



NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW515

COURSE TITLE: JURISPRUDENCE AND LEGAL THEORY I

COURSE CODE: LAW 515

COURSE TITLE: Jurisprudence and Legal Theory 1

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COURSE TITLE: Jurisprudence and Legal Theory I

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1.0 INTRODUCTION

LAW 515 deals with the various aspects of the Course known in full as Jurisprudence and Legal Theory. The Course seeks to provide the student with varied views of the theoretization of law, beginning with a general overview of the purpose and importance of Jurisprudence to all endeavours, particularly law.

Within the societal microcosm, law is seen in relation to justice, morality and religion and the interdependence of these various forces to each other is also pivotal, and therefore needs proper comprehension. Further, there is an inquiry into law and its influence on society, the interaction between law and social change, and the importance of ethics in the discipline of law.

The 'sources of law' is also made a subject of inquiry as a means of deciphering the specific content of law, among several other related courses.

What you will learn in this Course.

The overall aim of Jurisprudence and Legal Theory (LAW 515) is to focus on the foundational basis of law in relation to other elements of law like morality, justice, religion, ethics, social change, etc. It concludes with an expose on the sources of law (legislation, judicial precedents, customs and conventional customs).

The reason for the review of this course material is to provide further clarifications on the fundamental topics discussed in this course. Considerable effort was made to expound and analyse the topics where it is necessary.

2.0 JUSTIFICATION

With the proliferation of several areas of law previously unknown to students such as Aviation Law, Maritime Law, Law of Cyberspace and new law forms that have become an essential aspect of daily life, it has become crucial for the students to be aware of the purpose of law both at an individual level and on an institutional level. The major aim of this is to enable students develop their expertise in specific fields of law. Additionally, it allows students to develop an ideology that is specific to them in legal practice, making them aware of options open to them in order to avoid wrong career choices. And all this is done by the aid of information as to the nature, applicability and eternal purpose of law.

Lastly, all viewpoints are accommodated as regards human, cultural and social factors using traditional methodological patterns and other supportive methods of information gathering.

3.0 COURSE OBJECTIVES

The aim and objectives of this course is to give the students a foundational basis for the study and understanding of the basic contents of Jurisprudence and Legal Theory thereby preparing them for a more complex theoretical content in the second semester of the academic session. At course completion, students will be able to:

Have a basic understanding of the relation of law to society both in terms of its nature, applicability and its eternal purpose;

Be able to distinguish between law and morality, justice and religion and further be able to define law and its effectiveness in relation to these other societal imperatives;

Have a theorization of law and social change. Hopefully, with specific reference to Nigeria, be able to decipher the elements that can make law more efficient; understand its attributes as a social control tool and how this has been harnessed by various governments in and outside Nigeria;

Understand the relationship between ethics and the law;

Have a complete knowledge of the sources of law and what elements are characteristic of law in terms of its sources; and

To have a good understanding of the nature of law, how laws are ascertained and the tools lawyers and jurists use in arriving at resolutions through deductions and analogy.

4.0 WORKING THROUGH THIS COURSE

To complete this course, you are required to read the study units, recommended textbooks and other materials. Each unit contains self-assessment exercises, and at tutor-decided points in the course, you are required to submit assignments for assessment purposes. At the end of the course is a final examination. The course should take you 14 weeks (Revision and Examination inclusive) in total to complete. Below, you will find listed all the components of the course, what you have to do and how you should allocate your time to each unit in order to complete the course successfully on time.

5.0 COURSE MATERIALS

The major materials to be used for the course are:

This Course Guide;

Study Units;

Textbooks;

Assignment File; and

Presentation Schedule

In addition, you must obtain the textbooks as they are not provided by NOUN. You are required to obtain them in your own responsibility. You may purchase your own copies.

Your tutor will always be available should you have any problem in obtaining these textbooks.

6.0 **STUDY UNITS**

There will be 4 Modules in this Course which are subdivided into 12 Study Units, and they will be distributed as follows:

Module 1

Unit 1 The Purpose of the Study of law and Jurisprudence

Unit 2 Nature, definition and scope of Jurisprudence

Unit 3 Meaning and Functions of Law

Module 2

Unit 1 The Relation of law to: Justice, Morality and Religion

Unit 2 Law and Social Change

Unit 3 Ethics

Module 3

Unit 1 Sources of Law I: Legislation

Unit 2 Sources of Law II: Custom

Unit 3 Sources of Law III: Judicial Precedents

Module 4

Unit 1 Applicability and the Role of these Sources in Contemporary and Early Society

Unit 2 Analysis of Fundamental Legal Concepts I: Rights, Duties, and Liability

Unit 3 Analysis of Fundamental Legal Concepts II: Ownership, Possession, Personality and Liberty

Note: Each unit contains a number of self-test questions. These questions generally test your understanding of the topic you have just covered by requiring you to apply what you have read in some practical ways. This will definitely help you to gauge your progress and to reinforce your understanding of the materials. Together with the TMAs, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course in general.

7.0 REFERENCES

Some of the important materials that will be used throughout the course are listed below.

A.W.B. Simpson ed., J. Raz, *On the Functions of Law*, Oxford Essays in Jurisprudence, 2nd ser., Clarendon Press, Oxford, p. 278-304

Dennis Patterson, *Law and Truth, Moral Realism and Truth in Law*, Oxford University Press, Oxford, 1996, 43 – 58

Dias, R.W.M., *Jurisprudence*, 4th ed. (Butterworth & Co. (Publishers) Ltd, Boston)

Funso Adaramola, *Basic Jurisprudence*, 3rd ed., Raymond Kunz Communication, Lagos, 2004, 84-105

Hon. Justice Kayode Eso, *Law, Religion and Secular State*, MIJ Publishers, Lagos, 1990 at 291

J.M. Elegido, *Jurisprudence*, Spectrum Law Publishing, Ibadan, 1994, 182 – 195

L.B. Curzon, *Jurisprudence*, 2nd ed., Cavendish Publishing Limited, London, 1995, p. 1 – 11

L.B. Curzon, *Jurisprudence*, 2nd ed., Cavendish Publishing Limited, London, 1995, p. 159 – 167

Lord Denning, *Landmarks in the Law*, Butterworth, London, 1984 at 351 – 365

Lord Radcliff., *The Law and its Compass*, 1961, pp. 92-93

Prof. Okunniga, *Inaugural Lecture (1983) Series 62* at p. 207

Radcliffe and Cross, *The English Legal System*, 4th ed. London, Butterworth, 1964,
p. 375-392

8.0 ASSIGNMENT FILE

In this file, you will find all the details of the work you **MUST** submit to your tutor for marking. The marks you obtain for these assignments will count towards the final mark you obtain for this course. Further, information on assignments will be found in the Assignment File itself and later in this Course Guide in the section on assessment. You are to submit 5 assignments, out of which the best 4 will be selected and recorded for you.

Presentation Schedule

The presentation schedule included in your course materials gives you the important dates for this year for the completion of TMA's and attending tutorials. Remember: **YOU ARE REQUIRED TO SUBMIT ALL YOUR ASSIGNMENTS BY THE DUE DATE.** You should guard against falling behind in your work.

Assessment

There will be two aspects to the assessment of the course: the first is the TMA's, while written examination is the second.

In solving the assignment, it is expected of you to apply the information, knowledge and techniques you acquired during the course. With regards to the assignments, they must be submitted by or before deadlines stated in the presentation schedule and the Assignment

File. These TMA's will account for 30% of your total mark.

At the end of the course, you will be subject to a 3-hour final written examination. This will count for 70% of your total marks.

9.0 TUTOR-MARKED ASSIGNMENTS (TMA'S)

As already mentioned, there will be 5 TMA's in this course. You only need to submit 4 of the 5 assignments. It is however advisable and better for you to submit all 5 as this will leave a choice of selecting and recording the best 4 for your 30% CA.

Assignment questions for the units in this course are contained in the Assignment File. You will be able to complete your assignments from the information and materials contained on your textbooks, reading, and study units. However, it is desirable in all degree level education to demonstrate that you have read and researched more widely than the required minimum. Using other references will give you a broader viewpoint and may provide a deeper understanding of the subject.

When you have completed each assignment, send it together with a TMA form to your tutor. Make sure that each assignment reaches your tutor on or before the deadline given in the presentation schedule and Assignment File. If, for any reason, you cannot meet the deadline, contact your tutor before the assignment is due to discuss the possibility of an extension. Note that extensions will not be granted after deadlines except there are exceptional circumstances.

Final Examination and Grading

The final examination for LAW 515 will be of 3 hours duration and will account for 70% of the total course mark. The examination will, most probably, consist of questions that reflect the types of self-testing and tutor-marked problems you have previously encountered. All areas of the course will be assessed.

Make use of the time between finishing the last unit and sitting the examination to revise the entire course. You might find it useful to review your self-assessment exercises, TMAs and comments by your tutorial facilitator before the examination. The final examination covers information from all parts of the course.

Course Marking Scheme

The following table presents a representation of actual course mark allocation.

Assessment Marks

Assignments 1 – 5(Five) assignments, best four marks of the five counts as 30% of course marks.

Final Examination 70% of overall course marks

Total 100% of course marks

Table 1: Course Marking Scheme

Course Overview

This table brings together the units, the number of weeks you should take to complete them and the assignments that follow them.

Unit Title of Work Weeks Activity Assessment (End of Unit)

1 The Purpose of the Study of Law & Jurisprudence

Week 1

2 Nature, Definition & Scope of Jurisprudence

Week 2 Assignment 1

3 Meaning & Functions of Law Week 3

4 The Relation of Law to: Justice, Morality & Religion

Week 4 Assignment 2

5 Law & Social Change Week 5

6 Ethics Week 6 Assignment 3

7 Sources of Law I: Legislation Week 7

8 Sources of Law II: Custom Week 8

9 Sources of Law III: Judicial Precedents

Week 9 Assignment 4

10 Nature, Ascertainment, Applicability

& the Role of these Sources in

Contemporary & Early Society

Week 10

11 Analysis of Fundamental Legal

Concepts I: Rights, Duties, & Liability

Week 11

12 Analysis of Fundamental Legal

Concepts II: Ownership, Possession,

Personality & Liberty

Week 12 Assignment 5

13 Revision Week 13

Examination Week 14

Table 2: Course Organizer

10.0 HOW TO GET THE MOST FROM THIS COURSE

In Distance Learning programmes, the study units replace the university lecturers. This is one of the advantages of DL. You can read and work through specially designed study materials at your own pace, and at a time and place that suit you

best. In other words, the study units provide an avenue of reading the lecture instead of listening to the lecturer. The study units tell you when to read recommended books and other materials the same way a lecturer might recommend some readings to you. So, the study unit is to be seen as your lecturer. Each of the study units follows a common format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. The next is a set of learning objectives. These let you know what you must achieve upon completion of the unit in question. After completing a particular unit, it is desirable that you go back and check whether you have achieved the objectives set out at the beginning of the unit. If you constitute the habit of doing this, you will significantly improve your chances of passing the course.

The main body of the unit guides you through the required reading from other sources. This will usually be either from your recommended books or from a reading section. Self-assessment exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the units and prepare you for the assignments and the examination. You should do each self-assessment exercise as you come to it in the study unit. There will also be numerous examples given in the study units; work through these when you get to them too.

The following represents a practical strategy for working through the course. Should you run into any trouble, telephone your tutor or visit your study centre. Remember: your tutor's job is to help you. So, whenever you need help, do not hesitate to get in touch with your tutor.

- a) Read this Course Guide thoroughly;
- b) Organise a study schedule. Be aware of the time you are expected to spend on each unit and how the assignments relate to the units. Know how to source for relevant information and keep an up-to-date diary of all necessary activities.
- c) Once you have created your own study schedule, make sure you stick to it. The major reason most students do not perform well is that they get behind with their course work as a result of their inability to keep to their personally designed schedule. If you get into any kind of difficulty with your schedule, please let your tutor know before it will be too late for him to help you.

Tutors and Tutorials

There are 10 hours of tutorials provided in support of this course. You will be notified(of the dates, times and location of these tutorials, together with the name and phone numbers of your tutor, as soon as you are allocated to a tutorial group.

Your tutor will mark and comment on your assignments, keep a close watch on your progress and on any difficulty you might encounter and assistance will be available at the study centre. You must submit your TMAs to your tutor well before the due date (at least 2 working days are required). They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor if need be. You should try your best to attend the tutorials. This is the only chance to have a face-to-face contact with your tutor. You will be able to ask him any question pertaining to your course or any general guidance. To gain maximum benefits from tutorial, it is advisable that you prepare a list of questions before attending them. You will also learn a lot by participating in discussions at tutorials actively.

By so doing, you will be able to clear any doubt that you may have on your mind.

11.0 SUMMARY

By trying out all the above, we are quite confident that you will not only have a sound understanding of Jurisprudence and Legal Theory; you will also be able to pass your examination with ease.

We wish you success with the course and hope that you will find it both interesting and useful.

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MODULE 1

UNIT: 1 THE PURPOSE OF THE STUDY OF LAW & JURISPRUDENCE

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Why Studying the Course?

3.2 Importance of the study of Jurisprudence

3.3 The role and the uses of the study

3.4 How the study can be applied to practical purposes both in terms of practice and content.

4.0 Conclusion

5.0 Summary

6.0 References/Further Readings

1.0 INTRODUCTION

Every student, for a start, often deems the study of Jurisprudence a Herculean task. So they tend to ask themselves: Why studying Jurisprudence? Jurisprudence is studied for so many reasons. It helps law students to understand every aspect of the philosophy of law, just as it ensures appropriate use of legal terminology. The study of Jurisprudence broadens the knowledge of the students; it fosters the intellectual rigour that ought to be the hallmark of any university education; and it helps law students to turn out competent lawyers on the long run.

2.0 OBJECTIVES

To help the students deal with the importance of the study of jurisprudence with references to the functions of the study of jurisprudence of other non-law spheres. Examines the inadequacies of definitions and descriptions of what Jurisprudence entails.

Strives to explain to the students the overall study of Jurisprudence in terms of its uses, applicability, functions and purposes.

3.0 MAIN BODY

3.1 Why Studying the Course?

The question is often asked: Why studying a course obviously as dry as Jurisprudence and Legal Theory? The answer is within the finger-tips. The study of Jurisprudence and Legal Theory helps to put the various fields of human endeavours within a particular context.

Thus, there is the Jurisprudence of law (which examines the various rudiments making up the field of law), the Jurisprudence of Economics, the Jurisprudence of Medicine, the Jurisprudence of Sociology, and so on and so forth. We also take the pain to study the Course because it increases human knowledge and makes problem solving easier.

Students are advised to peruse the textbooks for more reasons why we study Jurisprudence as a course.

Self-Assessment Exercise (SAE) 1

Adduce some of the reasons why people study Jurisprudence and Legal Theory as a course.

3.2 The Importance of the study of Jurisprudence

The following are some aspects of the importance of studying Jurisprudence:

Jurisprudence discloses knowledge of general ideas and principles of all legal systems, so it is called eye of the law. Certain fundamental conceptions such as negligence, liability, mensrea etc. have to be learned before provision of law relating to them can be understood, and Jurisprudence teaches these fundamental conceptions.

Jurisprudence trains the mind into legal ways of thought. It teaches the proper use of legal terms, and is called grammar of law.

The study of jurisprudence helps law makers by providing them brief and clear terminology.

It enlightens students and helps them in adjusting themselves in the society without causing injuries to the interests of other students and other people.

To find out the true meaning of law, jurisprudence helps the judges and the lawyer.

Self-Assessment Exercise (SAE) 2

What are the benefits of the study of Jurisprudence?

3.3 The Role and the Uses of the Study

When properly understood, Jurisprudence plays a pivotal role in the society. It enhances an easy understanding of the laws of the land, thereby making application simple and effortless. Jurisprudence can be applied not only to the field of law but also to Sociology, Economics, Sciences, etc. Its uses are therefore beyond doubts.

3.4 How the study can be applied to practical purposes both in terms of practice and content.

Jurisprudence can be applied to several areas in Nigeria. The Natural Law school for instance has helped to shape our laws to a certain extent. Some instances of this include the penalisation of the offence of murder, stealing and some others based on the principles of morality.

Also, before customary law can become applicable, it must pass the repugnancy test, i.e. it must not be repugnant to natural justice, equity and good conscience. This is in line with the Natural Law school of thought.

Legal positivism is also in active use. According to this school, law is man-made. There must be an identifiable sovereign who doles out the law. There must be subjects who obey the laws of the sovereign, and in case of violation or breach, there must be accompanying sanction. The Criminal Code for example is promulgated by a sovereign (the National Assembly and the President). Nigerians are the subjects and penalties are available under various sections for breach.

There are also some jurists under legal positivism who see law as what the court says. In applying this to Nigeria, judicial precedent, which is what the court says, forms part of our laws in Nigeria.

The study of Jurisprudence has therefore been put to practical use in Nigeria

Self-Assessment Exercise (SAE) 3

What function does the study of Jurisprudence have in evolving a legal philosophy?

Self-Assessment Exercise (SAE) 4

Examine the current legal regime in Nigeria and explain your view of Nigeria having a legal philosophy or otherwise.

4.0 **CONCLUSION**

We have seen that Jurisprudence as the study of theories and philosophies of law has gone a long way in helping us grapple effectively with the nature of law, legal reasoning, legal systems and legal institutions. Its importance and practical applicability in Nigeria have also been explored.

5.0 **SUMMARY**

In this unit, you have learnt about the following:

- i. Why Studying the Course?
- ii. The importance of the study of Jurisprudence
- iii. Role and Uses of the Study
- iv. How the study can be applied to practical purposes both in terms of practice and content.

6.0 **REFERENCES**

A.W.B. Simpson ed., J. Raz, On the Functions of Law, Oxford Essays in Jurisprudence, 2 nd ser., Clarendon Press, Oxford, p. 278-304

L.B. Curzon, Jurisprudence, 2 nd ed., Cavendish Publishing Limited, London, 1995, p. 1 – 11

L.B. Curzon, Jurisprudence, 2 nd ed., Cavendish Publishing Limited, London, 1995, p. 159 – 167

Lord Radcliffe, The Law and its Compass, 1961, pp. 92 – 93

Prof. Okunniga, Inaugural Lecture (1983) Series 62 at p. 207

Radcliffe and Cross, The English Legal System, 4 th ed. London, Butterworth, 1964,
p. 375-392

UNIT 2 NATURE, DEFINITION AND SCOPE OF JURISPRUDENCE

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1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Nature of Jurisprudence

3.2 Definition of Jurisprudence

3.3 Scope of Jurisprudence

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assessment

7.0 Reference/Further Readings

1.0 INTRODUCTION

You are expected to learn three things under this unit. These are the nature, definition and scope of Jurisprudence. Under the nature of jurisprudence, the correlation of the nature to the scope of Jurisprudence is revealed in the sense that no delineation of the scope of Jurisprudence can be regarded as final. The issue of definition will face the same brick wall faced elsewhere as no universally acceptable definition can be spotted.

2.0 OBJECTIVES

Students are to identify the nature of jurisprudence as well as its scope. The various available definitions are also to be critiqued. At the end of this Unit, students must be able to draw an avid distinction between the scope and nature of Jurisprudence. They must also be able to appreciate the fact that there is no definition that serves as an end to all definitions.

3.0 MAIN BODY

3.1 Nature of Jurisprudence

Jurisprudence deals essentially with abstract and theoretical inquiry into important principles of law and legal systems. Jurisprudence, as a subject of study is unique because unlike other subjects in law it does not create a set of rules. Again, jurisprudence is not derived from authority nor does it have practical applications in the sense that it does not possess rules which can be deployed to solve factual problems. Consequently, there is no unanimity of opinion among jurists on the subject of jurisprudence. Every jurist possess his own idea of what jurisprudence is but also determines for himself what are the limits and scope of the study of jurisprudence. The divergence in thoughts are the product of ideological and environmental differences.

The point that students must be apprised of here is that the nature of Jurisprudence is such that no delineation of its scope can be regarded as final. This statement will be better appreciated with an illustration. On torts or contracts, a student may be recommended to read any of the standard textbooks with the assurance that whichever book he does read, he will derive much the same idea as to what the subject is about. With Jurisprudence, this is not so. Books called "Jurisprudence" vary widely in subject-matter and treatment. The reason is that these writings concern thought about law on the broadest possible basis, rather than expositions of law itself. Thus, students need know that Jurisprudence deals with the structure, uses and functioning of law and legal concepts. And that is what you are expected to focus on while embarking on the study of Jurisprudence.

Self-Assessment Exercise (SAE) 1

What is the nature of Jurisprudence?

3.2 Definition of Jurisprudence

Students should know by now that as simple as the issue of definition sounds, it is not simple in actual fact because we often end up not finding a generally accepted one. In the same manner, the answer to the question, 'What is Jurisprudence?' is that it means pretty much whatever anyone wants it to mean. A better way therefore, in the face of lack of agreement in definition, may probably be asking the question: 'How is this word used? Or more pertinently, what is a book on Jurisprudence going to do? Few of the available definitions are to be examined. It has been described etymologically to mean expositions of particular branches of the law, e.g., the name 'Equity Jurisprudence' was once given to a textbook on Equity. It can also be used to describe the legal connections of any body of knowledge. It has also been used to refer to the body of law built up by the decisions of particular courts. It has also come to mean almost exclusively the analysis of the formal structure of law and its concepts. The bottom-line here is that there is no definition which is an end to all definitions which is why it is often safer to describe what

Jurisprudence is than to define it. Consult textbooks for further reading on some of the definitions of jurisprudence offered by scholars.

Jurisprudence is the study of the general theoretical questions about the nature of law and legal systems, it examines the relationship between law, justice and morality. According to Dworkin, jurisprudential theories are theories aimed at showing the main point of the law. This means that it is important that we identify precisely what it is that a society gains by having a developed legal system.

Self-Assessment Exercise (SAE) 2

Jurisprudence as a concept is better described than defined. Do you agree?

3.3 Scope of Jurisprudence

Jurisprudence deals with thought about law rather than with knowledge of what the law is in various branches. Jurisprudential study therefore ranges from minute analytical dissections and sharp distinctions at one end of the intellectual scale to the broad sweep of ideas and philosophies through the ages at the other. Jurisprudence is primarily concerned with the nature and function of law. It deals with such questions as what is Law, where does it come from, what does it do? (And what are the means for doing it? Its ambit is not limited to law only; it extends to include any thought or writing about law and its relation to other social sciences such as economics, psychology, philosophy, sociology, politics and ethics etc. It digs, into the historical past and attempts to create the symmetry of a garden out of the confusion of different conflicting legal systems.

Jurisprudence discloses knowledge of general ideas and principles of all legal systems, so it is called the eye of law. Certain fundamental conceptions such as negligence, liability, mensrea, etc. have to be learned before provision of law relating to them can be understood, and Jurisprudence teaches these fundamental conceptions.

Self-Assessment Exercise (SAE) 3

Jurisprudence is a field that encompasses several other fields. Discuss

4.0 CONCLUSION

Thus far, we have examined the nature, meaning and scope of Jurisprudence. In the process, we are able to identify the relationship existing between the nature and scope of Jurisprudence. We also are able to further underscore the fact that no task is as difficult as defining a concept. That is the reason it was submitted that Jurisprudence is better described than defined.

5.0 SUMMARY

We have learnt the following:

The nature of Jurisprudence

The definition of Jurisprudence

The scope of Jurisprudence

6.0 TUTOR-MARKED ASSIGNMENT 1

Critically examine the nature, scope and purposes of studying Jurisprudence and Legal Theory.

7.0 FURTHER READINGS

Dias, R.W.M., Jurisprudence, 4 th ed. (Butterworth & Co. (Publishers) Ltd, Boston)

pp 1 – 28

Hart, H.L.A., 'Definition and Theory in Jurisprudence' (1954), 70 Law Quarterly

Review, 37

UNIT 3 MEANING AND FUNCTIONS OF LAW

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1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Meaning of Law

3.2 The Basic Schools of Law

3.3 Functions of Law

4.0 Conclusion

5.0 Summary

6.0 References/Further Readings

1.0 INTRODUCTION

This part of the module focuses on the main fulcrum of legal study, to wit, the meaning of law, the basic schools of law and the functions of law. In essence, the

Unit beams searchlight on law and the functions it performs in the society. It also endeavours to examine how the law has been able to effectively perform those functions.

2.0 OBJECTIVES

The basic objective of this unit is to have a basic understanding of the several definitions of law. It also aims at making students understand that there is no definition to end all definitions. At the end of this unit, it is expected that students will be able to place the various definitions of law within the particular school to which they belong. They must also be able to identify the functions of law and appreciate how the law has fared in performing those functions effectively.

3.0 MAIN BODY

3.1 Meaning of Law

The main focus of students, irrespective of whichever materials they use, is to appreciate the fact that defining a legal concept is as difficult as asking the camel to pass through the needle's eye. In defining law using various approaches, students are expected to factor in the relation of law to other social sciences and they equally must be apprised of the impact of the early periods of theorization, the Sophists, the Greeks, the Romans, etc on the emergence of the current modern meaning of law.

Underscoring the impossibility of having a generally acceptable definition, Prof. Okunniga once stated that 'nobody including the lawyer has offered, nobody including the lawyer is offering, nobody including the lawyer will ever be able to offer a definition of law to end all definitions'.

A working definition of law can be said to be 'the binding rules of conduct meant to enforce justice and prescribe duty or obligation, and derived largely from custom or formal enactment by a ruler or legislature.'

It is very essential that laws carry with them the power and authority of the enactor, and associated penalties for failure or refusal to obey. Law derives its legitimacy ultimately from universally accepted principles such as the essential justness of the rules, or the sovereign power of a parliament to enact them.

Elegido posits that many definitions of law have been proposed in the history of jurisprudence. This is as a result of the fact that law is a very complex phenomenon which can be studied from many different standpoints. The fact that two different writers are offering different definitions of law does not necessarily mean that their ideas are absolutely different. It could be that the two writers are emphasizing different areas of law. There could also be radical differences in definitions of law

offered by different writers which is reflective of radical or philosophical differences and different ideological leanings.

Also writers have different views of what constitutes a good definition. The task of differentiating law from other social phenomena which are somehow similar to law such as social morality is similar to the effort of distinguishing contiguous primary colours.

Despite the complex nature of law, there are fundamental characteristics that are present in law. Law has the peculiar value that it advances the common good of a community through the coordination of the activities of its members. There are many goods which men can attain through their individual efforts. However, there are also goods which makes it possible for each individual in the society to attain effectively whatever goods he chooses to pursue, examples are public infrastructure.

As Elegido has pointed out that it is necessary that human beings co-ordinate their actions if they are to pursue effectively any common good for the society. Effective co-ordination however depends on obedience to a common authority. Law therefore, he contends, is one of the means of achieving this aim. Law provides a means of fostering effectively the common good of one's society. Law also has the value that it makes it possible for authority to be exercised in a way that minimizes arbitrariness and maximizes the freedom of the members of the community. This requires the exercise of authority through the ideals of rule of law.

It is also important to note that law is made up of normative standards. This means that it is the duty of law to guide both judges and the people on the ways in which they must act in order to foster the common good of their community. Law seeks to guide the actions of the people through general rules. The learned author further states that law also is made by an authority which has effective control in the community. Equally law regularizes the social life of an independent political community and provides for a system of sanctions and means of coercion.

Self-Assessment Exercise (SAE) 1

Attempt a critique of the various definitions of law while coming up with your own working definition.

3.2 The Basic Schools of Law

Under this head, students are expected to explore the various theories of law. These are also referred to as the various schools of thought in Jurisprudence. Students are especially expected to be able to connect the dots by linking the various jurisprudential schools together in terms of ages. The starting point should be the Natural Law School. Some of the schools that should be explored include: the

Natural law school, analytical positivism, legal realism, sociology of law, critical legal studies, the work of the contemporary philosopher of law, Ronald Dworkin, etc.

Natural law is the idea that there are rational objective limits to the power of legislative rulers. The foundations of law are accessible through human reason and it is from these laws of nature that human-created laws gain whatever force they have. For legal positivism, there is no necessary connection between law and morality and the force of law comes from some basic social facts although positivists differ on what those facts are.

Legal realism on its part argues that the real world practice of law is what determines what law is. According to this school, the law has the force that it does because of what legislators, judges, and executive do with it.

Critical legal studies is a younger theory of Jurisprudence that has developed since the 1970s which is primarily a negative thesis that the law is largely contradictory and can be analysed as an expression of the policy goals of the dominant social group.

Ronald Dworkin has advocated a constructive theory of Jurisprudence in his work which can be characterised as a middle path between natural law theories and positivist theories of general Jurisprudence.

Students are expected to understand the standing of the various schools as well as the links or differences existing as between various schools or theories of Jurisprudence.

Self-Assessment Exercise (SAE) 2

While natural law theorists believe that law should legislate morality, the legal positivists are of the view that law should distant itself from morality. In the light of this statement, examine the similarities and the dissimilarities between the two schools of thought.

3.3 Functions of Law

What functions does law perform in a given society? Students must identify these functions and appreciate them in practical terms. Broadly speaking, law performs two major functions. It performs prescriptive function by prescribing how people ought to conduct themselves, and law helps to realise justice.

Specifically, law performs the following functions:

- a) It cultivates and ensures the existence of adequate order;
- b) It provides resolutions to conflicts;

- c) It provides a safe haven for individuals and their assets;
- d) It maintains the structured operation of the civilisation; and
- e) It protects civil liberties as set forth in each nation's constitution.

Added to the above, law also performs a host of other functions such as its functions in relation to achieving justice, tracing the root of sovereignty in a society, defining freedom of individuals and delineating where freedom of one must be curtailed so that it may not affect the freedom of the other, helping to determine the question of legitimacy of a given government, determining the question whether an entity can qualify as a state, and so on and so forth.

In view of the above we can therefore summarise(that the function of law connotes its purpose. The normative propositions of law are dictated by social, moral, economic, political and other purpose. The overall purpose of law is the achievement of justice. The function of law according to Salmond is its application in deciding disputes and by way of enforcement.

The bottom-line is that you are expected to know all these functions and to be able to explain them extensively through the use of the various reference materials stated at the end of the section.

Self-Assessment Exercise (SAE) 3

Without law, there can never be a society. Do you agree?

4.0 CONCLUSION

There are several definitions of law; yet there is no universally acceptable one. You have also learnt about the various schools of law all of which attempt a definition or a description of law from a perspective most relevant to and conducive to them; and finally, we look at the various functions performed by law.

5.0 SUMMARY

In this unit, you have learnt about:

- a) The meaning of law
- b) The Basic Schools of Law
- c) The Functions of Law

6.0 REFERENCES

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MODULE 2

UNIT 1 RELATION OF LAW TO JUSTICE, MORALITY & RELIGION

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1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Definitions of justice, morality and religion

3.2 Relation of law to justice

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5.0 Summary

6.0 Tutor-Marked Assignment (2)

7.0 References/Further Readings

1.0 INTRODUCTION

The existing relationship between law on the one hand, and morality, justice and religion, on the other, is the concern of this unit. It will also examine how other non-law elements affect the efficiency of law.

2.0 OBJECTIVE

This topic deals with the importance of morality, religion and justice to the notion of law and the influence these other elements have on its efficiency. Further, a study is carried out as to how these elements can be harnessed when legislation is drafted. We also examine the institutional adequacy of these elements in relation to law.

3.0 MAIN BODY

3.1 Definitions of justice, morality and religion

You are to look at the various available definitions of justice, morality and religion. This is only to aid your understanding of the relationship between each of these concepts and law. Justice, according to John Rawls, is 'the first virtue of social institutions, as truth is of systems of thought.' Thus, justice can be thought of as distinct and as more fundamental than benevolence, charity, mercy, generosity or compassion. It has traditionally been associated with concepts of fate, reincarnation or Divine Providence, i.e., with a life in accordance with the cosmic plan. Of particular importance to you as students is that justice is a concept that means different things to different people. To an accused person, justice will mean that system which set him free, regardless of how immoral this may sound. To the prosecution, justice is attained by the securing of conviction against the accused, while to the society, justice is done when the right person goes to jail and the right person is set free.

Morality can be used to refer to a code of conduct that, given specified conditions, will be put forward by all rational persons. Understand that morality can be used in its descriptive or normative sense. In its descriptive sense, morality refers to personal or cultural values, codes of conducts or social mores that distinguish between right and wrong in the human society. In the normative sense, morality refers to a code of conduct that applies to all who can understand it and can govern their behaviours by it. In the normative sense, morality should never be overridden, that is, no one should ever violate a moral prohibition or requirement for non-moral considerations.

Religion is a cultural system that creates powerful and long-lasting meaning by establishing symbols that relate humanity to beliefs and values. Note that the word 'religion' is at times used interchangeably with 'faith' or 'belief system', but religion differs from private belief in that it has a public aspect. Most religions have organised behaviours, including clerical hierarchies, a definition of what constitutes adherence or membership, congregation or laity, regular meetings or gathering for the purposes of veneration of a deity or for prayer, holy places (natural or artificial), and/or scriptures. The practice of a religion may also include sermons, commemoration of the activities of a god or gods, sacrifices, festivals, feasts, trance,

initiations, funerary services, matrimonial services, meditation, music, art, dance, public service, or other aspects of human culture.

Through these definitions and others you will come by, you will discover that there is a close nexus between religion, justice and morality, but each of the three concepts is closer to law than the other as you will soon discover.

Self-Assessment Exercise (SAE) 1

Attempt a working definition of justice, morality and religion.

3.2 Relation of law to Justice

Your focus here is to grapple with the relationship between law and justice. As a point of start you should concern yourselves with the four aspects of justice. First, there is achievement of justice in the distribution of advantages and disadvantages in society.

Secondly, there is achievement of justice by curbing the abuse of power and liberty.

Thirdly, there is achievement of justice in deciding disputes, which is the aspect closely related to the work of lawyers. And, finally, there is achievement of justice in adapting to change. The major relationship between law and justice is that law makes all these outlined aspects possible.

The relationships are several but few will be referred to herein. A given law is itself either just or unjust according to whether or not it complies with those objective principles of justice. But one may be pressed to ask: what will happen where a judge has to apply an unjust law? Will that make his judgment unjust? The issue here is where the judge considers the law to be unjust from its face. Justice, we need know, is as defined by legislation/law. Thus, where the law is clear and certain that a particular consequence should follow some behaviour, once that is done, justice has been achieved in that case.

Now, going back to our judge, he will be doing injustice if he rules contrary to what the law says. Besides, his decision is very likely to be overturned on appeal by higher courts. Thus, the law defines justice.

Salmon believes that law is an instrument of the society and the object of the law is to achieve justice. The goal of the law is the achievement of justice. According to Aquinas and Augustine, unjust law is no law; whilst Salmon believes that law is those principles applied by the state in the administration of justice. Justice can be gleaned from the wider and more restricted sense. In the wider sense, an unjust law is no law, while in the narrower sense, we see justice as one area of morality. According to Salmon, there are two different levels of justice – distributive justice which ensures a fair division of social amenities, benefits and burdens among the

members of the community. For example, it is a principle of democratic system that a citizen is entitled a right to vote and no one should have more than one vote. Also, in terms of taxation, the burden of taxation should be fairly distributed among the citizens.

The second level of justice is the corrective justice. The corrective justice intervenes at a point where the distributive justice fails to achieve its aim. If X takes possession of the land belonging to P, corrective justice would intervene to restore X land to it. In other words, distributive justice serves to secure benefits, opportunities and burdens while corrective justice is to redress problems created by distributive justice.

Distributive justice are usually contained in constitutions and codes while courts of law apply the corrective justice. Again, law strives to strike a balance between competing interests in the society. It is for this reason that Roscoe Pound regarded law as an instrument of social engineering, the function of which is to maximize the interest of community and its members, and to promote smooth running of the society.

You are expected to read more on this relationship in the texts provided under references.

You are expected to read more on this relationship in the texts provided under references.

Self-Assessment Exercise (SAE) 2

Is there any relationship between law and justice?

3.3 Relation of law to religion

The relations between law and religion have adopted an almost infinite variety of forms through the very long history of these two forms of human activities.

First of such relationship is that law has been of a tremendous help in fostering religious freedom/unity. The law prepares the ground by prescribing some acceptable modes of worship. Since it is not possible for the whole world to be of one religion, there is need for law to perform this task. Without such regulations, some barbaric religious practice such as sacrificing of human beings or killing of human beings may be permissible.

Second, in principle it is not difficult to draw a conceptual distinction between religious precepts and moral norms. Examples of the former are the duty of the Catholic to attend Mass on Sundays and the duty of the Moslem not to drink alcohol. Examples of the latter are the duties not to steal and not to kill the innocent. While religious precepts are binding only on the adherents of the religious body which

imposes them, moral norms or principles, if they are sound, are valid for all men irrespective of their religion.

The above distinction is important because while the imposition of a purely religious precept on people who are not members of a religious body is intolerable and is likely to destroy the basis for the religious coexistence of the adherents of different religions, basing the law on moral norms which are adopted by virtue of their intrinsic appropriateness in the regulation of common life is not objectionable in itself.

Even though it is acceptable for the laws of the society to reflect moral ideas which, at least in principle, can be defended without invoking religiously revealed doctrines, a problem may arise when laws, which may have been enacted for purely secular reasons and that, in the view of the legislator or even of the great majority of the population, are unobjectionable from a moral point of view, are vigorously objected to on religious grounds by the members of some religious group. Thus, law must be conversant with some religious precepts which if legislated against may cause national upheaval.

Self-Assessment Exercise (SAE) 3

The law plays a pivotal role in ensuring freedom of religion. Discuss.

3.4 Relation of law to morality

The relations between law and morality are the most obvious and prominent. There has always been a debate on whether law should legislate morality and views are varied on what is likely to be the consequences of legislating some people's morality as morality of everybody. Thus, issues of homosexuality, gay marriage, lesbianism, etc have attracted various comments especially as they relate to the reasons why the law cannot be used as a weapon to stop such practices.

There is no doubt about it: there is a nexus between law and morality. The laws prohibiting stealing and murder, among several others, are hinged on morality. It is therefore morally wrong to steal just as it is morally wrong to kill. But we need to be aware of the fact that the relations between law and morality are not as always clear-cut as these examples. For instance, while it is legally and morally wrong to kill, it is not legally wrong to watch a person drown in a swimming pool, even though the same act may be morally wrong. It is also not legally wrong to refuse to help an accident victim, even though this also will be morally wrong.

There is also the argument that there should be a limit to the extent the law will interfere in the private lives of the citizens. Cases made against criminalising homosexuality, lesbianism, gay marriage and prostitution are based on this ground. It has been argued that whatever people in this category do are done in the privacy

of their rooms; hence, since they do not constitute threat to the people around them or the public at large, it will be going too far for the law to poke-nose into their private lives. But, what about where a homosexual decided to practise the act on a young boy? Or, what about where he influences such a boy to be his partner in such a practice?

The normative structure of the language of the law reflects the use of the words "ought", obligation and duty. A person asserting a moral duty is usually obliged to proffer reasons for asserting a moral duty, while legal obligation is more in the nature of a command. A legal obligation does not depend on the reason but on authority.

There is equally distinctions of substance between morals and law. The two do not altogether coincide and that there is a field of positive law that is not deducible from any pre-existing system of natural law. One of the tenets of positivists is that positive law is quite distinct from, and its validity in no way dependent upon morals. However, a measure of coincidence between them may be essential to the working of human society.

Kant believes that laws prescribe for external conduct whereas morals prescribe internal conduct. This means that morals alone are concerned with subjective factors, such as motive. Law on the other hand, is concerned with the external manifestations of motive. Many lawyers believe that the characteristic element of law is sanctions which differentiates law from morals. Nevertheless, morals are not without sanctions such as incurring societal condemnation or the condemnation of peers. Law, however, has a regularized and specific sanctions.

The relations between law and morality, like other aspects, are inexhaustive. You are therefore expected to read up others.

Self-Assessment Exercise (SAE) 4

Does Law have any relation to morality?

3.5 How non-law elements affect law's viability

The viability of law is often affected by non-law elements. You should look at the need for the law making bodies to ensure that the laws they are churning out are in compliance with the practice and ways of life of the people who are expected to obey the law. For instance, where a law clashes with ideas which are vigorously held in the community, there is a strong likelihood that the law will be ignored or even positively boycotted. There is therefore a need for the law to take these ideas into consideration. In Nigeria for instance, the osu system has been abolished by law, but the practice still continues since the law is not in line with the publicly held belief

in that part of the country. The law to regulate bride price payable on brides(in some parts of the country has also suffered the same fate. Where these non-law elements are not taken into consideration, there is a possibility that the law will be weakened in the process and will remain unenforced.

Self-Assessment Exercise

To what extent do non-law elements affect the viability of law?

4.0 CONCLUSION

So far, we have examined the relations of law to justice, religion and morality, and in the course of doing this, we have been able to identify these relationships. Our study in this unit has made us to appreciate the interrelationship existing among these various concepts.

5.0 SUMMARY

In this unit, we have studied the following:

Definition of justice, morality and religion

Relations of law to justice

Relations of law to religion

Relations of law to morality

How non-law elements affect law's viability

6.0 TUTOR-MARKED ASSIGNMENT (2)

While it is not legally wrong to embark on acts of homosexuality, it is morally wrong to so(do. Discuss this assertion with particular reference to the relationship between law and (morality.

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UNIT 2 LAW AND SOCIAL CHANGE

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Law as an instrument for positive change

3.2 The limitation of law in creating social change

3.3 Resistance to Change

4.0 Conclusion

5.0 Summary

6.0 References/Further Readings

1.0 INTRODUCTION

One enviable attribute of law is its ability to adapt to changing situations. Thus, the law is never static. This unit will therefore examine how law influences and copes with social changes. It will also look at the roles of a lawyer in that change. Instances of law and social changes in Nigeria will be given while limitation of positive legal influence in Nigeria will also be considered.

2.0 OBJECTIVES

This topic will examine the law in relation to the changes in society while at the same time analysing specific cases that have brought changes to the Nigerian polity such as the status of bank interests, the influence of 'sacred cow' legislation and cases, issues emanating from electoral law cases and the general issue of judicial activism. It will also deal extensively with societal change and the lawyers' role in that change.

3.0 MAIN BODY

3.1 Law as an instrument for positive change

The laws of Medes and Persians were said to be immutable; but unless a system is capable of adapting itself to changing conditions, it can only go the way of the Laws

of the Medes and Persians. Adaptability is a condition necessary for the continued existence of a legal system. According to Lord Justice Scarman, 'these challenges are not created by lawyers; they certainly cannot be suppressed by lawyers; they have to be met either by discarding or by adjusting the legal system...' It is therefore for the law to meet new developments as well as challenges in the Society.

You are to examine the various ways by which changes may come within a legal system.

Some of these include (by) day-to-day adjustment of detail and tinkering with the instruments www.no-trafficking.org/resources_int_tip_laws.htmwww.no-trafficking.org/resources_int_tip_laws.htmwww.no-trafficking.org/resources_int_tip_laws.htm used in legal reasoning; or by reform on a larger scale. The system itself may be changed, in which case the change may be constitutional or revolutionary. Other forces of change include: social evolution, computers, medical developments, change through disobedience, etc.

You are also expected to particularly refer to changes in Nigeria and how the law have(been able to adjust to meet such changes. One common example is the discovery, recently, of the heinous effect of climate change and global warming on the environment. Since this discovery was made, countries world over at state level and at international level have enacted legislation to take care of the effects of climate change on their environment.

Another notorious example is the recent growing trend of terrorism. Terrorism had been in use before now but it has become prevalent in recent years. Owing to this, the UN constituted a committee on terrorism and by way of resolution, made it compulsory for all member states to legislate on terrorism. The advent of computers has also brought about lots of changes, but the law has always been equal to the task. There are several other examples of these changes. You are to read the textbooks under further reading to aid your knowledge in this regard.

Self-Assessment Exercise (SAE) 1

To what extent is law a vehicle of social change? Give examples.

3.2 The limitation of law in creating social change

Despite the fact that law has been said to be the vehicle driving social change and meeting the new demands thrown up by such changes, there are also limitations of law in creating social change in Nigeria, just like elsewhere. There is the argument that the law is imposed externally in an almost coercive way. Today, people are characterized by a "crisis of confidence" and alienation from social institutions because of uncontrollable economic conditions. It is therefore argued that law is hardly the expression of those people's will.

They argue further that few people participate in the formulation of laws and legislation.

One of the limitations of law as an instrument of social change is the possibility of prevailing conflict of interest. Other limitations related to the efficacy of law in social change include divergent views on law and the prevailing morality and values.

A very good example here is the Nigerian Evidence Act. The definition of a document as contained in that Act is far away from modern day reality. There are some documents that will not be admissible because they have not been specifically mentioned in the Act. The cause of this is legislative ineptitude by our parliamentarians and this constitutes a big limitation on legal-driven change in the field of evidence.

Also, despite the fact that corruption is on the increase in Nigeria, we still have not gotten it right to come up with up-to-the-task legislation that will discourage other corrupt leaders.

The laws as they exist now are such that permit plea bargaining, a situation where the rogue government officials will part with some of the loot and serve minimal jail term.

Government actions such as the above limit the ability of the law to create social change.

You are expected to embark on further readings to be able to appreciate other limitations.

Self-Assessment Exercise (SAE) 2

In what scenario can the law limit the extent of social change?

3.3 Resistance to Change

Even though social change is a desirable phenomenon, we have seen, from our discussion above, that there are times when law will itself constitute limitation to attaining social change, and we did say that such limitation should not be attributed to the law, rather it should be attributed to the law givers.

You need to know that there are also cases where laws face resistance from members of the society who find different reasons for their resistance such as their values, customs, or even the cost of change and sometimes because people feel threatened by the change. The factors that are a barrier to change are separated into social, psychological, cultural, and economic factors and all are interdependent. For instance, vested interests change is opposed by individuals or groups who fear they will lose their power, prestige or wealth when the new law is introduced. A

good example here is the Health Care Bill in America. Lots of health care operators resisted the passage of the Act and are still lobbying for its repeal after it has been passed. The passage of the Nigerian Health Bill is also another example. Various stakeholders in the health sector have advised President Jonathan not to sign the Bill into Law and they vow to embark on a strike should he go ahead to sign the Bill. These are social and economic factors which serve as bases for people to resist social change.

Similarly, in highly stratified societies, people of upper classes oppose changes because they fear losing privileges over the lower classes. Some people resist social change on ideological grounds. These and several others are reasons why some people resist social change.

Self-Assessment Exercise (SAE) 3

Identify and discuss the various factors that may lead to resistance of social change by the society.

4.0 CONCLUSION

This unit intimates you on the roles played by laws in bringing about social change as well as in sustaining it. The limitations to social change are also examined together with resistance to social change.

5.0 SUMMARY

This unit has taken you through the following areas:

Law as an instrument for positive social change

The limitation of law in creating social change

Resistance to social change

6.0 REFERENCES

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UNIT 3 ETHICS

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Character of a legal practitioner

3.2 Practitioner/Client & Practitioner/Practitioner Relationship

3.3 Practitioner/Court Relationship

3.4 Attraction of Business

3.5 Remuneration and Fees

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment (3)

7.0 References/Further Readings

1.0 INTRODUCTION

The importance of this unit cannot be over-emphasised since it deals with the ethics expected of a legal practitioner, a body of which you will soon become a member. The unit will examine the ideal personalities of a legal practitioner as well as what is expected of him vis-a-vis his clients and the court. You shall be properly guided here by the Rules of Professional Conduct for Legal Practitioners, 2007. This is therefore a must-get for you.

2.0 OBJECTIVES

This unit is meant to assist you in having an overall knowledge of what training in learning and character connotes as a law student and legal practitioner in the making. You will learn about the duty of confidentiality in your intercourse with your clients, your relation to other practitioners, improper client poaching and attraction of business as well as the authorized mode and scale of charging fees.

3.0 MAIN BODY

3.1 Character of a legal practitioner

What attributes must a legal practitioner possess? That is the question you are called upon to answer under this sub-topic. There are several of such attributes. By virtue of his being a legal practitioner, it is incumbent upon him to be 'fit and proper' and to live above board.

Since he is a minister in the temple of justice, he is expected to be an embodiment of justice, not only by his words but also by his deeds.

A legal practitioner is also expected to know the law, that being his workshop, and he must be ready to discharge his duties steadfastly whenever he is representing a client in court.

Self-Assessment Exercise (SAE) 1

What qualities must a legal practitioner possess?

3.2 Legal practitioner/Client & Practitioner/Practitioner Relationship

A legal practitioner owes some duties towards his clients just as the clients owe him some duties. In the same vein, a lawyer is expected to carry out some duties towards his colleagues and vice versa. You are expected to know what these duties are. What will be mentioned here are inexhaustive. As such, you are expected to embark on further reading for the other duties of a lawyer to his clients, clients to lawyer, and lawyer to lawyer.

Starting with the duties of a lawyer to his clients, the following are some of such duties:

A lawyer must listen to the instructions of his client attentively and must carry out the said instructions to the letter, provided the instructions do not involve the commission of crime.

He also must prosecute the case of the client diligently. Some lawyers have been dealt with by the LPDC for lack of diligent prosecution of their clients' cases or for avoidable negligence.

Most importantly, a legal practitioner owes his client the duty of confidentiality. In other words, the client is entitled to have all discussions between him and his lawyer kept confidential. The communication is privileged and must not be divulged to a third party without the consent of the client. However, where such instructions involve the commission of a crime, the lawyer in question will be bound to disclose with or without the consent of the client.

He must operate a separate bank account for his client money. He must not mix this up with his own money.

As for the client, he owes his lawyer the duty of full disclosure and he must pay his lawyer for the service rendered.

The relationship between legal practitioners is expected to be cordial and respectful. Senior lawyers must not look down on their juniors and must be ready to put them through whenever they seem to be in trouble in the court room. This is more so where a senior lawyer is appearing in a case where the lawyer on the other side is a new wig. He must not take advantage of this; rather, he must be ready to put him through on how to move motions or how to do whatever it is he is having problem doing.

Practitioners must also be ready to share useful information with one another. Where there is a new precedent on a particular legal principle, he must be ready to share same with his colleagues through the internet or through journal articles. New development in the field of law/legal practice must also be shared with other lawyers. This is where the NBA is most useful: to organise seminars, retreats, etc to ensure cordial relationship and friendly existence among legal practitioners.

Self-Assessment Exercise (SAE) 2

Itemise and explain the practitioner/client relationship.

3.3 Practitioner/Court Relationship

The lawyer's duties to the court include the following:

Punctuality: A legal practitioner must be punctual in getting to court. The court sits at 9 a.m. It is therefore incumbent upon the legal practitioner to be in court before that time and before His Lordship sits.

A legal practitioner must be properly robed before the court. A male lawyer must be adorned in dark suit with his wig and gown. The same colour is allowed for female lawyers. Odd colours are not permitted and lawyers owe the court the duty of being properly robed. Wearing of red or pink or yellow suits will therefore not be overlooked without admonition or being outright sent out by the court; so also is over-embellishment by female lawyers.

He must not mislead the court by mischievously citing wrong authorities.

He must make available to the court authorities relied upon in his argument before the court.

He must be respectful to their lordships.

He must address the court in proper nomenclature e.g. for the High Court Judges upward to the Supreme Court, the right nomenclature is My Lords or Your

Lordship/Ladyship (Note that Your Lordship is generally acceptable even for a female Judge). It is Your Worship in the Magistrate Court.

He must be able to control his temper even where he seems to have been wronged by their lordships.

He must be courteous to the court. Even where he does not share their lordships' views, it will be wrong for him and will be in breach of his duty to remain courteous to the court for him to fume immediately a decision is handed down by saying that 'your lordships are biased and we are going to appeal against this biased decision'.

The court also owes some duties to lawyers. These include:

Punctuality: the court must sit latest by 9 a.m. The practice by some Judges who sit far after 9 a.m. without any convincing reason is therefore in breach of this duty. Since respect is reciprocal, the court must also address counsel in a respectful manner.

The court must be seen as father of all. It must not show preference for any counsel.

This encapsulates the duty to direct counsel, especially the new wig. Instead of making them feel inferior, the court must help them through in the doing of whatever it is they want to do before the court.

The court must avoid abusive words.

You are to read the suggested textbooks/materials to get more of these duties

Self-Assessment Exercise (SAE) 3

Explain the reciprocal duties of the court to legal practitioners.

3.4 Attraction of Business

As a legal practitioner, it is imperative for you to know that you are distinct from other professionals and therefore, there are rules of professional conduct that guide you and the profession.

Following from the above, there is a limit to the extent you can go in attracting your clients. There are some practices that are not acceptable in legal practice. One of such is the rule against advertising. A legal practitioner is precluded from embarking on any kind of outrageous advertising style. He is not allowed to solicit for clients either through radio jingles or any other forms of adverts. What is allowed is moderate advertisement. A lawyer is thus permitted to put up a modest signpost indicating the name of his chambers and his general practice areas. The signpost must not be too big and the wordings contained therein must not be too specific. A

signpost with the wordings 'Adeolu & Co, the Best Criminal Lawyer in Town' will not be acceptable because it is indicting the credibility and ability of other practising lawyers in that area. An acceptable advert via signpost may include 'Olutunji Adegbeniga & Co. Adelabi Chambers: Solicitor and Advocate of the Supreme Court of Nigeria' etc.

It is also unacceptable for a legal practitioner to source out potential cases from clients. By this it is meant a situation where a legal practitioner will go out to look for actionable situations and then instigate the parties to go to court so that he can be their counsel.

A legal practitioner must also not engage himself in any form of advertisement that will run down his colleagues. This is known as 'touting'.

In soliciting for clients therefore legal practitioners must abide by the relevant sections of the Rules of Professional Conducts which govern attraction of business by counsel.

Self-Assessment Exercise (SAE) 4

Should advertising by legal practitioners be legal? Examine the pros and cons.

3.5 Remuneration and Fees

The remuneration and fees of legal practitioners are also governed by the relevant laws which must be abided by in charging clients for various services. With respect to land agreement, a legal practitioner is expected to charge 10% of the purchase sum of the land in question. For company incorporation and related activities under the Company and Allied Matters Act 2004, relevant rules applied. In the field of legal drafting generally, there is a law that regulates how a lawyer should charge for legal drafting.

A legal practitioner must charge his fees and remuneration in line with the various provisions of the law and must not charge clients arbitrarily.

Self-Assessment Exercise (SAE) 5

Discuss the rules guiding the remuneration and fees of legal practitioners.

4.0 CONCLUSION

So far in this unit, we have concerned ourselves with those rules of professional ethics that are laid down to maintain and further underscore the respect attached to the legal profession. The breach of any of these rules will not be overlooked by the appropriate authorities. It may lead to suspension of the affected practitioner. It may lead to warning, and where the breach is so grave, it may lead to the striking

out of the name of the affected legal practitioner from the Roll of the Supreme Court of Nigeria. Where the culprit is merely suspended, he can continue with his legal practice after serving the suspension term.

Where his name has been struck out of the Supreme Court Roll, he can be reinstated after showing convincing evidence of penitence.

5.0 SUMMARY

In this unit, you have learnt about ethics of legal practice. Specifically, the following areas have been covered:

- a) Character of a legal practitioner
- b) Practitioner/Client & Practitioner/Practitioner Relationship
- c) Practitioner/Court Relationship
- d) Attraction of Business
- e) Remuneration and Fees

6.0 TUTOR-MARKED ASSIGNMENT (3)

The legal profession is not a profession without ethics. While lawyers are expected to respect the court in prosecuting their clients' cases, the court is equally expected to be decorous toward counsel. In line with this, critically examine the roles of a counsel to the court and vice versa.

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MODULE 3

UNIT 1 SOURCES OF LAW I: LEGISLATION

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Emergence of Legislation

3.2 Merits and Demerits of legislation

3.3 Different types of subordinate legislation

3.4 Interpretation of Statutes

4.0 Conclusion

5.0 Summary

6.0 References/Further Readings

1.0 INTRODUCTION

This module will deal with sources of law as a whole and under it we shall be examining in three units the three sources of law, namely legislation, custom, and judicial precedent. This unit is however concerned with legislation. Under it, you are expected to know how legislation originated, its definition, merits and demerits, subordinate legislation and the interpretation of statutes.

2.0 OBJECTIVES

This unit treats the emergence of legislation as the dominant source of law. It delves into the different types of legislation (paying particular attention to types of subordinate legislation). It also examines the modes of interpreting statutes such as the literal and liberal interpretations and the philosophical basis for such interpretations thereby helping the student with a full appreciation of what will be his tools in legal practice. At the end of this unit, you are therefore expected to have mastered the art of legislating.

3.0 MAIN BODY

3.1 Emergence of Legislation

Until the 19th century, legislation played a relatively subordinate role in most countries as a source of law and was clearly dwarfed in importance and relevance by customary law and case law. This is however not to say that legislation did not exist from early times; indeed the earliest document written in the English language whose contents have been preserved is precisely the laws or "dooms" of King Ethelbert of Kent promulgated in the 7th century.

It is true also that many statutes were passed in England during the Middle Ages. Overall, however, it is fair to say that statutes played a comparatively small part in the development of the law until fairly recent times. However, the situation has now changed drastically.

During the 19th and 20th(centuries a huge increase in the use of enacted law has taken place and it is clear that legislation has now become by far the most important source of law.

In Nigeria for instance, before the advent of colonialism, the various indigenous localities were majorly guided in their acts and deeds by customary laws which were enforced by the family units as well as the royal system. But with the dawn of colonialism, there has been a gradual migration away from putting reliance on customs as our British masters came with the idea of legislating over the whole entity now called Nigeria. They equally qualified largely the application of our customary law which, according to the set standard, must not be repugnant to natural justice, equity and good conscience.

Aside from directly legislating for Nigeria through the Queen's Order-in-Council, our British masters also made applicable in Nigeria common law, equity and the statutes of general applications in force in England on the 1st of January 1900.

With the above foundation properly laid, the indigenous nationalist leaders that took over the affairs of the country after independence had no problem, with minimal supervision from Her Majesty's government, to make laws, by way of legislation, for the good governance of the country. Today, Nigerian legislation are designated as Acts of Parliament at the national level where they are enacted by the National Assembly in a civilian/democratic dispensation. Laws are the equivalent name given to them at the state level. During the military era, they are designated Decree and Edict respectively while By-laws are used to describe laws made by the local government during both eras.

According to Salmond, legislation as a source of law consists in the declaration of legal rules by a competent authority. Used in a wider sense, it includes all methods of law making. To legislate therefore is to make new law in any fashion or in any method. He therefore contends that any act done with the effect of adding to, or altering the law is an act of legislative authority. Used in this sense, legislation includes all sources of law, and not just one of them. In that regard, he further posits: when a judge establishes a new principle by the process of judicial decision, he may be said to exercise legislative and not just judicial power.

Used in a stricter or narrower sense, according to Salmond, legislation is the laying down of legal rules by a sovereign or subordinate(legislator. In this narrower sense, differentiation must be made between law making by a legislator and law making by the court.

Self-Assessment Exercise (SAE) 1

Trace the emergence of legislation in Nigeria.

3.2 Merits and demerits of legislation

There is no gainsaying the facts that legislation possesses some clear advantages over other sources of law especially judicial precedents. There are equally disadvantages. You are to look into these advantages as well as disadvantages of legislation.

Legislation, to give it a working definition, can be defined as the process through which statutes are enacted by a legislative body that is established and empowered to do so. It has also been described as law made deliberately in a set form by an authority, which the courts have accepted as competent to exercise that function. What is deducible from this is: legislation is a parliamentary process; people that take part in its making must be authorised to so do by law; these people must be recognised by the court; and the legislation must be in a 'set form'.

Some of the advantages of legislation over judicial precedent include the following:

The major advantage of legislation is that it is made by parliament and therefore reflects the will of the people in so far as members of the parliament are democratically elected. This cannot be said of the court system. Statutes made by the legislature therefore enjoy a direct democratic legitimacy that judge-made law lacks.

Secondly, the idea of limited power which is enjoined by the rule of law is better secured through the device of separation of power and this ideal is reflected by giving the main legislative powers to the legislature while confining the functions of the court in the main to the application of the law.

Additionally, as the society becomes more complex and the laws try to achieve ever more ambitious objectives, it becomes more important to have detailed information about the likely social effects of new laws. As late as two centuries ago the government lacked the means of collecting this information. The result is that now the legislature is much better placed than the judiciary to collect the necessary information prior to engaging in making complex laws.

Another important merit of legislation is that it provides for predictability. Since it is in a written form, it can be consulted so that citizens can know their 'dos' and 'don'ts' beforehand and they can regulate their lives along that axis accordingly. Even though case law can also be consulted, you only get to know of it as a party when the court has laid it down, and not before you go to court. This applies especially to new precedents.

Finally, legislation is far more suitable than case law to change quickly many related but different rules of law. While it will often take time to change judicial precedents, the enactment of statute can change overnight vast areas of law.

The major disadvantage of legislation is that the words and terms used in Acts of Parliament may be subject to many interpretations, thus rendering it unclear or ambiguous in a given fact situation.

You should be able to come up with additional advantages and disadvantages after reading your text books.

Self-Assessment Exercise (SAE) 2

Discuss the advantages and disadvantages of legislation in Nigeria.

3.3 Different types of subordinate legislation

Subordinate legislation is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is also known as delegated legislation.

Using subordinate legislation is advantageous for the following reasons: it saves limited time in parliament and allows rapid change; since members of the parliament lack detailed or technical knowledge in some cases, they can make up for this through the use of delegated legislation which allows for the use of expert knowledge; it also allows quick response to new development; it enables minor changes to statutes; its withdrawal or amendment is very easy; etc.

It equally has some disadvantages. These include: it implies that parliament has insufficient time to scrutinize it, and as such parliament is not reviewing legislation properly; sub-delegation of power is a further problem which causes complexity and confusion; there is lack of publicity as some of these delegated legislation are not known by people to be affected by it; it is undemocratic as most regulations are made by civil servants or other unelected people; etc.

There are several types of subordinate legislation. Some of these are listed below:

Local authority by-Laws made by local councils under enabling Acts;

Public corporation by-laws made under statutory authority;

Rules of court made by the rules committees pursuant to the enabling Acts;

Ministerial/departmental regulations made by statutory authority;

Order in Council made by statutory authority or under the Royal Prerogative; etc.

Self-Assessment Exercise (SAE) 3

Explain the various types of subordinate legislation in Nigeria.

3.4 Interpretation of Statutes

Statutes become meaningless if not interpreted by the court. The primary duty of the court in this regard is to find the intention of the legislation. Such intention must be discovered from the wordings of the statutes. It must be an intention manifested by the words used. If every word has only one meaning, this task would have been very easy. However, words have no particular meaning except they are put in context. Problem however emanates from the fact that members of the parliament lack the prescience to know all situations that will arise and therefore legislate unambiguously for each situation. Some words used in statutes represent such vague standard that interpreting them is like making a subsidiary legislation.

Examples of such words are 'reasonable time' and 'inordinate delay' among several others.

The type of interpretation technique that the court will apply will depend on how clear forward the words used are. Where the words are unambiguous, the court will most likely adopt the literal rule of interpretation. In some cases, the words may be unambiguous but the result of applying the words as they are may bring about injustice or absurdity. In such cases, the court may adopt the mischief rule of interpretation or any other rule of interpretation that will lead to justice.

The various rules of interpretation will now be summarily discussed. You are expected to read up on the pros and cons of each rule and form your own opinion about them.

Literal rule of interpretation which is the simplest and the most easily applied holds that statutes are to be interpreted literally. In other words, if the words used are unambiguous, such words must be given their literal meaning and it is immaterial that hardship would or is likely to result from the application of such literal interpretation. This is well illustrated in the cases of *R v. Bangaza* (1960)5 FSC 1; *Adegbenro v. Akintola* (1962)1 All NLR 465.

Note however that the principle that the wording of a statute is to be construed literally is only a general principle which must be applied only where the wording is clear and generally unambiguous.

The Golden rule of interpretation was formulated in *Beck v. Smith* (1836)2 M & W 191 at p. 195; 150 E.R. 724 at p. 726 and it states that 'it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further'.

Thus, where the word to be interpreted is ambiguous, it is the court's duty to interpret it in such a manner as to avoid absurdity. See *R v. Princewell* (1963)2 All NLR 31; *Council of the University of Ibadan v. Adamolekun* (1967)1 All NLR 213; *Awolowo v. Federal Minister of Internal Affairs* (1962) LLR 177

Also, in applying, Golden rule, the court may construe the word 'or' as 'and' and vice versa whenever this is necessary to avoid absurdity. See *Ejoh v. IGP* (1963)1 All NLR 250; *R v. Eze* (1950)19 NLR 110; Interpretation Act 1964 (No. 1 of 1964), ss 1 and 18(3); *Jamaal Steel Structures Ltd v. African Continental Bank Ltd* (1973) 1 All NLR 208

The Mischief rule of interpretation holds that in order to interpret a statute properly, it is necessary 'to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide and the remedy provided by the statute to cure the mischief'. See *Re Mayfair Property Co* (1898)2 Ch 28 at p. 35; *Balogun v. Salami* (1963)1 All NLR 129. The court is then to construe the statute in such a manner as to 'suppress the mischief and advance the remedy...' See *Heydon's case* (1584)3 Co. Rep. 7a; 76 ER 638; *Akerele v. IGP* (1955)21 NLR 37

Other general principles of interpretation include:

Lex non cogitadimpossibilia (the law does not compel the doing of impossibilities) *Ut res magisvaleat quam pereat* (that it may rather have effect than be destroyed) The *ejusdem generis* rule holds that where particular words of the same class are followed by general words, the general words must be construed to be similar in meaning to the particular words. See *Board of Customs & Excise v. Viale* (1970)2 All NLR 53; *Nasr v. Bouari* (1969)1 All NLR 35; *Onasile v. Sami* (1962)1 All NLR 272

In all, it is important that the provisions, being interpreted must not be read in isolation; rather it must be put in context, and this is the only reasonable explanation that can be given where the court has interpreted 'or' to mean 'and' and 'shall' to mean 'may'.

You shall be properly guided by the suggested further reading materials on this topic.

Self-Assessment Exercise (SAE) 4

Words must be interpreted from their context. Discuss.

4.0 CONCLUSION

This unit has taken us through the rubrics(of legislation and how they are interpreted in our courts. It has underscored the importance of placing words in

context before interpreting them and has also explored the various interpretation techniques often employed by our various courts.

5.0 SUMMARY

In this unit, you have learnt the following:

- a) Emergence of legislation
- b) Merits and demerits of legislation
- c) Different types of subordinate legislation
- d) Rules of statutory interpretation

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UNIT 2 SOURCES OF LAW II: CUSTOM

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Savigny'sVolksggeist theory of law and custom

3.2 Types of custom

3.3 Limitation to validity of custom

3.4 Colonial elements in Repugnancy cases

4.0 Conclusion

5.0 Summary

6.0 References/Further Readings

1.0 INTRODUCTION

This unit will consider in-depth custom as a source of law. It is meant to complement unit 1 which deals with legislation. As opposed to legislation as a source of law which emanates from a body of elected people and which may be at variance with the people's ways of life, this unit examines custom as a source against the backdrop that it derives and emanates from the people themselves. Attempt will be made to place this source of law within a jurisprudential context of Savigny's Historical School of law where he pontificated his Volksgeist theory of law.

2.0 OBJECTIVES

Termed volksgeist in Germany, customs are deemed to arise from a national consciousness. This unit will therefore examine the emergence and fall of customs as well as the different types of customs. Further, the limitations placed on the practice of customs by various statutes will be examined with particular reference to the notion of some kind of African law.

3.0 MAIN BODY

According to Salmond the importance of custom as a source of law continuously diminishes as the legal system grows. According to him under English law it has now almost ceased to operate, to an extent because it has been superseded by legislation and precedent and partly because of the stringent limitations imposed by law upon its law creating efficacy.

Reasons for the reception of customary law.

Salmond opines that custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. Equally, it is important to note that the fact any rule that has already the sanction of custom, raises a presumption that it deserves to obtain the sanction of law also. Courts of justice should be content to accept rules of right which have already in their favour the prestige and authority of long acceptance.

Salmond further contends that custom is to society what law is to state. Each is the expression and realisation of the principles of right and justice. The law embodies

those principles as they commend themselves to the community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not by the power of the state, but the public opinion of the society at large. Salmond further states that nothing is more natural than that, when the state begins to evolve out of the society, the law of the state should in respect of its material contents be in great part modelled upon, and coincide with, the customs of the society. When executing its function of administration of justice, it accepts as valid the rules of right already accepted by the society of which it is itself a product, and it finds those principles already realised in the customs of the land.

The second reason Salmond offered for the law-creative efficacy of custom is to be found in the fact that the existence of an established usage is the basis of a rational expectation of its continuance in the future. Justice demands that, unless there is good reason to the contrary, men's rational expectations shall, so far as possible, be fulfilled rather than frustrated. He went on to say that even if customs are not ideally just and reasonable, it may yet be wise to accept them as they are, rather than to disappoint the expectations which are based upon established practice.

3.1 Savigny's Volksgeist theory of law and custom

Under this topic, you are expected to make use of Savigny's theory of law to explain the concept of custom and its importance as a source of law. Literally, *volksgeist* is a term connoting the productive principle of a spiritual or psychic character operating in different national entities and manifesting itself in various creations like language, folklore, mores, and legal order.

According to Savigny however, the nature of any particular system of law was the reflection of the 'spirit of the people who evolved it'. Hence, in a simple term, *volksgeist* means the general or common consciousness or the popular spirit of the people. Savigny believed that law is the product of the general consciousness of the people and a manifestation of their spirit. Savigny's central idea was that law is an expression of the will of the people. It does not come from deliberate legislation but arises as a gradual development of common consciousness of the nation. He was of the view that a nation's legal system is greatly influenced by the historical culture and traditions of the people and growth of law is to be located in their popular acceptance. He therefore contended that, emanating from the consciousness of the people, custom not only precedes legislation but is also superior to it. He faulted the general view that laws are of universal validity or application and contended instead that each people develop its own legal habits, as it has peculiar language, manners and constitution. Relying on his own method, Savigny stated that the law is a product of the *volksgeist*, embodying the whole history of a nation's culture and reflecting inner convictions that are rooted in the society's common experience. The *volksgeist*, he claimed, drives the law to develop slowly over the course of history.

Thus, a thorough understanding of the history of the people is necessary for studying their law accurately.

According to Savigny, 'the foundation of the law has its existence, its reality in the common consciousness of the people. We become acquainted with it as it manifests itself in external acts, as appears in practice, manners and customs. Custom is the sign of positive law'. Hence, Savigny clearly believes custom as the source of law and Volksgesist (common consciousness) as the ultimate foundation of any legal system. Savigny's view of law is therefore in line with the meaning of custom which has been defined as the way of life of a people which develops with the people over time.

Self-Assessment Exercise (SAE) 1

Is there any link between custom and Savigny'svolksgeist theory of law?

3.2 Types of Customs

For our purposes, three main types of custom can be identified and briefly discussed. These are: local customs, usages and general customs.

Local custom refers to the customs of particular localities which are capable of being recognised as laws even in derogation of the common law. Local customs were respected and resorted to in the course of the development of common law doctrines when judges would go out to decide disputes arising among different people. Such resolution was oftenbased on local customs. Their acceptance by the court is hedged around with a number of conditions which have been evolved by the judiciary. For instance, such local custom to be applicable must possess a sufficient measure of antiquity; it must have been enjoyed continuously; it must have been enjoyed 'as of right'; it must be certain and precise; and the custom has to be consistent with other customs in the same area.

Note however that the fact that it may conflict with local customs elsewhere did not matter. This is why the geographical limit within which such local customs are applicable must be precisely defined. With time, reliability on local customs started to fizzle out as the common law had been able to develop common customs that had metamorphosed into written statutes. The idea of local customs also became demystified as developments in the transportation and other sectors brought together several localities which where hitherto unreachable.

Usage emanated from the fact that society is never still. As it develops it moves away from the letter of the law by evolving practices that may influence or simply by-pass existing rules. Such practices only acquire the label 'laws' when incorporated into statute or precedent, but they have immeasurably greater significance and operation apart from this.

One sphere is in contract. If transactions in a particular trade, or of a particular kind in a particular locality, have long been carried on subject to a certain understanding between the parties, it is but natural that in the course of time everyone in the trade, or in the locality, who carries on such transactions, will assume them to be done in the light of this understanding, if nothing is said to the contrary. Since one of the purposes of law is to uphold the settled expectations of men, the courts sometimes incorporate these settled conventions as terms of the contract.

Certain conditions must however be met before the court can do so, namely: the usage must be so well established as to be notorious; such usage cannot alter the general law of the land, whether statutory or common law; it must be a reasonable usage; it need have no particular scope; and the usage will not be enforced in a particular case if it purports to nullify or vary the express terms of the contract.

General custom: It has long been a commonplace of English judicial pronouncements that a custom prevailing throughout the land, if it existed before 1189, is part of the common law. This identity between general custom and the common law was a matter of historical development, for the common law from its earliest days was no more than the creation of the judges. The reliance by Royal justices on decisions given in one part of the realm, based on local customs, as precedents for decisions in other parts gradually produced principles of general application, which came to be known as the 'common custom of the realm' or the 'common law'. It is only for the judges then to declare what amount to 'general custom of the realm'

Self-Assessment Exercise (SAE) 2

Explain the various types of customs.

3.3 Limitation to validity of custom

Rules of customary law are subject to tests of validity prescribed by statute. These tests therefore constitute some limitation on the validity of customs. You are expected to study in detail those tests that limit the validity of customs.

The first test is the repugnancy test; This test holds that the custom sought to be applied must not be repugnant to natural justice, equity and good conscience. It is provided for in the High Court Laws of all states of the federation. See Section 26(1) of the High Court Law of Lagos State; see also Section 14(3) of the Evidence Act.

What this test is composed of has not really been well defined by scholars. It can only be understood through the cases where the courts have held some customary laws/practices to be in breach of the repugnancy doctrine. See the following cases: *Laoye v. Oyetunde* ((1944) AC 170; *EsugbayiEleko v. Officer Administering the Government of Nigeria* (1931) AC 662 at p. 673; *Lewis v. Bankole* (1908)1 NLR 81 at

pp. 99 – 102; *Dawodu v. Danmole* (1958)3 FSC 46; *Edet v. Essien* (1932)11 NLR 47; *Re EffiongOkon Ata* (1930)10 NLR 65; *Mariyama v. SadikuEjo* (1961) NRNLR 81 among others.

The repugnancy test thus constitutes a limitation on the validity of customs as a source of law. Where the custom is barbaric, contentious or out of tune with modern expectation, the court will be inclined to hold that such custom breaches the repugnancy test/doctrine.

The second test often applied by the court to test the validity of customary law is the incompatibility test. According to Section 26(1) of the Lagos State High Court Law, any customary law that is incompatible either directly or by implication with any law for the time being in force shall not be applied by the court. Similar provisions will be found in other High Court laws of various regions/states. The scope of 'any law for the time being in force' is debatable. Some have argued that it includes English law: see *Re Adadevoh* (1951)13 WACA 304 at 310, where the West African Court of Appeal stated obiter that 'any law in force' included 'the rules of the common law as to the unenforceability of claims contrary to public policy.' See also *Adesubokan v. Yinusa* (1971) NNLNLR 77 where it was held that 'any law' in section 34(1) of the High Court Law of the Northern States included the received English statutes of general application. See further: *Rotibi v. Savage* (1944)17 NLR 77.

The third and the last test is that of public policy. In other words, any custom to be applied by the court must not be contrary to public policy. The application of customary law has been precluded in many cases on the ground of being contrary to public policy. See section 14(3) of the Evidence Act; *Re Adadevoh* (supra); *Alake v. Pratt* (1951)13 WACA 304 and *Cole v. Akinyele* (1960)5 FSC 84.

The above are the limitations to the validity of custom.

Self-Assessment Exercise (SAE) 3

With the aid of decided cases, explain the repugnancy doctrine.

3.4 Colonial elements in Repugnancy cases

There is no disputing the fact that what was held to be repugnant to natural justice, equity and good conscience during the colonial era would mostly be determined by the colonial masters' perception of repugnancy. This was a very big mistake since one could not appreciate a people's culture except he is part of that culture. Hence, some of the customs that were held to be repugnant or that were deemed to be barbaric and outrageous may not be so when placed within African culture and customs of that time.

Self-Assessment Exercise (SAE) 4

Examine all the above cases to which you have been referred on repugnancy doctrine and bring out the colonial elements in some of them.

4.0 CONCLUSION

This unit has taken you through the fabric of custom as one of the sources of law. It has also examined the importance, types and other salient issues on customs.

5.0 SUMMARY

We have studied the following:

- a) Savigny's Volksgeist theory of law and custom
- b) Types of custom
- c) Limitation to validity of custom
- d) Colonial elements in Repugnancy cases

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UNIT 3 SOURCES OF LAW III: JUDICIAL PRECEDENTS

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3.0 Main Body

3.1 The doctrine of judicial precedent

3.2 The hierarchy of court and stare decisis

3.3 Ratio decidendi and how to isolate the ratio of cases

4.0 Conclusion

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6.0 Tutor-Marked Assignment (4)

7.0 References/Further Readings

1.0 INTRODUCTION

The defects of slowness and uncertainty which often affect customs can be overcome if a society comes to accept judicial decisions as a source of law. Wherever there is a doctrine of precedent when a new issue is brought before the courts the decision reached will become binding for later similar cases and in this way will achieve the status of a legal rule without having to wait for the much slower development of a common practice among the population at large. Again, in so far as courts explain and justify their decisions, they make them clearer thus avoiding to a certain extent the problems of uncertainty which can plague purely customary rules. This is the concept of precedent at work and it is what we shall be exploring in this unit.

2.0 OBJECTIVES

A judicial precedent is one of the lawyers' tools; and distinguishing one case law from another in terms of fact or ratio differences is crucial. Judicial precedent being a distinguishing characteristic of English law will be treated with specific reference to its influence in Nigeria in terms of its understanding, stare decisis, hierarchy of courts, ratio decidendi and how a ratio of a case can be isolated.

3.0 MAIN BODY

3.1 The doctrine of judicial precedent

The doctrine of judicial precedent simply means law found in judicial decisions. It is the principle of law on which a judicial decision is based, and it consists in what is often referred to as the 'ratio decidendi' meaning 'the reason for the decision'.

The origin of judicial precedent is traceable to the common law, a period when itinerant judges appointed by the Queen went out into the various localities to administer their local customs. With time, the judges soon discovered that some customs were similar in the different localities they had been to for the purpose of adjudication on their disputes. The judges would then take note of this and as the time went on, it got to a point when there emerged what was referred to as the common law of the realm.

The doctrine of precedent developed with the above system. Thus, instead of applying the local or general customs of a particular locality, the judges would conveniently refer to an earlier similar case and adopted their decisions in that earlier case to the case at hand.

The most important requirement for the application of the doctrine then, and now, is that the cases in question must be largely of the same/similar factual situations.

It is important that you know that there are two aspects of precedents: they possess law-quality and they are binding. The distinction between the two must be properly understood.

Quotability(as 'law' applies to the principle of a case, its ratio decidendi, while bindingness depends on the hierarchy of courts, for generally decisions of higher courts bind lower courts, but not vice versa. For instance, a decision of the High Court is 'law' although it is not binding on any court other than those below it in the hierarchy.

It is important for you also to know that there are cases where the decisions established in an earlier case will not be applied in a later one despite the fact that it ought to have been caught by the judicial precedent's rule. This happens where either of the lawyers in the cases is able to successfully distinguish his case from the earlier one.

There are several merits and demerits of judicial precedents such as predictability of judicial decisions (an advantage) and rigidity (a disadvantage), among others. You are to read up the other advantages and disadvantages of judicial precedents.

Salmond states that the doctrine of precedent is known also as stare decisis. The import of precedent is that judicial decisions have binding force and enjoy law-quality per se. the bindingness of precedent depends on the hierarchy of courts and accordingly higher courts bind lower courts and never the other way round. The aspect of decisions which enjoy law-quality is its ratio decidendi.e the principle behind a decision.

Salmond opines that for stare decisis to be established two conditions must be satisfied. (1) There had to be a settled judicial hierarchy before there could be any clear-cut doctrine of binding authority, for until then it could not be known whose decisions bound whom. (2) There had to be a reliable report of cases. This is because if cases are to be authoritative as law, there should be precise records of what they lay down.

According to Salmond, stare decisis must be distinguished from res judicata. Res judicata means that the final judgment of a competent court may not be disputed by the parties or their successors or any third parties in any subsequent legal proceeding. The main differences between the two doctrines are as follows:

- (1) Res judicata applies to the decision in the dispute while stare decisis operates as to the ruling of law involved.

- (2) Res judicata normally binds only the parties and their successors. Stare decisis relating as it does to the ruling of law, binds everyone, including those who come before the court on other cases.
- (3) Res judicata applies to all courts. Stare decisis is brought into operation only by decisions of the High Court and higher courts.
- (4) Res judicata takes effect after the time for appealing against a decision is past. Stare decisis operates at once.

Self-Assessment Exercise (SAE) 1

Critically examine the doctrine of judicial precedent.

3.2 The Hierarchy of Court and stare decisis

The correct application of the doctrine of judicial precedent is dependent on the availability of a well-defined hierarchy of court and an up-to-date law reporting. The decisions of higher courts are binding on lower courts within the hierarchy.

In Nigeria, the hierarchy of court is as provided for in the 1999 Constitution (as amended) in which the Supreme Court is at the apex, followed by the Court of Appeal, by the High Courts of States/Federal High Courts and by Magistrate Courts. What this implies is that the decisions of the Supreme Court will be binding on all the courts below it. In the same manner, the decisions of the Court of Appeal will be binding on High Courts up to the courts at the lowest rung of the ladder.

The decision of a court will either be binding or persuasive. It is binding where the court before which it is being cited has no option as to whether to apply it or not; it must be applied and obeyed. On the other hand, where a decision urged before their lordships only have a persuasive effect, this means that their lordships are at liberty to either rely on it or not. The concept of persuasiveness is brought about where the decision in question is either that of a court of coordinate jurisdiction, such as the effect of the decision of a division of Court of Appeal on another division or the effect of the decision of a Federal High Court on a State High Court. All these decisions shall have a persuasive effect only on the courts before which they are being sought to be applied. The same effect is accruable to foreign authorities such as those of the English or American or Australian courts of justice. Where a well-stratified hierarchy has been established, the courts within the hierarchy, knowing where they stand, must obey all the decisions binding on them in handing down their own decisions. This is to make for predictability of court processes. However, there are certain instances where a court can deviate from its earlier decisions and refuse to be bound by it. One of such cases is where its earlier decision is reached per incuriam. A decision is reached per incuriam where it is reached by a court in error. In such a case, if that court has the opportunity, it can correct the earlier error. Also, where there are conflicting decisions of the court of appeal, an appellate

court may overrule any of such conflicting decisions to set the law straight; and finally, where a decision has been impliedly overruled by the Supreme Court, the Court of Appeal can overrule its earlier decision on such issue.

Stare decisis on the other hand means 'following previous decisions'/'stand by the decision and not disturb the undisturbed.' It is a doctrine that complements that of judicial precedents.

Refer to the further reading section below to develop on what has been given to you herein.

Self-Assessment Exercise (SAE) 2

Discuss the importance of hierarchy of court to the doctrine of judicial precedent.

3.3 Ratio decidendi and how to isolate the ratio of cases

Your primary concern here is how to identify the ratio of a case. Even though this may appear a less onerous task, in actual fact, it is a difficult task.

To start with, ratio decidendi as we have already stated means 'the reason for the decision'.

It is important because it is what is binding on the courts below the hierarchy. There are several things that a judge says in the course of delivering his judgment. The basic reasons he gave for so doing in his judgment constitutes the ratio while other things said by the side are regarded as obiter dicta and have no binding effect.

Where the court in a previous case clearly stated the legal principle on which it based its decision, the task before the court in a later case would have been simplified as he would only need to regard those legal principles as the ratio. But it is not always easy to determine the ratio as the decision-giving court would usually have gone in a long circle before coming down to its decision.

In determining the ratio of a case, the courts usually consider any one or more of the following factors: the reason for the decision as stated by the judge; the principle of law stated by the judge as that on which the decision was based; and the actual decision in relation to the material facts. In addition to these three, the court may also consider the interpretation of the case in any later case determined before the instant case.

In order to easily determine the ratio decidendi of a case, some scholars have suggested the adoption of several theories such as the classical theory, Prof. A.L. Goodhart's theory, Prof J. Stone's theory, among others. Whatever approach is adopted, the fact remains that determining the actual ratio in a case is not an easy task.

Self-Assessment Exercise (SAE) 3

It has been said that identifying the ratio decidendi of any case is not an easy task. Do you agree? If yes, explain the various methods/theories of determining the ratio of any given judgment.

4.0 CONCLUSION

We have shown in this unit the invaluable importance of the doctrine of judicial precedent because it makes for predictability and certainty in the course of justice. It enables lawyers to know the weaknesses and strength of their cases even before they go to court. Hence, it is of great necessity for a lawyer to know how to decipher the ratio from a mere obiter.

5.0 SUMMARY

This unit covers the following areas:

- a) The doctrine of judicial precedent
- b) The hierarchy of courts and stare decisis
- c) Ratio decidendi and how to isolate the ratio of a case

6.0 TUTOR-MARKED ASSIGNMENT (4)

With case law examples, enumerate the circumstances when the Supreme Court may overrule itself.

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MODULE 4

UNIT 1 APPLICABILITY AND THE ROLE OF THESE SOURCES IN

CONTEMPORARY AND EARLY SOCIETY

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 The use of legal concepts in legal reasoning

3.2 Logic: deductive and inductive reasoning

3.3 Public policy, common sense, morality and ordinary sense of justice

4.0 Conclusion

5.0 Summary

6.0 References/Further Readings

1.0 INTRODUCTION

Lawyers/judges rely on the applicability of a combination of these sources in the preparation of their cases or in the determination of legal issues arising before them. They often take an entirely different approach from what a layman would have expected to be their decision on certain factual situations. This is because they are guided by law and legal principles which they must apply appropriately. This unit will take us through how this can be effectively done.

2.0 OBJECTIVES

This unit is to help students understand how judges arrive at decisions. The unit also discusses the interplay between the paths to the decisions of judges in their use of deductive and inductive analogy, logic, basic principles of justice, public policy, morals, common sense, etc. The hierarchy of the several tools at judges' behest is examined thoroughly.

3.0 MAIN BODY

3.1 The use of legal concepts in legal reasoning

In coming down to their decisions, judges and lawyers alike often rely on legal concepts which have acquired some legalised meanings. This is one of the

peculiarities of legal reasoning. A layman is often bothered by the fact that lawyers/judges do not decide cases by considering directly the merits of the possible alternative solutions to them. They are further bewildered by the fact that judges/lawyers are primarily preoccupied with categorising the cases coming before them into some already pre-determined categories or 'legal concepts' and then decide such cases according to the categories or concepts under which they fall.

Thus a judge would have to resort to whether someone has already assumed 'possession' to determine the question of ownership; whether 'property' has passed on to another person; or whether a particular union is a 'legal person'.

In as much as resort to these legal concepts may appear to portend grave danger, the fact cannot be gainsaid that all developed legal systems make extensive use of them and they cannot therefore be foregone.

You are expected to learn about these legal concepts and be conversant with the various instances where judges and lawyers alike often resort to them for the proper determination of cases before them.

Self-Assessment Exercise (SAE) 1

Salmond observes that 'sometimes this will all point to the same conclusion. At others each will pull in a different direction; and here the judge can only weigh one factor against another and decide between them. The rationality of the judicial process in such cases consists in fact of explicitly and consciously weighing the pros and cons in order to arrive at a conclusion'. Discuss.

3.2 Logic: deductive and inductive reasoning

Some writers have denied that there are cases in which judges can reach a decision by the straightforward application of a rule. It is useful, therefore, to start by reasserting that there are cases, especially many of the routine cases handled at the lower levels of the judicial hierarchy, which can be decided by a purely deductive application of known, clear and uncontroversial rules of law. A typical example of deductive reasoning is as follows:

Men are mortal.

Socrates is a man.

Therefore Socrates is mortal.

The above is an example of a valid deduction. 'Valid' means that if the two premises are true, then the conclusion must necessarily be true also.

A typical example of deductive reasoning in a legal context is provided below:

'Any undischarged bankrupt shall... be guilty of an offence... if he obtains credit to the extent of N100 or upwards from any person without first informing the person that he is an undischarged bankrupt'. X, being an undischarged bankrupt, has obtained credit to the extent of N100 from Y, without first informing him that he was an undischarged bankrupt. Therefore, X is guilty of an offence.

The above is also a valid deduction; if the truth of the premises is accepted, it would be self-contradictory to deny the truth of the conclusion. But, of course, logic itself cannot guarantee the truth of the premises. If the major premise were not an accurate expression of the law or the minor premises were a wrong description of what in fact happened, then the conclusion would be wrong even though the argument itself is valid.

On the other hand, while deductive reasoning proceeds from a general/major premise to a minor/particular conclusion as we have shown above, an inductive reasoning is just the opposite. An inductive reasoning proceeds from a particular premise to a general conclusion. An example goes thus:

Yemisi is lazy;

Yemisi is a woman;

Therefore all women are lazy.

This also may be applied to legal propositions.

Self-Assessment Exercise (SAE) 2

Logic and common sense lead to judges making law. Discuss.

3.3 Public policy, common sense, morality and ordinary sense of justice

While judges are expected to always align their decisions with laid down legal rules and concepts, they are equally guided by public policy, common sense, morality and ordinary sense of justice. Public policy has been employed by the court to deny some rights, even though Lord Denning has warned that judges should be careful when resorting to public policy as a ground for denying a right because, according to him, public policy may turn out to be an unruly horse if manned by a careless rider. Thus, while the law allows the members of the populace to have audience to court proceedings, public attendance at some proceedings is proscribed on the ground of public policy.

Morality is another key factor that may condition judges' decisions. Even though it is clear that the law will not necessarily legislate morals, we have shown in unit 1 of the 2nd Module that law may legislate morals at times. In the same manner, judges are swayed by moral dictates when writing their judgment but they have the

herculean task of aligning or subsuming their desire for morals under available legal concepts.

Common sense and ordinary sense of justice are also a veritable tool used by judges when determining their decisions in every given case.

Thus, the first point of call for judges is to place reliance on legal concepts/rules, after which they can rely on public policy, morality, ordinary sense of justice and/or common sense in that order.

Self-Assessment Exercise (SAE) 3

What are the several tools a judge may refer to in reaching a decision?

4.0 Conclusion

This unit has taught us the various determining factors that shape the decisions of judges. It has opened our eyes to the fact that judges are primarily expected to base their decisions on legal rules and concepts, and secondarily on other tools at their behest such as public policy, morality, common sense and ordinary sense of justice.

5.0 SUMMARY

In this unit, the following have been explored:

- a) The use of legal concepts in legal reasoning
- b) Logic: inductive and deductive logic
- c) Public policy, common sense, morality and ordinary sense of justice

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UNIT 2 ANALYSIS OF FUNDAMENTAL LEGAL CONCEPTS I: RIGHTS, DUTIES AND LIABILITY

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 The concept of rights

3.2 The concept of duties and liabilities

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment (5)

7.0 References/Further Readings

1.0 INTRODUCTION

This unit is meant to guide you through the various fundamental legal concepts with particular focus on the concepts of rights, duties and liability. At the end of the unit, you must be able to embark on your own on a critical legal analysis of these fundamental concepts, and in addition, you must be capable of employing the analysis in the legal field.

2.0 OBJECTIVES

This unit is meant to acquaint students with the concepts of rights, duties and liabilities which are commonly used in legal lexicons thereby arming them with the legal and philosophical basis for distinguishing them and helping them in general practice.

3.0 MAIN BODY

3.1 The concept of rights;(Few concepts are as fundamental in law as that of rights. However, on examination, it turns out that there is an amazing lack of consistency in the way in which most people use the term 'rights': as soon as one scratches a little below the surface it is quite likely that one will find that behind that technical-sounding expression, there exist several half-baked and mutually incompatible conceptions. Where one would expect to find a precisely defined and tightly delimited concept, one meets only muddle.

In defining what a right is, you are expected to resort to various definitions coined by jurists such as Vinogradoff, Salmond, Holmes, Gray, Hart, Dworkin, Raz, and several others. You are to pay particular attention to the basic nitty-gritty of each jurist's definition of the concept. The whole essence of resorting to several definitions is to open your eyes to the fact that the concept of right is not a straight-jacket (one as it is largely controversial among jurists).

Of particular importance to you in the proper understanding of the concept of 'right' is Hohfeld's analysis of rights, where he, through a diagrammatic representation, explains the relationship between rights, duties and liberties. He points out where there will be claim as well as where there will be no claim. The summary of his analysis is his categorisation of rights into four main sections. He further painstakingly explains the relations of power to immunity; the relations of liability to disability; the relations between power and liability; as well as the relations between immunity and disability. This is a very good point for you to start. An understanding of Hohfeldian analysis of rights will therefore be of priceless use to you.

You are also required to go through the main theories of rights: benefit theory, will or choice theory of right, expectation theory of rights, among several others.

The concept of right must also be applied to human rights and legal rights, and here, you should consider the main theories of human rights such as the state of nature theory, the social contract theories, the intuitionist theories, the duty-based theory of human rights, etc.

Self-Assessment Exercise (SAE) 1

Critically analyse Hohfeldian's conception of rights.

3.2 The concept of duties and liabilities

It is equally important to analyse with some care the idea of duty for several reasons. A proper understanding of the concept is necessary in order to understand the law. Law regulates and guides human behaviour by binding people to act in certain ways through the creation of legal duties. Any misconception of what it is to be under a duty is certain to result in a misunderstanding of how the law operates.

It is also essential to clarify one's ideas about duties in order to understand what a right is. Everybody can see that the concepts of duty and right are intimately related. What many people fail to realize is that it is impossible to understand what a right is without making reference to the idea of duty, but not vice versa. In other words, the concept of duty is the more basic of the two and until it is clarified, it is not possible to have a proper understanding of rights.

It is also of utmost importance that you know the various types of duty that exist: moral, legal, social, religious, etc. The duty to keep one's promise is moral; the duty to drive on the right-hand side of the road is legal (note however that there is a prima facie moral duty to comply with one's legal duties); there is a social duty among many Nigerian groups to offer food to a visitor who arrives at mealtime; while Catholics have a religious duty to attend Mass on Sundays.

To understand the concept of duty the more, you must be conversant with the various theories of duty such as the sanction theories of duty, the imperative theories of duty, the theories of duty based on 'feelings', the acceptance theories of duty and the rest. The analysis of duties in terms of reasons for action is also to be embarked upon. You must also note that some authors conceive of duties as encompassing obligations and liabilities.

Self-Assessment Exercise (SAE) 2

Some authors have contended that duties encompass obligations and liabilities. Do you agree with them? Discuss how.

4.0 CONCLUSION

The importance of basic legal concepts such as rights, duties and liabilities has been explored and we have been able to grapple with the importance of their understanding to everyday legal interactions and situations.

5.0 SUMMARY

In this unit we have learned the following legal concepts:

- a) The concept of rights
- b) The concepts of duties and liabilities

6.0 TUTOR-MARKED ASSIGNMENT (5)

Highlight and discuss the nitty-gritty of the Hohfeldian analysis of rights and the relations, if any, between duties and liabilities.

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UNIT 3 ANALYSIS OF FUNDAMENTAL LEGAL CONCEPTS II:

OWNERSHIP, POSSESSION, PERSONALITY AND LIBERTY

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 The concepts of ownership and possession

3.2 The concept of personality

3.3 The concept of liberty

4.0 Conclusion

5.0 Summary

6.0 References/Further Readings

1.0 INTRODUCTION

This unit will consider the other legal concepts in jurisprudence. Specifically, we shall be discussing the concepts of ownership and possession on the one hand and the concepts of personality and liberty subsequently.

2.0 OBJECTIVES

The aim of this unit is to guide students through how to understand the concept of ownership and its marked difference from that of possession which may or may not flow from ownership. As a social policy, the concepts permeate commercial law and go into areas as varied as criminal law in terms of the consequences of wrong assumptions.

3.0 MAIN BODY

3.1 The concepts of ownership and possession;

The existing interplay between ownership and possession is very pivotal in various fields of law such as contract and commercial laws. Until the conception of ownership as a bundle of rights is mastered in a legal system, the regulation of property in that system will be based on the intuitive concept of the immediate

physical control of a thing (i.e. possession). When this is the case the protection of property will be limited. This can be seen clearly if the present legal position of the holder of a right of occupancy in land in Nigeria is compared to that of a person who was 'seised' (of a piece of land in the 13th century in England).

Thus, while it is possible for the person in immediate control of a property to enjoy both possession and ownership, there may be cases where only possession inures in him while ownership is resident in another person.

To aid a better understanding of the concept of possession, a whole lot of theories have been evolved. These theories should be studied. Some of these include Savigny's theory, Ihering's theory, Salmond's theory, Holmes's theory, Pollock's theory, among others.

Ownership is well dissected by Dias in his book. This will be of profound assistance to you in understanding the concept of ownership.

Self-Assessment Exercise (SAE) 1

Discuss, if any, the relations existing between possession and ownership.

3.2 The concept of personality

The legal use of the word 'person' or 'personality' has attracted an assortment of theories which is probably second to none in volume. This word has undergone many shifts in meaning. Consult the various texts to ascertain and analyze these meanings. It is used in respect to human beings, corporation sole, corporations aggregate, public corporations, and unincorporated associations.

As earlier stated, there are several theories of legal personality. They include: the 'purpose' theory, the theory of the 'enterprise entity', the 'symbolist' or 'bracket' theory, Hohfeld's theory, Kelsen's theory, 'fiction' theory, 'concession' theory, and 'realist' and 'organism' theory.

Your attention here should be focused on how these theories impact on the legal personality of the various entities considered/referred to above.

Self-Assessment Exercise (SAE) 2

With regards to the various theories of personality, explain how personality is conferred on various entities.

3.3 The concept of liberty

The basic task expected of you here is to grapple with distinction between the concepts of liberty and claim. A claim implies a correlative duty, but a liberty does not. This shows that liberty and claim are separate and separable. Also, the abuse of

liberty is never the path to freedom or justice. The achievement of justice in relation to liberty, as with power, lies not in equal distribution, but in disallowing certain liberties altogether and in controlling the exercise of those that are allowed. It is thus essential that you are abreast of how to control liberty.

Apart from controlling liberty, there is equally a need to limit it in some deserving instances. The liberty to exercise power should therefore be limited to within legally available circumstances. Liberty must also be restrained. The whole of Chapter 5 of Dias (on Jurisprudence will be helpful here.

Self-Assessment Exercise (SAE) 3

How can liberty be controlled? (

4.0 Conclusion

We have so far examined the concepts of ownership and possession, with particular emphasis on the relationship between the two concepts. We also have looked into the concept of legal personality where we have been able to outline where the law will confer legal personality on certain categories of entities. The concept of liberty and the need to control, limit and restrain it have also been discussed.

5.0 SUMMARY

In this unit we have learned the following:

- a) The concepts of ownership and possession
- b) The concept of personality
- c) The concept of liberty

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