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ARTICLES

- Law, Morality and Medicine: The Euthanasia Debate W. Iyaniwura
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- The Relationship Between Employer and Employee According to Islamic Law Y. Y. Bambale
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- The Challenge of Revisiting the Past in Transitional Democracies: For Truth, Reconciliation and Justice in Nigeria M.T. Ladan
- The Operation of Anton Piller Order in Copyright Disputes T. F. Yerima
- International Law and Legal Regime of Resources Control and Ownership in Nigeria: A Critique Femi Ogunlade

CASE NOTES

- Non-Enforcement of Contract: A Comparative Analysis of *Kasumu v. Baba Egbe* (1956) AC 539; and *Batalha v. West Construction Company Ltd.* B. A. Omipidan
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CONTENTS

ARTICLES

	Page
Law, Morality and Medicine: The Euthanasia Debate W. Iyaniwura	1-27
The Defence of <i>Bona Fide</i> Claim of Rights in Nigeria: An Appraisal - A. Olajide-Bello	28-46
Continuities and Changes in Women's Reproductive Rights Law in Nigeria - F. Falana	47-61
Towards an Effective Judiciary in Nigeria A. Ige & U. Lamikanra	62-71
Participation of Women in Politics: Problems and Prospects - N. J. Udombana	72-90
The Role of the Police in Elections: The Nigerian Situation A. A. Idowu	91-112
Enforcement of Rights and the Problem of <i>Locus Standi</i> in Nigeria - A. Ibidapo-Obe	113-132
The Application of the Trust to Property Disputes in Nigeria - N. N. Chinwuba	133-158
Common Law and Constitutional Methods of Enforcing Human Rights in Nigeria - J. O. Ade-Raji	159-167
Iraqi Disarmament: Collective Initiative or Unilateral Action and Consequences for International Law W. A. Adebayo	168-193
Impeachment Proceedings Under the 1999 Constitution of Nigeria: A Shield or a Sword? - K. O. Amusa	194-204
The Rights of Statutory Tenants in Nigeria - H. Ijaiya	205-213
Proprietary Right in Corpses: Time to Stop the Uncertainties - R. A. Onuoha	214-234
The Relationship Between Employer and Employee According to Islamic Law - Y. Y. Bambale	235-245

The Scope and Extent of Admiralty Jurisdiction of the
Federal High Court in Maritime Claims

E. M. Akpanbang

246-269

Child Abuse in Nigeria: A Legal Appraisal

B. Abegunde

270-278

Eradication of Electoral Fraud: Some Legal
Considerations - **'Niyi Dada**

279-290

Reviewing the Legal Framework for Pension and
Retirement Rights - **E. T. Yebisi**

291-306

The Liability of Public Officers: Its Scope and Limitation
in Nigeria - **A. Taofik**

307-313

Law, Language and the Nigerian People - **A. M. Sani**

314-325

Pre-Emptive Injunctions: The Interlocutory Armoury

S.M. Tagi & H.Y. Mshelia

326-331

The Challenge of Revisiting the Past in Transitional
Democracies: For Truth, Reconciliation and Justice in
Nigeria - **M.T. Ladan**

332-353

The Operation of Anton Piller Order in Copyright
Disputes - **T.F. Yerima**

354-373

International Law and Legal Regime of Resources
Control and Ownership in Nigeria: A Critique

Femi Ogunlade

374-393

CASE NOTES

Non-Enforcement of Contract: A Comparative Analysis
of *Kasumu v. Baba Egbe* (1956) AC 539; and *Batalha*
v. West Construction Company Ltd. - **B.A. Omipidan**

394-396

Statutory Notices in the Recovery of Premises and
Lawyer's Authority: New Developments - **A.A. Oba**

397-402

STATUTE REVIEW

A Legal Analysis of the Nigerian Corrupt Practices and
Other Related Offences Act, 2000 - **A. Ibidapo-Obe**

403-414

THE DEFENCE OF BONA FIDE CLAIM OF RIGHT IN NIGERIA - AN APPRAISAL

AKEEM OLAJIDE BELLO*

INTRODUCTION

One of the aims of criminal law is the protection of property. Consequently, property offences¹ feature prominently under the Criminal Code² (hereinafter referred to as the "Code"). A central theme that runs through the definition of these offences is the requirement of *mens rea*. In property offences it is a general requirement that the accused person must have a fraudulent intent³ or that the accused person must have damaged a property belonging to another willfully and unlawfully⁴. The requirement of *mens rea* in property offences underscores the concept of criminal responsibility, a cardinal principle in criminal law. The concept of criminal responsibility expresses the idea that no one should be convicted of a crime unless some measure of subjective fault can be attributed to him. The criminal law therefore provides defences for those who cannot be said to be at fault⁵. A defence that is exclusively provided for in property offences under the Code is the defence of *bona fide* claim of right.

The interpretation and application of the defence by the courts in relation to some of the property offences has been problematic. The "literal approach" to the application of the defence has been adopted in some judicial decisions, while the "purposive approach" has been adopted in others. It is this dichotomy in the approach of the courts that Okonkwo described as disturbing and a manifestation of lack of

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1. The property offences under the Code includes the following: (a) stealing, section 383; (b) robbery, section 402; (c) demanding with menaces section 406; (d) obtaining property by false pretences section 419 and (e) malicious damage to property, section 451.
2. The Criminal Code is a Schedule to the Criminal Code Act, Cap 77 Laws of the Federation of Nigeria 1990.
3. This is the requirement in offences such as stealing, robbery, demanding with menaces, and cheating.
4. Section 451 of the Code.
5. Okonkwo & Naish, *Criminal Law In Nigeria* (2nd Ed. London: Sweet & Maxwell, 1990) at p. 66.

proper appreciation of the scope of the defence⁶. The literal approach adopts a literal interpretation of the provisions of section 23. The purposive approach adopts an interpretation aimed at avoiding perceived problems inherent in a literal interpretation. This paper intends to explore the jurisprudential basis of the defence of claim of right. This would facilitate an informed appreciation of the scope of the defence and the desirability of placing limitations on its application. The impression that one gets reading through some of the cases⁷ and textbooks⁸ on claim of right is that the defence applies with little or no restriction. This impression must have contributed to the attempt by some judges to import extraneous requirements into the application of the defence so as to place some limitations on the exercise of claim of right. This paper would therefore examine existing limitations under the Code on claim of right and suggest the introduction of additional limitations. Suggestions would be made to amend the provision of section 23 by proposing a model provision. The paper would be divided into four parts as follows:

- (i) claim of right, criminal responsibility and theoretical issues;
- (ii) application of claim of right by the courts;
- (iii) limitations on claim of right; and
- (iv) suggestions and conclusions.

6. Okonkwo, "Bonafide Claim of Right in Nigeria," (1973) J.A.L. 271.

7. In *Ohonbamu v. C.O.P.* (1990) 6 NWLR (Pt.155) 210 and *Ejike v. I.G.P.* (1961) FN.L.R. 7. where the defence was raised in circumstances which could have sustained a charge of forcible entry the court allowed the defence to avail the accused persons without adverting to the fact that forcible entry under section 81 of the Code is one of the limitations to the application of claim of right. Fortunately, the Court of Appeal in *Apamadari v. State* (1997) 3 NWLR (Pt.493)289 recognised that claim of right does not entitle a person to forcibly enter land in the possession of another.

8. See the treatment of *bona fide* Claim of Right by K.S.Chukkol, *Defences to Criminal Liability in Nigerian Law: A Critical Appraisal* pp 28-29 and Okonkwo & Naish op.cit. pp. 108-113, which made no reference to some of the limitations expressly enacted by the Code with respect to the application of the defence. Some of the limitations are contained in sections 298-294 and 81 of the Code. Okonkwo, however noted the limitation placed on section 23 by section 81 of the Code in Okonkwo, "Bona fide Claim of Right in Nigeria," (1973) J.A.L. 271. E. A. Ibeziako, in a book titled *An Outline of the Defence of Bona fide Claim of Right- Illustrated with Some Criminal Law Cases* Great Britain: Eastern Press Ltd of London and Reading, 1973) pp. 21-24 discussed in detail some of the limitations on claim of right.

Part I: Claim of Right, Criminal Responsibility and Theoretical Issues

Claim of Right and Criminal Responsibility: The concept of criminal responsibility is a cardinal principle in criminal law. It expresses the view that no one is liable for a crime without fault. The concept finds expression in the definition of most offences in terms of intention or knowledge⁹. The view that there should be no criminal liability without fault is reflected at common law in the doctrine of *mens rea*. At common law there is an irrebuttable presumption that practically every common law offence requires proof of guilty mind. The presumption is rebuttable where the offence is a statutory one¹⁰. With respect to Southern Nigeria where the Code applies Okonkwo has been argued that the common law doctrine of *mens rea* is irrelevant when considering the question of criminal responsibility. The true test of criminal responsibility is said to be the provisions of Chapter V of the Code particularly sections 24 and 25. It has been argued that sections 24 and 25 perform a function akin to that of the doctrine of *mens rea*. He noted that it is provided under section 2(4) of the Criminal Code Act that the provisions of Chapter V of the Code shall apply in relation to any offence against any legislative enactment and to all persons charged with any such offence¹¹. Section 24 of the Code provides that:

Subject to the express provisions of the Code relating to negligent act and omissions, a person is not criminally responsible for an act or omissions, which occurs independently of the exercise of his will, or for an event which occurs by accident.

This provision excludes criminal liability for an act or omission that occurs independently of the exercise of will or for an event, which occurs by accident. The word "will" in the section has been interpreted to mean not only intention to do the act or make the omission but also awareness of all the material circumstances¹². The fault required to make an offender liable under section 24 as a general requirement is that he must intend to do the act or make the omission and he must

9. Okonkwo & Naish, *Op. cit.* at p. 66.

10. *Id.* p. 67.

11. *Id.* pp.80 & 89. This view is also supported by Professor A.A.Adeyemi who noted that section 24 of the Code is the general provision concerning the requirement of mental element in Southern Nigerian Criminal Law. See A.A.Adeyemi, "Obscene and Indecent Publications" in *Nigerian Press Law*, ed. T.O. Elias (Lagos: University of Lagos and Evans Brothers Limited, 1969) p. 117.

12. Okonkwo & Naish, *Op.cit.* p.83.

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also be aware of all the material circumstances¹³.

In addition to the definition of offences to reflect the concept of liability without fault, defences are provided for those who cannot be said to be at fault¹⁴. The defence of bonafide claim of right is a defence that is designed to reflect the absence of fault on the part of a person who successfully establishes the requirements of the defence. An accused person relying on section 23 must show that the alleged criminal act or omission was done under an honest claim of right. The decision in the English case of *R. v. Bernhard*¹⁵ is a guiding light on what constitutes a claim of right. The court construing the meaning of claim of right under section 1 of the English Larceny Act, 1916 held that a person has a claim of right if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact. In other words, what is essential is that a person is honestly making a claim to a property. The property may be his in law and in fact. The property may ultimately turn out not to be his in law and in fact. The essential and determining factor is that he honestly believes that he has a claim as of right to the property. "A" may honestly believe that a coat of many colours worn by "B" is his, if it resembles so much the coat made specially for him by his mother. It would be a hard stance if the criminal law is to punish "A" for stealing the coat if he had taken it from "B" believing that the coat is his. His belief that the coat is his negates the fraudulent intent that the prosecution would ordinarily have to establish to sustain a charge of stealing¹⁶. It can therefore be safely asserted that the basis of the defence is that it negates *mens rea* in property offences. This point was well made by Stephen when he noted that:

Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be¹⁷.

13. The general requirement of mens rea under the Criminal Code has been described as salutary and it has been recommended for adoption under the Penal Code. See A.A.Adeyemi, "The Challenge of Criminology in a Developing Country: A Case Study Of Nigeria" in *International Annals of Criminology (Special Number) Non Institutional Treatment of Offenders 1971 (Vol.10-No.1)* p. 15; A.A.Adeyemi, "The Criminal Process as a Selection Instrument For The Administration of Criminal Justice" in *Nigerian Criminal Process*, ed. A.A.Adeyemi p.32.
14. Such defences include the plea of insanity, immaturity, offenders who acted in a state of unconsciousness and those who acted under compulsion.
15. (1938) 2 K.B. 264.
16. Section 383 of the Code.
17. Stephen, *History of the Criminal Law of England* Vol III at 124.

The accused person's belief in a claim of right must exist at the time the offence was committed. A belief that he may acquire a right in the future is not enough.¹⁸

Claim of Right: Justification or Excuse?

Justificatory defences are said not to be alterations of the statutory definition of the harm sought to be prevented or punished by an offence. The harm caused by justified behaviour remains a legally recognized harm which is to be avoided whenever possible. Under the justifying circumstances, however, that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest¹⁹. In excusatory defences, the deed is wrong, but the actor is excused because conditions suggest that the actor is not responsible for his deed²⁰. According to Williams, a defence is an excuse when (1) it amounts to a denial of the proscribed state of mind or negligence, or when (2) it affirms that the defendant was not a fully free and responsible agent so as to be fairly held accountable²¹. On the basis of the above analysis the following defences are classified as justificatory in nature: (a) self defence (b) necessity (c) public authority (d) discipline (e) consent and (f) superior orders²². The following defences are however, presented as excuses: (a) insanity (b) automatism (c) immaturity (d) mistake²³.

Applying the above theoretical framework to the defence of bona fide claim of right, it is submitted that the basis of the defence lies in excuse. As noted earlier a claim of right negatives the mental element required in property offences. A person who takes a property belonging to another person forcefully under an honest claim of right is not liable (subject to the limitations to be discussed later) for the offence of robbery. The society does not approve of taking a property belonging to another forcefully, but the conduct is excused on the basis not only that the accused lacks the mental element required for the offence but also on the basis that he does not deserve to be punished. According to Professor Smith, the society disapproves of what has been done but accepts that the actor should not be punished²⁴. When an accused person destroys

18. *R.v. Pollard* (1962) Q.W.N. 13; See also Carter R.A., *Criminal Law of Queensland* (4th Ed. Butterworths, 1974) at 70.

19. Paul Robinson, "Criminal Law Defences: A Systematic Analysis" (1982) 82 *Col. L.R.* at 213.

20. *Ibid.* page 221.

21. Glanville Williams, "The Theory of Excuses" (1982) *Crim. L. R.* 732.

22. C.M.V. Clarkson & H.M. Keating, *Criminal Law Text and Materials*, (London: Sweet & Maxwell, 1984) pp.319-320.

23. *Id.* page 322.

24. The Hamlyn Lectures Fortieth Series: J.C. Smith "Justification and Excuse in the Criminal Law" page. 11.

a property belonging to another under a claim of right, the defendant is excused not on the basis that his conduct is not wrongful but on the ground that his conduct is excused because of his claim of right. The implication of this approach is that an excuse destroys blame. An actor who has an excuse is not blamed. It is argued therefore that because we cannot blame the actor, punishing him is not permissible. The criminal law is an institution of blame and punishment²⁵.

However it is interesting to note that blame is not an "all or nothing" concept. Certain actors might be blamed more or less than others²⁶. A person who takes a property belonging to others claiming that the property belongs to him, may be blamed. A person who forcefully takes property, which he claims to be his in a violent manner beating up and injuring the person in possession of the property, is likely to receive a higher degree of blame.

Criminal law may impose certain conditions for the application of an excusatory defence, for example an accused person seeking to rely on the defence of provocation must establish the ingredients of the defence as stipulated in section 318 of the Code. These requirements are limitations, which aim at defining the circumstances under which the defence of provocation will be upheld. The defence of provocation when successfully established only excuses the offence of murder and reduces it to manslaughter. In other words the excuse is only partial. Whether an excuse would be partial or complete would depend on a balancing of the competing claims of moral pressure not to punish an offender and reasons of policy and practicality for not permitting the excuse²⁷. The implication of the foregoing analysis when applied to the defence of bona fide claim of right is as follows:

- (i) there is an implied admission that the interference with the property of another by an accused person is wrong;
- (ii) the claim of right by the accused person which formed the basis of the interference negates the mental element generally required in property offences;
- (iii) the accused person is excused from blame on the basis that he does not deserve to be punished and
- (iv) the criminal law may completely or partially excuse the conduct of the accused based on balancing moral considerations for allowing the defence and policy considerations in support of not allowing the defence.

25. M.V. Clarkson & H.M. Keating, *supra*, page 320-321.

26. *Id.* page 321.

27. Martin Wash. "Partial Excuses in the Criminal law" (1982) 45 M.L.R. 516 at 524- 525.

I shall now attempt to examine the application of claim of right by the courts.

Part II: Application of Claim of Right by the Courts

Section 23 of the Code provides as follows:

A person is not criminally responsible, as for an offence relating to property for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud²⁸.

Before a defence of bona fide claim of right can succeed, the accused must show by way of evidence that:

- (i) the offence for which he is charged relates to property²⁹ and that the act done or omitted to be done by him is with respect to any property;
- (ii) he honestly claimed a right to property in question, that is the property which is the subject matter of the charge³⁰; and that
- (iii) he had no intention to defraud.

If "A" takes a property belonging to "B" under a claim of right, "A" would be entitled to rely on the defence if he is charged with the offence stealing. There is little or no objection in allowing "A" to rely on the defence once he can show that he took the property under a claim of right. "A" would not be criminally responsible for the act if ultimately it is established that "A" had no right in law and in fact to the property³¹. The property would then be returned to the rightful owner. The defence would avail an accused person who takes a property situated on a disputed land, in exercise of a claim of right to the land³².

The defence would also be applicable to the offence of robbery or armed robbery. The ingredients of the offence of robbery are as:

- (i) There must be a stealing;

28. This provision is in *pari material* with section 22 of the Queensland Criminal Code.

29. Property is defined in section 1 of the Code to include everything, animate or inanimate or capable of being the subject of ownership. In *Pearce v. Paskov* (1968) W.A.R. 66. it was held that the phrase "offences relating to property" should be construed to mean exclusively offences relating to wrongful interference with the property of others.

30. *Essien v. C.O.P.* (1996) 5 NWLR (Pt. 249) 489.

31. See *R v. Benhard* (1938) 2 K.B. 264; *Dabierin & Anor v. The State* (1966) 1 All NLR 138; *Ohonbamu v. C.O.P.* (1990) 6 NWLR (Pt. 155) 201; *Nwakire v. C.O.P.* (1992) 5 NWLR (Pt. 241) 289.

32. *C.O.P. v. Otosi* (1998) 1 NWLR (Pt. 532) 166.

- (ii) The must be use or threat of the application of violence to any person or property to retain the thing stolen or to prevent or overcome resistance to its being stolen or retained³³.

It is clear that stealing is an essential ingredient of the offence of robbery. Where there is a defence to the stealing, the offence of robbery is not committed because an essential ingredient has not been proved³⁴. In other words, without stealing there is no robbery. It follows that the defence would also be available to the offence of armed robbery³⁵ under section 402 (2) of the Code.

In *R. v. Skivington*³⁶ the defence was applied to the offence of robbery. The appellant went to the offices of his employers of and his wife on a Wednesday. He drew a knife and demanded his wife's wages which according to him he had authority to collect. He pushed an assistant manager into an office where a safe was opened and there, at the point of the knife, the appellant was given two wage packets containing money. Wages were not due until Friday. At the trial on a charge of robbery with aggravation contrary to section 23 (1) of the Larceny Act, 1916 the appellant contended that he had an honest belief that he had a right to the money. The trial judge directed the jury that before the appellant could maintain a defence to the charge they must be satisfied that he had an honest belief that he was entitled to take the wages the way he did. On appeal against the resultant conviction by the High Court, the Court of Appeal's Criminal Division held that a claim of right was a defence to robbery or any aggravated form of robbery, and it was unnecessary to establish that the accused must have had also an honest belief that he was entitled to take the money in the way in which he did take it³⁷.

The defence of *bona fide* claim of right also applies to the offence of demanding property with menaces. The ingredients of the offence are as follows:

- (i) An intent to steal;
- (ii) Demanding property with threats of any injury or detriment of any kind³⁸.

33. See *Aruna V. The State* (1990) 6 NWLR (Pt. 155) 125; *Nwomukro v. The State* (1995) 1 NWLR (Pt.372) 432.

34. Okonkwo, "Bona fide Claim of Right in Nigeria" (1973) 17 J.A.L. 271.

35. The offence of armed robbery is constituted where the accused person is armed with any fire arms or any offensive weapon or he wounds any person at the time of the robbery.

36. (1967) 1 All E.R. 483.

37. See also *R. v. Boden* (1844) 1 C and K.395.; *R. v. Hemmings* (1864) 4F. and F. 50; *R V. Robinson* (1977) Crim. L.R. 173.

38. See section 406 of the Code and *I.G.P. v. Emeozo* (1957) W.N.L.R. 213.

The defence of *bona fide* claim of right is available to a person charged with demanding property with menaces. The defence would avail a claimant where he demands the payment of a debt³⁹ and threatens civil proceedings in the event of a failure to comply. There is menace (a threat of action detrimental to or unpleasant to the person addressed) but it is in the circumstances a perfectly lawful demand accompanied by a justifiable threat⁴⁰.

The defence of *bona fide* claim of right is also applicable to the offences of injury to property⁴¹. Section 451 relates to willful damage to property generally. It provides that:

Any person who willfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanor, and he is liable, if no other punishment is provided, to imprisonment for two years.

To constitute an offence under section 451 the accused person must willfully and unlawfully destroy or damage any property. The key words in the offence are "willfully", "unlawfully" and "destroy or damage". Section 440 of the Code defines unlawfully as an act which causes injury to the property of another, and which is done without his consent, unless such an act is authorized or justified or excused by law. The word, "willfully" is not defined in the Code. It has been submitted that having regard to the equation of the word "malicious"⁴² with "willful" by Lord Coleridge C.J. and Blackburn J. for the purpose of the Malicious Damage Act 1861⁴³ in *R.v. Pembleton*⁴⁴ the word "willfully" in Chapter

39. *I.G.P. v. Emeozo supra*, at page 214; Thomas J. noted that "Creditors daily threaten to sue debtors in court and no one would think the action of such a creditor would be as to result in a conviction under section 406 of the Criminal Code".

40. Smith & Hogan *Op.cit.* 607.

41. Offences relating to willful damage to property are contained in sections 443-451 of the Code. Sections 443-445 covers willful damage to property by fire. Sections 447-449 covers wilful damage to ships, while section 450 provides for willfully wounding animals.

42. In *R. v. Cunningham* (1957) 2Q.B. 396 at page 432 the Court of Criminal Appeal stated the meaning of malice as follows: "...in any statutory definition of crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it)".

43. The provisions of Chapter 41 of the Code are based on the provisions of the Malicious Damage Act 1861.

44. (1874) 12 Cox C.C. 607.

41 of the Code should bear the same meaning⁴⁵. In *Nwakire v. C.O.P.*⁴⁶ it was held that "damage" to property under section 451 of the Code is done when a property is rendered inoperative or imperfect for the purpose for which the property or object was procured such as to impose on the owner the need to expend money or efforts in restoring it to the original position.

The application of the defence to the offences of demanding with menaces, robbery and wilful damage to property raises problems and brings to the fore certain absurd consequences that may result from the defence. A desire to address these problems and absurdities has resulted in the adoption of what I christened the "purposive approach" to the application of section 23 of the Code. This approach applies the defence of *bona fide* claim of right to avoid perceived absurdities that may flow from a literal interpretation.

One significant point in the literal approach to the application of section 23 is that a claim of right will avail an accused person irrespective of whether the mode of pursuing his claim is unlawful or illegal. Indeed the defence excuses the unlawful conduct of the accused in interfering with the property of others⁴⁷. The approach of the courts in permitting the operation of the defence in this manner is no doubt in tune with a literal application of section 23 of the Code⁴⁸. A literal application of the defence may however be an open invitation to anarchy and lawlessness. The purposive approach is therefore a response to the perceived problems that may arise from a literal application of the defence. The case *State v. Okolo*⁴⁹ affords a good illustration of the rationale for the purposive approach. The accused used the services of an armed soldier to claim his own share of oil pollution compensation money from a village chief. In a charge of robbery the accused person raised the defence of claim of right. The learned trial judge rejected the defence of *bona fide* claim of right notwithstanding the fact that the accused entertained an honest belief in his claim. He observed as follows:

45. Bret & Maclean, *The Criminal Law And Procedure of the Six Southern States of Nigeria*, ed. CC.. Madarika & T. Akinola Aguda (2nd ed. London, Sweet & Maxwell, 1974) para. 2167.

46. (1991) 1 NWLR (Pt.167) 332.

47. In *R. v Skivington* supra the defence excused the accused from the charge of robbery. See also the cases of *Iroghan v. C.O. P.* (1964) M.N.L.R. 48; *Ejike v. I.G.P.* (1961) F.N.L.R. 7; and *Ohonbamu v. C.O.P.* (1990) 6 NWLR (Pt. 155) 201.

48. It is a cardinal principle in the interpretation of statutes that the where the words used in a statute is clear and unambiguous they should be given their ordinary meaning. See *Bamaiyi v. A.G. Federation* (2002) 38 WRN 1.

49. UHC/15C/170 (Unreported).

The accused may be legally entitled to the property and he may also feel satisfied that his demand is honest but when the demand is accompanied by the use of some violence or threat to life, the law negatives the legality of what may be a legitimate right in the property claimed.

The position taken in this case appears to be that illegality or unlawfulness in the way an accused person asserts his right may disqualify him from relying on the defence. It has been submitted that the decision is wrong because section 23 does not require that the conduct of a claimant should be lawful⁵⁰. It is very attractive to agree with this submission. However, the problem with this submission is that there are other provisions of the Code, which govern the application of claim of right in certain specific situations. The import of these provisions is that the claim of right should be exercised subject to certain limitations. A person exercising a claim of right must do so within the limitations provided to make the exercise of his right lawful.

The purposive approach might not have been necessary if the courts had appreciated some of the limitations placed on the application of claim of right in certain circumstances. This paper will now turn to an examination of the limitations placed by the provisions of the Code on the application of claim of right.

Limitations on Claim of Right

The provisions of sections 289 - 294 of the Code specifically govern the mode of exercise of a claim of right in variety of situations. A cardinal feature common to the provisions is that the claimant must exercise his right in such manner as to avoid harm to others⁵¹. It is lawful under these sections for a person to defend his property, either movable or immovable and for any person acting under his authority to do so⁵². It is submitted therefore that under the provisions the law require that the conduct of the claimant should be lawful. The provisions of sections

50. Okonkwo & Naish, *Op.cit.* at 111.

51. The provisions of section 289-294 do not allow the claimant to use such reasonable force as may be necessary to assert his claim of right. The provisions are different from the provision of section 282 which allows a person in peaceable possession of dwelling house to use of such force as he believes on reasonable grounds to be necessary in order to prevent the forcible breaking and entering of the dwelling house. Sections 289-294 relate to a person seeking to assert his claim of right over a property while section 282 relates to a person seeking to protect his life and property from an assailant.

52. E.A. Ibeziako, *An Outline of the Defence of Bona fide Claim of Right-Illustrated With Some Criminal Law Cases* (Great Britain: The Eastern Press Limited Of London and Reading, 1973) p. 23.

289-294 of the Code also play a very important role in enabling us to appreciate the scope of section 23 of the Code. A combined reading of sections 23 and 289-294 of the Code would reveal that the defence of claim of right in section 23 of the Code do not relieve an accused person of criminal responsibility, if the acts constituting an offence relating to property include or are accompanied by acts which constitute another offence not relating to property, e.g. an assault⁵³. It is imperative that the courts should consider the provisions of sections 289-294 when considering the defence of claim of right under section 23 of the Code.

Section 81 of the Code provides another additional limitation on the exercise of claim of right. It is an offence under the section for any person to enter a land in actual and peaceable possession of another in a manner likely to cause a breach of the peace or a reasonable apprehension of breach of the peace. The offender would be liable irrespective of whether he is entitled to enter on the land or not. In *Apamadari v. State*⁵⁴ Adamu JCA even though he did not expressly refer to section 81 of the Code, held that the appellant is not entitled under his claim of right to forcibly enter a land in actual possession of another.

⁵³ Id. p.1. In *Essien v. C.O.P.* (1996) NWLR (Pt.449) 489 the appellants were charged with the offence of breach of the peace under section 249(1) of the Code for blocking the entrance of a Church and for planting plantain suckers on same. The 2nd appellant admitted in his evidence-in-chief that he took part in planting plantain suckers at the Church as a result of their family meeting because the land is disputed. The trial Magistrate convicted the appellants under section 249(1) of the Code. The appellant unsuccessfully appealed to the High Court and the Court of Appeal against the decision relying on bona fide claim of right. Achike J.C.A in holding that the defence did not avail the accused observed as follows:

*The next issue is the defence of claim of right to property. This is a defence which is technically raised with regard to any dealing with another's property- movable or immovable- when the accused acts honestly in claim of right and without intention to defraud. The defence is subsumed under section 23 of the Criminal Code. The simple offence for which the appellants were charged is completely unrelated to any dealing with property; it is a charge relating to the conduct of the appellants in a public place. That defence is appropriate and features regularly in charges of malicious damage of economic crops on a disputed land or theft of property. The defence under section 23 of the Criminal Code of that State sought to be relied on by the appellants is inapposite to a charge under section 249(d) for conduct likely to cause a breach of the peace as much as section 81 of the same Criminal Code i.e. for the offence of forcible entry into land which is in actual and peaceable possession of another person. See *Nwachukwu v. C.O.P.* 1 ECCLR 10 and *Ejike v. I.G. of Police* (1961) 5 ENLR 7. It is therefore clear that the defence of bonafide is untenable and misconceived.*

⁵⁴ *Op.cit* at p.301.

The application of the defence to a charge of robbery implies that the offence is classified as a property offence. Should the offence of robbery be classified as a property offence for the purpose of the defence of claim of right? Is it desirable to allow a person charged with robbery to raise the defence? The offence of robbery is usually classified as property offence and is discussed by most writers on Criminal Law under theft offences or property offences⁵⁵. The goal of the offence of robbery is to punish the unlawful taking of property through the use of violence or the threat of it. However, it is important to appreciate that the victims of the offence are human beings. The horror, pain, psychological trauma etc. associated with robbery is felt by human beings and not the property sought to be stolen by the robbers. I agree with Adeyemi that criminologically, robbery is more similar to such personal offences as rape and other offences of violence against the person⁵⁶. The application of the defence to the offence of robbery is however subjected to some limitations. Section 291 of the Code provides that a person entitled by law to possession of moveable property is entitled to use force against a person in possession without a claim of right provided that no harm is done to such person. The implication of section 291 combined with section 23 of the Code it is submitted is as follows:

- (i) a person who takes a property with a claim of right from another person in circumstances that would have constituted the offence of robbery is liable for any harm caused in the process of the exercise of his claim of right;
- (ii) the claimant may be excused for the threat of violence where no actual harm has been inflicted on the victim.

In *R.V Hemmings*⁵⁷ a creditor who severely beat up his debtor and thereby obtain payment, was held not guilty of robbery. It is submitted that this authority may not be applicable in Nigeria in the light of section 291 where harm is caused to the victim⁵⁸.

It is submitted that there are compelling policy reasons to justify placing the limitations contained in section 291 of the Code on the use

55. Allen Michael, *Text Book On Criminal Law* (5th ED. London: Blackstone Press Ltd., 1999) at 393; Smith & Hogan, (9th ed. London: Butterworths, 1999) at 548; Okonkwo & Naish *Op.cit.* at 302.

56. Adeyemi A.A. "The Nature and Pattern of Crime in Nigeria Planning and Policy Implications For Crime Prevention And Law Enforcement" (1991) *JUS*. Vol. No. 4.

57. (1864)4 FF. 50.

58. Harm is defined in section 1(1) Code to mean any bodily hurt, disease, or disorder, whether permanent or temporary.

of force for the exercise of a claim of right. It is self evident that one of the most important social problems confronting us as a people, is the problem of violent crimes particularly armed robbery and a pervading culture of violence as manifested in inter-ethnic clashes, arson e.t.c. The offence of robbery is also usually the setting for the commission of other violent offences such as assault, grievous bodily harm and murder. In a society as ours that is bedeviled by illiteracy, poverty, and high crime rate it would be an invitation to anarchy to allow individuals to use force in making a claim of right to property without placing stringent limitations on the right. There is therefore a greater societal interest to be served by discouraging acts, which may encourage the use of violence or the threat of it. A person asserting a bona fide claim of right is morally permitted to assert his claim but the greater interest of ensuring law and order in the society demands that restrictions be placed on his right.

It was noted earlier that the defence of claim of right applies to the charge of demanding property with menaces. However, there is the need to place some limitations on the kind of threat of any injury or detriment that a claimant is allowed to make in a bid to protect a claim of right. If "A" is owed a sum of money by "B" there is no objection if "A" threatens to sue "B" in a court of law to recover the debt. However, the law should not allow "A" to threaten to assault "B's" son on his way from school if the debt is not paid. The use of such a threat by "A" is not a proper means of reinforcing the demand. It is therefore submitted that the provisions of section 406 of the Code be amended to incorporate the following requirements contained in section 21 of the English Theft Act 1968. Under the provisions, for an accused person charged with the offence of demanding with menaces to succeed on a claim of right he must establish the following:

- (i) that he has reasonable grounds for making the demand; and
- (ii) that the use of the menace is a proper means of reinforcing the demand

The incorporation of the above provisions in section 406 of the Criminal Code would ensure that desirable limitations are placed on the application of *bona fide* claim of right in relation to the offence of demanding with menaces.

The application of a claim of right to offences relating to damage to property also raises substantial problems, which is reflected in the bare literal and purposive approaches to the defence. We shall examine the decisions following the bare literal approach first. In *Iroaghan v. Commissioner of Police*⁵⁹ the defence of claim of right excused the

59. (1964) M.N.L.R. 48.

destruction of cement pillars, plants and barbed wire fence. In *Ejike v. Inspector General of Police*⁶⁰ the appellant hired some labourers and paid them to demolish 526 blocks on a disputed land erected by the complainant. The defence of a claim of right availed the appellant. In *Ohonbamu v. C.O.P*⁶¹ the appellant was charged, *inter alia*, with unlawfully damaging six boys quarters, cement blocks walled fence and unlawfully damaging six wooden frames. He was convicted at the Magistrates' Court and the conviction was confirmed at the High Court. The appellant appealed to the Court of Appeal. The Court allowed the appeal on the defence of bona fide claim of right.

Taking a purposive approach to the application of section 23 some courts have insisted that in addition to the accused person having a claim of right, his conduct should be reasonable. In *Nwachukwu v. C.O.P*⁶² the accused was charged with unlawful damage to property. The defence of claim of right failed. The court held that there must be some limitations to the conduct of claimant under section 23 and that the degree of force and damage must be reasonable. In *Ejike v. I.G.P*⁶³ the court emphasized the fact that it is necessary when considering the defence of bona fide claim of right to ask the question whether the conduct of the appellant was reasonable. The Court noted that the reasonableness of the conduct of the accused is pointer to the accused's state of mind. Mbanefo C.J stated that "If his act is unreasonable then it goes beyond asserting a claim of right"⁶⁴. On a strict interpretation of section 23 of the Code one cannot but agree with Okonkwo that the requirement of reasonableness is not an element of the defence in section 23⁶⁵. The Supreme Court in *Dabierin & Anor v. The State*⁶⁶ supports this position. In that case the Court held as follows:

Section 21 of the Criminal Code (Western Nigeria Criminal Code) does not require that the claims shall be a reasonable one, and it differs in this from section 23, which modifies and may altogether exclude criminal responsibility for an act done or omitted under an honest and reasonable though mistaken,

60. (1961) F.N.L.R.7.

61. (1990) 6 NWLR (Pt.155) 201.

62. (1970 - 71) 1 E.C.S.L.R..100.

63. (1961) 5 E.N.L.R. 7.

64. *Id.* pp. 9-10.

65. Okonkwo & Naish, *Op.cit.* at page 113; Okonkwo: "Bonafide Claim of Right in Nigeria" (1973) J.A.L. at page 271; O Achike, "Bona fide Claim of Right in Malicious Damage Charges: Case Note on *Okpaku and 4 Ors. v. Commissioner of Police*," (1973) Nig. J. Contemp. Law Vols. 4 Nos. 1 & 2 p. 129.

66. (1968) 1. All N.L.R. 138.

wire fence. In *Ejike v.* some labourers and land erected by the appellant. In *inter alia*, with a walled fence and was convicted at the High Court. The Court allowed the

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belief in the existence of any state of things. In our view, section 21 lay down a rule applicable to offences relating to property to the same effect as that in the definition of "Larceny" in the Larceny Act 1916, section 1 so that a claim of right exists whenever a man honestly believes that he has a lawful claim even though it may be completely unfounded in law or in fact as was held in *R.v. Skivington* (1967), 2 W.C.R 665. It is enough if the belief is honestly held and there can be no justification for reading into section 21 of the Criminal Code any implied requirement that it should also be a belief, which it was reasonable for the accused person to hold⁶⁷.

However, the issue of whether the reasonableness of the accused's conduct should be incorporated into section 23 by amendment is worthy of consideration. It would appear that Okonkwo is not in support of making the reasonableness of the conduct of the accused to be a requirement of section 23. He argues that if the accused believed that he had a right to do what he did there is absence of *mens rea* and he is free from criminal liability⁶⁸. While this is conceded, a requirement that the conduct of the accused should be reasonable is not necessarily inconsistent with the *mens rea* requirement in property offences. Such a requirement would provide an additional platform on which to evaluate the honesty of the claimant in his claim of right⁶⁹. It is submitted that the requirement that the belief of an accused in his claim of right should be honest and reasonable would not be merely cosmetic. Commenting on the twin requirement of honesty and reasonableness in the defence of mistake of fact under section 25 of the Code, Okonkwo noted that a mistake may be honest and not reasonable and conversely a mistake may appear to be reasonable and yet not be a genuine mistake⁷⁰. A twin requirement of a honest and reasonable claim of right will add value to section 23 of the Code by placing a higher and a desirable hurdle in the path of any person seeking to rely on section 23. It would impose a burden on an accused person to show that he had reasonable

67. *Id.* page 140.

68. Okonkwo: "Bona fide Claim of Right in Nigeria" (1973)J.A.L. 271 at p.277.

69. The element of reasonableness would be irrelevant in a situation in which the ownership of the land in dispute had been declared to be in the accused, for in that case the ownership of the fixtures on the land remains vested in him. He could destroy the entire thing at will. See the comments of Aniagolu J. in *Ukaegbu & Anor. v. C.O.P.* (1972) E.C.S.L.R. 207 at 210.

70. Okonkwo & Naish *Op.cit.* 105.

grounds⁷¹ to base his claim of right. If it is discovered that no such grounds exists the defence of claim of right would not avail the accused person. Where there is a subsisting judgment of a court, which has decided that title to a property vests in a person, the rival claimant would have no reasonable grounds to base any exercise of a claim of right with respect to such property. It is submitted that any purported exercise of a claim of right in such circumstances should fail on the grounds that it is unreasonable.

The need to impose additional conditions on the application of a claim of right cannot be over emphasized with respect to the offence of malicious damage to property. The majority of the cases where the accused persons have raised the defence of claim of right involve cases raising issue of ownership or title to land⁷². Rival claimants in the desire to maintain their claims to disputed land destroy structures on the land put up by their adversary. Allowing this kind of situation to continue without additional requirements beyond exercising "a honest claim of right" is surely an invitation to anarchy.

In response to the fear of anarchy and breakdown of law and order expressed in some of the decisions and in this paper concerning a literal application of section 23, Okonkwo argues that such a fear is covered by section 81 of the Code, which provides for the offence of forcible entry. Section 81 provides as follows:

Any person who in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, enters on land which is in actual and peaceable possession of another is guilty of a misdemeanor, and is liable to imprisonment for one year. It is immaterial whether he is entitled to enter on the land or not.

It is conceded that this provision would regulate activities of rival

71. The courts should adopt the test of reasonableness adopted by the Northern Region High Court in *Lamba Kunbin v. Bauchi N.A.* (1963) N.N.L.R. 49 (Reed Ag. S.P.J. & Holden J.) on the reasonableness of foresight under the Penal Code definition of culpable homicide. The court stated the test as follows: In applying the reasonable man's test the court must take into consideration, the background, education, and worldly knowledge of the individual, a person from a remote backward part of the country might well differ in this respect from an educated person. After the court has given due consideration to the person's way of life, it must apply the test to the average man in that way of life.

72. *Dabierin & Anor v. The State* (1968) 1 All NLR 138; *Ukaegbu & Anor v. C.O.P.* (1972) ECSNLR 207; *Ejike v. I.G.P.* (1961) E.N.L.R. 7; *Ohonbamu v. C.O.P.* (1990) 6NWLR (Pt. 1550) 201; *Nwakire v. C.O.P.* (19920 5 NWLR (Pt. 241) 285; *Apamdamari v. The State* (1997) 3 NWLR (Pt.493) 289.

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claimants to land in a way that would prevent breach of peace. The provision may preclude any of the rival claimants from relying on a *bona fide* claim of right where there is forcible entry of land in possession of another. However the exclusion of the defence in two unrelated provisions of the Code is rather untidy and might have given rise to some of the perceived problems relating to the application of section 23. There are 521 sections in the Code. It is undesirable to have two separate provisions having cross-purpose effect on the same subject matter in a statute without any provisions linking the two sections together. This is also the case with section 289-294 of the Code. Section 23 of the Code is drafted in such a manner as to suggest that it is not subject to any other limitations under the Code. Usually the provisions of such sections of statutes are linked together by such words as "subject to the express provision of this law", "unless otherwise expressly provided" or by a specific provision making the general provision inapplicable in relation to the provisions of the specific section. It is submitted therefore that the provisions of sections 23, 81 and 289-294 of the Code should be linked together. This may assist in making some of the limitations on the defence of claim of right, clear and apparent.

SUGGESTIONS AND CONCLUSION

The foregoing analysis of section 23 of the Code is to demonstrate the need to review that provision. The provision of section 23 indirectly encourages the use of self-help in protecting property. The application of the defence to the offences of robbery, demanding property with menaces, and willful damage to property generally without incorporating provisions setting out limitations is undesirable. Nigeria as a nation is battling to solve the problems of violent crimes, inter-ethnic bloody confrontations, religious riots etc. Against the background of our socio-economic circumstances it is imperative that the law should endeavour to discourage the use of self-help in settling disputes. In *Apamadari v. The State*⁷³ the court emphasized the need for a person relying on claim of right to follow the due process of law. The appellants were charged with six counts of offences including conspiracy, willful damage to properties and threat to life. The appellant with seven other accused persons hired as thugs damaged a three-storey building, three bungalow buildings, etc belonging to the complainant. The appellant claimed ownership of the land on which the properties were built and tendered a deed of transfer conveying the land to him. He raised the defence of *bona fide* claim of right. The defence failed at the Magistrates' Court,

73. (1997) 3 NWLR (Pt. 493) 289.

the High Court, and at the Court of Appeal. Adamu J.C.A. delivering the judgment of the court noted that:

The mere fact that part of the land upon which the properties damaged were erected was owned or purchased by the appellant does not entitle him to forcibly enter the buildings and destroy them. In my view the action of the appellants was illegal and amounted to taking the law into their hands by their forcible entry and damage or destruction to the property which was then in possession of PW1. ... the appellants entry into the property was illegal and their demolition of the property was a criminal act and a wanton disregard to the rights of others. When the appellants claimed to be exercising their right and they entered and destroyed the building of PW1 they did not do so through the due process of law. Their act was consequently illegal and unlawful (or willful as used in section 451). It is pertinent to recall the jurisprudential concept that wherever there is right there is also a corresponding duty. In the present case apart from the duty to PW1. (i.e. in not trespassing upon and damaging his properties) they also have a public duty to be law abiding citizens and maintain peace and order in the society. When this fundamental duty of the appellants is weighed against their purported claim of right which had not been declared through due process of law) the willfulness or unlawfulness of their action will be glaringly seen. Consequently the appellants cannot be helped by the defence of section 23 of Criminal Code⁷⁴.

Requiring the citizens to resort to due process of law would inevitably bring to forefront the relevance of appropriate machineries for the settlement of disputes. The Nigerian Constitution has vested the courts with power to adjudicate on questions concerning the civil rights and obligations of any person⁷⁴. The need for a holistic reform of the machinery for the administration of justice becomes pertinent. If citizens are expected to refer disputes to the courts, (which is the ideal) an efficient justice delivery system is a *sine qua non* to building confidence and faith in our system of administration of justice. Our justice delivery system should be reformed to enhance its efficacy and speed. The government should also encourage other means of dispute settlement.

Finally it is our humble submission that a redraft of section 23 of the Code incorporating the suggestions in this paper could be as follows:

Subject to the provision of sections 81 and 298 – 294 of this Code a person is not criminally responsible, for an offence relating to property for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right. Provided that he has reasonable grounds for making the claim and the act or the omission is a proper means of reinforcing or protecting his claim of right and it does not involve harm or injury to others.

74. *Id.* p 301.