will eliminate these problems. It will enable judges to refer to the code directly in the course of discharging their duties. Certainty in the law will also curb the excesses of judges as it will no longer be left to the judges to ascertain what is the custom and what is not or to judge the validity of customs.

It is also contended that codification of customary law is the only means of preserving it. Since customary law is unwritten, its survival and preservation depends on human memory. Human memory is often unreliable. Furthermore, when the elders who are

[114] Kanam, Y. M. "The Merits and Strategies for the Codification of the Sharia (Islamic Law) In Nigeria" in Ajibola, B. ed. *Op. cit.* p. 363

[115] Osinbajo Y and Taiwo Osipitan "Proof of Customary Law in Non-Customary Courts" in Ajibola, B. *op. cit.* p. 255 at 265

the custodians of our customs and traditions die their descendants, most of who spend most of their lives in urban areas, are not likely to know or remember the customs and traditions of the people.

It is contended that codification will lead to improvement in the law through rectification of some of the weaknesses of customary law.[116]

Before British-type courts, where customary law has not been established in previous cases, a lot of time is spend leading evidence in proof of customary law. Where customary law is codified, time, which would otherwise have been spent on proving the custom, will be saved. This will promote the trial of cases within a reasonable time.

In any case, there are some arguments against codification of customary law. The following arguments have been proffered against codification of customary law.

Demerits of Codification

Codification of customary law may lead to ossification of customary law and the stultification of its growth and development. Codification will freeze customary law and thereby deprive it of one of its qualities, which is its capacity to change over time.

It is also argued that once customary law is codified, it will cease to be customary law and will become statute law.

A very strong argument against codification is that the product of the exercise is likely to either reflect more conspicuously the laws of a particular group(s) or community(ies) than others, or inadequately represent the rules of any given group. Codification may thus lead to the loss of cultural identity. Codification will challenge the characteristic of customary law as a mirror of accepted usage. Nigeria is a highly ethnic conscious society where no ethnic group will accept a code which consists of the customary laws of a different ethnic group.

[116] Ojo, M. I. "The Codification of Customary Law in Nigeria" *ibid* p. 312

There is another argument that since majority of Nigerians are illiterate, it will be unwise to codify the customs in a language the people will not understand.

Another argument against codification of customary laws is that series of distortions will result from the process of codification

Chapter 5

JUDICIAL PRECEDENT

The doctrine of judicial precedent or stare decisis is one of the attributes of the common law system. The very core notion of the precedent system, according to G.W. Paton, is that questions ought to be decided today in the same way as they were decided yesterday simply because they were decided that way yesterday.[1] *In Clement v Iwuanyanwu*[2] Oputa, JSC said that a precedent is an adjudged case or decision of a higher court considered as furnishing an example or authority for an identical or similar question afterwards arising on similar question of law. It needs to be mentioned, however, that the binding decision needs not necessarily be that of a higher court. Some courts are bound by their own decisions.

Stare decisis (an abbreviation of the Latin phrase, *stare decisis et non quieta movere)* means to abide by a former decision where the same points come up again in litigation.[3]

The doctrine of judicial precedent or stare decisis requires that the principle of law on which a court bases its decision in relation to the material facts, or issues, before it must be followed by courts lower in hierarchy and may be followed by a court of co-ordinate jurisdiction or a court which is higher in hierarchy in future similar cases. When a court is under obligation to follow a previous decision, the precedent is said to be binding. When a

[1] George Whitecross Paton, *A. Textbook of Jurisprudence* 3rd edn by David P. Derham (Oxford:
Oxford University Press, 1964) P. 181.
[2] (1989)3 NWLR (pt.. 107) 54
[3] *The Norfolk Peerage Case* (1907) A.C. pp. 10-12 quoted with approval by Aluko, A.O. "The doctrine of Stare Decisis and the Nigerian Legal System: A Theoretical Perspective" (1992) J.C.L.P Vol.3 Nos. 3 and 4, p. 74 at 78.

court has discretion whether or not to follow a previous decision, the precedent is said to be persuasive.

Case law or judge-made law is one of the sources of law in common law countries. However, judges do not make law in the sense in which the legislators do. Thus Prof. C. K. Allen has noted:

> By no possible extension of his office can a judge introduce new rules for the compensation of injured employee, for national health insurance, for the rate of taxation, for appropriation of public money. The legislature can project into the future a rule of law which has never before existed. The courts can do nothing of the kind.[4]

In any case, when a judge decides a particular case, the blackboard is not wiped out; the decision may stand as an authority for future cases on similar facts. The judge may create new rules in applying law to changed circumstances. And where there is a lacuna or no law governing the situation before a court, the judge may also create new rules. Sometimes judges widen and extend a rule of law.

Advantages of following Precedent

The practice of following past decisions has been justified on several grounds. On the benefits of the doctrine of judicial precedent, Kalgo J.S.C. said:

> Standing by a previous decision, which has not been proved to be perverse, or to have been decided per incuriam or proved to be faulty legally or procedurally has a lot of advantages. It fosters stability and enhances the development of a consistent and coherent body of law. In addition, it preserves continuity and manifest respect for the past. It also assures equality of treatment for litigants similarly situated. It likewise spares judges the task of re-examining rules of law, or principles, with

[4] *Law in the Making,6th ed.*, (London: Clarendon Pres, 1964) p. 294

each succeeding case, and finally it affords the law a desirable measure of predictability.[5]

The advantages of following past decisions in appropriate cases will be considered in greater details as follows.[6]

Certainty and Predictability of the Law

In *Comptel International SPA v Dexson Ltd,*[7] Uwaifo J.C.A. (as he then was) said:

> The doctrine thrives on the basis that when the Court has at one time laid down a principle of law as applicable to ascertained state of facts, it will not unsettle that principle but will adhere to it, and apply it to all future cases where the facts are substantially the same, irrespective of whether the parties and subject matter are the same. This is because there ought to be certainty in legal principles so that individuals may know how to manage their affairs as regards the requirement of the law.

When the law is reasonably certain individuals and their legal advisers can predict the future action of the court. Adherence to precedent therefore provides behavioural guidelines. It enables members of the society to plan their activities within legal limits. The ability of prospective litigants to predict the likely outcome of a case based on precedents will encourage them to settle their disputes out of court, because they know what direction the law is likely to follow if the matter goes to trial. Certainty and predictability of the law also enables lawyers to advise their clients based on their predictability of what the attitude of the court to a given matter will be.

[5] *Global Transport Oceanico S.A. & Anor v Free Enterprises Nig. Ltd.* (2001)5 NSQR 487 at 505

[6] See Generally on this Aluko, A.O. "The Doctrine of Stare Decisis and the Nigerian Legal System: A Theoretical Perspective" (1992) J.S.L.P. Vol.3 Nos.3 and 4 p.74

[7] (1996)7 NWLR (Pt 459) 170 at 184

Certainty in law is highly desirable because since individuals regulate their conduct in conformity with judicial decisions, the decisions should not be lightly altered because of the inconvenience and mischief, which will result from such alteration.

Promotion of Judicial Efficiency

The doctrine of judicial precedent is a convenient practice since it requires that a question once decided should not be subject to re-argument in every case in which it subsequently arises. Thus there is gain of time and resources in not treating as open questions already decided. Cardozo said that the labour of judges would be increased almost to a breaking point if a settled point could be re-opened in every case.[8]

Scientific Development of the Law

Application of the doctrine makes for scientific development of the law. If each new case is decided without any consideration of prior cases, law will cease to be a science, for the possibility of prediction which is the hallmark of science will disappear.[9]

Prevention of Partiality or Prejudice

Adherence to the doctrine prevents partiality or prejudice on the part of the judge. Because he is required to follow precedent, his personal whims and caprices are brought under check. By making a judge conform to laid down standards, he is prevented from allowing his subjective views, his prejudices and biases to colour his judgments.

[8] (1951)25 Aust L.J. 296 cited in Aluko *op.cit* p.79

[9] Ezejiofor, G. "Sources of Nigerian Law" in Okonkwo, C.O. ed *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) p.15.

It Satisfies the Principle of Equality

Equality before the law, which is an aspect of the rule of law and justice, implies that like cases should be treated alike while unlike cases should receive unlike treatment. Following previous decisions is in consonance with this principle of equality.

Respect for the Opinions of One's Ancestors

It is said that following past decisions is a mark of respect for the opinion of one's ancestors who should be presumed not to have acted "wholly without consideration." Succeeding generations leave their mark on the law and the effect of their work is not confined to the particular disputes that they decide.

Delimitation of Judicial Function

Archibald Cox has pertinently observed that "the wholesale discard of precedent and the readiness to overturn ... doctrines reaffirmed by the court ... do no service to the idea of law as something distinct from politics and the arbitrary preferences of individuals." The doctrine of stare decisis restricts judges to their proper role – it separates judicial function from law making and politics. Judges are, in the majority of cases, not elected but appointed. They lack contact with the electorates and therefore cannot understand or fashion out policy direction. As such, reform of the law is the function of the legislators.

It Reduces the Chances of Error

If every judge has to determine all questions before him without reference to previous decisions, there are greater chances of error than if he follows the earlier decisions which embody the collective wisdom of the many.

It foresters the Appearance of Justice following precedent helps to satisfy the requirement that justice should not only be done but must be manifestly seen to have been done. There will be no room for speculation as to the motive for which the judge

decided a case if it is show that he has adhered to precedents in arriving at his decision.

Disadvantages of Following Past Decisions

The doctrine of judicial precedent is not a bed of roses without thorns. It has the following disadvantages.

Rigidity

The binding force of precedents may prevent the adaptation of the law to changing social and economic order of the country. The discretion of courts is fettered, and they quite frequently have to give decisions of which they strongly disapprove.

It is said that the doctrine of precedent promotes respect for the opinion of elders and that such respect is desirable. However, the wisdom of our ancestors must be located within their time and age. The circumstances that made a particular rule wise may no longer exist in which case it may be folly to continue to follow the rule.[10]

Danger of Illogical and Technical Distinctions

Over subtle distinctions are sometimes drawn to avoid applying a rule that causes hardship. This leads to technicalities.

Perpetuation of Injustice

The doctrine of precedent may lead to perpetuation of injustice. The doctrine insists that it is more important that the law is settled than settled correctly. The doctrine may therefore give rise to a situation where the courts may be consistently wrong.

---

[10] Olaniyan, H.A. "Precedent in our Legal System: An Evaluation" in C.O. Okonkwo, C.O. ed, *Contemporary Issues in Nigerian Law* (Lagos: Toma Micro Publishers Ltd, 1992) pp.283 - 288

Law Reports

The operation of the doctrine depends on the availability of law reports. Law reports may, at times, be unavailable or unaffordable to both lawyers and judges. In such circumstance, there may be chances of reaching wrong decisions by relying on available authorities that might even have been overruled.

Inapplicability to Decisions Based on Discretion

The much talked about certainty and predictability of the law resulting from following previous decisions will disappear when the earlier decision was based on the discretion of the judge since it has been held that a court is not bound to follow earlier decisions based on discretion.[11]

It is not every pronouncement of the judge in the course of a judgment that is a binding precedent, which must be followed. It is only the ratio decidendi that is binding. A statement made in passing which is called (obiter dictum) does not constitute a binding precedent. However, it has never been clear what constitutes the previous decision[12].

The Meaning of Ratio Decidendi

For purposes of the doctrine of judicial precedent, the two elements of a decision are the ratio decidendi and the obiter dictum. It is generally agreed that the former is binding while the latter is of persuasive effect. Nevertheless there is cleavage of

[11] it has been held that each exercise of judicial discretion must depend on the facts and peculiar circumstances of each case as previous exercise of discretion is not precedent *Odusote v Odusote* (1971)1 All NLR 219 S.C., see also *ICAN v Federation* (2003)42 WRN 49

[12] For instance, in *Rossek v ACB* (1993)8 NWLR (pt. 312) 382 the Nigerian Supreme Court was divided on what was the ratio of the cases of *Ojokolomba v Alamu* (1987)3 NWLR (pt. 61)377 and *Taylor v Trustees of Trinity Methodist Church* (1986)3 NWLR (Pt. 30)561

opinions on the meaning of ratio decidendi. Furthermore, how to find the ratio decidendi of a case is also a question of abiding interest in jurisprudence. What constitutes the ratio decidendi of a collegiate court is another dimension to the problem.

Different meanings have been ascribed to the concept of ratio decidendi. R.W.M. Dias[13] postulates that three shades of meanings can be attached to the expression, ratio decidendi. The first, which according to him, is the translation of it, is the reason for the decision[14]. To him, even a finding of fact may in this sense be the ratio decidendi. It is difficult, however, to appreciate how a finding of fact can be a ratio decidendi. The finding of fact will necessarily be followed by a course of reasoning that leads to the actual decision. The reasoning will normally be based on law or rules having legal effect. Where there is no law governing the situation, the reasoning will now constitute law for future decisions.

The second meaning, according to Dias, is the rule of law proffered by the judge as the basis of his decision. The third sense of the term is the rule of law which others regard as being of binding authority. Thus the ratio decidendi in this third sense includes subsequent elucidation or interpretation of the previous decision.

Salmond distinguished what a case decides generally and as against all the world from what it decides between the parties themselves. To him, what it decides generally is the ratio decidendi or rule of law for which it is authority; what it decides between the parties includes far more than just this. On this premise he described ratio decidendi as the rule of law applied by, and acted on, by the court, or the rule which the court regarded as

[13] Dias, R.W.M. Jurisprudence 5th edn. (London. Butterworths, 1985) P. 140.

[14] In the Nigerian case of *Agbai v Okagbue* (1991)7 NWLR (pt 204) 391 at 434 the Supreme Court similarly defined ratio decidendi as the reason for the court's decision.

governing the case[15]. Salmond's conception of ratio decidendi thus approximates to Dias' second meaning of the term.

Paton[16] appears to be in agreement with Salmond when he said that though specific decisions on specific questions are binding, however, such precise decisions will ordinarily be supported by a course of reasoning which establishes a general proposition of law which the court uses to explain and justify its decision. That proposition may properly be called the ratio decidendi of the decision, and is binding. This opinion tends to support the earlier assertion that a mere finding of fact cannot constitute a ratio decidendi.

The classical theory of ratio decidendi as explained by Julius Stone is that the ratio decidendi is the principle propounded by the precedent judge as necessary for, or as a basis of his decision.[17] Julius Stone criticizes this theory because, according to him, it is based on two wrong assumptions; to wit, that there is normally one and only one ratio decidendi of a case, which explains the holding on the material facts; the other is that such a ratio can be delimited from the examination of the particular case itself. The first criticism is quite tenable because many cases have more than one ratio. In this regards, Paton pertinently observed,

> It simply is not true to say that the only thing binding in a case is the principle upon which it was decided. One case may provide binding authority for many propositions of law. Each judicial decision of a question or issue leading to the determination of the whole case, whether in interlocutory proceedings or at trial, may provide binding

[15] *Salmond on Jurisprudence* 12th edn by P.J. Fitzgerald (Bombay: N.M. Tripathi Private Ltd., 2001) PP. 176 - 177.
[16] Paton op. cit p. 189.
[17] Stone, J. *Legal system and Lawyers' Reasonings* (Sydney: Maitland Publications Pty. Ltd., 1986) P. 268 *Agbai v Okagbue* (1991)7 NWLR (Pt. 204)391 at 434.

> authority. If the same questions arise in subsequent proceedings in a subordinate court, they will bind that court to decide the question in the same way[18].

However, Julius Stone's second criticism appears misplaced to the extent that it suggests that the ratio of a case can only be explained by future decisions. In some cases the ratio of a case is ascertainable by reference to the decision of the precedent court.

The definition of ratio decidendi by Professor Ilochi Okafor,[19] as "the principle of law, based on the material facts of the case, on which the case has been ultimately decided" cannot, with due respect, be accepted since it presupposes that a case must have been ultimately decided before a ratio could flow from it. As Paton observed above, a decision on an issue in a case, even at an interlocutory stage may constitute a ratio decidendi.

In the recent case of *A.I.C. Ltd. v NNPC* Edozie, J.S.C. said that the ratio decidendi of a case represents the reasoning or principle or ground upon which a case is decided. With due respect, this definition suffers the same pitfall as the definition by Professor Ilochi Okafor. In *Ajibola v Ajadi,*[20] Mikailu, J.C.A. delivering the leading judgment of the Court of Appeal, defined ratio decidendi as the enunciation of the reason or principle on which a question before a court has been decided. In order words, it is the general reason given for the decision or the general ground on which it is based, detached or abstracted from the specific peculiarities of the particular case which gave rise to the decision. This definition corresponds with Salmond's conception of ratio decidendi and explains why a case can be an authority for another case whose facts, though similar, are not the same.

[18] Paton *op.cit.* p.183
[19] Okafor, I. "The Appellate System of Justice in Nigeria" in Elias T.O. ed. *Nigerian Essays in Jurisprudence* (Lagos: MIJ Publishers, 1993) P. 314
[20] (2004) All FWLR 1273 at 1289

In *Clement v Iwuanyanwu,*[21] Oputa JSC conceived ratio decidendi in Dias' second sense. He said:

> Courts attempt to decide cases on the basis of principles established in prior cases. Thus, prior cases which are close in facts or legal principles to the case under consideration are called precedents. The two cases (the one under consideration and the other used as precedent) must be close in facts – the facts must be similar for the doctrine to apply.

His Lordship went further to distinguish between principles and rules as follows:

> As I said earlier on, courts attempt to decide cases on the basis of principles established in prior cases. These now serve as authorities. But an accepted principle may not necessarily decide the outcome of a dispute. Principles are wider than rules. Rules apply in an all or nothing dimension. Either the decision falls within the antecedent portion of the rule, in which case it must be dealt with as the rule dictates; or it does not, in which case it is unaffected by the rule. Rules dictate results, come what may. Principles do not operate that way. Principles merely incline a decision one way but not conclusively. Principles survive intact even when they do not prevail in any particular instance. As principles are distilled from the facts of the case in which they were promulgated; as principles draw their inspiration and strength from the very facts which framed the issues for decisions; it follows that when the facts are not similar, the principle need not apply or be applied, to the new case
>
> It needs to be added, however, that what is required is not necessarily that the facts of the previous and the subsequent cases

[21] (1989) 3 NWLR Pt.107, 54

should be the same or similar; it is sufficient if the same question decided in previous case arises in a subsequent case.

In the final analysis, ratio decidendi may be defined as the reasoning, or principle, or ground or general proposition of law on which a case or an issue in a case is decided or subsequent interpretation of the reasoning or principle or ground or the proposition of law in future cases[22]. In fact the future interpretation may expand or narrow down the ratio of a case.[23]

Having examined the meaning of the term 'ratio decidendi' the next issue is how to find the ratio decidendi of the decision of a single court and that of a collegiate court.

Finding the Ratio Decidendi

In practice it is difficult to identify the ratio of a case. The traditional approach is to identify the principle or principles of law propounded by the judge as the basis of his decision.[24] Prof. A. L. Goodhart seriously criticized this approach. Professor Goodhart did not stop at criticizing the traditional approach but went further to propound criteria for ascertaining the ratio decidendi. He summarized his rules for finding the ratio decidendi of a case as follows

1. The principle of a case is not found in the reasons given in the opinion.

[22] Singular words in this definition includes their plural

[23] For instance the ratio of the Supreme Court decision in *Garba v University of Maidiguri* (1986)4 NWLR (pt. 34) 162 has been cut down in subsequent cases of *Arinze v F.B.N. Ltd* (2004)12 NWLR (pt. 888) 663; *Esiaga v University of Calabar* (2004) All FWLR (pt.203) 381; *Military Governor of Imo State & Anor v Chief B.A. E. Nwauwa* (1997) 2 NWLR (pt.490) 675

[24] Opene, J.C.A. gave a similar definition in *Ukpo v Alede* (2001)9 NWLR (pt. 717) 203 at 224. He said that the ratio decidendi of a case is the principle of law upon which a particular case is decided, that is the legal reasoning leading to the court's decision.

2. The principle is not found in the rules of law set forth in the opinion.
3. The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision.
4. The principle of the case is found by taking account of (a) the facts treated by the judge as material, (b) his decision as based on them.
5. In finding the principle it is also 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 inclusion".[25]

According to Goodhart, the main reasons for these general rules are that as regards (1), the courts often state their reasons too widely and sometimes incorrectly but the cases are nevertheless authoritative; as regards (2), sometimes there is no rule stated; as regards (3), (4) and (5), it is the facts which the trial judge regards as material which is important. According to Goodhart, "it is by his choice of material facts that the judge creates law."[26]

One obvious criticism of Goodhart's theory is that it presupposes that the facts of a case must have been found before the ratio of a case can be deduced. Some cases are actually decided on assumed facts and yet the legal reasoning leading to the decision will constitute a ratio decidendi.[27]

[25] *Essays in Jurisprudence and the Common Law* pp. 25 – 26 quoted in Farrar *et.al. Introduction to Legal Method* (London: Sweet & Maxwell, 1990) p. 92.
[26] Paraphrasing Goodheart's theory, Julius Stone said that in Goodhart's theory the ratio decidendi is squarely asserted to be controlled by the case and the holding on these facts, and this control is said to be complete. Julius Stone *op.cit* pp.268 -269
[27] The case of *Adesanya v The President* (1981)2 NCLR 358 which is the locus classicus on locus standi was actually decided based on assumed facts upon reference to the Supreme Court.

Karibi-Whyte, J.S.C. quite appreciated that a ratio could be derived from a decision based on assumed facts when he said:

> The ratio decidendi of a case is not determined from isolated dictum in the judgment. It is determined on considerations of the issues in dispute between the parties and the facts pleaded and found in support of the contention of the issues. Hence every judgment ought to be read as applicable to the particular facts proved or assumed to be proved. The generality of the expressions found therein are not intended to be exposition of the whole law but are governed and qualified by the particular facts of the case in which such expressions are to be found. [28]

Goodhart also failed to appreciate that decisions on interlocutory questions can yield rationes decidedi.

A scathing criticism of Goodhart's theory was made by Prof. Julius Stone. Stone started from the premise that Goodhart was attempting to produce a prescriptive rather than a descriptive theory, which, according to him, is a big mistake. According to Stone, the process is basically one of choosing an appropriate level of generality. There is thus implicit in a decided case a number of potential rationes decidendi.[29] Stone came to the conclusion that there is "a range of alternative rationes decidendi competing inter se to govern future situations and as among these, only future decisions will show which is binding.[30] J. M. Elegido has pertinently observed that though Stone's point is valuable, it should not be exaggerated. In his words, "by combining in a random manner the "facts" of a case stated at different levels of generality, it is certainly possible to generate literally thousands of alternative rationes for the same decision. But in practice the great

[28] *Uba v Gmbh & Co* (1986)3 NWLR (pt 110) 374 at 402.
[29] J. Stone "The Ratio of the Ratio Decidendi" (1959)22 Modern Law Review 597.
[30] *Ibid*

majority of them will not be given serious consideration by an experienced lawyer".[31]

Elegido further maintained that the recent consensus among the leading writers on the subject seems to be to abandon the proposals of both Goodhart and Stone and go back to the traditional theory.[32]

In practice, in determining the ratio decidendi of a case, the courts usually consider any one of the following factors: the reason or reasons for the decision as stated by the judge; the ground or grounds or the principle or principles of law stated or implied by the judge as that on which the decision on the case or an issue in the case was based, and the actual decision in relation to the material facts. In addition, the court may consider the interpretation of the case in any later case determined after the instant case.[33]

Finding the Ratio Decidendi of a Collegiate Court

The foregoing discussion borders on finding the ratio decidendi of the decision of a single judge. The problem is more complex in the case of appellate or collegiate courts, which are made up of more than one judge. In such a situation the starting point is that you should follow the majority decision. A minority decision does not constitute a precedent. But the matter does not end there. The majority may have different reasons for their decision. Furthermore, the case may be fragmented into a number of different issues and there may be different majorities on different issues.

Dealing with the problem of finding the ratio of a case decided by appellate or collegiate courts, a leading authority on the Nigerian Legal System, Professor Obilade, said:

[31] Elegido, *op.cit* p.264
[32] *Ibid* p. 265
[33] Obilade *op.cit* pp. 115 – 116. Obilade's views are slightly modified here.

> Where the court is divided and the majority judgments are consistent with one another even though each majority judge relies on a legal principle different from that relied upon by any other majority judge, it seems that all the legal principles relied upon in the majority judgments constitute the rationes decidendi of the case. Where the majority judgments are consistent with one another and they are based on the same legal principle, that principle is the ratio decidendi of the case. In cases where the majority concurs in the result but the majority judgments are inconsistent with one another it is difficult to determine the ratio decidendi. Suppose, for example, that the majority of the judges in a case are in support of the order of the court but there is no majority in support of any of the grounds of the decision.. . . it appears that the case should not be cited as a binding authority for any proposition.[34]

While one generally agrees with the erudite Professor, it is difficult to agree with him that where different legal principles are relied upon by each majority judge to arrive at their decisions, these divergent principles will constitute the rationes. The question will readily arise, which of the principles will bind a lower court.

A justice of the Nigeria Supreme Court, Okey Achike, in the case of *Abacha v Fawehinmi*[35] asserted that in the judgment of an appellate court where more than one justice sits, it is the ratio contained in the leading judgment that constitutes the authority for which the case stands. All other expressions contained in the

[34] Obilade, A.O. *The Nigerian Legal System* (London: Sweet & Maxwell, 1979) p.113; See also
Phillips, O.H. *A First Book of English Law* (London: Sweet & Maxwell, 1970) 206.
[35] (2000)6 NWLR (Part 660) 228.

concurring judgments are obiter dictum or dicta. In his own words,

> Where a single judge presides, the situation does not admit of any difficulty; the judgment of that court is what may be discerned as the ratio decidendi or rationes decidendi of that case.... The problem such as the one raised in this appeal, arises when three justices (as is usually the case in the Court of Appeal) or five justices (as is usually the case in the Supreme Court) preside over a case or an appeal wherein one of the Justices is assigned the responsibility to write the leading judgment and others under the mandatory provision of the Constitution are obliged to render either their concurring or dissenting judgments. In such a situation, it is the leading judgment that is, in legal circles, regarded as the judgment of the court.
>
> The other judgments may respectively be a two word judgment, e.g. "I concur" or judgments longer or shorter than the leading judgment ... .The point of jurisprudential interest and of considerable interest in this appeal is the relationship of the bindingness of the ratio decidendi or rationes decidendi contained in the leading judgment on the one hand, and the other concurring judgments, on the other hand. Are they at par or are some superior to others? The jurisprudence and practice of law in this country appears to be tolerably clear: it is the ratio or rationes contained in the leading judgment that constitutes or constitute the authority for which the case stands. All other expressions contained in the concurring judgments, particularly those not addressed in the leading judgment are obiter dicta.[36]

[36] Per Achike, JSC in *Abacha v Fawehinmi* (Supra) at pp. 322 – 323.

In making this proposition of law, Achike, JSC relied on the Supreme Court decision in *Elijah Idise & 5 Ors v Williams International Ltd,*[37] where Wali JSC in his leading judgment said:

> Issues for determination based on ground of appeal from a concurring judgment which is different from the leading judgment can only be obiter dicta, and therefore it will be mere academic exercise to consider them. In the instant case, issues 3, 4, and 5 which were based on the concurring judgment of Uche Omo JCA which differs from the lead judgment and thus amounts to obiter dicta are not valid as it will amount to a mere academic exercise to consider them.

His Lordship, Wali J.S.C., however, did not cite any judicial or juridical authority to support his far-reaching proposition. It is also well to remember that the opinion of Achike, JSC in *Abacha v Fawehinmi*[38] was contained in his dissenting judgment.

It is submitted with great respect that the above opinions of Achike and Wali J.J.S.C. on finding the ratio of the decisions of appellate courts made up of more than one judge appear to be contrary to section 294(3) of the 1999 Constitution of Nigeria which provides:

> A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members.

The constitution is silent on the issue of leading judgment, which however is a matter of convenient practice. Following the constitutional provision, Andrew Obaseki, J.S.C. In *Ige v Olunloye*[39] said that the decision of a composite court means the opinion of the majority of the judges constituting the court. The

[37] (1995) 1 NWLR (Pt 370) 142 at 150
[38] (2002) 6 NWLR (Pt 660) 228
[39] (1984) 1 SCNLR 158 at 165

opinions of Justices Wali and Achike, with utmost respect, are also against the current of juridical and juristic opinions. Where judges of a composite court such as the Supreme Court or Court of Appeal state different reasons or make different statements of principle in giving judgment for the same party, the ratio will be that concurred in by the majority where there is no dissenting judgment. To constitute a ratio, the majority must have a common ground on the reasoning leading to the decision. If there is a dissenting judgment, the opinion of the dissenters are discountenanced for purposes of determining the ratio. What now becomes the ratio is the reasoning supported by the majority of the majority provided they constitute the overall majority. Where the majority of the majority are less than the overall majority, then their opinion will not constitute a ratio.

The recent Supreme Court decision in *Chief Kalu Igwe & 2 Ors v Chief Okuwa & 2 Ors*,[40] contradicts the proposition that the ratio decidendi of a case decided by a composite court can only be found in the leading judgment. In that case, the Supreme Court on 15th February 2003 delivered a judgment in an appeal between the parties herein. The appellant's appeal was dismissed by a majority judgment. On 20th February, 2002, the appellant brought a motion on notice praying for an order setting aside the judgment of the Supreme Court, and an order for the appeal to be heard *de novo* before a new panel of the Court. The application was based on two grounds. The appellants alleged in the first place that there was a denial of fair hearing when the Supreme Court struck out grounds 5 and 6 raised in the notice of appeal filed on 9th September, 1999 and argued as issue 5 in the appellant's brief, which issue touched on the title to the land in dispute. The appellants claimed that the grounds were struck out by the Court on the basis that leave of court was not obtained to argue the grounds when in fact leave was obtained. Secondly, the appellants also relied on some comments contained in the lead judgment which they claimed proved that the

[40] (2003) 47 W.R.N. 21

learned Justice of the Supreme Court who read the lead judgment[41] did not read the appellants' reply brief.

In dismissing the application by a majority of 4 to 1, the Supreme Court held, inter alia, that failure to consider issue 5 in the leading judgment in the circumstances stated did not rob the judgment of its efficacy where the said issue was exhaustively considered and resolved against the applicants in one of the concurring opinions.[42] In his dissenting opinion, Kutigi, JSC maintained that issue 5 was germane to the appeal. In the circumstance, the wrongful exclusion of that issue deprived the majority lead judgment of the character of a legitimate adjudication.

Unfortunately, the opinions of the Supreme Court in *Idise v Williams International* [43] and *Abacha v Fawehinmi* [44] regarding the status of a concurring judgment were neither cited to the court nor did the court consider them *suo motu*. Of course the decision in the instant case contradicts that opinion. If the opinion of Wali and Achike JJSC that the opinion contained in the leading judgment is the judgment of the court, then it goes without saying that the Supreme Court in this case will be taken as not having considered the vital issue number five. In any case, the fact that the majority failed to consider issue number five which is germane to the appeal means that the appeal was not properly heard. In the circumstance, one will support the dissenting opinion of Kutigi, JSC.

The question of the status of a concurring judgment was more directly in issue in the case of *Emeka Nwana v Federal Capital Development Authority &5 Ors.*[45] The appointment of the 1st Appellant with the 1st Respondent was terminated. He was then

[41] At p. 33
[42] (Supra)
[43] (Supra)
[44] (2004) All FWLR 1243

asked to vacate the residential accommodation allocated to him in the course of his employment. He refused to yield up possession and resisted ejectment by obtaining an injunctive order. The respondents nevertheless forcefully ejected him from the residential house. The Appellant sued the Respondents at the high court and claimed exemplary damages for trespass to the premises and his goods. The High Court found for him. The decision was set aside by the Court of Appeal. On appeal to the Supreme Court, learned counsel for the Appellant submitted, inter alia, that the case of *Chukwumah v Shell Petroleum Development Company of Nigeria Limited*[46] was inapplicable in that the statement by Karibi-Whyte, JSC in his concurring judgment relied upon by the Court of Appeal is an obiter dictum which is not binding on the court. The Supreme Court unanimously dismissed the appeal. In his leading judgment, Niki Tobi, JSC said that a concurring judgment has equal weight with a leading judgment. According to him, it complements and adds to the leading judgment. A concurring judgment could at times be an improvement of the leading judgment when it adds certain aspects which the writer of the leading judgment did not remember to deal with. In so far as a concurring judgment performs some or all the above functions, it has equal force with or as the leading judgment in so far as the principles of stare decisis are concerned.

Just as in the above case of *Chief Kalu ,v Igwe,* earlier Supreme Court authorities on the status of a concurring judgment were neither cited to the court in the instant case nor did the court advert to them on its own. The effect is that there are two conflicting Supreme Court decisions on the matter. The better view, it is submitted, with due respect, is that the status of a concurring judgment depends on the position of the majority of the other judges. If an issue not considered in the leading judgment is considered in the majority of the concurring judgments and the reasoning supporting the decision in the issue is consistent, then

[46] (1993)4 NWLR (Pt 289) 512

the reasoning will constitute a ratio decidendi, provided that the majority constitutes overall majority.

The English Court of Appeal decision in *Harper and Others v National Coal Board*[47] is so illuminating on this subject that it will be given detailed consideration. The plaintiff was a coal-miner who had worked underground for 34 years. In February 1968 he was certified as suffering from pneumoconiosis. He did not then realize that he could make a claim against his employers for damages and when he sought advice, his union did not suggest to him that he could. He had thought that his only remedy was to claim disablement benefit. As a result of a case published in the newspapers in 1971 the Plaintiff discovered for the first time when he saw the union's solicitors, that he had a worthwhile cause of action against his employers. He was advised that he could seek leave under the Limitation Act 1963 to bring proceedings. In September 1973 he applied for leave pursuant to section 1(1) of the 1963 Act. The judge refused to grant leave, taking the view that the plaintiff had failed to fulfill the requirements of section 1(3) of the 1963 Act, in that he had knowledge of all the material facts on which his action was based in 1968, i.e. more than three years before the action was brought. The judge based his decision on the speeches in the House of Lords in *Central Asbestos Co. Ltd. v Dodd.*[48] The root issue is on this point of law: what is the knowledge which bars a man from getting leave? Is it his knowledge of the fact or his knowledge of the law? Prior to the decision of the court in the *Central Asbestos Co. Ltd case,* the Court of Appeal had held in a series of cases that time did not run against a man until he knew that he had a worthwhile cause of action[49]. None of those cases were overruled

[47] (1974) 2 All ER 441
[48] (1971) 2 All ER 1135
[49] Such cases include *Pickles v National Coal Board* (1968)2 All ER 598; *Skinsley v Cape Asbestos Co. Ltd.* (1968)2 Lloyd's Rep. 201; *Smith v Central Asbestos Ltd.* (1971)3 All ER 769; *Newton v Cammel Laird & Co.*

by the House of Lords in *Central Asbestos Co. v Dodd.* Dodd suffered from asbestosis due to work. He knew it when he had to give up work in 1965 because of it. But he did not know he had a cause of action until after the limitation period. He got leave in October 1967, within 12 months of getting to know that he had a cause of action, but more than 12 months of getting to know the facts. The Court of Appeal held that he was within time. The House of Lords affirmed the decision, but only by a majority of three to two. The speeches of the Law Lords however show perplexing difference of view. Two of the majority accepted the view of the Court of Appeal in Dodd's case that time did not run against a man until he knew that he had a worthwhile cause of action. The two in the minority disagreed. They took the view that time ran against a man as soon as he knew all the material facts, even though he did not know that he had a worthwhile cause of action.

Lord Pearson was the odd man out. He held that time did not run against Dodd until April 1967 because "he did not appreciate that the appellants were at fault and that his injuries were attributable to their fault." On that ground, he agreed with Lord Reid and Lord Morris that Dodd succeeded. But he went on to say that he agreed in substance with the opinion of Lords Simon and Salmon that time begins to run from the period of knowledge of the facts.

Lord Denning with whom Stephenson agreed made the following propositions of law:

(a) We can only accept the line of reasoning which supports the actual decision of the House of Lords. By no possibility can we accept any reasoning which would show the decision itself to be wrong[50].

[50] Smith and Bailey agrees with this view when they said that where a judge dissents as to the result, his or her views must technically be disregarded for purposes of ascertaining the ratio on the ground that his reasons cannot be 'necessary' for a decision he opposes. Smith and Bailey *op cit* p. 240

(b) The second proposition is that if we can discover the reasoning on which the majority based their decision, then we should accept that as binding on us.

(c) The third proposition is that, if we can discover the reasoning on which the minority base their decision, we should reject it. It must be wrong because it led them to the wrong conclusion.

(d) The fourth proposition is that if we cannot discover the reasoning on which the majority based their decision, we are not bound by it. We are free to adopt any reasoning which appears to us to be correct, so long as it supports the actual decision of the House.

Applying these propositions to the instant case, Lord Denning further said:

> The actual decision of the House in favour of Dodd must be accepted as correct . . .. We cannot accept any line of reasoning which would show it to be wrong. We cannot therefore accept the reasoning of a minority of two . . . . We ought to accept the reasoning of the three in the majority if we can discover it. But it is not discoverable. The three were divided . . . . So we cannot say that any of the three in the majority was correct. The result is that there is no discernible ratio among the majority of the House of Lords. In the circumstances, I think we are at liberty to adopt the reasoning which appears to us to be correct.[51]

In the final analysis, the Court of Appeal adopted the reasoning in the long line of cases before the decision of the House of Lords in the Dodd's case which did not overrule them.

What of a situation where the concurring judge merely says, "I concur", without more? Russel, L.J. had suggested that a

[51] At p.446

statement "I agree" may simply indicate concurrence with the order proposed in the leading judgment and not necessarily all the reasoning.[52] This view cannot be supported. To agree or concur with a leading judgment clearly means concurrence with all the reasoning and order in the leading judgment. The concurrence is not qualified.

By way of summary, the position can be stated as follows. In a court made up of more than one judge, the ratio decidendi can only be found in the decision of the majority. On no account can an opinion expressed in a minority judgment be part of the ratio decidendi. In respect of the majority judgment, if they are consistent with one another, the reasoning leading to the decision on which the majority has a common ground, will constitute the ratio decidendi, provided that the majority constitutes an overall majority. Where the majority of the majority are less than the overall majority, then their opinion will not constitute a ratio decidendi which will bind a lower court. In such circumstance, the lower court is free to adopt any reasoning which appears to it to be correct, so long as it supports the earlier decision.

The other element in a decision which deserves consideration at least for the purpose of distinguishing it from the ratio decidendi is obiter dictum.

[52] In an address to the Holdsworth Club of the University of Birmingham 1968-69 reprinted in B.W. Harvey (ed), The Lawyer and Justice (1978) cited in S.H. Bailey and M.J. Gunn *Smith and Bailey on The Modern English Legal System* 3rd (London: Sweet & Maxwell, 1996) p. 420

Obiter Dictum

The word 'obiter' simply means in passing, incidental, cursory.[53] An obiter dictum is what a judge says in his judgment that goes beyond what is necessary to decide the particular case. It is an expression of opinion made in giving a judgment by the judge, but not necessary for his decision and accordingly cannot form part of the ratio decidendi of the judgment. Obiter dictum, not being a decision, cannot be made a subject of an appeal.[54] Professor A.L. Goodhart following his theory of ratio decidendi said that an obiter dictum is "a conclusion based on a fact the existence of which has not been determined by the court."[55] This view cannot be supported. It has been pointed out earlier that there is a distinction that can be drawn between statements based on facts the existence of which has been denied by the court and statements based on facts the existence of which has not been determined by the court. The latter may arise where the court gives a preliminary ruling on a point of law on assumed facts. In such cases the ruling can be regarded as ratio decidendi, whereas in cases where the facts are denied by the court the statements are purely obiter. [56] There may also be reference to a higher court of some questions of law before the facts of the case have been ascertained. The rationes decidendi of such decisions are binding.

Attempts have been made to categorize obiter dicta as follows. Dicta that are manifestly tangential to the case in which

[53] Per Edozie, JSC in *A.I.C. Ltd. v NNPC* (2005) 11 NWLR (pt.937) 563 at 589. His Lordship further said that obiter dictum reflect the opinions of the judge which does not embody the resolutions of the court.
[54] *Abacha v Fawehinmi* (2002)6 NWLR (pt 660)228
[55] Goodhart *op cit*, p.22 quoted with approval in Farrar *et al. op. cit.* p.96.
[56] Sir Rupert Cross, *Precedent in English Law* (3rd edn) quoted with approval in Farrar *et.al op. cit.* p.96.

they occur are called gratis dicta. Dicta that relate to a collateral issue are called judicial dicta. Where, in order to settle the law on a particular point, the court asks counsel to address it on the law and then makes general statements about the law, these statements are regarded as superior species of obiter dicta.[57]

The weight to be given to an obiter depends on the following factors: the rank of the court; the prestige of the judge; whether it was a considered judgment; the date of the decision; whether there were different rationes for the same decision; whether action was opposed or the point was argued by counsel; the reliability of the reporter.[58]

If a judge is a luminary of high standing, his obiter dictum may in due course crystallize to good law. However, if it is the contrary, the dictum will sooner than later be ignored completely.[59]

Distinguishing

The doctrine of stare decisis is based first and foremost on the relevant likeness between cases – the previous case and the one before the court. Where there is no relevant likeness between the two, it is an idle exercise to consider whether the previous one should be followed or departed from.[60] Thus, where a previous decision is cited to a court in a future case as a binding precedent, the court has a duty to examine the facts of the instant case in relation to the facts of the previous case sought to be relied on as a precedent. Where the court finds some material difference in the facts of the two cases, the court may distinguish the previous decision and will therefore not follow it. In *Chief Mene Kenon & 2 Ors v Chief Albert Tekan & 5 Ors.*[61] The Supreme Court per Ejiwunmi, JSC, held that for a previous decision to be binding on a

[57] *Ibid*
[58] Phillips O.H. *A First Book of English Law 6th edn* (London: Sweet & Maxwell, 1970) pp.194 – 5.
[59] Per Achike, JSC in *Oshodi & 2 Ors v Eyifunmi* (2000)3 NSCQR 320 at 377
[60] *Adisa v Oyinwola* (2000)10 NWLR (Pt) 3 - 7
[61] (2001) 14 NWLR (pt. 732) 45 at 89

future court the facts and issues pronounced upon in the earlier case must be on all fours with the facts and issues in the subsequent case. However, in the more recent case of *Adetoun Oladeji (Nig.) Ltd. V Nigerian Breweries Plc*[62] Niki Tobi, JSC, who delivered the leading judgment observed, as follows:

> Factual distinctions or differences in cases can only avail a party when they are germane or material to the stare decisis of the case. Stare decisis … is based on a certain state of facts which are substantially the same….This also means that the facts need not be on all fours in the sense of exactness or exactitude. There can hardly be any two cases where the facts are exactly the same, and the doctrine of stare decisis which has been built by the judicial system over the years does not say that the facts must be exactly the same. Thus, there could be inarticulate differences that will not necessarily hinder the application of the doctrine.[63]

It is submitted that the opinion of Niki Tobi is preferable. Even in the Chief Mene Kenon case, Ogundare, JSC, in his concurring judgment talked of similarly between the facts of the earlier case and the facts of the subsequent case.

Distinguishing involves the assertion of the difference between cases as a justification for not following the ratio decidendi of a previous case which otherwise should have been binding. The court in the subsequent case will mention the difference in order to show that the principle in the previous case is not applicable. This differs from a refusal to follow, and overruling of, the previous case, which are courses open only to a court which is not bound to follow a decision of the earlier court. Thus in distinguishing, the hierarchy of the court that gave the earlier decision, or of the court distinguishing such decision, is irrelevant.

[62] (2007)5 NWLR (pt. 1027) 415
[63] at p. 436

Distinguishing, however, is not limited to identification of the factual differences between cases and reliance on these differences as a ground for not following the earlier decision. This is only one kind of distinguishing which Professor Granville Williams calls non-restrictive distinguishing.[64] Non-restrictive distinguishing occurs where a 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 this ratio decidendi because of some material difference of fact. Restrictive distinguishing, on the other hand, cuts down the expressed ratio decidendi of the earlier case by treating as material to the earlier decision some fact, present in the earlier case, which the earlier court regarded as immaterial, or by introducing a qualification (exception) into the rule stated by the earlier court.[65] Professor Williams rejects the view of Professor Goodhart that the judge in a case is the final arbiter of what facts are material.

The Doctrine of Judicial Precedent and the Hierarchy of Courts

The doctrine of judicial precedent means that the decision of a court is binding on every court lower in hierarchy and that some courts are bound by their previous decisions. Knowledge of the hierarchy of courts is therefore indispensable for an appreciation of the working of the doctrine. The British type courts to which the doctrine applies include the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; State High Court; Magistrate's Court and such similar courts that may be created by the National Assembly or State House of Assembly.

[64] Williams, G. *Learning the Law* (11th edn) (London: Stevens and Sons, 1982) p. 75
[65] *Ibid* p.76

The Supreme Court

The Supreme Court of Nigeria stands at the apex in the hierarchy of courts in Nigeria. Created in 1963 on the attainment of republican status by Nigeria, the Court succeeded the Judicial Committee of the Privy Council as the Court of final appeal in the country. The decisions of the Privy Council on appeals from Nigeria therefore rank at par with the decisions of the Supreme Court. By their manner of appointment, (through Federal officer and instrumentalities) funding, control etc. both the Supreme Court and the Court of Appeal could be said to be Federal Courts. However, judging by the nature of their appellate jurisdiction which covers hearing appeals from State Courts, and the original jurisdiction of the Supreme Court which extends to matters between the Federal Government and a State Government, or State Governments inter se, these Courts are not really federal Courts but federation Courts. Thus both the Supreme Court and the Court of Appeal fall within the hierarchy of State and Federal courts.

The question is, in the interest of certainty and predictability in the law, whether a court of last resort should depart from its previous decision. In England, from the middle of the 19th century the rule developed that the House of Lords was bound by its previous decisions.[66] This rule was finally recognized and acknowledged by the House of Lords in *London Street Tramways Co. v L.C.C.*[67] in 1898. It was only in 1966 that Lord Gardiner L.C. on behalf of himself and the other Lords of Appeal issued the following practice direction:

> Their Lordships regard the use of precedent ... as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

[66] Farrar *et al op.cit* p.104
[67] (1898) A.C. 375

> Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.[68]

The House of Lords in *Vestry v Inland Revenue Commissioners (Consolidated)*[69] said that the discretion conferred on it by the Practice Direction of 1966 should be exercised sparingly particularly in relation to questions of the construction of statutes.

The Supreme Court of Nigeria quoted with approval the Practice Direction in *Bronik Motors Ltd v Wema Bank Ltd.*[70] The Supreme Court has overruled its previous decisions in a number of cases[71] while refusing to overrule itself in some cases.[72] In the recent *case of Alhaji Karimu Adisa v Emmanuel Oyinwola 4 Ors*[73] the Supreme Court restated that it will depart from or

[68] (1966)3 All E R 77.
[69] (1979)3 WLR 915
[70] (1983)1 SCNLR 296.
[71] *Ngwo & Ors v Monye* (1970)1 ANLR 9; *Bucknor-Mclean v Inlaks Ltd.* (1980) 8 – 11 S.C. 11; *Surakatu v Nigerian Housing Development Society* (1981)4 SC 26; *American International Insurance Co. v Ceekay Traders Ltd* (1981)5 S.C. 81.
[72] *Okpe Jacob Oyeyikpo v Chief Oyinloye (1987)1 NWLR (Pt 50) p.356, Chief John Chukwu & Ors v N.C.* Ezulike (1986)S NWLR (Pt 45) p.892; *Chief Ogbu & Ors v Chief Ogboru Urom* (1984)4 S.C.I. See also *Paul Odi & Anor v Gbaniyi Osafile & Anor* (1985)1 S.C. 37 where the Supreme Court refused to overrule its decision in *Ifezue v Mbadugha (1984)5 S.C. 79.*
[73] (2000)IV NWLR (Pt) 116

overrule its previous decisions in the interest of justice where the decisions are shown to be: vehicles of injustice; or given per incuriam; or clearly erroneous in law; or impeding the proper development of the law; or having results which are unjust, undesirable or contrary to public policy; or inconsistent with the provisions of the constitution; or capable of fettering the exercise of judicial discretion by a court. The court, however, admitted in that case that there is no hard and fast rule exhausting the area within which to warrant a departure from a previous decision. Thus each case must be decided on its special facts and circumstances. In *Nwako v Governor of Rivers State*[74] it was said that decisions to overrule long-standing decisions of the Supreme Court should be made by a full panel of the Court. The Supreme, however, has held in more recent cases that it has the power and jurisdiction to depart from its previous decision whether or not by a full court.[75]

The decision of the Supreme Court is binding on all other courts in Nigeria to which the common law doctrine of precedent applies. It must be noted that the luxury of overruling a previous decision is the sole responsibility of a court of superior of co-ordinate jurisdiction. A lower court cannot presume to do so.[76] Therefore, it is not for an inferior court to say that a decision of the higher court was reached per incuriam; that is the privilege of a higher court, if after reconsidering its former decision, it thinks that the decision had been reached per incuriam.[77] The Supreme Court of Nigeria has said in *Adisa v Oyinwola*[78] that a case is decided per incuriam where a statute or rule having statutory effect or other

[74] (1989)2 NWLR 470
[75] *Rossek v A.C.B.* (1993)8 NWLR (Pt 312) 382; *Adia v Oyinwola* (2000)10 NWLR 116
[76] *Unilag v Olaniyan* (1985)1 NWLR (Pt 15) p.156; *Yusuf v Egbe* (1987)2 NWLR (Pt 28) p.265
[77] *Millangos v George Frank (Textiles) Ltd* (1975)3 W.L.R. 758; *Jalo Tsamiya v Bauchi N.A.* (1957) NRNLR, 73 at pp.82 – 83; *General Electric Company v Harry Ayode Akande & 5 Ors* (1999)1 NWLR (Pt 588) 532 C.A.
[78] *Supra;* See also *Rossek v A.C.B.* (1993)8 NWLR (Pt 312) 382

binding authority which would have affected the decision had not been brought to the attention of the court.

The preponderance of judicial opinions now is to the effect that where the Court of Appeal is faced with conflicting decisions of the Supreme Court, it will chose any of the decisions.[79] In *Peter Onwumelu v Ezeanya Duru*[80] Achike, J.C.A. (As he then was) after quoting the dictum of Wali, J.S.C. in *Onwuka v Ediala*[81] said:

> It is clear the above dictum of Wali, J.S.C. is not in accord with several other Supreme Court construction placed on the section such as in *Sunday Piaro v Chief Wopnu Tenalo* (supra) and *Idundun v Okumagba* (supra) and or in the decision of W.A.C.A. in *Ededem Archibong v Ntoe Asim Ita* (supra) ... It is certainly clear to me that the decision in *Onwuka v Ediala* (supra) does not accord with other decisions of the same court or the other decisions from other jurisdictions. It does not lie in my mouth to pronounce on the correctness or otherwise of *Onwuka v Ediala* (supra). To do that will tantamount (sic) to judicial recklessness. Be that as it may, where a lower court is confronted with conflicting decisions of a superior court, while the inferior court cannot sit on appeal over decision of the superior court, nevertheless, the inferior court is accorded a right to make a choice between the conflicting decisions. My preference or choice goes for the other decisions rather than for *Onwuka v Ediala*.

[79] Ademola, JCA faced with two conflicting decisions of the Supreme Court in *SkenConsults v Ukey & Anor* (1981)1 S.C. 6 and *Ezomo v Oyakhare* (1985)2 SC 260 held he was free to choose which of the decisions to follow- see *Adegoke Motors Ltd v Babatunde Odesanya & Ors* CA/L/218/87 delivered on 9/12/87.

[80] (1997)10 NWLR (Pt 525) 377

[81] (1989)1 NWLR (Pt 96) 182 at 199

It is interesting to note that Achike, J.C.A. (as he then was) in the above case chose the older decisions.

Ubaezeonu, J.C.A. has raised a pertinent question on this issue. He said:

> When a lower court is faced with conflicting decision of a higher court, what does the lower court do? It must follow one of the decisions of the higher court and necessarily refuse to follow the other. Would such a court be accused of a breach of the principles of stare decisis because it has refused to follow that other decision? There is a school of thought that (sic) the inferior court should follow the latter decision. Suppose the latter decision was given per incuriam the earlier decision, what does the inferior court do? These are some of the intriguing legal questions in our jurisprudence which call for clarification from our apex court.[82] It is submitted that the better position should have been that the lower court should follow the earlier decision. This is because the later decision was in the circumstance given per incuriam.

The Court of Appeal

The Court of Appeal, established in 1976, is next to the Supreme Court in the hierarchy of Courts in Nigeria. It exercises jurisdiction in both federal and state matters. Consequently, its decision binds both the Federal High Court as well as State High Courts. With regard to its own decisions, the Court of Appeal is bound by its previous. Though the Court of Appeal has several Divisions, every Division of the Court of Appeal is bound by an earlier decision of any of the Divisions, subject however, to the overriding condition that such earlier decision is on all fours with the one under consideration.[83] The Court of Appeal has adopted the principle established by the English Court of Appeal in *Young*

[82] In *Nwangwu v Ukachukwu* (2000)6 NWLR (Pt. 662) 685

[83] *Peter Onwumelu v Ezeanya Duru* (1997)10 NWLR (Pt 525)3 77.

v Bristol Aeroplane Co. Ltd[84] on the circumstances in which it will depart from its previous decisions. In *Adeline Njideka Megwalu v Justin Obidi Megwalu*[85] the Court of Appeal said that it is bound by its earlier decision, but may depart from its previous decision in the following circumstances.

a. the Court of Appeal is entitled and bound to decide which of the two conflicting decisions of its own it will follow;
b. the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with the decision of the Supreme Court; and
c. the Court of Appeal is not bound to follow a previous decision of its own if it is satisfied that the decision was given per incuriam.

The above principle must be criticized as it relates to the attitudes of the Court of Appeal to its two conflicting previous decisions. If a court should choose between any of its conflicting previous decisions, the much desired certainty and predictability in the law which is one of the rationale for following past decisions will be elusive. When two decisions of a court bound by its previous decisions are in conflict, it means that the later decision was given per incuriam.

In *Olutola v University of Ilorin*[86] the Supreme Court held that the Court of Appeal is bound by its own decision except when the decision cannot stand with the decision of the Supreme Court. In other words, where a previous decision of the Court of Appeal is in conflict with a decision of the Supreme Court, the Court of Appeal most follow the decision of the Supreme Court.

[84] (1944) K.B. 718
[85] (1996)2 NWLR (Part 428)104 C.A. See also *Comptel Intl. SPA v Dexson Ltd* (1996)7 NWLR (Pt 459)170 C.A.
[86] (2005) ALL FWLR (pt 245) 1151

It must be noted that the principle established by the English Court of Appeal in *Young v Bristol Aeroplane Company Ltd*[87] applies only to its civil jurisdiction. The Court believes that there are compelling reasons why it should not feel bound by its previous decisions in criminal cases. Speaking in the English Court of Appeal in *R v Taylor*[88] Lord Goddard, C.J. stated what ought to be the practice of the court in such matters and the reasons for his view. His Lordship said:

> This court, however, has to deal with questions involving the liberty of the subject, and if it finds on reconsideration that in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted. The exceptions, which apply in civil cases, ought not to be the only ones applied in such cases as the present.[89]

There is no Nigerian case known to the author where the Nigerian Court of Appeal expressed its position on how it will treat its previous decisions in criminal matters.

The Federal High Court

The present Federal High Court was established in 1973 as Federal Revenue Court. The 1979 Constitution styled it the Federal High Court but its jurisdiction was limited to the jurisdiction of its predecessor, the Federal Revenue Court.[90] Decree 107 of 1993

[87] Supra
[88] (1950)2 K.B. 368
[89] *Ibid p.371*
[90] Section 230 of the 1979 Constitution.

widened the scope of its jurisdiction and conferred exclusive jurisdiction on the court in certain Federal matters. The 1999 Constitution in Section 251 sustained the position. Yet the Court was not conferred with exclusive jurisdiction in Federal matters and causes. The Federal High Court is at par with State High Courts but is outside the hierarchy of State courts. The Federal High Court is bound by the decisions of the Court of Appeal and the Supreme Court but not by its previous decisions.

State High Courts

The High Courts of States and the Federal Capital territory are bound by the decisions of the Supreme Court and the Court of Appeal. With respect to State matters, a State High Court does not form part of the hierarchy of the court of any other state based on the principle of federalism. Consequently, the decision of State High Courts are binding on only Magistrate Courts, District Courts and other British-type inferior courts in the State but not those of other States. When a State High Court exercises federal jurisdiction (i.e. jurisdiction in federal matters and causes) its decision is binding on the Magistrate, District and other inferior courts of other States.

Nigerian High Courts generally follow the practice of the High Courts of England in their treatment of their past decisions. The practice of the High Court of England when constituted by a single judge was stated by Lord Goddard in *Police Authority of Huddersfield v Watson*[91] as follows:

> I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the

[91] (1947) K.B. 842 at p.848

> decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court.

Following this practice, a judge of the High Court in Nigeria does not bind himself or another High Court judge. But he is expected to accord great weight to such decisions and will only depart from them with reluctance after a most careful consideration.[92] Decisions of High Courts in Nigeria are rarely reported. In such a situation it is difficult to refer to such decisions. The decisions of High Courts are also too many and it has not been possible to distill the criteria in accordance to which departures are made. A past decision has, for example, not been followed for the following reasons: that it was inconsistent with the general stream of authorities;[93] that it was based on some misunderstanding;[94] that it was inconsistent with a decision of a court superior in hierarchy;[95] that it was given per incuriam[96]

The decision of a High Court sitting on Appeal is equally not binding on the judge who gave the decision or on any other High Court for that matter. A judge of a local High Court sitting as a court of appeal is not equivalent to a Divisional Court of England. The exception, perhaps, may be the High Courts of States of Northern Nigeria which are made up of two Judges when exercising their appellate jurisdiction, and therefore could be likened to the Divisional Court in England.

Magistrate's and District Courts

Magistrate's and District Courts are bound by the decisions of the High Courts of their respective states and also by the decisions of the Court of Appeal and the Supreme Court. They are, however not bound by the decisions of High Courts of other states

[92] *Inspector-General of Police v Ojo* (1958) W.R.N.L.R. 161.
[93] *Oke v Odolofin* (1961) W.N.L.R. 151
[94] *Coker v Animashawun* (1960) L.L.R. 71
[95] *Aremu v Board of Customs and Excise (1965) NMLR 258* at 262
[96] *Kugbai v Odunjo* (1926)7 N.L.R. 51; *Han v Paul* (1957) W.R.N.L.R. 66.

except where these High Courts exercise federal jurisdiction. Magistrate's and District Courts are not bound by their previous decisions. The judgment of inferior courts are not regarded as precedents. The large number of cases (mostly questions of fact) tried by these courts, and the circumstances in which they are heard, make it undesirable that they should be reported.[97]

Customary and Islamic Courts

The preponderance of juridical opinions is that the common law concept of binding precedent applies only to those courts which are empowered to administer adjective common law of which the doctrine forms a part.[98] In other words, the doctrine does not apply to Customary Courts, Area Courts, Customary Courts of Appeal, Sharia Courts, and Sharia Courts of Appeal. However, against the current of juridical opinions, the renowned jurist, T.O. Elias, said that the doctrine of precedent operates in the native and customary courts.[99] A perusal of the Customary Court Laws of different States of the Federation indicates that their procedure and practice shall be regulated in accordance with customary law.[100] These courts are also enjoined not to pay undue attention to technicalities but to strive to dispense substantial justice between parties to suits before them. One therefore supports the view that these courts are under no obligation to follow the common law doctrine of precedent. In any case, where these courts are manned by lawyers, they ought in principle to have due regard for decisions of superior courts.

[97] Phillips, O.H. *op.cit.* p.194.
[98] Obilade *op.cit.* p.114; Park *op.cit.* p.56; Okonkwo (ed) *op.cit.* p.16.
[99] See Elias, *British Colonial Law* quoted by Ezejiofor *op.cit* p.17
[100] Customary Courts Law (W/R) (Cap. 31) S 19' Customary Courts (No.2) Edict (E/R) No. 29 of 1966 S.15; Native Courts Law (N/R) (Cap. 78) S.23

The Decisions of Foreign Courts

Normally decisions of the courts of one country do not bind the courts of other countries because they belong to different hierarchies of court. The view has, however, been canvassed by a leading authority on the sources of Nigerian law that as long as Nigerian Courts are directed to apply the common law and equity of England, the conclusion is inescapable, that they must be bound by decisions of at least some of the English courts.[101] On this premise, it is contended that since the House of Lord's decisions present the conclusive expositions of English law, and that being so, it will not be open to the Nigerian Courts to depart from them.[102] Professor Gains Ezejiofor, who shares the same view, said:

> The question as to whether a decision of an English Court binds a Nigerian Court, and if so, which, can only arise when such a decision bears on English rules of common law and principles of equity that have been "received" into Nigeria by local statutes. English statutes were also brought into operation in Nigeria in a number of ways ... Now, since the Nigerian courts are required to apply the common law of England and English principles of equity, and since the statutes applying to Nigeria ... above are unalloyed enactments of the United Kingdom Parliament, the provisions of which are in operation in England, then English decisions bearing on them should bind the Nigerian courts ... since the most authoritative statement of English law can be made only by the House of Lords, it is only those decisions that should bind the Nigerian courts.[103]

It is submitted with utmost respect that these views cannot be supported. Though Nigerian courts apply English law, these laws are applied subject to local circumstances. More importantly, the

[101] Park, A.E.W. *The Sources of Nigerian Law* (Lagos: African Universities Press, 1963) p.62.
[102] *Ibid*
[103] Ezejiofor, G. *op.cit* pp. 30 – 31.

decisions of a foreign court or tribunal cannot bind the courts of another sovereign country. Prof. Ezejiofor had earlier contended, and correctly in my view, that the decision of a High Court of a State does not bind the courts of other States because, as in other federations, a State is regarded as a foreign country in relation to another for purposes of the doctrine of precedent.[104] For the same reason, Professor Ben Nwabueze has opined that inferior courts in one State are not bound by decisions of the High Court of another State.[105] The opinion of Professor Obilade[106] on this matter to the effect that no Nigerian court is bond by the decision of any English court is preferable. The matter has now been laid to rest by the Supreme Court in a line of cases. In *Nafiu Rabiu v The State*[107] Sir Udo Udoma, speaking for the Supreme Court, said:

> It is not a correct approach to the proper interpretation of our present Constitution, to begin by looking to the meaning or interpretation of statutory provisions or Constitutions of other countries with different wordings. But of course, foreign Constitutions or statutes with identical provisions accepted as in pari material with the relevant provisions of our Constitution will naturally carry some weight in their persuasive influence, bearing in mind always, that even in such cases, circumstances may be at variance.

In *Okon v The State,*[108] Nnaemeka-Agu, JSC spoke in a similar tone. He said:

> It is well to remember not only that a foreign decision should at best be of persuasive authority in a Nigerian court but also before it can even qualify as such, the legislation, substantive and procedural, upon which it was based must be in pari materia with our own.

Obaseki JSC was more pungent when he said:

[104] *Ibid* p.25
[105] Nwabueze, *The Machinery of Justice in Nigeria* p.35
[106] Obilade *op.cit.* p.134
[107] (1980)2 NCR 117 at 134
[108] (1988)1 NWLR (Pt) 172

> Just as Australian courts apply Australian law and American courts apply American law, be they State or Federal, Nigerian courts are enjoined by the Nigerian Constitution to follow Nigerian law which is applicable to the cases before them no matter how attractively presented before them cases and authorities from other countries of similar judicial system as our may be.[109]

However, the Supreme Court held in *Adetoun Oladeji (Nig) Ltd v Nigerian Breweries PLC*[110] that though decisions of foreign courts and tribunals are only of persuasive authority, where Nigerian courts have followed a particular principle adopted from a foreign decision over the years, it will be erroneous to say that such a principle still remains a foreign decision.

Effect of Failure of a Lower Court to follow a Binding Decision of a Higher Court

It was held in *Ndili v Akinsumade*[111] that where a judge of a lower court refuses to follow a decision of a higher court on the same matter, his decision is perverse. This does not mean that the decision is a nullity but the decision is likely to be set aside on appeal. Furthermore, it can be a ground for disciplinary action against the judge. In *Dalhatu v Turaki*[112] the Supreme Court per Edozie, J.S.C. maintained that the refusal by a lower court to follow a binding decision of a higher court is an act of judicial rascality.

Binding Precedent and Subsequent Legislation

It must be noted that the authority of a case may be altered by legislation. Thus the Supreme Court decision in *Lakanmi v A.G. (West)*[113] was abolished by the Federal Military Government

[109] *A.G. Bendel v A.G. Federation & Ors* (1982)3 NCLR 1 at 70
[110] (2007) 5 NWLR (pt 1027) 415 at 439
[111] (2000) 8 NWLR (Pt 668) 306. See also *Cardozo v Daniel* (1986)2 NWLR (pt 20) 1
[112] (2003) 42 WRN 15 at 43
[113] (1971)1 U.I.L.R. 201

(Supremacy and Enforcement of Power) Decree No. 28 of 1970. In such a situation, the ratio of the case can no longer be followed as an authority.

CHAPTER 6

STATUTORY INTERPRETATION

By the principle of separation of powers ordained by the 1999 Constitution of Nigeria, law-making function is vested on the legislature while the function of the courts is to interpret and apply the law. In interpreting the law made by the legislature, the court is not permitted to invite the lawmaker to explain what the provisions of any law mean. The judge must find the intention of the law maker through the medium of the words used. However, it has not always been very easy to ascertain the intention of the law maker from the words used, for a number of reasons. There may be absence of precision in the meaning of the words and phrases used. There is no doubt that some words bear two or more meanings. It may be difficult to find the exact meaning intended in a particular context. There may also be wrong choice of words by the draftsman. Particularly, the word 'or' which bears a disjunctive meaning has in many cases been erroneously used when the word 'and' which bears a conjunctive meaning is intended and vice versa. The draftsman may also use a wrong punctuation mark, which may have the effect of altering the meaning of a sentence. There may also be an omission of a necessary punctuation mark or the insertion of unnecessary one, and this is capable of affecting the meaning of the sentence. Furthermore, there may be gaps or lacuna in a particular statute. Some authorities contend that the courts are not entitled to fill gaps in statutes - that where there is a gap in a statute, it is only the legislature that can fill it by a subsequent amendment.[1] Some other authorities contend that

[1] *Magor v New Port Corporation* (1952) A.C. 189, 191.

where gaps exist in a statute, the judge has a duty to fill the gaps.[2] There may also be the existence of provisions leading to absurd results. Lastly, it must be appreciated that the law maker is a human being subject to human error. The draftsman cannot provide in clear terms for all social, economic and political contingencies that may arise in future in relation to the statute. The draftsman lacks the ability to foresee and provide for all future events and circumstances that may arise in relation to a particular subject matter being legislated upon. For instance, in the case of *Awolowo v Shagari*,[3] the question of the meaning of two-thirds of 19 states nearly scuttled Nigeria's march to a democratic Second Republic. If the draftsman had foreseen the problem, he would have conveniently taken care of it in his draft.

In interpreting a statute, the courts are not permitted to invite the law maker to ask him the meaning of the provisions of a statute. Even if this is possible, most statutes outlive their makers in which case it will not be possible to reach the makers for clarifications on the meaning of the statute.

In the light of the foregoing problems that may arise in the interpretation of a statute, the courts have in the course of time evolved some principles of interpretation, which will assist them in finding the intention of the law maker. In the *Awolowo v Shagari* case, Atanda Fatayi Williams, C.J.N., speaking for the Supreme Court, said:

> . . . in most countries with common law jurisdictions (sic) such as Nigeria, it is generally accepted that it is the function of the judiciary to interpret the law with the minimum of direction from the legislature as to how they should set about this task. Thus nearly all the principles, precepts and maxims of statutory interpretation are judge-made[4].

[2] *Ibid* (1950)2 ALL ER 1226
[3] (1979) 6 – 7 S.C.

The Court also observed in that case that the three major rules of statutory interpretation are: the literal rule; the golden rule; and the mischief rule. There are other minor rules of interpretation.

A distinction has been drawn between the words "interpretation" and "construction". A learned writer has said that "Although the courts do not draw any distinction between these two words in the sense they use them, it would appear that to "interpret" is to declare simply what the words used in the instrument or document say, hence reference is often made of interpreting the statute or constitution by assigning to the words used in the instrument or document their natural and ordinary meaning, their plain, literal meaning – the so-called literal rule of interpretation. On the other hand, "construction" is often used when the words to be interpreted are ambiguous or incapable of clear interpretation, that is, the literal rule will be of no assistance, then the court, in order to ascertain the intention of the legislature, resorts to broad, narrow, or progressive interpretation or may take a look at the legislative history, the preamble to the enactment or indeed, consider precedents from other jurisdictions".[5] It is however, often difficult to say where interpretation stops and construction begins; the distinction between the two words is definitely not clear-cut and the courts appear to use them inter-changeably.

The Literal Rule of Interpretation

This rule of interpretation is also known as the ordinary and natural meaning rule; the plain word rule; or the grammatical approach. The literal rule of interpretation is based on the premise

[4] at p. 68
[5] Okpaluba, Chuks *Judicial Approach to Constitutional Interpretation in Nigeria* (Enugu: Matt Madek & Co. 1992) pp. 6-7.

that the office of a judge is *jus dicere*, not *jus dare* – to state the law, not to give law.[6] Accordingly, amendment of legislation is a power primarily and exclusively reserved for the legislature, which is the arm of government vested with power or function of making law. A court cannot take upon itself the duty of altering words of, or inserting into an enactment words to make it read in the manner it ought to be. In *Onah v Atenda*[7] the Court of Appeal held that if the words of a statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. When the words of a statute are clear and unambiguous, it is unnecessary to travel beyond the statute for the purpose of construing them. In *Idehen v Idehen*[8] the Supreme Court held that the first and most elementary rule of construction is the literal rule. The advocates of the literal rule of interpretation believe that the legislature has said what it means and means what it said. The intention of the legislature must be ascertained through the medium of the words used. In *R v Bangaza*[9] section 319(2) of the Criminal Code fell for interpretation. It provided that "where an offender who in the opinion of the courts has not attained the age of 17 years have been found guilty of murder such offender shall not be sentenced to death but shall be ordered to be detained". Applying the literal rule of interpretation, the court held that the relevant age was the age at the time of conviction not the time of commission of the offence. In *UBN v Ozigi,*[10] there was a mortgage deed with a provision that empowered the bank to stipulate the interest rate from time to time. The Supreme Court held that since there was a clause to the effect that the bank could stipulate the interest from time to time, the

[6] *Ogunlowo v Ogundare* (1993)7 NWLR (Pt 307)610 S.C.
[7] (2000)5 NWLR (Pt 656)244 C.A.
[8] (1991)6 NWLR (Pt 198)382; See also *IBWA v Imano* (1988)2 NWLR (Pt 85)633 at 668
[9] (1949)2 K.B. 481
[10] (1994)3 NWLR (Pt 333) 385

clause has to be given its natural meaning and therefore interest has to be paid at the rate stipulated by the bank from time to time.

The literal rule of interpretation was equally applied by the Supreme Court in the case of *Chief Obafemi Awolowo v Alhaji Shehu Shagari*[11] which arose from the presidential elections of 1979. The Supreme Court was dealing with the meaning of the provisions of section 34A(1)(c)(ii) of the Electoral Act, 1977 (as amended) which had provided that to be elected President, a candidate must obtain the highest number of votes cast at the election and "not less than one-quarter of votes cast at the election in each of at least two-thirds of all the States in the Federation". The case of the Petitioner was that the declaration of the respondent by the Returning Officer as winner of the Presidential Election was a nullity since the respondent had not complied with the requirements of section 34A(1)(c)(ii) in that instead of scoring over twenty-five per cent of the votes cast in thirteen States, he scored that percentage only in twelve and two-third States in the then nineteen States of the Federation of Nigeria. The Election Petition Tribunal applying the literal rule of interpretation held that two-thirds of nineteen States is twelve two-thirds States. Petitioner's appeal to the Supreme Court was dismissed. In dismissing the appeal, Fatayi-Williams CJN speaking for the majority of the Supreme Court, held that the words being construed were "plain enough" and that there was no reason for doubting the intention of the legislature. The majority rejected the other canons of interpretation urged on the court and approved the literal interpretation of the words of the subsection which they considered unambiguous.

The literal rule of interpretation was equally applied by the Supreme Court in *Nkwocha v Governor of Anambra State.*[12] The issue was whether the Governor of Anambra State was the proper authority to exercise the powers or functions vested in or

[11] (1979) FNLR Vol. 2 p. 60 at 82
[12] (1984)1 SCNLR 634

exercisable by the Military Governor under the provisions of the Land Use Act 1978. Kayode Eso JSC held that the ordinary meaning of the words "vested in" would clearly suggest that the land which was vested by section 1 of the Land Use Act 1978 on the Military Governor of a State has now become vested on the Civilian Governor of the State.

The literal rule of interpretation has been criticized on several grounds. In the first place, it seeks to diminish or extinguish the creative role of the judge in the interpretation of a statute and thereby reduces the judge to a mere mechanical interpreter whose role is to give effect to the literal words of a statute at their face value. Secondly, the rule presupposes that legislators are active and all-wise law makers ever ready to rectify injustices discovered in statutes. The truth is that most legislative houses concern themselves with contemporary issues rather going over or revising existing laws for the purpose of removing any defects found in them. Assuming the legislature was even minded to do so, pressure of work may not permit them to undertake such exercise. Lastly, the literal rule of interpretation will reduce statute law to an arbitrary body of rules devoid of underlying reason or purpose since the words of the legislature are taken on their face value even when this will defeat the purpose of the legislation.

In spite of the criticisms of the literal rule of interpretation, it still has an impregnable reign. Other rules of interpretation are subject to it. As stated by Nnamani JSC in *Bronik Motors Ltd v Wema Bank Ltd*[13] "it is indeed one of the first rules of interpretation of statutes that words must be given their ordinary, plain, natural meaning". However, Andrew Obaseki, J.S.C.

[13] (1983)1 SCNLR 296, at 327. In *Amokeodo v I.G.P. & 3 ors (1999)6 NWLR (Pt 607) 467 S.C.* Katsina-Alu *JSC* said: The golden rule is that the words of a statute must prima facie be given their ordinary meaning. In other words, where the words used in an enactment are plain on the face of it, their literal meaning should, in accordance with the canons of construction and interpretation, be given to them.

pertinently observed in *Awolowo v Shagari & 2 Ors*[14] that the proper application of the literal rule does not mean that the effect of a particular word or phrase, clause or section is to be determined in isolation from the rest of the statute in which it is contained.

The Golden Rule

The golden rule of interpretation allows for a departure from the literal rule when the application of the statutory words in the ordinary sense would be repugnant to or inconsistent with some other provisions in the statute or even when it would lead to what the court considers to be an absurdity.[15]

The golden rule is also called the purposive rule. This rule proceeds from the assumption that every legislation has some underlying purpose, and that in construing the words of the legislation the court must give effect to the purpose of the legislation. Therefore, where to apply the words "literally" is to defeat the obvious intention of the legislature and produce a wholly unreasonable result, the courts in order to produce a reasonable result must do some violence to the words. Where the application of the plain, grammatical meaning of the language of the enactment would lead to "manifest" absurdity or repugnance", the language "may be varied or modified so as to avoid such inconvenience."[16]

Lord Denning is outstandingly the most forceful exponent of the golden rule of statutory construction. In *Seaford Court Estates Ltd v Asher*[17] he said:

> It would certainly save judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive

[14] (1979) ANLR Vol. 2 p. 60 at 82
[15] Per Andrew Obaseki, J.S.C. in *ibid*
[16] Per Parke B. in *Becke v Smith* (1836)2 M & W 191 at 195
[17] (1949)2 K.B. 481

> task of finding the intention of parliament... Put into a more homely metaphor, it is this: A judge should ask himself the question. If the makers of the Act had themselves come across this rucks in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

In *Magor v Newport Corporation*,[18] Denning further said:

> We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

This proposition was promptly denounced by Lord Simons at the House of Lords.[19] He said of the proposition:

> ... it is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament ... cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited ...
>
> The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequence of the first. The court having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition which restates in a new form the view expressed by the Lord Justice in the earlier case of *Seaford Court Estates Ltd v Asher* (to which the Lord Justice himself refers) cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable

[18] (1950)2 All E.R. 1226 at 1236

[19] *Magor and St. Mellons R.D.C. v Newport Corpn* (1952) A.C. 189

> when it is guesswork with what material the legislature, if it had discovered the gap, would have filled it in. If a gap is discovered, the remedy lies in an amending Act.

Lord Morton expressed a similar opinion. He said:

> ... it is not the function of any judge to fill in what he conceives to be the gaps in the Act of Parliament. If he does, he usurps the function of the legislature.

In the United Kingdom, the preponderance of judicial opinion is in favour of the literal rule.[20]

In the recent case of *A.G. Ondo State v A.G. Ekiti State*[21] the Supreme Court of Nigeria cited with approval the House of Lord's decision in *Magor v Newport Corporation*.[22] Justice I. L. Kutigi who read the leading judgment of the Supreme Court said:

> It is certainly a cardinal principle of interpretation that where in their ordinary meaning the provisions are clear and unambiguous effect must be given to them without resorting to any aid internal and external. It is the duty of the court to interpret the words of the law maker as used. Those words may be ambiguous, but if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.[23]

In any case Nigerian Courts (including the Supreme Court) have in a number of cases applied the golden rule of interpretation, in some cases without expressly mentioning the rule.[24] In *Ademolekun v*

[20] *A.G. v Lockwood (1842)*9 M & W 378 at 398; *R v City of London Court Judge (1892)1* Q.B. 273 at p.290; *Thompson v Goold & Co. (1910)* A.C. 409 at p.420; *A.G. for Canada v Hallet Carey Ltd* (1952) A.C. 427 at p.449; *Adegbenro v Akintola (1963)*3 All E.R. 544.

[21] (1951)2 a.e.r. 839

[22] Reported in The Guardian, Tuesday, 30/10/2001 p.77; (2000)2 SCNQR 990; Adesanoye v Adewole (2000)

[23] *Ibid*

[24] See for instance *Lakanmi v A.G. (West)* (1971) U.I.L.R. 201; *Nafiu Rabiu v The State* (1981)2 NCLR p.293 at 32; *Awolowo & Ors v Federal Minister of Internal Affairs & Anor* (1966) ALL NLR 178; *Department of Customs & Excise v Barau* (1982)10 S.C.48

The Council of the University of Ibadan[25] section 6 of Decree No.1 of 1966 provides that "no question as to the validity of this or any other Decree or of any Edict shall be entertained by any Court of law in Nigeria." The Supreme Court held that the ouster clause "does not preclude the Courts from enquiring into any inconsistency that may arise between an Edict and a Decree but merely bars the courts from questioning the validity of the making of a Decree or an Edict on the ground that there is no valid legislative authority to make one. In *Ohuka v The State*[26] section 31 of the Supreme Court Act 1960 provides:

> 32 (2) – The periods for the giving of notice of appeal or notice of application for leave to appeal are - ... (b) in an appeal in a criminal case thirty days from the date of the decision appealed against, ...
>
> (4) The Supreme Court may extend the periods prescribed in subsection (2) except in the case of conviction involving sentence of death.

The appellant was in custody and was not aware of the judgment. When he became aware, he appealed against the judgment. Oputa, JSC who wrote the leading judgment in the case construed the thirty days to mean thirty days after the Appellant had knowledge of that decision. His Lordship pertinently observed:

> The Court (that is the Supreme Court) is not a mechanical and automatic calculator. No. It is a Court of law dealing with varying situations and applying the same law to these situations in order to do justice in each and every situation according to its peculiar surrounding circumstances ...[27]

The words of the legislation in that case on their face surface or taken literally clearly suggests that in capital cases an appellant has to appeal within 30 days of the decision of the Court of Appeal or his right of appeal is foreclosed. But the Supreme Court adopted a

[25] 1958 NMLR 253
[26] (1988)1 NWLR (Pt 72)539
[27] at p.

construction that preserved the right of appeal of the Appellant. In *F.C.S.C. v Laoye*[28] the Supreme Court observed that although generally it is for the legislature to change the law when it desires to do so, the court can, and ought to, correct obvious slips in drafting. In all such cases, it is permissible for the court to depart from strict literal construction in order to give effect to the legislator's intention.

It has also been accepted by Nigerian courts that a broad and liberal spirit should prevail in interpreting the provisions of the Constitution although one has constantly to bear in mind the objects which such provisions were intended to serve. In *Nafiu Rabiu v The State*[29] Udo Udoma JSC, said:

> ... the function of the constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution .... My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been one of the liberalism, probably a variation on the theme of the general maxim *ut res magis veleat quam pereat.* I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.

It cannot be stated with confidence whether the liberal approach is synonymous with the golden rule or whether it is an

[28] (1989)2 NWLR (pt 106) 652 at 723
[29] (1981)2 NCLR p.293 at 326

independent rule of interpretation. C.U. Ilegbune (now Professor) said that the liberal approach is also variously called the 'golden rule' or the 'purposive approach'[30]. On the other hand, Professor Chuks Okpaluba treats the 'golden rule' and the 'liberal approach' as two distinct principles of interpretation.[31] However, from Professor Okpaluba's treatment of the two concepts, one can only appreciate a distinction but not a difference.[32]

As noted earlier, prima facie, words used in a statute must be given their ordinary natural meaning. However, where the literal interpretation tends to derogate from the intention of the law maker, or where it will lead to manifest absurdity, or injustice, or unreasonable result, the language may be varied only to avoid such absurdity and no further.[33] Where the interpretation of a statute in its ordinary meaning and grammatical construction would result in clear absurdity, some effort would be made by the court to avoid the absurdity etc by modifying the structure of the sentence or the meaning of the words.[34] It has, however, been emphasized that when the golden rule is used as a justification for ignoring or reading in words, resort may only be made to it in the most unusual

[30] Ilegbune C.U. "Statutory Interpretation: The Impregnable Reign of Literalism" (1978 – 1988). The N.J.R. vol..3 (Enugu: Faculty of Law, University of Nigeria, Enugu Campus) p.145

[31] Okpaluba, C. *op.cit* pp. 67-77 and pp. 159 – 165.

[32] At page 164 Prof. Okpaluba said, "Unlike the literal rule, the liberal approach involves choosing between two interpretations, one wider, the other narrower. The real difference between the two is the fact that while the literal rule restricts the interpreter to the strict confines of the immediate words used in the provision sought to be interpreted, the liberal approach makes room for judicial activism and creativity." On the golden rule, the learned author said: "This cannon of interpretation comes into aid where the application of the plain, grammatical meaning of the language of the enactment would lead to manifest absurdity or repugnance in which case the language may be varied or modified so as to avoid such inconvenience." One cannot really appreciate the difference in the two concepts.

[33] *Idehen v Idehen* (1991)6 NWLR (Pt 198) 382 S.C.

[34] *Abacha v Fawehinmi* (2000)6 NWLR (Pt 660) 228 at 326

cases for as Lord Mersey observed in *Thompson v Goold & Co*[35] "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do". Thus, what is needed is a balanced situation that allows the judge some creativity without unduly sacrificing the rule of law to the judge's intuitive sense of right and wrong as the basis of decision.[36]

The Mischief Rule

In the construction of the provisions of a statute, the history of the legislation and the mischief it was designed to prevent must be considered since the purpose of every interpretation is to discover the intention of the legislature from the words used.[37] The mischief rule of interpretation was formulated in the Heydon's case[38] and is otherwise known as the rule in Heydon's case. This rule requires the judge to consider some historical facts and background information pertaining to the making of a statute in order to appreciate the real intention of the law maker. In the Heydon's case, it was said that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) the following four things are to be considered,

(i) what was the common law before the making of the Act;

(ii) what was the mischief and defect for which the common law did not provide;

(iii) what remedy hath parliament resolved and appointed to cure the decease of the common law;

[35] (1910) A.C. 409 at 420

[36] Nwabueze, B.O. *Judicialism in Commonwealth Africa* (London: C. Hurst & Company, 1977) p.152

[37] *Idehen v Idehen op.cit*

[38] (1584)3 Co Rep. 76

(iv) the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and to add force and life to the cure and remedy, according to the true intent of the maker of the Act.

Thus the mischief rule requires a consideration of the state of the law prior to the enactment of the statute sought to be interpreted; the mischief or the defect which the old law did not provide for, which made it necessary to enact the statute sought to be interpreted; the remedy provided by parliament in the current law to cure the defect or disease or mischief in the previous law. The court is then to find the true reason for the remedy and construe the statute in such a manner as to suppress the mischief and advance the remedy.

In *IBWA Ltd v Imano (Nig), Ltd*[39] the Supreme Court held that the court's duty is always to make such construction that will suppress the mischief and advance the remedy but this will only arise if there is latent ambiguity in the words used in the statutory provision; otherwise it is the literal rule – the first and most elementary rule of construction – that will apply if the words used in the statutory provision are in themselves precise and unambiguous. In *Ifezue v Mbadugha*[40] section 258(1) of the 1979 constitution fell for interpretation. The section provides, "every court established under this constitution shall deliver its decision in writing not later than three months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of delivery thereof. The question was whether non-compliance with the above provision vitiates the trial. Applying the mischief rule, Aniagolu, JSC who read the leading judgment, said

[39] (1988)3 NWLR 633
[40] (1984)1 SCNLR 427

that the provision was aimed at a situation whereby "some Judges became notorious for very long adjournments of judgments leading to a deprivation from them of the advantage of forming fair impressions of witnesses and evaluation of evidence". According to his Lordship, the mischief aimed at was clearly against delays in the delivery of judgments after the conclusion of the hearing of cases by the courts. The Supreme Court ultimately held that the word "shall" as used in the section is mandatory with regard to delivery of judgment within three months. In *Onwuchekwa v N.D.I.C.*[41] Ayoola, J.S.C. observed that when a court feels uneasy about the justice of its conclusions, it should pause to examine the relevant law and facts more deeply before it accords finality to such conclusions. Such deeper reflection may in relevant cases necessitate such construction that would reflect the mischief at which the statute aimed.

Outside the above three major principles of interpretation, there are other minor rules of interpretation which include the ejusdem generis rule; noscitor a sociis rule; expressio unis est exclusio alterus rule; lex non-cogit ad impossibilia; ut res magis valeat quam pereat.

Ejusdem Generis Rule

The words 'ejusdem generis' means "of the same kind or genus". This rule of interpretation is to the effect that where particular words of the same class (or genus) is followed by a general word (a generis), the meaning of the general words will be limited to things similar to the class of things earlier enumerated. In other words, where particular words which refer to members of a class or things of the same class, is followed by general words, the meaning of the general word are limited to members or things of that class as specified by the particular words. In *Jammal Steel*

[41] (2002)5 NWLR (pt 760) 371 at 392

Structures Ltd v ACB Ltd,[42] the plaintiffs claimed from the defendants the sum of ₦641,328.39 being the balance due to plaintiffs for an overdraft granted by the plaintiffs to the defendants in normal course of their business as bankers to the defendants and for money paid by the plaintiffs to the defendants as bankers at the latter's request which said sum the defendants have refused and/or neglected to pay in spite of repeated demands. The issue was whether the State High as against the Federal Revenue Court should have the jurisdiction to try the matter in view of the provisions of section 7(1)(b)(ii) of Decree No.13 of 1973 which are as follows: "The Federal Revenue Court shall have and exercise jurisdiction in civil causes or matters ... connected with or pertaining to ... (iii) banking, foreign exchange, currency or other fiscal measures". The Supreme Court held that the ejusdem generis rule applied in the reverse to the interpretation of that section such that the word "measures" must be taken to qualify each of the preceding specifically enumerated subjects including banking. In the subsequent case of *Bronik Motors Ltd v Wema Bank Ltd.*[43] Nnamani J.S.C. who read the leading judgment of the Supreme Court made the following observation in respect of the majority decision in the *Jammal Steel Structures* case:

> As regards the decision of the majority that ejusdem generis rule applies in construing section 7(i) (b) (iii), I do not think that this can be justly supported by claiming that the rule applies in reverse. If the ejusdem generis rule applied, the generic words "or other measures" would have taken their colour from specifically enumerated subjects: banking, foreign exchange, and currency and not the other way round as indeed happened here ... Rather than argue that ejusdem generis rule was applied to section 7 (i) (b) (iii) in reverse, I think that the basis of the decision was that associated words could be understood in a common sense.[44]

[42] (1973)2 S.C. 77
[43] (1983)1 SCNLR 296

One agrees with this view. In applying the ejusdem generis rule, it is the meaning of the general word following particular words of the same class that is narrowed to the genus of the particular words. It is not the other way round. In the earlier case of *Nasr v Bouari*[45] the question before the Supreme Court was whether premises used partly as living accommodation and partly as a night club were premises within the meaning of section 1(1) of the Rent Control (Lagos) Amendment Act 1965. The Act defined "premises" as "a building of any description occupied or used by persons for living or sleeping or other lawful purposes, as the case may be, whether or not at any time it is also occupied or used under any tenancy as a shop or a store ..." The court had to determine whether "other lawful purposes" meant any lawful purposes other than premises for living or sleeping. The court held that "other lawful purposes" must be confined in meaning to purposes similar to living or sleeping. Accordingly, it was held that the premises used partly as a nightclub were not premises within the meaning of the provision notwithstanding the fact that they were also partly used for living.

The ejusdem generis rule was applied by the English Court of Appeal in *Coleshill and District Investment & Co. Ltd v Minister of Housing and Local Government & Anor*[46] where the Court held that in determining the meaning to be given to the phrase, "building, engineering, mining or other operations" in section 12(1) of the Town and Country Planning Act, 1947, the words "other operations" must be construed ejusdem generis with "building", "engineering" and "mining".

[44] at 347 – 8
[45] (1969)1 All NCR 35
[46] (1968)1 W.L.R. 600 at 605

Noscitur A Sociis Rule

The Noscitur A Sociis rule of interpretation postulates that a word is known by the company it keeps. In other words, the meaning of particular terms in a statute may be, and quite often is, ascertained by reference to the words associated with them in the statute.[47] Where two or more words which are susceptible of analogous meaning are coupled together noscitur a sociis. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.[48] This rule of interpretation was explained in the U.S. case of *Virginia v Tennesse*[49] thus:

> Noscitur a Sociis is a rule of construction applied to all written instruments. The obscurity or doubt of any particular word may be removed by reference to associated words. And the meaning of a term may be enlarged or restricted by referring to the object of the whole clause in which it is used.

The noscitur a sociis rule was applied to the construction of the Offences Against the Person Act 1837 (of England) which made it a felony to shoot at or to "stab, cut or wound" any person. The word "wound" was held to be restricted by the words which preceded it to injuries inflicted by an instrument, and consequently to bite off a finger or a nose, or to burn the face with vitrol, was not to wound within the meaning of the Act.

In the Nigerian case of *Bronik Motors Ltd v Wema Bank Ltd*[50] the Supreme Court maintained that contrary to the position taken by the majority of the Supreme Court in *Jammal Steel Structures Ltd v ACB*[51] that ejusdem generis rule applied to the

[47] Per Chike Idigbe in *Bronik Motors Ltd v Wema Bank Ltd* (19831 SCNLR 296 at 346.
[48] Maxwell on Interpretation cited in *Bronik Motors v Wema Bank op.cit*
[49] 148 US 503
[50] (1836)7 A.C. p.446
[51] (1983)1 S.C.L.R. 296

interpretation of section 7(i)(b)(iii) of Decree 13 of 1973, it is more appropriate to say that the noscitur a sociis rule applies to the interpretation of the section. In the *Bronik Motor* case, Idigbe, JSC observed that the noscitur a sociis rule has no application to a statute the terms of which are too plain to admit of construction. It only applies where any particular word is obscure or of doubtful meaning, so that taken by itself the obscurity or doubtful meaning of the word may be removed by reference to associated words.[52]

Expressio unis est exclusio alterius

This means that the express mention of one thing means the exclusion of another. By this rule, the deliberate inclusion of one or more members of a class means the deliberate exclusion of those not mentioned. Thus an express provision in an instrument excludes any stipulation, which would otherwise be implied with regard to the same subject matter.[53] It was held in *R v Sedgley Inhabitants*[54] that although the word "land" would usually include all kinds of mine, a statutory reference to "lands, houses and coalmines" meant that no mines were included in the word "lands", since if mines were intended to be included, there would be no need to expressly mention coalmines. In *Udoh v Orthorpaedic Hospital Management Board*[55] section 1(a) of the Trade Disputes Amendment Decree 47 of 1992 provided for the abatement of pending orders, interim or interlocutory orders, judgment or a decision of any court other than the National Industrial Court. It was held that the provision did not affect final judgments and appeals therefrom.

[52] at p. 346
[53] *Ogbuinyinya & Ors v Okudo & Ors* (1979) 6 – 9 S.C. 32.
[54] (1831)3 B and Ad 65
[55] (1993) 7 NWLR 304

Ut res magis valeat quam pereat

This expression literally means "that the thing may rather have effect than be destroyed".[56] As a principle of interpretation, it means that the construction should ensure that the intention of the legislature is not frustrated or defeated.[57] Thus, where a provision is reasonably susceptible of two interpretations and it is found that by one interpretation the provision would be valid and by the other it would be invalid the provision ought to be construed in such a manner as to make it valid. According to the Supreme Court in *F.C.S.C. v Laoye*[58] the court should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. The court went further to add that it has long been established that the legislator himself intends the interpreter of an enactment to construe an enactment in such a way as to implement rather than defeat the legislative intention.[59]

Lex non logit ad impossiblia

A statute is to be construed in such a manner as not to command what is impossible. In *Ohuka v The State*[60] section 31 of the Supreme Court Act No.12 of 1960 requires appellants to give notice of appeal within a prescribed time from the date of the judgment of the Court of Appeal. The appellant was in custody and was not aware of the judgment. When he became aware of the judgment, he appealed against it. The Supreme Court held that time did not start running until the appellant becomes aware of the judgment.

[56] Blacks Law Dictionary
[57] *Idehen v Idehen* (1991)6 NWLR (Pt 198) 382 S.C.
[58] (1989)2 NWLR (pt 106) 652
[59] at pp 682, 686
[60] (1988) 1 NWLR (Pt 72) 539.

Other general principles of interpretation are as follows. A statute, which seeks to take away vested rights or interests or which seeks to oust the jurisdiction of the court is construed strictly.[61] Where a statute tends to encroach on or curtail the freedom or liberty of an individual, that statute is generally construed very strictly and narrowly against anyone claiming benefit therefrom.[62] Similarly, a statute which takes away a citizen's right of access to the courts ought to be construed narrowly and strictly against any one claiming its benefit.[63] To construe a statute narrowly and strictly does not mean that the court should arbitrarily wring a false meaning out of the language of the statute. As applied to statutes generally, that expression means that the court should give a fair and natural interpretation to the statutory language as applied to the facts of the particular case, and not straining the meaning of the words unnecessarily but, guided by certain principles, arrive at a reasonable construction.[64]

Where specific provisions of a statute are opposed to the general provisions, the specific provisions will prevail.[65]

A general principle for the interpretation of the Constitution was laid down by Andrew Obaseki, JSC in *A.G. Bendel State v A.G. Federation and 22 Ors.*[66] He said that in the interpretation and construction of our constitution, the following principles should be borne in mind. (1) Effect should be given to every word. (2) A construction nullifying a specific clause will not be given to the constitution unless absolutely required by the context. (3) A constitutional provision cannot be used by way of condition to

[61] *A.G. Bendel v Aideyan* (1989) 4 NRLR (Pt 118) 646 S.C. *Yusuf v Egbe* (1987)2 NWLR (Pt 56) p.341; *Wilson v A.G. Bendel State* (1985)1 NWLR (Pt 4) 572.
[62] *Abacha v Fawehinmi* (2000)6 NWLR (Pt 660) 228 at 325 - 326
[63] Nwosu v Imo State Environmental Sanitation Authority (1990)2 NWLR (pt 135) 688 at 723
[64] *Ibid p.* 723
[65] *Schroder v Major* (1989) 3 NWLR (Pt 101) 1 S.C.
[66] (1982)3 NCLR 1 at 66, 71, 74.

attain unconstitutional result. (4) The language of the Constitution which is clear and unambiguous must be given its plain evident meaning. (5) The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with in its entirety; a particular provision cannot be dissevered from the rest of the Constitution. (6) While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. (7) A constitutional provision should not be construed so as to defeat its evident purpose (8) Under a Constitution conferring specific powers, a particular power must be granted or it cannot be exercised. (9) Delegation by the National Assembly of its essential legislative function is precluded by the Constitution (section 58 (4) and section 4(1)). (10) Words are the common signs that mankind make use of to declare their intention one way or another and when the words of a man express his meaning plainly and distinctly and perfectly, there is no occasion to have resource to any other means of interpretation. (11) The principles upon which the Constitution was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions. (12) Words of the Constitution are, therefore, not to be read with stultifying narrowness. Courts, it must be emphasized, cannot amend the Constitution. They cannot change the words. They must accept the words, and so far as they introduce change, it can come only through their interpretation of the meaning of the words which change with the passage of time and age.

Parts of Statutes and their Uses

A statute is a law made by a law-making body. It has several parts which will be considered below.

The Long Title

This is set out at the beginning of the statute and usually contains a general statement of the legislative purpose. It is part of the statute. Accordingly, it is relevant when interpreting the

statute.[67] The judge may make reference to the long title to resolve a doubt about the meaning of an enacted word.[68] However, it should not be used to modify the interpretation of plain and unambiguous language.[69] In other words, it is only when there is a doubt about the meaning of an enacted word that recourse can be made to the long title. The long title can serve a useful purpose in communicating the intended spirit and scope of a statute.
Civilian Parliaments in Nigeria invariably use long titles but their military counterparts do not.

The Preamble

The preamble, according to Chief Justice Dyer in *Stowell v Lord Zouch,* [70] is a key to open the minds of the makers of the Act, and the mischief which they intend to redress.

The main function of a preamble is to set out the facts and assumptions upon which a statute is based, and to explain the purport of the legislation and the reasons for enacting the legislation. It is to an enactment its preface or introduction, the purpose of which is to portray the interest of the framers and the mischief they set out to remedy. A preamble needs not be looked at all if the enacting part is unambiguous. It can only be resorted to as an aid to construction when there is an ambiguity or when there are two conflicting views as to the true meaning of the enactment in which case that view which fits with the preamble ought to be preferred.[71] It was held by the Court of Appeal in *Ona & Anor v Alhaji Diga Romani Atenda*[72] that the preamble is part of the

---

[67] *Vaacher Ltd v London Society* 1913 A.C. 107, 128
[68] *Fisher v Raven* (1964) A.C. 210
[69] *Re Wykes* (1961) Ch. 229 at 242
[70] (1569 1 Plowd 369 cited in Awolowo v Shagari & 2 Ors(1979) FNLR Vol. 2, 60 at 82
[71] *Per Nnaemeka Agu, JSC in Ogbonna v A.G. Imo State* (1992) 2 SCNJ
[72] (2000)5 NWLR (Pt 656) 244 C.A. See also *Ogbonna v A.G. Imo State* (1992)1 NWLR (Pt 220) 647

statute and it is a legitimate aid in construing the enactment, particularly when there is an ambiguity or conflicting views as to the true meaning of the enactment in which case the view which fits the preamble ought to be preferred. However, it is only where the preamble is clearer and more definite than some part of a statute that it may prevail over the obscure part. Generally, but not invariably, preambular clauses start with the word "whereas".

The Enacting Sections

The enacting sections are the main body of the law and the most important parts of a statute. They contain the actual provisions of the statute. They may make new law, modify existing law, declare what the unwritten law has been, or repeal existing statute.

The Short Title

Statutes are usually cited by their short titles (not by their long titles). The purpose of the short title is to identify and describe a particular law. Lord Moulton in *Vaacher Ltd v London Society*[73] describes short title as "a statutory nickname to obviate the necessity of always referring to the law under its full descriptive title." Generally, citations are not legitimate aids to construction of statutes. It is, however, advisable to consider the purpose of the law and the mischief it is aimed at with the citation in mind.[74]

Marginal Notes

These are written on the margin to highlight what the particular section of the law is all about. Marginal notes help to identify what a part is all about. They are also known as side-notes, and appear (usually in smaller prints) besides sections of the statute. They indicate in brief what the subject- matter dealt with in the section is, for ease of reference. Like citations, marginal notes

[73] (1913) A.C. 107 at 128
[74] *Ona & Anor v Atenda* (2000)5 NWLR (Pt 656) 244

are not legitimate aids to construction of statutes. However, the purpose of the law and the mischief it is aimed at may be considered having the marginal note in mind.[75]

Schedules

Schedules usually appear at the end of the statute and contain technical information, statistics and details which are considered necessary but whose inclusion in the enacting sections or actual texts of the statute will make the statute clumsy or unwieldy. The principles of the technical information, statistics and details, which cannot be conveniently drafted into the main body of the statute, are highlighted in the main body with reference to a particular schedule for details. Schedules, tables and forms are useful in construing the provisions in the body of a statute. In case of ambiguity they become useful handmaids to interpretation, but they will not override the plain words of the statutes.[76] Thus, it was held in *A.G. Anambra State v A.G. Federation*[77] that where a schedule is in conflict with the body of a statute, the body of the statute will prevail over the schedule.

Interpretation Section

Words and expressions used in a statute may be defined in the interpretation section to avoid ambiguity. Such a definition may delimit, extend or narrow the meaning of words and expressions used in the body of the statute.

Commencement Section

The commencement section indicates when an act comes into operation. Usually an act specifies the commencement date. When an act is silent about the commencement date, the general

[75] Ibid
[76] *FCSC v Laoye* (1989)2 NWLR (Pt 106) 652 – 711; *Commissioner for Finance & Anor v Ukpong* (2000)4 NWLR (Pt 653) 363
[77] (1993)6 NWLR (pt. 302) 692

rule is that it commences either on the date it receives assent or the day it was published in a gazette. Decrees and Edicts take effect on the date they are signed, unless it is stated otherwise.[78]

[78] *Obimiami Brick & Stone Nig. Ltd v A.C.B.* (1992)3 NWLR 260

CHAPTER 7

THE NIGERIAN JUDICIARY IN HISTORICAL PERSPECTIVES

The Role of the Judiciary in a Polity

In order to secure the life, liberty and property of the individual, governments were instituted among men. However, unless the powers of government are limited by law, governments would themselves constitute a threat to the rights of the individual. The limitations on the powers of the principal organs of the government are normally embodied in a constitution. The judiciary is constituted the ultimate interpreter of the constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the rule of law which permeates every provision of the constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the government.[1] The judiciary discharges this function by the exercise of the power of judicial review, which is a most potent weapon in the hands of the judiciary for the maintenance of the rule of law.[2] And according to the International Commission of Jurists, "the rule of law is a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free

[1] Per Bhagwati, C.J in *The State v NTN Pty and NBN Ltd* (1988) CLB 43
[2] Ibid

society, but also to establish social, economic, educational and cultural conditions under which the legitimate aspirations and dignity of the individual citizens of the country may be realized.[3]

A society consists of individuals who as of necessity have to interact for the purpose of achieving individual aspiration within the society as well as the society's commonly shared values and aspirations. The consequence of such interaction also means and implies the emergence and existence of rights and benefits; as well as duties and obligations.[4] Living in society necessarily involves conflict, which has to be resolved by the judiciary. Judicial power, according to Chief Justice Griffith of the High Court of Australia in *Huddart Parker & Co Proprietary Ltd v Moorehead*,[5]

> Means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

This definition of judicial power was adopted without reserve by the Judicial Committee of the Privy Council in the Australian case of *Shell Co. of Australia v Federal Commissioner of Taxation*[6] and the Nigerian Supreme Court in *Bronik Motors Ltd v Wema Bank Ltd.*[7] The term judicial power is thus co-extensive with the power of the state to administer public justice and, again, with the authority of the court (i.e. power of the court) to decide and pronounce judgment and carry it into effect between persons and

[3] The Law of Lagos 1961.
[4] Jegede, M.I. *What's wrong with the law?* (Lagos: Nigerian Institute of Advanced Legal Studies, 1993) p.5
[5] (1909)8 C.L.R 330 at 383
[6] (1931) A.C. 275 at 295 and 297
[7] (1983) 1 SCNLR 296

parties who bring a case before it.[8] The last sentence in Justice Griffith's definition of judicial power quoted above distinguishes judicial power from jurisdiction. Idigbe JSC lucidly stated the distinction, in the *Bronik Motors* case as follows:

> . . .although the terms 'judicial power' and 'jurisdiction' are frequently used interchangeably and jurisdiction is defined as the power to hear and determine the subject-matter in controversy between parties to a suit there is a clear distinction between the two concepts; . . . jurisdiction is the authority of a court to exercise judicial power which is the totality of powers a court exercises when it assumes jurisdiction and hears a case....[9]

Judicial power power possesses some characteristics. Lord Delvin in *United Engineering Workers' Union v Devanayam*[10] stated the following essential characteristics of judicial power. They are:

(a) There must be a *lis* as to a right past or present and not with future right.
(b) The power exercised must be derived from the sovereign and not conferred by the parties themselves and must be bound by the existing law of the land.
(c) The rules of natural justice must be observed, that is, the parties must be given the opportunity of presenting their case, the judge must not be a party to the dispute, the parties must have prior notice of the issue litigated.
(d) The parties must be bound by the decision arrived at after arguments on the law or ascertainment of the facts in dispute.

[8] Per Idigbe, JSC in the *Bronik Motors Ltd v Wema Bank Ltd p. 337*
[9] at p. 336
[10] (1967)3 WLR 451 at 419

The word 'judiciary' describes collectively all the judges of the Nation or a State while the term "judicature" embraces both the institution (the courts) and the judiciary (the judges).[11]

The Meaning of Court

The contemporary meaning of the term 'court' is a place where justice is judicially administered or the judge or judges who sit in a court or an aggregate of separate courts judges.[12] A court is a tribunal but not all tribunals are courts. The word 'tribunal' means a body of people with power to determine issues of law and fact affecting people's rights and obligations. In this sense, a tribunal has a wider meaning than court. It extends to and includes courts. In the Australian case of *Shell Company of Australia Ltd v Federal Commissioner of Taxation*[13] the Privy Council noted that there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power. The Privy Council went further to enumerate some negative propositions on the subject. It said: "A tribunal is not necessarily a court in the strict sense because it gives a final decision. Nor because it hears witnesses on oath. Nor because two or more contending parties appear before it between whom it has to decide. Nor because it gives decisions which affect the rights of subjects. Nor because there is an appeal to a court. Nor because it is a body to which a matter is referred by another body".[14] A body may act administratively although it functions like a court in many respects e.g. hearing witnesses under oath; deciding between two or more contending parties. Further, a body may be administrative though it decides matters referred to it by another body, and its decision

[11] Per Uwais, JSC (as he then was) 1989 Judicial Lectures: Continuing Education for the Judiciary (Lagos: MIJ Publishers, 1991)p.5

[12] Jowitt, E, Jowitt's *Dictionary of English Law*, 2nd edn by John Burke (London: Sweet & Maxwell, 1977) p. 493

[13] (1931) A.C 275

[14] at page 297.

takes the place of that other body's decision.[15] It has become a common, perhaps, inevitable, phenomenon of modern governments to confer upon administrative authorities functions which possess many of the attributes of judicial power to an extent that may justify classifying them as 'judicial' for the purpose of the review of the exercise of these functions by courts. However, a distinction must be drawn between 'judicial functions' and judicial power' in the constitutional sense, with the latter being reserved for the power exercised by courts and judicial tribunals created by law, and judicial officers strictly so called. The former may be called quasi-judicial functions which may be exercised by administrative tribunals.[16]

Classifications of Courts

Courts in Nigeria may be classified in several ways. But the most important forms of classification are classification into superior courts and inferior courts; classification into courts of records and non courts of record; classification into courts of limited jurisdiction and courts of unlimited jurisdiction; classification into British-type court and non-British type courts; classification into courts of original jurisdiction and courts of appellate jurisdiction; classification into federal courts and states courts.

Superior and Inferior Courts

Courts are divided into inferior and superior courts. Many factors distinguish an inferior court from a superior court. In the first place, superior courts are not subject to the control of any

[15] *Shell Company of Australia Ltd v Federal Commissioner of Taxation ibid* p. 281; *Rex v Electricity Commissioners* (1924)1 K.B. 171, 205

[16] Nwabueze, B.O. *Judicialism in Commonwealth Africa* (Enugu: Nwamife Publishers, 1977) p. 15.

other courts, except by way of appeal.[17] In the words of Denning, L.J., (as he then was) in *R v Northumberland Compensation Appeal Tribunal, ex p. Shaw*[18]

> .....the court of King's Bench has an inherent jurisdictions to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own view for those of the tribunal, as a Court of Appeal would do . . ..

In other words, the high courts exercise supervisory jurisdiction over inferior courts and tribunals through the prerogative writs of certiorari, mandamus, prohibition and quo warranto. For instance, an inferior court or tribunal can be stopped from exceeding its jurisdiction by a writ of prohibition issued from the High Courts.[19] On the other hand, it is only an appellate court that can pronounce that a superior court has acted without jurisdiction, when there is an appeal on that ground.

There is a presumption of jurisdiction in favour of superior courts. In the proceedings of a superior court, it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or otherwise. Thus, prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is deemed to be within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the

[17] Jowitt et op. cit pp. 493-494, see also sections 22-23 High Court Edict of 1987 of the old Anambra State empowering the High Court to exercise supervisory jurisdiction

[18] (1952)1 K.B. 338

[19] R v St. Edmuhdsbury (Chancellor) (1947)2 AER 170, 172.

particular matter is within the cognizance of the particular court. *In Achiakpa v Nduka*[20] the Supreme Court held, inter alia, that an inferior court, such as a native court or tribunal, is not presumed to have any jurisdiction but that which is expressly provided, and that the party against whom a native court judgment is offered in evidence could under section 53 of the Evidence Act establish its invalidity by showing that the court from which it emanated had no jurisdiction to do what it did.

Under the common law, judges of superior courts of record have greater immunity from being sued for matters done in their judicial capacity than judges of inferior courts. DeGrey C.J in the old English case of *Miller v Seare*[21] put the position succinctly. He said:

> In all the cases where protection is given to the judge giving an erroneous judgment, he must be acting as judge. The protection in regard to the superior courts is absolute and universal; with respect to the inferior courts it is only when they act within their jurisdiction.

However, some recent statutes have in Nigeria neutralized the distinction made in England between superior and inferior courts in the liability of judges for their judicial acts. In *Egbe v Adefarasin*[22] the Supreme Court accepted the proposition that the provision of section 61(1) of the Magistrate's Court Law and section 88(1) of the High Court Law of Lagos State are similar and offer the same immunity to both judges and magistrates acting judicially. There are, however, some State where the distinction is still maintained.[23]

[20] (2001) 14 NWLR (pt 734) 623

[21] (1777)2 WM B1 1141 at 1145

[22] (1985)1 NWLR (pt 3) 549 at 563

[23] See, for instance s. 46 of the High Court Edict No. 16 of 1987 of the old Anambra State which provides (1) No judge or person appointed to act as a judge shall be liable for any act done or thing said by him in the course of any proceedings before him, provided that at the time, he in good faith, believed himself to have jurisdiction in such proceedings.

Furthermore, an officer of a superior court of record is immune from liability for executing the process of the court unless he acted unlawfully.[24] In addition, a plaintiff is liable to an action for executing the process of an inferior court in a matter beyond its jurisdiction, and cannot in the absence of statutory provision, justify such other process whether he knows of the defect or not. On the other hand, a plaintiff cannot be liable for executing the judgment or process of a superior court of record except where such judgment has been reversed on appeal. In *Iheanacho v Uzochukwu*[25] the appellant (a caretaker of a premises) acting on an affidavit endorsed by a chief magistrate forcibly removed the respondent's goods from the premises in question and gave possession to the highest bidder. Iguh, JSC, speaking for the Supreme Court, said:

> The controversial affidavit under which the appellants purportedly acted, is, without doubt, neither a warrant nor an order issued by any District Court. Thirdly, it is crystal clear that the purported execution of a so-called order of possession based on Exhibits D and E, the affidavits in issue, is manifestly illegal, unlawful and without colour of legal justification. It suffices to state that whatever order he purportedly made was not done by him in the cause of any proceedings before him, that at no time did he believe himself to have jurisdiction to dispossess the respondents of their premises by mere affidavits and that the purported execution in issue was manifestly unlawful, illegal and without any legal justification.

It was therefore held that the immunity provided under section 83(1) or (2) of the District Court Law[26] could not avail the appellant.

Another distinction between inferior and superior court is that while the judgment of a superior court is conclusive as to all relevant matters thereby decided, the judgment of an inferior court involving a question of jurisdiction is not final. In addition, while judgments of superior courts remain precedents (binding or persuasive) for future cases on similar facts, judgments of inferior courts are never regarded as precedents.[27]

Furthermore, while every court, inferior or superior, has some inherent jurisdiction to enable it effectively discharge its judicial function, including the power to punish for contempt of itself, an inferior court may only punish for contempt committed in facie curiae (in the face of the court) while a superior court's power to punish for contempt extends to contempt committed both in facie curiae (in the face of the court) and ex facie curiae (outside the face of the court). Lastly, superior courts have no jurisdictional limit with respect to the value of the subject matter but an inferior court, in most cases, has jurisdictional limit with respect to the value of the subject matter.

By section 6(3) and (5) of the 1999 Constitution, the superior courts of record in Nigeria are: the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory, Abuja; a High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory, Abuja; a Sharia Court of Appeal of a State; the Customary Court of Appeal of the Federal Capital Territoty, Abuja; a Customary Court of Appeal of a State. While the National Assembly or a State

[24] (2) No person required or bound to execute warrant or order issued by a judge or a person acting as a judge shall be liable in any action for damages in respect of the execution of such warrant or order unless it be proved that he executed the same in an unlawful manner. Compare this provision with S.10 of the Customary Court Edit No. 6 of 1984 of the old Anambra State which provides – s. 10 – A member of the court shall not be liable in any action for any act done or ordered to be done by him in good faith within his powers and jurisdiction under this Edict.

[25] (1997) 2 KLR

[26] Cap 33, The Laws of Northern Nigeria, 1963.

[27] Phillips, O.H A First Book of English Law (London: Sweet & Maxwell, 1970) p. 194.

House of Assembly can by law establish other courts, none of these legislative bodies has the competence to establish other superior courts of record outside those specifically mentioned in the constitution.[28]

Courts of Record and Non-courts of Record

Traditionally, a court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony[29] In *R v Northumberland Compensation Appeal Tribunal Ex p Shaw*[30] it was held that the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons for the judgment, unless the tribunal chooses to incorporate them. Superior courts of record are required to keep formal and detailed records containing the proceedings, including evidence adduced, and the judgment. Their judgment must contain the reasons for the judgment. This is not so with inferior courts and tribunals which are not bound to give reasons for their decisions.

The statute creating a court may expressly declare the court to be a court of record.[31] In any case, where a statute establishing a court is silent on that, the current test is whether the court has authority to fine or imprison for contempt of its authority[32] If it has such power, then it is a court of record. Conversely, where it lacks such power, it is not a court of record.

Invariably, all superior courts are courts of record. An inferior court may be a court of record. All High Courts and

[28] See section 6(3) of the 1999 Constitution

[29] Jowitt, *et. al op. cit* In *Ogele v Nuhu* (1997)10 NWLR (pt. 523) 109 the Court of Appeal held that Area Court are courts of record. Abdullahi, J.C.A. who delivered the leading judgment queried: "otherwise, why have we been talking of record of proceedings and challenge to the records".

[30] (1952) 1 AER 122, 131-132

[31] See for instance section 6(3) of the 1999 constitution declaring certain courts to be superior court of record.

[32] Jowitt, *et. al op. cit*

Magistrate Courts in Nigeria are courts of record. However, while a superior court of record has power to punish a person summarily by fine or imprisonment for contempt whether the offence is committed in the face of the court or out of court, an inferior court of record has power to punish summarily by fine or imprisonment for contempt but only where such contempt is committed in the face of the court. Summary committal for contempt must be distinguished from contempt proceedings brought under the penal code or criminal code. The latter proceedings can be tried by an inferior court of record whether the offence is committed in the face of the court or not.[33] The power to punish summarily for contempt is part of the inherent powers of court preserved by section 6(6) (a) of the 1999 constitution.

Courts of Limited Jurisdiction and Courts of Unlimited Jurisdiction

Jurisdiction is the legal authority, the extent of the power given to a court by the law or statute establishing the said court.[34] This jurisdiction may be limited or unlimited. It may be limited either locally, that is, in terms of the geographical area over which the court's jurisdiction may extend. It may be limited personally as where a quorum is required for the court to be properly constituted. It may be limited as to the amount over which the court should not exceed for the case to fall within its jurisdiction. It may be limited as to the type or character of the questions to be determined by and in the court. It may be limited by and as to the value of the property in litigation. When the jurisdiction of the court is limited one way or the other, that court is called a court of limited jurisdiction. When there are no such limitations, the court is called

[33] Obilade, A.O. *The Nigerian Legal System* (London: Sweet & Maxwell, 1979) pp. 169-170.

[34] Per Oputa, JSC in *Alade v Alemuloke* & 2 Ors (1988) 2 S.C (part 1) p. 1 at p. 10

a court of unlimited jurisdiction.[35] There is no single court that has the jurisdiction to exercise all the judicial powers, which have been assigned to the judicature. In effect, every court has its jurisdiction limited one way or the other. While some of the courts have first instance jurisdiction without the right to hear appeals, others have the right to hear appeals without first instance jurisdiction. And in the case of courts which have both the jurisdiction to determine cases at first instance and on appeal (for instance State High Courts), their appellate jurisdiction does not extend to hearing appeals from the decisions of the courts superior to them, namely the Supreme Court and the Court of Appeal[36] Strictly speaking, therefore, no court of law in Nigeria has unlimited jurisdiction for the jurisdiction of every court has been limited in certain respect. However, only a state High Court approximates to a court of unlimited jurisdiction in the sense that except those matters expressly excluded, it has original jurisdiction over all matters. Under the 1979 Constitution, State High Courts were declared by section 236 of the constitution to be courts of unlimited jurisdiction. Though State High Courts are still courts of general jurisdiction under the 1999 constitution, their jurisdiction in certain matters have been limited in favour of the Federal High Court.[37]

British-Type Courts and Non-British Type Courts

British-type Courts are those courts, which, in their practice and procedure and other institutional arrangements, follow the pattern of English courts. These courts not only have their English counterparts, they apply English law as the regular law of the court. To these courts, the received English law and Nigerian legislations are questions of law of which no formal proof need be adduced. On the other hand, while these courts are enjoined to

[35] *Ibid*

[36] Uwais, M.L. 1989 Judicial Lecturers: continuing Education for the Judiciary (Lagos: Academy Press Ltd, 1991) pp. 84-85.

[37] See sections 251 and 272 of the 1999 constitution.

apply customary law, the latter is a question of fact to be proved by evidence or taken judicial notice of.

Non-British type courts are courts which are indigenous to Nigeria and which have no English counterparts. These courts are set up primarily to administer customary or Islamic law, which is a question of law to them. They are equally not required to follow any formal procedure but to have regard to substantial justice. In the administration of justice, they do not apply the rules of evidence as contained in the Evidence Act.[38] Examples of British-type courts are the Supreme Court, Court of Appeal, Federal and State High Courts, Magistrate or District Courts. Non-British-type Courts include Customary or Sharia Courts, Customary or Sharia Courts of Appeal, Area Courts.

Courts of Original Jurisdiction and Courts of Appellate Jurisdiction

A court is of original jurisdiction where a particular type of case can come before it at first instance, or for the first time, without any other court having first decided the matter. Where, however, a court has powers to review the decision of another court given at first instance, it is said to have or exercise appellate jurisdiction. A court may have original and appellate jurisdiction in respect of the same or different subject matters.

Federal Courts and State Courts

A necessary incident of federalism is the division of power between a central government and regional (state) governments. By section 6(1) of the 1999 constitution the judicial powers of the Federation shall be vested in the courts established for the federation. And by section 6(2) the judicial powers of a state shall

[38] In *Okorie v Onyejuluwa* (2000)2 WRN 114 at 126 it was held per Fabiyi, J.C.A. that the provisions of the Evidence Act do not apply to customary and native courts.

be vested in the courts established for a state. However, the Supreme Court has held in *Bronik Motors Ltd v Wema Bank Ltd*[39] that the judicial powers given to the courts in section 6 of the 1979 (the equivalence of section 6 of the 1999 constitution) were not in any way intended to delimit the extent of Federal and State judicial powers but to define the nature of judicial power as authority for the determination of the rights of parties in all matters before the courts.

According to the Supreme Court, within the limits of the jurisdiction given by the 1979 constitution to each court, the judicial powers vested on the courts, are the same whether it be the judicial power of the Federation or judicial power of the State.[40] In *Mandara v A.G Federation*[41] the Supreme Court maintained that there could be no room for the creation of Federal justice and State justice; there can only be justice according to the laws of the land. The pronouncement of Kayode Eso, J.S.C., on this matter in *A.G. Ondo v A.G. Federation*,[42] is worthy of note. He said:

> ... If the state and the Federation are equal when it comes to the determination of a dispute between them before a tribunal, that tribunal must be one accepted by all parties to the dispute as independent of all the governments.

Under chapter VII of the 1999 constitution headed "The Judicature", the Federal Courts are the supreme court of Nigeria; the court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory, Abuja; the Sharia Court of Appeal of the Federal Capital Territory, Abuja; and the Customary Court of Appeal of the Federal Capital Territory, Abuja.[43]

By the manner of appointment of, and disciplinary control over, members of these Courts through federal officers and

[39] (1983)1 SCNLR 296
[40] Ibid
[41] (1984)1 SCNLR 311
[42] (1983)2 SCNLR 269 at pp. 277-278
[43] See sections 230; 237; 249; 255; 260 and 265 of the 1999 constitution.

instrumentalities, and by the fact of their funding by the Federal Government, these courts may be said to be federal courts. However, by the nature of the jurisdiction of the Supreme Court and the Court of Appeal which covers hearing of appeals from State High Courts, coupled with the original jurisdiction of the Supreme Court which extends to disputes between the Federal Government and State Government or Governments or between States inter se, both courts are really not Federal Courts but Federation Courts. It is only the Federal High Court that can, strictly speaking, be said to be a Federal Court in the sense of exercising jurisdiction only in Federal matters.

The courts listed under the heading of "State Courts" in the Constitution are: High Court of a State; Sharia Court of Appeal of a State; Customary Court of Appeal of a State.[44]

The Traditional System for Dispute Resolution

"Before the advent of British colonial rule in Nigeria, the traditional legal and judicial systems in operation in the communities that make up the country were largely aimed at reconciling disputants in a conflict and maintaining peace and harmony within the society. Indeed, the traditional Nigerian system differed from the European system mainly because the European system was more often concerned with establishing and enforcing the rights of the individual."[45] In other words, the justice system was less formal than what obtains today; it was more arbitral and conciliatory and was geared towards the maintenance and restoration of social equilibrium.[46] Apart from some of the Hausa/Fulani communities of the former Northern Region, the

[44] See sections 270, 275, 280 of the constitution.
[45] Adewoye, O, *The legal Profession in Nigeria* quoted in Nwankwo *et al Nigeria: The limits of Justice* (Lagos: Constitutional Rights Project, 1993) p.1.
[46] Onyekpere, E op. cit. p.6.

territories that make up Nigeria today did not have any formal courts before the advent of colonialism. Life in society was controlled and regulated mainly by customary law, usages and conventions. Special arbitral tribunals the composition of which varied from place to place resolved disputes. In areas with crystallized system of kingship, such as Yoruba land and Benin, resolution of disputes among members of each community formed part of the governmental functions exercised by the paramount chief, or king, and his councilors. In some areas, such traditional rulers were assisted or even controlled in some cases, by some secret societies, some of which in fact usurped the functions of government. Examples of such secret societies are the Ogboni society in Yorubaland and the Egbo or Ekpo society in Calabar province.[47] In chiefless, and republican societies like the Igbos, political organization was extremely amorphous. Enforcement of rules in each autonomous community was in the hands of all adult male members or age grades, though controlled and directed in some cases by elders and titled men. From their decision appeal usually went to all the male members of the town or clan sitting together. Women also played an important part in resolving disputes, especially, where a dispute involved elderly members of a family and the male members of the family had failed to have it resolved. In such a case, women born within the family, married and unmarried, would intervene and possibly impose a settlement.[48] The closest approximation to a modern legal profession in the area called Nigeria before the coming of the British was Northern Nigeria, where following the Islamic revolution led by Uthman Dan Fodio early in the 19th century, the Islamic culture and Islamic legal system were enthroned in many communities in the area. In each of the communities, there was a strong ruler called the Emir, who had an empire over which he

[47] Ewelukwa D. I. O, " Administration of justice" in Okonkwo C.O. (ed) *Introduction to Nigerian Law* (London: Sweet and Maxwell 1980) p. 56
[48] *Ibid p. 57*

ruled with the help of an executive council and with his council, he formed the highest court of appeal in the Kingdom. Each empire or emirate was divided into a number of zones or districts, each of which was placed under the charge of a subordinate chief or headman who, like the Emir, ruled over the district though responsible to the Emir. Both the Emir and his subordinate chiefs each had his own court, but in bigger centers the Emir usually delegated his judicial functions to qualified officers known as Alkalis. Serious cases could originate and end up in the Emir's court, while other cases could originate in an Alkali's court or in the court of a subordinate chief.[49] The traditional machinery of justice has obvious defects. The system of adjudication was very casual, most unpredictable, extremely capricious, and the sanctions largely rudimentary and not institutionalized. By the middle of the 19th century, there were many European immigrants in Lagos and other coastal cities and trade with Europe was gradually taking off. The traditional system of justice administration was unacceptable to these immigrants who had been used to having their legal rights and obligations determined by formal courts and legal experts guided by tested and long established principles. The traditional system lacked formal courts manned by jurists, regularity and openness of proceedings, adherence to established rules of evidence and procedure and predictability of results of proceedings.[50] Furthermore the traditional system could not be changed or modified by legislation since there was no formal legislature to enact desirable statutes.[51] Consequently, the important function of law as an instrument of social, economic and political change was lacking in the traditional legal system. These defects were highlighted in the report of Consul Brand to the secretary for Foreign Affairs, which read in part:

[49] Ibid
[50] Onyekpere, E *op. cit* pp. 9-10
[51] Ibid

> Lagos at present may be said to have no Government, there is no effective protection to (sic) property, no mode of enforcing the payment of debts applicable to Europeans; and the wonder is that in such a state of things there are so few disturbances . . . This consulate exercises at present a feeble, irregular and irresponsible jurisdiction over a variety of judicial, police and even administrative matters. This jurisdiction has been acquiesced in, as a matter of necessity, knowing that the consulate is the only place where their cases will be heard with impartiality; but in a large and increasing commercial community there are questions of great importance affecting trade and property frequently arising, which the Consul has not the means even if he had the Authority of dealing with in a satisfactory manner. [52]

Historical Development of Courts in Nigeria

Before Lagos became a British colony, the problem created by the defects in the traditional system of adjudication were in some places tackled from two angles. First, the consul appointed to stand guard over British citizens and interests in the Bights of Benin and Biafra constituted himself into a court with jurisdiction over disputes involving British subjects. Secondly, in the Bight of Biafra, the immigrant traders took the law into their own hand and established arbitral tribunals, called courts of equity to resolve disputes arising among themselves.

In 1861 King Dosemu ceded Lagos to the British Crown. British rule was consequently introduced in Lagos with British system of courts. [53]

[52] paper presented to the Secretary Foreign Affairs on April 9 1860 relating to the Occupation of Lagos.

[53] paper presented to the Secretary Foreign Affairs on April 9 1860 relating to the Occupation of Lagos.

The colonizing power set up courts some by statutory provisions and some by administrative arrangements. When British rule gradually extended to other kingdoms around Lagos the jurisdiction of the courts were equally extended to those areas.[54] By 1876 the Supreme Court ordinance established a Supreme Court (equivalent to a high court) with extensive powers in civil and criminal matters. In 1900, the proclamation of that year which set up the Protectorate of Southern Nigeria established certain courts, for example, the Supreme Court of Southern Nigeria, the Commissioner's Courts, and the Native Courts. A separate area of British influence existed in the Moslem North where an organized indigenous court system was already in existence. The colonizing authorities set up in addition, a Supreme Court and Provincial Court, and Cantonment Courts and an attempt was made to reorganize the native courts. [55]

In 1906 the colony of Lagos was merged with the Protectorate of Southern Nigeria to become the Colony and Protectorate of Southern Nigeria. The Supreme Court of Lagos was changed to the Supreme court of the Colony and Protectorate of Southern Nigeria. The other courts remained intact.

In 1914 the colony and protectorate of southern Nigeria and the Protectorate of Northern Nigeria were amalgamated into the Colony and Protectorate of Nigeria. The judicial systems of the two parts of the country were merged under the overall control and supervision o one chief Justice. The judiciary consisted of the Supreme Court, the Provincial Courts and the Native Courts. The Supreme Court consisted of the Chief Justice and a number of puisne judges who sat singly to exercise the original jurisdiction of the court. The jurisdiction of the court was restricted to commercial centres or townships. According to Lord Lugard, interior districts required a separate system of courts. However, in

[54] Obi Okoye, A *The Development of Judicial Trial in Nigeria* (Onitsha: Africana-Feb Publishers Ltd, 1988) p.l.

[55] Ibid

cases involving non-natives, the court exercised jurisdiction even outside the territorial limits of any commercial centre or township. The court also had jurisdiction to hear and determine appeals from the decisions of its individual judges as well as from the Provincial Courts. Under the Provincial Courts Ordinance, 1914 the Governor established a Provincial Court for each province composed of the Resident or Assistant Resident of the province as president, and a number of other members who were to be styled commissioners of the Provincial Court. Any of the officials sitting alone could constitute the court, which was a superior court of record. Divisional courts were established only in and around Lagos. As reorganized a Native Court was constituted by an Alkali with or without an assistant in the North or by a single judge in the South.[56]

The year 1933, witnessed the modification of the judicial system introduced in 1914. The principal changes included the restriction of the territorial jurisdiction of the Supreme Court, the creation of the High Court and Magistrate's Courts for the Protectorate, the reorganization of the Native Courts and the creation of the West African Court of Appeal to stand between the Supreme or High Court and the Privy Council. The reforms, carried out by Governor Sir David Cameron were embodied in the Supreme Court (Amendment) Ordinance 1933 the Protectorate Courts Ordinance 1933, the West African Court of Appeal Ordinance 1933, and the Native Courts Ordinance 1933.[57] The Provincial Courts were abolished and replaced with a High Court and a number of Magistrate's Courts in the Protectorate. The High Court was composed of a chief justice, puisne judges and assistant puisne judges, but each of the judges was competent to sit alone and discharge the judicial functions of the court. The High Court had the same status as the Supreme Court and exercised in the Protectorate the jurisdiction which, in Lagos, was exercised by the

[56] Ibid p. 77
[57] *Ibid* pp. 77-78.

Supreme Court except that even within the Protectorate the Supreme Court retained and the High Court did not acquire, jurisdiction over (a) probate, divorce, and matrimonial causes, (b) admiralty matters and (c) proceedings based on certain specified ordinances such as Companies Ordinance, the Intestate Estates Ordinance the Legal Practitioners Ordinance.[58]

Further re-organization of the judicial systems was carried out in the country between 1943 and 1945. From the re-organization emerged a two-tier system (excluding the native and religious courts systems). The Supreme Court Ordinance 1943 unified the Supreme Court of Lagos and the High Court of the Protectorate of Nigeria, which was headed by a single Chief Justice. The new Supreme Court, which came into existence on June 1, 1945, was empowered to issue processes, which were valid throughout the country. It was a court of unlimited jurisdiction similar to the High Court of Justice in England.[59] Also, the Magistrate's Courts Ordinance 1943, as subsequently amended created a single and country-wide system of Magistrate's Courts which absorbed (a) the pre-existing Magistrate's Courts of the Protectorate, and (b) the Courts of the Commissioners of the Supreme Court which existed and functioned in the colony district. Each magistrate sat alone and exercised the functions of the court within a specified magisterial district. Another development of significance was the creation of the Juvenile Courts by the Children and Young Persons Ordinance 1943.

Prior to 1954 Nigeria operated as a unitary state with a unitary judiciary structure. The 1954 Constitution introduced the Federal system in Nigeria, which affected the structure of the judiciary. Thus as we had a Federal and three regional

[58] *Ibid* pp. 78-79.
[59] Aguda, A.T. "Development in the Adjudicatory system" in Aguda A.T (ed) *The Challenge of the Nigerian Nation: An Examination of its Legal Development 1960- 1985* (Lagos: Nigerian Institute of Advanced Legal Studies, 1985) p.33

governments, so we had one Federal and three regional judicial systems. At the Federal level we had the Federal Supreme Court and the High Court of Lagos. The West African Court of Appeal (WACA) which had taken appeals from the Supreme Court of Nigeria, the Supreme Court of Ghana (the Gold Coast) and the Supreme Court of Sierra-Leone was disbanded at this time. From 1954 appeals lay from the High Court of a Region to a new re-designated Federal Supreme Court presided over by the Chief justice of the Federation. Appeals from the decisions of the Federal Supreme Court lay to Her majesty in Council. Each of the three Regions now had a High Court, Magistrate's Courts and Native Courts and or Islamic Courts.

In 1956 and 1957 both the Eastern and the Western Regions respectively, renamed their Native Courts Customary Courts. The courts were reorganized extensively by the Customary Courts Law 1956 of the Eastern Region and the customary Courts Law 1957 of the Western Region. In the Northern Region, the Native Courts Law 1956 also effected some reorganization of the courts which continued to exist as Native Courts until 1968 when they were renamed area courts. By the Moslem Court of Appeal Law 1956 a Moslem Court of Appeal was established for Northern Nigeria. Appeals from lower grade courts went as before to the higher grade courts of first instance and from the decisions of the latter in both their original and appellate jurisdiction where principles of Moslem law was applied, the appeal went to the Moslem Court of Appeal.[60] Appeals from the Moslem Court of Appeal lay to the High Court. In 1960, the Moslem Court of Appeal was abolished and replaced by the Sharia Court of Appeal. Also established was a Court of Resolution to exist side by side with the Sharia Court of

[60] Wali, A.B "Constitutional Structure and Position of the Judiciary with Particular reference to the Sharia Court of Appeal" 1989 Judicial Lectures: Continuing Education for the Judiciary (Lagos; MIJ Professional Publishers Ltd, 1991) P.148

Appeal to resolve jurisdictional disputes between the Sharia Court of Appeal and the High Court. The above court and judicial structure were retained by the 1960 Constitutions. The 1963 Republican Constitution also retained the same judicial structure with some changes, which include the abolition of appeals to the Privy Council. Consequently, the Supreme Court of Nigeria became the court of final appeal in the country. Appeals from the High Courts of the Regions and the Sharia Court of Appeal of the Northern Region lay to the Supreme Court. As a corollary to the abolition of further appeal to the Privy Council the 1963 Constitution envisaged a situation in which courts of appeal intermediate between the High Court and the Supreme Court, would be created. Consequently, the Constitution of each of the Regions except that of the Western Region prescribed that "the legislature of the Region may establish Regional Court of Appeal to which appeals may lie from the High Court of the Region in such circumstances as the legislature may prescribe".[61]

In the case of the Western Region the constitution prescribed that "there shall be a Court of Appeal for the Region".[62] The Western Region Court of Appeal was constituted in 1967. Other Regions never had a court of appeal. The Western Nigeria Court of Appeal was abolished in 1976 and replaced with the Federal Court of Appeal, which though based in Lagos then, has divisions in some other States of the country.[63]

In 1973, the Federal Military Government, by the Federal Revenue Court Decree 1973, established the Federal Revenue Court with the status and powers of a High Court. The Court exercised jurisdiction throughout the country on certain specified matters.

[61] Ss 56 and 54 respectively of the constitutions of the Northern and Eastern Regions. 1963

[62] S. 51 Constitution of Western Region 1963

[63] The Constitution (Amendment) (No. 2) Decree 1976 and the Federal Court of Appeal Decree 1976.

CHAPTER 8

THE NIGERIAN JUDICIARY TODAY

Courts in Nigeria

At the apex of the court structure in Nigeria today is the Supreme Court to which appeals lie from the decisions of the Court of Appeal. Immediately below the Supreme Court is the Court of Appeal. A stop below the Court of Appeal stand the Federal High Court, the High Courts of States and the Federal Capital Territory, Abuja, the Sharia Court of Appeal and the Customary Court of Appeal. These are the only superior courts of record in Nigeria. Immediately below the High Courts are the Magistrate's Courts and the District Courts. The former exists in every State of the Federation while the latter exists only in the Sates carved out of the former Northern Region. A step below the Magistrate's Courts is a number of Customary and Area Courts. Customary Courts exist in most of the Southern States, while Area Courts exist in all States carved out of the former Northern Region of Nigeria. Some States in Northern Nigeria have recently created Sharia Courts and Upper Sharia Courts with both criminal and civil jurisdiction.[1] There are in existence several other courts and judicial tribunals which exercise judicial power. Under section 6(4) of the 1999 Constitution, States are at liberty to establish and abolish courts other than superior courts of record.

The Supreme Court

The Supreme Court is the Court of final appeal in Nigeria. On the introduction of the federal system in Nigeria in 1954 the Court was established under the name "Federal Supreme Court" but appeals went from the Court to the Privy Council. It was retained under the 1960 independence constitution with some

[1] See ss 3, 41 and 42 Sharia Courts (Administration of Justice and Certain Consequential Changes) Law 1999 of Zamfara state

modifications. On the attainment of republican status by Nigeria in 1963, it became the final appellate court in the country with the name changed to Supreme Court of Nigeria. Presently, the Supreme Court owes its existence to section 230 of the 1999 constitution.

The Supreme Court is located at the Federal Capital Territory, Abuja. It consists of the Chief Justice of Nigeria and such number of Justices, not exceeding twenty-one, as may be prescribed by an Act of the National Assembly.[2] The Supreme Court has both original and appellate jurisdiction. The Court, to the exclusion of any other court, has original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.[3] In *Attorney General of the Federation v Attorney General of Abia State and 35 others*,[4] the Attorney General of the Federation filed an action in the Supreme Court pursuant to its original jurisdiction under section 232 of the 1999 constitution against the 36 States of the Federation for a determination of the Seward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from the State, pursuant to the provision of section 162(2) of the 1999 Constitution. The plaintiff further contended that it is only the Federal Government and not the Government of any state that has power to: exercise legislative, executive, or judicial powers over the entire area designated as the "territorial waters of Nigeria pursuant to the provisions of the Territorial Waters Act, Cap 428, Laws of the Federation of Nigeria, 1990 (as amended); exercise

[2] S. 230 1999 constitution

[3] S. 232 Ibid

[4] (2001) FWLR (pt 64) 202. see also *A.G Bendel State v A.G. Federation* (1983)1 SCNLR 239 where the original jurisdiction of the Supreme Court was successfully invoked.

any of the sovereign rights exercisable by Nigeria over the entire area designated as the "Exclusive Economic Zone" pursuant to the provisions of the Exclusive Economic Zone Act Cap 110, Laws of the Federation. Some of the Defendants raised preliminary objection on the grounds, inter alia, that the original jurisdiction conferred on the Supreme Court does not extend to the realm of international law; and that the plaintiff's claim does not establish the existence of a valid dispute whether of law or fact; nor disclose the existence or extent of a legal right. In dismissing the preliminary objection by a majority of 6-1, the Supreme Court held, inter alia, that by the provisions of section 232(1) of the 1999 constitution, for the Supreme Court to exercise its original jurisdiction in a civil case between the Federation and a State(s) or between States, there must be a dispute between the Federation and a State or States, or between States; the dispute must involve a question of law or fact or both; and the dispute must pertain to the existence or extent of a legal right. To invoke the original jurisdiction of the Supreme Court, there must be a dispute as so qualified between the Federation and a State or between States. Dispute was defined by the Supreme Court as "the act of arguing against, controversy, debate, argument, disagreement, contention as to rights, claims and the like or a matter of opinion." In the instant case, the Supreme Court held that paragraph 10 of the statement of claim discloses the existence of a dispute between the plaintiff and the defendants concerning the sharing of revenue in the "federation account". The Court further held that any issue which calls for the interpretation of the Constitution is obviously justiciable unless otherwise provided by the Constitution, and that the instant case involves the interpretation of section 162(2) of the 1999 Constitution.

The original jurisdiction of the Supreme Court can only be invoked when a State sues in its corporate capacity. Thus, a state cannot invoke the original jurisdiction of the Supreme Court to assert the rights of the citizens of the State. In *Attorney General of Ondo State v Attorney General of the Federation and 19 others,*[5] the plaintiff invoked the original jurisdiction of the Supreme Court under section 212 of the 1979 Constitution. The action was against the Federation, 18 States and the Federal Electoral Commission as the 20th Defendant. The complaint was the alleged interference with, and usurpation of the duties of the 20th Defendant in relation to the preparation for the conduct of the 1983 general elections and also particularly the wrongful compilation and revision of the voters register. The pith and substance of the plaintiff's claim was directed against the 20th defendant. Preliminary objection was taken against the action on the ground that the Supreme Court has no jurisdiction to entertain the action and that the 20th defendant is not a state within the purview of section 212 of the 1979 Constitution. In unanimously upholding the preliminary objection, the Supreme Court held that it had no jurisdiction to entertain an action or a dispute, which is not between the Federation and a State. The Plaintiff has no legal right in that Ondo State is not a voter, and the Federal Electoral Commission is not a state. According to the Supreme Court, section 212 does not authorize a State to bring another State to the bar of the Supreme Court for a dispute that does not affect the property or powers of the complaining State in its sovereign or corporate capacity but at most affects only the rights of individual citizens within the State. Kayode Eso, JSC, displayed his usual wits when he said:

> A state is not a knight in a shining armour undertaking the errands of just any of its citizens around. If it does, it may turn itself into the legendary Don Quixote who strikes at imaginary windmills.[6]

In the earlier case of *Attorney General of the Federation v The Attorney General of Imo State and 2 others*[7] the Supreme Court

[5] (1983) 2 SCNLR 269
[6] At p. 277

held that its jurisdiction under section 212(1) of the 1979 constitution was a special jurisdiction, which is limited to any dispute between the Federation and a State or between States and no more. It does not cover dispute between a state and a body that is not a state or between the Federation and a 'non-state'.

In the following cases whether the plaintiff can invoke the original jurisdiction of the Supreme Court was in issue.

In *A.G. Eastern Nigeria v. A.G. of the Federation*[7] the Government of Eastern Nigeria had brought an action in the original jurisdiction of the Supreme Court for a declaration that the Government of the Federation was not entitled to accept or act on the 1963 census on the ground, inter alia, that the figures had been inflated, and were vitiated by irregularities. The plaintiff had argued that acceptance of the figures could affect the demarcation of constituencies under section 43 of the 1963 constitution, and also the making of monetary grants under section 141 of the constitution. The Federal Supreme Court held that Eastern Nigeria had no legal right to any particular number of constituencies or seats in the Federal House of Representatives, since the constitution, unlike other federal constitutions, did not apportion constituencies among the constituent units. Secondly, it was held that Eastern Nigeria had no legal right to have the formula for the allocation of revenue under section 141 of the constitution maintained unaltered, since it was entirely within the discretion of the parliament, acting with the votes of two-thirds majority of its members and the consent of the legislative houses of at least three regions, to alter it for any purpose, including that of making it reflect the population figures. The court then concluded that as no legal right has been shown to exist in favour of Eastern Nigeria, it lacked the locus standi to inquire into the substantive claim i.e whether population figures had been inflated or vitiated by irregularities.

[7] (1964)1 All NLR 224

The case of *A.G. Bendel v A.G. Federation*[8] arose over a new revenue sharing arrangement which was enacted by the Federal Government on February 2, 1981. The 12 State Governments not controlled by the party in power then (the NPN) disagreed with the revenue sharing formula. Their complaint was that the inadequate share given to the states had resulted from the unconstitutional procedure used in passing it, in that the share allocated to the states by the Act was less than what had been approved by the House of Representatives when the Act was before it. They also contended that the Federal Government's share under the Act represented an amended version of the bill as passed by the Senate only, and adopted by 13 votes to 11 by the Joint Finance Committee consisting of 12 members from each house, from where it went straight to the President for his assent and was assented to by him and thereby purportedly brought into force as an Act of the National Assembly without being referred back to the two Houses in separate or joint sessions after the Join Finance Committee had finished with it.

The Supreme Court held that the failure to refer the bill back to the two houses after the proceedings in the Joint Finance Committee was a violation of the procedure laid down in the constitution for making laws, and that accordingly, the resulting Act was null and void.

On the issue of locus standi, the court distinguished the case before it from the case of *A.G. Eastern Nigeria v. A.G. of the Federation.*[9]

In *A.G. Ogun State v. A.G. Federation*[10] the Supreme Court recognized the right of Ogun State Government to challenge the adaptation of the Public Order Act 1979 by the President but held that the Public Order Act was an existing law under section 274 of

[8] (1981) 10 S.C.I.
[9] Supra
[10] (1982)3 SNCLR 166

the constitution and that the President was the appropriate authority to adapt it.

In *A.G. Abia State & 35 Ors v. A.G. Federation*[11] Abia and 35 other States successfully invoked the original jurisdiction of the Supreme Court to determine whether some sections of the Electoral Act 2001 are intra vires the National Assembly. The Supreme Court, however, rejected the application of the 774 Local Government Councils to be joined in the suit as the Councils cannot invoke the original jurisdiction of the Supreme Court.

In another case of *A.G. Abia State & 35 Ors v. A.G. Federation*[12] the original jurisdiction of the Supreme Court was invoked to challenge the Allocation of Revenue (Federation Account, etc) (Modification) Order, Statutory Instrument No. 9 of 2002 made by the President. The action however failed for lack of merit.

In the case of *A.G. Ondo State v.. A.G. Federation*[13] which was instituted in 2002, the Ondo State Government invoked the original jurisdiction of the Supreme Court to determine whether the National Assembly is competent to enact the Corrupt Practices and other Related Offences Act No. 5 of 2000 which applies throughout the federation.

In *A.G. Adamawa State & 21 Ors v A.G. Federation & 8 Ors*[14] plaintiffs challenged the validity of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004. An objection was taken that the Plaintiffs lacked the locus standi to institute the action. The Supreme Court held that the complaint of the Plaintiffs was that the operation of the Act affected their rights to the receipt of funds

[11] (2002) 6 NWLR (pt. 763)
[12] (2002)6 NWLR (pt. 809)
[13] (2002)9 NWLR (pt. 772) 222
[14] (2005)18 NWLR (pt. 958) 581

from the Federation Account. In that wise they have the right to institute the action.

Another pertinent question is who must authorize the action invoking the original jurisdiction of the Supreme Court. The issue arose squarely in the case of *Plateau State of Nigeria and Anor v Attorney General of the Federation & Anor.*[15] The facts of the case are as follows. On 18th May 2004, the Federal Government declared a state of emergency in Plateau State. The office of the Governor of Plateau State was suspended. Suspended also was the State House of Assembly. Major General Chris Alli was then appointed Sole Administrator of Plateau State by the President. The Plaintiffs challenged the constitutionality of the declaration of state of emergency and certain action taken in pursuance of the declaration. The Defendants raised a preliminary objection that the action was incompetent as it was not authorized by either the Sole Administrator of Plateau State or the Attorney General of Plateau State at the time the action was instituted. The Supreme Court held that since the action was commenced during a state of emergency, only the Sole Administrator could have authorized the action and the fact that he did not authorize the action renders the action incompetent. The Supreme Court also held that it could not in its original jurisdiction grant relief's for the benefit of individuals.

This decision must be criticized on the ground that it is preposterous to insist that it is the beneficiaries of the impugned state of emergency that are competent to authorize the institution of action in the name of the state to challenge the declaration of state of emergency. Section 20(a) of the Supreme Court Act[16] prescribes that action by or against the Federal Government shall be brought in the name of the Attorney-General of the Federation. In the case of *A.G. Abia State and 35 Ors v A.G. Federation*[17] the Plaintiffs challenged the constitutional validity of certain

[15] (2006) 3 NWLR (pt. 967) 346
[16] Cap 424 Laws of the Federation 1990
[17] (2002)6 NWLR (pt. 763) 264

provisions of the 2001 Electoral Act. The National Assembly sought to be joined in the suit. The Supreme Court held that the National Assembly is one of the three arms of the Federal Government of Nigeria. Therefore by virtue of section 20(a) of the Supreme Court Act which prescribes that action by or against the Federal Government shall be brought in the name of the Attorney General of the Federation the National Assembly was already a party to the suit by virtue of the Federal Attorney General being a Defendant. In the circumstance, the application to be joined in the suit was unnecessary and was therefore refused.[18]

It must be noted that section 20(a) of the Supreme Court Act[19] has been amended by section 3 of the Supreme Court (Additional Original Jurisdiction) Act 2002[20] which provides that in any suit by or against the National Assembly or a State House of Assembly in which the original jurisdiction of the Supreme Court is invoked the nominal party in the suit should be the National Assembly and the Speaker of the State House of Assembly, respectively.

One of the issues that arose in the case of *Plateau State and Anor v A.G. Federation and Anor*[21] was the competence of an action invoking the original jurisdiction of the Supreme Court in which the Plaintiffs were Plateau State Government and House of Assembly of Plateau State. The opinions of the Justices of the Supreme Court on the matter were divided. Kutigi, J.S.C., who delivered the leading judgment said that he believed that the Plateau State Government as well as the House of Assembly of Plateau State were the substantive parties, while the Attorney-General and Speaker were merely nominal parties. His Lordship then came to the conclusion that failure to sue in the names of the

[18] at p. 377
[19] Cap 424 laws of the Federation 1990
[20] Cap 16 Laws of the Federation 2004
[21] (2006) 3 NWLR (pt. 967) 346

appropriate nominal parties was a mere irregularity.[22] Ejiwunmi, J.S.C. considered it immaterial that the suit was brought in the names of Plateau State of Nigeria and the House of Assembly.[23] Misdapher, J.C.S. who agreed with the lead judgment did not address the issue. Parts-Achalonu, J.S.C. concurred with the lead judgment without saying more. On the other hand, Uwais, J.S.C. who, though concurred with the lead judgment, held that the Plaintiffs were not proper parties in the suit.[24] So also Niki Tobi, JSC.[25] By the rules of precedent the opinion that failure to institute the action in the names of the nominal parties prescribed by law is not fatal to the case is the decision of the court.

In addition to the original jurisdiction conferred upon it by section 232(1) of the 1999 constitution, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly provided that no original jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter.[26]

The Supreme Court has exclusive appellate jurisdiction over appeals from the Court of Appeal,[27] and is the apex court in Nigeria from which no appeal lies to any other body or authority.[28] An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in the following cases:

a. Where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;

[22] at p. 394
[23] at p. 415
[24] at p. 397
[25] at pp 423 - 424
[26] 1999 Constitution S. 232(2) and the Proviso to the section.
[27] *Ibid* S. 233
[28] This is however without prejudice to the power of prerogative of mercy vested in the President or Governor.

b. Decisions in any civil or criminal proceedings on questions as to the interpretation or application of the constitution.

c. Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of the constitution has been, is being, or is likely to be contravened in relation to any person;

d. Decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;

e. Decisions on any question-

i. Whether any person has been validly elected to the office of president or vice-president under the constitution;

ii. Whether the term of office of the president or vice-president has become vacant; and

f. Such other cases as may be prescribed by an Act of the National Assembly.[29]

Any other appeal outside the above cases must be with the leave of the court of Appeal or Supreme Court.[30] In *Aqua Limited v Ondo State Sports Council*[31] it was held, inter alia, that the provisions of the Constitution have been formulated and designed to protect the rights of the citizens. Consequently, unless the provision is so clear, unequivocal, unambiguous, and compelling in favour of a contrary view, the court ought to strive to enhance the construction of a right of appeal to be as of right and not by leave.

By section 12(7) of the Legal Practitioners Act, the Supreme Court has appellate jurisdiction from the decisions of the Nigerian Bar Association Disciplinary Committee.

[29] S. 233(2)
[30] S. 233(3)
[31] (1988) 4 NWLR (pt 81) 625

For purposes of exercising any jurisdiction conferred upon it the Supreme Court shall be duly constituted if it consists of not less than five Justices of the Supreme Courts[32] provided that where the Supreme Court is exercising its original jurisdiction in accordance with section 232 or is hearing an appeal involving decisions in any civil or criminal proceedings on questions as to the interpretation or application of the constitution, or decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of the Constitution has been, is being or is likely to be, contravened in relation to any person, the Court shall be constituted by seven Justices of the Supreme Courts;[33]

Being a court of final appeal, once the Supreme Court has decided an issue and the decision has been embodied in some judgment or order, it cannot re-open the matter.[34] In other words, the Court has no power to review any judgment once given and delivered by it save to correct any clerical mistake or accidental slip made by it.[35] However, where the judgment of the Supreme Court is obtained by fraud or for any other reason is a complete nullity, the Court has discretionary power to set aside such judgment.[36] Chukwudifu Oputa, J.S.C. pertinently observed in *Adegoke Motors Ltd v Adesanya*[37] that the Supreme Court is not a final Court "because we are infallible, rather we are infallible because we are final". The primary responsibility of the Supreme Court is that of developing and maintaining consistency in the law to be applied in the subordinate courts and of interpreting the country's fundamental law - its constitution. These are two functions of cardinal importance and the Supreme Court should not

[32] S. 234
[33] Proviso to S.234
[34] *Nneji v Chukwu* (1988)8 NWLR (Pt 81) 184; *Oyeyipo v Oyinloye* (1987) NWLR 356
[35] *Okegbe & Ors v Chikere & Ors* (2001)3 NSCQR 215
[36] *Vulcan Gases Ltd v Gesellschaft Furn Industry* (2001)6 NSCQR 481.
[37] (1989) 3 NWLR (pt 109) 250 at 274-275

be unduly distracted from these two important functions, or its proper role, by a deluge of unimportant or frivolous appeals.[38]

The Court of Appeal

When appeals to the Privy Council was abolished in 1963 there was no intermediate Court of Appeal between the Supreme Court and the High Courts. The Constitutions of the three Regions provided for a Court of Appeal. However, it was only the Western Region that set up a Court of Appeal in 1967, which was abolished in 1976. The Federal Court of Appeal was set up in 1976 pursuant to the provisions of the Constitution (Amendment) Decree (No.2) of 1976 and the Federal Court of Appeal Decree No. 43 of 1976. The name was modified to Court of Appeal by the Constitution (Suspension and Modification) Decree No. 1 of 1984. The Court of Appeal consists of a President and such number of Justices of the Court of Appeal, not less than 49 of which not less than three shall be learned in Islamic personal law, and not less than three shall be learned in customary law.[39] For the purpose of exercising any jurisdiction conferred upon it, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal and in the case of appeals from (a) Sharia Court of Appeal if it consists of not less than three Justices of the Court of Appeal learned in Islamic personal law; and (b) Customary Court of Appeal, if it consists of not less than three Justices of the Court of Appeal learned in customary law.[40] In *Sokoto State Government & 2 Ors v Kamdex Nigeria Limited,*[41] three Justices of the Court of Appeal rendered a judgment of the Court of Appeal. One of the Justices did not participate in hearing the appeal. The judgment was set aside by the Supreme Court which held that by section

[38] Per Oputa, JSC in *Sanusi Aiyeriyina Alade v Olalere Akanji Alemuloke & 2 Ors* (1988)2 SC (Pt 1)3-4.
[39] S. 237
[40] S. S. 247
[41] (2007)7 NWLR (pt. 1034)

247(1) of the 1999 constitution, for the purpose of exercising any jurisdiction conferred upon the Court of Appeal by the constitution or any other law, the court shall be constituted by not less than three justices at the stage of hearing the appeal . The Court of Appeal is based in Abuja but has divisions in Lagos, Kaduna, Enugu, Ilorin, Calabar, Jos, Port-Harcourt, Benin and Ibadan. It has exclusive original jurisdiction to hear and determine any question as to whether (a) any person has been validly elected to the office of President or Vice-President; (b) the term of office of the President or Vice-President has ceased; or (c) the office of President or Vice-President has become vacant.[42]

The Court of Appeal has exclusive jurisdiction to hear and determine appeals from the Federal High Court; the High Court of the Federal Capital Territory, Abuja; High Court of a State; Sharia Court of Appeal of the Federal Capital Territory, Abuja; Sharia Court of Appeal of a State; Customary Court of Appeal of the Federal Capital Territory, Abuja; Customary Court of Appeal of a State and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly.[43] The Court of Appeal also has jurisdiction to entertain appeals from the decisions of the Code of Conduct Tribunal established under the fifth Schedule to the constitution.[44] Moreover, the Court of Appeal is the final court of appeal with respect to the decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals.[45]

Appeals lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases: (a) final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance; (b) where the ground of appeal involves questions of

[42] S. 239
[43] S. 240
[44] S. 246b(i) – 246b(iii) 1999 Constitution.
[45] *ibid*

law alone, decisions in any civil or criminal proceedings; (c) decisions in any civil or criminal proceeding on questions as to the interpretation or application of the constitution; (d) decisions in any civil proceedings on questions as to whether any of the provisions of chapter IV of the constitution has been, is being or is likely to be contravened in relation to any person; (e) decisions in any criminal proceedings in which the Federal High Court or a High Court has imposed a sentence of death; (f) decisions made or given by the Federal High Court or a High Court – (i) where the liberty of a person or the custody of an infant is concerned; (ii) where an injunction or the appointment of a receiver is granted or refused; (iii) in the case of a decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise; (iv) in the case of a decree nisi in a matrimonial cause or a decision in an admiralty action determining liability; and (v) in such other cases as may be prescribed by any law in force in Nigeria.[46]

All other appeals must be with the leave of the Federal High Court or a High Court or of the Court of Appeal.[47] Appeal also lie as of right to the Court of Appeal from the decisions of Customary Court of Appeal, Sharia Court of Appeal, the Code of Conduct Tribunal, National Assembly Election Tribunals, and Governorship and Legislative Houses Election Tribunals[48]

Federal High Court

The Federal High Court was originally established by section 1 of the Federal Revenue Court Decree 1973, and it was then known as the Federal Revenue Court. Originally the limit of the jurisdiction of the Federal Revenue Court would be found in sections 7, 8 and 11 of the Federal Revenue Court Act, and was in

[46] S. 241
[47] S. 242
[48] Ss. 244, 245 & 246 1999 Constitution

respect of matters related to the Revenue of the Federal Government. The 1979 Constitution styled it the Federal High Court and vested on it all the powers and jurisdiction of the Federal Revenue Court; but it shared its jurisdiction with the State High Court, the latter being a court of unlimited jurisdiction.[49]

The jurisdiction of the Court was widened and made exclusive by Decree 107 of 1993, which amended section 230 of the 1979 Constitution, and includes exclusive jurisdiction in respect of any cause or matter challenging the action of the Federal Government or any of its agencies. The current jurisdiction of the Court is provided for in section 251 of the 1999 Constitution which is in pari materia with section 230 of the 1979 Constitution (as amended by Decree 107 of 1993). The issue of jurisdictional conflict between the Federal and State High Court will be considered in fuller details below. The Federal High Court is a superior court of record and is located at Abuja but has divisions in some states of the Federation. The Federal High Court consists of a Chief Judge and such number of other Judges as may be prescribed by an Act of the National Assembly.[50] But the Court is properly constituted by a single judge.

State High Courts

Each State of the Federation is under obligation to establish a High Court. The High Court of a State consists of a Chief Judge of the State and such number of judges as may be prescribed by a law of the House of Assembly of the State.[51] However, for the purpose of exercising any jurisdiction conferred upon it under the Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one judge.[52] The 1979

[49] *Savannah Bank of Nigeria Ltd v Pan Atlantic Shipping & Transport Agencies Ltd & Anor* (1987)1 Sc 198.
[50] S. 249
[51] S. 270
[52] S. 273

Constitution in section 236 conferred State High Courts with unlimited jurisdiction. However, Decree 107 of 1993 imposed some limitations on the jurisdiction of the State High Court in respect of matters within the exclusive jurisdiction of the Federal High Court. Following the pattern of Decree 107 of 1993, section 272 of the 1999 Constitution conferred State High Courts with general jurisdiction limited only in respect of matters in which the constitution confers exclusive jurisdiction on other courts or tribunals, or where the jurisdiction of the court is ousted by the constitution.

The traditional view is that State High Courts have no jurisdiction to entertain at first instance customary law matrimonial causes.[53] In a recent decision of a High Court of Enugu State in *Okenwa v Okenwa*[54] the court held that it has no jurisdiction to entertain at first instance action for dissolution of marriage under customary law. It would appear that lawyers and judges are influenced by the opinion of text writers on the subject without adequate consideration of the extent of the original jurisdiction vested on state High Courts by the Constitution. Some text writers on the subject anchor their opinion on this matter on the provisions of the various High Court Laws and the judicial opinions based on these provisions.[55] An eminent authority on Family Law in Nigeria, Professor E. I. Nwogugu, said:

[53] See further Osita Nnamani Ogbu "the Jurisdiction of the State High Court to Entertain at First Instance Customary Law Matrimonial Causes: Comment on Okenwa v Okenwa" N.B.J. Vol. 3 no. 2 p. 94

[54] Suit No. E/7D/2001 (Ruling delivered by Hon. Justice K.C. Udeh on 12/2/2003

[55] See *Omodion v Fasoro* (1960) WNLR 27; *Nwafia v Ububa* (1966) NMLR 219. In *Adeyemi v Opeyori* (1976) 9 and 10 SC 31 the Supreme Court held that it is clear that the High Court of the former Western State is precluded from exercising original jurisdiction in all matters which are subject to the jurisdiction to the jurisdiction of a customary court and relate to marriage, family status, guardianship of property on death, etc.

> . . . State High Courts and Magistrates' (sic) Courts do not, as a general rule, 'possess original jurisdiction in matrimonial causes arising under customary law.' The statutes establishing the High Courts, for instance, clearly provide that '. . . the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court relating to marriage, family status . . .'[56]

The learned author, however, stated some exceptions to this general rule. He said that a High Court or Magistrate Court may exercise original jurisdiction in respect of customary law matrimonial causes where the military governor of a state so directs by an order; or where a suit is transferred from a Customary Court to a High Court or Magistrate Court; or where Customary Courts have been abolished or do not exist.[57]

The above propositions may represent the law prior to 1979. However, to the extent that these views are canvassed as the law after 1st October 1979 (when the 1979 Constitution came into force) and up to the present time, they are, with due respect misconceived. With effect from 1st October 1979 when the jurisdiction of the State High Court became a constitutional matter, the extent of the original jurisdiction of a State High Court cannot be determined by reference to an ordinary statute but by reference to the Constitution itself.

By section 61(3) of The Corrupt Practices and Other Related Offences Act 2000 the Chief Judge of a State or the Federal Capital Territory, Abuja, shall by order under his hand, designate a court or judge or such number of courts or judges as he

[56] E.I. Nwogugu, *Family Law in Nigeria* 3rd edn (Ibadan: Heinmann Educational Books (Nigeria PLC, 1990) p.118

[57] *Ibid*

shall deem appropriate to hear and determine all offences under the Act.

The Extent of the Original Jurisdiction of A State High Court since the Advent Of the 1979 Constitution

In the recent case of *Karimu Adisa v Emmanuel Oyinwola & 4 Ors*[58] the Supreme Court (per Ayoola, JSC) explained that before the promulgation of the 1979 Constitution, High Courts both in the Northern as well as the Southern States of Nigeria were regarded as courts of unlimited jurisdiction by virtue of their status as superior courts of record. Thus, prima facie, the High Court being a superior court of record was a court of unlimited jurisdiction. The jurisdiction is described as unlimited only because it is presumed to exist in any case unless it is expressly curtailed by statute, as has been done in several regional or state laws before the promulgation of the 1979 Constitution. The coming into force of the 1979 Constitution had a considerable impact on the jurisdiction of the State High Courts. While prior to that constitution there was no express vesting of judicial power in the judicature and the jurisdiction of the High Court of a State was to be found in State legislations which tended to vary from State to State, a change was effected by section 236(1) of the 1979 Constitution.

Thus, under the 1979 Constitution, a State High Court became a court of unlimited jurisdiction by express constitutional provision. In the case of *Karimu Adisa v Emmanuel Oyinwola & 4 Ors*[59] the Supreme Court re-affirmed the position that the provisions of section 236(1) of the 1979 Constitution did not permit the unlimited jurisdiction vested on the High Court of a State to be limited other than as the constitution itself may have provided. According to the Court, the answer to the question whether the jurisdiction of the High Court of a state is curtailed

[58] (2000) 10 NWLR (Pt.674) 116 at 172-173
[59] (2000) 10 NWLR (Pt.674) 116

after the 1979 Constitution had come into effect is, therefore not to be found in any state legislation but solely in the constitution itself.

The Extent of the Original Jurisdiction of the State High Court under the 1999 Constitution

Section 272 of the 1999 Constitution, which confers jurisdiction on the State High Court, provides as follows:

> Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

Unlike the 1979 Constitution, the State High Court is under the 1999 Constitution not stated to be a court of unlimited jurisdiction. However, there is no express limitation on the jurisdiction of a state High Court save that its jurisdiction is made subject to other provisions of the constitution and the exclusive jurisdiction of the Federal High Court under section 251 of the Constitution. Thus, the jurisdiction of a State High Court can only be limited or ousted by reference to the provisions of the Constitution. Such limitations include the limitation imposed by section 251 of the Constitution in respect of matters within the exclusive jurisdiction of the Federal High Court. Other limitations on the jurisdiction of the State High Court include the limitations in sections 285(1) Constitution in respect of matters relating to election petitions, or to the question as to whether the seat of a member of the Senate or a member of the House of Representatives has become vacant. Other such limitations are in respect of matters within the original jurisdiction of the Supreme Court pursuant to section 232 of the Constitution, and matters

within the original jurisdiction of the Court of Appeal pursuant to section 239 of the constitution. The jurisdiction of the State High Court is ousted by sections 6(6)(c), 6(6)(d), 143(10) and 188(10) of the constitution. Thus, a State High Court can be described as a court of general jurisdiction whose jurisdiction is only limited by the specific provisions of the Constitution. Furthermore, being a superior court of record, everything is deemed to be within the jurisdiction of the State High Court except those expressly removed.

In the recent case of *A.G. Oyo State v NLC*[60] the Court of Appeal held that the combined effect of section 2 of the Trade Disputes (Amendment) Act No. 47 of 1992, and section 20 of the Trade Disputes Act, Cap 432 Laws of the Federation is that the jurisdiction of the regular courts to entertain trade disputes matters was removed and vested exclusively in the National Industrial Court which can be interpreted to mean that the High Court of a State cannot exercise jurisdiction in trade disputes matters. Accordingly, the court held these sections unconstitutional for being in conflict with the provisions of section 272 of the 1999 Constitution. Speaking for the Court of Appeal, Adekoye JCA said:

> The curtailment of jurisdiction of the High Court established the conflict between the Trade Disputes Act and section 272 of the 1999 Constitution – whereas section 251 of the 1999 Constitution is the only lawful and constitutional curtailment on the jurisdiction of a State High Court (sic). The provision of section 1(3) is categorical on the fact that any law that conflicts with the constitution is null and void.[61]

The original jurisdiction of the State High Court having been conferred by the Constitution cannot be whittled down by any

[60] (2003)8 NWLR (pt.821)1
[61] At p.32

Act of the National Assembly or Law of a State House of Assembly by virtue of the supremacy of the Constitution as provided for in section 1(3) of the Constitution.

The various High Court laws and Customary or Area Court laws, which were enacted before the promulgation of the 1999 Constitution, are existing laws saved pursuant to section 315 of the Constitution. However, these existing laws will be in operation to the extent they are compatible with the provisions of the Constitution. The provisions of these High Court laws that sought to limit the original jurisdiction of the High Court are therefore unconstitutional for being inconsistent with section 272 of the 1999 Constitution.

For administrative convenience States are carved into judicial divisions. In *Egbo v Laguma*[62] it was held that the issue of judicial division is only a matter of convenience and not an issue of jurisdiction, and by the provisions of sections 234 and 236 of the 1979 constitution, there is only one and not more than one High Court for each State. A State High Court is a superior court of record and it is the highest court of first instance in each state. The jurisdiction of the Court covers proceedings which originate in the Court and those which come to it on appeal from magistrate or customary courts, and it exercises supervisory jurisdiction over administrative agencies, inferior courts and tribunals through the prerogative writs of mandamus, prohibition, certiorari, habeas corpus, and quo warranto.

[62] (1988)3 NWLR (Pt.80) 109. *See also Nwobodo v Onoh (1984)1 SCNLR 1.* in *Ukpai v Okoro* (1983)2 SCNLR 380, at 390, it was held that where a judge handling a case is transferred to another judicial division, the judge has jurisdiction to continue the trial of the suit when it was transferred to him.

JURISDICTIONAL CONFLICT BETWEEN THE STATE HIGH COURT AND THE FEDERAL HIGH COURT[63]

Since the Federal High Court came into being in 1973 as Federal Revenue Court, there has been a lingering controversy about the extent of the jurisdiction conferred on the court *vis-à-vis* the jurisdiction of a State High Court. The controversy was laid to rest in 1983 in the *Bronik Motors* case. However the ghost of the jurisdictional conflict has been resurrected by Decree 107 of 1993 and subsequently the provisions of the 1999 Constitution.

The Origin of the Federal High Court

The Federal High Court succeeded the Federal Revenue Court. The Federal Revenue Court was established in 1973 by Decree No. 13 of 1973. Section 7(1) of the Decree stipulates the jurisdiction of the Federal Revenue Court as follows:

(1) The Federal Revenue Court shall have and exercise jurisdiction in civil causes and matters –

(a) relating to the revenue of the Government of theFederation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;

(b) connected with or pertaining to –

(i) the taxation of companies and of other bodies established or carrying on business in Nigeria and all other person subject to Federal taxation;

(ii) customs and excise duty;

(iii) banking, foreign exchange, currency or other fiscal measures;

(c) arising from –

(i) the operation of the Companies Decree 1968, or any other enactment regulating the operation of companies incorporated under the Companies Decree 1968.

(ii) any enactment relating to copyright, patents, designs, trade marks and merchandise marks;

[63] Substantial part of this topic has been published as an article in NJPJ Vol. 6 No. 1 p. 56

(d) of admiralty jurisdictions.

Section 7(2) and (3) of the Decree also stipulates the criminal jurisdiction of the Federal Revenue Court as follows:

(1) The Federal Revenue Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters arising out of or connected with any of the matters in respect of which jurisdiction is conferred by subsection of this section.

(2) The jurisdiction conferred under the foregoing subsection in respect of criminal causes and matters shall without prejudice to the generality of that subsection and subject to section 63(3) below include original jurisdiction in respect of offences under the provisions of the Criminal Code being offences in relation to which proceedings may be initiated at the instance of the Attorney General of the Federation.

The Federal Revenue Court was subsequently incorporated into the 1979 Constitution (section 228) and renamed Federal High Court, and was conferred with the jurisdiction of the former Federal Revenue Court in addition to any other jurisdiction that may be conferred by the National Assembly.[64] However, the National Assembly did not confer additional jurisdiction on the Federal High Court until the demise of Nigeria's Second Republic.

The question of the plenitude and amplitude of the jurisdiction of the Federal High Court has been a subject of controversy. The controversy revolved around the following questions: whether the jurisdiction of the Federal High Court is limited to matters stipulated in section 7 of Decree No.13 of 1973 and further jurisdiction to be conferred by the National Assembly; whether in the light of the principle of federalism the Federal High Court has original and exclusive jurisdiction in all federal causes or matters; whether in the light of the unlimited jurisdiction of the State High Court under the 1979 constitution, the State High Court has concurrent jurisdiction with the Federal High Court in causes

[64] See Section 230 of the 1979 Constitution

or matters within the jurisdiction of the Federal High Court; and whether matters coming within the jurisdiction of the Federal High Court must relate to the revenue of the Federal Government. Section 7 of the Federal Revenue Court Decree of 1973 fell for construction in *Jammal Steel Structures Ltd v A.C.B. Ltd.*[65] In that case, the plaintiffs claimed from the defendants the sum of ₦641,328.39 being the balance due to plaintiffs for an overdraft granted by the plaintiffs to the defendants in the normal course of their business as bankers to the defendants and for money paid by the plaintiffs to the defendants as bankers at the latter's request which said sum the defendants have refused and/or neglected to pay in spite of repeated demands. Section 7(1)(b)(ii) of the Decree fell for construction. The section provides as follows:

"The Federal Revenue Court shall have and exercise jurisdiction in civil causes or matters ...
Connected with or pertaining to ...
(iii) banking, foreign exchange, currency or other fiscal measures.

The Supreme Court held that the ejusdem generis rule applied in the reverse to the interpretation of that section such that the word 'measures' must be taken to qualify each of the preceding specifically enumerated subjects including banking. This would mean that the ordinary meaning to be given to the subsection is that it should read: banking measures, foreign exchange measures, currency measures and other fiscal measures. It was further held that where there is involved only a dispute between a bank and one or more of its customers in the ordinary course of banking business or transactions as in the case with the subject-matter of that case, any State High Court was competent to entertain the case because the Government was not really interested in the outcome of the dispute.

At the inception of the 1979 Presidential Constitution, it was contended that with the principle of federalism enshrined in that Constitution, where a matter relates to federal law only a

[65] (1973) 2 S.C. 77

Federal High Court could determine the matter. Consequently, the contemplation of section 42 of the 1979 Constitution was that where the Federal Government or any of its agencies is to be sued for breach of fundamental rights, the action has to be brought in a Federal High Court. This view was canvassed in *Federal Minister of Internal Affairs v Shugaba*[66] In that case, Shugaba alleged that his fundamental rights were breached by the Minister of Internal Affairs. He was deported from Nigerian contrary to his wish thereby encroaching on his freedom of movement as provided for in section 38(1) of the 1979 Constitution. In seeking redress, he instituted an action at a Maiduguri High Court in Borno State. The question was whether the plaintiff was in order in instituting the action in a State High Court since the defendant was a Federal agency. The majority of the Court of Appeal held that the State High Court was the appropriate Court to entertain the matter. However, Mamman Nasir, President of the Court of Appeal, in his dissenting judgment, accepted the argument to the effect that the claim of the plaintiff involved Federal functionaries, and therefore, he ought to have filed his case in the Federal High Court and that the State High Court which had disposed of the matter had no jurisdiction to entertain it.

This line of reasoning was adopted by the majority of the Court of Appeal (Lagos Division) when a similar issue arose in that Court in the case of *Tony Momoh v The Senate*[67]. The Court stated as follows:

> The next question is: does a person who complains of his right have a free choice as to which of the two High Courts ... he could go for redress ... It is my view that it is the intendment of the section that a person who wishes to enforce a fundamental right against the Federal Government or authority must go to the Federal High Court whereas a person who wishes to enforce such a

[66] (1982) 3 NCLR 915
[67] (1983) 4 NCLR 269

> right against a State Government or authority must go to the High Court of the State. It is only by so construing section 42(2) that effect will be given to the words 'subject to the provisions of this Constitution'... to say that it is a special jurisdiction which enables one to go to either a Federal or a State High Court at one's free choice is merely to change 'High Court' in the section to 'Federal High Court or the High Court of a State', as defined by section 277 and leave the above opening phrase unconstrued.[68]

According to Nnaemeka-Agu, J.C.A. (as he then was) who read the lead judgment, the Federal High Court is supposed to fulfill for the Federal Government similar jurisdiction and powers as the High Court of a State.

The controversy was laid to rest in *Bronik Motors Ltd v Wema Bank*.[69] There the Supreme Court held that the jurisdiction of the State High Court under the 1979 Constitution was unlimited in all matters whether civil or criminal in both Federal and State causes within the State except as limited by section 230 of the Constitution. According to the Supreme Court, the judicial powers given to the courts in section 6 of the 1979 Constitution were not in any way intended to delimit the extend of Federal and State judicial power but to define the nature of judicial power as authority for the determination of the rights of parties in all matters before the Court. This decision was followed in *Mandara v A.G. Federation*[70] where the Supreme Court held that there can be no room for the creation of Federal Justice and State Justice; there can only be justice according to the laws of this land. In *Savannah Bank v Pan-Atlantic*[71] the Supreme Court, while affirming the

[68] Supra
[69] (1983)1 SCNLR 296
[70] (1984)1 SCNLR
[71] (1987) 1 NWLR (pt. 49) 212 S.C.

decision in the *Bronik Motor* case, however, held that the State High Court as a court of unlimited jurisdiction under the 1979 Constitution had concurrent jurisdiction with the Federal High Court in matters falling within the jurisdiction of the latter.

Chukwudifu Oputa, J.S.C. in *Eze v Republic*, lucidly clarified the position subsequently.[72]

According to His Lordship:

(1) Before 1973 our ordinary normal superior courts of record and of first instance were the State High Courts.

(2) These Courts within their competence exercised unlimited jurisdiction in civil and criminal causes and matters including causes and matters listed in section 7(1) of Act No.13 of 1973.

(3) After the establishment of the Federal Revenue Court in 1973 jurisdiction over matters listed in section 7(1) of the Act was vested in the Federal Revenue Court exclusively by section 8 of the Act.

(4) The whole purpose of establishing this special court, as its name implied was to ensure the expeditious dispatch and disposal of cases involving the revenue of the Federal Government. Matters or causes having nothing to do with the revenue of the Federal Government were not to be 'smuggled' into the jurisdiction of the Federal Revenue Court. On the coming into force of the 1979 Constitution the State High Courts were granted unlimited jurisdiction by section 236 and the Federal Revenue Court was re-styled "the Federal High Court" and granted a jurisdiction limited by section 230 of that Constitution to the former jurisdiction conferred on it by section 7(1) of the Act which created it (Act No.13 of 1973), plus any jurisdiction given to it by any specific provisions or sections of the 1979 Constitution, plus any extra jurisdiction that may be

[72] (1983)1 NWLR (pt. 51) 506 S.C.

conferred on it in future by any enactment of the National Assembly. As at present none was or had been enacted. In actual practice therefore the only jurisdiction properly belonging to the Federal High Court is still that conferred on it by section 7(1) of the 1973 Act.

(5) The jurisdiction of the State High Courts being unlimited by section 236 necessarily includes the jurisdiction over matters set forth in section 7(1) of Act No.13 of 1973. This means that in respect of those matters both Courts (Federal High Court and State High Courts) have concurrent jurisdiction.

(6) The Federal High Court has no jurisdiction even over matters coming generally under section 7(1) unless such matters or causes relate to the revenue of the Government of the Federation.

(7) Section 7(3) of Act No.13 of 1973 did not confer any additional jurisdiction on the Federal High Court but rather it merely amplify ed section 7(2) which itself relates back to section 7(1).

Thus the position was settled before the promulgation of Decree 107 of 1993.

The Advent of Decree 107 of 1993

This Decree resurrected the jurisdictional conflict between the Federal High Court and the State High Court. The Decree not only made the jurisdiction of the Federal High Court exclusive but also widened the scope of the Court's jurisdiction. The provisions of the Decree relevant to this discourse are as follows:

230(1) - Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion to (sic) any other court in civil causes and matters arising from:

a) the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is party;

b) the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;

c) customs and exercise duties and export duties including any claim by or against the Department of Customs and Excise or any member or officer thereof, arising from the performance or purported performance of any duty imposed under any regulation relating to customs and exercise duties and export duties;

d) banking, banks, other financial institutions, including any action between one bank and other (sic), and action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bill of exchange, letter of credit, promissory note and other fiscal measures; Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank;

e) the operation of any Act or Decree relating to companies and allied matters and any other common law regulating the operation of companies;

g) any Federal enactment relating to copyright, patents, designs, trade marks and passing-off, industrial designs and mercantile marks, business names and commercial industrial monopolies, and combines and trusts, standards of goods and commodities and industrial standards.

i) any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluent and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal Port, including the constitution and power of the ports authorities for Federal ports and carriage by sea;

j) diplomatic, consular and trade representation;
k) citizenship, naturalization and aliens, deportation of persons, who are not citizens of Nigeria, extradition, immigration into and emigration from Nigeria, passport and visa;
l) bankruptcy and insolvency;
m) aviation and safety of aircraft;
n) arms, ammunition and explosives;
o) drugs and poisons;
p) *(sic)* mines and minerals (including oil fields, mining, geological surveys and natural gas);
r) weights and measures;
s) the administration or the management and control of the Federal Government or any of its agencies;
t) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so as it affects the Federal Government or any of its agencies; and
u) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; Provided that nothing in the provisions of paragraphs (q), (r) and (s) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.

(1A).[73] The Federal High Court shall also have and exercise jurisdiction and powers in respect of treason and the criminal causes or matters in respect of which jurisdiction is conferred by subsection (1) of this section.

Under section 230(1)(c) of the Decree, the jurisdiction of the Federal High Court now extends to claims against the Custom

[73] i.e. Subsection (1A) of section 230 of the 1979 Constitution as amended by Decree 107 of 1993

Department or officer of the Department. The proviso to section 230(1)(d) appears to imply that the jurisdiction of the Federal High Court does not extend to banker/customer relationship. In *Nigerian Industrial Development Bank Ltd. v Fembol (Nig) Ltd*[74] the respondents filed an action in the Akure High Court, Ondo State against the appellants and three others as defendants in respect of a dispute arising out of a banking transaction entered into by the two sets of parties. The first appellant, being substantially a government owned institution, brought a preliminary objection claiming that by reason of section 230(1) of the 1979 Constitution (as amended by Decree 107 of 1993), the Ondo State High Court did not have jurisdiction to hear the matter as same was within the exclusive jurisdiction of the Federal High Court. The Court of Appeal held that any dispute arising from a banker/customer relationship is expressly excluded from the provisions of section 230(1) of the 1979 Constitution (as amended) by virtue of the proviso to sub-section 230(1)(d). The result of this is that the State High Court and not the Federal High Court has jurisdiction over the claim.

In *N.D.I.C. v Federal Mortgage Bank of Nigeria*[75] Uwaifo, J.C.A. (as he then was) interpreted the proviso to section 230(1)(d) of the 1979 Constitution as amended by Decree 107 of 1993 to mean that the State High Court shall have jurisdiction in the circumstance indicated in the proviso; and that the Federal High Court shall not have exclusive jurisdiction as given to it under the main section, when it comes to matters falling within the circumstance of the proviso. The Court of Appeal's decision in this case went on appeal to the Supreme Court on the main issues.[76] At the Supreme Court, Ogundare, J.S.C. who delivered

[74] (1997)2 NWLR (Pt 489) 543 C.A.
[75] (1997)2 NWLR (Pt 490) 735
[76] See *Federal Mortgage Bank of Nigeria Ltd v N.D.I.C.* (1999) 2 NWLR (Pt 591) 333 S.C. at 363

the lead Judgment of the Supreme Court in agreeing with the Court of Appeal said:

> . . . I must hold that it is a simple customer/banker relationship which the proviso in section 230(1)(d) exempts from the exclusive jurisdiction of the Federal High Court.[77]

This position was subsequently interpreted by the Court of Appeal in *Coop Development Bank PLC v Joe Golday Co.*[78] and *Afribank PLC v Kokatex Commerce General (Nig) Ltd*[79] to mean that the Federal High Court has concurrent jurisdiction with the State High Court in any matter bordering on banker/customer relationship. The decision in *Federal Mortgage Bank of Nigeria v Nigeria Deposit Insurance Corporation*[80] was cited and followed by the Supreme Court in the recent case of *FMBN v Olloh*[81]. However, in the latter case, the Supreme Court merely held that a State High Court has jurisdiction in matters of banker/customer relationship without deciding whether the Federal High Court has concurrent jurisdiction in the matter.

With due respect, the proposition that the State High Court and the Federal High Court have concurrent jurisdiction in actions founded on banker/customer cannot be supported. It has the effect of doing serious violence to the plain words of the proviso to section 230(1)(d) of the 1979 Constitution as amended by Decree 107 of 1993. The proviso is clear and unambiguous that matters of banker/customer relationship do not come with the jurisdiction of the Federal High Court.

It must be noted that where in a customer/banker relationship the customer is a bank, the proviso is still applicable.[82] Thus the mere fact that an action is brought by one bank against

[77] *Ibid* at 363
[78] (2000) 14 NWLR (Pt 688) p.506 at 548-549
[79] (2001)8 NWLR (pt. 714) 87
[80] Supra
[81] (2002) 9 NWLR (Pt 773) 475
[82] *B. Zee Bee Hotels Ltd v Allied Bank (Nig) Ltd* (1996) 8 NWLR (Pt 465) 176 C.A.

another does not *per se* bring the matter outside the purview of the proviso to section 230(1)(d) if their transactions disclose banker/customer relationship.

In the recent case of *Attorney General of Lagos State v Eko Hotels*[83] the Supreme Court held that the combined effect of sections 151-153 of the Companies and Allied Matters Act Cap 20 Laws of the Federation 2004 and section 251(1)(e) of the 1999 constitution is to vest exclusive jurisdiction on the Federal High Court to entertain disputes arising from a sale and purchase of shares. It was also held in C.G.G. (Nig) Ltd v Ogu[84] that every civil matter arising from or connected with, mines, minerals, including oil fields, oil mining, geological surveys and natural gas fall within the exclusive jurisdiction of the Federal High Court. However, in respect of claim for compensation for land used for oil exploration the Supreme Court held in *Nkuma v Odili*[85] that the State High Court is the court with jurisdiction to entertain the matter.

Perhaps the most controversial aspect of section 230(1) of Decree 107 of 1993 appears to be paragraphs (q), (r), (s) pertaining to actions against the Federal Government and any of its agencies. Explaining the mischief behind these paragraphs, the then Attorney General of the Federation, Dr. Olu Onagoruwa, stated that it was an aftermath of Justice Donald Akinsanya's judgment, which declared illegal the Interim National Government. The Federal Government felt that too many injunctions and orders were being granted against it by State High Courts. The crucial question is whether these provisions are the best solution to the problem. If State High Courts make unjustified orders and injunctions against the Federal Government, such orders and injunctions are not final; they are subject to appeal. Secondly, it means that something is wrong with our judicial system and a panacea, which will strike at

[83] (2007) 18 NWLR (pt 1011) 378
[84] (2005)8 NWLR (pt 927) 366
[85] (2006)6 NWLR (pt 977) 587

the root of the malady, should be sought for rather than resorting to such panicky and *ad hoc* measures. Furthermore, the action of the Federal Government may suggest that the Federal High Court will be favourably disposed towards the Federal Government and its agencies, in which case the Federal High Court will cease to be seen as impartial. Moreover, the agencies of the Federal Government are not properly categorized, more especially during military regimes whose command structure dovetails into the governance of the country and thus makes it difficult to say who is and who is not an agent of the Federal Government. The issue of whether a State Military Administrator and State Commissioner of Police is an agency of the Federal Government arose in the case of *Military Administrator of Kwara State & 4 Ors v Lafiagi.*[86] The facts of the case are as follows. An allegation was made against the respondent that he misappropriated large sums of money granted by the Federal Government to the Kwara State Government when the respondent was the civilian Governor of the State. On taking over the governance of Kwara State as Military Administrator, the 1st appellant, decided to investigate the matter. The Military Administrator set up an investigating Panel headed by Hon. Justice Isa Ayo Salami, a Justice of the Court of Appeal. After completing its assignment, the Panel submitted its report and recommendations to the 1st appellant who issued a white paper on the matter. The respondent instituted an action in the Federal High Court, seeking, *inter alia*, a declaration that the commission of inquiry lacked jurisdiction to entertain the matter and that the decision of the Kwara State Government based on the recommendation of the Commission directing him to refund ₦32 million and to prosecute him without giving him the opportunity of reacting to the recommendations was a breach of his right to fair hearing. The appellants filed a preliminary objection challenging the jurisdiction

[86] (1998) 7 NWLR (Pt 557) 202 C.A.; See also *Mil. Admn. Of Benue State v Abayilo* (2001) FWLR (Pt 45) 607

of the Federal High Court to entertain the matter in that the whole incident that led to the case was a State Government affair and that none of the appellants were agents of the Federal Government. The Federal High Court dismissed the objection. On appeal to the Court of Appeal, in unanimously allowing the appeal, the Court of Appeal held, *inter alia*, that in spite of the command structure, which is a normal feature of a military administration, the provisions of the 1979 Constitution as amended did not make a State Government an agency of the Federal Government. Likewise, a Military Administrator and a Commissioner of Police posted to a State when carrying out a duty purely in relation to the State matter cannot be regarded as an agent of the Federal Government when carrying out such a duty. The Court of Appeal, after finding that the Federal High Court lacked jurisdiction in the matter made an order transferring the action to the Kwara State High Court.

It has been held by the Court of Appeal that the Phrase "any of its agencies" as contained in Decree 107 of 1993 is meant to cover all the organs established by law through which the Federal Government carries out its functions.[87] In the case of *University of Abuja v Ologe*,[88] the Court of Appeal held that the University of Abuja is an agency of the Federal Government and therefore an action brought by a dismissed employee of the University properly lies at the Federal High Court. On the contrary, it has been held that an incorporated company cannot be an agency of the Federal Government even if the Federal Government wholly owns the shares of the company.[89] In *Nigerian Industrial Development Bank Ltd v FEMBOL (NIG) Ltd*[90] the contention of learned counsel for the appellant at the Court of Appeal was that

[87] *National Orthopaedic Hospital Board & Anor v Godfrey Ajogwu* (2000) 12 NWLR (Pt 682) 626 C.A.
[88] (1996) 4 NWLR (Pt 445) 706
[89] See the Court of Appeal decision in *Nigerian Industrial Development Bank Ltd v FEMBOL (Nig) Ltd* (1997) 2 (Pt 489) 543 C.A.
[90] *Ibid*

because the first appellant is a limited liability company whose shares are wholly owned by the Federal Government and its agencies, and as a result, whose control and management are by the Federal Government, it ought to be regarded as an agency of the Federal Government within the provisions of sections 230(1)(q), (r) and (s) of the 1979 Constitution as amended by Decree 107 of 1993. In rejecting this contention, Akintan, J.C.A. said:

> .... It is not in dispute that the 1st appellant is a company incorporated under the Companies Act 1968, an Act now replaced with the Companies and Allied Matters Act, 1990. Arising from the facts of its incorporation, therefore, is that the company has a distinct legal personality and distinct identity from its shareholders, subscribers, and promoters. It is also not an agent of its shareholders. It follows therefore that the 1st appellant could not be held to be an agency of the Federal Government, even if all its shares are wholly owned by that Government. The reference in the phrase: "Federal Government or its agencies" in section 230(1) of the 1979 Constitution cannot be interpreted to infer that the legislature intended to change the age-long legal principles governing the separate identity of an incorporated company *vis-à-vis* its shareholders, directors, and subscribers.[91]

Similarly, in *Federal Mortgage Bank of Nigeria v Olloh*,[92] the question was whether the Federal Mortgage Bank of Nigeria is an agency of the Federal Government within the meaning of section 230(1)(q), (r) and (s) of the 1979 Constitution as amended by Decree No.107 of 1993. The Supreme Court held that though the Bank was created by an Act of the National Assembly and the

[91] At page 546
[92] (1997) 4 NWLR (Pt 498) 192 C.A.

staff of the Bank come within the definition of "public service of the Federation" in section 277(1) of the 1979 Constitution, the Federal Mortgage Bank is not an agency of the Federal Government.

It has been held that the proviso to paragraphs (q), (r), (s) of section 230(1) of the 1979 Constitution (as amended by Decree 107 of 1993) does not derogate from the exclusive jurisdiction of the Federal High Court. In *Mohammed Mubarak Ali v CBN*[93] the appellant who was a Manager (Banking) at the Kaduna Branch of the Respondent was suspended from office on 27th October, 1993 as a result of criminal charges pending against him before the Miscellaneous Offences Tribunal. However, while still on suspension, he was dismissed. The Appellant sued the Respondent in the High Court of Kaduna State for irregular and wrongful dismissal. The Defendant objected to the jurisdiction of the State High Court to handle the matter and the objection was upheld. Dissatisfied with the decision, the appellant appealed to the Court of Appeal. The Court of Appeal held, *inter alia*, that section 230 of the 1979 Constitution as amended by Decree 107 of 1993 in its ordinary meaning is intended to give exclusive jurisdiction to the Federal High Court in matters specified therein. According to the Court, the proviso to paragraphs (q), (r), (s) of section 230(1) does not derogate from the exclusive jurisdiction conferred on the Federal High Court.

A similar decision was reached by the majority of the Court of Appeal in *Oil Mineral Producing Areas Development Commission (OMPADEC) & 2 Ors v Wonodic C. Ajoku*[94] when a similar question arose in that Court.

[93] (1997)4 NWLR (pt 498) 192 CA
[94] (2001) 8 NWLR (Pt 715) 379 C.A.

The Jurisdiction of the Federal High Court Under the 1999 Constitution

Section 251 of the 1999 Constitution, which confers jurisdiction on the Federal High Court, is in substance a reproduction of section 230 of the 1979 constitution as amended by Decree 107 of 1993. The above section also empowers the National Assembly to confer additional jurisdiction on the Federal High Court. Section 19 of the Economic and Financial Crimes Act 2004 confers jurisdiction on the Federal High Court, High Court of a State or the Federal Capital Territory to try offences under the Act. Some Decrees enacted before the coming into effect of the 1999 constitution which conferred additional jurisdiction on the Federal High Court will qualify as existing laws saved pursuant to section 315 of the 1999 Constitution. Such Decrees[95] include the Insurance Commission Decree No.2 of 1997 which, for purposes of the Decree, defines court in section 97 to mean the Federal High Court. Another such Decree is the Admiralty Decree No.59 of 1991. The Decree defines the extent of the admiralty jurisdiction of the Federal High Court. Of particular interest is section 1(h) of the Decree which provides:

1) The admiralty jurisdiction of the Federal High Court includes:. . .
2) any banking or letter of credit transaction involving the importation or exportation of goods to and from Nigeria in a ship or an aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer.

This provision is now of no moment since it has been held that both the Federal and State High Courts have concurrent jurisdiction in actions bordering on banker/customer relationship.

The extent of the admiralty jurisdiction of the Federal High Court was in issue in *NV Scheep v MV S.Araz.*[96] In that case, the

[95] Now Acts
[96] (2002) 15 NWLR (Pt 691) 622

Supreme Court found that the action of the appellants was not for the enforcement of, or a claim arising out of, an arbitral award; it was for the sole purpose of obtaining security for the satisfaction of whatever award that might ultimately be made in their favour in the United Kingdom arbitration proceedings. The Supreme Court held that the appellants cannot in the circumstance invoke the admiralty jurisdiction of the Federal High Court because our law as it stands does not clothe the Federal High Court with such admiralty jurisdiction.

Another Decree which makes far-reaching provisions on the jurisdiction of the Federal High Court is Decree No.62[97] of 1999 which abolished Special Military Tribunals and transferred certain matters within the jurisdiction of these Tribunals to the Federal High Court or State High Courts. Matters in Part 1 of the schedule to the Decree were transferred to the Federal High Court. Accordingly, the jurisdiction hitherto exercised by Special Military Tribunals under the following Decrees were transferred to the Federal High Court: Recovery of Public Property (Special Military Tribunal) Decree 1984; Miscellaneous Offences Decree 1984; Counterfeit and Fake Currency Decree 1984; National Drug Law Enforcement Agency Decree 1989; National Agency for Food and Drugs Administration and Control Decree 1993; the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1995; Money Laundering Decree 1995; Counterfeit and Fake Drugs (Miscellaneous Provisions) Decree 1999. Furthermore, section 14(3) of the Food and Drug Act[98] was amended by substituting for the words "High Court of a State or a Magistrate" the words "the Federal High Court".

Under Part II of the Schedule to Decree No.62 of 1999, offences created under the following Decrees now come within the jurisdiction of the State High Courts: Robbery and Firearm (Special Provisions) Decree 1984; Students Union Activities

[97] Tribunals (Certain Consequential Amendments etc) Decree 1999
[98] Cap.159 Laws of the Federation 1990

(Control and Regulations) Decree 1989; Advance Fee Fraud and Other Fraud Related Offences Decree 1995. In 1991, Decree No.60 of that year sought to expand the jurisdiction of the Federal High Court and to make it exclusive. However, that Decree was repealed by Decree No.16 of 1992.

The 1979 Constitution by section 230(2) enabled the Federal Revenue Court Decree No.13 of 1973 to continue as one of the sources of jurisdiction of the Federal High Court. On the other hand, the tenor of section 251 of the 1999 Constitution suggests that the Federal Revenue Court Decree No.13 of 1973 has ceased to be one of the sources of jurisdiction of the Federal High Court. This is because under section 251 of the 1999 Constitution, there appears to be no nexus between the Federal Revenue Court and the Federal High Court.

It is not clear whether the criminal jurisdiction of the Federal High Court is exclusive since the word "exclusive" was not used in section 251(2), which confers criminal jurisdiction on the Court.

Both Decree 107 of 1993 and the 1999 Constitution went short of expressly conferring exclusive jurisdiction on the Federal High Court as a court of first instance in all Federal causes or matters. In *NDIC V FMB*[99] Uwaifo, J.C.A. (as he then was) in his leading judgment said:

> ... Upon reading section 230(1)(a)-(s) of the 1979 Constitution as amended by Decree 107 of 1993 as a whole, it will be appreciated that its import is to bring litigations in all matters which in one form or another concern, affect, or reflect on the vital interests of the Federal Government as regards revenue and other fiscal measures, financial institutions such as banks, the running of the Federal Government and its agencies and all other matters within its exclusive list largely under the exclusive jurisdiction of the Federal High Court.[100]

However, a comparison of the exclusive legislative list and section 251 of the Constitution clearly shows that certain matters within the exclusive legislative list are not listed in section 251 as part of the matters over which the Federal High Court has jurisdiction.

The decision of the Court of Appeal (Enugu Division) in *Omosowan v Chiedozie*[101] appears to be in the opposite direction. In that case, the Court of Appeal held that there is no blanket provision in section 230(1)(a)-(s) of the 1979 Constitution as amended by Decree 107 of 1993 which confers exclusive jurisdiction on the Federal High Court in suits against the Federal Government or any of its agencies regardless of the subject matter. According to the Court, only a few selected topics are made the exclusive preserve of the Federal High Court. The Court of Appeal then came to the conclusion that there is no provision of the above mentioned section conferring exclusive jurisdiction on the Federal High Court to entertain action on simple contracts involving the Federal Government or any of its agencies.

The conferment of exclusive jurisdiction on the Federal High Court nullifies the Supreme Court decision in *Savannah Bank v Pan-Atlantic*.[102]

Unfortunately, the Supreme Court has rendered two conflicting decisions on this issue in the recent cases of *NEPA V Edegbero*[103] and *Onuorah v K.R.P.C. Ltd.*[104] The facts of the former case are as follows. The respondents were employees of the appellant (NEPA). Following an industrial action embarked upon by the employees of the appellant, including the respondents, the appointments of the respondents were terminated. The

[99] (1997)2 NWLR (pt 490) 735

[100] (1997) 2 NWLR (Pt 490) 735
[101] (1998) 9 NWLR (Pt 566) 477
[102] Supra
[103] (2002) 18 NWLR (pt.798) 79
[104] (2005)6 NWLR (pt.921) 392

respondents challenged the termination of their appointment in the High Court of Niger State. The appellant challenged the jurisdiction of the High Court of Niger State to entertain the matter on the ground that the jurisdiction of that court was ousted by virtue of section 230(1)(q),(r)&(s) of the 1979 constitution as amended by Decree 107 of 1993. The High Court held that by virtue of the proviso to the above sub-sections, it has jurisdiction to entertain the matter. The decision of the High Court was affirmed by the Court of Appeal. On further appeal to the Supreme Court, the Supreme Court unanimously allowed the appeal. Ogundare, JSC who read the leading judgment held that the aim of paragraphs (q), (r)& (s) of section 230(1) of the 1979 constitution as amended by Decree No. 107 of 1993 was to vest exclusive jurisdiction in the Federal High Court in matters in which the Federal Government or any of its agencies is a party. A State High Court would no longer have jurisdiction in such matters notwithstanding the nature of the claim in the action. According to His Lordship, a careful reading of paragraphs (q),(r)&(s) of section 230(1) reveals that the intention of the law-makers was to take away from the jurisdiction of the State High Court and confer same exclusively on the Federal High Court actions in which the Federal Government or any of its agencies is a party. In the view of his Lordship, while paragraph (s) talked of actions for declaration or injunction, the proviso extended this to actions for damages, injunction or specific performance. It did not say that actions for damages, injunction or specific performance against the Federal Government or any of its agencies could still come before a State High Court. The High Court was therefore in error in its interpretation of the purport of the proviso. Niki Tobi, JSC in his concurring judgment held that entering into a contract of employment is a business relation which comes within the meaning of administration. Similarly, the Supreme Court held in the case of *Adah v NYSC*[105] that any action

[105] (2002) All FWLR (pt. 223) 1850

for damages, injunction or specific performance against the Federal Government or its agencies have to be commenced in the Federal High Court.

The decision in the *NEPA v Edegbenro* case has far reaching implications. The decision extends the exclusive jurisdiction of the Federal High Court to actions in respect of which the Federal Government or any of its agencies is a party. This goes beyond the words of paragraphs (q),(r)&(s) of section 230(1) of the 1979 constitution as amended by Decree 107 of 1993 which talks of actions brought against the Federal Government or any of its agencies. From the lead judgment, the nature of the subject matter is irrelevant in determining the jurisdiction of the Federal High Court once the Federal Government or any of its agencies is a party. This goes to narrow down the jurisdiction of both the State High Court and the High Court of the Federal Capital Territory Abuja.[106] The decision is also in conflict with the subsequent decisions of the Supreme Court vesting concurrent jurisdiction on both the Federal High Court and the State High Court in the matter of fundamental rights enforcement.[107]

On the other hand, in the subsequent case of *Felix Onuorah v Kaduna Refining & Petrochemical Co. Ltd,*[108] the appellant entered into a contract to purchase specified number of empty tins from the respondent at an agreed amount which he paid to the respondent. But before delivery was made to the appellant, the respondent increased the price of the tins and asked the appellant to pay the difference between the old and the new prices. The appellant refused and insisted that the respondent was bound to deliver to him the quantity of the empty tins he had ordered at the price agreed by the parties. Consequently, the appellant filed a suit against the respondent at the Federal High Court claiming, inter

[106] See a critical analysis of this decision by Okuwade Olorundare *"NEPA V EDEGBENRO*: Need For Modification" Thisday, Tuesday, June 15, 2004 p.36
[107] See *Jack v University of Agriculture, Makurdi* (2004)5 NWLR (Pt 865) 208
[108] (2005)6 NWLR (pt.921)393

alia, specific performance of the contract, which was granted by the Federal High Court. On appeal to the Court of Appeal, the respondent challenged the jurisdiction of the Federal High Court to entertain the matter. The Court of Appeal held that the Federal High Court has jurisdiction to entertain the suit. On further appeal to the Supreme Court, the Supreme Court in unanimously allowing the appeal held that section 230(1) of the 1979 constitution as amended by Decree 107 of 1993, did not confer on the Federal High Court jurisdiction over matters of simple contract. The case of *NEPA v Adegbenro*[109] was not cited to the Supreme Court nor did the Court refer to it suo motu. Even Justices Sylvester Umaru Onu and Niki Tobi who were on the Supreme Court Panel that decided the case of *NEPA v Edegbenro* did not refer to that decision in the instant case.

It is submitted with due respect that the decision in the Onuorah case is right but the reason for the decision is wrong. The appeal should have been rightly dismissed on the ground that the respondent, being an incorporated company under the Companies and Allied Matters Act is a body distinct from the shareholders and is therefore not an agency of the Federal Government. Akintan, J.S.C. who delivered the leading judgment alluded to this fact but appears not to have grounded his decision on it. If he had done so, it would have brought the decision in accord with the previous Supreme Court decisions such as *Federal Mortgage Bank of Nigeria v Olloh*[110]. The decision came into conflict with *NEPA v Edegbenro* when His Lordship went further to say:

> A close examination of the additional jurisdiction conferred on the Federal High Court in the section and by the 1979 Constitution clearly shows that

[109] (2002) 18 NWLR (pt.798)79

[110] (2002)9 NWLR (pt.773)475. In *Okomu Oil Palm Co. Ltd. V Iserhienrhien* (2001)6 NWLR 660 at 686, the Supreme Court held that the fact that the Federal Government holds a controlling number of shares in the appellant does not make it an agency of he Federal Government.

> the court was not conferred with jurisdiction to entertain claims founded on contract as in the instant case. In other words, section 230(1) provides a limitation to the general and all embracing jurisdiction of the State High Court because the items listed under the said section 230(1) can only be determined exclusively by the Federal High Court. All other items not included in the list, would therefore still be within the jurisdiction of the State High Court.[111]

This opinion has the effect of rendering paragraphs (q),(r)&(s) of section 230(1) of the 1979 constitution as amended by decree 107 of 1993 (which is in pari materia with section 251(1)(p),(q)&(r) of the 1999 Constitution) redundant which could not have been the intention of the drafters of the constitution when the mischief behind these subsections are taken into consideration.

Niki Tobi, JSC, with due respect, made a volte face in the instant when he said that only the reliefs or claims (that is the subject matter) donate jurisdiction to the court. In the *NEPA v Edegbenro* case he maintained that both the party sued and the subject matter of the suit are relevant in determining the jurisdiction of the Federal High Court.

Jurisdiction to Enforce Fundamental Rights

Section 46 of the 1999 Constitution confers jurisdiction to enforce fundamental rights on a 'High Court' in a State. Both the Constitution and the Fundamental Rights (Enforcement) Procedure Rules define High Court as "State or Federal High Court". In *Bronik Motors Ltd v Wema Bank*[112] the Supreme Court held that where both the State High Court and the Federal High Court exist in a State, both have concurrent jurisdiction in matters pertaining to fundamental rights. But the question is, in what circumstance

[111] At p.405

[112] Supra

does one go to one court or the other? The decisions of the courts while considering the issue in relation to section 42 of the 1979 Constitution have not been consistent. In *Senate of the National Assembly v Momoh*[113] the Court of Appeal (Lagos Division) held that the implication of the Federal principle is that a person who wishes to enforce fundamental right against the Federal Government or authority must go to the Federal High Court. A majority of the Court of Appeal (Jos Division) rejected a similar proposition in *Federal Minister of Internal Affairs v Shugaba.*[114] The Supreme Court decision in *Tukur v Government of Gongola State*[115] tried to settle the matter. In that case, the Military Government of Gongola State removed Alhaji Umaru Abba Tukur, the Appellant as the Emir of Muri. The appellant was in addition to his removal ordered to be detained at Mubi. The appellant filed an application under the Fundamental Rights (Enforcement Procedure) Rules 1979 at the Kano Federal High Court seeking, *inter alia*, an order quashing the deposition order on the ground that it violated his fundamental rights guaranteed by section 33(1) of the 1979 Constitution in that the appellant was never given the opportunity of being heard before the order was made. The Supreme Court held that rather than expand the jurisdiction of the Federal High Court, section 42(3) of the 1979 Constitution has by the opening phrase "subject to the provisions of the Constitution" limited the jurisdiction of the Federal High Court to enforce the fundamental right provision to matters in respect of which the Constitution has invested it with jurisdiction. According to the Court, a court cannot adjudicate over ancillary claims if it has no jurisdiction to entertain the main claim. By the same token, an ancillary claim can only be determined by the court with jurisdiction to determine the principal claim. In that particular case,

[113] Supra
[114] (1989) 4 NWLR (Pt 117) 517
[115] Supra

the State High Court, being a court of unlimited jurisdiction, has jurisdiction to hear the matter.

The Supreme Court decision in the *Tukur* case when read together with paragraphs (p), (q), (r) of section 251(1) of the 1999 Constitution will suggest that any action for the enforcement of fundamental rights against the Federal Government or any of its agencies can only be brought at the Federal High Court. In *Dr. Okoroma & Anor v Chief Christian Uba & 5 Ors*[116] the matter was in substance a land dispute. The destruction of the property on a piece of land in dispute was reported to the Police. Dissatisfied with the role of the Police in the matter, the 1st Respondent instituted an action in the Federal High Court against the appellants and the 2nd to the 6th Respondents who were senior police officers at the material time. The reliefs sought by the Respondent (Applicant) included a declaration that his right of way or easement and profits unto or over the disputed strip of land was appurtenant to his property and also that the conduct of the appellants and the 2nd – 6th Respondents in preventing him from enjoying the profits in respect of the strip was a violation of sections 38 and 40 of the 1979 Constitution. Leave was granted to the 1st Respondent (applicant) to enforce his fundamental right. An objection by the appellants to the jurisdiction of the Federal High Court to entertain the matter was overruled. On appeal to the Court of Appeal, the Court of Appeal in unanimously allowing the appeal, held, *inter alia*, that by virtue of section 42(1) of the Constitution of the Federal Republic of Nigeria, 1979, a litigant who wants to enforce his fundamental rights is at liberty to go to the State High Court or the Federal High Court. But where he goes to the Federal High Court, it must be on matters in which the Federal High Court has jurisdiction. If a matter is not covered by the specific constitutional provisions or the law giving the Federal

[116] (1999) 1 NWLR (Pt 587) 359. See also *Inah v Ukoi* (2002) 9 NWLR (Pt 773) p.563

High Court jurisdiction, no fundamental right action can be brought in the Federal High Court.

Thus, generally, it is the subject matter of the suit and not the party sued that determines jurisdiction on questions of enforcement of fundamental rights. However, where the action is against the Federal Government or any of its agencies, the party sued becomes relevant in determining jurisdiction pursuant to paragraphs (p), (q), (r) of section 251(1) of the 1999 Constitution. However, for this provision to apply, the Federal Government or its agencies must be the principal party, not a nominal or ancillary party. And the agent of the Federal Government must have acted in that capacity. In the *Dr. Okoroma*[117] case the Court of Appeal held that although the 2nd – 6th Respondents are police officers in the Federal establishment, so long as they are in the state carrying out state duties, they are not agencies of the Federal Government for purposes of section 230(1) (q), (r), and (s) of the 1979 Constitution as amended by Decree 107 of 1993. The Court of Appeal in that case reasoned that a police officer in Nigeria is capable of enjoying a dual status. When he is complying with the directions of the Governor of a State with respect to maintaining and securing of public safety and public order within the State he is an agent of the State and not an agent of the Federal Government even though he is a servant of the Federal Government. On the other hand, where he is also complying with the directions of the President issued to the Inspector General of Police then he is acting as an agent of the Federal Government. The penultimate proposition cannot be supported. By section 214 of the 1999 Constitution of Nigeria, we have a single Police Force which is a federal agency. And Police is item 45 in the exclusive legislative list. It is therefore submitted with due respect that the question of the Police enjoying a dual status, cannot arise. If the members of

[117] Maclean (ed) *European Community Law and Human Rights Textbook* (London: The HLJ Group Ltd, 1992) pp.61-62

the police Force violate people's rights even when carrying out the order of a State Governor, the Police will still be liable, more so when the Police Force is not under obligation to carry out every order of a Governor willy nilly. However, this issue is no longer of any moment since it has been held that both the Federal High Court and State High Court have concurrent jurisdiction on questions of fundamental rights enforcement.

The Supreme Court has finally settled the issue of jurisdictional conflict between the Federal and State High Court on questions of fundamental rights enforcement in *Grace Jack v University of Agriculture, Makurdi*[118]. The appellant in that suit was employed by the respondent on 4th June, 1990 as a clinic attendant. On 7th May, 1999 she was transferred to the Bursary of the University. An internal inquiry was set up by the respondent to determine the involvement of the appellant in some misconduct in relation to the collection of, and issuance of receipts for, fees and other dues from students. The panel of inquiry found the appellant guilty of misconduct and accordingly the respondent dismissed her from service. The appellant commenced an action at the High Court of Benue State under the Fundamental Rights (Enforcement Procedure) Rules challenging her dismissal. The trial court granted all the relief's claimed by the appellant. The respondent appealed against the decision to the Court of Appeal which allowed the appeal on the ground that the High Court lacked the jurisdiction by virtue of section 230 (1)(s) of Decree 107 of 1993 to entertain the matter since the respondent is a Federal Government Agency. On further appeal to the Supreme Court, the Supreme Court held that section 42(1) of the 1979 constitution is a special provision which could derogate from the general provision in section 230(1) of the 1979 constitution as amended by Decree 107 of 1993. Accordingly, both the Federal High Court and the High Court of a State have concurrent jurisdiction in matters of enforcement of fundamental rights. Nevertheless, the appeal was dismissed

[118] (2004)5 NWLR (pt 865) 208

because violation of fundamental rights was only an ancillary issue in the suit. In the recent case of *Alhaji Sheu Adbul Gafar v The Government of Kwara State & 2 Ors*[119] the Supreme Court reaffirmed the position that both the Federal and State High Courts have concurrent jurisdiction on questions of fundamental rights enforcement. These decisions, though welcome for promoting access to justice, are nevertheless in conflict with the Supreme Court decision in *Tukur v Government of Gongola State*[120]

Power to Transfer a Suit Commenced in the Wrong Court

It was held in *Fasakin Foods (Nign) Ltd v Shosanya*[121] that the Federal High Court can transfer to a State High Court a matter in which it lacks jurisdiction, but there is no state law empowering a State High Court to do so. It is submitted that it is imperative that state legislative houses enact appropriate laws to enable State High Courts to transfer matters falling within the jurisdiction of the Federal High Court to the Federal High Court. In any case, it should be part of the inherent powers of a court to transfer a matter in which it lacks jurisdiction to the appropriate court.

High Court Of The Federal Capital Territory Abuja

The High Court of the Federal Capital Territory, Abuja is a creation of section 255 of the 1999 constitution. The jurisdiction of the court is stated in section 257 in the same terms as the jurisdiction of State High Court. However, section 257 must be read together with section 299 of the 1999 constitution which provides as follows.

> "The provision of this constitution shall apply to the Federal Capital Territory as if it were one of the states of the federation, accordingly,

[119] (2007) 4 NWLR (pt 1024) 375
[120] (1989) 4 NWLR (pt 117) 517
[121] (2006)10 NWLR (pt 987) 126

(a) all the legislative powers, the executive powers and judicial powers vested in a House of Assembly, the Governor of a state and in court of a state shall, respectively, vest in the National Assembly, the President of the Federation and in the court which by virtue of the foregoing provisions are courts established for the Federal Capital Territory;
(b) all the powers referred to in paragraph (a) of this section shall be exercised in accordance with the provision of this constitution; and
(c) the provisions of this constitution pertaining to the matters aforesaid shall be read with such modification and adaptations as may be reasonably necessary to bring them into conformity with the provisions of this section.

The provisions of section 301 of the 1999 constitution are also relevant. The section provides as follows: "Without prejudice to the generality of the provisions of section 299 of this constitution, in its application to the Federal Capital Territory, this constitution shall be construed as if:

(a) .....
(d) references to the Chief Judge and Judges of the High Court of a State were references to the Chief Judge and Judges of the High Court which is established for the Federal Capital Territory, Abuja by the provisions of this constitution.

Sharia Court of Appeal

The Sharia Court of Appeal was established first in 1960. It replaced the Moslem Court of Appeal, which was considered unsatisfactory. At the time of establishment, the jurisdiction conferred on the Sharia Court of Appeal was spelt out by section 12 of the Sharia Court of Appeal Law, 1960, covering Moslem law concerning marriage, divorce, guardianship of children, wagah, gifts, wills, succession (or inheritance) and maintenance of infants or persons of unsound mind. In addition to these, section 12(a) of the Sharia Court of Appeal Law of 1960 gave the court jurisdiction in matters other than Moslem personal law when both parties in the

court of first instance stated in writing that they wanted the case decided according to Moslem law.[122]

When the 1979 constitution was being drafted, the Sharia Court of Appeal became a matter of great controversy. The Constitution Drafting Committee had proposed that there should be a Federal Sharia Court of Appeal.[123] Moslems supported the proposition with vim and vigour while non-Moslems opposed it with all their might. The compromise on the matter was reflected in the 1979 Constitution. Section 240 of the 1979 constitution gave any State that requires it the liberty to establish a Sharia Court of Appeal. The 1999 Constitution has a similar provision in section 275.

The Sharia Court of Appeal consists of a Grand Kadi and such number of Kadis as may be prescribed by a law of the House of Assembly of the State.[124] The Sharia Court of Appeal of a State, in addition to such other jurisdiction as may be conferred upon it by the law of the State, is empowered to exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of section 277.[125] Subsection (2) of section 277 provides that for the purposes of subsection (1) of the section, the Sharia Court of Appeal shall be competent to decide: (a) any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and

[122] Wali, O.F.R. "Constitutional Structure and Position of the Judiciary with Particular reference to the Sharia Court of Appeal" *1989 Judicial Lectures: Continuing Education for the Judiciary* (Lagos: MIJ Professional Publishers Limited, 1991) P.154.

[123] Proceedings of the Constituent Assembly. Official Report vol. I (Federal Ministry of Information, Lagos, 1978) 47.

[124] S. 275(2)(b) 1999 Constitution

[125] S. 277(1) 1999 constitution

relating to family relationship or the guardianship of an infant; (b) where all the parties to the proceedings are

Muslims, any question of Islamic personal law regarding a marriage including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant; (c) any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim; (d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or (e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

Section 277 of the 1999 Constitution, which provides for the jurisdiction of the Sharia Court of Appeal is almost in pari materia with section 242 of the 1979 Constitution. However, whereas section 242(2)(e) of the 1979 Constitution extends the jurisdiction of the Court to cases "where all the parties to the proceedings (whether or not they are Muslims) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law....", the equivalent provisions in the 1999 constitution (sections 262(2) and 277(2)) require that the parties must be Muslims. Thus, a non-Muslim party cannot by consent submit himself to the jurisdiction of the court whereas that was possible under the 1979 constitution.

Decree, 107 of 1993, which amended the 1979 constitution, had omitted the word personal from section 242 of the 1979 constitution that confers jurisdiction on the Sharia Court of Appeal. Decree 26 of 1986 had earlier made a similar omission. The question was whether that omission had by implication extended the jurisdiction of the Sharia Court of Appeal. The issue arose in

Maida v Modu.[126] The appellants sued the respondents at the Mobbar Area Court, Damasak, Borno State, for declaration of title to a farmland. The Area Court held in favour of the appellants, whereupon the Respondents appealed to the Upper Area Court, Kukawa, which dismissed the appeal, upholding the Area Court judgment. On further appeal, the Borno State Sharia Court of Appeal, Maiduguri, allowed the appeal, set aside the decision of the trial Area Court and ordered a retrial by the Upper Area Court. Unhappy with the decision of the Sharia Court of Appeal, the appellants appealed to the Court of Appeal. At the Court of Appeal, it was contended that the Sharia Court of Appeal had no jurisdiction to entertain a land matter not involving Islamic personal law. Holding that the Sharia Court of Appeal had no jurisdiction in the matter, the Court of Appeal said that the omission of the word 'personal' from the provision that confers jurisdiction on the Sharia Court of Appeal does not enhance the court's jurisdiction.

Some states that have recently adopted the Islamic legal code have established Sharia Courts of Appeal. Section 43 of the Zamfara State Sharia Courts (Administration of Justice and Certain Consequential Changes) Law 1999 which confers jurisdiction on the Sharia Court of Appeal provides:

> The Sharia Court of Appeal shall have the jurisdiction and power to hear and determine all appeals from the decisions or orders of an Upper Sharia Court sitting in its original or appellate jurisdiction in all civil or criminal proceedings as provided for in this law.

This provision appears to be contrary to the letters and spirit of the 1999 Constitution. Though section 277(1) empowers a State House of Assembly to confer additional jurisdiction on the Sharia

[126] (2000)4 NWLR (Pt 65)99. See also *Gambo v Tukuji* (1997)10 NWLR (Pt 526)591; *Muninga v Muninga* (1991)1 NWLR (Pt 527)1; *Garba v Dogon Yaro* (1991)1 NWLR (Pt 165)102.

Court of Appeal, such jurisdiction must relate to subsection (2) of section 277 which prescribes matters in respect of which the State Sharia Court of Appeal is competent and such matters must savour the flavour of Islamic personal law. The provision, no doubt, cannot stand with the Court of Appeal decision in the *Maida* case. In the recent case of *Haji Hamma Maishanu & Anor v Isa Ardo Manu & Anor*[127] what was in issue in the case was title to land. The Court of Appeal held that the Sharia Court of Appeal has no jurisdiction to determine any matter which is not an issue of Islamic personal law.

By section 244(1) of the 1999 constitution, an appeal shall lie from decisions of a Sharia Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic personal law, which the Sharia Court of Appeal is competent to decide.

Customary Court of Appeal

By section 280(1) of the 1999 Constitution, any State that requires a Customary Court of Appeal is at liberty to establish it. The Customary Court of Appeal of a State shall consist of a President and such number of judges as may be prescribed by a law of the House of Assembly of the State.[128] However, for the purpose of exercising any jurisdiction conferred upon it a Customary Court of Appeal of a State shall be duly constituted if it consists of at least three Judges of that Court. The Court is empowered to exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.[129] The Court shall also exercise such jurisdiction and decide such questions as may be prescribed by a law of the House of Assembly of the State for which it is established.[130] In *Ojisua v*

[127] (2007) 7 NWLR (pt 1032) 42
[128] S. 280(2)
[129] S. 282(1)
[130] S. 282 (2)

Aiyabelehin[131] the Court of Appeal held that the law making powers of the legislature in relation to the Customary Court of Appeal must relate to customary law. This is because the Customary Court of Appeal of a State is created to exercise appellate jurisdiction in civil proceedings involving questions of customary law.[132] Appeal lies as of right to the Court of Appeal from the judgment of the Customary Court of Appeal of a State.

Court of Resolution

A Court of Resolution was first established in the Northern Nigeria in 1960 pursuant to the provisions of the Court of Resolution Law 1960 of the former Northern Region. The States that were subsequently carved out of the former Northern Region retained the Court of Resolution. The Court is to resolve conflict of jurisdiction between the Sharia Court of Appeal and the High Courts. It is usually composed of the Chief Judge of the state, who is the President of the Court, the Grand Kadi of the State, one judge of the Sharia Court of Appeal nominated by the Grand Kadi.[133] When any question of conflict of jurisdiction arises and is referred to the Court, the Court will make a declaration as to which of the Courts has jurisdiction over the matter. The decision of the Court is final and not subject to appeal.[134]

Magistrate's Courts

Section 6(4)(a) of the 1999 Constitution empowers State Houses of Assembly to establish other courts other than superior courts of record. This provision sustains the Magistrate Courts established under the Magistrate's Court Laws of various States of Nigeria. There are in each State of the Federation many Magistrate Courts as there are Magistrates.

[131] (2001) 11 NWLR (Pt 723) p. 45 at 52
[132] Dang Pam v Sale Dang Gwom (2000)1 WRN 51 at 58
[133] Court of Resolution Law 1960 Ss. 2 and 3
[134] Court of Resolution Law 1960 Ss. 2 and 3

The jurisdiction of each Magistrate extends throughout the State, though its exercise is limited to the Magisterial District to which a particular Magistrate is assigned. In States of Northern Nigeria, they are known as Magistrate's Court when they entertain criminal cases and as District Courts when they entertain only civil cases.

Such dual nomenclature is not known to States in Southern Nigeria. In effect, every Magistrate Court in Southern Nigeria exercises both civil and criminal jurisdiction.

Magistrate's Courts are inferior courts of record. Their jurisdiction is limited both as to the nature and the value of the subject matter. They are also courts of summary jurisdiction in that they do not follow the elaborate procedures of the High Courts in their proceedings.

Each State of the Federation is divided into Magisterial Districts distinguished by such names or numbers as the Chief Judge thinks fit, and each District can be extended or reduced in size at the discretion of the Chief Judge. At least one Magistrate is assigned to each District to preside over the Court. Where there are more than one Magistrate in a District, the District is normally headed by the most senior whose duty it is to ensure that all legal business within the District or Districts is evenly distributed and expeditiously disposed of. Magistrates are normally of various grades.

Appeal lies from the decisions of Magistrate's Courts to High Courts. The High Courts also exercise supervisory jurisdiction over Magistrate's Courts. However, appeals from decisions of lower grades of Magistrate's Court may lie to higher grades of Magistrate's Court in some states.

Generally, Magistrate's Courts exercise appellate jurisdiction over decisions of Customary Courts, except where declaration of title to land is involved. In most states, Magistrate's Courts have no original or appellate jurisdiction in land matters.

District Courts

In Northern States the Magistrate's Courts assume the names of District Courts and the Magistrates are known as District Judges when exercising civil jurisdiction. Magistrate's Courts have no civil jurisdiction in those States. The District Judges are of various grades, with each grade having a maximum limit in the value of the subject matter, which it has jurisdiction to entertain.

District Courts have no jurisdiction, unless the Governor-in-Council directs otherwise, in issues involving interest or title to land, or matters subject to the jurisdiction of Area Courts relating to the custody of children, inheritance upon intestacy, the administration of intestate estates, matrimonial causes and matters between persons married under customary law.[135] Appeals from District Courts usually go to High Courts.

Customary Courts

These courts had existed throughout the country as native courts prior to 1956. Their names were changed to customary courts in Eastern and Western Regions of Nigeria in 1956 and 1957 respectively.[136] The Courts are established usually by warrants signed and issued by either the Governor of the state (as in old Anambra and Cross-River States) or the Chief Judge of the State (as in Ogun old Ondo and old Oyo States) or the Attorney General (as in Lagos State). Such a warrant normally specifies the name, grade, composition and territorial jurisdiction of the court it has established.

Under the Customary Courts Edict, 1984 of the old Anambra State (then) applicable to Anambra and Enugu States, Customary Courts have and exercise jurisdiction over all persons and classes of persons within the territorial limits of their jurisdiction in

[135] The District courts law 1960, S. 13(2)

[136] See Customary Court Law 1956 of Eastern Region; Customary Court Law, 1957 of Western Region

(a) land causes or matters;

(b) matrimonial causes in respect of marriages under customary law;

(c) debt, demand or damages claimed between persons married under customary law or arising from marriage under customary law;

(d) custody of children and other causes and matters relating to children under customary law.[137]

In respect of these matters, the Courts have unlimited jurisdiction. The jurisdiction of the Customary Courts is said to be unlimited in this context in the sense that there is no limit as to the value of the subject matter. The Land Use Act in section 39 specifically confers jurisdiction on Customary Courts in respect of land situate in non-urban areas. However, the Supreme Court has held in *Adisa v Oyinwola*[138] that both Customary Courts and State High Courts have concurrent jurisdiction in such matters. In the following matters, the jurisdiction of Customary Courts of the old Anambra State is limited to two thousand Naira:

(a) civil actions in contract and torts at common law and at customary law;

(b) causes or matters relating to inheritance upon intestacy under customary law and grant of power or authority to any person to administer the estate of an intestate under customary law.

The jurisdiction of Customary Courts in other States of Southern Nigeria in civil matters are similar, with minor variations.

The criminal jurisdiction of customary courts varies from State to State but in all States, they exercise only limited criminal jurisdiction.

In States where Customary Courts of Appeal exist, appeal lies from the decisions of Customary Courts on questions of customary law to the Customary Courts of Appeal. Under section 49 of the

[137] S. 12(2) Customary Courts Edict, 1984 of old Anambra State and the 2nd Schedule to the Edict.

[138] (2000)10 NWLR (Pt) 116

Customary Courts Edict, 1984 of the old Anambra State, an appeal from the decision of a Customary Court in any cause or matter shall lie: (a) to the Magistrate's Court within the area of jurisdiction of the Customary Court that gave the decision if the Magistrate's Court has original jurisdiction to try the cause or matter; (b) where a Magistrate's Court has no jurisdiction, to the High court in the Judicial Division of which the Customary Court that gave the decision is located. These States have no Customary Court of Appeal.

Under this law, an appeal shall lie as of right to the appropriate appellate court from the final decision of the Customary Court-

(a) in a civil cause or matter or in any proceeding involving or under Customary law, where the matter in dispute in the appeal is not less than one hundred Naira in value; or
the appeal involves a claim to or a question respecting any property or other right, of not less than one hundred Naira in value and

(b) in all criminal proceedings.
An appeal shall lie with the leave of the appropriate appellate court from the decision of a Customary Court in such other cases where by virtue of the provision of any enactment in force in the State, an appeal does not lie as of right.[139]

Customary Courts are normally composed of a President and such other members as prescribed by the enabling law, and they are inferior courts under the supervisory jurisdiction of the High Courts or the Customary Court of Appeal, which has the authority to control their activities and review their decisions. In *Ogele v Nuhu*[140] the Court of Appeal held that Area Courts are courts of record.

[139] *Ibid S. 50 (1) & (2)* C.A.
[140] (1997)10 NWLR (Pt 523) 109 at 123

The Supreme Court has held in *Odofin & Anor v Oni*[141] that it is important that superior appellate courts in relation to matters relating to Customary Courts should focus their attention on the substance of the judgments or decisions in those courts rather than the form. This is so because Customary Courts – whether they are called Area Courts or whatever name they are christened in our various judicial divisions - are generally presided over by laymen without even rudimentary exposure to legal principles. An appellate court should in all circumstances strive to get to the bottom of the decision of a Customary Court. This can only be achieved by considering the import of a decision of a Customary Court not in fragments or in isolation of excerpts thereof but must be read harmoniously as a whole in order to capture its import. In other words, when greater latitude is accorded to the interpretation of the decisions of customary courts, it will be sufficient if such decisions are seen to accord with the view of persons of good common sense and reason, completely devoid of legalistic encrustments.

Area Courts

In Northern Nigeria, the equivalent of Customary Court is Area Court. Like Customary Courts in Southern Nigeria, they are the direct successors to the former Native Courts. In 1966, the Native Courts Law of Northern Nigeria was replaced by the Area Courts Edict of the various States of Northern Nigeria, which changed the names of the Courts to Area Courts. All the Area Court Edicts have identical provisions. In each State, the Chief Judge is empowered to issue warrants establishing such courts identified by such names and located in such area as he considers fit, and by such a warrant to define the territorial jurisdiction of the courts. An Area Court is constituted by a judge, designated Area

[141] *(2001)5 NSCQR 67*

Judge, sitting alone, or with one or more members.[142] All members of Area Court including Area Judges are public officers in the public service of the State. They are appointed by the Interim Area Courts Judicial Service Board for the State.

Area Courts are of various categories or grades - Upper Area Court, Area Courts Grade II and Area Courts grade III.

Generally, all Area Courts have both civil and criminal jurisdiction though the warrant establishing an Area court may confer it with either civil or criminal jurisdiction only.

The civil jurisdiction of an Area Court extends to:

(a) matrimonial causes and matters between persons married under native law and custom or arising from or connected with a union contracted under such law and custom;
(b) suits relating to custody of children under native law and custom;
(c) civil actions for debts, demands or damages;
(d) cases based on succession to property and the administration of estates under native law and custom; and
(e) cases concerning the ownership, possession or occupation of land.

The awards that can be made depend on the grade of the particular court.

All Area Courts have jurisdiction in criminal cases in accordance with the provisions of the Criminal Procedure Code, save in homicide cases.[143] However, the sentence that can be imposed by an Area Court depends on its grade.

Appeals lie from the decisions of the lower Area Courts to the Upper Area. From the decision of an Upper Area Court appeal lies to the Sharia Court of Appeal in cases involving questions of Islamic personal law and to the High Courts in all other cases. In deciding such appeals the appellate courts are enjoined to have

[142] See Area Courts Edict (No. 4) 1968 (B.P.S) s. 3(2).
[143] Area Court Edict 1967 of Kwara state ss. 17, 18 & schedule 1.

regard to the substance rather than the form or technicalities.[144] Outside appeals, Area Courts as inferior courts are subject to the supervisory jurisdiction of the High Courts.

Juvenile Courts.

The Children and Young Persons' Law of the various States of the Federation empowers the Chief Judge of a State to constitute a Juvenile Court for the purpose of hearing and determining cases relating to children and young persons.[145] The enactments in force in various states are similar, since they are all adapted from the Young Persons Act (formerly Ordinance) 1943. A Juvenile Court is generally constituted by a Magistrate sitting with such other persons, if any, as the Chief Judge shall appoint. Therefore, each Magistrate's Court is potentially a Juvenile Court, and a Magistrate can proceed as a Juvenile Court to hear and determine a case even if no other member of the court has been appointed or is present.

Juvenile Courts are vested with sole criminal jurisdiction to try young persons and children except

(a) where the charge is one of homicide, or
(b) where the juvenile is charged jointly with adults.[146]

Where a juvenile is charged for homicide or is being tried along with adults, the trial must be at regular courts.

The sitting of a Juvenile Court shall be held either in a different building or room from that in which court sittings are held. By section 6(5) of the Children and Young Persons Law of Lagos State the proceedings of a Juvenile Court shall be held in camera. In other words, no person other than the members and officers of the Court and the parties to the case, their lawyers and other persons directly concerned in the case, shall except by leave of the Court, be allowed to attend the Court session.

[144] *Odofin & Anor v Oni* (2001)5 NSCQR 67
[145] Children and Young Persons Law Cap. 26 Laws of Lagos State 1973, s. 6
[146] *Ibid* Ss. 8(2) & 6(2)

The question is, who is a juvenile? A juvenile may be a child or a young person. A child is a person under the age of 14 years, while a young person is one who is between 14 and 17 years of age.[147]

A juvenile may be "found guilty" but the expression "conviction" or "sentence" shall not be used. A child must not be ordered to be imprisoned. For a young person, he cannot be ordered to be imprisoned if he can be dealt with in any other authorized way, for instance probation, fine, corporal punishment or committal to an approved remand home. The Court may also issue a corrective order committing him to the care of a relative or other fit person.[148]

Sharia Courts

Since the inception of the present civilian regime, many States in Northern Nigeria have adopted the Islamic legal code and created Sharia Courts following the precedent set by the Zamfara State Government. We shall however, examine only the Sharia court system of the Zamfara State Government.

By the Sharia Courts (Administration of Justice and Certain Consequential Changes) Law, 1999 which came into effect on 27th January 2000, the Zamfara State Government established the following Sharia Courts: Sharia Court, Higher Sharia Court, Upper Sharia Court. A Sharia Court shall be properly constituted if presided over by a single Sharia Court Alkali.[149] An Upper Sharia Court sitting in its original jurisdiction shall be properly constituted if presided over by a single Sharia Court Alkali, and shall be properly constituted in its appellate jurisdiction if it is presided over by at least two Sharia Court Alkalis to hear and determine appeals from the judgments or orders of the Sharia

[147] *Ibid* s. 2
[148] *Ibid* s. 11
[149] Sharia Courts (Administration of Justice and Certain Consequential Changes) Law, 1999 of Zamfara State s. 4(i)

Courts.[150] In other words, there shall be at least two Sharia Court Alkalis to sit and determine appeals from the lower Sharia Courts and decisions shall be by concurrence of all the Alkalis. Where there is no concurrence of the Alkalis, an additional Upper Alkali shall be appointed to sit with them and the majority decision shall be the decision of the Court.

Sharia Courts have jurisdiction to hear and determine:

(a) Civil proceedings in Islamic law in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim (due to an individual or individuals or the State) is in issue; or

(b) Criminal proceedings in Islamic law involving or relating to any offence, penalty, forfeiture, punishment or other liability in respect of an offence committed by any person or against the state.[151]

The Sharia Courts are empowered to exercise jurisdiction and power over all persons professing the Islamic faith; and any other person who do not profess the Islamic faith but who voluntarily consents to the exercise of the jurisdiction of Sharia Courts.[152]

The applicable laws and rules of procedure for the hearing and determination of all civil and criminal proceedings before the Sharia Courts shall be as prescribed under the Islamic law. For purposes of the section, Islamic law comprises: the Holy Quran; the Hadith and Sunnah of Prophet Muhammed (saw); Ijmah; Qiyas; Masahalat Mursala; Istihsan; Al-urf; Mashabul-Sahabi; Shar'u man Kablana.[153]

Appeals shall lie from all the decisions or orders of the Sharia Courts in civil or criminal proceedings to the Upper Sharia Courts within the same territorial jurisdiction sitting in its appellate

[150] *Ibid S.* 4(ii)5
[151] *Ibid* s. 5(i) (a) & (b)
[152] *Ibid* s. 5(ii)(a) & (b)s
[153] *Ibid* s. 7(i)(a)

jurisdiction.[154] Appeals from the decisions of Upper Sharia Court lie to the Sharia Court of Appeal.[155] The Sharia Court of Appeal is conferred with the jurisdiction to hear and determine all appeals from the decisions or orders of an Upper Sharia Court sitting in its original or appellate jurisdiction in all civil or criminal proceedings.[156]

The adoption of the Sharia legal system by the Zamfara State Government and, subsequently, many other States of Northern Nigeria provoked instant denunciation from several quarters in Nigeria and beyond. The constitutionality of the exercise was questioned. Controversy had dogged the issue of Sharia long before now. The former Northern Regional Government had made strenuous efforts to find a compromise legal system in the multi-religious and multi-ethnic society of Northern Nigeria. In 1959 the whole structure of the legal and court systems in the North were re-examined in order to allay the fears of minorities who are not of Moslem faith and the Moslem majority vis-à-vis the Moslem law. This resulted in sending two delegations to other Moslem countries, which had experienced similar type of problems. One delegation visited Libya and Pakistan while the other visited Sudan.[157] A commission was equally set up to look into the fears of minorities and the means of allaying these fears. On receipt of the reports of the delegations and the commission the Northern Regional Government appointed a panel of Jurists to consider

(a) the system of law at present in force in the Northern Region, that is English law as modified by Nigerian legislation, Moslem law and customary law, and the

[154] *Ibid* s. 41(i)
[155] *Ibid s.42*
[156] *Ibid s. 43*
[157] Nwali, A.B. "constitutional Structure and Position of the Judiciary with particular reference to the Sharia Court of Appeal" 1989 Judicial Lectures: Continuing Education for the Judiciary (Lagos: M.J.J. Professional Publishers Ltd, 1991) P.150

organization of the courts and the judiciary enforcing the systems; and

(b) whether it is possible and how far it is desirable to avoid conflict, which may exist between the present systems of law; and to make recommendations as to the means by which this object may be accomplished and as to the re-organization of the courts and the judiciary in so far as this may be desirable"[158]

The panel was composed of some eminent Nigerians and the following foreigners: Abu Rammat, Chief Justice of the Sudan, Mr. Justice Mohammed Sherrif, chairman of the Pakistan Law Commission, Professor J.N.D Anderson, a lawyer and authority in Islamic law. The panel made the following recommendations:

1. Northern Nigeria should have a uniform penal code law and a criminal procedure code, thus displacing Moslem law and other customary laws. The codes were to be drafted with necessary caution and care as not to offend the basic tenets of Islamic law and at the same time must be of such quality as to win universal acceptance among the adherents of faiths other than Islam.
2. The personal and family law of each community was to be retained and unaffected.
3. Contract cases would be governed by such law as the parties thereto intended to govern the transaction.
4. Tort cases would be governed by the law applicable to the parties.[159]

The panel's recommendations were implemented and brought into effect from 1st October 1960. The jurisdiction of the Sharia Court of Appeal, which was consequently created, was confined to matters of Islamic personal law, though the Court has jurisdiction in matters other than Moslem personal law where both

[158] *Ibid* p. 151
[159] *Ibid* p. 152

parties in the court of first instance stated in writing that they wanted the case decided according to Moslem law.[160]

The Sharia controversy reared up its head again at the Constituent Assembly constituted in 1977 to deliberate on the draft 1979 constitution. The Constitution Drafting Committee had proposed that "there shall be a Federal Sharia Court of Appeal which shall be an intermediate Court of Appeal between the States' Sharia Courts of Appeal and the Supreme Court of Nigeria." After heated debate it was agreed that there shall be no Federal Sharia Court of Appeal. Whenever there was a Sharia case on appeal, the Federal Court of Appeal (as it was then called) would be constituted by three judges learned in Islamic law. Furthermore, each State that wants it should set up a Sharia Court of Appeal whose jurisdiction would be confined to questions of Islamic personal law.[161] Effect was given to these decisions in sections 242 and 247 of the 1979 Constitution.

In 1986, Decree No. 26 of that year amended the 1979 Constitution by removing the word 'personal' wherever it occurred after the word Islamic in the constitution. In the recent case of *Maida v Modu* [162] it was held by the Court of Appeal that the omission of the word 'personal' from the provision conferring jurisdiction on the Sharia Court of Appeal does not enhance the court's restricted jurisdiction. It is also implied in the Supreme Court decision in *Usman v Kareem*[163] that though the word 'personal' was omitted from the section of the 1979 Constitution conferring jurisdiction on the Sharia Court of Appeal, the jurisdiction of the Court was still restricted to matters in respect of which the Court is competent to decide under subsection (2) of

[160] S. 12 Sharia Court of Appeal Law of Northern Nigeria, 1960

[161] Kukah, M.H. *Religion, Politics, and Power in Northern Nigeria* (Ibadan: Spectrum Books Ltd, 1993) pp. 125-126.

[162] 2000)4 NWLR (Pt 651) 99; See also *Gambo v Tukuji* (1997)10 NWLR (Pt 526) 591; *Muninga v Muninga* (1997) 11 NWLR (pt 527) 1

[163] (1995)2 NWLR (pt 379) p. 537

section 242 of the 1979 Constitution (as amended). Ogwuegbu, J.S.C. said:

> The cause of action in this appeal involves a gift and the donors are Moslems. Section 242(2)(c) of the constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 26 of 1986 vest the Sharia Court of Appeal with jurisdiction to exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Law which the Court is competent to decide in accordance with the provisions of subsection (2) of that section . . ..[164]

The wholesale adoption of the Islamic legal system and the concomitant establishment of Sharia Courts by the Zamfara State Government and some other States in Northern Nigeria generated heated controversy and tension in the country. The concern of this work, however, is with the jurisdiction of the Sharia Courts. The Attorney-General of Zamfara State anchored his argument in favour of the constitutionality of the establishment of Sharia Courts on sections 4, 6 and 38 of the 1999 constitution. Section 4(7)(a) of the constitution empowers a State House of Assembly to make laws with respect to any matter not included in the exclusive list, while section 6(4) empowers a State to establish courts to exercise jurisdiction on matters with respect to which the House of Assembly have power to make law. In support of this contention, Justice Mohammed Bello, former Chief Justice of Nigeria, said:

It is axiomatic, therefore, that a state may establish a Sharia Court of first instance.[165]

On the expansion of the jurisdiction of the Sharia Court of Appeal by the Sharia Court Law of Zamfara State, 1999, a learned commentator said: "Section 277 is not couched in an exhaustive

[164] at 551-552

[165] "Sharia and the Constitution" Memorantum in the Sharia Issue: A working paper for Dialogue by Committee of Concerned Citizens p.11

term to preclude the expansion of the jurisdiction of the Sharia Court".[166]

While it is conceded that States have powers to create courts and confer them with jurisdiction, the creation of such courts cannot be in pursuance of the adoption of a state religion, which is expressly prohibited by the constitution. Secondly, the criminal jurisdiction of any court in Nigeria can only extend to offences under a written law.[167] Though the Islamic religion can be a historical source of law, it cannot be a direct or formal of source of law, with the possible exception of Islamic personal law. Furthermore, it has been held in a plethora of cases that the jurisdiction of the Sharia Court of Appeal must in all cases savour of Islamic personal law.[168] Thus no law of a State can whittle down or expand the jurisdiction of the Sharia Court of Appeal as conferred by the constitution except, perhaps, as permitted by the constitution itself. The Court of Appeal held in *Ojisua v Aiyebelehin*[169] that though a State House of Assembly has the legislative power under section 6(4) of the 1979 constitution to establish courts outside those provided for in section 6(5) and confer them with jurisdiction, once an appeal lies from such court to an appellate court created by the constitution, the appellate court can only entertain those matters which fall within the jurisdiction conferred on it by the Constitution. On this score, section 42 of the Sharia Court Law of Zamfara State appears to be unconstitutional to the extent that it purports to confer appellate criminal jurisdiction and jurisdiction in civil causes not connected with Islamic personal law on the Sharia Court of Appeal.

[166] Yadudu, A.H. "Sharia Debate in Nigeria: A time for Reflection", a memorandum in ibid p. 38
[167] S. 36(12) 1999 Constitution; *Aoko v Fagbemi* (1963)1 All NLR 400
[168] *Maida v Modu* (2000)4 NWLR (pt 651)1 C.A; *Gambo v Tukuyi* (1997)10 NWLR (pt 526) 591; *Muninga v Muninga* (1997)11 NWLR (pt 527)1
[169] (2001)11 NWLR (pt 723) p. 44 at 53

Federal Capital Territory Courts

These include the High Court of the Federal Capital Territory; the Sharia Court of Appeal of the Federal Capital Territory; the Customary Court of Appeal of the Federal Capital Territory; Magistrate's, Customary or Area Courts of the Federal Capital Territory. These courts are in all respects similar to their State counterparts.

The National Industrial Court

The National Industrial Court was first established under the Trade Disputes Decree No. 7 of 1976, now Trade Disputes Act Cap 432 Laws of the Federation of Nigeria, 1990. In 1992, the Trade Disputes Act was amended by the Trade Disputes (Amendment) Decree (now Act) No. 47 of 1992. By virtue of this amendment the National Industrial Court was conferred with the status of a superior court of record.[170] However, just like under the 1979 constitution, the drafters of the 1999 constitution advertently or inadvertently failed to provide for the court in the constitution. Nevertheless the 1990 and 1992 Acts were saved by section 315 of the 1999 constitution which saved all existing laws provided that such laws are not inconsistent with the provisions of the constitution. By section 316 of the constitution any court office that has been established before the commencement of the 1999 constitution shall continue to exist as if it were created by the 1999 constitution.

In 2006 the National Assembly passed the National Industrial Court Act. By section 1(2)(a) and (b) of the Act the Court shall consist of the President of the Court and not less than twelve judges.

Section 1(3)(a) of the Act provides that the court shall be a superior court of record. This provisions is, however, inconsistent with section 6(3) of the 1999 constitution which provides that only the courts listed in section 6(5)(a)-(i) of the constitution shall be

[170] See section 19(2) of the Decree

superior courts of record. Since the National Industrial Court was not among the courts listed in that subsection, it cannot be a superior court of record.

The jurisdiction of the court is conferred by section 7(1)(a)–(v). By section 7(1) the jurisdiction of the court is exclusive. It is however submitted that this provision is unconstitutional.

Under section 272 of the 1999 constitution the State High Court is a court of general jurisdiction. The jurisdiction conferred on the State High Court cannot be whittled down by any law except by specific provisions of the constitution. The phrase "subject to the provisions of this constitution" used in section 272(1) of the constitution implies that the jurisdiction of the High Court can only be limited by the provisions of the constitution. Some of the provisions of the 1999 constitution which grant exclusive jurisdiction to other courts on some matters and thereby limit the jurisdiction of the High Court of States have been mentioned above in our discussion on state high courts. In *Western Steel Works Ltd & Anor v Iron and Steel Workers Union of Nigeria & Anor*[171] the Supreme Court held per Coker, J.S.C. that no Act of the National Assembly including the Trade Disputes Act, 1973, can cut down or oust the jurisdiction conferred on State High Courts by section 236(1) of the 1979 constitution. In the recent case of *A.G. Oyo State v NLC*[172] the Court of Appeal held that the combined effect of section 2 of the Trade Disputes (Amendment) Act No .47 of 1992, and section 20 of the Trade Disputes Act, Cap 432 Laws of the Federation is that the jurisdiction of the regular courts in entertaining trade dispute matters was removed and vested exclusively on the National Industrial Court which can be interpreted to mean that the High Court of a State cannot exercise jurisdiction in trade disputes matters. Accordingly, the court held those sections unconstitutional for being in conflict with the

[171] (1987) 1 NWLR (pt 49) 284
[172] (2003)8 NWLR (pt.821)1

provisions of section 272 of the 1999 Constitution. Speaking for the Court of Appeal, Adekoye JCA said:

> The curtailment of jurisdiction of the National Industrial Court established the conflict between the Trade Disputes Act and section 272 of the 1999 Constitution – whereas section 251 of the 1999 Constitution is the only lawful and constitutional curtailment on the jurisdiction of a State High Court (sic). The provision of section 1(3) is categorical on the fact that any law that conflicts with the constitution is null and void.[173]

Section 7(1) of the National Industrial Court Act further provides that the court has jurisdiction in respect of matters:

(a) relating to –
(i) labour, including trade unions and industrial relations; and
(ii) environment and conditions of work, health, safety and welfare of labour, and matters incidental thereto; and
(b) relating to the grant of any order to restrain any person or body from taking part in any strike, lock-out or any industrial action, or any conduct in contemplation or in furtherance of a strike, lock-out or any industrial action;
(c) relating to the determination of any question as to the interpretation of–
(i) any collective agreement,
(ii) any award made by an arbitral tribunal in respect of a labour dispute or an organizational dispute,
(iii) the terms of settlement of any labour dispute, organizational dispute as may be recorded in any memorandum of settlement,
(iv) any trade union constitution, and
(v) any award of judgment of the Court.

The National Assembly is empowered to confer such additional jurisdiction on the Court in respect of such other causes

[173] At p.32. See also *Kalango v Dokubo* (2003)15 WRN 32.

or matters incidental, supplementary or related to those set out in section 7(2) above.[174]

Section 7(3) provides as follows:

"Notwithstanding anything to the contrary in this Act or any other enactment or law, the National Assembly may by an Act prescribe that any matter under subsection (1)(a) of this section may go through the process of conciliation or arbitration before such matter is heard by the Court".

An appeal shall lie from the decisions of an arbitral tribunal to the Court as of right in matters of disputes specified in section 7(1)(a).[175]

Section 9(1) and (2) of the Act which provides for appeals from the decisions of the court is inelegantly drafted. The section provides:

> 9(1) Subject to the provisions of the constitution of the Federal Republic of Nigeria 1999 and subsection (2) of this section, no appeal shall lie from the decisions of the court to the Court of Appeal or any other court except as may be prescribed by this Act or any other Act of the National Assembly
>
> (2) An appeal from the decision of the court shall lie only as of right to the Court of Appeal only on questions of fundamental rights as contained in chapter IV of the constitution of the Federal Republic of Nigeria 1999.

The meaning of the above provision is far from clear. Does it mean that there is no appeal from the decisions of the court except on questions of fundamental right? Or does the provision mean that unless on questions of fundamental rights, appeals shall lie to the Court of Appeal from the decisions of the National Court with leave? This latter proposition is the better view. In any case,

[174] section 7(2)
[175] section 7(4)

one finds it difficult to appreciate how appeals shall lie from the decisions of the Court to the Court of Appeal on questions of fundamental right since the court has no jurisdiction to enforce fundamental rights.

By section 2(1) of the Act the Court has jurisdiction throughout the federation. Section 53 of the Act repealed Part II of the Trade Disputes Act Cap 432 Laws of the Federation 1990.

Election Tribunals

Election tribunals are judicial tribunals. They share much of the attributes of courts. Section 285 of the Constitution which provides for election tribunals provides as follows.

285-(1) There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether-

(a) any person has been validly elected as a member of the National Assembly;
(b) the term of office of any person under this Constitution has ceased;
(c) the seat of a member of the Senate or a member of the House of Representatives has become vacant; and
(d) a question or petition brought before the election tribunal has been property or improperly brought.

(2) There shall be established in each state of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy governor or as a member of any legislative house.

(3) The composition of the National Assembly Election Tribunals, Governorship and Legislative Houses Election Tribunals shall be as set out in the Sixth Schedule to this Constitution.

(4) The quorum of an election tribunal established under this section shall be the Chairman and two other members.

The composition of election tribunals is provided for in the Sixth Schedule to the constitution as follows.

A-National Assembly Election Tribunals

(1) (1) A National Assembly Election Tribunal shall consist of a Chairman and four other members

(2) The Chairman shall be a judge of High Court and the four other members shall be appointed from among judges of a High Court, Kadis of a Sharia Court of appeal, Judges of a Customary Court of Appeal or other members of the Judiciary not below the rank of a Chief Magistrate.

(3) The Chairman and other members shall be appointed by the President of the Court of Court of Appeal in consultation with the Chief Judge of the state, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.

B - Governorship and Legislative Houses Election Tribunal

2, - (1) A Governorship and Legislative Houses Election Tribunal shall consist of a Chairman and four other members.

(2) The Chairman shall be a judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or members of the Judiciary not below the rank of a Chief Magistrate.

(1) The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.

In *Atiku Abubakar v A.G. Federation*[176] the Supreme Court held that by virtue of section 239(1)(b)&(c) of the 1999 Constitution, original jurisdiction is conferred on the Court of Appeal to hear and determine any question as to whether: (a) the term of office of the President or Vice President has ceased; or (b) the office of President or Vice President has become vacant.

Savings Clause in Respect of Courts Established Before the 1999 Constitution

Section 316(1) of the 1999 constitution contains a savings clause in respect of courts established before the coming into effect of the constitution. The section provides as follows.

316,(1)Any office, court of law or authority which immediately before the date when this section comes into force was established and charged with any function by virtue of any other constitution or law shall be deemed to have been duly established and shall continue to be charged with such function until other provisions are made, as if the office, court of law or authority was established and charged with the function by virtue of this constitution or in accordance with the provisions of a law made thereunder.

TRIBUNALS

The word 'tribunal' means a body of persons with power to determine issues of law and fact affecting people's rights and [illegible] in this sense of the word, it will include courts. By section [illegible] the 1999 constitution, the determination of a person's civil rights and obligations or trial of a person for a criminal offence may be by a court or tribunal.[177] Such court or tribunal must, however, be established by law and constituted in such a

[176] (2007) 6 NWLR (pt 1031) 626

[177] Subsection (1) & (4)

manner as to guarantee its independence and impartiality. A tribunal which is established by law in this fashion exercises judicial powers. In *L.P.D.C v Fawehinmi*[178] it was held that the Legal Practitioner's Displinary Committee is a tribunal within the meaning of section 33(1) of the 1979 constitution.

Majority of tribunals are, however, not judicial tribunals, but administrative or domestic tribunals, which may act judicially but cannot exercise judicial power. The Supreme Court held in *L.P.D.C v Fawehinmi* [179] that the test necessary for determining whether a body has judicial powers are: whether it has before it a *lis inter partes*; whether the decision of the statutory body is binding; and whether the decision is conclusive and final. According to the Court, there is a clear distinction between the exercise of judicial power and of administrative power. The characteristics of bindingness, finality and *lis inter partes* are clearly absent in the exercise of administrative powers.

Distinction Between Tribunals and Courts.

There are certain attributes of courts, which are absent in administrative tribunals. Courts are known for their independence and the impartiality of judges, which ensure that proceedings would be free from bias and extraneous considerations. The openness of the proceedings and decisions of courts ensure that they would as far as possible be fair to the parties. In fact while section 36(3) of the 1999 constitution stipulates that the proceedings of courts determining civil rights and obligations should be in public that is not so of administrative tribunals constituted under section 36(2). Courts also adhere to rules of evidence and procedure that makes for consistency of decisions and exclusion of human elements from their proceedings. This is not so of administrative tribunals. Lastly, courts are bound by the rules of precedent that guarantees consistency of decisions.

[178] (1985)2 NWLR (pt 7) 300
[179] *Ibid*

Administrative tribunals are not bound to follow the rules of precedent.

The question may be, in spite of the obvious short comings of tribunals, why are they still being established. The following are proffered as reasons for the continued use of tribunals.

Expertise of Tribunals

Tribunals are normally composed of experts in the relevant fields for issues in dispute may not be primarily legal. The factual aspects of the dispute may so outweigh the legal aspect that all issues hinge on it. The use of tribunals may, for instance, enable engineering questions to be determined by engineers, medical questions to be determined by medical doctors etc.

Speed

Proceedings of tribunals are relatively faster. Delays in the legal process have become the order of the day. There is an age-long dictum that justice delayed is justice denied. Tribunals are free from the formalities, procedural hitches, and consequent protracted trials, which has become a feature of Nigerian courts. The situation will be compounded if there are no tribunals to determine the numerous cases arising from welfare schemes.

Cheapness

Tribunal proceedings are cheap and inexpensive as opposed to the very expensive cost of going to court, which normally keep many low-income earners out of court even when they have genuine grievances.

Informality

Tribunals are often composed of laymen who adopt informal procedure and usually appear more friendly and approachable.

Flexibility

Because tribunals are not bound by strict rules of evidence or procedure or precedent their proceeding are flexible. They can easily adapt the law to changing social and economic order.

Hostility of Courts to Government Programmes

In some countries, it is believed that most judges are conservative and savour of the capitalist ideology. In the circumstance they apply the law to frustrate social welfare schemes.

Dangers of Conferring Criminal Jurisdiction on Tribunals

Tribunals in the field of criminal prosecutions are generally disliked because of their tendency to be inquisitorial and not adversarial in their approach to cases.

Members of tribunal may also not follow the time-honoured rules of evidence and procedure, which er.
to the accused. Furthermore, tribunals may act arbitrarily because they are not bound by the rules of stare decisis. The position is worse where such a tribunal is a military one. Military tribunals are usually composed of only or mainly soldiers with no knowledge of law and no regard for human rights or due process of law. The mere sight of soldiers is enough to scar and intimidate an accused and his witnesses, and in the ensuing nervousness, they tend to incriminate themselves. Moreover, the decisions of most military tribunals are above judicial review and not open to appeal.

Judicial Personnel: Appointment and Tenure

An independent and impartial judiciary is an indispensable requisite of a free society under the rule of law. Independence of the judiciary means far more than immunity from executive or legislative interference. It means that judges are free to bring their own sense of value to bear in interpreting a law and do not simply reflect the values of government. It also means that judges should not be influenced in their decision by other motives other than the

motive of justice. The factors that influence the independence of the judiciary include: the mode of appointment of judges; security of tenure; remuneration and working conditions of judicial officers; retirement benefits and pension rights of judges; control of funds and staff by the judiciary.

Appointment of Judges

The mode of appointment of judges has serious implication for the independence of the judiciary. The mode of appointment of judges should be such as to insulate the choice of candidates from political motives[180]

Under the 1999 constitution, the Chief Justice of Nigeria and other Federal judicial officers are appointable by the President on the recommendation of the National Judicial Council subject to confirmation by the Senate in the cases of Chief Justice of Nigeria, President of the Court of Appeal, and Chief Judge of the Federal High Court. In respect of State judicial officers, section 271(2) of the 1999 constitution provides that the appointment of a person to the office of Chief Judge or a Judge of a High Court of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council. However the State Judicial Service Commission created by section 197(1) of the constitution is empowered to advise the National Judicial council on suitable persons for nomination to the office of Chief Judge and Judges of the High Court of a State. Confirmation by the State House of Assembly is required in the case of Chief Judge of a State.

Generally, the State Judiciary –Service Commission appoints Magistrates and other judicial officers outside those mentioned above.

[180] Quoted by Ademola, A. "Independence of the Judiciary: Problems and prospects in Nigeria" Sir Louis Mbanefo memorial lectures No 4 1987 (Enugu: University of Nigeria, Enugu Campus) p.2

Tenure of judicial officers

The security of tenure of judges is one of the most important safeguards of the rule of law. A judge who is removable at the whim of the executive cannot discharge his functions without fear or favour. A judge should be removable only for inability to discharge the functions of his office or for misbehaviour. Under the 1999 constitution, the chief Justice of Nigeria, President of the Court of Appeal, Chief judge of the Federal High, President of the Customary Court of Appeal and President of the Sharia Court of Appeal are removable by the President acting on an address supported by two thirds majority of the Senate.[181] The Chief Judge of a State, Grandi Khadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State, are removable by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the state.[182] Other judicial officers are removable by the President or Governor (as the case may be) on the recommendation of the National Judicial Council.

The removability of judicial officers at the instance of the legislature is prone to abuse.[183]

Magistrates and Judges of Customary or Area Courts are removable at the instance of the state Judicial Service Commission.[184]

Administrative Personnel of the Judiciary

Members of staff of the judiciary are neither staff of the Ministry of Justice nor civil servants. The judiciary is an independent arm of the government. The Chief Judge is the head of a State judiciary. Directly below the Chief Judge is the Chief Registrar who is the accounting officer and is responsible to the

[181] S. 292(1) (a) (i) 1999 Constitution
[182] S. 292(1) (a) (ii) *ibid*
[183] See for instance the case of *Kalu Anya v A.G. Borno* suit No. FCA/K/141/82
[184] Part 11 3rd schedule to the 1999 constitution s. 6 (c)

Chief Judge for the day to day running of the judiciary. He is assisted by the Deputy Chief Registrar. The judiciary is for administrative purposes divided into divisions or departments such as finance and supply, probate, personnel management, library, litigation, courts, planning and research and statistics. The heads of the various divisions are responsible to the Chief Registrar. The appointment and discipline of the senior administrative staff of the judiciary is exercised by the State Judicial Service Commission. The employment and discipline of staff on levels 01-06 are usually delegated to the Chief Registrar, though he usually consults the Chief Judge in carrying out the exercise.

Court clerks are responsible for organizing the business of the court and they draw up cause lists and sometimes act as interpreters during court proceedings.

Bailiffs are court messengers who are empowered to serve and execute court processes and depose to affidavits in proof of the service effected.

CHAPTER 9

INTERNAL CONFLICT OF LAWS

Internal conflict of laws arises where the laws within a sovereign state are in conflict with one another.[1] The sources of Nigerian law include English law and customary law. Conflict may arise between English law and customary law as to which of the two should apply to a given situation. Another dimension to the matter is that there is no uniform customary law applicable throughout the whole country. Customary law differs from area to area. There may even be divergence in the customs of people of a given tribe or in the customs of the people of a given state. The question of which particular custom to apply to a given situation, therefore, usually arises. For the moment we are concerned with conflict between English law and customary law.

Conflict Between English Law and Customary Law

Local statutes provide for the application of English law and customary law without stating expressly that one is to apply subject to the other. The question of which of the two to apply in any given circumstance often arises. Such a question may arise in cases between a Nigerian and a foreigner or in cases between two Nigerians.

Cases Between a Nigerian and a Foreigner

The starting point is to determine who is a Nigerian and who is a foreigner for purposes of internal conflict of laws. Different enabling statutes adopted almost different terminologies in reference to a Nigerian and a foreigner for purposes of internal

[1] Tobi, Niki *Sources of Nigerian Law* (Lagos: MIJ Professional Publishers Ltd, 1996) p. 153

conflict of laws. Thus the High Court Law of the former Eastern Nigerian[2] talks of 'persons of Nigerian descent' and 'persons who are not of Nigerian descent.' Both the Lagos State High Court Law[3] and the High Court Law of the former Northern Nigeria[4] talk of 'natives' and 'non-natives.' The High Court Law[5] of the former Western Nigeria used the term 'Nigerians' and 'Non-Nigerians.' It is not only the terminologies used by the various High Court Laws that differ; the scope of persons that comes within each term also differs. The repealed section 3 of the Interpretation Act[6] defined the word 'native' as follows:

> "Native" includes a native of Nigeria and a native foreigner. "Native of Nigeria" means any person whose parents were members of any tribe or tribes indigenous to Nigeria and the descendants of such persons; and includes any person, one of whose parents was a member of such tribe.
>
> "Native foreigner" means any person (not being a native of Nigeria) whose parents were members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons; and includes any person one of whose parents was a member of such a tribe.

However, the Interpretation Act of 1964 and the Interpretation Law of Lagos State 1973 repealed that section. Professor Obilade contends that the absence of the term in the Interpretation Act, 1964 and the Interpretation Law of Lagos State, 1973 was an oversight on the part of the draftsman; consequently the learned author suggested that the definition contained in the repealed section is intended to be adopted by the legislature.[7]

[2] S. 20
[3] S. 27(2) of the High Court of Lagos Act
[4] S. 34(2) of the High Court Law of Northern Nigerian.
[5] S. 12(2)
[6] Cap 89, Laws of the Federation and Lagos, 1958
[7] Obilade, A *The Nigerian Legal System* (London: Sweet & Maxwell, 1979) P.149

The erudite Justice Niki Tobi expressed a contrary opinion. He said: "It is an established canon of statutory interpretation that once a law is repealed, it has no more life. Such a law is dead, completely dead, and moribund. It is as good as not enacted at all. The only difference is that all acts which were done commenced, prosecuted or concluded while it was in existence, will survive it, unless the legislature says otherwise. The Supreme Court stated this position in *Abaye v Ofili*.[8] What the courts can do in the circumstance is to fall back on the case law and not to construe the provisions of a repealed law or statute".[9]

Northern Nigeria whose High Court Law similarly adopted the term "native" and "non-native" rely on the meaning of native as contained in section 3 of the Interpretation Act.[10] Thus for purposes of internal conflict of law, the term "native" within the meaning of the Lagos and Northern Nigeria High Court Laws includes Nigerians and Africans.

Neither the expression "persons of Nigerian descent" nor the word "Nigerian" is defined in the High Court Laws of Eastern Nigeria or Western Nigeria respectively.[11] But in the Customary Courts Law of Western Nigeria, "Nigerian" is defined as:

> A person whose parents were members of any tribe or tribes indigenous to Nigeria and the descendants of such persons and includes any person one of whose parents was a member of such a tribe.

It would appear that the expression "persons of Nigerian descent" would bear the same meaning. In the circumstance, the class of persons whose transactions are to be controlled by customary law are in Lagos and the Northern states wider than in other parts of Nigeria.

[8] (1986) 1 NWLR (pt 15) 134
[9] Tobi, Niki *Sources of Nigerian Law* (Lagos: MIJ Professional Publishers Ltd, 1996) 155.
[10] Cap 89 1958.
[11] Cap 61 Laws of Eastern Nigeria 1963

The constitutional provision for citizenship appears to have settled the question of who is a Nigerian. The constitution provides for citizenship by birth, registration and naturalization. On citizenship by birth, section 25(1) of the 1999 constitution provides as follows.

S.25(1) – The following persons are citizens of Nigeria by birth, namely

(a) every person born in Nigeria before the date of independence either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria:

Provided that a person shall not become a citizen of Nigeria by virtue of this section if neither of his parents nor any of his grandparents was born in Nigeria;

(b) every person born in Nigeria after the date of independence either of whose parents or any of whose grandparents is a citizen of Nigeria; and

(c) every person born outside Nigeria either of whose parents is a citizen of Nigeria.

A person who is a Nigerian citizen within the meaning of chapter III of the 1999 constitution cannot be declared a non-Nigerian by any ordinary law. Similarly, an ordinary law that extends the scope of persons to be regarded as Nigerians will be ultra vires the constitution.

Having answered the question, who is a Nigerian for purposes of internal conflict of laws, one now proceeds to consider the applicable law in cases between Nigerians and non-Nigerians.

Section 20 of the High Court Law of Eastern Nigeria provides:

2. Such local customs shall be deemed applicable in any civil cause or matter between persons of Nigerian descent and persons who are not of Nigerian descent where it may appear to the court that substantial injustice would be done to either party by a strict

adherence to the rules of any law or laws other than local custom.

3. No party shall be entitled to claim the benefit of any local custom if it shall appear either from express contract or from the nature of the transaction out of which any cause or matter may have arisen that such party agreed or must be taken to have agreed that his obligation in connection with any such transaction should be regulated by some law or laws other than local custom or that such transaction is one which is unknown to local custom.

The High Court Laws of other parts of Nigeria have identical provisions.[12] The import of this provision is that prima-facie cases between a Nigerian and non-Nigerian are to be decided according to English law, not customary law. In *Koney v Union Trading Company Ltd*[13] the plaintiff, an educated African carpenter sued the defendant, an European Company, for breach of contract of employment. The defendant company relied on the English statute of limitation, a statute of general application, while the plaintiff relying solely on the fact that he was an African argued that English law should not govern the case. It was held that English law was to govern the case, since the plaintiff was a native and the defendant a non-native.

However, where the application of English law in cases between natives and non-natives will lead to substantial injustice, then customary law should apply. In *Nelson v Nelson*[14], it was held that customary law would apply if the application of English law will result in substantial injustice to either party to the transaction. Similarly, in *Ajayi v White*[15], it was held that it would

[12] S. 26 (2) & (3) High Court Law of Lagos State 1973; S.'34 (2)&(3) High Court Law, Northern Nigerian Laws, 1963 Cap. 52); High Court Law (W.R.N. Laws 1959, Cap 44) S. 12

[13] (1934) 2 W.A.C.A 188

[14] (1959) NRNLR 39

[15] (1946) 18 NLR 41

be most inequitable to hold that the succession to the property should be regulated in accordance with the principles of English law and furthermore, that substantial injustice would be done to the plaintiffs by a strict adherence to such law and that in the absence of a mutual agreement for partition, the property should be sold and the proceeds paid into court and a scheme of distribution drawn up. This case involved two natives. Niki Tobi has criticized the decision in this case on the ground that the substantial injustice rule does not apply to cases between two Nigerians.[16] He is correct. The relevant provisions of the High Court Laws of various states in Nigeria are clear and unambiguous that the substantial injustice rule applies only in cases between Nigerians and Non-Nigerians.

What of a situation where both English law and the rule of customary will cause substantial injustice? Park suggests that "where both systems would produce an equally unjust result, it cannot be said that English law causes the injustice, for it would occur in any event. Consequently, in such a case there is no point in departing from the general rule that English law should apply."[17] On the contrary, Niki Tobi's opinion is that in such situation, the courts should consider which of the rules would cause graver injustice in their application to the parties. The courts have to weigh justice on a scale and see where the pendulum tilts. In the course of this exercise, the courts have to jettison the particular system of law that will cause graver injustice.[18] One is in sympathy with the opinion of Niki Tobi.

The courts should always bear in mind that the substantial inustice rule is intended to protect the native. Thus recourse to the rule can only be made when the application of any other law will occasion substantial injustice to a native.

[16] Tobi, *op. cit.* p. 162

[17] Park *op. cit* p. 112

[18] Tobi *op. cit* p. 163.

It must be noted that on matters of personal law, a non-native cannot voluntarily submit to customary law. In *Savage v Mcfoy*[19] the Defendant (Mcfoy) was a descendant of a freed slave and was born in Freetown Sierra Leone. At the time "native" was defined as a native of "the said colony or protectorate" and consequently he was not a native.[20] He eventually settled in Lagos and married the plaintiff, Savage, purportedly according to native law and custom. After his death this action about the inheritance of his property arose between the plaintiff and Mcfoy's brothers and sisters. The vital question was whether the marriage was valid or not. Osborne C.J held that although the requisite customary formalities had been complied with the purported marriage nevertheless could not stand since Mcfoy did not have the capacity to enter into it. The mere fact that Mcfoy made Lagos his domicile or repudiated the Christian way of life would not necessarily make him subject to, or to be given the benefit of, native law and custom, and his ordinary relations would be governed by English law not native law.

Cases Between Nigerians

Generally, cases between Nigerians are to be governed by customary law. In *Labinjo v Abake*[21] the defendant, an infant sought to rely on the Infant Relief Act 1874, a statute of general application, to defeat the claim for certain trade debts made against her on the ground of unenforceability of the debt against an infant. Both the trial court and the Divisional court assumed that the Act applied, but this was reversed on appeal to the Full Court, which said:

> The general rule is that, if there is a native law and custom applicable to the matter in controversy, and if such law and custom is not repugnant to natural justice, equity and good conscience or incompatible with any local ordinance, and if it shall not appear that it was intended by the parties that their obligations under the transaction should be regulated by English law, the matter in controversy shall be determined in accordance with such native law and custom.

[19] (1909) Ren 504

[20] The Interpretation Act which gives a wider definition had not been enacted by then.

[21] (1924)5 N.L.R. 33

There are two exceptions to the general rule that customary law shall govern cases between Nigerians. In the first place, where parties who are ordinarily subject to customary law agree that English law should apply to their transaction, then English law should govern the transaction. Secondly, where the nature of the transaction is unknown to customary law, English law will apply.

Agreement to be Governed by English Law

Parties to a transaction who are Nigerians can agree that English Law should apply to the transaction. This agreement may be express or implied. In *Okolie v Ibo*[22] two Ibos resident in Jos were engaged in a dispute involving the supply of petrol. The respondent had brought an action against the appellant in the Court of the Senior Alkali and got judgment against which the appellant appealed. It was held that the race of the parties, their respective occupations, the nature of the transaction between them, and the commodity involved, are such that they intended their relations to be regulated by the principles of English law. Similarly, in *Green v Owo*[23] the plaintiff brought an action claiming possession of a piece of land. He had bought the land at a public auction and having intended that the purchase be governed by English law he had obtained in relation to the purchase documents of title couched in English law form. But the defendant who had openly occupied the land for 20 years without any interruption or challenge from any one contended that the Real Property Limitation Act 1833 an English statute, applied to the action. On the other hand, the

[22] (1958) N.R.N.L.R. 89

[23] (1936) 13 N.L.R. 43

plaintiff argued that English law could not apply, as there was no agreement between him and the defendant to be bound by that law. Rejecting this argument the Court held that his rights in relation to the property should be governed by English law and that notwithstanding the fact that agreement was not entered into with the defendant, the plaintiff remained bound by English law. The court also discovered an intention to be bound by English law from the nature of the transaction in the case of *Griffin v Talabi* [24] Here a native took from Chief Oloto in connection with a sale of land a document couched in English law form. It was a receipt, which contained the following sentence "We shall be ready to convey unto the said purchaser the land aforesaid at any time that we may be called upon to do so and that without delay". Verity, C.J said: "It is impossible for us to brush aside the terms of these two documents. They clearly evidence a transaction the nature of which is unknown to native law and custom."[25] It may be pertinent to point out that reduction of the terms of transaction into writing does not necessarily import an intention to subject the transaction to English law. In *Rotibi v Savage*, [26] Waddington, J. clarified that the existence of written documents does not necessarily preclude the operation of customary law, especially where the document merely serves to evidence a money transaction.

Transaction Unknown To Customary Law

In cases between Nigerians, if the transaction is unknown to customary law, then English law will govern it. Some of the cases discussed above on agreement to be bound by English law, apply here. For instance, in the case of *Okolie v Ibo* [27] the subject matter of the transaction, petrol, is unknown to customary law, and this could have been a sufficient ground to hold that English law

[24] (1948) 12 W.A.C.A.371
[25] at pp 372 and 373.
[26] (1944) 17 N.L.R.77
[27] (1958) NRNLR 89

should apply to the transaction. In *Salau v Aderibigbe*[28] the court held that hire-purchase agreement transaction is unknown to customary law. Similarly, in *Apatira v 'Akanke* [29] a will was drawn up in English form, but there was a technical flaw, which would make it invalid under the Wills Act. It was contended that since the deceased was a Moslem the will should be admitted to probate under Islamic law. It was held that the testator had clearly intended his will to take effect under English law, and therefore it was by the standard of that law that it should be judged.

Natural Justice, Equity And Good Conscience Rule

Section 21(2) of the Native Courts law No. 6 of 1956 of Northern Nigeria provides that if in the opinion of the court none of the paragraphs of the subsection is applicable to any particular matter in controversy, the court shall be governed by the principles of natural justice, equity and good conscience. Similarly, section 34(4) of the High Court Law of the former Northern Nigeria provides as follows:

> In cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of natural justice, equity and good conscience.

The question is whether these provisions empower the judges to, where there are no express rules, decide matters based on their intuitive sense of right and wrong. The answer appears to be in the negative. Dealing with the latter provision, Park maintained that the principle of justice, equity and good conscience will be relevant only to the questions of whether English law or customary law should apply. It was not intended to give the courts the absolute discretion to impose, in any case whatever solution they thought fit.[30]

[28] (1963) W.N.L.R. 80
[29] (1944) 17 N.L.R. 149
[30] Part *op. Cit* p. 100.

Conflicts Between Different Systems Of Customary Law

Although Nigeria is one single nation the presence of different and diverse ethno-cultural groupings and consequently multifarious rules of customary law, makes the presence of conflict of laws problems in evitable.[31] Problems of internal conflict of laws arise in Nigeria whenever there is a clash between two or three different systems of customary law and the court is faced with the task of determining and choosing which of them to apply in the case before it. Where the court is faced with conflict of law problem much depends on the peculiar facts and circumstances of each case, and the statutory provision in the various states.

While some writers have considered separately different parts of the countries and their applicable laws on conflict between different systems of customary law,[32] it is intended here to consider the matter subject by subject and highlight the areas of uniformity and differences in the laws of the various parts of the country.

Succession Matters.

Generally speaking the law is that in succession cases the appropriate law is the personal law of the deceased.[33] In *Tapa v Kuka*[34] a Nupe Moslem of Bida origin died intestate leaving a house in Lagos. It was held that the personal law of the deceased was the Moslem law prevailing among the Nupe tribe and not the law of Lagos where the real estate was situated and that it should apply to the distribution of his estate. Similarly, in the Ghanaian

[31] Per Oputa JSC in *Olowu and 2 Ors v Olowu and Anor* (1985) 3 NWLR (Pt 13) 372 S.C.

[32] see for instance, Obilade *Op. cit*,pp.157-165; Park *Op.cit* pp 116-181. Niki Tobi adopted a similar approach as the present writer (see Niki Tobi *Op. cit* pp 169-175).

[33] s. 20 (2) Customary Courts Law of Ogun, Ondo and Oyo States; 5.20 (1) Area Court Edicts of different States of Northern Nigeria.

[34] 18 NLR 5

case of *Ghamson and Ors v Wobill*[35] the plaintiff claimed recovery of possession of a house said to have been sold to him by deed against the defendants. The vendors under the deed of sale traced their title through their mother that inherited from a woman who died in Winneba where Efutu native customary law applies but the deceased contended, as head of the deceased woman's family, that Fanti native law applies. It was held that although Fanti law would not ordinarily be binding between the parties, it was binding in this case because the plaintiff's claim depended on the issue as to succession by a person who traced his title through a person subject to Fanti law.

But what do we mean by the phrase "personal law"? According to Professor Niki Tobi, "personal law," in the context of the succession cases, would appear to mean the law the deceased was normally subject to when he was alive."[36] It must be noted that a person may change his personal law either by choice or by the process of assimilation or acculturization. In *Olowu & 2 Ors v Olowu & Anor*[37] the deceased, Adeyinka Ayinde Olowu was a Yoruba man by birth, belonging to the Ijesha cultural group. He had lived most of his life in Benin City. He married Benin women who begot for him all his children who are the plaintiffs and defendants in this case. In 1942 the deceased applied to the traditional ruler of Benin to be 'naturalized' as a Benin citizen. His application was granted. As a result of his status as a Benin man he was able to acquire a lot of landed property both in Benin City and elsewhere in Bendel State. He died in 1960 without making a will. The Defendants, two of his children, were granted letters of administration to administer the deceased's estate. First Defendant distributed the estate in accordance with the Benin customary law. The plaintiffs were dissatisfied and claimed that the estate ought to have been distributed according to Ijesha

[35] (1947) 12 W.A.C.A 181

[36] Tobi *op. cit* p. 168.

[37] (1985) 3 NWLR (pt 13) 372

customary law rather than Benin customary law. Plaintiffs brought an action against the Defendants in the High Court to, inter alia, set aside the distribution according to Benin customary law, and sought a declaration that Ijesha customary law was the applicable law. Plaintiffs lost at the High Court. Upon appeal to the Court of Appeal, the decision of the High Court was affirmed. On further appeal to the Supreme Court, the Supreme Court, in unanimously dismissing the appeal held as follows. .

(0) A person may change his status under customary law (and consequently his personal law) either by choice or 'culturalization' (sic).

(0) When a person becomes a member of a cultural group either by birth or by the process of 'culturalization' (sic) and thereby acquires rights and liabilities of members of that cultural group or community, those rights and liabilities will automatically pass on as birth right to his children.

(0) Where as in the instant case, a man has lived all his life amongst a people different from his birth place, has chosen to become part of that community, has acquired his properties by virtue of being a member of that community, married women belonging to that community and died as a member of that community, he is deemed to have chosen the law of that community as his personal law, which law must then regulate the distribution of his estate upon intestacy.

(0) The issues of a deceased cannot, after the death of the deceased change the status of the diseased from what it was at the time of the deceased's death. If they must enjoy his property, it must be in accordance with his personal law at the time of his death.

It was held in *Ekem v Nerba*[38] that where the personal law of the deceased cannot be easily ascertained, the *lex situs* will apply.

[38] (1947)12 W.A.C.A 258

In Western Nigerian, and the old Bendel State, and Northern Nigeria, (but not in Eastern Nigeria or Lagos), the law has shifted from *Tapa v Kuka* and *Ghamson v Wobil*. In these areas, a distinction has been made between succession to personal property and succession to real or immovable property. While the principle in *Tapa v Kuka* and *Ghamson v Wobill* govern succession to personal property, succession to reality or immovable property is governed by the *lex situs*. Thus, while section 20(2) of the Customary Court Law of Western Region, which was enacted in 1957, codified the principle in *Ghamson v Wobill*[39] that sub-section is expressly made subject to the provisions that deal with land matters. And section 20(1) dealing with land matters provides as follows:

> In land matters the appropriate customary law shall be the customary law of the place where the land is situated.

Thus in *Olowu and 2 ors v Olowu and Anor* [40] it was held that the general principle of law is that succession to immovable property is governed by the *lex situs*.

However, the application of the principle of *lex situs* in succession cases involving land is qualified by section 20(4) which preserves in relation to land something of the principle that in inheritance matters the applicable law is the personal law of the deceased. Section 20(4) reads:

> Where the customary law applying to land prohibits, restricts or regulates the devolution on death to any particular class of persons of the right to occupy such land it shall not operate to deprive any person of the beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereon to which he may be entitled under the rules of inheritance of any other customary law.

Obilade explained the import of this provision. He said:

[39] (1947)12 W.A.C.A 181
[40] (1985) 3 NWLR (pt 13) 372

> The effect of the exception is that where under the *lex situs* rule a party's right to occupy land by devolution on death is affected, but under the rules of inheritance of any other customary law to which the party in question is subject he would have been entitled to beneficial interest in the land or in the proceeds of the sale of land, the *lex situs* cannot deprive him of any such beneficial interest except the right to occupy the land.[41]

In Northern Nigeria, a distinction is equally made between succession cases involving land and succession cases not involving land. And the latter is divided into mixed succession cases and unmixed succession causes. With regard to unmixed causes of succession, other than succession to land, section 20 of the Native Courts Law, 1956 requires the court to apply the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties. The preponderance of juridical opinions is that the courts should prefer the personal law of the parties[42] thereby preserving the principle in *Ghamson v Wobill*[43]

In mixed causes of succession, section 21(2) of the Native Courts Law did not make any clear provision but academic commentators are almost unanimous that the courts should apply the personal law of the deceased.[44]

In succession cases involving land, the applicable law is the *lex situs* provided that the *lex situs* rule cannot deprive a person of any beneficial interest to which he is entitled under the personal law of the deceased apart from occupation of the said land.

In summary, in all parts of the federation, the personal law of the deceased will apply to cases of intestate succession not involving land. In the Eastern States and Lagos, the personal law

[41] Obilade *op. cit* p. 160.
[42] Park *op. cit* p.121 ; Obilade *op. cit* 163; Niki Tobi *op. cit* p. p. 172.
[43] (1947) 12 W.A.C.A 258.
[44] Park *op. cit* p. 122; Obilade *op cit*; Niki Tobi *op. cit.*

of the deceased will apply notwithstanding that succession to land is involved. In the States of the old Western Nigeria, old Northern Nigeria and the old Bendel State, the *lex situs* will apply to succession cases involving land provided that the application of the *lex situs* rule does not deprive a person of any beneficial interest, other than the right of occupation, to which a person is entitled under the personal law of the deceased.

One agrees with Justice Niki Tobi that the appropriate law in all succession cases whether involving land or not should have been the personal law of the diseased. This is because if he were to part with his property *inter vivos*, he most likely could have done so in accordance with the customary law applicable to him.[45]

Where a person previously subject to customary law undergoes a marriage celebration either by Christian rites or according to English law, or in accordance with the provision of the Marriage Act, he is deemed to have rendered himself subject to English law for the purpose of the distribution of his estate upon intestacy.[46]

It is no longer in doubt that Islamic law is one of the personal laws. In fact under the 1999 Constitution the jurisdiction of the Sharia Court of Appeal is restricted to questions of Islamic personal law.[47] However, it does not necessarily follow that Islamic law is the personal law of all adherents of the Moslem religion. The rule is that whether in any particular case, Moslem law should be regarded as the personal law of the party is to be decided not on the fact of his faith alone, but whether he regarded or conducted himself as subject to Islamic law. In *Mariyama v Sadiku Ejo* [48] a divorced husband claimed custody of his wife's child. The parties were Moslems of the Igbirra tribe. It was

[45] Tobi *op. cit* p. 172
[46] *Olowu & 2 Ors v Olowu & Anor* (1985) 3 NWLR (pt 13) 372; *Cole v Cole* (1935) 12 N.L.R 31
[47] See s. 277 1999 Constitution
[48] (1961) N.R.N.L.R. 81

suggested that because of their religion Islamic law should be applied, but it was clear from the general conduct and statements of the parties that they thought themselves as bound only by Igbirra law. It was held that Igbirra, and not Islamic, law was applicable. This case can be contrasted with the case of *Asiata v Goncallo* [49] where the deceased had lived all his life as a devout Moslem, and had with the full acquiescence of his two wives, plainly considered himself subject to Islamic law. The Full Court held that Islamic law should govern the distribution of the estate of the diseased.

Land Cases

In the former Eastern Nigeria, there is absence of statutory provision prescribing the law to apply in land cases. However, it has been suggested that the law of the area or the place where the land is situated (*lex situs*) prevails in order that all land in the same area be subject to the same system of law.[50] It should be noted that the *lex situs* may not necessarily be the law prevailing in the area of the Court. In *R v Ilorin N.A. Ex Parte Aremu*[51] Ademola, J., held that the law prevailing in an area was the law predominant in the area. This may be different from the *lex situs*. The *lex situs* is the more appropriate law. In *Mojekwu v Iwuchukwu* the Supreme Court held that it was the *lex situs* that governs succession to landed property in Onitsha, Anambra State.

In the States carved out of the former Western Nigeria and Bendel State[52] the *lex situs* applies in land cases subject to the qualification that the application of the *lex situs* principle in matters of succession to land cannot operate to deprive a person of

[49] (1900) I N.L.R. 41

[50] Park *op. cit* p. 119. Obilade *op. cit* pp.158-9; Tobi *op. cit* p. 173.

[51] (1950) 2 N.L.R. 44

[52] See High Court Law (W.R.N. Laws cap 44) s. 12(4); Customary Courts Law (W.R.N. Laws 1959, cap. 31), ss. 19 and 20; Customary Courts Edict 1966 (No. 29) M.W.N. ss.22 and 23; ss. 19 & 20 Customary Court Edict (Lagos Laws 1973 cap. 33).

any beneficial interest he is entitled to in the land under any law of inheritance save the right to occupy the land.[53] In Lagos State, the *lex situs* applies in land cases not involving succession.

The position in the Northern Nigeria is the same as in the old Western Nigeria and old Bendel State.[54]

Other Civil Causes Or Matters

In the States within the former Eastern Nigeria, the courts are required to administer the customary law prevailing in the area of jurisdiction of the court or binding between the parties.[55] The laws however, went short of prescribing situations when the law prevailing in the area of jurisdiction of the court as opposed to the law binding between the parties would apply or vice versa. Park has suggested that when the personal laws of the parties are the same, but differ from the laws of the area of the court's jurisdiction, (except in land matters) the personal law of the parties should prevail over the law of the area of the court. Where, however, the law of the of jurisdiction of the court is the personal law of one of the parties there may be a slight preference for the local law, when there is no indication as to which system they assumed to govern their transactions. Where however, the personal laws of the parties differ and are at the same time different from the law of the area of the court much will depend on the facts and attitudes of the parties. But where the facts and attitudes of the parties offer no guidance the courts will probably prefer the law of the area of the court.[56]

[53] s. 20 (4) Customary Courts Law (W.R.N. laws 1959, cap.31); s. 23 (4) Customary Courts Edict 1966 (No 29 of 1966); ss.19 and 20 Customary Courts Edict (Lagos Laws 1973, cap 33).

[54] s. 21(2) Area Courts Law 1968

[55] See Customary Court Edit No. 6 of 1984 of the old Anambra State, s.15; Magistrates' Courts Law (E.N. Laws 1963 cap. 82) s. 43(1) as amended by the Magistrate's Courts Law (Amendment) Edict, 1971; Customary Courts Edict No 9 of 1969 (S.E.S) s. 15(a); Customary Courts No 2 Edict No 38 of 1966 (Rivers State) s. 15(a)

[56] Park *op. cit* pp 119 – 120.

The laws[57] applicable to the States in the former Western Nigeria are more explicit and comprehensive and can be summarized as follows. In civil causes or matters, other than land or succession cases, the applicable law is the law of the area of jurisdiction of the court. There are, however, three situations under which the courts are enjoined to apply the law binding between the parties, viz.

( ) Where both parties are not natives of the area of jurisdiction of the court;

( ) Where the transaction was not entered into within the area of jurisdiction of the court;

( ) Where one of the parties is a non-native of the area of jurisdiction of the court, and the parties agreed or may be presumed to have agreed that the customary law applying to that party should regulate their obligations wholly or partly.

In respect of Lagos State, the provisions of sections 19 and 20 of the Customary Court Edict[58] regarding internal conflicts of laws are in pari materia with the provisions of the laws of Western Nigeria and Bendel State, save that the Lagos law did not make specific provisions in respect of land matters.

In Northern Nigeria civil causes other than those concerning succession or land are divided into unmixed civil causes and mixed civil causes.

Unmixed civil causes are governed by section 20(1)(a) of the Area Court Law 1967 which requires the court to choose between the native law and custom prevailing in the area and the native law and custom binding between the parties. Unmixed civil causes are those in which the parties are subject to the same customary law. In *Osuagwu v Soldier*,[59] two Ibos residing in Kaduna were involved. The plaintiff claimed the value of a box of

[57] s. 20 (3) Customary Courts Law of Western Nigeria 1957.
[58] Cap. 33 Laws of Lagos State 1973
[59] (1959) N.R.N.L.R. 39

clothing, which he had allegedly entrusted to the defendant for safekeeping. The Alkali court of first instance applied Islamic law and awarded damages to the plaintiff. The unsuccessful defendant then appealed to the High Court contending among other things that Islamic law should not have been applied. The High Court held, inter alia, that where the law of the court is the law prevailing in the area but a different law binds the parties, the Native Court should be reluctant to apply the law prevailing in the area and if it tries the case at all, it will in the interest of justice, choose to administer the law which is binding between the parties. The case was remitted for retrial.

As regards mixed civil causes other than succession or land matters section 21 of the Area court law 1967 will apply. The section defines a mixed civil cause to be a cause in which two or more of the parties are normally subject to different systems of customary law. In other words, it means the causes in which the parties do not have common or the same personal law. In mixed civil causes not concerning land or succession section 21(2)(a) and (b) provides that the courts should apply the particular customary law or combination of customary laws which the parties agreed or intended or may be presumed to have agreed or intended should regulate their obligations in connection with the transactions which are in controversy before the court. In the absence of such agreement or intent or presumption, section 21(2)(c) applies i.e. the appropriate law will be the particular customary law or combination of customary laws which it appears to the court to be appropriate to the matter in hand.

CHAPTER 10

OUTLINE OF CIVIL PROCEDURE

The sources of the law of civil procedure in Nigeria are: the High Court Laws and the High Court Rules of the various States of Nigeria; the Federal High Court Rules; the Magistrates Court Laws and Magistrate's Court Rules of the various States of the Federation; the Constitution of the Federal Republic of Nigeria; Court decisions; applicable English rules of procedure.

Parties

A party to an action is a person whose name is designated on the record as plaintiff or defendant. The term party refers to that person by or against whom a legal suit is brought whether in law or in equity[1]. A party may either be a plaintiff or defendant, whether composed of one individual or more, and whether natural or legal persons, but all others who may be affected by the suit indirectly or consequently are persons interested and not parties[2]. A plaintiff is a person who is claiming a legal right or who seeks to redress a legal wrong, which has infringed his legal right. A defendant is a person against whom a relief is claimed.[3]

Only legal persons can sue and be sued in their own names. A legal person can be a natural person or an artificial person. The law ascribes legal personality to the following: human beings; incorporated companies; corporation sole with perpetual succession; trade unions; partnership; friendly societies. The categories are not closed.[4]

[1] *Fawehinmi v NBA* (No. 1) (1989)2 NWLR (Pt 105) 494
[2] *Ibid*
[3] Other terminologies may be employed instead of plaintiff and defendant, depending on the nature of the action, and the particular rules of court.
[4] *Fawehinmi v NBA* (No 2) (1989) 2 NWLR (Pt 105) 558

The Government or a Government department can also sue or be sued though the Attorney General may represent it.

An unincorporated association is not a juristic but a juridical person and can only sue or be sued in a representative capacity[5].

Special Party

This refers to persons who do not posses full social and civil rights. They are natural persons whose legal capacity is subject to some disability. They include infants, persons of unsound mind, and lunatics.

An infant sues by his next friend and so does a person of unsound mind. They both defend an action by their guardian ad litem (a person appointed by the court in which a particular litigation is pending to represent the person under disability). A "next friend" or a guardian ad litem of an infant is usually his father or a person in loco parentis.

A lunatic is a person adjudged by a court to be insane (a person of unsound mind may not have been so adjudged but the fact of the unsoundness of his mind is observable from his conduct). A lunatic may sue and be sued in the Magistrate's Court by his committee in lunacy, but in the High Court he can only sue by his committee in lunacy and defend by his guardian ad litem.

Representative Action

Representative actions are of two kinds. The first kind of representative action is the one in which the existence of the authority to represent is a legal fact. This must be indicated on the face of the writ, and leave of the court is not necessary to bring the action. Examples are actions brought by executors, administrators, and holders of power of attorney[6] in their capacity as such.

The second category of representative action is brought on the basis of a common interest. Thus where there are numerous

[5] *Ibid*
[6] *Archibong v Archibong* 8 N. L R 117

persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or defend any such action on behalf, or for the benefit, of all persons so interested[7]. In this case leave of court is required by some high court rules to bring or defend the action in representative capacity. The requirements for representative action are:

( ) common interest, not merely similar interest;
( ) common grievances;
( ) the reliefs claimed must be beneficial to all[8].

Joinder of Parties

Where a party fails to join a necessary party, he may apply to court in the course of the proceedings to join such a person. A party who considers it necessary can also apply to be joined in a case. It is necessary to join a defendant who will be affected by a decision as a defendant in order that he may be bound by the decision. In *A. G. Federation v A.G. Abia State & 35 ors*[9] the Supreme Court held that the object of the rule of joinder is to prevent a multiplicity of actions by enabling a plaintiff to proceed in the same action against all persons who he alleges he has the same relief against.

The Supreme Court in *Green v Green*[10] defined a necessary party as:

> Those who are not only interested in the subject matter of the proceedings but also who in their absence, the proceedings could not be fairly dealt with. In other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff.

[7] *Fawehinmi v N..B.A (No. 2)* (1989)2 NWLR (Pt 105) 558
[8] *Ugwu & Anor v Agbo* (1977)10 S. C. 27
[9] (2001) F. W. L. R. (Pt 64) 202
[10] (1987) 3 NWLR (pt. 61) 480

Commencement of Proceedings in the High Court

Place of Institution of Action[11]

All suits relating to land, or any mortgage or charge thereon, or any other interest therein or for any injuries thereto, and also all suits relating to personal property, distrained or seized for any cause, shall be commenced and determined in the judicial division in which the land is situated, or the distress or seizure took place.

All suits for recovery of penalties and forfeitures shall be commenced and tried in the judicial division in which the cause of action arose.

All suits for specific performance, or upon the breach of any contract, may be commenced and determined in the judicial division in which such contract was made or ought to have been performed or in which the defendant resides.

All other suits outside the above may be commenced and determined in the judicial division in which the defendant resides or carries on business.

The court has power to try an action commenced in the wrong division. It also has the power to transfer the suit to the appropriate judicial division.

Forms of Commencement of Action

A suit may be commenced by a writ of summons or an originating summons or a petition or an originating motion.

Writ of Summons

A summons is a command by the state to the defendant whose name and address are inserted that he must enter an appearance to the writ on a particular day or a given time, to answer to the suit of the plaintiff, in default of which the court may proceed to enter judgment against him.

Every action must be commenced by a writ of summons unless there is a specific provision that prescribes that an action

[11] OIR 1 – 4 HCRR Lagos State; 04 R 1 – 4 HCRR, 1988 Anambra State

should be commenced by any other form[12]. Where the facts of a case are likely to be disputed, the action should be commenced by writ of summons[13].

Originating Summons

This is a summons for initiating proceedings, which sought to be dealt with expeditiously and in which the facts are not in dispute. The proceedings are usually based on affidavit evidence. This procedure can only be adopted when statutorily provided for. This procedure is usually used for the interpretation of a document or statute.

Petition

Petitions are used to commence certain civil proceedings such as divorce and election matters. The relevant statutes and rules made thereunder regulate such proceedings including who may petition, forms, contents and signing of the petitions, and the manner of presentation of the petitions.

Originating Motion

Certain civil proceedings are commenced by originating motions. The use of this procedure has to be provided for by a statute. For instance, the Fundamental Rights (Enforcement Procedure) Rules 1979 provides for the originating motion as one of the procedures for enforcement of fundamental rights.

Issuance of a Writ

Under the High Court Rules of Lagos State,[14] the plaintiff's solicitor obtains the requisite form from the Registry, fills it and then delivers it to the Registrar for filing. It shall be endorsed with the nature of the claim made or the relief or remedy sought. The position is not the same in other states. For instance under the old High Court Rules of the old Anambra State (then applicable in Anambra and Enugu States) the plaintiff's solicitor will apply to

[12] 05R2 High Court Rules 1988 Anambra State; 02 R1 High Court of Lagos State Civil Procedure Rules 1972

[13] *Doherty v Doherty* (1968) NMLR 241

[14] 02R3

the High Court Registrar for a writ and the particulars of claim will be subjoined to the application. On the basis of the application, the High Court Registrar will issue a writ on payment of the prescribed fees. The High Court Registrar shall seal every writ. The new High Court Rules have introduced additional requirements.

When does an action commence?

Once a person has completed all that the law and rules of court require him to do in order to validly institute an action, the action shall be deemed to have been commenced notwithstanding that certain administrative functions of the court registry are still outstanding, such as signing of the writ[15].

Service of Processes[16]

Service of any process of the court shall be made by the bailiff of the court or any other officer of the court, or by a police officer, or by a person appointed therefor either specially or generally by the court. Service of originating processes must be by an officer of court and must be served personally on the party whose name appears as the defendant on the process. Originating process refers to the documents with which you start an action in court. Personal service of an originating process shall not be necessary where the legal practitioner for the defendant undertakes in writing to accept service. Processes other than originating processes may be served by a legal practitioner or a clerk under his control, and the processes may be served on the other party or his counsel. Every originating process shall contain an address at which the adverse party may be found for the service of the process on him.

[15] *Alawode v Semoh* (1959)4 F. S. C. 27.

[16] See generally Order 7 High Court Rules of Anambra State 1988; Order 6 High Court Rules of Lagos State 1972.

Substituted Service[17]

Where personal service is required and it appears to a court or judge in chamber that prompt personal service cannot be effected, the court or judge may order substituted service. Application for substituted service is normally made by motion ex parte supported by an affidavit. The modes of substituted service include the following: by delivery to an agent of the defendant; by advertisement on a newspaper or magazine; by delivery to an adult inmate at the usual or last known place of abode or business of the defendant; by affixing the process in the court or some other place of public resort; by pasting on the last known address of the defendant; by registered letter addressed to the defendant at the address indicated by the plaintiff in the affidavit.

The court determines the sufficiency of the reasons to warrant an order of substituted service [18].

Service of Process Outside Jurisdiction

Service of process outside the jurisdiction of the issuing State High Court is a matter under the exclusive legislative list of the Constitution. The Sheriff & Civil Processes Act, a Federal enactment, governs the matter. By section 96(2) of the Act, such a writ could be served as if it was being served in the state or Federal capital territory of issue. However, section 97 provides that a writ of summons for service out of jurisdiction in which it was issued shall in addition to any other notice or endorsement required by the law of a state have endorsed thereon the following notice, namely, "this summons (or as the case may be) is to be served out of the state (as the case may be) . . . and in the . . . state (or as the case may be)". In *Nwabueze v Okoye*[19] it was held that failure to comply with section 97 of the Sheriffs and Civil Process Act renders the service invalid. It was also held in that case that the law governing the service of a writ of summons outside the area of

[17] 07R14 Anambra Rules; 06R6 Lagos Rules
[18] *Giwa Amu v Dikpe Olu* (1968) NMLR 59
[19] (1988)4 NWLR (Pt 91) 664

jurisdiction of the State High Court that issued it but within the Federation is the Sheriff and Civil Process Act.

Section 99 of the Act provides that the period specified in the writ for service outside jurisdiction within which the defendant shall be required to answer before the court to the writ shall not be less than 30 days.

Issuance of a writ for service out of jurisdiction is a matter for each state. Section 94 of the Sheriffs and Civil Process Act enables the Chief Judge of a State or of the Federal Capital Territory with the approval of the Governor or President, as the case may be, to make rules pertaining to issuance of process. Issuance of processes is quite different from service of processes. Thus where a State law or rules requires leave to issue a process for service out of jurisdiction, leave must be obtained before issuing such writ[20]. Under the old Lagos rules, leave is required for issuance of writ for service out of jurisdiction. The old Anambra rules has dispensed with leave in respect of such writs.

In *Odu'a Investment Co Ltd v Talabi*[21] the Supreme Court held that a defendant served with a writ of summons in breach of sections 97 and 99 of the Sheriffs and Civil Process Act, has a choice either to object to the service by applying to have it set aside or ignore the defect and proceed to take steps in the matter. By entering unconditional appearance and filing pleadings, as in the case on hand, he is deemed to have waived his right to object and cannot later in the proceedings seek to set same aside because of the original defect. The Supreme Court revisited and explained the cases of *Skenconsult (Nig) Ltd v Ukey;*[22] *Nwabueze v Okoye;*[23] *NEPA Onah;*[24] *and Adegoke Motors Ltd v Adesanya*[25] which used

[20] *Okafor v Igbo* (1991)8 NWLR (Pt 210) at 47
[21] (1997)10 NWLR (Pt 523)1
[22] (1981)1 S. C. 6
[23] (1988)4 NWLR (Pt 91) 664
[24] (1997)1 NWLR (Pt 484) 680
[25] (1989)3 NWLR (Pt 109) 250

to be considered to be conflicting. . Ogundare JSC, who read the leading judgment said:

> I am not unmindful of the fact that in *Skenconsult* and *Nwabueze* this court had held that non-compliance with these sections would render the proceedings null and viod. It would appear that this declaration was unnecessary in those cases as the defendants were *ex debito justitiae* entitled to have the proceedings set aside because in Skenconsult there was no service at all on the 2nd defendant and the service on the 1st defendant was irregular and they did not waive the irregularity. In NEPA there was indication in the lead judgment of Mohammed JSC that there was no waiver which would suggest that had there been waiver the decision might have been otherwise.
>
> In *Skenconsult, Nwabueze* and *NEPA*, there was no waiver and this Court, in those cases, rightly in my respectful view, set aside the defective service on the application of the defendant.
>
> In *Adegoke Motors*, there was waiver and this court rejected similar application. And rightly, too, in my humble view.
>
> From all I have been saying, my answer to the question set out in this judgment, therefore, is that non-compliance with section 97 and/or section 99 of the Sheriffs and Civil Process Act and the rule of court requiring leave of the Court or judge for a writ to be served out of jurisdiction renders the writ and/or service of it voidable . . . [26].

In *Broad Bank of Nig. Ltd v Alhaji S. Olayiwola & Sons Ltd & Anor*[27] the Supreme Court reaffirmed the position that a writ of

[26] at pp 51 – 52

[27] (2005) 3 NWLR (Pt 912) 434

summons for service out of a state which does not bear the prescribed endorsement is irregular procedurally. According to the Court, once a defendant is given 30 days to enter appearance to a writ of summons served outside the jurisdiction of a court, the failure to endorse on the writ that the defendant has 30 days within which to enter appearance to the writ would not invalidate the writ. The Court further held that non-compliance with the rules of court is generally curable if not intended to overreach.

Service Outside Nigeria

Service of process on a defendant outside Nigeria is governed by the various State High Court rules. Generally, such service is with the leave of the court[28]. When leave is given the document to be served is sealed with the seal of the court for use out of jurisdiction and passed to the Ministry of Justice by the Chief Registrar for onward transmission to the Government of the country where the writ is to served.

Appearance

The defendant after being served with the writ or any other originating process is either to appear in court on a return date indicated on the writ or in the originating process referred to as "the return date" or to "enter an appearance" to prevent judgment being given against him. A defendant enters appearance by completing in duplicate and filing in the court registry a form referred to as the memorandum of appearance. The memorandum of appearance will normally contain an address for service within jurisdiction. The time for entering appearance is 8 days from the date of service of the writ, though appearance may be entered at any time before judgment.

Types of Appearance

Appearance may be unconditional or conditional. Appearance is unconditional when the defendant merely completes the memorandum of appearance and files it without doing more.

[28] 07R 19(2) Anambra Rules; O7R1 Lagos Rules.

By entering unconditional appearance the defendant is deemed to have waived any irregularity in the writ or service of the writ, and submitted to the jurisdiction of the court, though not when there is a total want of jurisdiction. There is a difference between jurisdiction over the subject matter and procedural jurisdiction. While the former cannot be waived the latter can be waived or acquiesced in by the affected party.[29]

If the defendant on the other hand, enters conditional appearance, this may suggest that the defendant wishes to contest the jurisdiction of the court; or that the defendant wishes to object to irregularities on the writ or in the services of the writ. Having entered such a conditional appearance, the defendant should promptly, and without taking further steps in the proceeding raise the objections to jurisdiction or apply to set aside the writ. If he fails to do so promptly the appearance will be taken as unconditional.

Pleadings

Pleadings arise in actions commenced by a writ of summons. After a defendant has been served with a writ of summons, he enters appearance. The next procedure is filing and exchange of pleadings. The position has, however, changed under the new High Court Rules that require 'front loading'. Pleadings are written statements of facts in actions commenced by writ of summons, which the plaintiff relies on for establishing his claim and the defendant for establishing his defence. Pleadings embrace two types of statements – statement of claim and statement of defence. The functions of pleadings were spelt out in *Yar Adua v Baida*[30] to include: (a) to inform the other side of the nature of the case he is

[29] *Kossen (Nig) Ltd & Anor v Savannah Bank of Nig. Ltd (1995) 12 SCNJ 29 AT 31*

[30] (1999) 3 NWLR (Pt 231) 638

to meet, in order to be prepared for same as distinguished from the mode in which the case is to be proved; (b) to prevent the other side from being taken by surprise and to save unnecessary expense; (c) to enable the opponent to know what evidence he ought to prepare for at the trial; (d) to limit the generality of the pleading or of the claim or of the evidence; (e) to limit and define the issues to be tried and as to which discovery is required; (f) to tie the hands of the party, so that he cannot without leave of court go into matters not formally included therein. In the case of *Makwe v Nwukor*[31] the Supreme Court maintained that primarily, the function of pleading is to ascertain with as much certainty as possible the various matters actually in dispute among the parties and those in which there is agreement between them. Pleadings must not be evasive but must deal with the substantive points that are between the parties.[32]

A statement of claim is filed by the plaintiff in which he sets out the facts he will rely on in order to prove his case. In *M.S.C. Ezemba v S. O. Ibeneme &* Anor[33] the Supreme Court held that the cardinal rule of pleadings is that when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegations. Thus, a party is required to plead facts and not the evidence by which these facts are to be proved. The defendant will on receipt of the statement of claim file a statement of defence in which he sets out the facts he may be relying on for any defence he has to the claim. In some cases, after receipt of the statement of defence the plaintiff may file a reply. A reply is not necessary if its only purpose is to deny the allegations made in the statement of defence, because in the absence of a reply there is an implied joinder of issues. Reply may be necessary for meeting new facts raised by the defence, or to admit some of the facts in the

[31] (2001) 7 NSCQR 435

[32] *Orizu v Anyaegbunam* (1978)5 S.C. 21.

[33] (2004) All F.W.L.R. 1786

statement of defence. A defendant may file a rejoinder in answer to a reply. The plaintiff may answer the rejoinder by a surrejoinder which may be followed by a rebutter by the defendant and to which a plaintiff may file a surrebutter in answer.

A pleading must be sufficient and comprehensive, as neither party will be allowed to raise at the trial of the suit, an issue which has not been pleaded[34].

Judgment must not be given on issues the facts relating to which are not pleaded. Similarly, evidence on facts, which are not pleaded, go to no issue. Parties are bound by their pleadings and cannot give evidence of facts not pleaded. Evidence, which is at variance with the pleadings, must be discountenanced as they go to no issue. In other words, it is not open to a party to depart from his pleadings and put up a different case from the one pleaded just as it is not competent for a court of law to depart from the pleaded case to find on that which is never pleaded[35]. Parties must state in their pleadings facts, and material facts only, not the evidence to prove them, and points of law need not be pleaded[36].

Statement of Claim

A statement of claim contains a statement of all material facts in a concise and clear manner, which the plaintiff needs to establish the relief claimed. It consists of three parts – introductory averments, the body and the prayer or relief. The introductory averments normally state the parties, the business they carry on, and how they came to be connected with the case. The body contains facts that give rise to the cause of action, while in the prayer the plaintiff indicates the reliefs he is asking from the court.

[34] *Makwe v Nwukor* (2001)7 NSCQR 435
[35] *Umukoro v NPA* (1997)4 NWLR (Pt 502) 65; *Emegokwe v Okadigbo* (1973)4 S.C. 113.
[36] *Olawole v Attorney General* (1971)1 All NLR 313.

Relationship of the writ of Summons and the Statement of Claim

The cause of action is determined by the writ of summons. This means that a person cannot in the statement of claim deviate from the cause of action in the writ, without amending the writ. However, the statement of claim supersedes the writ. This means that where there are two inconsistent statements about the same matter in the writ and the statement, the statement will override the writ. Secondly, if something is stated in the writ but omitted in the statement of claim, it is deemed to have been abandoned[37].

Statement of Defence

The statement of defence shall contain all material facts on which the defendant relies for his defence. The statement of defence can answer the allegations in the statement of claim in six ways – admission; traverse; confession and avoidance; objection on point of law; plea of set-off; plea of counterclaim. The defendant may in addition give his own version of the transaction.

Admission indicates that the defendant does not quarrel with the averments in the statement of claim. Facts, which are admitted, need not be proved[38]. Traverse means a categorical denial in a statement of defence of any fact alleged in the statement of claim. The defendant must specifically or by implication deny any material allegation in the statement of claim. A mere general or evasive denial will be taken as admission. In *Akintola v Solano*[39] the Supreme Court held that in respect of essential and material allegations in the statement of claim, the general traverse ought not to be adopted and that such essential and material allegations should be specifically traversed.

It is by means of a traverse that issues are joined. A joinder of issues arises where a fact alleged in the statement of claim is

[37] *Udechukwu v Okwuka* (1956)1 F.S.C. 70.
[38] S. 75 Evidence Act; *Wiri v Wuche* (1980) 1-2 S.C I
[39] (1986) NWLR (Pt 24) 598.

categorically denied in the statement of defence. The court must then resolve the issues by making a finding one way or the other.

Pleading by way of confession and avoidance means that the defendant admits the facts alleged but goes further to set out new facts not mentioned by the plaintiff which new facts combined with the admitted ones will give a totally different legal results. The new facts 'avoid' the effect of the 'confession' by constituting a defence to the claim, for instance plea of justification in a libel action.

Set-off

Set-off can only arise where both the plaintiff's and defendant's claims are monetary in nature. A set-off has no independent existence. Its life depends on the life of the action brought by the plaintiff. If it is raised, and it succeeds, the judge will give judgment on the difference. Pleading of set-off does not necessarily admit the debt. For the purpose of set-off, the debt must exist between the parties and in the same right. Thus, if the plaintiff is claiming in a representative capacity, the defendant cannot plead as set-off a debt the plaintiff owes him personally.

Counter-Claim

The nature and purpose of counter-claim was elucidated by the erudite Niki Tobi J.C.A. as he then was) in *Peterside v I.M.B. (Nig) Ltd*[40]. According to his Lordship, a counter-claim is a contrary or opposing claim. It contrasts or contradicts the main claim. It is a cross action. A counter-claim is a legal procedure, which allows the defendant to maintain an action against the plaintiff as profitable as in a separate suit. It is a weapon of defence, which enables the defendant to enforce a claim against the plaintiff as effectively as in an independent action. A counter-claim is to all intents and purposes an action by the defendant against the plaintiff. It has an independent and separate existence from the main claim. As a matter of law it is a distinct and separate action by the defendant. It is only for convenience that the defendant uses

[40] (1993)2 NWLR (Pt 278) 712 C.A.

the forum of statement of defence to include his claim. But that does not in law make it part of the defendant's defence[41]. As a separate action, a counter-claim can survive even if the plaintiff's action abates or is stayed or is aborted. Therefore, even if a plaintiff's action is dismissed, the counter claim has to be taken on its merit.

Preliminary Objections

On receipt of the writ of summons or statement of claim, the defendant may raise a preliminary objection on several grounds. Such grounds may include: that the writ of summons or statement of claim discloses no cause of action; that the court lacks jurisdiction to entertain the matter; that the plaintiff has no locus standi; that pre-action notice was not given; that the action is not competent before the court.

Cause of Action

A cause of action means the factual situation stated by the plaintiff, which if substantiated entitles him to a remedy against the defendant[42]. In *A.G. Federation v A.G Abia State & 35 ors*[43] the Supreme Court defined a cause of action to mean the fact (or facts) which establishes or gives rise to a right of action and that it is the factual situation which gives a person the right to judicial relief. The Supreme Court maintained in that case that it is sufficient for a court to hold that a cause of action is reasonable once the statement of claim in a case discloses some cause of action or some questions fit to be decided by a court notwithstanding that the case is weak or not likely to succeed. Where the writ of summons or statement of claim discloses no reasonable cause of action, the suit ought to be struck out.

[41] *Ogbonna v A.G. Imo State* (1992)1 NWLR (Pt 220) 657
[42] *Egbe v Adeferasin* (1985)1 NWLR (Pt 3) 549
[43] (2001) FWLR (Pt 64) 202

Locus Standi

The term 'locus standi' denotes the legal capacity to institute proceedings in a court of law. It is used interchangeably with terms like 'standing' or 'title' to sue. The doctrine of locus standi requires that a party bringing an action must have a personal stake or interest in the outcome of the controversy. Sometimes it is said that the interest of the plaintiff must be peculiar to him and not an interest that he merely shares in common with the general public. However, the fact that there is a general injury against many people and the other people affected do not complain does not make the complaint of the complainant who is one of those affected unjusticiable[44]. Locus standi is an issue that goes to jurisdiction and could be raised at any stage even for the first time on appeal. In determining the issue of locus standi, judicial powers are involved and the matters in which the judicial powers can be exercised are by the provisions of section 6(6)(b) of the Constitution expressly stated to extend to all matters between persons or between government or authority and any person in Nigeria for the determination of any question as to civil rights and obligations of that person. Consequently, it was held in *Thomas v Olufosoye*[45] that a plaintiff, who has not raised any question as to his civil rights and obligation, has not locus standi, since he has not disclosed any right alleged to have been infringed and calling for redress.

The fundamental aspect of locus standi is that it focuses on the party seeking to get his complaint before the court and not on the issue he wishes to have adjudicated[46]. The locus classicus in Nigeria on the law of locus standi is the case of *Adesanya v The President*[47]. In that case the majority of the members of the Supreme Court held as follows:

[44] *Badejo v Minister of Education* (1990)2 WBRN 48 C.A
[45] (1986)1 NWLR (Pt 18) 669 S.C
[46] Per Obaseki JSC in *Adesanya v The President* (1981) SC 112
[47] (1981) S.C. 112.

> (a) Litigation envisaged by section 6(6)(b) of the constitution seems to be largely contentious and adversary. Despite the enthusiasm of all to ensure compliance with the constitution, the right of the individual to engage in such an exercise in court can only arise where circumstance of an oppressive or hostile nature exist and where the rights of the citizens guaranteed under the law are curtailed or invaded or breached by a breach of, or non-compliance with the constitution.
>
> ( ) The mere fact that an act of the executive or legislature is unconstitutional without any allegation of infraction of or its adverse effect on, one's civil rights and obligations poses no question to be settled between the parties.

In the recent case of *A.G. Federation v A.G. Abia State & 35 ors*[48] the Supreme Court maintained that the twin factors to be considered in determining locus standi are: that the plaintiff must be able to show that his civil rights and obligations have been or are in danger of being violated or infringed; and that the plaintiff must have a justiciable dispute with the defendant.

Pre-action Notice

Where a statute prescribes that a pre-action notice must be issued before an action can be commenced against any authority, public body, government department etc, failure to give the pre-action notice before commencing the action renders the suit incompetent and it is bound to be struck out. In *Umukoro & 8 ors v Nigeria Ports Authority & Anor*,[49] section 110(2) of the Ports Act[50] provides:

> No suit shall be commenced against the Authority until one month at least after written notice of

[48] (2001) FWLR (Pt 64) 202.
[49] (1997)4 NWLR (Pt 502) 656.
[50] Cap 361 Laws of the Federation 1990

> intention to commence the same shall have been served upon the Authority by the intending plaintiff or his agent. Such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims.

The Supreme Court held that except the aforesaid provision of the Port Act is complied with, any action commenced against the Nigerian Ports Authority is incompetent. There is no doubt that insistence or compliance with the requirement of pre-action notice is an undesirable inhibition to right of access to justice.

Competence of Action

An action can be challenged on the ground of competence. In *Madukolu & ors v Nkemdilim & Ors*[51] it was held that a court is competent. (1) if it is properly constituted as regard number and qualifications of members of the bench and no member is disqualified for one reason or another; (2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and (3) the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. These principles are well settled and have been approved in a good number of cases[52].

Jurisdiction

Jurisdiction is the legal authority, the extent of the power given to a court by the statute, which establishes the said court. It connotes the entire basis of taking cognizance of matters presented formally to the court for the purpose of deciding them[53]. Jurisdiction is blood that gives life to survival of an action in a court of law and without jurisdiction the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it

[51] (1962) All NLR 587
[52] *Alao v A.C.B* (2002)2 SCNQR 1067
[53] *A.G. Anambra State v A.G. Federation* (1993)9 KLR 158

would be an abortive exercise [54]. Because the issue of jurisdiction is fundamental, it can be raised at any time, even for the first time on appeal. Where a court exercises a jurisdiction which it does not posses, its decision amounts to nothing.

Limitation of Action

Where the law provides for the bringing of action within a prescribed period, in respect of a cause of action accruing to the plaintiff, proceedings shall not be brought after the time prescribed by the statute. Action brought after the prescribed period offends against the provision of the section and does not give rise to a cause of action[55]. Limitation periods are of two kinds, namely, limitation under the general law - under the various Limitation Acts or Laws – and limitation under special statutes, such as various Public Officers Protection laws, States Action laws, Local Government laws. In *Egbe v Adefarasin*[56] the Supreme Court held that the Plaintiff's/Appellant's action against the 2nd respondent was statute-barred by section 2 of the Public Officers Protection Law [57] in that the action was brought not within three months as prescribed under the law but after a period of two years, nine months and twenty eight days of the event complained of. In *Umukoro v N.P.A*[58] section 110(1) of the Ports Act[59] provides that whoever wishes to sue the Nigerian Ports Authority or its servants must do so within 12 calendar months, next after the act complained of. The cause of action arose between July 1980 and April 1981 but action was commenced on 27th November, 1984. The action was held incompetent.

[54] *Shitta-Bey v A.G. Federation & Anor* (1998)7 SCNJ 264 at 266.
[55] *Egbe v Adefarasin* (1985) NWLR (Pt 3) 549
[56] *Ibid*
[57] Cap 92 Lagos Laws
[58] (1997) 4 NWLR (Pt 502) 656
[59] Cap 361, Laws of the Federation of Nigeria, 1990

Demurrer

The procedure by way of demurrer is in vogue in the states of the former Eastern Nigeria but not elsewhere. By the procedure, where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, the defendant may raise his defence by motion that the suit be dismissed without any answer upon question of fact being required from him[60]. For the purposes of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations, and no evidence respecting matters of fact will be allowed. A defendant who feels that he has legal or equitable defence to a claim by way of demurrer will file a motion praying the court to dismiss plaintiff's claim, stating the point of law he relies on. He should not file any statement of defence before bringing the motion. Where the motion is overruled, the defendant is then entitled to deny in the statement of defence facts he admitted for purpose of demurrer. It must be noted that demurrer has been abolished almost throughout Nigeria. For instance, the High Court (Civil Procedure) Rules of Enugu State 2006 in Order 22 Rule 1 provides that "no demurrer shall be allowed".

It must be noted that by abolishing demurrer the rules did not abolish preliminary objections on point of law. So the defendant is still entitled to raise preliminary objections on point of law.[61]

Procedure in lieu of Demurrer

Under the procedure in lieu of demurrer any party is entitled to raise by his pleadings any point of law, and any point so raised may be disposed of by the trial judge before, at, or after the

[60] O10R1 Anambra Rules.

[61] Please see Ojukwu, E *et. al Introduction to Civil Procedure* (Aba: Helen-Roberts Research & Resources Limited, 2002) pp. 195

trial. This procedure, unlike demurrer, is available to either party. The plaintiff may challenge the statement of defence on any legal ground and vice-versa. The procedure presupposes that the statement of defence and statement of claim must have been filed. In *Lasisi Fadare v A.G. Oyo*[62] it was pointed out that the procedure is designed to ensure that suits that can be expeditiously dealt with and disposed of on grounds of law are not carried through a long and expensive trial.

The procedure in lieu of demurrer is applied in Lagos State, and States of the former Western and Northern Nigeria.

Interlocutory Applications

An interlocutory proceeding is a proceeding within a proceeding[63]. Interlocutory applications may be made at any stage of a case. It may be made before or during the pendency of, an action or even after judgment, depending on the nature of the application. Such applications are made by motion. A motion is an application, oral or written made to the judge in open court or chambers seeking the order of the court in respect of the prayers stated in the application. A motion may be *ex parte* in which case the other party is not put on notice. It is usually filed in court when the application relates to an order of substituted service or the applicant seeks a court order for an interim injunction in grave emergencies to preserve the status quo. Generally, motions are required to be on notice[64]. The exception is where the delay of notice will entail irreparable damage such as the destruction of the *res*. In *Kotoye v CBN*[65] it was held that interlocutory as opposed to interim injunction can only be made when the other party is put on notice. Motions are normally supported with affidavits.

[62] (1982)4 S.C. 257

[63] Nwadialor *op cit* P. 348

[64] O16 Anambra Rules

[65] (2000)16 W.R.N. 71

An affidavit is a written statement of evidence sworn to by the person making it called a deponent, before a person authorized to take affidavit (the commissioner for oath) and where admissible is receivable in legal proceedings as evidence either in support of an application or in answer or reply. An affidavit must be headed as other processes in the cause or matter. It must be expressed in the first person and divided into convenient paragraphs numbered consecutively. Generally an affidavit should contain only such facts as the deponent is able to prove from his personal knowledge or from information, which he believes to be true.

Any conflict in affidavit evidence must be resolved by oral evidence[66].

The Undefended List Procedure

The undefended list procedure applies in most States in Nigeria, except Lagos State. This procedure is applied in respect of a claim for a specific amount of debt or liquidated money demand owed by the defendant to the plaintiff and where the defendant does not deny that he is liable for the claim. The defendant does this either by not showing any intention to defend or where he shows such an intention, the defence he purports to raise is in fact no defence to the plaintiff's claim.

Under this procedure, the application for writ of summons is supported by affidavit setting out the grounds upon which the claim is based and stating that in the deponent's belief there is no good defence to the claim. If the court is satisfied that there is no good defence, it will list the case on the undefended list, and make the writ of summons accordingly, and enter a hearing date. When the defendant is served with the writ of summons together with the affidavit, if he does not file a defence accompanied with an affidavit by the hearing date, the court can give judgment to the plaintiff without calling on him to prove his case. If the defendant intends to defend, he serves a notice of intention to defend together

[66] *Falobi v Falobi* (1976) 9 – 10 S.C.I

with an affidavit setting out the grounds of defence. If the court considers that there is good defence, it shall grant leave to defend and remove the action from the undefended list to the general cause list. In *Progress Bank of Nigeria & Anor v O.K. Contact Point Holdings Ltd*[67] the Court of Appeal emphasized that summary judgment should not be given unless the defendants' defence is vague waterless and impotent. But where there is weakness in the defence of the defendant, judgment should be given to the plaintiff. However, where facts are diametrically opposed, the court should afford the parties equal opportunity to canvass their case.

A judgment entered on the undefended list is a judgment on the merits and can only be set aside by way of appeal[68]. Where the court finds that there is a good defence and transfers the matter to the general cause list, the parties will be required to file their pleadings, otherwise pleadings will not be necessary[69].

Order 10[70] Procedure – Specially Endorsed Writ

This is applicable only to Lagos State. According to the Supreme Court in *UTC (Nig) Ltd v Pamotei*[71] the rationale of Order 10 procedure is for straightforward cases, which are legally incontestable, and to enable speedy trial of claims, which in law ought not to be contested because the legal situation is too clear to allow a defence. It is also designed to discourage unmeritorious claims or spurious defence. By its very nature, the Order 10 procedure means that a judgment is given without taking the defence of the defendant[72].

The specially endorsed writ is designed for all but seven actions, whether the nature of the claim is liquidated or

[67] (2001)32 W.R.N. 109
[68] *UAC (Tech) Ltd v Anglo-Canadian Cement Ltd* (1966) NMLR 349.
[69] 09R2 Anambra Rules
[70] Order 10 High Court Civil Procedure Rules, Lagos State.
[71] (1989)2 NWLR (Pt 103) 244
[72] *Macaulary v NAL Merchant Bank ltd* (1990) 4 NWLR (Pt) 283

unliquidated. By Order 3 Rule 4 the actions that cannot be prosecuted by a specially indorsed writ are: defamation; malicious prosecution; breach of promise of marriage; false imprisonment; seduction; a claim based on allegation of fraud. The preliminary requirements for the Order 10 Procedure as contained in Order 10 Rule 1(a) are as follows. The defendant must have entered appearance. The statement of claim must have been indorsed on, or accompanied, the writ served on the defendant. There must be affidavit verifying the cause of action or the amount claimed and stating that there is no defence to the action. In *Macaulay v NAL Merchant Bank Ltd*[73], the Supreme Court held that a plaintiff can still make an application for summary judgement after the defendant has put in his statement of defence if it appears that the defence which has been delivered itself discloses facts which make an application for summary judgment right and proper.

Where the plaintiff has satisfied the conditions, he can apply by summons supported with affidavit for judgment. The judge may enter judgement for the plaintiff unless the defendant:

( ) satisfies him that he has a good defence to the action, or
( ) discloses such facts as may be deemed sufficient to entitle him to defend the action.

The defendant may show cause, against the plaintiff's application for summary judgment. This the defendant can do by a preliminary or technical objection; for example, that the case is not within the order or that the statement of claim or affidavit in support is defective. The defendant can also show cause on the merits, for example, by showing that he has a good defence to the claim on the merits, or that a difficult point of law is involved, or that there is a dispute on the facts, which ought to be tried[74].
The Supreme Court held in *Cotia Commercio v Sanusi Bros Ltd*[75] that the defendant's affidavit must condescend upon particulars

[73] *Ibid*
[74] *Ibid*
[75] (2000)2 SCNQR 1515

and as far as possible deal specifically with the plaintiff's claim and affidavit, and should also clearly and concisely state what the defence is. A mere denial by the defendant of the plaintiff's indebtedness is not enough. It is also not enough for the defendant to show a case of hardship, or a mere inability to pay.

In *Nishizawa v S.M.Jethwani Ltd*[76] Aniagolu, J.S.C. in line with older decided cases stated the principles governing the determination of the grant of leave to a defendant to defend action under order 10 procedure. In the first place, a defendant who has no real defence to the action should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by delay tactics aimed, not at offering any real defence to the action but gaining time within which he may continue to postpone meeting his obligation and indebtedness. Secondary, on the other hand, a plaintiff should not be permitted to shut out real (not a sham) defence to an action by his clinging to the assertion that once the defendant has failed to "show cause" against such "plaintiff's application by affidavit" as required by order 10 rule 3, he is out of court and must have a judgment entered against him no matter how genuine a defence he has disclosed by means other than by affidavit under that rule or the Order".

Recent Innovations in Civil Procedure

Lagos State blazed the trial when it promulgated a new High Court (Civil Procedure) Rules in 2004 with radical innovations for a more efficient and expeditious dispensation of justice. The Federal Capital territory, Abuja and many other states in the federation have followed the Lagos state example. Some of the innovations include the following.[77]

[76] (1984)12 S.C. 234
[77] For an incisive discussion on the innovations of the new High Court (Civil Procedure) Rules see Carol Ajie "Comparing the Lagos, Abuja and Kwara

Commencement of Action by Writ of Summons Under the New Rules

Under the Lagos Rules the person instituting an action is now known as a 'claimant'. The Rules of the Federal Capital Territory and other states of the Federation still employ the terminology 'Plaintiff'.

By Order 3 Rule 2(1) of the Lagos Rules, all civil proceedings begun by writ of summons shall be accompanied by

( ) statement of claim
( ) list of witnesses to be called at the trial
( ) written statements on oath of the witnesses, and
( ) copies of every documents intended to be relied on during trial.

This is what has been called 'front loading'. By Order 3 Rule 2(2) where a claimant fails to comply with Order 3 Rule 2(1) above, his originating process shall not be accepted for filling by the Registry. Under the Abuja Rules, there is no provision authorizing the Registry to reject a writ of summons on similar grounds.[78]

Order 4 Rule 15 of the Abuja requires a writ of summons to be accompanied by:

( ) a statement of claim
( ) copies of documents mentioned in the statement of claim to be used in evidence;
( ) witness statement on oath; and
( ) a certificate of pre-action counseling.

The purpose of the pre-action counseling is to show that the parties have been appropriately advised as to the relative strength or weakness of their respective cases. Under the Abuja jurisdiction, counsel shall be personally liable to pay the costs of the proceedings where it turns out to be frivolous.

State Civil Procedure Rules" This Day, September 27, 2005 p.47; Thisday, October 11, 2005 p.43

[78] The High Court Rules of Enugu State 2006 contain a provision in pari material with the Order 3 Rules 2(1) & (2) of the Lagos Rules.

The defendant is required to respond to the writ of summons within 42 days under the Lagos Rules and 8 days under the Abuja Rules.[79] The statement of defence shall be accompanied with the following:

(a) documents intended to be used in the defence;
(b) written statement on oath of witnesses;

The Lagos Rules requires the filing of list of witnesses. This is not required by the Abuja Rules. The Abuja Rules requires the filing of a certificate of pre-action counseling. This is not required under the Lagos Rules.[80]

Motions to be supported with written Submissions

Another innovation made by the Lagos State High Court (Civil Procedure) Rules is that motions should be accompanied with written submissions at the time of their filing.

Under the Lagos Rules[81] ex-parte orders abate after seven days of its grant but can be extended for another seven days if the application for extension is made before the expiration of seven days from the date of the grant. Under the Abuja Rules ex-parte order elapse after 14 days.[82] All the Rules restate the position that ex parte orders should be sparingly granted to avoid irreparable damage or serious mischief to the applicants.

Pre-Trial Conferences

The Lagos Rules provide for pre-trial conferences.[83] The pre-trial conferences should be concluded within three months of their commencement unless the Chief Judge extends the period. Order 25 Rule 1(1) of the Lagos Rules provides that within 14 days after close of pleadings the claimant shall apply for issuance of a pre-trial conference notice. The purposes of the pre-trial conference are: (a) disposal of matters which must or can be dealt

[79] See Order 3 Rule 3 Lagos Rules: Order 4 Rules 1 and 8 Abuja Rules.
[80] See Order 17 Rule1, Lagos State (Civil Procedure) Rules 2004; Order 23 Rule 2 High Court (Civil Procedure) Rules, Abuja 2005
[81] Order 39 Rule 3
[82] Order 7 Rule 12
[83] Order 25 Lagos Rules

with on interlocutory application; (b) giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal; (c) promoting amicable settlement of the case or adoption of alternative dispute resolution.

If the plaintiff (claimant) does not apply for pre-trial conference, defendant may do so or apply for an order to dismiss the act At the pre-trial conference, the judge may make an order for: joining other parties; amending pleadings or any other process; filing motions; further pre-trial conferences; any other matters appropriate in the circumstances of the case. Failure by the claimant (plaintiff) to participate in the pre-trial conference will lead to the dismissal of his case. If the defendant fails to participate in the pre-trial conference, it will lead to judgment for the claimant (plaintiff).

There is no provision for pre-trial conferences under the Abuja Rules. Nevertheless, Order 17 Rule 1 of the Abuja Rules provides that "A Court or Judge, with the consent of the parties, may encourage settlement of any matter{s} before it by either arbitration, conciliation, mediation or any other lawfully recognized method of dispute resolution". On settlement of issues, Order 33 of the Abuja Rules provides as follows: "On conclusion of pleadings, the parties shall within 14 days of it submit in writing to the Registrar the material questions in controversy between them in the form of issues, which shall be noted by the court and set down for ;

Settlement of issues is important in order to narrow the issues on which evidence should so that time is not wasted on irrelevant issues.

Written Final Addresses

Under the new Lagos State High Court (Civil Procedure) Rules final addresses are required to be written. The same is the position in most other jurisdictions that have modelled their civil procedure Rules after the Lagos Rules.

[84] Order 25 Rule 3 Lagos Rules.

Proceedings at the Trial

By section 36(3) of the 1999 Constitution, the proceedings of every court or tribunal determining the civil rights and obligations of any person shall be held in public. The party on whom the burden of proof lies shall be entitled to address the court at the commencement. Usually it is the plaintiff. Usually too, there is no address. The plaintiff will go ahead to call his witnesses. Generally, a witness gives evidence in court by answering a series of questions put to him by counsel or the parties to the proceeding. This method of putting questions to witnesses with a view to obtaining material evidence from him is called the examination of the witness[85]. The examination of a witness by the party who calls him is called his examination-in-chief[86]. Usually, a witness is examined-in-chief before cross-examination. Leading questions are not to be asked in examination-in-chief if objected to by the adverse party except with the permission of the court[87]. A leading question is one that suggests the desired answer; or a question that assumes a controverted fact about which the witness has not testified. The two main problems with examination in chief are how to examine a witness in such a way as to bring out all relevant testimony as effectively as possible, and where the witness fails to remember certain details, how to refresh his memory without infringing the rules. However, the new High Court Civil Procedures Rules that adopted the 'front-loading' method have rendered examination- in-chief unnecessary.

After the evidence-in- chief (or introduction of the witness where the 'front-loading' method is adopted) the witness is cross-

[85] Aguda, T.A. *The Law of Evidence* 3rd edn, (Ibadan, Spectrum Law Publishing, 1989) 316
[86] S. 188(1) Evidence Act.
[87] S. 195(1) *Ibid*

examined by the opposing party or his counsel, if he desires. On purpose of cross-examination, Achike, J.S.C. has this to say[88].

> The noble art of cross-examination constitutes a legal weapon in the hands of the adversary to enable him effect the demolition of the case of the opposing party. It is therefore good practice for counsel not only to put across his client's case through cross-examination, he should, as a matter of the utmost necessity, use the same opportunity to negative the credit of the witness whose evidence is under fire. Plainly, it is unsatisfactory if not suicidal (sic) bad practice for counsel to neglect to cross-examine a witness after his evidence-in-chief in order to contradict him or impeach his credit while being cross-examined but attempt at doing so only by calling other witnesses thereafter[89]

Generally, the purposes of cross-examination are: to discredit a witness by showing from his own mouth that he is unworthy of belief; to discredit a witness by demonstrating that his evidence is inconsistent with other testimonies or to discredit another witness on the same side; to separate truth from false and exaggerated statement; to add purposely or inadvertently omitted facts and to minimize or explain facts; to give the court advance notice of the theory of the cross-examiner's case; and to obtain admissions or proof of facts advantageous to the cross-examiner's case. In cross-examination, all manners of questions, including leading questions, are allowed, provided they are not irrelevant or vexatious.

After cross-examination, the party who called the witness will re-examine him, if necessary. Re-examination is for the purpose of clarification of doubts arising from the cross-examination, and possibly, amplification, of the witness's

[88] Okegbe & Ors v Chikere & Ors (2000)3 NSCQR 223
[89] at. 268

evidence. All plaintiff witnesses are called and, in turn, they go through the above procedure. When they have all been called, that is the end of the plaintiff's case. It should be noted that documentary evidence are tendered through the witnesses and marked as exhibit in court by the clerk of court.

The defendant will now open his defence by calling his witnesses in turn and each witness will undergo the same process as the plaintiff's witnesses. The defendant after calling all his witnesses will then close his case. Alternatively, a defendant may at the close of plaintiff's case, wish to make a submission of no case to answer. In that case, he shall be put to an election either to stand on the submission or to proceed to lead evidence without making the submission. If he refuses to make the election, the court shall refuse to entertain the submission[90]. But if he elected to make the submission, he shall not, if overruled, lead evidence again in defence of the action.

At the conclusion of evidence of all the parties, counsel for the parties will address the court. The plaintiff will first address the court only if the defendant has stated that he proposes not to call evidence, that is where the defence rests its case on the plaintiff's case. Where the defendant calls evidence, he addresses at the conclusion of his witnesses' testimony, summing up his case and commenting thereon. The plaintiff will then reply generally on the whole case. This will be followed by a reply on point of law by the defendant, where necessary.[91]

Non-Suit

An order of non-suit implies that although, on that particular occasion, the plaintiff has failed to prove his case against the defendant, he should in fairness, not be denied an opportunity of relitigating the same case[92]. Therefore, if at the close of hearing,

[90] *Ekpe v M.N. Dev Corp* (1967) NMRL 407.
[91] Nwadialo, F. op. cit. pp. 702 – 703.
[92] *Okegbe & Ors v Chikere & Ors* (2000)3 NSCQR 219

neither the plaintiff nor the defendant is entitled to judgment, and the plaintiff ought to be given a second opportunity of proving his case, the suit ought to be non-suited and not dismissed[93]. An order of non-suit ought to be granted where the plaintiff has failed not because he has not proved his case on the merits, but due to a mere technical hitch, for instance, where the plaintiff lacks capacity[94]. Furthermore, it is appropriate where plaintiff has failed to adduce sufficient evidence on a crucial point which was not sufficiently pleaded, and where the state of evidence does not entitle the defendant to judgment[95].

In *Okegbe & Ors v Chikere & Ors* [96] the Supreme Court held that an order of non-suit was not appropriate in the case where the plaintiffs have been found not to have a standing to bring the action. Also, a court of trial should not make an order of non-suit without hearing from the parties or their counsel as to the desirability or otherwise of such an order. If it does so, the order will be quashed[97].

Retrial

An order of a new trial may be made where there has been an error in law or an irregularity in procedure of such a nature that on the one hand the trial was not rendered a nullity and on the other hand the court is unable to say that there has been no miscarriage of justice[98]. In *Eke v Okwaranyia*[99] the Supreme Court laid down some principles regarding the question of retrial. Where a trial court made no finding of fact on conflicting material evidence adduced on an issue by both parties to an action, the resolution of which is essential to the just determination of the

[93] *Oduola v Coker* (1981)5 S.C. 197
[94] *Okpaloka v Umch* (1976) 9 –10 S.C. 269
[95] *Ode v Trustees of Ibadan Diocese* (1966)1 All NLR 28
[96] (2000)3 NSCQR 215
[97] *Akpapuna v Nzeka* (1983)2 SCNLR 1
[98] *Achiakpa v Nduka* (2001)7 NSCQR 341
[99] (2000)6 NSCQR 239

case, the proper cause is to order a retrial unless the circumstances of the case do not warrant such an order. An order of retrial will also be made: where there has been a substantial misdirection by the court; or where there are other substantial error by the court itself and the error cannot be corrected by the appeal court; or where it appears that the rules of fair hearing has been violated. In general, the appeal court must be satisfied before ordering a retrial: that the other party is not thereby being wronged in a manner that there would be a miscarriage of justice; or that it cannot, in the exercise of its appellate jurisdiction, do justice in the case and bring all the litigation to an end; or the justice of the case, looked at in all its special circumstances, justifies it[100].

However, when a plaintiff's case has failed in toto, that is to say, he has not succeeded in discharging the burden on him going by the evidence, a retrial order is inappropriate and will not be made[101].

Judgments and Orders

Consent Judgment

There is a consent judgment where parties to an action in court have fashioned out an agreement as to how to settle their dispute out of court and apply to the court to give judgment on the terms they have agreed upon. Such judgment when given is called a judgment by consent and serve as a final determination of the dispute between the parties[102]. To have a valid consent judgment the parties must be *ad idem as* to the agreement, and the terms of settlement must be filed in court. It is the order of court based upon the terms of settlement that is the consent judgment[103]. A consent

[100] *Eke v Okwaranyia Ibid*
[101] *Ibid*
[102] Per Karibi-Whyte JSC in *Afegbai v A.G. Edo State & Anor* (2001)7 NSCQR 549 at 568
[103] *Ibid* P. 569

judgment is a final decision, though an aggrieved party can appeal against the order of consent judgment with leave of the court[104]. The fact that the terms of agreement were negotiated and signed by counsel on behalf of plaintiff and not by the plaintiff himself with the defendant did not affect its validity. This is because plaintiff has given to his counsel a general authority without limitation to act on his behalf and to represent him in the action[105].

A consent judgment will be set aside on any ground, which may invalidate an agreement on which it is founded and would be rescinded[106]. For there to be a consent judgment, there must have been an agreement of the parties on all aspects of the matter to be covered by the consent judgment. Where the parties agree on some aspects and have not agreed on others, they should be permitted to reach an agreement on the latter, or resolve the points of disagreement by evidence before judgment is pronounced[107].

Default Judgment

Judgment may be entered against a defendant for default of appearance or pleadings. If after the service of a writ on him a defendant fails to enter appearance, the plaintiff can at any time after the period prescribed for appearance, obtain judgment through a motion on notice supported with affidavit[108]. Under Order 9 Rule 12 of the Lagos Rules, the Plaintiff shall on default of appearance by the defendant, cause a statement of claim to be served and the action may then proceed as if appearance had been entered.

Where a defendant fails to file a statement of defence, the plaintiff can, after the period specified for filing a statement of defence, bring an application supported with affidavit for judgment[109].

[104] *Ibid*
[105] Ibid P. 570
[106] *Ibid* P. 569
[107] Per Ayoola, JSC in *Menakaya v Menakaya* (2001)7 NSCQR 685 at 732
[108] 08R15 Anambra Rules;
[109] 024R11 Lagos Rules; 09R 42(2) Anambra Rules.

Judgment obtained in any of the above instances is a default judgment. A plaintiff is not automatically entitled to judgment because the defendant has failed to appear or to enter a defence. It is a matter within the discretion of the judge, to be exercised in proper cases where it is clear that the defendant does not have a defence, or has not shown interest in making any defence[110].

A defendant may apply for a default judgment to be set aside. The principles guiding a court when considering an application to set aside its judgment given in the absence of one of the parties before it are:

(0) The reasons for the applicant's failure to appear at the hearing or trial of the case in which judgment was given in his absence;
(0) Whether there has been undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists;
(0) Whether the party in whose favour, the judgment subsists would be prejudiced or embarrassed upon an order for rehearing of the suit being made, so as to render such a course inequitable.
(0) Whether the applicant's case is manifestly unsupportable; and
(0) Whether the applicant's conduct throughout the proceedings that is, from the service of the writ upon him to the date of judgment, has been such as to make his application worthy of a sympathetic consideration.

All the conditions must be severally met[111].

[110] *Jammal Limited v MISR* (Nig) Ltd (1972)4 S.C. 79
[111] *Haruna v Ladende* (1987) NWLR (Pt 67) 941

Final Judgment

At the close of the case for both parties and their addresses, the decision of the court may be delivered at that time or be reserved for another date. The decision must be delivered in the open court[112]. By section 294(1) of the 1999 Constitution, the court is obligated to deliver its judgment within 90 days from the conclusion of final addresses, though non-compliance with this requirement cannot be a sufficient ground to set aside the judgment except where the party complaining has suffered a miscarriage of justice by reason of that [113].

In *C.C.B. (Nig) PLC v Okpala*[114] the Supreme Court held that legal decision of a court of record are never made or handed down orally.

Execution of Judgment

Interlocutory Judgments

An interlocutory judgment or order is one, which does not deal with the final rights of the parties but merely directs how the parties are to proceed in order to obtain the final decision. Interlocutory judgments are usually enforced by contempt proceedings and the courts have inherent power to take disciplinary action in order to enforce its orders[115].

Final Judgments

A final judgment is one, which finally settles the rights of the parties in the subject matter of the claim[116]. There are various writs available for the purpose of execution of final judgments depending on the circumstances of each case. Execution may be against the judgment debtor or against his property.

[112] Section 36(3) 1999 Constitution.
[113] Section 294(5)
[114] (1997)8 NWLR (Pt 518) 673
[115] Okoya v Santilli (1990)2 NWLR (Pt 130) 172
[116] Babajide v AISA (1966)1 ANLR 254.

The Writ of Fifa (Fieras Facias)

This is the commonest writ of execution but it is for money judgments only. It is an order which will authorize the court bailiff to seize and sell moveable property, and with the leave of the court, immovable property, of the judgment debtor.

Garnishee Proceedings (Writ of Garnishment)

This is execution by diverting money due to the judgment debtor from other persons, (for instance in his bank account), to the judgment creditors.

Writ of Sequestration

Such a writ empowers persons appointed by the court to enter upon all the immovable property of the judgment debtor to collect rents and profits therefrom and to take possession of all his movable property until he complies with the judgment.

Writ of Possession

This is used for the enforcement of judgment on landed property. The party who obtains judgment employs the writ to take actual possession of the property.

Writ of Delivery

This is the mode of enforcement of a judgment for the delivery of goods. It is usually an order for the judgment debtor to return specified goods or chattel to the judgment creditor on or before a certain date.

CHAPTER 11

OUTLINE OF CRIMINAL PROCEDURE

Institution of Criminal Proceedings

Criminal proceedings can be instituted in any court or tribunal vested with criminal jurisdiction by any of the following: (a) the attorneys general; (b) the police; (c) special prosecutors; (d) private persons.

The Attorneys General

By sections 174(1) and 211(1) of the 1999 Constitution of Nigeria the Attorney General of the Federation or of a State, respectively, shall have power;

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial, in respect of any offence created by law;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

The Attorney General of the Federation acts in respect of Federal offences while the State Attorneys General generally act in respect of State offences. The powers conferred on the Attorney General under subsection (1) above may be exercised by him in person or through officers of his department.[1] In the exercise of his powers, the Attorney General shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.[2] It

[1] S.I 74(2) and s.211(2) 1999 Constitution

[2] S.I 74(3) and s.211(3) 1999 Constitution

must be noted that in exercising his power, the discretion of the Attorney General is absolute. He is not subject to the control of any person or authority whatsoever — not even the courts. And even where he has abused his discretion, the only sanction against him is the reaction of his employer or adverse public opinion.[3] The Attorney General has an absolute discretion in deciding who to prosecute and for what offences, even where several people commit the same offence. And he needs not give reasons for his decision.[4] After filing information in the court the Attorney General can ask a private legal practitioner to continue the prosecution.[5]

The Police

The law empowers the police to conduct criminal prosecutions. By the combined effect of sections 4 and 19 of the Police Act 1967 (as amended by the Police Miscellaneous Provision) (Decree No. 5 of 1989) any police officer may conduct in person all prosecutions before any court whether or not the information or complaint is laid in his name.. In practice the bulk of criminal prosecutions are conducted by the police and in the magistrate's courts. In *Federal Republic of Nigeria v George Osahon*[6] the Supreme Court held that the Police authority can, by virtue of section 174(1) of the 1999 constitution, prosecute any criminal charge at the Federal High Court through its legally qualified officers or through any counsel they may engage for the purpose. However, the power of the police to prosecute criminal offences is subject to the power of the Attorney General under the constitution to takeover or discontinue any criminal prosecution.

[3] *State v S.A. Ilori* (1983) 1 S. C.N.L.R. 94

[4] *State v Commissioner of Police, A. G. Oyo State and DPP, Oyo State* (1982) 1 NCR 209

[5] *Tukur v Government of Gongola State* (1988) 1 NWLR (pt68) 37; *State v Gwonto* (1983) 1 SCNLR 142

[6] *Tukur v Government of Gongola State* (1988) 1 NWLR (pt68) 37; *State v Gwonto* (1983) 1 SCNLR 142

Special Prosecutors

Certain legislations creating an offence may specify persons other than the police who can institute legal proceedings in respect of the offence. In such circumstance, it is only a person within the category specified by the legislation who can institute criminal proceedings in respect of the offence. For instance, section 7(2) of the National Drugs Law Enforcement Agency Act stipulates that the prosecuting unit of the Agency is responsible for prosecuting persons alleged to have committed offences created by the Act. By section 157(2) of the Customs and Excise Management Act only the Attorney General of the Federation can institute criminal proceedings for offences created under the Act and such prosecutions must be sanctioned by the Board of Customs and Excise. Section 61(1) of the Corrupt Practices and Other Related Offences Act 2000 provides as follows: "Every prosecution for an offence under this Act or any other law prohibiting bribery, corruption and other related offences shall be deemed to be done with the consent of the Attorney-General." By section 157 of the Electoral Act 2006 the Independent National Electoral Commission is empowered to prosecute electoral offences disclosed in an election petition reported to it by an election tribunal.

Private Persons

A private person normally lays his complaint to the police who after investigation will decide whether to prosecute or not. However, in certain instances, a private person is empowered by law to institute criminal prosecution against an offender. A private person is allowed by law to lay a complaint before a magistrate except in respect of offences in which the law stipulates that complaint can only be laid by or with the consent of the Attorney General or by a specified person.[7] By section 342 of the Criminal Procedure Act applicable in Southern Nigeria, a private

[7] See S. 59(1) CPA; S. 143(e) CPC; S.185(b) CPC; S. 342 CPA.

person can file information in respect of any offence upon compliance with conditions stated in the provision. In Northern Nigeria, a private person can file a charge under the Application for leave to file a charge rules 1970. It must be noted that the power of a private person to institute criminal proceedings is rarely exercised.

Courts with Original Criminal Jurisdiction

The courts with general original criminal jurisdiction in Nigeria are the Magistrate Courts and State High Courts. Courts of special criminal jurisdiction are Juvenile Courts, Coroner's Courts, Customary Courts, Area Courts, the Federal High Courts, Military Courts and Court Martial.

Modes of Instituting Criminal Proceedings

Magistrate's Courts

The most popular mode of instituting criminal proceedings in Magistrate's Courts in Southern Nigeria is by bringing a person arrested without warrant to court upon a charge signed by a police officer. In Northern Nigeria, an accused can also be tried upon a charge[8] but the charge is drafted by a magistrate upon conviction that a prima facie case has been made against the accused.[9] The police would normally bring the accused and a first information report before the magistrate. Another procedure in the North is the short summary procedure whereby if an accused admits committing the offence, the court will punish summarily without drafting a charge.

Criminal proceedings can also be commenced in the Magistrate's Courts (whether in Southern or Northern Nigeria) by laying a complaint before a magistrate.[10] A complaint is an allegation made orally or in writing to a court that any named

[8] S. 78(b)
[9] Ss. 159-160 CPC
[10] S.77(a) CPA;s143(a)CPC

person has committed an offence, with a view of moving such court to issue a process.[11] On the basis of the complaint the magistrate may issue processes against the suspect. Generally, a Magistrate handles summary offences as opposed to indictable offences. However, a Magistrate may try an indictable offence summarily, except capital offences like murder or armed robbery. In any case, before a Magistrate can try an indictable offence, the accused must be put to his election whether he wants to be tried summarily by the Magistrate's Court or whether he prefers to be tried at the High Court. If he elects summary trial, then the Magistrate can proceed with the trial of the offence. A trial by a Magistrate for an indictable offence is vitiated if the accused is not put to election.

High Courts

The commonest mode of instituting criminal proceedings in the High Courts is by filing an information in the South and preferring a charge in the North.[12] Before filing an information, the consent of a High Court judge must be obtained and failure to obtain the consent is fatal.[13] Under the Criminal Procedure Law[14] applicable in Anambra and Enugu States, the consent of a high court judge has been dispensed with. Preliminary Inquiries has also been dispensed with.[15] What is required is proof of evidence by a law officer where the charge relates to (a) capital offence; offence punishable with imprisonment for life; (c) any indictable offence in respect of which the accused person has elected to be tried by the High Court. In some States of Southern Nigeria[16] information for an indictable offence is filed after preliminary inquiry or investigation by a magistrate to ascertain whether there is a prima facie case against the accused.

[11] S.I CPA;s.I CPC
[12] S.77(b)CPA; s 185(b)CPC.
[13] S.77(b)CPA; s 185(b)CPC.
[14] Cap 37 Laws of Anambra State Ss 233-241
[15] S.237
[16] The Old Bendel and Rivers States

In Northern Nigeria, the commonest mode of instituting criminal proceedings is by filing a charge in the High Court with the leave of a High Court Judge.[17] In both Southern and Northern Nigeria, a complaint may be laid before a High Court Judge whether orally or in writing.[18] In this case, consent is not necessary.

Lastly, information may be exhibited by the Attorney General. Under section 72 of the Criminal Procedure Act the Attorney General may exhibit to the High Court information for all purposes for which the Attorney-General for England may exhibit information in the High Court of Justice in England. The only type of such information that Her Majesty's Attorney General can now exhibit is the information ex-officio for such misdemeanors as sedition.[19]

Processes to Compel Appearance of an Accused Person in Court

The appearance of an accused person in court may be secured by issuance of summons, warrant of arrest or arrest without warrant.

Summons

This is a document directed by the court to a suspected offender calling upon him to appear before the court to answer a complaint made against him. The summons must state in writing the substance of the complaint, the name of the accused, the date of issue, and must be in duplicate, signed by the magistrate or justice of the peace. It should require the suspected offender to appear before the court at a certain time and place. Summons is normally served personally on the person summoned. Where personal

[17] S. 185(b)CPC
[18] CPA S.77 (b) (iv); CPC S.143(d)
[19] Nwadialor F. "Criminal procedure" in Okonkwo (ed). *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) pp. 383-4.

service is not possible, application can be made to the court for an order of substituted service. Substituted service may be effected by affixing a duplicate copy of the summons on a conspicuous part of the residence of the person to be served. In the Northern States, substituted service can be made by handing a copy of it to an adult male member of his family.[20] Service of summons is effected by the police, an officer of court or any other public officer. A summons to be served out of jurisdiction is first sent to a court within jurisdiction, which shall thereafter direct service as if it has issued the summons.

Receipt of summons is acknowledged by endorsing the duplicate to that effect and a copy shall be returned and retained by the court. Proof of service is established by an affidavit or evidence in court of the serving officer. Refusal to receive a summons may attract detention or committal to prison.

A summons is normally issued when the offence is a minor one. Where a person fails or refuses or neglects to appear in court after receipt of a summons, a warrant for his arrest may be issued.

Warrant of Arrest

A warrant of arrest is an authority in writing issued by a court or justice of the peace to a police officer or any other person to arrest an offender.[21] A warrant of arrest is normally issued in respect of a serious offence or where a summons is disobeyed. A warrant of arrest orders the person to whom it is directed to arrest the offender and bring him before the court. It is issued on a complaint which must be in writing and on oath. It must bear the date of issue, state concisely the offence for which it is issued, name or otherwise describe the person against whom it is issued. It must also state the person to whom it is directed who shall execute it.

[20] S. 55 CPC
[21] Ss. 25, 26 and 27 CPA; S. 58(1) CPC.

A warrant of arrest remains in force until executed or cancelled.[22] It may be executed on any day, including a Sunday or a public holiday.[23]

Arrest Without Warrant

Under certain circumstances, a police officer may without a warrant and without the order of a magistrate or judge arrest a person. A police officer can arrest any person without warrant where the person commits any offence in his presence.[24] A police officer can also arrest without warrant a person reasonably suspected to have committed an indictable offence. To constitute an arrest the police officer shall actually touch or confine the body of the person to be arrested, unless there be submission to custody by word or conduct.[25] The person is not to be handcuffed, bound or subjected to unnecessary restraint without the order of a court, magistrate, or justice of the peace, except when there is likelihood of violence being committed or an attempt being made to escape or for personal safety of the person concerned.[26] A judge or magistrate can arrest or direct the arrest of any person who commits an offence in his presence.[27] A private person has power to arrest without warrant a person who commits an indictable offence in his presence; or a person who is reasonably suspected to have committed a felony; or is reasonably suspected to have committed a misdemeanour at night.[28]

[22] S.25(2)C.P.A.;S.62C.P.C.
[23] S. 28(2) C.P.A.
[24] S. 10(1) C.P.A. S.26C.P.C.
[25] S. 3 C.P.A.; S. 7 C.P.C.
[26] S.4 C.P.A.; S.37C.P.C.
[27] S.15 C.P.A.; S. 30(1) C.P.C. However, under the C.P.A. jurisdiction, the offence must have been committed within the judicial division or magisterial district of the judge or magistrate respectively.
[28] Ss. 12 and 13 C.P.A. S. 28 C.P.C,

Bail Pending Trial

A person under arrest or in custody may be granted temporary released pending his trial. This is by means of bail. The 1999 Constitution provides that a person arrested on reasonable suspicion of having committed a criminal offence or for the purpose of preventing him from committing a criminal offence must be brought to court within a reasonable time (S.35(4). Reasonable time in this context means one day where there is a court of competent jurisdiction within a radius of 40 kilometres (S.35(5)(a)). Where there is no such court, reasonable time means two days (S.35(5)(b)). This provision does not however apply to persons suspected to have committed a capital offence (S.35(7)).

Where a person is charged to court, after making a plea, an application for bail is normally made orally from the Bar where the prosecution in its turn also states its objection (if any) and the court thus determines the application upon the informed statements not on oath. In *Abiola v Federal Republic of Nigeria*[29] the defence made an oral application under the provision of section 341 of the Criminal Procedure Code for the release of the appellant on bail. The trial court refused bail on the ground, inter alia, that the application for bail was made orally. On appeal to the Court of Appeal, it was held, inter alia, that the court was wrong in its conclusion that the application for bail must be in writing supported by affidavit evidence. According to the Court, application for bail pending trial can only be required to be by summons or written motion where an accused person has not be formally arraigned before a court. It was also held in that case that since the court presumes in favour of the liberty of the subject and his innocence until found guilty, the onus is on the prosecution to show, in a given case, that an accused or applicant for bail is one that should be refused bail. If an accused is not represented by counsel, the court has a duty to consider bail for him even when he

[29] (1998) 1 HRLRA 333.

did not apply for it. In the recent case of *Bamaiyi v The State & 4 Ors*[30] the Supreme Court held that the factors to be considered in granting or refusing bail pending trial are: (1) the evidence available against the accused; (2) availability of the accused to stand trial; (3) the nature and gravity of the offence; (4) the likelihood of the accused committing another offence while on bail; (5) the likelihood of the accused interfering with the course of justice; (6) the criminal antecedents of the accused person; (7) the likelihood of further charge being brought against the accused; (8) the probability of guilt; (9) detention for the protection of the accused; (10) the necessity to procure medical or social report pending final disposal of the case. The court has in most cases, discretion to admit an accused person to bail pending trial, but, in the exercise of the discretion, the nature of the charge, the evidence by which it is supported, the sentence which by law may be passed in the event of a conviction, the probability that the appellant will appear to take his trial, are the most important ingredients for the guidance of the court and where these are weighty, an appellate court will not interfere.[31] In practice, bail is granted as a matter of course where the offence is a simple offence or misdemeanour, except there is a compelling reason to the contrary. Where the offence is a felony the court normally exercises a discretion taking relevant factors into consideration. A person arrested for capital offence cannot be granted bail by the police or a magistrate. It is only a high court that has discretion to grant bail in such matter, and the discretion can only be exercised where there are special circumstances.[32]

[30] (2001) 6 NSCQR Vol. 6 (pt. 1) 156

[31] Bamaiyi v The State & 4 others Ibid.

[32] S. 118(1) C.P.A.;s. 34(1) C.P.C.; s.73(l) Criminal Procedure Law of old Anambra State Cap. 37 Laws of Anambra State 1986.

Charges

A charge is a document containing the statement and particulars of offence(s) with which a person is accused and tried before a court of law. The document is referred to as a charge in all courts in Northern Nigeria. In Southern Nigeria, it is called a charge in magistrate courts but in the High Courts it is called an information. The charge shall contain the name of the accused; the date of commission of the offence; the place of commission of the offence; the description of the offence by the name given to it by the law creating it, but if there is no such name, so much of the definition of the offence must be stated as would give the accused person sufficient notice of the matter with which he is charged. The charge should also contain the section of the law under which the accused will be punished. Failure to state the law alleged to have been violated is fatal because of the requirement of section 36(10) of the 1999 constitution that a person cannot be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law. The authority preferring the charge must sign the charge.

Trials Generally

A large majority of criminal trials are conducted in the magistrate courts and by the police. On the other hand, criminal trials in the high court are generally conducted by law officers of the state otherwise called state counsel. The offences prosecuted by the police are necessarily the less serious ones involving mainly issues of fact and little or no technical legal arguments. Such offences are the commonest ones and therefore constitute the greater part of criminal trials. There is however a growing practice whereby victims of a crime or complainants who can afford it will hire the services of a private legal practitioner who will apply to the Attorney General for fiat to prosecute an offence. If the Attorney General grants his fiat, then the private legal practitioner will undertake the prosecution. The accused person may defend himself

in person or by a legal practitioner of his own choice.[33] The Supreme Court in *R v Uzodinma*[34] declared unconstitutional section 28 of the Area Court Edict of 1967 of Northern Nigeria which prohibits the appearance of a legal practitioner to represent an accused. Every accused person shall be present in court during the whole of his trial unless he misbehaves himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable.[35] In the Northern states, the court may dispense with the presence of the accused when a summons has been issued for his appearance provided he either appears by counsel or he pleads guilty in writing. But in such circumstances the court may not sentence the accused to any term of imprisonment or detention or order him to be subjected to any disqualification without adjournment for his personal appearance.[36] In the South, where the offence in respect of which a summons is issued carries a penalty not exceeding N100.00 or imprisonment not exceeding 6 months or both, if the accused pleads guilty in writing, or appears and so pleads by a legal practitioner, his presence will be dispensed with.[37] The court can dispense with the presence of an accused if he is of unsound mind.[38] In Anambra and Enugu States, the complainant is required to be present throughout the trial otherwise the case will be struck out.[39]

Plea

When an accused is brought before the court, the charge shall be read and explained to him by the clerk of court to the satisfaction of the court. If the trial is in the magistrate court and an indictable offence is involved, the accused will be called upon to

[33] S. 36(b)(c) 1999 Constitution
[34] (1982) 1 NCR 27
[35] S 210 C.P.A.;s. 153C.P.C.
[36] Nwadialor, *op. cit.* p. 374: s 154(2) C.P.C.
[37] S. 100C.P.A.
[38] S. 223(2) C.P.A.
[39] S. 167 Criminal Procedure Law Cap. 37 Laws of Anambra State 1986.

elect whether to the tried in the magistrate's court or not. After election, where election is required, the accused shall thereafter be asked to plead to the charge. This is called arraignment. Failure to read and explain a charge to the accused before plea or trial vitiates the trial.[40] The accused may refuse or fail to plead to the charge. In such a situation the court has to determine whether the refusal to plead to the charge is out of malice or due to the visitation of God. If the court is of the opinion that the refusal or failure to plead to the charge is out of malice, the court shall enter a plea of not guilty. Where, however, it is as a result of visitation of God, the court shall order that the accused be sent to an asylum.[41] The accused may plead guilt to the charge. Where there is such a plea, the court shall ask all necessary questions to ensure that the accused intends to admit the offence. If the court is satisfied that the accused intends to admit the truth of the essentials of the offence, it shall convict him of that offence and sentence him accordingly.[42] A plea of guilty must be unambiguous and unequivocal, otherwise it will be treated as a plea of not guilty. An accused may plead not guilty to the charge in which case he is deemed to have put himself upon his trial.

The accused may plead not guilty to the offence charged but guilty to one not charged, but for which he can be convicted. There are specific cases under the Criminal Procedure Act where, on a charge of one offence, the accused may be convicted of another offence which, though not charged, is somehow related to the one charged.[43] In such a situation, where there is a plea of guilty to the offence not charged, and the court and the prosecution accept the plea, the court may convict and sentence the accused for the offence thus admitted.

[40] S. 36(6)(a) 1999 Constitution; *Ibrahim v State* (1979) 3 LRN 110
[41] S.220 C.P.A.; S. 188 C.P.C. *Yesufu v State (W2)* 12 S.C. 1,43
[42] S.218C.P.A.;Ss. 187 and 161(3) C.P.C.; *Ahmed v CQP* (1971) N.M.L.R.
[43] Ss. 169-179C.P.A.

The fourth kind of plea is the plea of autrefois acquit, or autrefois convict or pardon. Pursuant to the provisions of section 36(9) and (10) of the 1999 Constitution, where such a plea is supported by evidence, the court must dismiss the charge.

Presentation of Prosecution's Case

The prosecution may begin his case with an opening speech giving a summary of evidence he intends to adduce to support the charge. In practice, however, the prosecution makes no such speech but goes ahead to call his witnesses one after the other. Before a witness begins to testify, the clerk of the court will announce that other witnesses in the case should be out of court and out of hearing. The Court of Appeal held in *Ekang v State*[44] that failure to keep witnesses out of court when another witness is testifying may affect the weight of their evidence but does not make it inadmissible.

Witnesses shall ordinarily give their evidence on oath or affirmation.[45] However, evidence may be given when not on oath where it is the testimony of a child who does not understand the nature of an oath but possesses sufficient knowledge to justify the reception of his evidence and understands the duty of speaking the truth.[46] Evidence not on oath may also be received when it is the evidence of a non-believer or a person whose religion forbids the taking of oath.[47] Prosecution witnesses will be called in turn and led in evidence-in-chief. Thereafter each witness will be cross-examined by the accused or his counsel. The prosecutor may re-examine the witness after the cross-examination if there is any ambiguity to resolve. This process will go on until all the evidence against the accused person has been adduced. The prosecution will then close his case.

[44] (2001) 11 NWLR (Pt723) 1; See also *Falaju or Amos* (1983) 2 SC 209
[45] S. 179 Evidence Act
[46] S. 182 Evidence Act; *Okon v State* (1988) NWLR Pt77
[47] S. 181 Evidence Act

Case for Defence

When the case for the prosecution has been closed, the defendant has two courses of action open to him. He may submit that there is no case to answer - no case submission. He may alternatively proceed to state his own defence.

No Case Submission

A no case submission may be made in the following circumstances:

(a) when there has been no evidence to prove an essential element of the offence;

(b) when the evidence adduced by the prosecution has been so discredit as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.[48]

If a no case submission is upneld, the accused shall be discharged which is equivalent to acquittal.[49] Where a no case submission is overruled the accused will be called upon to present his defence. At the close of the prosecution's case, if it appears to the court that a prima facie case is made out against the defendant sufficiently to require him to make a defence the court will call upon him for his defence. If the accused is not represented by a legal practitioner, the court will inform him that he has three alternatives open to him, namely:

(a) he may make a statement, without being sworn, from the place where he is; in which case he will not be liable to cross-examination; or

(b) he may give evidence in the witness box, after being sworn as a witness; in which case he will be liable to cross-examination; or

(c) he need not say anything at all if he so wishes.

[48] *Ibeziako v COP* (1963) 1 All NLR 61; Mohammed v State (2007) NWLR (Pt 1032) 152

[49] *IGP.v Marke* (1957) 2 F.S.C 5; S. 301(1) C.P.A.; S. 191(5) C.P.C.

In addition, the court shall ask him if he has any witness to examine or evidence to adduce in his defence and the court will then hear the defendant and his witnesses and other evidence, if any. The witnesses of the defence will go through the same processes of evidence-in-chief, cross-examination, and re-examination (if necessary), as the witnesses of the prosecution.

Closing Addresses

The defence or his counsel has the right to address the court at the commencement or conclusion of his case. The prosecution has a right of reply in the following circumstances;

(a) where a law officer appears personally for the prosecution;

(b) where the defendant tenders a document in support of his case;

(c) where the defendant calls a witness other than the defendant himself, and the witness testifies for the defence (other than as to the character of the defendant).

(d) Where the defence, while addressing the court either before or at close of their case, introduced some new matter not supported by evidence.

Judgment

At the close of the case for both sides, the court will pronounce its judgment. Where the prosecution has established its case beyond reasonable doubts, the accused may be convicted. Where the prosecution has not met the standard of proof the accused will be discharged and acquitted. Section 294(1) of the 1999 constitution provides that every court established under the constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof. However, non-compliance with this provision cannot be a sufficient ground to set aside the judgment, except

where the party complaining has suffered miscarriage of justice by reason thereof.[50]

Allocutus

Allocutus means a plea made by the accused or defence counsel in mitigation of sentence after conviction. The registrar will normally ask the accused whether he has anything to say why sentenced shall not be passed on him according to law.

Sentence

The main punishments, which the courts can inflict under the Criminal Procedure Act or Code, are death, imprisonment, fine and caning.

Death Sentence

Death is the mandatory sentence for the offences of murder or armed robbery or other capital offences. Only the High Courts and the superior Area Courts in the North can impose death sentence. A death sentence cannot be passed on a woman found to be pregnant at the time of conviction but in lieu of it, the woman is sent to imprisonment for life. Death sentence cannot also be passed on an offender, who, in the opinion of the court, has not attained the age of 17. Such offender should be ordered to be detained at the pleasure of the President or Governor as the case may be.

Imprisonment

Imprisonment as a punishment for a crime may be either with or without hard labour. A person sentenced to imprisonment is detained in a prison. Where a person is convicted of more than one offence and sentenced to terms of imprisonment therefor, the terms may be ordered to run concurrently or consecutively.

Fines

Generally a court has the power to impose fine in lieu of imprisonment.[51] In any case, many offences are punishable with fines only. Where there is default in payment of fine, the court may order imprisonment.

[50] S. 294(S) 1999 Constitution

[51] S. 382(1) C.P.L.; S. 23(1) C.P.C.

Caning

Courts are authorized in certain circumstances to impose a sentence of caning.[52] [1] However, the sentence cannot be passed on females or males of 45 years of age. In the States in the former Eastern Nigeria, caning as a punishment can only be imposed on juveniles. It is submitted that caning as a punishment for adults constitutes inhuman and degrading treatment within the meaning of section 34 of the 1999 Constitution.

[52] S. 18 of the Criminal Code; S. 387 C.P.A.

CHAPTER 12

THE LEGAL PROFESSION, LEGAL AID AND ADVICE

The legal profession, in the words of Professor Ijalaye, is the portmantum phrase encasing two vocations or callings – the bar and the bench.[1] The bench generally refers to the entire judiciary. There are two categories of the bench, namely, the lower bench and the higher bench. The lower bench comprises Magistrates and Judges of District Courts, Customary and Area Courts (who are trained lawyers). Thus the lower bench is made up of judges of inferior courts. On the other hand, the higher bench is made up of judges of superior courts of records.– High Court Judges, Judges of Sharia and Customary Courts of Appeal, and Justices of the Court of Appeal and the Supreme Court. The word 'judiciary' is used to refer to collectively all the judges of the lower and the higher bench.[2] The term 'judicature' is wider than the term judiciary in that it embraces both the institution (the courts) and the judiciary (the judges).[3] It has however been contended by some authorities that the judiciary as an institution consists of the bar and the bench.[4]

[1] 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

[2] *Ibid*

[3] Uwais, M.L. J.S.C. (as he then was) "The Position of the Judiciary – Structure and Position of the Judiciary" 1989 Judicial Lectures: Continuing Education for the Judiciary (Lagos: MIJ Professional Publishers Ltd., 1991) p.81

[4] Oputa, 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.

The bar is however distinguishable from the bench. In a court of law, the 'bar' is more or less an imaginary barrier separating the bench and the front row of counsel's seats from the rest of the court. In Nigeria and in other common law countries, the word 'bar' has now acquired a different meaning. It now metaphorically refers to all lawyers who have been admitted or called to the bar whether or not they are actively practicing at the bar.[5] Thus, the bar includes law officers employed by the government, private legal practitioners, law lecturers, and other qualified legal practitioners employed by companies and statutory bodies.

In England, there are two branches of the profession (outside the bench) – barristers and solicitors. The barrister is involved mainly in advocacy, having the right of audience in all the superior courts. Advocacy means pleading for another. A person who speaks in favour of, or who argues a case in court of law on behalf of, either party to a suit is an advocate at the bar – a barrister. The solicitor, on the other hand, is the general legal adviser to the citizens. He does non-litigatious works like drawing up conveyances, contracts, wills and administration of estates, trusts and advising clients). For litigatious matters the solicitor instructs the barrister and does all the necessary spade works before the commencement of the action. He settles the materials to be used in any application. The barrister in turn is to interview clients in the presence of the solicitor. He also talks to the instructing solicitor for his fees and not the clients.

In Nigeria, the two branches are fused. Every lawyer on enrolment practices both as a barrister and as a solicitor.

Right to Practice

By section 24 of the Legal Practitioner's Act,[6] a legal practitioner means a person entitled in accordance with the

[5] Ijalaye, *op.cit*

[6] Cap 207 Laws of the Federation 1990

provisions of the Act to practice as a barrister either generally or for the purpose of any particular office or proceedings.

Those Entitled to Practice Generally

A person shall be entitled to practice generally if his name is on the roll of Legal Practitioners kept by the Chief Registrar of the Supreme Court.[7]

A person is entitled to be enrolled if he has been called to the bar and he produces a certificate of his call to bar to the Chief Registrar of the Supreme Court.[8] In order to be entitled to be called to the bar, a person shall produce to the Body of Benchers a qualifying certificate, and in addition satisfy the Benchers that he is of good character.[9] The qualifying certificate includes a law degree from a recognized university and completion of the practical training course at the Nigerian Law School. Students from other accredited common law institutions may be admitted to the Law School though they are required to take extra courses – part 1 of the bar examinations. Part II of the bar examination is compulsory for both Nigerian and foreign students.

The Council of Legal Education can exempt a person from going through the Law School before issuing him with a qualifying certificate.[10] This power of exemption is exercised in very exceptional circumstances. So far only two persons have benefited from the exemption.

The good character of a prospective legal practitioner is of utmost importance. Law is a noble and honourable profession that has no place for a doubtful character. Before admission, a prospective lawyer is required to produce evidence of his fitness to practice law. He must obtain letters from two members of the Body of Benchers certifying that he is a fit and proper person to be

[7] S. 2 Legal Practitioner's Act Cap. 207
[8] S. 6(1) *ibid*
[9] Under the Legal Practitioners Act of 1962, there was an additional requirement of Nigerian citizenship in order to be called to the Bar. Decree No.9 of 1992 has removed that requirement.
[10] S. 5(5) Legal Practitioner's (Consolidation) Act 1976

admitted into the profession. In addition, the applicant must swear to an affidavit of good character. He must disclose whether he has ever been accused of, charged with, or convicted of a criminal offence.

In *Re: Applicants for Licence Case,*[11] Brown J. Said:

> If the applicant passes the threshold of the bar with a bad moral character the chances are that his character will remain bad, and that he will become a disgrace instead of an ornament to his great calling; a curse instead of a benefit to his community.

Thus, the Council probes into the past of an applicant in order to determine his suitability for the profession. The Council now adopts the practice of advertising the names of prospective students and calling for public comments on them before admission. It is to be noted for purposes of good character that discharge or acquittal from a criminal charge is not a conclusive evidence of good character neither is a pardon.

The Body of Benchers is responsible for call to the Bar of persons seeking to be legal practitioners. The Legal Practitioners Decree (No.15 of 1975) established the Body of Benchers "as a body of legal practitioners of the highest distinction in Nigeria".

Those Entitled to Practice for the Purpose of any Proceedings (By Warrant)

By virtue of section 2(2) of the Legal Practitioner's Act, the Chief Justice of Nigeria, if he deems it expedient, may permit a foreign lawyer to practice as a barrister for the purposes of any proceedings with respect to which the application was made. The foreign lawyer must, however, satisfy the Chief Justice of the Federation that he is a member of the legal profession in a country where the legal system is similar to that of Nigeria. However, such

[11] 143 N.C.I, 21, 1906, See also *Okonjo v Council of Legal Education* (1979) Digest of Appeal Cases 28

a foreign lawyer must satisfy the requirements of the immigration laws of Nigeria before he could be allowed to enter Nigeria.[12]

Those Entitled to Practice for the Purpose of any Office

Pursuant to section 2(3) of the Legal Practitioners Act any person who exercises the functions of the office of the Attorney General, Solicitor General or Director of Public Prosecution of the Federation or of a State is entitled to practice as a barrister and solicitor for the purpose of the office.

Furthermore, the Attorney General of the Federation may authorize holders of certain offices in the public service to practice as barristers and solicitors for purposes of such offices. Such offices include the office of the Deputy Director of Public Prosecution and Deputy Solicitor General.

These provisions must however be understood within their historical context. They were made at a time when there was a dearth of legal practitioners in the country. The provisions are today either obsolete or in part unconstitutional. For instance, by sections 150(2) and 195(2) of the 1999 Constitution a person shall not be qualified to hold or perform the functions of the office of the Attorney-General of the Federation or of a State, respectively, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than ten years.

Practising Fee

On enrolment, a practicing fee is paid, and thereafter, every legal practitioner must pay his annual practicing fee in order to have his name maintained on the roll and to sustain his right to practice By Rule 9(1) of the new Rules of Professional Conduct for Legal Practitioners made on 7th February, 2007 a lawyer shall pay his annual practicing fees not later than 31st March in every year. In the case of lawyers who are enrolled during the year, the fees shall be paid within one month of the enrolment. By sub-rule

[12] *Awolowo v Federal Minister of Internal Affairs* (1962) LLR 117; 1966 NSCC 208.

(3) of rule 9, a lawyer shall not sign or file legal documents or process as a legal practitioner, legal officer or adviser of any government department or ministry or any corporation when he is in default of payment of his annual practicing fees.

Continuing Professional Development Programme

Rule 11 of the Rules of Professional Conduct for Legal Practitioners requires every lawyer who wishes to carry on practice as a legal practitioner to participate in and satisfy the requirements of mandatory Continuing Professional Development Programme operated by the Nigerian Bar Association. By Rule 12(3) a lawyer, unless he holds an Annual Practicing Certificate issued by the Nigerian Bar Association under this rule, is prohibited from conducting or taking part in any proceedings in court, or judicial tribunal or sign any legal documents.

Limitations on Right to Practice

A Senior Advocate of Nigeria shall not be entitled to engage in practice as a member of the legal profession, other than as a barrister, unless in partnership with a legal practitioner who is not a Senior Advocate of Nigeria.[13] A Senior Advocate of Nigeria shall also not appear as counsel in any civil case before any (superior court of record) except with a junior or another senior advocate of Nigeria.[14] A Senior Advocate of Nigeria does not appear in magistrate court.

By the Supreme Court Practice and Procedure Order 1972, a legal practitioner of less than seven years' standing at the Bar is not entitled to appear in any case before the Supreme Court of Nigeria except as a junior to a legal practitioner of at least seven years. This rule, however, is no longer in vogue, more so when it

[13] S. 5(8) L.P.A.

[14] Rule 2(1) Senior Advocate of Nigeria (Privileges & Functions) Rules 1979.

appears to be in conflict with the constitutional provision for representation by counsel of one's choice.[15]

By section 292(2) of the 1999 Constitution any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria. In *Justice F.O.M. Atake v Chief N.S. Afejuku,*[16] the Supreme Court held that by virtue of section 256(2) of the 1979 Constitution (the equivalent of section 292(2) of the 1999 Constitution), a retired judicial officer cannot appear or act as legal practitioner again in Nigeria, but can appear in person when he is a party to the litigation. The Supreme Court also held in *Fawehinmi v. NBA (No.1),*[17] that the right of a Legal Practitioner to represent a client and his right of audience in court can only be exercised whilst it is available and not when it is in abeyance. The right of audience as legal practitioner before the court is in abeyance whilst a legal practitioner is also a litigant before the court. In such circumstance, he cannot represent and conduct the case of a co-defendant. He can only speak on his own behalf.

Duties of A Lawyer

A legal practitioner owes a number of duties to the court; the client, the general public, the state, his fellow advocate and the profession.

Practice as a Legal Practitioner

A lawyer shall uphold and observe the rule of law, promote and foster the cause of justice, maintain a high standard of professional conduct, and shall not engage in any conduct which is unbecoming of a legal practitioner.

[15] S. 36(6).(c) 1999 Constitution.
[16] (1994)9 NWLR (Pt 368) 379
[17] (1989)2 NWLR (Pt 105) 494

Duty to the Court

The lawyer and the judge are co-worshippers in the temple of justice. As a minister in the temple of justice, a lawyer has a paramount duty to the court to protect and foster the course of justice.[18] As such a minister, he must not consciously mis-state the facts. He must not knowingly conceal the truth. Counsel should be properly dressed and comport himself in court with decorum and address the judge with utmost respect. By Rule 35 of the Rules of Professional Conduct a lawyer appearing before a judicial tribunal shall accord due respect to it and shall treat the tribunal with courtesy and dignity. In the recent case of *Global Transport Oceanico S.A. & Anor v Free Enterprises Nig. Ltd.,*[19] the third person pronoun, 'she' was used in the issue for determination in reference to the judge who is a lady. The Supreme Court maintained that this is a very bad way of showing discourtesy to a lady judge or in fact any judge at all by referring to her or him in the third person pronoun. The Court considered this absolutely unethical, holding that counsel should have referred to the judge as the "learned trial judge" or "learned judge" or even "honourable judge".

Counsel in a case has a duty not only to bring to the attention of the Court authorities that support his case but also those that decide otherwise and attempt either to distinguish such authorities or to advance arguments why they should not be followed. In the words of Ogundare JSC in *Adio v A.G. Oyo State & Ors,*[20] it will be a sorry day when counsel hide from the Court authorities he is aware of and relevant to the case before the Court simply because such authorities do not favour his case. The duty of counsel to the court was acknowledged by the oracle of the common law, Lord Denning, in *Rondel v Worsley,*[21] He said: "He

[18] *NBA v Fawehinmi* (No.1) *ibid*
[19] (2001)5 SCNQR 487 at 506
[20] (2000)2 SCNQR 752 at 782 - 783
[21] (1966)3 All E. R. 657

has a duty to the Court, which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants, or his tool to do what he directs. He owes allegiance to a higher cause. It is the cause of truth and justice".

Counsel must be punctual in court and prosecute his case diligently. In *Chime v Chime.*[22] Wali, JSC observed that it is counsel that should wait for the court and not the other way round.

However, by Rule 31(2) of the Rules of Professional Conduct, where a lawyer has a proper ground for complaint against a judicial officer, he shall make his complaint to the appropriate authorities.

Duty of a Prosecuting Counsel

A prosecuting counsel for the state must present the case against the accused with utmost impartiality and fairness. He must ensure that evidence in favour of the accused is brought before the court and given at least equal prominence with evidence against him. He must make frank and legitimate disclosures to the defence. As pertinently observed by Justice Oputa,

> In criminal cases, it is never the role of counsel of the state to press for or to secure a conviction at all costs. It is not even to secure a conviction as such. The state is not interested in securing a conviction wrongly or by any foul means. Its only interest is that the truth should be known and justice be done by the guilty person being convicted. To this end, the whole policy of our criminal law has been to see that as against the accused person, every rule in his favour is observed and that no rule is broken so as to prejudice the fair trial of the real issues.[23]

Duty of Defence Counsel

It is the right of a lawyer to undertake the defence of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defence.

[22] (2001)5 NSCOR 275

[23] Rule 37(4) Rules of Professional Conduct

"A lawyer cannot pick and choose his clients. He is bound to accept a brief from any man who comes before the court no matter how great a rascal the man be, no matter how given to complaining, no matter how undeserving or unpopular his cause, the barrister must defend him to the end, provided only that he is paid the proper fee ... He must accept the brief and do all he honourably can on behalf of his client."[24] The lawyer is bound, by all fair and honourable means to present every defence that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

A confidential disclosure of guilt alone does not require a withdrawal from the case. However, after a confidential disclosure of facts clearly and credibly showing guilt, the lawyer should not present any defence inconsistent with these facts. He should never offer testimony, which he knows to be false.[25]

Duty to the Client

A lawyer owes a number of duties to his client or potential client. In the first place, he has a duty to accept brief in the court in which he practices subject to proper professional fees;[26] no matter how unpopular the client's cause may be. There are however, some special circumstances which may justify a refusal. Thus, refusal to accept a brief on grounds of personal interest in the suit, conflicting interest or on religious grounds may be justified.

A lawyer must take instructions in chambers and not in his client's house or office,[27] except on grounds of illness of client, infirmity or other reasonable grounds. And he must take full instruction and ascertain all facts before advising on them.[28]

A lawyer is required not just to take full instruction, he has a duty to follow these instructions. However, if the instruction is

[24] Per Lord Denning in *Rondel v Worsley* (1966)3 All E.R. 657

[25] Rule 9(b)

[26] Rule 23

[27] Rule 32

[28] Rule 12

such that the lawyer cannot in the proper exercise of his professional judgment accept, he must terminate the brief.[29]

It must be observed that though a lawyer has a duty to follow his client's instruction, he, in the final analysis controls the incidents of trial.[30] In *Afegbai v A.G. Edo State & Anor*[31] the Supreme Court held that the nature of the legal relationship between counsel and his client is one of an independent contractor and not one of principal and agent. It is not that of master and servant. Counsel is clearly not a servant of his client. It is accepted that where a client gives a specific instruction to counsel, such instruction must be adhered to. However, where the nature of the specific instruction is in conflict with the manner of discharging his professional skill and interferes with his control of how to conduct the case of his client, counsel who is in law the *dominis litis* is not bound to obey any such instructions. In the exercise of his apparent general authority in the discharge of his professional duties to his client, he ought to have complete control of how such instructions are to be carried out and over the conduct of the case.

Counsel has a duty to appear in litigation on behalf of his client until the conclusion of the case. He can only withdraw from employment, once assumed, for good cause and after reasonable notice to the client.[32] Upon withdrawal, he should refund part of the retainer as has not been clearly earned. And a client on his part has a right to terminate his brief to counsel at any time when he no longer has confidence in him. A client can change his lawyer whether for good cause or not.

The lawyer owes entire devotion to the interest of his client, warm zeal in the maintenance and defence of the client's righ[illegible]rtion of his utmost learning and ability, to the end [illegible] nothing be taken or be withheld from him save by the rules of

[29] *Adewunmi v Plastex Ng Ltd* (1986)2 NSCC 852.
[30] Rule 18
[31] (2001)7 NSCQR 549 at 571-572
[32] Rule 29

law legally applied. Some schools of thought contend that there is no limit to what a lawyer can do in pursuit of his client's cause. The dictum of Lord Brougham in defence of Queen Caroline at the House of Lords is that a lawyer should defend his client's cause by every expedient means and at all costs to others. This position cannot, however, be supported. The acceptable view is that put forward by the House of Lords in *Myres v Elman*[33] that while the lawyer should be fearless in defence of his client, he should remember that the arm which he wields are to be the arms of a warrior and not the arms of an assassin. It is his duty to strive to accomplish the interest of his clients per *fas*, but not per *nefas*. It is his duty, to the utmost of his power to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice.

A lawyer should avoid a situation where his personal interest will be in conflict with the interest of his client.

Duty to the General Public and the State

The International Commission of Jurists (ICJ) in 1962 at Rio de Janeiro recognized that the responsibilities of the lawyer are no longer confined to matters affecting his clients only. He is now considered as a social engineer whose skill should be held in tr for the wider community.[34] This proposition received judicial assent in the Nigerian case of *Williams v Akintunde*[35] where Pats-Achalonu, JCA, said:

> We all agree that the Attorney whose professional thoughts begin and end with his own private clients is a pitiable mockery of what a great lawyer really is and that only by taking part in the movements for the betterment of the law of the profession can he practice law in the grand manner, the only way it is worth practicing.

[33] (1940) A.C. 282 at 307
[34] Oputa *op.cit*
[35] (1995)3 NWLR (Pt 381) p.101

The other conclusions arrived at by the ICJ at Rio de Janeiro in 1962 are as follows. (i) It is the duty of lawyers in every country, both in the conduct of their profession and in public life, to help ensure the existence of a responsible legislature elected by democratic process and an independent and adequately remunerated judiciary and to be always vigilant in the protection of civil liberties. (ii) Lawyers should be anxiously concerned with the prevalence of poverty, ignorance and inequality in human society and should take a leading part in promoting measures, which will help eradicate those evils, for while they continue to exist, civil and political rights cannot of themselves alone ensure the full dignity of man. (iii) Lawyers have to be active in law reform, especially where public understanding is slight and the knowledge of lawyers is of importance. They should review proposed legislations and present to the appropriate authorities programmes of reform. (iv) Lawyers should promote knowledge of and inspire respect for the rule of law, and appreciation by all people of their rights under the law.[36]

Necessarily, the duties and responsibilities of lawyers in third world countries most of which are under autocratic regimes, should be greater. In the context of a developing country the lawyer must, in the words of President Kenneth Kaunda:

> . . . be something more than a practicing professional man; he must be even more than the champion of the fundamental rights and freedoms of the individual. He must be, in the fullest sense, a part of the society in which he lives, and he must understand that society if he is to be able to participate in its development and the advancement of the economic and social well-being of its members.[37]

Similarly, Gower, a renowned jurist, acknowledged the fact that the public responsibilities of the legal profession in a

[36] Oputa *Op. Cit* pp. 15 - 16

[37] Address to the Law Society of Zambia on April 24, 1970 (quoted in Orojo, O.I. *Conduct and Etiquette for Legal Practitioners* (London: Sweet & Maxwell, 1979) p.45

developing country are greater than in highly developed states. According to him, developing countries need courageous lawyers with the highest ethical standards if the rule of law and personal freedom are to be preserved, and the corrosive growth of corruption, nepotism and elitism are to be arrested, and if military and police power are to be kept within bounds.[38]

Duty to Fellow Advocate

Clients, not lawyers, are the litigants. Whatever may be the ill feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. The purpose of organizing regular dinners for lawyers is to promote fraternal feelings and commensality among them. By Rule 27(1) of the Rules of Professional Conduct a lawyer shall observe good faith and fairness in dealing with other lawyers. By Rule 26(1) a lawyers shall treat one another with respect, fairness, consideration and dignity, and shall not allow any ill-feeling between opposing clients to influence their conduct and demeanour towards one another or towards the opposing clients. A lawyer should adhere strictly to all express promises to, and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.

A lawyer has a duty not to covet clients. Efforts direct or indirect in any way to encroach upon the professional employment of another lawyer are unworthy of those who should be brethren at the Bar. Nevertheless, it is the right of any lawyer, without fear or favour, in general to give proper advice to those seeking relief against unfaithful, neglectful, or dilatory counsel, after communication with the lawyer concerned. A comparison between touting and champerty at the Bar and motor park touting was made in a lucid language by Justice Ezeozobu. He said:

[38] Gower, Independent Africa: The Challenge of the Legal Profession (1966) p.102 quoted in Orojo *ibid* p.46

> In our day to day activity we meet experienced Motor Park tout. A nuisance – a dishonourable person. He is not employed by a regulatory body. Each day he hangs out at the Motor Park looking for passengers. For each passenger he convinced to board a vehicle he receives a commission. He stops at nothing to get his commission. He quarrels with and harasses passengers. At the least opportunity he poaches the passenger's travel bags and steals his money and property. He has no trade union to protect him. His touting cannot be classified as occupation or gainful employment. There are some advocates who tout for cases. They form liaison with some police officers who unmeritoriously refer criminal cases to them. He shares with the Police the fees paid to him by the referred accused. In the circumstances of such an arrangement the advocate is a tout. He is a disgrace to the honourable profession. And can be cited for unprofessional behaviour.[39]

Champerty means trading in litigation or the fruits of litigation. It was abolished and criminalized in England by the Criminal Law Act 1967 of the United Kingdom.

Duty to His Profession

A lawyer should avoid advertising himself. A client should choose a lawyer not on the basis of the lawyer's advertisement but on the basis of his reputation and competence.

The best service a lawyer can render to his profession is the maintenance of the highest standard of professional conduct and ethics.

Professional Negligence

A lawyer has a duty to devote to the clients business that reasonable care and skill to be expected from a normally

[39] Law Dinner Speech presented to law students of Enugu State University of Science and Technology on 27 Nov. 1999 pp. 7 – 8.

competent and careful practitioner. By Rule 16 of the Rules of Professional conduct, a lawyer shall not

(a) handle a legal matter which he knows or ought to know that he is not competent to handle, without associating with him a lawyer who is competent to handle it, unless the client objects;
( ) handle a legal matter without adequate preparation;
( ) neglect a legal matter entrusted to him; or
( ) attempt to exonerate himself from or limit his liability to his client for his personal malpractice or professional misconduct.

In any case, if a barrister is to be able to do his duty fearlessly and independently, he must not be subjected to the threat of an action for negligence. It was pertinently observed in *Montriou v Jeffreys*[40] that "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney is bound to know all the law or that an attorney should lose his fair recompense on account of an error, being such an error that a cautious man may fall into." In *Rondel v Worsely*[41] the plaintiff was employed as a rent collector and caretaker of the premises of the landlord. During a visit to the premises one morning the Landlord engaged in an argument with the door-keepers and in the ensuing violence, the door-keeper's hand was torn by the plaintiff who also bit part of his ear off. The plaintiff was charged with causing grievous bodily harm, and he chose the defendant to conduct his defence. The plaintiff was convicted and sentenced. Nearly six years later, he brought the present action against the defendant (his counsel in the previous case), claiming damages for alleged professional negligence in the conduct of his

[40] (1825) C & p.113 at 116
[41] (1966)3 AER 657

defence. It was held that a barrister is not liable for negligence in the conduct of a case both in criminal and civil cases. Lord Denning said.

> There is in my judgment, a sure ground on which to rest the immunity of a barrister. At any rate, so far as concerned his conduct of a case in court. It is so that he may do his duty fearlessly and independently, as he ought; and to prevent him from being harassed with a vexatious action such as the present one now before us.

On public policy, if action for negligence were to be permitted against counsel, every convicted prisoner who blames his counsel could at once bring an action for negligence.

It must be noted that the exemption extends only to the conduct of proceedings in the face of any court, tribunal or other bodies.[42] Thus, a lawyer will for instance be held liable for delay in instituting proceedings, which results in the action being statute barred.[43] A lawyer has also been held liable for failure to make searches in conveyancing which results in the purchaser purchasing an encumbered property.[44]

In any case, Order 49 Rule 13 of the Lagos State High Court (Civil Procedure) Rules 2004 and Order 55 Rule 13 of the Kwara State High Court (Civil Procedure) Rules 2005 have created personal liability clauses against lawyers who are negligent in the conduct of cases in court. Since the Rules have statutory effects, they will override any inconsistent common law position on the liability of lawyers for negligence.

Discipline

Discipline is a matter of utmost importance in the legal profession. Appropriate sanctions have therefore be stipulated for

[42] S. 9(3) Legal Practitioner's Act.
[43] *Clayton v Kearsey* (1935) 79 SJI 180.
[44] *Salf Alli v Sydney Mitchelol & Co.* (1980) A.C.

professional misconducts by members of the profession. By section 11 of the Legal Practitioners Act,[45] disciplinary action may be commenced against a member of the bar in any of the following instances:

( ) where a person whose name is on the roll is judged by the Disciplinary Committee to be guilty of infamous conduct;
( ) where a person whose name is on the roll is convicted by any court with criminal jurisdiction in Nigeria of an offence which in the opinion of the Disciplinary Committee is incompatible with the status of a legal practitioner;
( ) where the disciplinary committee is satisfied that the name of any person has been fraudulently enrolled;
( ) where a person whose name is on the roll is judged by the Disciplinary Committee to be guilty of misconduct not amounting to infamous conduct, but which, in the opinion of the Disciplinary Committee, is incompatible with the status of a legal practitioner.

It must be noted that any breach of the Rules of Professional Conduct could be held to constitute infamous conduct in a professional respect. Nevertheless, the Disciplinary Committee may find a person guilty of unprofessional conduct on the basis of conduct that has not been specifically mentioned by the rules of professional conduct if such conduct can reasonably be expected to affect the fitness of a person to practice.

Obtaining enrolment by fraud extends to a situation where a person obtained enrolment by misrepresentation of facts and if the true facts had been known he would not have been enrolled. This would cover any of the conditions that must be fulfilled to be called to the Bar since this is a precondition for enrolment.

The sanction for professional misconduct ranges from admonition to suspension and striking out the name of a person

[45] Cap 207 Laws of the Federation 1990.

from the roll of legal practitioners. Admonition is for less serious offences.

Suspension could be imposed where the misconduct is serious but not enough for striking out of the person's name from the roll. Suspension may also be imposed with a view to instituting disciplinary proceedings or while such proceeding is pending.[46] Any of the above punishments may, where appropriate, include a provision requiring the refund of money paid or the handing over of documents or any other thing as the circumstances of the case may require.[47]

Striking out of a person's name from the roll of legal practitioners is the most severe punishment for offences of the highest gravity. However, it is not necessarily the seriousness of the offence that is material but whether a person who commits the offence should remain a member of a learned profession. Offences involving financial dishonesty have always been regarded as incompatible with the status of a legal practitioner.[48]

The relevant factors to be taken into consideration in deciding whether or not to re-admit a legal practitioner whose name has been struck out from the roll were stated by the Court in *Re-Abuah.*[49] The appellant in that case, a legal practitioner, was convicted of criminal offence (forgery). In May 1961, his appeal to the Supreme Court was dismissed and on 30th April, 1962, the Court ordered that his name be struck off the roll. He applied for reinstatement in 1965, but it was refused. Another application made in 1970 was also refused. In 1973, after obtaining a free pardon by the Administrator of the East Central State, he applied again to the Supreme Court for restoration of his name on the roll. In granting the application, the Court took account of the following

[46] S. 13(2) LPA
[47] Ijalaye *op.Cit* p.8
[48] *R v Sagoe* (1973) ALL NLR 290; *R v Abuah* (1963)1 ALL NLR 279.
[49] (1973) ALL NLR 165

facts: that the applicant had shown sufficient remorse and that nearly 12 years had elapsed during which he was reduced to a state of penury. The Court further held that in exercising its discretion whether or not to reinstate a person whose name was struck out of the roll of Legal Practitioners, it must take the following into consideration.

(0) The gravity of the offence or offences necessitating the striking off of the applicants name in the first instance.
(0) Whether there is sufficient evidence of a genuine remorse shown by the applicant in the period between the striking off of his name and the submission of his application for reinstatement.
(0) Whether in all the circumstances of the case, the court is satisfied that the applicant has in the intervening years become a fit and proper person to be re-incorporated as a member of the legal profession.

The Court also observed that the fact that the Governor granted the applicant a free pardon did not automatically entitle him to reinstatement but it is only one of the factors to be taken into consideration. In the recent case of *Nigerian Bar Association v Kayode Alabi*[50] the Supreme Court ordered the striking out of the name of the respondent, from the Roll of legal practitioners in Nigeria for infamous conduct in professional respect. The respondent, a legal practitioner, employed as receiver manager, recovered the sum of 2.3 million for his client but refused to remit it to his client and willfully converted the money to his own use. According to the Supreme Court, an infamous conduct in a professional respect is an act or omission which in the opinion of the Legal Practitioner's Disciplinary Committee is such that will bring the legal profession into disrepute. In *Eke Umazi Ndukwe v Legal Practitioner's Displinary Committee & Anor*[51] the Legal

[50] (2006)14 NWLR (pt 1000) 827
[51] (2007)5 NWLR (pt 1026)

Practitioner's Disciplinary Committee suspended the Appellant from practicing as a legal practitioner for one year for collecting a client's money and failing to deliver it to the client despite her demands. The appeal by the appellant to the Supreme Court was dismissed. In *Nigerian Bar Association (NBA) v Oluwasesan Edu*[52] the respondent had collected the sum of N2,520,000 in favour of his client but failed to pay the money over to his client. When the matter was reported to the police, he issued a cheque for the amount which turned out to be dud. The Legal Practitioner's Disciplinary Committee found him guilty of misconduct in a professional respect and ordered that his name be struck off the Roll of legal practitioner in Nigeria. According to the Committee, the following are examples of what will amount to misconduct in the legal profession: (a) any form of dishonesty or fraud perpetrated against the client by the legal practitioner; or (b) failure to deliver to the client money or property received on his behalf or to disclose the receipt of such money or property; or (c) making use of any property of the client entrusted to him without the client's authority.

The bodies charged with disciplinary control over lawyers are the Legal Practitioners Disciplinary Committee and the Court.

The Legal Practitioners Disciplinary Committee, is by section 9 of the Legal Practitioners Act charged with the duty of considering and determining any case where it is alleged that a person whose name is on the roll of Legal Practitioners has misbehaved in his capacity as a Legal Practitioner or should for any other reason be subject to proceedings under the Act.[53]

In *L.P.D.C. v Fawehinmi*.[54] held that in the exercise of its disciplinary authority over erring legal practitioners, the Legal

[52] (200614 NWLR (pt 1000) 827
[53] *Fawehinmi v NBA* (No.1) (1989)2 NWLR (Pt 105) 494
[54] *L.P.D.C. v Fawehinmi* (1985)2 NWLR (Pt 7) 300

Practitioners Disciplinary Committee must observe the rules of natural justice.

The Supreme Court is empowered to exercise disciplinary control over erring legal practitioners. Thus, where it appears to the Supreme Court that a person whose name is on the roll has been guilty of infamous conduct in any professional respect with regard to any matter of which the Court or any other court of record in Nigeria is or has been seized, the Supreme Court may if it thinks fit, after hearing any representations made and evidence adduced by or on behalf of that person and such other persons as the court considers appropriate, give such a direction as is mentioned in subsection (1) of section 11 of the Legal Practitioner's Act, and the direction shall take effect forthwith. The direction as mentioned in subsection (1) of section 11 relates to: admonition, suspension, or striking off of name from the roll.[55]

Furthermore, where it appears to the Chief Justice that a legal practitioner should be suspended from practice, either with a view to the institution against him of proceedings under the Act before the Disciplinary Committee, or while any such proceedings are pending, the Chief Justice, if he considers it fit, after giving the practitioner in question a hearing, may direct that the person be suspended.[56]

Legal Education

Prior to 1962 there was no local institution for training of lawyers in Nigeria. The training of legal practitioners was undertaken in the United Kingdom. The cost of such training kept away many qualified persons. Secondly the products of such training had not the opportunity to study some important aspects of Nigerian law like customary law and Nigerian legislations. Another dimension to the situation is that in England, the

[55] S. 13(1) L.P.A.
[56] S. 13(2) L.P.A.

profession has two branches – barristers and solicitors – but in Nigeria, we have a fused legal profession right from inception. Consequently, legal practitioners who were trained in England as either barristers or solicitors were ill prepared to take on the functions of both arms of the profession in Nigeria.

It was against this background that in April 1959, the Federal Government set up the Unsworth Committee to consider, and make recommendations on the future of legal profession in Nigeria. The Committee recommended that: legal education should be provided locally and tailored to meet the requirements of Nigeria; law -faculties should be established in Nigerian universities; a law school to provide practical training for law graduates should be established in Lagos; a university degree in law should be mandatory requirement for a person aspiring to join the legal profession; a council of legal education should be established.

The Federal Government accepted most of these recommendations. To give effect to these recommendations, the Legal Practitioners Act designed to regulate the legal profession, and the Legal Education Act, designed to regulate practical legal education in Nigeria, were enacted in 1962. The Legal Education Act established the Council of Legal Education with the general responsibility for the legal education of persons seeking to become members of the profession.

Pursuant to the Legal Education Act of 1962, the Nigerian Law School was established in Lagos in 1962 for the purpose of providing a systematic course of professional training suitable for a legal practitioner in a fused profession. In 1997 a Campus of the Law School was established in Abuja as the main campus. Two additional campuses at Kano and Enugu took off in the year 2001.

Meanwhile the National Universities Commission harmonized the curricula of law faculties in the nation's universities in 1989. The curricula was revised in 2004. A minimum academic standard in law for all Nigerian Universities was approved in that year. The programme of studies was

broadened to include many non-law courses. The intention according to the National Universities Commission was to ensure that law graduates will have a clear understanding of the place and importance of law in society. Because all human activities – social, economic, political etc – take place within legal framework, it is necessary that the student of law should have a broad general knowledge and exposure to other disciplines in the process of acquiring legal education[57]

Legal Aid and Advice

The plight of the ordinary Nigerian in his search for justice was captured by Hon. Justice Chukwudifu Oputa in the following illuminating passage.

> In his search for justice and redress resulting in the effectuation of his rights, the ordinary citizen of Nigeria is caught in the mess of a rather vicious circle.
>
> 1. The Court cannot adjudicate upon and effectuate his rights unless there is a suit complaining about the breach or threatened breach of these rights filed in court.
> 2. People especially the illiterate masses of our country do not even know what their human rights are. They may therefore not even know when those rights have been or are being infringed.
> 3. Even if the ordinary citizen knows of his rights and knows that they are being infringed, he may be too afraid to sue the powers that be. It does require considerable courage to drag the chief executive or functionaries of the Government to Court. And very few of our people have that courage.

[57] National Universities Commission Minimum Academic Standard for Law, May 1989 para 1.1

4. Where there is an awareness of the right and the knowledge of realization of its breach or threatened breach and the courage to prosecute the claim, the prospective litigant may be too poor to embark on the luxury of costly and prolonged litigation up to the Supreme Court.[58]

It is against the background of the above observations that the issue of legal aid and advice is considered a crucial one in this country.

The rationale for legal aid can be stated as follows. The prohibitive cost of litigation either in terms of filing fees, counsel's fees or other ancillary costs, make access to justice illusory to the average Nigerian. Secondly, there is the psychological barrier usually associated with the underprivileged due to the sense of fear, hopelessness and unfamiliarity with the legal system. Thirdly, there is lack of awareness on the part of the average person in Nigeria as to his rights or the means of obtaining justice. In the fourth place, even a fairly educated person cannot understand the language employed in the drafting of legislations. The problem is compounded by our plural legal system, which encompasses the received English law and customary laws. The idea of receiving English law to operate side by side with our indigenous laws alienates the under privileged from the legal system. People are in many cases deprived of the customary rules with which they are familiar which should have governed all aspects of their lives.[59]

Another dimension to the matter is that Nigeria operates the adversary system of adjudication where the contending parties bring their own evidence and present their arguments. The role of

[58] Oputa, C.A. "Human Rights in The Political and Legal Culture of Nigeria" Idigbe Memorial Lectures. (Lagos: Nigerian Law Publications Ltd., 1989) pp. 65-66.

[59] Banire, M.A. "Legal Aid in the Administration of Justice in Nigeria" in Agbede, I.O. (ed) *Current Themes in Nigeria Law* (Lagos: Faculty of Law, UNILAG, 1997) pp. 55-57.

the judge is to sit and listen attentively as an impartial umpire. At the end of the exercise, the judge then decides the case on the basis of the evidence presented and argument proffered on both sides. If therefore there is difficulty in gathering evidence that will definitely affect the judgment. That may also lead to injustice as the poor who cannot easily gather their evidence or hire an efficient counsel to marshal out the legal arguments start off with obvious disadvantage.[60]

The rule of law cannot be maintained in a situation where people cannot have access to justice as a result of poverty. The International Commission of Jurists in the Delhi Declaration of 1959 concluded as follows:

> Equal access to law for the rich and poor alike is essential to the maintenance of the rule of law. It is, therefore, essential to provide adequate legal advice and representation to all those threatened, as to their life, liberty, property or reputation who are not able to pay for it . . .. The primary obligation rests on the legal profession to sponsor and use its best effort to ensure that adequate legal advice and representation are provided.[61]

The above conclusion was approved in 1961 by the African Conference on the Rule of Law held in Lagos which declared:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

The Legal Framework for Legal Aid in Nigeria

The 1999 Constitution in section 17 proclaims that every citizen shall have equality of rights, obligations, and opportunity before the law. However, the level of poverty and the grave economic inequality in the country renders this provision illusory. It is in respect of enforcement of fundamental rights that the

[60] Oputa *op.cit* p. 85

[61] The Rule of Law in a Free Society p. 14

constitution makes express provision for legal aid. Section 46(4) of the 1999 Constitution provides:

> The National Assembly ... shall make provisions for the rendering of financial assistance to any indigent citizens of Nigeria where his right under this chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim.

The National Assembly did not promulgate a separate legislation for this purpose. Rather the existing legal aid scheme was extended in 1994 to cover cases of alleged human rights violations.

Government controlled legal aid scheme is governed by the Legal Aid Act 1990[62] which improved on the Legal Aid Act 1976.

The Legal Aid Council

The Legal Aid Council is the managing body of the legal aid scheme established under the Legal Aid Decree No. 56 of 1976 (as amended by Decree No. 22 of 1994.) This scheme is aimed at helping the poor under certain economic bracket to have access to justice either by providing them with legal advice or representation in Court.[63] Activities of the Council are by the combined effect of section 7 of, and the second schedule to, the Act restricted to the scope of the legal aid prescribed by the Act. The scope is defined as follows:

(a)	**CRIMINAL CODE**	**PENAL CODE**
	1. Murder of any degree	Culpable homicide punishable with death
	2. Manslaughter	Culpable homicide not punishable with death
	2. Maliciously or willfully wounding or inflicting grievous bodily harm	Grievous hurt
	2. Assault occasioning actual bodily harm	Criminal force occasioning bodily hurt
	2. Common assault	
	2. Affray	
	2. Stealing	
	2. Rape	

(b) Aiding and abating, or counseling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the offences listed in paragraph A of the schedule.

(c) Civil claims in respect of accidents.

(d) Civil claims in respect of breach of fundamental rights. (The jurisdiction of the Council was enlarged in 1994 to cover breach of fundamental rights guaranteed under Chapter IV of the 1979 Constitution, now Chapter IV, of the 1999 Constitution).[64]

The effect of this provision is that for matters outside the above listed ones, legal aid is not available under the Act except with the approval of the Council of Ministers. The bureaucratic bottlenecks for which Government ministries are known in Nigeria makes his procedure an unattractive one.

The preponderance of judicial opinions is that a person charged with a capital offence who cannot procure the services of a lawyer should be assigned one by the Court. And such a lawyer must be of sufficient experience as to enable him carry out the defence effectively[65]. The Legal Aid Council has offices in all the 36 States of the Federation, including the Federal Capital Territory, Abuja. There is one legal officer in every state office of the Council. [66] Private Legal Practitioners registered with the Council also render legal services to the Council for a token fee.

[62] Cap. 205 Laws of the Federation 1990.
[63] Information Brochure on the Legal Aid Council, May 2000 p.1.
[64] *Ibid*
[65] See Josiah v State (1985)1 NWLR (Pt 1) 125
[66] *Ibid* p.3

The Council also utilizes the services of lawyers serving in the National Youth Service Corp.[67]

Any citizen of Nigeria shall be eligible for free legal aid provided: he has no income of any type; his income per annum does not exceed the minimum wage; or the courts refer the case to the Council; or his income per annum exceeds the minimum wage but cannot accommodate access to the services of private legal practitioner; or it is reasonable in all the circumstances to provide him with free legal aid.[68] Application for legal aid may be in writing or orally to the headquarters of the Council or Zonal or State offices.

Another institution that provides legal aids to indigent persons is the National Human Rights Commission, though their focus is on human rights violations.

The National Human Rights Commission

The National Human Rights Commission Act, 1995, established the National Human Rights Commission. The Commission serves as a mechanism to enhance the enjoyment of human rights. Part of the mandate of the Commission is to assist victims of human rights violations and to seek appropriate redress and remedies on their behalf. The Secretariat of the Commission is located in Abuja but it has offices in the six geo-political zones of the country.

Under the various High Court (Civil Procedure) Rules there are provisions which enable the poor or indigent to sue or defend in forma pauperis.

Proceedings in Forma Pauperis

The High Court Civil Procedure Rules of various states provide that the court may admit a person to sue or defend in forma pauperis if his means do not permit him to employ legal representation in the prosecution of his case, provided that the

[67] *Ibid* p.4
[68] *Ibid*

Chief Judge is of the opinion that it is a reasonable cause. A person seeking relief under this order must write to the Chief Judge and attach a sworn affidavit showing that he is indigent and cannot pay for a lawyer's service or even court fees for which a waiver may then be granted by the Chief Judge.[69]

Non-Governmental Legal Aid Scheme

Some non-governmental organizations and individuals operate legal aid schemes. Such organisations include: the Committee for the Defence of Human Rights (C.D.H.R.), Lagos; the Constitutional Rights Project (C.R.P.), Lagos; the Centre for the Advancement of the Rule of Law, Enugu; the Shelter Rights Initiative, Lagos; the Catholic Institute for Development, Justice and Peace Enugu and Ijebu-Ode; the International Federation of Women Lawyers (FIDA); the Civil Liberties Organisation; Women's Aid Collective (WACOL).

The International Federation of Women Lawyers is an organization of women lawyers all over the world. One of the objectives of FIDA is to enhance and promote the welfare of women and children. The Organisation has Family Law Centres in most States of the Federation to cater for the needs of destitute women and children. The Centres provide the following services free of charge. They handle civil and criminal matters, with particular attention to Family Law and other related legal matters such as: probate; the rights of women and children under the law; the procedure for adoption of children; rights of the widow under Nigerian law; succession matters.

[69] See Order 47 High Court (Civil Procedure) Rules 2004, Lagos State and Order 51 Federal Capital Territory High Court (Civil Procedure) Rules 2004.

BIBLIOGRAPHY

Ademola, A. *Independence of the Judiciary: Problems and Prospects in Nigeria* Enugu: University of Nigeria, Enugu Campus, 1987.

Aguda, A. T. *The Challenge of the Nigerian Nation: An Examination of Its Legal Development 1960-1985* Lagos: Nigerian Institute of Advanced Legal Studies, 1985.

Aguda, A. T. *The Law of Evidence* Ibadan: Spectrum Law Publishing, 1989.

Allen, C. K. *Law in the Making* London: Clarendon Press, 1964.

Amucheazi, E. *The Judiciary and Democracy in Nigeria* Abuja: National Orientation Agency, 1998.

Aristotle *Politics* New York: Random House, 1943.

Austin, J. *The Province of Jurisprudence Determined* California: Dickenson Publishing, Inc. 1975.

Bailey, S. H. et al *The Modern English Legal System* 3rd edn London: Sweet & Maxwell, 1996.

Baker, E. *The Political Thought of Plato and Aristotle* London, 1906.

Committee for the Defence of Human Rights *Path to People's Constitution*, Lagos: Committee for the Defence of Human Rights, 2000.

Elias, T. O. *Nigerian Essays in Jurisprudence,* Lagos: MIJ Publishers Ltd, 1993.

Farrar, J. H. *et. al. Introduction to Legal Method,* London: Sweet & Maxwell, 1990.

Garner, J. F. *Administrative Law*, London: Butterworths, 1985.

Gray, J. C. *The Nature and Sources of Law,* 1921.

Gross, R. *Precedent in English Law* Oxford: Clarendon Press, 1961.

Hanbury, H. G. *Modern Equity: The Principles of Equity* London: Stevens & Sons Ltd, 1962.

Hart, H.L.A. *Concept of Law* Oxford: Oxford University Press, 1961.

Jegede, M. I. *What's Wrong With the Law*? Lagos: Nigerian Institute of Advanced Legal Studies, 1993.

Jenkyns, H. *British Rule and Jurisdiction Beyond the Seas* London, 1902.

Jennings, I. *The Law and the Constitution* London: University of London Press, 1957.

Kiralfy, A.K.R. *Potter's Historical Introduction to English Law and Its Institutions 4th edn,* London: Sweet & Maxwell Ltd, 1958.

Freeman, M.D.A. *Lloyd's Introduction to Jurisprudence,* London: ELBS, 1985.

Mill, J. S. *On Liberty, Representative Government and Subjection of Women* Oxford: Oxford University Press, 1969.

Nwabueze, B. O. *Constitutional History of Nigeria* London: Longman, 1982.

Constitutionalism in the Emergent States London: C. Hurst & Co, 1973.

Judicialism in Commonwealth Africa, Enugu: Nwamife Publishers, 1977.

Nwadialo, F. *Civil Procedure* 2nd edn Lagos: University of Lagos Press, 2000.

Nwankwo, C. *et al The Limits of Justice*, Lagos: Constitutional Rights Project, 1993.

Obi Okoye, A. *The Development of Judicial Trial in Nigeria,* Onitsha: Africana-Feb Publishers Ltd, 1988.

Obilade, A. O. *Nigeria Legal System*, London: Sweet and Maxwell, 1979.

Okonkwo, C. O. and Nash *Criminal Law in Nigeria*, London: Sweet and Maxwell, 1980.

Okpaluba, Chuks *Judicial Approach to Constitutional Interpretation in Nigeria* Enugu: Matt Madek & Co, 1992.

Ojukwu, E. *et al Introduction to Civil Procedure* Aba: Helen-Roberts Research & Resources Limited, 2002.

Omoregbe, J. I. *Philosophy of Law: An Introduction to Philosophical Jurisprudence* Lagos: Joja Educational Research and Publishers Ltd, 1997.

Onyekpere, E. *Justice for Sale* Lagos: Civil Liberties Organisation, 1996.

Orojo, O. I. *Conduct and Etiquette for Legal Practitioners London*: Sweet & Maxwell, 1979.

Park, A.E.W. *Sources of Nigerian Law* London: Sweet & Maxwell, 1966.

Paton, G.W. A *Textbook of Jurisprudence* Oxford: Clarendon Press, 1946.

Philips, O. H. *A First Book of English Law* London: Sweet & Maxwell, 1970.

Sabine, T. *A History of Political Theory 4th edn* New York: Dryden Press, 1973.

Tobi, N. *Sources of Nigerian Law* Lagos: MIJ Professional Publishers Ltd, 1996.

Williams, G. *Learning the Law* London: Stevens and Sons, 1982.

INDEX

Appointment of judges,303
Area Court, 283
Arrest
  warrant of, 370
  without warrant, 371
Attorney General,364
  Instituting of criminal proceedings by, 374
Bail, 303, 304
British-type court (see classifications of courts)
Case law, 83
Cause of action (see civil procedure)
Charges (see criminal procedure)
Civil law,45
Civil Procedure, 326
  appearance,335
  commencement of action, 329
  competence of action, 344
  execution of judgment, 362,
  interlocutory applications, 347
  judgment & orders, 359
  locus standi, 342
  order 10 procedure,349
  parties, 326
  pleadings 336
  pre-action notice, 343
  preliminary objection, 341
  proceedings at the trial, 355
  service of process, 331
  retrial,348
Classifications of courts
  Court of appellate jurisdiction,211
  Court of limited jurisdiction,209
  Court of original jurisdiction,211
  Court of record,208
  Court of unlimited jurisdiction,209
  Federal Court,211
  Inferior court,203
  State court,211
  Superior court,203
Common law,46-49
  characteristics of,47
  conflict with equity,53
  origin,47
Classifications of Nigerian law,35
  Case law, 48
  Civil law, 45
  Common law, 48
  Criminal law,35
  Customary law, 48
  Equity, 48
  International law, 47
  Municipal law, 47
  Private law,47
  Public law,47
  Statute law,48
Competence of action (see civil procedure)
Court
  Meaning of, 202
  classifications of,203
  historical development of,217
Court of Appeal,234
  Judicial precedent, and, 163
Court of appellate jurisdiction (see classifications of courts)
Court of limited jurisdiction (see classifications of courts)
Court of original jurisdiction (see classifications of courts)
Court of record (see classifications of courts)
Court of resolution,278
Crime,32,33
  meaning of,32
Criminal procedure,364
  attorney general,364
  bail pending trial 372

charges,374
judgment,379
outline of, 364
mode of instituting,367
no case submission, 378
plea,375
police,365
sentence,380
summons,369
trials, 374
warrant of arrest,370
Custom,86
meaning of,77
Customary court, 280
Customary Court of Appeal,277
Customary law, 86
ascertainment of,93
characteristics of,87
codification of,126
human right criterion,124
incompatibility test,118
judicial notice of,103
meaning of,86
public policy test,122
repugnancy test,107
validity of,106
whether Moslem law is,91
Distinguishing, 156
District Court,280
Judicial precedent, and,167
Duties of lawyers,388
Ejusdem generis rule (see statutory interpretation)
Election Tribunal,297
English law (see sources of Nigerian law)
Equity (see sources of Nigerian Law)
Execution of judgment,362
Federal Capital Territory Court,293
Federal Court,211
Federal High Court,236
Judicial precedent, and,165
Federal Revenue Court,236
Federal Supreme Court,220
Functions of law, 8,9
Final judgment (see judgment)
Golden rule (see statutory interpretation)
High Court (see Federal or State High Court)
High Court of the Federal Capital Territory,272
Historical school, 10,26,27
Imperative theory, 15
Incompatibility test (see customary law)
Inferior court (see classifications of courts)
Internal conflict of laws, 306
Conflict between English and customary law,306
Conflict between different systems of customary law,316
Interpretation of statutes (see statutory interpretation)
Islamic Court,168
Judges
appointment of 303
tenure,239,240
Judgment,359
consent,359
default,360
execution of,362
final,361
interlocutory,362
Judicial notice (see customary law)
Judicial officers,
appointment of,303
tenure of, 304
Judicial power, 200,201
Judicial Precedent, 130
advantages of,131
disadvantages of,135

distinguishing,156
foreign courts decision,and,136
hierarchy of courts, and 158
obiter dictum,155
ratio decidandi,136
subsequent legislations, and,138
Judicial officers,
meaning of, 164,314
role of, 1
Judicial power,200,201
Jurisdiction
meaning of, 279
Jurisprudence, schools of,11
Historical school, 29
imperative theory, 16
legal positivism,16
legal realism, 26
Marxist economic theory, 23
natural law, 12
normative theory, 21
sociological school, 31
Juvenile court, 285
Law
functions of, 8
meaning of, 11
Legal Aid,382,405
Legal Aid Council, 408
Legal education, 403
Legal positivism,16
Legal profession,382
discipline,398
duties of a lawyer,388
right to practice,383
Magistrate's court,367
Marxist Economic Theory of Law, 23
Mischief rule, 185
Moslem Court, 183
Municipal law, 38
National Industrial Court,293
Natural law, 12
Normative theory (see pure theory)
Nigerian case law,74
Nigerian legal system characteristics of,33
Nigerian legislation,68
history of,69
No case submission, 309
Non-British-type court (see classifications of courts)
Obiter dictum, 155
Parts of statutes,194
commencement section,197
enacting section,196
long title,194
marginal note,196
preamble,195
schedule,197
short title,196
Petition, 330
Pleadings, 336
statement of claim,338
statement of defence,339
Positive school, 16
imperative theory,16
pure theory,21
Preamble (see parts of statutes)
Preliminary objection, 275
Private law, 34
Privy Council , 234
Professional negligence,327,328
Proof of customary law
assessors, 93
before customary courts,84
before non-customary courts,89
books and manuscripts, 91
witnesses, 90
Public law, 38
Public policy (see customary law)
Pure theory, 20,21
Kelson, on, 20,21
Ratio decidendi (see judicial Precedent}
Realist school (see legal realism)

Received English law (see sources of Nigerian law)
Retrial, 289,290
Right to practice (see legal profession)
Schedule (see parts of statutes)
Sharia Court,286
Sharia Court of Appeal,273
Service of processes,331
service outside jurisdiction, 332
substituted service,332
Short title (see parts of statute)
Sociological school,31
Sources of Nigerian law,49
Common law,55
Customary law,84
Equity,59
English statutes, 76
International law,85
Nigerian case law,83
Nigerian legislation,77
Received English law,53
Statutes of general application, 67
Stare decisis (see judicial precedent)
State High Court,237
Original jurisdiction of,240,241
Jurisdictional conflict with Federal High Court, 243
precedent and, 133
Statement of claim (see pleadings)
Statement of defence (see pleadings)
Statutes of general application,58-67
Statutory interpretation,173
ejusdem generis rule,187
expressio unis exclusio ulerus,191
golden rule,179
lex non-cogit ad mpossiblia,192
literal rule,175
mischief rule,185
noscitor a sociis rule,189
ut res magis valeat quam pereat,192
Summons, 300,301
Substituted service (see service of processes)
Supreme Court,222
Traditional system for dispute resolution,213
Tribunal,299
Undefended list procedure, 348
Validity of customary law (see customary law)
Trials (see civil or criminal procedure)
West African Court of Appeal, 218,219
Writ of delivery,363
Writ of fifa,363
Writ of possession,363
Writ of sequestration, 363
Writ of summons, 363