NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

(d) **Enhances Business Relationship** – Because the informal processes are consensual and strive for solutions that suit the parties rather than those necessary according to the letter of the law, often all the parties come away with solutions that satisfy their wants or needs. This enhances business relationships between them. Solutions that people agree to themselves and which they feel have advantaged themselves are usually more readily adhered to than those that have been imposed. If one side wins and the other side loses, as in the adversarial processes, usually the loser feels resentment and has no commitment to the solution but only adheres to it because of the fear of punitive action. This situation does little to enhance the business relationship between the parties.

(e) **Wider Remedies** – As the informal processes are not limited to the remedies provided by the law or legal system, a wider range of remedies or solutions may be contemplated and implemented by the disputants. For instance, whilst renegotiation of the whole contract is not a remedy a court can impose, informal processes do allow for this. This is often the most appropriate remedy since most disputants in a commercial dispute have an investment in seeing all parties continue in business, and being profitable. There is a mutual interdependence among businesses which can be enhanced by the informal processes.

(f) **Confidentiality** – As these processes are private they keep the disputants from adverse publicity. Within the process, communications, including those with the third party, are confidential and this encourages more honest exchanges.

3.5.5 Main Types of ADR

(a) **Negotiation** needs no introduction except perhaps to say it is used in this instance to indicate negotiation without the assistance of a third party.

(b) **Mediation** is a significant growth area in ADR in Nigeria today, especially in court-connected schemes. There are many variations of procedure in mediations. However, the usual concept of a mediation is a structured process in which a neutral third party (mediator) helps the parties to negotiate their own solution to their dispute by assisting them to systematically isolate the issues in dispute, to develop options for their resolution, and to reach an agreement that accommodates the needs of the parties. This agreement reached in mediation is not legally binding. However, the parties normally redraft the

agreement into a binding contract after receiving advice from their respective lawyers, accountants and/or other professional advisors.

Usually, the parties voluntarily enter into mediation. 'Mandatory' mediation does not exist, however. Nonetheless, the parties are not obliged to come to an agreement and either party may withdraw at any time.

In broad terms, the parties control the content and outcome whilst the mediator controls the process. The mediator may not impose an outcome on the parties. The mediation session usually proceeds in an extremely informal atmosphere. The parties, if they wish, may be represented by another, such as a lawyer.

Unlike negotiation or mediation, with **independent expert appraisal,** a third person is called in to give their view of the matters in dispute. Unlike arbitration, however, the process is informal and speedy and most importantly the parties are not bound by the expert's conclusion. This process is often very useful where technical issues are in dispute.

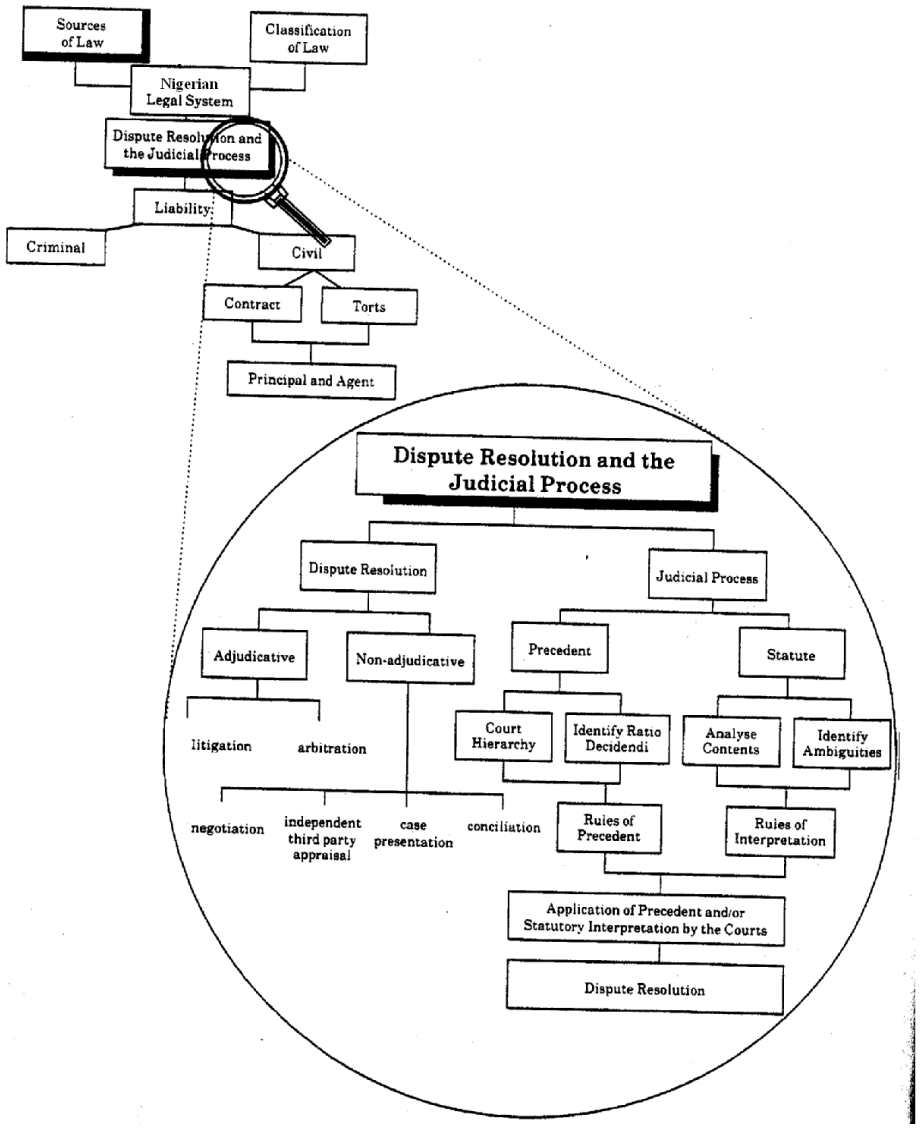
Case Presentation involves each side of the dispute making submissions in. The submissions may be made by lawyers or other representatives of each disputant. Having heard the presentation, are given opportunities to negotiate a settlement of the issues.

(c) **Conciliation** is used in two primary senses in the ADR field in Nigeria:

(i) in a general sense to mean any ADR process whereby a third-party's assistance to the disputants includes the making of a non binding recommendation. In this sense, conciliation still includes mediation and appraisal.

(ii) in a more limited context of bringing the parties together to assist them to use a particular ADR process. The conciliator provides the facilities for the settlement process, such as the premises and support services, but is not involved in the substantive issues of the dispute.

3.6 Overview of Dispute Resolution and the Judicial Process



Five methods of dispute resolution (including court-based) help us to look at the way lawyers' reason and the process adopted by a court in reaching a decision in a given situation.

In the urban areas, dispute resolution is almost entirely taken up with litigation. This is because synonym bonds are weak and most times, people have looked to the courts to resolve disputes. In the rural areas, dispute resolution is still largely informal. In recent times and in both urban and rural sectors, potential litigants, and even lawyers, have turned to other means of resolving disputes. They have become concerned at the cost of litigation (both in human and money terms), the time taken for resolution, the fact that even a successful outcome in court does not always solve the fundamental dispute and most importantly, that an extended court battle invariably destroys the business relationship between the parties. Branded 'Alternate Dispute Resolution' or ADR this movement has continued to gather force and is

increasingly found as an adjunct to court processes themselves. The fundamental difference between ADR and litigation is that the former is non-adjudicative (the parties resolve the dispute themselves) while the later requires a third party (the judge) to adjudicate on the issue. Arbitration falls into the same category as litigation. In this unit it is proposed to divide dispute resolution along those lines, i.e. adjudicative and non-adjudicative systems. In the former we examine the main steps involved in civil litigation together with a brief look at arbitration. In the non-adjudicative field a broad outline is given of the main types of processes, with some more attention being paid to mediation.

4.0 CONCLUSION

We have talked about judicial process in this module. The idea is to enable you to grasp the principles of legal reasoning. This will assist you in your study of substantive branches of law, such as the law of contract and torts, which you will do presently. It is also necessary to assist you to identify legal problems and in some situations to resolve them.

What you must understand though, is that the legal process is a rather inexact science or as some people would describe it, an 'art'. The skills involved are acquired by lawyers over a period of time (often after they leave law school) so in the time available in this course you are not expected to reach anywhere near the standard of lawyers in legal reasoning. So do not feel too frustrated if you find that you cannot grasp all of the principles or that there is more to the area than you are exposed to. You will appreciate the relevance of the material as we study the Law of Contract and Torts. The study of statutory interpretation equips you much more readily with a life skill. The ability to interpret and apply legislation is becoming increasingly important as so much of our every day life is regulated by government laws and by-laws

> *Let us continue with a fairy tale: It is a very popular fairy tale. The public, and especially newspaper editorialists, hate to see it doubted. Once upon a time, the Parliament made the law. The Judges only interpreted and applied it. The Executive enforced it. In this Kingdom of 'strict and complete legalism' it was considered that the Judge certainly never made new the law should be.*

(Source: Kirby 1984)

5.0 SUMMARY

Evidence may be direct or circumstantial original, oral, documentary, or real. Standard of proof is balance of probability (Civil matters) and beyond reasonable doubts (Criminal matters). That is adversarial or accusatorial. The party calling a witness elicits examination in itself. The other cross examines. The party calling him/her re-examines. Only experts may give expert evidence, and certain evidence may be privileged.

Litigation is not the only way to resolve difference. Arbitration is another. It is also adjudication. Non-adjudicative processes include: Alternative Dispute Resolution (ADR) eg. Negotiation, mediation and conciliation. Do not forget what we said about their differences, merits, and disadvantages.

6.0 TUTOR-MARKED ASSIGNMENT

1. Define the following terms:

a. Respondent
b. Interlocutory Proceedings
c. Execution
d. Service

2. Why are pleadings important in a civil litigation?

3.a. What can a court admit as evidence?
b. What is a reason for excluding hearsay evidence?
c. How is evidence presented in court?
d. What is the standard proof in a criminal trial and a civil trial?

7.0 REFERENCES/FURTHER READINGS

LRN: The Criminal Procedure All/Criminal Procedure Code.

LRN: The Evidence Act.

Study Book. Introduction to Law USQ Australia.

MODULE 3

UNIT 1 CRIMINAL LAW

CONTENTS

1.0 INTRODUCTION

At first glance, you may be wondering why there is a segment on criminal law in a course, which has as its primary focus the study of civil law, especially in a business context. The reasons for including criminal law are various but it was felt that some understanding of the criminal justice system is useful for citizens in general also, there is a clear relationship between business and crime. The increase of 'white collar' and computer crime is one fact of this.

Another reason for this study is the fact that there is considerable overlap between the criminal and civil law system. Two examples of this. If a person assaults another then they will be dealt with in the

criminal courts and may be sued in a civil court for damage for the injuries suffered. In company law there are many examples where a director who contravenes a provision of company law may be liable for a fine or imprisonment and may also be liable to compensate a person who has suffered loss as a result of the actions of the director.

2.0 OBJECTIVES

On successful completion of this unit, you should be able to:

- identify the differences between civil and criminal law
- describe the fundamental characteristics of criminal law
- describe the role of the criminal trial
- distinguish between summary and indictable offences and between arrest and summons
- describe the types of bail and outline the basis upon which bail is granted
- distinguish between *mens rea* and *actus reus*
- explain he notion of strict liability and why it is invoked
- describe the problem of 'white-colar' crime and why the law has difficulty in controlling this type of conduct.

3.0 MAIN CONTENT

3.1 Identifying Features of Criminal Law

3.1.1 Differences between Criminal Law and Civil Law

To gain an understanding of criminal law, it is useful to be aware of the essential differences between criminal law and civil law. Some of these differences will be well known to you but they bear repeating.

- Criminal law involves an action between the State and the citizen usually called the accused or the defendant, whereas the civil action has one citizen suing another. The police usually prosecute criminal offences in the Magistrate Court whereas offences in the higher courts are usually prosecuted on behalf of the state by Attorney General of the Federation or Solicitor General at the state.

- The title of civil cases are the names of one party against another whereas criminal cases in the higher courts are titled the State or R.v(/)…in the Magistrate, it is titled Police or Commissioner of Police v (?); Examples: The State v. Obi R. v. Adeleke; Police v. Haruna; Commissioner of Police v. Phillips etc.

- The **function** of criminal law is to punish the wrongdoer while the civil case compensates the individual who has been wronged.

- There are substantial **procedural** differences between criminal law and civil law. One example of this is the way an action is commenced. In the criminal case the police proceed by way of charge, summons or by arrest while the civil action begins with a claim or writ.

- Another important procedural difference centres on the **standard of proof** which for a criminal trial is proof beyond reasonable doubt while in the civil courts, it is the balance of probabilities.

- Given the different functions of criminal law and civil law, the **outcomes** are different. In the criminal sphere the defendant or accused, if found guilty, is fined or imprisoned (there are other forms of punishment) while in he civil case the successful plaintiff is usually awarded damages or granted an injunction to stop the conduct complained of. There is no attempt to punish the defendant. Quare: example damage.

3.1.2 Definition of Criminal Law

Criminal conduct is defined as the 'acts and omissions as are prohibited under appropriate penal provisions by authority of the State'. (Lord Atkin in *Proprietary Articles Trade Association v Attorney-General Canada* [1931] AC 310, 324). Under this broad definition a vast range of offences are included which might run from murder to failure to wear a seat belt. One might ask whether the latter is a 'crime' in the accepted sense of that word but it is treated as such in this course because it is an omission which is prohibited by the law. Statutory crime or offence is an act or omission which renders the person doing the act or making the omission liable to punishment under a written law: Criminal Code.

Generally speaking, there is a correlation between **crime and moral,** but this is not necessarily so. We all recognize that murder breaches our moral code but what about the failure to wear a seat belt? Conversely, selfishness or adultery may be regarded as immoral but they do not breach the Criminal Code. The lack of absolute connection with our moral code means that it is difficult to predict in advance what is a crime or as Lord Atkin (in the *Proprietary Articles* case) said it cannot be 'discerned by intuition'. This is why the simple question is whether the conduct in question is **prohibited** by the law with penal consequences.

3.1.3 Traits of Criminal Law

Gillies, *Business Law* 8th edition page 110, points to some traits of criminal law:

…its public implication (the public has an interest in State intervention; the matter is too important for the activation of the legal machinery to be left to the individual); it has a victim (there are exception for the generally regulatory offence); and that the extent of the injury inflicted by the wrong is such as to demand punishment….

Both the criminal code and the Companies and Allied Matters Act have created corporate crimes.

3.1.4 Aims of Criminal Law

While still on the nature of criminal law, it is as well to bear in mind the four aims of the criminal law as they effect those convicted of a crime.

- Retribution;
- Deterrent effect;
- Restraint or incapacitation of the offender; and
- Rehabilitation
- Reformation

SELF ASSESSMENT EXERCISE 1

1. Identify three differences between Criminal and civil Law
2. Give examples, not taken form the study guide, of where Criminal Law and moral Law differ
3. When Politicians state that they are "going tough on criminals" which of the aims of criminal law are likely to suffer?

4 what role does the victim play in the criminal process?

3.1.5 Source of Criminal Law

In Nigeria, the source of the criminal law are Statutes. Common law crimes have been enacted into statutory from and Nigeria criminal and Penal Codes have displaced the common law.

3.2 Criminal Liability

3.2.1 Elements of a Crime

A crime is established if:

- the accused has carried out certain **conduct** (known as the *actus reus)*;
- which has an **effect** which the criminal law prohibits; and
- where the act in question is done with a **guilty mind** (known as the *mens rea).*

A murder case illustrates the three requirements. The accused must have done certain acts such as shooting the victim (the *actus reus*) which leads to his death (the prohibited effect) and this must be done with intention to kill, the guilty mind (*mens rea).*

Each of these elements must be present before the crime is committed. It would not be a crime, for example, if the death in question was caused by a soldier in battle during a declared war or if the accused shot the victim by mistake. Nor is it a crime if all the accused person does is admit that they would like to murder another but they take no steps to carry out that wish. In this case you may have the guilty mind buy no *actus reus.*

The terms '*mens rea'* and '*actus reus*' are derived from the common law and are not strictly appropriate to Nigeria which has a Criminal Code and a Penal Code. Nevertheless the terms are retained here because of their widespread use in texts on criminal law and because the elements they represent are found in Code provisions. We shall now look at the terms in some more detail.

(a) *Actus Reus*

The *actus reus* is often referred to as the collective external ingredients of the crime or the physical conduct that is prohibited. Typically, the *actus reus* involves **positive** acts such as stealing another's property. However, it can involve an **omission,** where there is a **duty** to act. An example of this type of crime is the failure of parents to adequately feed a young child.

There are two main elements of the *actus reus:* the conduct must be **voluntary** and the prohibited conduct must **cause** the result in question.

(b) Conduct Must Be Voluntary

The conduct of the defendant must be voluntary in the sense that it is

controlled by the mind or will. A pure reflex action, something done while sleep walking, concussed, or in some cases of extreme intoxication, the defendant's will may not be voluntary. Suppose, a person was charged with dangerous driving causing death arising from a car accident which killed a passenger. The circumstances were that the driver fell asleep at the wheel and the car left the road and hit a tree. Since the defendant was asleep his actions were not conscious or voluntary and he would not criminally be responsible. You should not assume from this case that a defendant in such a situation will always escape criminal liability as there could be other circumstances where the offence of culpable driving may be committed or where other offences could apply.

(c) Causation

Some crimes are what are known as 'result crimes' which means that the prohibited conduct brings about a certain **result,** such as the death of another person. In this case the conduct of the accused must bring about or **cause** the result in question. The conduct need not be the direct or sole cause of the result but it must be 'an operating and substantial cause'. This is known as the concept of causation and it arises also in the law of negligence where substantially the same law applies.

In a simple case where a person shoots another then the case of death is directly attributable to the actions of the accused. However, if it could be established that the victim was already dead before the bullet left the gun, the crime of murder is not committed. Similarly, if the victim was wounded and taken to hospital but died of an illness that resulted from his poor treatment in hospital then the crime of murder may not be made out. In this case there is an intervening act, namely, the negligence of the hospital, which causes the death. The presence of an intervening act is the most common reason the prosecution in these types of cases fails to show the required level of causation.

Issues of causation do not arise in the other broad type of crime known as 'conduct' crimes where the conduct itself constitutes the crime. An example is the possession of an unlicensed firearm. No 'result' is required here, simply the possession of the firearm which is not licensed to the defendant is all the prosecution has to prove.

In some of the examples given above, the state may fail to prove an element of the offence and the defendant is acquitted. You should not take it from these examples that the defendant escapes punishment entirely. In the instance of the person dying in hospital as a result of an illness contracted there, murder may not be made out but a lesser charge of an assault occasioning grievous bodily harm could, or perhaps