

# Nigerian Legal Methods



# Nigerian Legal Methods

Edited by

C. C. Ohuruogu and O. T. Umahi

**CAMBRIDGE**  
**SCHOLARS**  

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**P U B L I S H I N G**

Nigerian Legal Methods,  
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## DEDICATION

This book is dedicated to the memories of **Mazi Mark Chikere Ohuruogu**, a.k.a “MC” (1932-1995), an educationist par excellence, community leader and disciple of Christ whose exemplary life touched many people, and **Chief William Ikeji Umahi**, a.k.a “Omeluatu I of Mgbowo” (1924-2005) of blessed memory; a community leader, health professional and peace builder. They laid the solid foundation on which we have built.

And to the Alpha, the Omega, the everlasting Father, in whom there is neither variableness nor shadow of turning—GOD.



# TABLE OF CONTENTS

|  |       |
|--|-------|
| Table of Cases .....                     | ix    |
| Table of Statutes .....                  | xiv   |
| Preface .....                            | xviii |
| Acknowledgements .....                   | xix   |
| Chapter One.....                         | 1     |
| Law in Social Context                    |       |
| Lilian Akhirome-Omonfuegbe               |       |
| Chapter Two .....                        | 17    |
| Aspects of Law                           |       |
| Theophilus Chinedu Nwano                 |       |
| Chapter Three .....                      | 38    |
| Law as an Instrument of Social Control   |       |
| Chukwuma Famous Ikechukwu                |       |
| Chapter Four .....                       | 49    |
| Legal Reasoning and Approach to Problems |       |
| Oyekanmi Idode Adewoye                   |       |
| Chapter Five .....                       | 59    |
| Legal Reasoning in Judicial Processes    |       |
| Chukwudumebi Okoye                       |       |
| Chapter Six .....                        | 79    |
| Legal Reasoning in Legislation           |       |
| Jesuorobo Emmanuel Idugboe               |       |

|  |     |
|--|-----|
| Chapter Seven.....                                   | 100 |
| Sources of Law in Nigeria                            |     |
| Josephine Omi Obasohan                               |     |
| Chapter Eight.....                                   | 116 |
| Secondary Sources of Law                             |     |
| Chukwuemeka Celestine Okoro Esq                      |     |
| Chapter Nine.....                                    | 121 |
| Use of Source Materials                              |     |
| Theresa Uzoamaka Akpoghome                           |     |
| Chapter Ten .....                                    | 147 |
| Legal Research Writing in Nigeria                    |     |
| Okechukwu Timothy Umahi                              |     |
| Chapter Eleven .....                                 | 171 |
| Regulation of the Legal Profession in Nigeria        |     |
| Nkechi Huomachi Worlulh-Okolie                       |     |
| Chapter Twelve .....                                 | 195 |
| Advocacy and Mooting Skills                          |     |
| Onyeka Osuji   |     |
| Chapter Thirteen.....                                | 215 |
| Examination Skills and Strategies                    |     |
| Okechukwu Timothy Umahi and Collins Chikaodili Ajibo |     |
| Contributors.....                                    | 224 |
| Index.....   | 228 |



## TABLE OF CASES

|   |        |  |         |
|---|--------|--|---------|
| <i>A.G. Bendel State v. A.G. of the Federation and 22 Others</i> (1982)<br>All NLR 85 .....     | 82     | <i>Akwule and Others v. The Queen</i><br>(1963) NNLR 105 .....   | 82      |
| <i>A.G. Ondo State v. A.G. of the Federation</i> (2002) 9 NWLR (pt 772) 722 .....               | 82     | <i>Aladetoyinbo v. Adewunmi</i> (1990) 6<br>NWLR (pt. 154) 98 .....                                      | 182     |
| <i>A.I.C. Ltd v. Nigerian National Petroleum Corporation</i> (2005)<br>NWLR (pt. 937) 572 ..... | 67, 71 | <i>Alaka v. Alaka</i> (1904) 1 NLR<br>55.....  | 108     |
| <i>Abiodun v. FRN</i> (2009) 7 NWLR<br>(pt. 1141) p. 509.....                                   | 66     | <i>Alake v. State</i> (1991) 1 NWLR (pt.<br>205) 567 .....   | 28      |
| <i>Action Congress v. Jang</i> (2009) 4<br>NWLR (pt. 1132) 485 .....                            | 73     | <i>Alao v. V.C. Unilorin</i> (2008) 1<br>NWLR (pt. 1069) 425 .....                                       | 77      |
| <i>Adegboyega &amp; sons v. Igbinosun</i><br>(1969) NMLR 9 SC.....                              | 37     | <i>Alhaji Karimu Adisa v. Emmanuel Oyinwola</i> (2000) 10 NWLR (pt.<br>674) 116 .....                    | 75      |
| <i>Adeniran v. Interland Transport Ltd</i><br>(1991) 9 NWLR (pt. 214) 155<br>SC .....           | 28     | <i>Ali Safe v. Northern States Marketing Board</i> (1972) 1 All<br>NLR 61 .....                          | 180     |
| <i>Adesanya v. A.G. Federation, SC</i><br>(1964) 130.....                                       | 194    | <i>Alibi-Rasaki v. State</i> (2011) 16<br>NWLR (pt. 1273), 251 .....                                     | 66      |
| <i>Adesubokan v. Yinusa</i> (1971)<br>NWLR 71.....  | 112    | <i>Amori v. Iyanda</i> (2008) 3 NWLR<br>(pt. 1074) 261 .....   | 69, 73  |
| <i>Adewusi v. State</i> (1963) 1 All NLR<br>316 .....   | 28     | <i>Ansa v. Registered Trustees of the Presbyterian Church of Nigeria</i><br>(2008) 1 NWLR (pt.1069)..... | 77      |
| <i>Aduku v. FRN</i> (2009) 1 NWLR (pt.<br>1146) 377 .....                                       | 73     | <i>Aoko v. Fagbemi</i> (1961)1 All NLR<br>400.....   | 23, 112 |
| <i>African Press Ltd v. Ikejiani</i> (1953)<br>14 WACA 386 .....                                | 28     | <i>Archibong v. Duke</i> (1926) 4 NLR<br>92.....   | 108     |
| <i>Afro-Continental Nig. Ltd v. Ayantuyi</i> (1991) 3 NWLR (pt.<br>178) 211 .....               | 75     | <i>Aromolaran v. Oladele</i> (1990) 7<br>NWLR (pt.162), 359 .....  | 36      |
| <i>Agbai v. Okagbue</i> (1991) 7 NWLR<br>(pt.204) 391 SC .....                                  | 36     | <i>Aseimo v. Abraham</i> (1994) 8<br>NWLR (pt.361) 191 CA.....   | 67      |
| <i>Agidigbi v. Agidigbi</i> (1992) 2<br>NWLR (pt. 221) 98 .....                                 | 112    | <i>Atake v. Afejuku</i> (1994) 12 SCNJ<br>1.....   | 182     |
| <i>Aje v. State</i> (2006) 8 NWLR (pt.<br>982) 349 .....  | 23     | <i>Awolowo v. Minister of Internal Affairs</i> (1962) 1 All NLR 178 .....                                | 178     |

|   |            |
|---|------------|
| <i>B.J. Export &amp; Chem. Co. Ltd v. Kaduna Refining &amp; Petro-Chem. Co. Ltd</i> (2003) FWLR (pt. 165) 445 ..... | 108        |
| <i>Babatunde &amp; Anor v. Olatunji &amp; Anor</i> (2000) NWLR (pt. 648) 557 .....                                  | 72         |
| <i>Bakare v. Ishola</i> (1959) WRNLR 106 .....  | 28         |
| <i>Barclays Bank v. Hassan</i> (1961) NNLR 293 .....  | 76         |
| <i>Beaulieu v. Finglam</i> (1401) YB 2 Hen 4, f 18, pl. 6 .....   | 32         |
| <i>Bello v. A.G. Oyo State</i> (1985) 5 NWLR (pt. 45) 828 .....   | 25         |
| <i>Brown v. Adebajo</i> (1986) 1 NWLR 383 .....   | 109        |
| <i>Buhari v. Obasanjo &amp; Ors.</i> (2005) 2 NWLR (pt. 910) 321 .....  | 67, 69, 76 |
| <i>Carter v. Bradbeer</i> (1975) 1 WLR 1204 at 1205 .....   | 92         |
| <i>Central London Property Trust Ltd v. High Trees House Ltd</i> (1947) KB 130 All ER 265 .....                     | 35         |
| <i>Charles Richards Ltd v. Oppenheion</i> (1950) KB 616 at 623 .....  | 34         |
| <i>Chedi v. A.G. Federation</i> (2008) NWLR (pt. 1067) 168 .....  | 71         |
| <i>Chianugo v. State</i> (2002) 2 NWLR (pt. 750) 225 .....  | 22         |
| <i>Chief Loveday Ebere &amp; 2 ors. v. John Onyenge</i> (2000) 2 NWLR (pt. 643) 63 at 80 .....                      | 68, 76     |
| <i>Chief Young Dede v. African Association</i> (1910) 1 NLR 130 ....  | 106        |
| <i>Chinwendu v. Mbamali</i> (1980) 3-4 SC 31 at 82 .....  | 58         |
| <i>Chiroma Giremade v. Bornu Native Authority</i> (1961) All NLR 469 .....  | 82         |
| <i>Chukwu v. State</i> (1992) 7 LRCN 83.23  |            |
| <i>Clark v. State</i> (1986) 4 NWLR (pt.35) p.381 .....   | 24         |
| <i>Cole v. Akinyele</i> (1960) 5 FSC 84 ..  | 112        |
| <i>Commonwealth Shopping Representatives v. P.O. Branch Services</i> (1923) AC 191 at 213 .....                     | 36         |
| <i>Comptroller of Nigerian Prison v. Adekanye</i> (1999) 10 NWLR (pt. 623) 400 .....                                | 74         |
| <i>Concord Press (Nig) Ltd v. Olutola</i> (1999) 9 NWLR (pt. 620) 578 .....   | 74         |
| <i>Courtney v. Glanvil</i> (1615) Cro Jac 343 .....   | 34         |
| <i>Dalhatu v. Turaki</i> (2003) 15 NWLR (pt.1843) p. 310 .....  | 71, 72     |
| <i>Donoghue v. Stevenson</i> (1932) A.C 562 (HL) .....  | 50, 143    |
| <i>Dorset Yacht Co. v. The Home Office</i> (1970) AC 1004 .....   | 56         |
| <i>Edet v. Essien</i> (1932) 11 NLR 47 ...  | 111        |
| <i>Elebanjo v. Tijani</i> (1980) 5 NWLR (pt.46) 954 .....   | 184        |
| <i>Eloichin Nig Ltd v. Mbadiwe</i> (1986) 1 NWLR (pt. 14) 47 .....  | 42         |
| <i>Ezeokafor v. Ezeilo</i> (1999) NWLR (pt. 619) 369 .....  | 72         |
| <i>Famfa Oil Limited v. Attorney General of the Federation</i> (2003) 18 NWLR (pt. 852) 453 .....                   | 10         |
| <i>Fayemi v. Oni</i> (2009) 7 NWLR (pt. 1140) .....   | 72         |
| <i>FMG v. Ken Saro Wiwa &amp; 8 others</i> Unrep. Suit No. OCDT/PH/1/95 ....  | 25         |
| <i>G &amp; T Investment Ltd v. Witt &amp; Bush Ltd</i> (2011) 8 NWLR (pt. 1250), 500 S.C. ....                      | 65         |
| <i>Gallagher v. Lynn</i> (1937) A.C. 863 .....  | 82         |
| <i>General Sani Abacha and ors v. Chief Gani Fawehimwin</i> (2000) NWLR (pt. 4) 533 .....                           | 72         |
| <i>George v. Fajore</i> (1939) 15 NLR 1 .....   | 108        |
| <i>George v. FRN</i> (2011) 10 NWLR (pt. 1254) p. 67 .....  | 66         |

|  |       |   |     |
|--|-------|---|-----|
| <i>Griffin v. Donnelly</i> (1881) 6 QBD<br>P.307 .....   | 85    | <i>Mackson Ikeni and Anor. v. Chief<br/>William Akuma Efamo</i> (2001) 14<br>NWLR (pt.734) 539 at 546.....                | 77  |
| <i>H.B. (Nig) Plc v. Lodigiami (Nig)<br/>Ltd</i> (2010) 14 NWLR (pt. 1213)<br>330 .....                                  | 45    | <i>Magna Maritime Services Ltd &amp;<br/>Anor v. S.A. Oteju &amp; Anor.</i><br>(2005) All FWLR (pt. 270), 6<br>SC 92..... | 182 |
| <i>Hedley Byrne &amp; Co Ltd v. Heller</i><br>(1963) 2 All ER 575.....   | 143   | <i>Mariyama v. Sadiku Ejo</i> (1961)<br>NRNLR 81 .....  | 111 |
| <i>Hill Station Hotel Ltd v. Adeji</i><br>(1996) 4 NWLR (pt. 442) 294.....   | 75    | <i>Martins v. Malade</i> (1930) 9 NLR<br>53 .....   | 109 |
| <i>House of Assembly Bendel State v.<br/>A.G. Bendel State</i> (1984) 5<br>NCLR p.161 .....                              | 86    | <i>Meribe v. Egwu</i> (1979) 3 SC 23 .....  | 111 |
| <i>Ibeziako v. Abutu</i> (1954) 3 ENLR<br>24 .....   | 108   | <i>Military Governor of Lagos State &amp;<br/>others v. Ojukwu</i> (1986) ANLR<br>233.....                                | 42  |
| <i>Ibidapo v. Lufthansa Airlines</i> (1997)<br>4 NWLR (pt. 498) 124 .....  | 109   | <i>Mkpudem v. Udo</i> (2000) 9 NWLR<br>(pt. 673) 631 .....  | 77  |
| <i>Igabete v. State</i> (2006) 6 NWLR<br>(pt. 975) 100.....  | 66    | <i>Modupeola Johnson v. State</i> (1986)<br>4 NWLR (pt. 35) 381 .....   | 25  |
| <i>IGP v. All Nigerian Peoples Party</i><br>(2007) 18 NWLR, (pt.1066)<br>457 .....                                       | 5, 11 | <i>Muyiwa Inakoju and ors v. Hon.<br/>Abraham Adeolu Adeleke and ors</i><br>(2007) All FWLR (Pt. 353) p.97 ...            | 10  |
| <i>Ikpeazu v. African Continental Bank<br/>Limited</i> (1965) NMLR 374 .....   | 194   | <i>N.B.A v. Odiri</i> (2007) 8 NWLR (pt.<br>1035) 203 .....   | 192 |
| <i>Imo Concord Hotel v. Anya</i> (1999)<br>4 NWLR (pt. 234) 210 .....  | 76    | <i>National Assembly v. President</i><br>(2003) 9 NWLR (pt. 824) 104.....   | 82  |
| <i>INEC v. Action Congress</i> (2009) 2<br>NWLR (pt. 1126) 546.....  | 75    | <i>Ndili v. J. M. Akinsumade &amp; Anor.</i><br>(2000) NWLR (pt. 5) 750 at 786...72                                       |     |
| <i>INEC v. Hashidu</i> (2009) 4 NWLR<br>(pt. 1130) 78.....   | 73    | <i>Neath v. Rydley</i> (1614) Cro Jac<br>335.....   | 34  |
| <i>INEC v. Musa</i> (2003) 10 WRN 1 ...  | 103   | <i>NEPA v. Akpata</i> (1991) 2 NWLR<br>(pt. 175) 536.....   | 71  |
| <i>INEC v. Oshiomohle</i> (2008) WRN<br>24 .....   | 6     | <i>NEPA v. Alli</i> (1992) 8 NWLR (pt.<br>259) 276 .....  | 71  |
| <i>John Holt (Nig) Ltd v. Halt African<br/>Workers Union of Nigeria &amp;<br/>Cameroon</i> (1963) 1 All NLR<br>397 ..... | 109   | <i>Niger-Benue Transport Co. Ltd v.<br/>Ogele Construction</i> (2010) 18<br>NWLR (pt. 1196) p. 258 .....                  | 61  |
| <i>Johnson v. Lufadeju</i> (2002) 8<br>NWLR (pt. 768) 192.....   | 24    | <i>Nordenfelt v. Maxim Nordenfelt<br/>Cums and Ammunition Co.</i> (1894)<br>AC 535 .....                                  | 142 |
| <i>Larinde v. Ajiko &amp; Anor.</i> (1940) 6<br>WACA 108 .....   | 36    | <i>Nwangwu v. Ukachukwu</i> (2000) 6<br>NWLR (pt. 662) 674 .....  | 77  |
|  |       | <i>Obi v. INEC</i> (2007) 11 NWLR<br>(pt.1046) 565 .....  | 74  |

|  |     |  |     |
|--|-----|--|-----|
| <i>Obi-Odudu v. Duke</i> (2008) 10<br>NWLR (pt.932) 120.....   | 74  | <i>Queen v. Imadebhor Eguabor</i><br>(1962) 1 All NLR 287 .....                                  | 184 |
| <i>Odinaka v. Moghalu</i> (1992) 4<br>NWLW (pt. 233) 1 at 15 SC .....  | 28  | <i>R v. Secretary of State, Hillingdon</i><br><i>LBC</i> (1986) 1 WLR p.192 .....                | 85  |
| <i>Odugbo v. Abu</i> (2001) 14 NWLR<br>(pt. 732) 45.....   | 71  | <i>R. v. Sussex Justice, Ex parte</i><br><i>McCarthy</i> (1924) 1 KB 259.....                    | 61  |
| <i>Oil field Supply Centre Ltd v.</i><br><i>Johnson</i> (1987) 2 NWLR 625 .....                                  | 109 | <i>Re A. C. Abuah</i> (1962) 1 All NLR<br>279 at 285.....  | 194 |
| <i>Ojisua v. Aivebelehin</i> (2001) 11<br>NWLR (pt. 723) 44 .....  | 110 | <i>Re Certain Legal Practitioners</i> 5<br>FSC 233.....  | 194 |
| <i>Ojule v. Okoya</i> (1968) 2 All NLR<br>342 .....  | 108 | <i>Re Cyril v. Rogers Wright</i> 7 WACA<br>17 .....  | 194 |
| <i>Okike v. L.P.D.C &amp; 3 Ors.</i> (2005)<br>15 NWLR (pt. 949) 471 .....                                       | 193 | <i>Re Martin</i> (1843) 6 Beav. 337, 49<br>ER 856 .....  | 194 |
| <i>Oko v. Nkudiken</i> (1993) 2 SCNJ 33 ...  | 36  | <i>Rechitt &amp; Colman Ltd v. Gongoni</i><br><i>Co. Ltd</i> (2001) 8 NWLR (pt. 718)<br>592..... | 72  |
| <i>Okonjo v. Council of Legal</i><br><i>Education</i> FAC/L16/78 March 12,<br>1979 .....                         | 185 | <i>Ritz &amp; Co v. Techno Ltd</i> (1999) 4<br>NWLR (pt. 598) .....                              | 72  |
| <i>Oladekoji v. Inspector General of</i><br><i>Police</i> (2011) 16 NWLR (pt.<br>1273) p. 430 .....              | 61  | <i>Roe v. Wade</i> 410 U.S. 113, 93 S.<br>Ct. 705, 35 L. E. d 2 <sup>nd</sup> 147 (1973) ...     | 61  |
| <i>Olagbemiro v. Ajagungbade</i> 111<br>(1990) 3 NWLR (pt. 136) 37.....  | 111 | <i>Rondel v. Worsley</i> (1969) 1 AC<br>191.....   | 184 |
| <i>Olaseni v. Olaseni</i> (2010) 5 NWLR<br>(pt. 1187) p. 253.....  | 61  | <i>Rotibi v. Savage</i> (1944) 17 NLR<br>77 .....  | 112 |
| <i>Olutola v. University of Ilorin</i><br>(2005) NWLR (pt. 905) 416.....   | 77  | <i>Ryland v. Fletcher</i> (1866) LRL Ex<br>265.....  | 71  |
| <i>Onigbongbo Community v. Minister</i><br><i>of Lagos Affairs and Ors</i> (1971)<br>LPELR-SC271/1971 .....      | 184 | <i>Safe v. Northern State Marketing</i><br><i>Board</i> (1972) 1 SC 19 .....                     | 178 |
| <i>Oshoboja v. Amida</i> (2009) 18<br>NWLR (pt. 1172) 194.....   | 75  | <i>Saliso v. Police</i> (1960) WNLR 213... 24  |     |
| <i>Owie v. Ighiwi</i> (2005) 5 NWLR (pt.<br>917) 814.....  | 75  | <i>Savage v. Sarrough</i> (1937) 13 NLR<br>141.....  | 108 |
| <i>Owoniyyin v. Omotosho</i> (1961) 1 All<br>NLR 304 .....   | 110 | <i>Seager v. Copydex</i> (1967) 1 WLR<br>123.....  | 33  |
| <i>Pawodu v. Danmole</i> (1958) 3 FSC<br>46 .....  | 112 | <i>Shagari v. Awolowo</i> (1979) 6-9 SC<br>51 .....  | 60  |
| <i>PDP v. Haruna</i> (2004) 16 NWLR<br>(pt. 904) 597.....  | 73  | <i>Solomon v. Gbabo</i> (1974) UILR (Pt.<br>111) 396 .....                                       | 111 |
| <i>PDP v. INEC</i> (1999) 11 NWLR<br>(pt.626) 200 SC.....  | 9   | <i>State v. Njoku</i> (2010) 1 NWLR (pt.<br>1175) 243 .....                                      | 41  |
| <i>Pharmatek Industrial Projects Ltd</i><br><i>v. Trade Bank (Nig) Plc</i> (2009) 13<br>NWLR (pt. 1159) 596..... | 75  | <i>State v. Oladotun</i> (2011) 10 NWLR<br>(pt. 1256) p. 572 .....                               | 66  |

|  |     |  |     |
|--|-----|--|-----|
| <i>Sweeney v. The Department of Highways</i> (1933) O.W.N 783 (CA) ..... | 139 | <i>Wan v. Ibrahim</i> (1997) 9 NWLR (pt. 519) .....              | 113 |
| <i>Taiwo v. Dosumu</i> (1966) NMLR 4 SC .....                            | 37  | <i>Wertheim v. Chiccoutime Pulp Co.</i> (1911) AC 301 (PC) ..... | 143 |
| <i>Taiwo v. Lawani</i> (1961) All NLR 703 .....                          | 109 | <i>White house v. Jordan</i> (1981) 1 WLR 246 (HL) .....         | 62  |
| <i>Tofi v. Uba</i> (1967) 3 NWLR (pt. 62) 707 CA .....                   | 23  | <i>Wood v. Lucy</i> 222 N.Y. 88, 90-91 (1917) .....              | 3   |
| <i>Ukorah v. State</i> (1977) 4 SC 167 at 171 .....                      | 25  | <i>Wood v. Martins Bank Ltd</i> (1971) AC 79 .....               | 33  |
| <i>Utih v. Onoyivwe</i> (1991) 1 NWLR (pt.116) 166 .....                 | 75  | <i>Yakugbe v. C.O.P.</i> (1992) 4 NWLR (pt. 234) 152 .....       | 75  |
| <i>Uwazurike v. A. G. Federation</i> (2008) 10 NWLR (pt. 1096) 452...77  |     | <i>Yusuf v. Obasanjo</i> (2003) 16 NWLR (pt. 847) 544 .....      | 73  |
| <i>Uzodinma v. Police</i> (1982) 1 NCR 27 .....                          | 180 | <i>Yusuf v. State</i> (2011) 18 NWLR (pt. 1279) p.853 .....      | 61  |

# TABLE OF STATUTES

|   |                |
|---|----------------|
| Arbitration and Conciliation Act  |                |
| CAP A18 Laws of Federation of Nigeria 2004.....                         | 44             |
| Body of Benchers Regulations of 1983 .....                              | 186            |
| Regulation 1(2) .....   | 187            |
| Regulation 2(2) .....   | 187            |
| Regulation 3(2) .....   | 186            |
| Child Rights Act, 2003.....   | 6              |
| Constitution of the Federal Republic Nigeria, 1999 (Amended 2011) ..... | 30, 49, 50, 53 |
| S. 1 .....  | 182            |
| S. 1 (2) .....  | 14             |
| S. 2 .....  | 13             |
| S. 3 .....  | 13, 22         |
| S. 4 (1) .....  | 49, 80         |
| S. 4 (2) .....  | 50, 80         |
| S. 6 (1) .....  | 59             |
| S. 6 (5) .....  | 73, 74         |
| S. 12 (1) .....   | 114            |
| S. 14 (2) (a).....  | 15             |
| S. 14 (2) (b).....  | 8, 13          |
| S. 33 (2) (c).....  | 27             |
| S. 33 (5) .....   | 66             |
| S. 35 (5) .....   | 66             |
| S. 36 .....   | 53             |
| S. 36 (12) .....  | 14, 23         |
| S. 38.....  | 11             |
| S. 38 (4) .....   | 11             |
| S. 40.....  | 5, 10, 11      |
| S. 41.....  | 11             |
| S. 45.....  | 6, 11          |
| S. 56(2) .....  | 81             |
| S. 58.....  | 81             |
| S. 58(4) .....  | 80             |

|                 |        |
|-----------------|--------|
| S. 58(5).....   | 80     |
| S. 59 .....     | 81     |
| S. 59 (2).....  | 82     |
| S. 59 (3).....  | 82     |
| S. 59 (4).....  | 80, 82 |
| S. 62 (3).....  | 82     |
| S. 77 (2).....  | 12     |
| S. 117 (2)..... | 12     |
| S. 121 .....    | 114    |
| S. 222 .....    | 12     |
| S. 230 (1)..... | 74     |
| S. 235 .....    | 74     |
| S. 237 .....    | 74     |
| S. 247 .....    | 74     |
| S. 251 .....    | 76     |
| S. 270 .....    | 74     |
| S. 275 (1)..... | 74     |
| S. 280 .....    | 74     |
| S. 292 .....    | 182    |

|   |     |
|---|-----|
| Constitution of the Nigerian Bar Association 2001 ..... | 181 |
| Article 19 .....  | 181 |

|                             |     |
|-----------------------------|-----|
| Conveyancing Act 1881 ..... | 106 |
|-----------------------------|-----|

|  |         |
|--|---------|
| Companies and Allied Matters Act CAP 20, Vol. III, LFN 2004f.... | 46, 181 |
| S. 35 (3).....   | 181     |
| S. 37 .....  | 46      |

|  |            |
|--|------------|
| Criminal Code Act, CAP C38 Laws of Federation of Nigeria, 2004 | 14, 23, 49 |
| S. 3 .....   | 24         |
| S. 37 .....  | 14, 23     |
| S. 38 .....  | 14, 23     |
| S. 252 .....   | 23         |
| S. 383 .....   | 23, 27, 49 |

|   |        |                                    |            |
|---|--------|------------------------------------|------------|
| Criminal Procedure Act CAP C41,<br>2004 ..... | 22     | S. 68 .....                        | 62         |
| S. 2 .....                                    | 24     | S. 73 .....                        | 36         |
| S. 255 .....                                  | 26     | S. 121 .....                       | 65         |
| S. 270 .....                                  | 25, 26 | S. 131 .....                       | 65         |
| S. 300 .....                                  | 26     | S. 132 .....                       | 65         |
| S. 308(5) (b) .....                           | 26     | S. 133 .....                       | 65         |
| S. 309 .....                                  | 26     | S. 133 (2) .....                   | 65         |
| S. 368 (2) .....                              | 25     | S. 134 .....                       | 65         |
| S. 368 (3) .....                              | 26     | S. 135 .....                       | 65         |
| S. 377 .....                                  | 25     | S. 137 (2) .....                   | 66         |
| S. 385 .....                                  | 26     | S. 138 (2) (c) .....               | 66         |
| S. 386(2) .....                               | 26     | S. 139 .....                       | 66         |
| S. 387 .....                                  | 26     | S. 140 .....                       | 66         |
| S. 391 .....                                  | 24     | S. 141 .....                       | 66         |
|   |        | S. 175 .....                       | 62         |
| <br>Criminal Procedure Code                   |        |                                    |            |
| S. 25 .....                                   | 26     | Fatal Accident Acts 1846 and 1864  | 106        |
| S. 270 .....                                  | 25     | Federal High Court Act .....       | 44         |
| S. 271 (3) .....                              | 25     | S. 17 .....                        | 44         |
| S. 272 (3) .....                              | 25     | Fraudulent Conveyances Acts        |            |
| S. 308(4) .....                               | 26     | 1571 .....                         | 106        |
| S. 308(5) .....                               | 26     | High Court of Federal Capital      |            |
| <br>Criminal Procedure Law, Lagos             |        | Territory, Abuja (Civil Procedure  |            |
| State CAP C118, 2003 .....                    | 22     | Rules), CAP 114, 2004 .....        | 22, 45     |
| Decree No. 1 (Suspension and                  |        | Order 17 .....                     | 45         |
| Modification) 1966 .....                      | 30     | High Court of Lagos State (Civil   |            |
| Decree No.13 (Supremacy and                   |        | Procedure) Rules, Lagos State, CAP |            |
| Enforcement of Powers) 1990 .....             | 30     | 114 2004 .....                     | 21, 36, 45 |
| Education Tax (Amendment) Act,                |        | S. 13 .....                        | 35         |
| CAP E2 Laws of Federation of                  |        | S. 14(3) .....                     | 36         |
| Nigeria 2004 .....                            | 48     | S. 15 .....                        | 35         |
| S. 1(2) .....                                 | 48     | S. 26 .....                        | 36         |
| <br>Nigerian Evidence Act No. 18,             |        | Infants Relief Acts 1874 .....     | 106, 109   |
| 2011 .....                                    | 22, 30 | Interpretation Act, 1964 .....     | 105, 107   |
| S. 1 .....                                    | 63, 64 | S. 45 (1) .....                    | 107        |
| S. 2 .....                                    | 36     | Land Use Act of 1978 .....         | 29         |
| S. 10 .....                                   | 62     | Land Transfer Acts 1897 .....      | 106        |
| S. 12 .....                                   | 62     |                                    |            |
| S. 14 (3) .....                               | 36, 37 |                                    |            |
| S. 18 (3) .....                               | 109    |                                    |            |

|   |                    |  |          |
|---|--------------------|--|----------|
| Limitation Acts (Real Property<br>Limitation Acts 1833 as amended<br>in 1874) ..... | 106                | S. 11 (2).....   | 192      |
| Legal Education (Consolidation,<br>etc.) Act 1976 CAP. L10, LFN<br>2004 .....       | 175, 176, 179, 185 | S. 11 (7).....   | 194      |
| S. 1 .....  | 185                | S. 12 .....  | 179      |
| S. 1 (2) .....  | 185, 186           | S. 12 (1).....   | 192      |
| S. 2(1) .....   | 185, 186           | S. 12 (1) (c) (i)-(iii) .....  | 194      |
| S. 3 .....  | 179                | S. 12 (2).....   | 192      |
| S. 5 .....  | 179, 186           | S. 12 (4).....   | 191      |
| S. 6 .....  | 179                | S. 13 .....  | 179      |
| S. 7 .....  | 179                | S. 14 .....  | 179      |
| S. 8 .....  | 179                | S. 15 .....  | 179      |
| S. 9 .....  | 179                | S. 15 (1).....   | 190      |
| Legal Practitioners Act, CAP L11<br>LFN, 2004 .....                                 | 175, 176, 179      | S. 15 (3).....   | 190      |
| S. 1 .....  | 179, 190           | S. 16 .....  | 179      |
| S. 1(1) .....   | 190                | S. 17 .....  | 179      |
| S. 1(2) .....   | 190                | S. 18 .....  | 179      |
| S. 2 .....  | 176, 179           | S. 19 .....  | 179      |
| S. 2 (1) .....  | 176                | S. 20 .....  | 179, 191 |
| S. 2 (2) .....  | 178                | S. 22 .....  | 178, 179 |
| S. 2 (3) .....  | 176                | S. 22 (d).....   | 181      |
| S. 3 .....  | 179, 186           | S. 23 .....  | 179      |
| S. 3(1) .....   | 186, 187           | S. 24 .....  | 179      |
| S. 4 .....  | 179                | S. 25 .....  | 179      |
| S. 4 (1) .....  | 176                | Legal Practitioners (Amendment)<br>Decree No. 21 of 1994.....            | 186      |
| S. 5 .....  | 179, 186           | S. 3 (1).....  | 186, 187 |
| S. 5 (1) .....  | 189                | Marriage Act CAP M2 Laws of<br>Federation of Nigeria 2004.....           | 44       |
| S. 5 (2) .....  | 189                | S. 47 .....  | 44       |
| S. 5 (3) .....  | 188                | Magistrate Courts Law, Lagos State<br>2003.....                          | 35, 44   |
| S. 5 (4) .....  | 188                | S. 23 .....  | 35       |
| S. 5 (7) .....  | 189                | Partition Acts 1868 and 1876 .....                                       | 106      |
| S. 5 (8) .....  | 189                | Professional Bodies (Special<br>Provisions) Act 1972 .....               | 177      |
| S. 6 .....  | 179                | S. 2 (b).....  | 177      |
| S. 7 .....  | 179                | Professional Bodies (Legal<br>profession) Exemption Order 1973 ...       | 177      |
| S. 7 (1) .....  | 176                | Penal Code CAP 89, (applicable in<br>the Northern part of Nigeria) ..... | 26       |
| S. 8 .....  | 179                | S. 68 (1) (b) .....  | 26       |
| S. 8 (2) .....  | 181                |  |          |
| S. 9 .....  | 179                |  |          |
| S. 10 .....   | 179                |  |          |
| S. 11 .....   | 179, 192           |  |          |



|  |          |   |          |
|--|----------|---|----------|
| S. 387 .....   | 41       | Sale of Goods Act 1893.....   | 106, 109 |
| S. 388 .....   | 41       | Settled Land Acts 1882 (as<br>Amended) .....                                    | 106      |
| Recovery of Premises Ordinance<br>CAP 176 (Lagos).....             | 30       | Statutes of Fraud 1677.....   | 106      |
| Recovery of Premises Law CAP<br>113 (Eastern Region) etc .....     | 30       | Supreme Court Act 2004 .....  | 35, 36   |
| Rules of Professional Conduct of<br>Legal Practitioners, 2007..... | 171, 180 | S. 17 .....   | 35, 36   |
| Rule 1 .....   | 183      | Taxes and Levies (Approved List<br>for Collection) Act, CAP T2<br>LFN 2004..... | 47, 48   |
| Rule 2 .....   | 183      | Trustee Acts 1888.....  | 106      |
| Rule 3 (1) (a).....  | 183      | Wills Law of Lagos State CAP 194  |          |
| Rule 4.....  | 183      | Laws of Lagos State 1994 .....  | 44       |
| Rule 6 (2) .....   | 181      | S. 4 .....  | 44       |
| Rule 6 (3) .....   | 181      | Wills Act, 1837 .....   | 44, 106  |
| Rule 6 (4) .....   | 181      | S. 9 .....  | 44       |
| Rule 7 .....   | 182      |   |          |
| Rule 8 .....   | 181      |   |          |
| Rule 14.....   | 184      |   |          |
| Rule 15.....   | 184      |   |          |
| Rule 15 (2) (a).....   | 183      |   |          |
| Rule 16.....   | 184      |   |          |
| Rule 16 (b) .....  | 183      |   |          |
| Rule 17.....   | 184      |   |          |
| Rule 18.....   | 184      |   |          |
| Rule 19.....   | 184      |   |          |
| Rule 19 (2) .....  | 184      |   |          |
| Rule 20.....   | 184      |   |          |
| Rule 21 .....  | 184      |   |          |
| Rule 22.....   | 184      |   |          |
| Rule 23.....   | 184      |   |          |
| Rule 24.....   | 184      |   |          |
| Rule 25.....   | 184      |   |          |
| Rule 27 .....  | 183      |   |          |
| Rule 30.....   | 182      |   |          |
| Rule 31 .....  | 182      |   |          |
| Rule 32.....   | 182, 183 |   |          |
| Rule 33.....   | 182      |   |          |
| Rule 34.....   | 182      |   |          |
| Rule 35.....   | 182      |   |          |
| Rule 37 (2) .....  | 183      |   |          |
| Rule 39 (3) .....  | 183      |   |          |
| Rule 47 (1) .....  | 183      |   |          |

## PREFACE

This text is a collection of writings on assigned topics by some scholars and lecturers in the Faculty of Law at Benson Idahosa University and those invited from outside. The idea to write a text for use in the study of legal methods for law students was borne out of the desire to present a range of updated material in this area of study.

The focus of this text is Nigeria. It is written in simple, easy-to-understand language, and meant essentially for law students in the first year of the five year course in Law, as structured by the National Universities Commission (NUC). Nevertheless, persons who have need of information or education on different aspects of Nigerian legal process will also find aspects of the text useful. In addition, advanced students and researchers will find some parts of the text useful, particularly those parts dealing with legal research and writing.

The contributors come from diverse backgrounds and experiences, which is reflected in their styles of presentation. However, each has endeavoured to present the assigned topic in such a form as to enhance comprehension by the primary beneficiaries.

The inclusion of the chapters on advocacy and mooted skills, as well as examination skills and strategies make this text unique, and beyond what existing texts in Nigeria provide. In the course of time, additional topics will be added when we prepare the next edition.

**Prof. C.C. Ohuruogu and Dr. T.O. Umahi**

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# CHAPTER ONE

## LAW IN SOCIAL CONTEXT

### LILIAN AKHIROME-OMONFUEGBE<sup>1</sup>

#### **Introduction**

In any given society, it is imperative that there should be some set standards or rules to regulate the affairs of people. The ability to make rational choices is one of the major distinguishing features which set men apart from animals. However, where there is freedom of choice, abuse is inevitable. Thus, as far back as biblical days, the need for man to abide by rules so as to avoid chaos and anarchy has always existed. Today even ordinary people regularly make laws for their own circumstances; it is a way of regulating behaviour.<sup>2</sup> Let us look at our everyday life; for example, if you set up a club or a committee which accords its members certain rights and privileges, it becomes a necessity to put in place some form of body of rules or code of conduct to regulate the affairs of the club/committee. An absence of a body of rules or code of conduct will no doubt lead to abuse of the rights and privileges which the members possess.

Looking at this illustration, it is important to note also that this body of rules or code of conduct will not only prescribe a set standard for the members, but will also make provision for some form of sanction or penalty, e.g. payment of fine or loss of membership, in the event that any member does not abide by them. This is important because a code of conduct/body of rules brings about rights and privileges as well as duties. Where there is no means of enforcing the body of rules/code of conduct, these rights will be abused and duties may never be executed. The

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<sup>2</sup> A. Bradney et al, *How to Study Law*, 3<sup>rd</sup> ed., (London: Sweet and Maxwell, 1995), 3.

members have to be aware that if they do not abide by the rules, they will be punished; this consciousness brings about obedience and conformity, and suppresses deviant behaviour.<sup>3</sup> The same goes for the society at large. All over the world, no matter how free a society claims to be, there must be laws in existence and a system in place to enforce these laws. Sanctions or penalties must also be put in place as a guide, to protect the interests of the entire society. Therefore where a man possesses rights and privileges, there must be corresponding duties/obligations on his part. In other words, where the law imposes on him a duty, it creates also a right in his favour.

This chapter has so far shown that law is necessary to ensure a free, safe, orderly and progressive society. It is important for the people of a society to live a normal and free life and have commercial, religious and personal relationships with one another in peace, safety and orderliness. This chapter will discuss the nature, definition and functions of law. It will also examine some of the legal concepts which describe the aims and objectives of law—that is, how law serves as a check and balance in society.

## **The Nature of Law**

The nature of law simply means the attributes or features and characteristics of law, not the definition; law does not possess a single or definite attribute. It is diverse, and includes the following:

1. A collection of rules to be obeyed; that is, it can be said to be a collection of do's and don'ts. It prescribes what a person should or should not do.<sup>4</sup>
2. It provides remedies for a person against whom a wrong has been committed, as well as sanction or penalty for a person who has disobeyed the law.
3. In times past, laws evolved from customs. In Nigeria, our customary law is a part of our legal system. In the present day, by contrast, laws are made by legislature or parliament depending on the legal system of the country. In Nigeria, laws/statutes are made by legislature.
4. Laws which evolved from custom are largely unwritten, although these days some are partly written and others have evolved through

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<sup>3</sup> J. H. Farrar and A. M. Dugdale, *Introduction to Legal Method* (London: Sweet and Maxwell, 1990), 6.

<sup>4</sup> E. Malemi, *The Nigerian Legal Method* (Lagos: Princeton Publishing Co, 2010), 8.

judicial precedent. However a major feature of law today is that it is written (codified).

5. Sometimes law and morality are confused. They may be used together in certain situations, but law is not the same as morality. Although law may reflect the morality of a society, the main difference is the existence of sanctions which exist in conjunction with law.

6. Law is fundamental—it covers all aspects of human existence. For everything in life, there is a law.

7. Law can also be seen as the answer/response to societal problems or issues. That is, the law makers make the law to address a particular issue or problem/condition prevalent in a society.

8. The aim of law is fairness and equity. Thus the popular saying “no man is above the law.” The law serves to bring about justice. For example, the statue of justice is blindfolded and holds two equal scales; this signifies that law promotes justice, fairness and equality irrespective of your colour, economic or academic status. “Law is not a one way traffic, ... and all persons should be able to approach the seat of justice openly without inhibitions or handicap.”<sup>5</sup> However, on rare occasions law may lead to injustice, for example where a strict interpretation is applied.

9. As noted above, sometimes a strict interpretation of the law may lead to injustice and this creates a gap between justice and the law. This can be addressed by amendments. Thus we can say that law is not static; it evolves. Dynamism is one of its distinctive features. It is continually amended to meet societal needs and changes. Justice Benjamin N. Cardozo, Justice of the US Supreme Court put it succinctly thus; “The law, like the traveller must be ready for the morrow. It must have a principle of growth.”<sup>6</sup>

10. Law is the last hope of the common man. It helps organize a society. Its existence brings about development, growth, stability and hope in a society. It gives the people a sense of security, and helps to structure a society as well as maintain that structure.

11. Law is territorial.<sup>7</sup> it guides and binds the conduct of people within a given territory. Even though the law of the different places

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<sup>5</sup> Hon. Justice P. A. Onamade, *Guide to Words and Phrases in Nigerian Law*, Vol. 2 (Lagos: Philade Company Ltd, 2003), 649 para. 1469.

<sup>6</sup> Justice B. N. Cardozo, *The Growth of the Law*, (New Haven: Yale University Press; 1924), pp. 19-20. See also the case of *Wood v. Lucy* 222 N.Y 88, 90-91 (1917).

<sup>7</sup> A. O. Sanni, *Introduction to Legal Methods* (Ile-Ife: Obafemi Awolowo University Press Limited, 2006), 7.

might be similar; there will always be differences which distinguish one town from another.

## What Is Law?

Over the years, there have been several attempts at a definition of this concept. However numerous the definitions are today, none is free from criticism. There cannot be said to be any authoritative, complete or absolute definition of law. Nevertheless, the overall attempt to define the concept has succeeded in one way or another to capture the essence of what law ultimately is.

The difficulty in achieving an absolute definition may be due to the dynamic and evolving nature of the law. Thus everyday new features of this concept are discovered, such that the definitions of previous years become limiting and do not completely or sufficiently describe law. Some of the definitions attributed to law include:

- A rule of behaviour; a code of conduct. It is the rules and regulations of a particular country, usually made by the legislative arm of government which orders the way persons, bodies and society should behave.<sup>8</sup>
- The whole reservoir of rules from which judges draw their decisions.<sup>9</sup>
- The rule of action which is prescribed by a superior person or body and which an inferior person or body is bound to obey.<sup>10</sup>
- A body of rules made by institutions, bodies and persons vested with the power to make such rules which are binding and enforced among the members of a given society.<sup>11</sup>

Some schools of thought however believe that the definition of law is only complete when it includes the presence of sanctions; following this understanding, law is therefore defined as rules whose obedience is

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<sup>8</sup> E. Malemi, *The Nigerian Legal Method* (Lagos: Princeton Publishing Co, 2010), 7.

<sup>9</sup> See L. B. Curzon, *Basic Law: An Introduction for Students*, 1990, cited in E. Malemi, *The Nigerian Legal Method* (Lagos: Princeton Publishing Co, 2010), 7.

<sup>10</sup> Sir William Blackstone (1923-1980), cited in E. Malemi, *The Nigerian Legal Method* (Lagos: Princeton Publishing Co, 2010), 7.

<sup>11</sup> B. A. Garner, *Black's Law Dictionary* 9<sup>th</sup> ed. (St. Paul, Minnesota: West Group; 2009).



secured by sanctions;<sup>12</sup> that is, a body of rules made by the Sovereign, to be obeyed by the people, disobedience of which would attract sanctions. John Austin (1954),<sup>13</sup> who propounded the Command Theory of Law, put it succinctly thus: “That law is a command set by a political superior for a political inferior, which the inferior has to obey or suffer sanction.”<sup>14</sup> This definition, though clearly applying to criminal law with regard to sanctions (punishment of offenders), has however been criticized as it has been argued by scholars that law is not always couched in the form of a command. Some laws are only procedural e.g. the Marriage Act<sup>15</sup> in Nigeria which regulates statutory marriages, or the Civil Procedure Rules of the various state high courts in Nigeria.

Another criticism is that in modern democratic countries today, there no longer exists a “political superior” who has unlimited powers. For example, in Nigeria, the Constitution<sup>16</sup> posits that the people of Nigeria made and adopted the Constitution as their supreme law and appointed the government into power through their vote. In essence, the government and the people work hand in hand and the leaders are not to be seen as “uncommanded commanders.”<sup>17</sup> In the case of *IGP v. All Nigerian Peoples Party & Others*,<sup>18</sup> the respondents had contended in court that the Public Order Act<sup>19</sup> was unconstitutional, as its provisions constituted a breach of fundamental rights to peaceful assembly and association provided in the Constitution.<sup>20</sup> The Federal High Court, Abuja held that the Public Order Act was unconstitutional and in breach of the rights of the respondents to freedom of peaceful assembly. On appeal, the Court of Appeal affirmed the judgment of the trial court. This example clearly shows why the command theory does not give a very good definition of law as it stands today.

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<sup>12</sup> A. O. Obilade, *The Nigerian Legal System* 3<sup>rd</sup> ed. (Ibadan: Spectrum Books Ltd, 2005), 3.

<sup>13</sup> John Austin (1954) of the Positive Theory school of thought, cited by L. B. Curzon, *Jurisprudence* 2<sup>nd</sup> ed., (London: Cavendish Publishers Limited), 99-110.

<sup>14</sup> John Austin of the Positive Theory school of thought.

<sup>15</sup> CAP M.6, Laws of the Federation of Nigeria (LFN) 2004.

<sup>16</sup> The preamble to the 1999 Constitution as amended 2011; see also Chapter 1 of the Constitution.

<sup>17</sup> E. Malemi, *The Nigerian Legal Method* (Lagos: Princeton Publishing Co, 2010), 61.

<sup>18</sup> (2009) 18 NWLR (Pt. 1066) p.457.

<sup>19</sup> 1990 (now 2004).

<sup>20</sup> Section 40, 1999 Constitution as amended 2011.

All of these definitions have attempted to capture the meaning of law. Similarities run through all the various definitions. In essence, therefore, law can be understood to mean a set of rules which prescribe the standard by which persons or bodies should behave/conduct themselves in society.

## **Functions of Law**

1. Law provides a structured framework for a society, guiding and regulating all aspects of human existence and relationships. In other words, it stipulates what a good, orderly, safe, peaceful and organized society should look like, such that any behaviour, relationship or institution that promotes or creates anything outside that stipulated framework will be seen as contrary to the law or illegal.
2. Law serves to guarantee and streamline the freedom, rights and duties of the members of a society. Therefore, though an individual may possess “absolute” freedom, the law puts a limit to such freedom<sup>21</sup> in order to protect the interests of other members of society.
3. Law serves as a medium for resolving disputes or conflicts. It follows therefore that there exist the necessary institutions like law courts, tribunals, etc, to carry out these functions. Law also seeks to provide remedies and justice to people who have suffered negatively<sup>22</sup> by the action or inaction of another. The most obvious way in which law contributes to the maintenance of social order is the way in which it deals with disorder or conflict.<sup>23</sup>
4. Law can also be put in place specifically to address or respond to a particular societal problem or issue.<sup>24</sup> For example, the increase in child abuse and child trafficking in recent times have made it necessary for laws prohibiting and punishing such offences to be put in place.<sup>25</sup>
5. For there to be social order and balance in a society, there has to be well-formulated law and institutions or systems put in place to enforce such law. Thus law serves as a formal mechanism of social control. It plays a major role in ensuring the existence and maintenance of order in a society. “... When the law curbs the excesses of the strong

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<sup>21</sup> Section 45 of 1999 Constitution as amended 2011.

<sup>22</sup> *INEC v. Oshiomohle* (2008) WRN 24, where the gubernatorial aspirant (Oshiomohle) contested the INEC election result in court and judgment was given in his favour; he was returned as the legitimate governor of Edo state of Nigeria.

<sup>23</sup> G. Slapper and D. Kelly, *The English Legal System*, 12<sup>th</sup> ed. (Essex: Pearson Education Limited, 2012), 2.

<sup>24</sup> *Ibid*, p. 2.

<sup>25</sup> See Child Rights Act, 2003.

and balances their rights and duties as well as powers... then we can say the law has dominion...”<sup>26</sup>

6. Finally, law constitutes and regulates the principal organs of power in a society.<sup>27</sup>

This chapter has looked at the nature, definition and functions of law. A good question to ask at this stage is what the main aim or objective of the law is particularly in relation to its functions, what does the law aim to achieve as its end result?

## **Aims and Objectives of Law**

In summary, the law serves as a check and balance in society. It ensures that every individual is accorded certain rights and privileges as a human being, but stipulates that individuals must exercise those rights in such a manner that will not interfere with the rights and privileges of others in society.

Some of the legal concepts describing the aims and objectives of law are as follows:

### **1. Law and Order**

According to Gary Slapper and David Kelly,<sup>28</sup> “law plays an important part in the creation and maintenance of social order.”<sup>29</sup> The major aim of any government is to maintain law and order within its territory. In order to achieve this, laws are usually put in place and institutions/bodies set up for the enforcement of these laws. This is because the law would no doubt be useless if there was no means of enforcing it.

A. O. Obilade<sup>30</sup> in defining law explains that, in the absence of law, there would be chaos and anarchy. Imagine a society in which people were allowed free reign, with no rules and no code of conduct—disaster would be prevalent in such an environment. Therefore, the law is an instrument

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<sup>26</sup> O. N. Ogbu, *Modern Nigerian Legal System* (Enugu: CIDJAP Publishers, 2002), 7.

<sup>27</sup> J. H. Farrar and A. M. Dugdale, *supra* note 3.

<sup>28</sup> G. Slapper and D. Kelly, *The English Legal System*, 12<sup>th</sup> ed., (Essex, United Kingdom: Pearson Education Limited, 2012), 2.

<sup>29</sup> *Ibid*, p. 2.

<sup>30</sup> A. O. Obilade, *The Nigerian Legal System*, 3<sup>rd</sup> ed., (Ibadan: Spectrum Books Ltd, 2005), 3.

of social control to promote order in society. This is the main reason for the creation of a government and governing bodies in any society. For example, in Nigeria, the Constitution provides that “the promotion of the welfare and the good of the people shall be the primary purpose of the government.”<sup>31</sup>

Similarly, in the international scene, where countries interact with each other, different rules (treaties, conventions, etc) are put in place to regulate the relationships between them.<sup>32</sup> Even during war, when it may seem as if there is no order, law comes into force and ensures that the war is fought according to the laws of war. For example, international humanitarian law (IHL) deals with law applicable during armed conflict (all cases of declared war).<sup>33</sup> One of the main provisions under IHL is that combat must be restricted between combatants only and civilians should not be attacked. Thus, the elderly, women and children are protected at times of war.<sup>34</sup> Breach of law of war is a ‘war crime;’ for example, Charles Taylor, former president of Liberia, was sentenced to fifty years in prison for war crimes. There are numerous other examples of people punished for war crimes by United Nations tribunals. Finally, for order to be maintained through law, the enforcement and administration of law has to be done without fear of favour to anyone, else this aim will be defeated.

## 2. Law and Justice

Some authors have defined justice as, “fairness, rightness, right, just, good, reasonable.”<sup>35</sup> Justice is ultimately the correct application of the law.<sup>36</sup> Hence, we can say that justice simply means what is good, fair and right. Justice seeks to promote equality. As discussed earlier on in this chapter, the law is the last hope of the common man. The fact that the law aims at promoting justice is the reason why a man cannot do wrong to his

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<sup>31</sup> Section 14 (2) (b) of the, 1999 Constitution of Nigeria as amended 2011.

<sup>32</sup> For example, trade-related aspects of intellectual property rights agreement.

<sup>33</sup> W. Kälin et al, *Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), 108.

<sup>34</sup> *Ibid*, p. 81. See also M. Sassòli et al, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practise in International Humanitarian Law*, Vol. 11, 2<sup>nd</sup> ed. (Geneva: ICRC, 2011), 128, 132.

<sup>35</sup> E. Malemi, *The Nigerian Legal Method* (Lagos: Princeton Publishing Co, 2010), 114.

<sup>36</sup> A. O. Sanni, *Introduction to Legal Methods* (Ile-Ife: Obafemi Awolowo University Press, 2006), 32.

fellow man and not receive a penalty. This serves as a deterrent to other members of society.

Justice seeks to balance the conflicting or competing interests of people in society. There are two main types of justice:

- a. Formal justice
- b. Substantive justice

### **a) Formal justice**

This is when the law is applied strictly and mechanically by the court. In this case, the judge will interpret the law as it is, without regard or recourse to any external factors or influence (how he feels or what he thinks). One of the arguments in favour of formal justice is that it does not see anything wrong with the law as it is and as such can be applied the way it is without fear or favour. Proponents of this type of justice also posit that it promotes clarity and certainty of the law, since everyone will know what the law is and follow it as it is without allowing external considerations to affect the interpretation or application. This is the type of justice achieved when the literal rule of interpretation of statutes<sup>37</sup> are applied by judges. See the case of *PDP v. INEC*,<sup>38</sup> where the court held that if the wording of a statute is clear and unambiguous it should be given its clear and literal meaning. It was also held in that case that if there is a gap in statutory provisions, it is the job of the legislature to correct it, not that of the judges. Thus the judges should interpret the law as it is without modification.

Nevertheless, a major demerit of this type of justice is that since it does not see anything wrong with the law, it does not encourage improvement, change or development of the law. Considering the fact that one of the major features/attributes of law is its dynamism and ever-evolving nature, this is a big minus for the theory of formal justice. Law should not be static; it has to constantly improve and develop to suit the ever growing and changing needs of society.

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<sup>37</sup> This is when the judge gives the words of statute their literal and ordinary meaning.

<sup>38</sup> (1999) 11 NWLR (Pt. 626) p. 200 SC.

## b) Substantive justice

This is when the court adopts a more liberal approach in the application of law. Here, the judge will consider some external factors especially if a strict application of the law will lead to manifest hardship. It is the need to do substantive justice that led to the existence of the doctrine of equity in the history of English law.<sup>39</sup> Common law, which had already been in existence, was found to be too strict and inflexible and caused manifest hardship on the people.<sup>40</sup> Thus the Chancellor or Judges of the Chancery Court interpreted the law liberally to achieve substantive justice<sup>41</sup> and fairness. Substantive justice is also known as judicial activism.

This type of justice is more predominant today as judges are now more interested in achieving justice than strictly interpreting the law. For instance, technicalities during court proceedings are no longer a ground for striking out cases in court. Previously, the fact that a court process was not properly endorsed, or if the heading bore the wrong name of court or wrong section of the law under which it was brought, was usually enough grounds to strike out the matter. However today the case is different as courts are encouraged to promote justice and lean less on technicalities.<sup>42</sup>

## 3. Law and Freedom

Freedom is a state of being free. It means liberty, right to do what one wants to do, or right to refrain from what one does not want to do.<sup>43</sup> Man has an innate desire to be free at all times. The history of mankind is replete with stories of how man has pursued this desire from time immemorial. This accounts for the various wars and protests that man has waged in a bid to counter domination and intimidation.

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<sup>39</sup> G. Rivlin, *Understanding The Law*, 4<sup>th</sup> ed. (Oxford: Oxford University Press, 2006), 26, 27.

<sup>40</sup> C. Elliott and F. Quinn, *English Legal System*, 12<sup>th</sup> ed. (Essex: Pearson Education Limited, 2012), 117.

<sup>41</sup> *Ibid*, p. 27.

<sup>42</sup> See the case of *Famfa Oil Limited v. Attorney General of the Federation*. (2003) 18 NWLR (pt 852) 453; see also *Muyiwa Inakoju and Ors v. Hon. Abraham Adeolu Adeleke and Ors*- [2007] All FWLR (Pt. 353) 3 p. 97 where Niki Tobi JSC asserted that justice should prevail over technicalities.

<sup>43</sup> E. Malemi, *The Nigerian Legal Method* (Lagos: Princeton Publishing Co, 2010), 117.