

CRIMINAL DEFENCE FOR SOCIAL MOVEMENTS

OUTLINE

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1. CRIMINAL LAW IN NIGERIA: SOURCES AND SCOPE

CRIMINAL LAW v CIVIL LAW

- There are two broad categories of legal cases: civil cases and criminal cases. Civil cases deal with disputes by individuals and organisations, usually about enforcing a private right by one party against the other. However, criminal cases deal with the determination of crime and the legal punishment of criminal offenses.
- A major difference between the two is the 'weight' of evidence needed to decide the case (this is called 'burden of proof'). In criminal cases, the burden of proof is that the guilt of the accused must be shown 'beyond reasonable doubt' while in civil cases, liability is simply a matter of which party's story has the higher probability.
- The state is usually the prosecutor in criminal cases, whereas civil cases have a plaintiff and a defendant. Conviction in criminal matters usually result in punishment while civil cases do not have any punishment attached to it, other than the payment of damages or following some other court ordered action.
- Civil cases are considered to be private affairs while a criminal matter has public interest of protecting lives and property and maintaining public order. One implication for this is that while a civil matter can be settled without state involvement, criminal matters cannot be settled without the involvement of the state.

CRIMINAL LAW v CIVIL LAW (cont'd)

- In some cases, such as assault and battery, there is an overlap between civil and criminal wrongs and the rights of the individual can be enforced through either means.
- A crime is an action or omission which contravenes a state law and for which punishment is prescribed. This requires that 3 things be present; (i) an action or omission, (ii) a law that criminalises the action or omission, and (iii) punishment for the action/omission.
- Nigeria operates what is called an 'adversarial' style of criminal prosecution. This means that both the prosecutor and the accused have to prove their cases through arguments and evidence before an impartial judge. In this system, the accused is presumed innocent until proven guilty and the prosecutor has the legal burden of proving that the accused committed the crime beyond a reasonable doubt.
- As such, the task of the criminal defence lawyer or advocate is to challenge the validity and sufficiency of the prosecution's evidence, and to establish that the prosecutor has not been able to prove the crime beyond a reasonable doubt.

CONSTITUTIONAL PRINCIPLES ON CRIMINAL DEFENCE

- **Every accused person enjoys rights** which are protected in Chapter 4 of the Nigerian Constitution, especially in sections 35 (right to personal liberty) and 36 (right to fair hearing). Except where permitted in the Constitution, these rights continue to exist from arrest to judgment. Otherwise, only a court sentence or court order can strip such rights from the accused. **For instance, where a person has been arrested under the anti-gay laws, they are still entitled to the respect for their dignity as guaranteed under the Constitution. Merely because they have been arrested doesn't mean they can be paraded before cameras as the police often do in Nigeria.**
- **All accused persons are presumed innocent until proven guilty.** Consequently, the process of getting the conviction of persons who are guilty must not affect the rights of the innocent. Considering that there is a presumption of innocence for all accused persons, then all of their constitutionally entrenched rights must be protected during the course of the criminal justice process.

CONSTITUTIONAL PRINCIPLES ON CRIMINAL DEFENCE

- **The person that alleges must prove.** Generally, a person that makes an accusation has the duty to prove the guilt of the party accused. To this end an accused person does not have to prove their innocence until there exists a *prima facie* case against them. **This means that where the police or a witness claims that a person has committed a same-sex offence or is in a same-sex relationship, it is their responsibility to prove this in court and they cannot compel the accused to defend themselves from mere allegations without first proving the allegation.**
- **No double jeopardy.** This principle bars a retrial for the same offence where the offence has already been tried on the merits by a court of competent jurisdiction.
- **Right to counsel.** An accused person has the right to be represented and defended by any lawyer of their choice from the point of arrest to trial.

2. CRIMINAL LAW AND SOGIESC ISSUES

THE CRIMINALISING LAWS

- Nigeria generally criminalises and discriminates against LGBTIQ+ people under several state and federal laws.
- Federal:
 - Criminal Code Act (1916);
 - Penal Code (Northern States) Federal Provisions Act (1960);
 - Armed Forces Act (1993);
 - Same Sex Marriage (Prohibition) Act (2013).
- Some states:
 - Sharia Penal Code Law (used in twelve predominantly Muslim states in the north);
 - Same Sex Marriage (Prohibition) Law of Lagos State;
 - Prostitution and Immoral Acts (Prohibition) Law of Kano State;
 - Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law of Borno State.

SOME PROBLEMATIC ISSUES

- **Constitutionality:** The mere existence of a criminal law does not mean the law is constitutional. The existing criminal laws on SOGIESC issues are discriminatory in ways that violate the fundamental rights in the Nigerian Constitution. However, SOGIESC issues are yet to be tested to the limits under the Nigerian Constitution and so, until the Supreme Court pronounces on their validity, these laws should continue to be challenged by advocates as unconstitutional.
- **Unwritten offences:** Under section 35 of the Nigerian Constitution, a person can only be convicted for a written criminal offence and tried under an established criminal procedure. Despite this provision, LGBTIQ+ persons are often arrested for acts that do not state as offences in the criminalising laws. For example, having gay pornography on one's phone or walking or dressing in a gender-nonconforming way.
- **Intention to commit an offence:** Generally, principles of criminal responsibility requires two essential elements in an offence: (i) the *actus reus* (the offensive physical element in the act or omission); and (ii) the *mens rea* (the guilty mental negligence or intent). As such, an action does not automatically make a person guilty of a crime unless their 'mind' is also involved in the intention. However, in Nigeria, the police have arrested men for walking 'like a girl', even though there is no mental intent involved in the act, as it is not a predetermined action.

3. RELEVANT PROCEDURAL RIGHTS

DIGNITY

- The **right to dignity** of the human person especially provides that: 'Every individual is entitled to respect for the dignity of human person, and accordingly - no person shall be subjected to torture or to inhuman or degrading treatment.'
- The whole essence of this right is to preserve the dignity of the individual at whatever stage in the criminal justice system. This will extend to physical and psychological treatment.

DIGNITY (cont'd)

- The Kenyan case of *COL & GMN v. Resident Magistrate Kwale Court & Others* (Petition No. 51 of 2015), is a good example of how dignity should be respected.
- In that case, two men from Kwale County were arrested on suspicion that they might have engaged in 'carnal knowledge against the order of nature and indecent acts between adults' (in violation of the Sexual Offences Act of the Laws of Kenya). The two men were subjected to forced HIV testing and anal examination under a magistrate's order to ascertain whether they might have engaged in anal sex, consensually and in private. They were later charged with 'carnal knowledge against the order of nature and indecent acts between adults'. Their petition questioned whether it was constitutional to subject them to anal examination and whether the results of the examination can be admitted as evidence when their constitutional rights to dignity was breached in acquiring the evidence.
- The court of appeal ruled that a forced anal exam would violated the right to dignity of the accused under the Constitution of Kenya. However, because the accused consented to the exam so it was not considered a violation. The outcome of this case highlights the importance of knowing one's rights and not consenting to potential violations of the right.

PERSONAL LIBERTY

- The right to personal liberty (section 35 of the Nigerian Constitution) requires that the arrest or detention of an individual must be in accordance with the law. The right, therefore, protects the individual against the excesses of the government and its agents. For instance, the practice of detaining people while the police claim to be 'investigating' the offence is unconstitutional. The maximum time anyone should spend in police custody without a court order is 48 hours.
- It is also unconstitutional for the police to detain a person for the crime allegedly committed by another person. This often happens when the police arrest all individuals at a venue (as has happened in cases in Lagos and Abuja) for alleged crimes committed by some individuals at the place, often without the knowledge of everyone present.

FAIR HEARING

- When a person is arrested and accused of a crime, they must be promptly charged and brought before a court. Section 36 of the Nigerian Constitution guarantees an accused person a free and fair trial. This means that the accused's version of events must be heard and that the judge must be independent in determining the case. Where a judge begins to show bias or sensitivity towards an issue, the independence of the judge can be questioned in order to prevent a miscarriage of duty. All trials must be held in public. The court must be accessible to members of the public except in situations where the court believes that it may be against public interest.
- Every one is presumed innocent until proven guilty. It is very important that every accused person be informed of their offence at the point of arrest.
- Any one charged with a criminal offence is entitled to adequate time and facilities to prepare for their defence. Thus, anyone charged with a criminal offence is entitled to defend themselves in person or by legal practitioner of their own choice. Every accused person has a right to call witnesses in their defence and also to cross examine the witnesses of the prosecution. If the accused person cannot understand the language used for trial, they have a constitutional right to an interpreter.

4. THE CRIMINAL JUSTICE PROCESS

ARREST, SEARCHES, AND INVESTIGATIONS

- A criminal case can be dismissed by the court where the police or the prosecutor have failed to follow the applicable rules on the rights of the accused. In this section, we consider some of the rights that must be respected by the police/prosecutor throughout the process.
- Police often search and arrest people in Nigeria on SOGIESC-related issues in ways that are not permitted by law. Both at the police station and in court, advocates can challenge the procedure used by the police when searching and arresting the client. Searches can be conducted either of the person, of premises, or of things. While the police are generally allowed to search a person, it is clear that a search must be in order to retrieve evidence and not merely to harass the person as is often the case in arbitrary searches on the streets.
- There are **constitutional safeguards** that must be followed during searches and arrests and which can form the basis of challenging the procedure. These include: the right to be informed of the alleged offence (sections 35(3) of the Nigerian Constitution), a right to immediate police bail in certain instances (sections 17 (1&2) ACJL, S35(4) Nigerian Constitution); a right to legal representation (section 35(2) Nigerian Constitution).

ARREST, SEARCHES, AND INVESTIGATIONS (cont'd)

- Similarly, the process of search and arrest must not be in violation of the right to privacy and family life (section 37 of the Nigerian Constitution) or the right to dignity of the human person (section 34 of the Nigerian Constitution).
- The **right to silence**, provided by section 35(2) of the Nigerian Constitution provides that an arrested or detained person has the right to remain silent or avoid answering any question until after consultation with a legal practitioner or other person of their choice.
- Police station interviews are a means of fact finding and, therefore, involve interaction with suspects. This interview has to be conducted as humanely as possible and must not be tortuous. However, the police often have a practice of compelling arrested persons to write self-incriminating statements before they have consulted a legal practitioner. This practice is unconstitutional and can form the basis of challenging the procedure in an arrest.
- Consequently, a suspect must not be coerced into answering questions. Sec 3(2)(c) ACJL provides that a person shall be informed of their right to 'refuse to answer any question or make or endorse any statement.' An accused person should not be compelled to make a statement or a confession after an arrest. An accused person can also choose to make a statement only after consulting with their legal practitioner.

ARREST, SEARCHES, AND INVESTIGATIONS (cont'd)

- Another important point to note is that the police can be required to identify the offence for which they are making an arrest. This is because all **offences must be created by law**. Section 36 (12) of the Nigerian Constitution provides that 'a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law. The practice of arresting LGBTIQ+ persons on imaginary offences can be challenged under this principle. In *Aoko v. Fagbemi & ors* (1961) 1 All N.L.R. 400, woman was tried and convicted on a charge of committing adultery, which was not a crime under written law, the appellate court held that this was unconstitutional.
- During questioning, and at every stage of the criminal justice process, a suspect has a **right to have a legal counsel** represent and guide them during interviews and questioning.

ARREST, SEARCHES, AND INVESTIGATIONS (cont'd)

- It is important that an arrested person should refrain from making statements in the absence of their lawyers, as a common tactic of the police is to compel the making of a 'confessional' statement.
- A common practice in Nigeria by the police is the parading of alleged offenders before the media. This is also true for mass arrests of people accused of committing a SOGIESC offence. This practice has no constitutional or legal backing. Identification parades are only legal in a situation where where an accused person was not apprehended at the scene of the crime and the identification parade is being conducted in order to ascertain the identity of the accused person (*Biodun Bello v. State* (2017) LPELR-43742(CA)).
- In victimless crimes such as those related to SOGIESC issues, parading the alleged offenders is a violation of their procedural safeguards and will constitute a violation of the right to dignity.

BAIL

- Bail is a constitutional right available to all accused persons except those charged with a capital offence, and even those charged with capital offences can be granted bail under special circumstances. Excepting for the sharia provisions in some of the northern states, SOGIESC offences are not capital offences and, as such, the alleged offender is entitled to a bail either at the police station or in court pending the outcome of the trial.
- **Administrative bail:** a suspect has **the right to be bailed** out of police custody within a maximum of 48 hours after being arrested, otherwise they have to be charged to and remanded by a court upon the expiration of that time (sec 35(1)&(5) of the Nigerian Constitution). Where the police do not have enough evidence to charge the suspect to court, they have to release them either unconditionally or on bail. This bail is administrative bail granted by the police to ensure the attendance of the suspect for interviews and questionings during investigation.
- **Court bail:** The decision to grant bail pending trial is choice of the trial court. Nevertheless, it is expected that the trial court will exercise the choice 'judicially and judiciously' – *that is as fairly as possible*. (*Ugbabe v Federal Republic of Nigeria* (CA/L/200/2016) [2016] NGSC 82)

BAIL (cont'd)

- Generally, in considering whether to grant an application for bail pending trial, the courts will consider the following factors: the nature of the charge; the strength of the evidence which supports the charge; the gravity of the punishment in the event of conviction; the previous criminal record of the accused, if any; the probability that the accused may not surrender for trial; the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate them; the likelihood of further charge being brought against the accused; the probability of guilt; detention for the protection of the accused; the necessity to procure medical or social report pending final disposal of the case.
- While these factors will differ from case to case, it is the duty of the criminal defence advocate to put forward as much positive evidence as possible around these factors to support an application for bail. It should be emphasised that the same-sex acts prohibited by Nigerian laws are victimless crimes, and it there is no danger to the society if the accused person attends the court proceedings from home on bail. It is settled law in Nigeria that bail should not be withheld merely as punishment.

TRIAL

Developing a case theory and trial plan

- Defending a criminal case on a SOGIESC issue can be tricky in a homophobic legal environment. As such it is important not to rush into trial but to first develop a case theory and a trial plan.
- A case theory is a line of argument by the criminal defence advocate that can convince the court to grant judgment in favour of the accused. It is, essentially, a story or hypothesis based on the facts and the relevant law. The narration of the facts and the legal issues must reasonably lead to a conclusion that the accused will win the case. A good case theory must be straightforward and believable.
- A trial plan is the visual outline of how the case theory will be actualised in the course of the trial.

TRIAL (cont'd)

- **Presence of the prosecutor:** The prosecutor or complainant must be present in court when the case is fixed for hearing. Where they fail to do this, and if the court is satisfied that the prosecution had due notice of the time and place of the hearing, the defence can apply to the court to dismiss the case; unless the court having received reasonable excuse for the non-appearance or for other sufficient reason deems it fit to adjourn the hearing of the case to some future date on such terms as the court may deem just.
- **Presence of the accused:** The accused is generally expected to be present in court during the whole of the trial. While an accused person can be absent at the hearing of an interlocutory application; or can authorise their legal practitioner in writing to represent them, it is advisable that an accused is present at all times during trial.
- **The arraignment:** An arraignment is the process of taking and recording the plea of the accused to the charge before the court. The trial begins with the arraignment. For this purpose, the accused is placed before the court in the dock. The charge or information is read and explained by the registrar or other officer to the accused in the language that they understand and to the satisfaction of the court. The accused is then called upon to state their plea to the charge. The accused must have no restraints or handcuffs when being arraigned. After the charge is read, the accused may: (i) **raise a preliminary objection** such as lack of jurisdiction or a defect in charges; (ii) **plead guilty**; (ii) **plead not guilty**; and (iv) **plead guilty to another offence** not charged.

TRIAL (cont'd)

- **Evidence and proof:** The burden of proof is on the prosecution at all times, but the proof of certain facts within the knowledge of the accused can shift to the accused. However, it should be clear that the responsibility of proving a case during a criminal trial is on the prosecution. As such, the prosecution may still fail even if the accused person does not utter a word in their defence.
- **Competence and compellability:** All persons are competent to testify at a trial unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. An accused person cannot be compelled to give evidence in their own trial and the prosecutor is not allowed to make an argument that the defendant failed to give evidence because they are guilty.

TRIAL (cont'd)

- **Challenging documentary evidence:** Defects in documentary evidence (including confessional statements, expert evidence, and police reports) can be challenged during trial, when they are sought to be introduced as evidence by the prosecution.
- People arrested on SOGIE issues are often compelled to make statements by the police. However, a confessional statement, which is an admission by the accused that they committed the alleged offence, must have been made voluntarily to be admissible (section 29 Evidence Act). The statement should be brought in evidence through the investigating police office only after a proper foundation has been laid by prosecution to establish that it was made voluntarily. If the defence can show that it was obtained by oppression, torture, inhuman and degrading treatment including threats, then it would be inadmissible. Also, the confessional statement must be tendered in whole and not in part, including part favourable to the accused.

5. ADVOCACY AND CRIMINAL DEFENCE

USING STRATEGIC LITIGATION

- Criminal defense cases on SOGIESC issues can be undertaken as strategic litigation. Strategic litigation is the use of courts and litigation to attempt to create broad social change beyond the individual case at hand.
- The enforcement of criminalising laws, such as the SSMPA often presents an opportunity for strategic litigation, particularly in relation to the invasion of privacy during arrests and gathering of evidence, the vagueness of criminal liability as set out in provisions of the laws, the overall constitutionality of the criminalising provisions, and the scope of human rights limitations.
- Designing the case as a strategic litigation can be both at trial and appellate levels. Where the trial court does not factor in the constitutional issues raised in the defence, this can serve either as the basis for a 'case-stated' constitutional referral to a higher court (sec 295 Nigerian Constitution) or as grounds for an appeal.

THE ROLE OF ACTIVISTS

- LGBTIQ+ activists can undertake the following roles in ensuring a successful criminal defense process:
 - Training and educating community members on their rights and on steps to take during a criminal case process
 - Creating and implementing processes for community members to aid criminal defense, such as making 24-hour hotlines available
 - Documenting and reporting cases of human rights violations in LGBTIQ+ arrests and trials
 - Organising SOGIESC trainings for local lawyers and firms
 - Liaising with lawyers to identify opportunities for strategic litigation
 - Liaising with lawyers to develop a case theory and to select witnesses for a case

THE ROLE OF LAWYERS

- Lawyers can undertake the following roles in ensuring a successful criminal defense process:
 - Ensuring that the rights of the accused person are protected at all times and that any violations are ceased
 - Researching and familiarising with procedural safeguards for accused persons during trial
 - Using persuasive precedence from foreign law and from international law in preparing a case
 - Working closely with community activists to ensure that the litigation is guided by the needs of the community and not just by the aims of the lawyers