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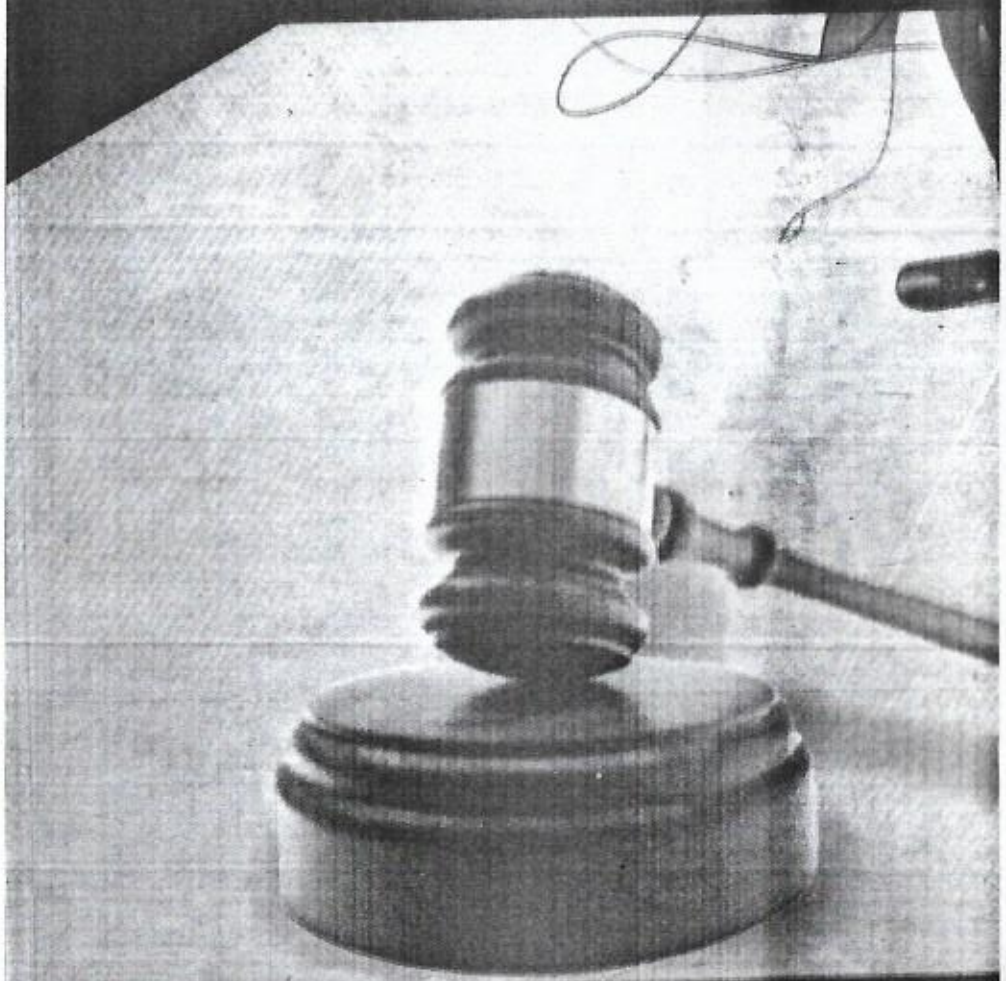

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Penal Jurisdiction of the State in Nigerian Criminal Jurisprudence: Any Justification Thereof?

By

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Introduction

One salient feature of criminal justice administration in Nigeria, as in all common law jurisdictions, is that a victim of a crime is not a party in the proceedings. Unlike civil justice system wherein the usual parties are the plaintiff(s) and the defendant(s) who were at least deemed personally involved in the effect and the cause of the civil wrong, the real victim of a criminal act is at best a mere witness. By a force of a legal fiction, the State in a criminal trial becomes the complainant while the alleged offender is the defendant or the accused person[1]. The ready-to-hand reason given is that crime is a violation of the State laws made for the security, order and good government of the society. While the Commissioner of Police, or the Inspector General of Police within the Federal Capital, represents the State in all criminal proceedings in Magistrate's courts in Nigeria[2], the Attorney General represents the State in all the State's High Courts. However, unlike civil trials involving the State wherein the Attorney General is usually a party, the appellation "the State" is retained once it is a criminal proceeding. At the Federal High Court, the Attorney General of the Federation (A.G.F.) represents the Federation but does it under the name "Federal Republic of Nigeria" (F.R.N.). The matter would be different in civil proceedings involving the Federal Government or the Federal Capital Territory wherein the A.G.F as a party retains his official name. The implication is that no private legal practitioner can institute criminal proceedings unless such practitioner is seized with a fiat from the relevant Attorney General, and which fiat[3] must be produced in court before the commencement of the proceedings[4]. In this paper, all the complainants be it the Commissioner of Police, Inspector-General of Police, the State or the F.R.N are all subsumed under our umbrella term "the State".

It is the intendment of this paper to jurisprudentially furnish reasons why the State assumes the criminal and punitive jurisdiction of its territory to the extent of making itself a party and indeed the complainant in a criminal trial. In other words, this study examines the rationale on which the State rather than the individual or group wronged takes up the authority of prosecuting the suspected offender within the geographical area covered by it. Thus, what is the basis on which the punitive right of the State is founded? What locus standi has the State in assuming the legal power to prescribe and punish criminals in modern societies? Indeed, what are grounds for regarding crimes as offences against the State rather than against the person directly injured by the act of an offender? Why is the victim seen merely as a witness in adjectival criminal law?

There is no gainsaying that a proper response to the above jurisprudential questions will involve an analytical consideration of the purpose of the State and the role of law, in this situation, criminal law, in the maintenance of order in the society. It also borders on how the State uses criminal law as an instrument of social control. It is upon the examination of these issues that one will locate the grounds of the penal jurisdiction of the State. But before then, it may be apt to know the meaning of the State.

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[1] The terminological option of using the term "accused person" or "defendant" is a result of the plurality of criminal justice systems in Nigeria. Under section 1 of the **Criminal Procedure Code**, Laws of the Northern States of Nigeria 1963, the expression "accused person" is used to define persons who are charged with the commission of a crime, arrested persons and persons who are the subject of a complaint or First Information Report (FIR). On the other hand, section 1 of the Criminal Procedure Act uses the term "defendant" to denote any person against whom a complaint of a criminal nature is made. However, it does seem that the use of either "accused person" or "defendant", whether in the North or the South, to describe an alleged offender on the face of a charge is permissible. The necessary caution is that consistency must be the guide about whichever expression is used to describe the person on trial.

[2] Although it was contended in some circles that police power of prosecution is limited to Magistrate, Area and Customary courts, it has been held by the Court of Appeal Abuja Division that the Police could represent the State in only superior courts of records (**Obuseme v. C.O.P.** (1998) N.W. L.R. (pt 575) 547). In **F.R.N v. Osahon** (2006) 5 N.W.L.R (pt 973) 361, it is even held that the Police can represent the State even in the Supreme Court. This police power is however subject to the constitutional powers of the relevant Attorney General.

[3] The fiat is sequel to an endorsement on the information by a law officer certifying that he has seen such information and does not intend to prosecute the offence contained therein at the instance of the public (see section 342 of C.P.A). While the Constitution of the Federal Republic of Nigeria 1999 pursuant to its sections 174 and 211 vests authority on the A.G to elect whether to institute criminal proceedings or not. It does seem the A.G does not enjoy the discretion to endorse or not to endorse private information. The A.G. can indeed be compelled to endorse private information via a *mandamus*. (**Fawehinmi v. Akilu** (1987) 11 12 S.C.N.J. 151; **A.G. Anambra v. Nwoboda** (1992) 7 N.W.L.R. (pt 256). However, in some States, the right of a private person to institute criminal proceeding is quite curtailed. In Lagos, such right is limited to the offences of perjury and any non-indictable offences (**Attake v. Mene Afejuku** (1996) N.S.C.C., (1996) 3NWLR (pt 437) 483).

[4] **Adewumi v. F.R.N** (2007) All F.W.L.R. (pt 368) 1000.

The Meaning of the State

Although scholars are not agreed on how the State originated[5], they are nevertheless united on the meaning and purpose of the State. From Aristotle to present day political philosophers and philosophers of law, the State, though variously defined, has always been designated by some common features and characteristics. According to Aristotle, the State is "the most sovereign association formed with a view to some good purpose[6]". Being the sovereign or supreme association, the State is described by Aristotle as "a natural end and culmination of all other earlier associations[7]" such as the family. Fagothey similarly defines the State thus:

> By a state we mean not just a body of rulers, a government, but an organic community, both governor and the governed, who occupy a given territory and under some independent polity or form of rulership sought by public action and adequate human good[8].

What is salient in the above definition is the sense of organic unity and territoriality embedded in the notion of the State. However, the fact of the need for a government and body of rulers cannot be dispensed with in the modern understanding of the State. No wonder, Sanni defines the State as "an organized political community with a definite territory, and identifiable population with its apparatus of government"[9]. Again, the integrative element of law and the attendant issues of rights in the description of the State have been underscored by Cicero as adopted by Okwudiba Nnoli:

> The people's affairs and the people is not every group of men associated in any manner, but it is the coming together of a considerable number of men who are united by a common agreement about law and rights and by the desire to participate in mutual advantages[10].

This means that the State is a corporate entity in which its membership is the common possession of all its citizens. It does not belong to any one person nor did one person create it. Rather, a State is a community of group of persons coming together and forming a body, which can be advantageous to all. It is therefore "a distinct set of political institutions whose specific concern is with the organization of domination in the name of common interest, within a delimited territory[11]". Noteworthy, however, is that the State for the purpose of criminal justice can, mutatis mutandis, be the central unit or the federating units in a federal structure.

Common Good and the Criminal Jurisdiction of the State

It goes without saying that one main purpose of the State is the provision of those facilities which the individual, left on his own, would not be able to or at best would be extremely difficult for him to afford in view of the realization of his goals and destiny as a human person. Such facilities include, inter alia, the security of life and property, and peaceful co-existence in a community populated by persons of diverse characters and orientations. It thus becomes necessary that mechanisms for social integration and engineering be introduced for a smooth development of a human society and achievement of the common good. No doubt, one such integrative mechanism is law and the penal system[12].

Therefore, the right of the State to punish criminals is indispensable to the safeguard of order in the society, which constitutes a highly important aspect of the common good. Hence, an important object of all punishments is the defence of the common good. The State, via the penal system, strives to secure the safety of the legal order by means of education of the citizens, be it by general or special prevention, seclusion or

[5] The competing theories on the origin of the State include social contract theory, theory of divine origin, theory of force, patriarchal theory, matriarchal theory, evolutionary theory, etc. Cf. A.Appadorai, **The Substance of Politics**, Oxford University Press, Delhi, 1975, pp.19-37.
[6] Aristotle, "The Politics I.1" in R. McKeon, **The Basic Works of Aristotle**, Random House, New York, 1941, p.1127.
[7] *Ibid.*
[8] A.Fagothey, **Right and Reason: Ethics in Theory and Practice**, C. V. Mosby Company, U.S.A., 1985, p.427.
[9] A. O. Sanni, "Law in its Social Context" in A.O Sanni (ed.), **Introduction to Nigerian Legal Method**, Kunnel Publishing House, Ile-Ife, 1999, p.15.
[10] O.Nnoli, **Introduction to Politics**, Toran Publishers, Owerri, 1986, p.23.
[11] I. McLean & A. McMillan (eds.), **Oxford Concise Dictionary of Politics**, Oxford University Press, New York, 2003, p.512.
[12] Cf. H. C. Bredemeier, "Law as an Integrative Mechanism" in V.I. Aubert (ed.), **Sociology of Law**, Penguin Books Ltd., Canada, 1969, pp.52-67.

killing of dangerous and incorrigible offenders, and the provision of reparation to the extent that this is possible.

Moreover, sociological studies show that criminal acts cause injury not only to the immediate victim, but also the harmonious order of justice in the community at large. This is perhaps why Farrar and Dugdale view criminal law as that branch of law "concerned with acts or omissions which are contrary to public order and society as a whole"[13]. That is to say, the criminal wrong has a destabilizing effect on the social order, which has to be repaid. It is thus the function of the community to determine which satisfaction (punishment) it will consider due reparation. Rather than to the individual victim who may not be able to enforce the reparation, punishment is left to the hands of the State armed, as it were, with necessary coercive apparatus and machineries.

Again, penal legislation and enforcement by the State instruct the citizenry on the inadmissibility of certain conducts, insofar as they offend against the common good, and by means of the attached penalties, strive to confirm them in their legal allegiance. Too, the actual infliction of the penalty on the offender expresses public disapproval of the deed and by this means undergirds the validity of the norm. In this sense, the criminal jurisdiction of the State becomes an instrument of preservation of societal norm. Besides, the protection of the common weal demands that criminals be prevented from further crimes by sufficiently safe means. Certainly, such safety measures as required for the protection of the public are better taken care of by the State rather than by the individual victim.

Criminal Justice and Sovereignty of the State

The idea of "sovereignty" in legal studies is not unequivocal. The meaning, which the term expresses in legal positivism, is not immediately in tandem with its denotation in international law. In the later sense, sovereignty signifies the independence or the authority a state has, to the exclusion of every other state, to exercise the functions of

[13] J.H.Farrar & A.M.Dugdale, Introduction to Legal Method, Sweet & Maxwell, London, 1990, pp.38-39.

a state. This type of sovereignty, which is territorial in nature, relates to the exclusivity of the competence of the state regarding its own territory[14]. This sovereignty is always vis-à-vis the rights of other states and of international bodies. The above notion of sovereignty is to a great extent not in issue in the present discursion.

In spite of numerous trenchant criticisms[15] against John Austin's command theory of law[16], the meaning of sovereignty enunciated by him approximates, though not exactly, to that of our subject matter. Sovereignty here invokes the idea of an unfettered power of promulgating and enforcing legal rules. In this understanding of sovereignty, the state becomes a corporate entity with an organized will, while the members of that state constitute the citizenry. However, sovereignty in this sense is a function of law. The law can vest sovereignty on a person, a group of persons, or many persons. But at any point, the sovereign is vested with enormous power to determine the running of the polity even if he is not the Austinian 'uncommanded commander'.

Be that as it may, just as law generally is related to the idea of State sovereignty, so is criminal justice system. The individual does not make law. Law is made and enforced by the appropriate authority. Thomas Aquinas puts this succinctly:

> The promulgation of law is the business either of the whole community, or of the political person whose duty is the care of the common good. A private person has no authority to compel right living. He may only advise, but if his advice is not accepted, he has no power of compulsion but law has power of compulsion[17].

John Austin, in spite of the many issues raised by his definition of law, is equally convinced that law is the "command of the sovereign"[18]. Thus, through many years of

[14] Judge Huber, Island of Palmas case, 2 RIAA, pp. 329, 838 (1928); 4 ILR pp.103 104.
[15] Austin's command theory has been faulted on several grounds. For instance the existence of "no-command" laws, illimitability of sovereign power, subjection of citizens to obey even draconic laws, indivisibility and continuity of sovereignty, etc constitute the points and counterpoints along which the theory is criticized. *Cf.* F. Adamolekun, **Jurisprudence**, Lexis Nexis, Butherworths, 2009, pp. 188 125).
[16] For Austin's theory, see J. Austin, **The Province of Jurisprudence Determined.** Cited in F. Adamolekun, *Op. Cit.* pp. 111 125.
[17] T. Aquinas, **Summa Theologiae**, Ia IIae, q. 90, a. 4.
[18] J. Austin, **The Province of Jurisprudence Determined.**

hard struggle and revolutions, sovereign power in most countries of the world which hitherto was in the hands of few individual rulers under the guise of the theory of divine right of kings, was now vested in the people collectively who now express their sovereign power through the State and its government. No wonder, section 14 (2) (a) of the Constitution of the Federal Republic of Nigeria 1999 provides that "sovereignty belongs to the people of Nigeria from whom government through the Constitution derives all its powers and authority".

It therefore follows that in the organization of modern democratic State, there is a distinction between sovereignty de jure and sovereignty de facto. While the former belongs to the people, the latter is vested in the State only through which way the people can exercise their sovereign power. In this way, the State becomes, in the views of Dennis Lloyd, a personification, for legal purposes, of all ramifications of legal authority, and though particular parts of that authority, including even the sovereign legislative power, may be reposed in some particular person or body, ultimately that power is regarded as derived from the State itself[19]. This certainly forms a basis of the modern State's assumption of criminal and penal jurisdiction over wrongs committed on the individual victims by the offenders.

In the light of the above considerations, self help in criminal and penal justice is no longer acceptable. The situation where people suspected of stealing, for instance, are lynched or burnt alive in major Nigerian cities is quite contrary to the established procedure for adjudication over criminal matters. This practice by which the mob by way of self-help dispenses justice instanta without recourse to law is fraught with many inadequacies such as the likelihood of punishing an innocent person without affording him the fundamental right of fair hearing. Thus, it is partly to ensure the necessary procedural safeguards that the State prohibits self-help and takes on the role of punishing the offender.

[19] D. Lloyd, **The Idea of Law**, Penguin Books, London, 1991, p.173.

Criminal Justice and the Idea of Social Contract

Relevant to the criminal jurisdiction of the state is the notion of social contract. As an account of the origin of the state, the social contract theory believes that the state is the result of an agreement entered into by men who originally had no governmental organization. Although this idea was entertained in the thoughts of very many ancient and medieval philosophers and jurists such as Maurya (c.321 300 B.C), Plato (428-347), Manegold (11th C), St. Thomas Aquinas (1225 1274), etc, the social contract as a theory of the origin of the state blossomed in the political philosophies of Thomas Hobbes (1588 1679), John Locke (1632 1704) and Jean Jacques Rousseau (1712 1778). In spite of the nuances and the peculiarities of their respective propositions, the theorists agree that at a particular point in time, either the individuals or the collectivity surrender their rights to either the community or the government for the purposes of initiating and maintaining a peaceful, strong, harmonious, humane and orderly society where life will no longer, according to Hobbes, be "short, nasty and brutish", nor would man remain a "homo homini lupus" (man being a wolf to man)[20]. Whether or not this surrender of rights is absolute or contingent upon certain conditions is a matter of individual philosophical reflections among the theorists.

There is therefore, no doubt, that the criminal and punitive powers of the state form a cardinal point on the trajectory of the above philosophical notion. It has thus been argued that the powers and jurisdiction, which the state assumes to prosecute and punish criminals, derive from the contributory surrender of the individuals' right (in this case victims' right) to punish and retaliate the criminal injuries inflicted on them by offenders. It is quite true that this school of criminal jurisprudence would rise or fall with the success or failure of the theory of social contract[21]. Yet the advocates believe that the transfer of the prosecutory and punitive rights to the state is congenial as the state is much more seized with the objectivity, the machinery and structures

[20] T. Hobbes, **Leviathan**, Collins, Great Britain, 1976. (first published in 1651), pp 173 186.

[21] A number of criticisms have been made against the theory. First, some scholars hold that historically the theory is untenable as there was no one eyewitness to the contract. The theory is at best a fiction. Secondly, even if the contract took place, can it necessarily bind the descendants of those who originally entered into the contract? Thirdly, it has been argued that the theory is dangerous in practice as it is favourable to anarchy. This is because both the state and its institutions are regarded as the product of individual will, and as such will have no sufficient authority when they contradict this individual will. Again, the theory, according to some jurists, is illogical since it presupposes a certain political consciousness in a people merely living in a state of nature as would only be possible in individuals who are already living in a state. Yet with all these defects, the theory still reminds the government of those human purposes, which the state can serve, and which alone can justify its existence (cf Appadorai, *Op. Cit.*, pp 29 30).

necessary for adequate dispensation of criminal justice whether in its distributive, retributive or corrective dimension. The individual victim would likely not be able to measure correctly the criminal liability of the offender vis-à-vis the proportion of criminal act committed against him. Nor would he have the required adjudicatory apparatuses that are germane for maintenance of due process.

Criminal Justice and Jurisprudence of Interests

The tension between the state (community) and the individual has been a matter for serious discussion among scholars within the province of sociological jurisprudence. Certainly, these considerations are quite relevant to the subject matter under discourse. While Hegel (1770 1831)[22] and Marx (1818 1883)[23] mainly concentrate their views in this regard on political and economic sociologies respectively, Bentham (1748 1832) and Jhering (1818 1892) relate the discussion to law. Although viewpoints of departure of these scholars seem diametrically opposed to each other, yet there is a convergence in their viewpoints of arrival.

Bentham is an utilitarian philosopher and an egalitarian. He sees the individual as the most important unit of a society and as such must be left to pursue his own happiness. For him, the community interest is by no means greater in value than that of the individual. In the province of economics, he is an avant-garde of the laissez-faire doctrine that favours free economic enterprise and opposes any governmental control or regulation over economic practices. Nevertheless, Bentham realizes that in any community there may be conflict of interest between those of one member and those of others, or between the individual's and those of the community as a corporate body. As a result, Bentham conceded some limitations on the individual's freedom of pursuing his happiness. Although it is not immediately clear in his thought whether this limitation can be effected via a justice system as he flatly rejects the idea of justice, yet Bentham theorizes that the individual cannot be isolated from other members of the society but must interact with them. The individual is thus affected by what affects other individuals in the society such as crime. Therefore, the happiness

[22] Cf. G.W.F Hegel, **Philosophy of Right**, (trans. T.M. Knox), Clarendon Press, Oxford, 1942, pp.20-45.
[23] Cf. K. Marx, **The German Ideology**, (ed. R. Paschal), International Publishers, New York, 1947,pp.15-19.

of the individual would be enhanced once, for instance, crime is eradicated from the society. Consequently, Bentham concedes to the curtailment of individual's freedom to pursue his own happiness for the purpose of balancing of interests. Strangely, for Bentham, need for law would immediately fizzle out once these interests had been balanced and equal opportunity created among individual members of the society[24].

On other hand, Jhering, a German jurist, puts the society over the individual. He sees the society as a machine with man merely as its part. For him, laws are mere instruments for serving the needs of the society, and which purpose is purely for the promotion and protection of the interests of society. Jhering holds that all juridical thoughts and actions must be guided by this purpose. There is no gainsaying that according to Jhering, the purpose of the society is to fulfill human wants which the individual cannot satisfy alone. He divides these wants into three categories. The first group consists of extra-legal wants, which, fulfilled by nature, do not require the intervention of law such as food, sleep, air and so on. The second group is comprised of those wants that are referred to as "mixed-legal". Both nature and law play same role. Hence, although these wants are based on natural instinct of man and can be satisfied without law, legal regulations make them more secure. According to Jhering, preservation of life, reproduction, labour, and trade constitute the most fundamental ones. There is however the third category of wants which are purely legal. These wants are artificial and peculiar to man in society. They include, for instance, the provision of public funds through rates and taxes, maintenance of an army, etc.

Like Bentham, Jhering recognizes the possibility of conflict of interest. But unlike Bentham who holds that these conflicts would at a point disappear, Jhering believes they would always be there. Jhering thus sets out to construct his "interresen jurisprudenz" (jurisprudence of interest) on this Archimedean standpoint. Jhering argues that in society, the conflict of interests between individuals inter se, and between individuals and the state or community can be reconciled through various instrumentalities such as morality, religion and law. He nevertheless explains that

[24] J. Bentham, **The Principles of Morals and Legislation**, Hafner Publishing Company, New York, 1947, chapters 1&2.

even as the individual is the basis of all legal rules, he must however be seen as a member of a higher legal unit standing above him, such as the state. Jhering therefore puts the state above the individual, reversing, as it were Bentham's postulate[25].

However that may be, in spite of the divergence of their opinions, Bentham and Jhering agree on the necessity of the state in the resolution of conflict of interests. The state can do this through, for instance, enactment of laws, prosecution of crimes, and punishment of offenders. It is thus to balance the conflict of interests and to better and objectively do so that the state assumes the total jurisdiction to prosecute and dispense criminal justice. In Nigeria, a good instance of where the state can use legislation to prevent conflicts of interest is the clawback provision of the Constitution. An example is the derogation in section 33 of the Constitution of the Federal Republic of Nigeria 1999 which provides that one's right to life is forfeited at the event of the " execution of the sentence of a court in respect of a criminal offence of which he has been found guilty." The implication is that the pursuit of one's interests, which culminates in the commission of a capital offence, is met with death penalty on the offender in order to enhance the corporate interests of the society on the one hand and the interest of other persons on the other hand. Again, the exercise of one's freedom of liberty[26] and movement[27] which are purely and primarily individual interests can be curtailed via imprisonment if convicted of certain offences, for the purpose of providing enabling atmosphere for the promotion of communal interest. Surely, the Nigerian Constitution[28] harbours a general clawback provision by which every individual's freedom to pursue and promote his interests is tested from the point of view of whether or not it respects the communal interest of defence, public safety, public order, public morality, public health, or for the purpose of protecting the rights and freedom of other persons. It thus appears that for adequate possible adjudication and sanctions in relation to these matters, the state is saddled with enormous responsibility including that of execution of proportionate and well-considered penalties.

[25] Cited in Adaramola. See footnote 15, pp 259-262.
[26] Constitution of the Federal Republic of Nigeria 1999, section 35.
[27] Ibid, section 41
[28] Ibid, section 45

Conclusion

It is quite glaring from this study that the total exercise of criminal jurisdiction by the State is in accord with the modern notion of the State. As a premise on the principle of common good and the doctrine of sovereignty, the reality is that the individual victim is striped of his power to punish offenders, and which power, as though in a social pact, is wholly transferred to the State. The implication is that State's jurisdiction in this regard is really total. The State creates offences on the basis of nulla crimen sine leges (no crime without law)[29]. The State prosecutes offenders at the event of their transgressing against the law. The State as the judiciary accepts and assumes the role of an arbiter in a criminal proceeding. It is also the same State that punishes the convict. Does the scenario therefore not amount to the State being a judge in its own case? Does the overbearing nature of the State often not influence the judgments of the courts especially in criminal disputes?

However that may be, the State is better placed to perform the role under discussion. It is endowed with the machinery and paraphernalia necessary for dispensation of criminal justice. The legislature, the police, the court and the prison are all State structures put in place for the orderly and responsible administration of justice. No doubt, the State has the better socio-economic means to institute these apparatuses which happily eclipse the practice of self-help by individual victims who are governed by their whims and caprices.

But there must be a caveat. The State must be guided by the interest of the common good. It is because of this that the legislature must make good and enforceable laws. This is also why the police must stand tall to its duties and discharge them diligently and responsibly. The judiciary must also have justice and truth as its girdle and helmet in exercising its adjudicatory roles.

[29] Ibid, section 36(12)