

LEGAL CAPACITY OF PRISONERS TO SUE OR BE SUED: A CASE FOR EXPANDING THE SCOPE OF LEGAL DISABILITY

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Abstract

The law recognizes that prisoners retain their constitutional rights that are not inconsistent with the reason and conditions of their imprisonment. In particular, prisoners are considered to retain the right to property and the right to have access to the courts for the protection and defense of their residual constitutional rights. And under the law, prisoners who possess the requisite mental and intellectual abilities are deemed to have legal capacity to sue or be sued. But in reality, prisoners are effectively disabled from exercising the right or legal capacity to institute civil action or enter defense for the purpose of protecting or defending their right to property. This article critically examines the legal capacity of prisoners to sue or enter defense when sued in civil action that involves their right to property or other proprietary interests. The article proposes an expansion of the scope of the existing concept of legal disability to admit of prisoners as suffering a legal disability by reason of incarceration. The focus of the article is a recondite area of prisoners' right in Nigeria as such its main objective is to attract and develop academic discourse for policy considerations towards protecting prisoners' fundamental rights and proprietary interests.

Keywords: Prisoners' right, legal disability, legal capacity, constitutional rights, property right

1. Introduction

It is elementary learning in law that a person must have the requisite legal capacity to be a party to a lawsuit, either to sue as a plaintiff or to be sued as a defendant. There is a category of persons considered as *non sui juris* or not having active legal capacity under the law¹. For example, a child who has not attained the age of majority and an adult person who is insane or mentally retarded due to illness, age or infirmity of the mind, have a legal disability. The legal disability is that though the child and the insane adult have legal rights, they lack the requisite legal capacity for the purpose of instituting a civil action to assert or defend their legal rights. However, legal disability does not imply that persons in this category are totally excluded from being parties to civil actions. Their claims or defenses can be activated on their behalf by a legal representative, such as a parent, guardian, trustee, or executor².

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¹ See the categorizations in Lewis, O. (2011) Advancing legal capacity jurisprudence. *European Human Rights Law Review*, 6, pp. 700–714

² For example, Order 11, rule 9 of the High Court of Lagos State Civil Procedure Rules 2019 provides that a person under legal disability may enter appearance through his Guardian. See also

The law also ensures that this category of persons can possess the requisite legal capacity to sue or be sued upon the cessation of their legal disability; when a minor attains majority or when an insane adult regains sanity. For instance, in recognition of legal disability most statutes of limitations make exception for action to be instituted outside the limitation period where any of the parties suffered legal disability during the prescribed period³. This is because where a statute of limitation prescribes a period within which an action should be instituted, no such action can be validly instituted after the expiration of the prescribed period. An action instituted after the expiration of the prescribed limitation period will become statute barred⁴. As an exception for legal disability, therefore, statutes of limitations may be tolled or suspended during the relevant period of legal disability, and then begins to run again after cessation of the legal disability⁵.

The concept of legal disability therefore encompasses factual circumstances where certain persons with legal rights are deemed not mentally or physically capable to act for the purpose of protecting or defending their legal rights. However, legal disability is not ascribed to persons in prison confinement who cannot institute or defend their rights that are not taken away by the circumstances of their confinement. The law appears to be now settled that prisoners, in spite of their imprisonment, retains all civil rights which are not taken away expressly or by necessary implication. Courts across different jurisdictions have consistently held that prisoners are entitled to their civil or constitutional rights that are not lawfully abridged by their convictions and incarceration⁶. The common view is that though prisoners' rights may be diminished by the needs and exigencies of the institutional environment, prisoners are not wholly stripped of constitutional protections when they are imprisoned for crimes for which they have been convicted. According to Chief Justice Earl Warren in *Wolff v. McDonnell*⁷, "there is no iron curtain drawn between the Constitution and the prisons".

Order 15, rule 9; Under this High Court Rules, persons under legal disability means persons who lack the capacity to institute or defend any proceedings by reason of age, insanity, unsoundness of mind, or otherwise. See Order 1, rule 2

³ This is provided for in the Statutes of Limitations in the different jurisdictions. See for example Limitation Law of Lagos state 2003

⁴ See the case of *Ogunko v Shelle* (2004) 6 NWLR (Pt. 868) page 17

⁵ D Rudolph, (2017) Workers, Dignity, and Equitable Tolling. *Northwestern Journal of Human Rights*, 15:1

⁶ See the Nigerian case of *Nemi v Attorney General, Lagos State* (1996) 6 NWLR PT 452 P.42; the South African case of *Minister of Justice v Hofmeyr*, 1993 (3) SA 131 (C); the English case of *Raymond v Honey*, (1982) 1 All ER 756R; and the US case of *Bound v Smith*, 430 U.S. 817 (1977)

⁷ 418 U.S. 539, 555 (1974)

In most literature, the residual constitutional rights of prisoners have mostly been discussed in the context of fundamental rights provisions; mostly the constitutional right of prisoners not to be subjected to torture or inhuman or degrading treatment⁸. The deplorable prison conditions in most African countries and the maltreatment of prisoners form the basis or focal point of available literature that examines prisoners' rights within the ambits of the constitutional provisions on the right to dignity of the human person. But prisoners' right of access to court for the protection or defense of their residual fundamental rights as contained in the constitution and international human rights covenants is yet to be examined. The right of access is the right upon which the integrity of the constitutional provisions on basic rights necessarily depends.

Prisoners need access to courts to challenge or seek redress for violations of their residual human, statutory and constitutional rights. Prisoners also need to be able to sue defendants in a civil action for the protection of other basic rights such as the right to property they already own or may own in the future. Right of access is also necessary when prisoners are confronted with a *bona fide* legal action that threatens their interests. Such prisoners who need to defend a civil suit require a due process right of access to the courts. The right of access to the courts is no less important in general civil matters than it is in cases of criminal appeal or the enforcement of human rights. Where right exists, there is a concomitant remedy, and access to court offers the only forum for the protection and enforcement of such right. However, the nature of prison institutions and the status of prisoners present serious legal issues around prisoners' legal capacity to sue or be sued in civil actions.

More so, the right to sue or be sued is neither absolute nor does it enure in perpetuity; the right may be forfeited or reinstated under certain legal circumstances. This article critically examines the right or legal capacity of prisoners to sue or to enter defense when sued in civil action that involves their right to property or other proprietary interests. The article proposes that prisoners may be so incapacitated in the exercise of this right to the extent of coming within the legal implication of legal disability. The article discusses possible legal

⁸ N.J Udonbana, (2010) An Examination of the Right of Prisoners and Detainees in Nigeria. *Nigeria Bar Journal*, Vol. 6, No. 1, July; SM Olooba, and ON Ademola, (2015) An overview of the rights of prisoners under Nigerian law. *Conference Journal of Jurisprudence and International law*, Department of Jurisprudence and International law, faculty of law, Kogi State University, Anyigba, p.135; MA Araromi, (2015) Prisoners' Rights under the Nigerian Law: Legal Pathways to Progressive Realization And Protection. Afe Babalola University: J. of Sust. Dev. Law & Policy, Vol. 6: 1

mechanisms to protect prisoners against the violations of their basic rights that are not eroded by their imprisonment. The focus of the article is a recondite area of prisoners' right as such its main objective is to attract and develop academic discourse for policy considerations towards protecting and promoting prisoners' proprietary rights and interests.

2. Rights of Prisoners

For contextual clarification, the term "prisoners" as used here includes awaiting trial inmates, who are alleged offenders lawfully confined to prisons pending the conclusion of their trial⁹. While the term is not synonymous with awaiting trial inmates, this contextual usage is in line with the definition of a "prisoner" in most statutes establishing the prison systems. For example, section 19 of the Nigerian Prisons Act defines a prisoner as 'any person lawfully committed to custody'¹⁰. In examining prisoners' rights in Nigeria, writers like Udonbana¹¹ and Araromi¹² have tried to differentiate between prisoner's rights before conviction and prisoner's rights after conviction. In this article no such differentiation is made or considered necessary. What is examined here is the rights of every person who is lawfully confined to prison custody, whether after conviction or pending conclusion of trial. This is more so as some awaiting trial inmates charged with serious crime such as murder or armed robbery may be denied bail and spend more years in prisons during trial than inmates already convicted for lesser offences. While convicted prisoners and awaiting trial inmates do not share the same rights and privileges, in essential respects both categories of inmates face the same deprivations by reason of their confinement to prison custody.

According to Rock, "the prisoner, a person committed to the custody of a designated state agency, is effectively severed from society. He has and receives

⁹Awaiting trial inmates are alleged offenders who were either granted bail by the courts but could not meet the bail conditions imposed by the court or were denied bail by the courts due to the gravity of the alleged offences, the likelihood of their escaping trial, the likelihood of their interference with witnesses, or the likelihood of their committing another offences. For instance, in Nigeria the courts are extremely reluctant to grant bail pending trial in alleged crime of murder or armed robbery which carries the capital punishment. Therefore, anywhere the term 'prisoner' is used in this article includes awaiting trial inmates

¹⁰ Cap P29, Laws of the Federation of Nigeria, 2004

¹¹N.J Udonbana, (2010) An Examination of the Right of Prisoners and Detainees in Nigeria. Nigeria Bar Journal, Vol. 6, No. 1, July

¹² MA Araromi, (2015) Prisoners' Rights under the Nigerian Law: Legal Pathways to Progressive Realization and Protection. Afe Babalola University: J. of Sust. Dev. Law & Policy, Vol. 6: 1

what the custodian grants, and nothing more”¹³. In pre-1960s America this was the predominant view about prisoners. A prisoner was deemed to have, “as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state”¹⁴. This view implied that prisoners, as a result of their criminal offence and imprisonment, had forfeited all their rights as citizens and were deserving of any inhuman conditions and maltreatment that characterized prisons life at the time. This view developed into the “hands-off doctrine” under which State and prison officials enjoyed immunity against judicial sanction for any inhuman treatment of prisoners¹⁵.

But since the 1960s this is no longer the case in the US and across the world. The common view now is that prisoners who are in confinement do not totally lose their rights as human beings and are therefore entitled to some basic rights¹⁶. There are basic rights which are both naturally given and protected in the letters and spirit of the law. These basic rights are regarded as very fundamental to human existence and therefore should not be deprived except in circumstances provided by the law. For instance, a prisoner in custody is lawfully subjected to restriction on movement and privacy therefore, does not have full enjoyment of the freedom of personal liberty and right to privacy under the law.

Thus, lawful incarceration brings about the necessary withdrawal or restriction on many privileges and rights, a derogation justified by the considerations underlying the penal system¹⁷. The courts have held that certain rights afforded under the constitutions are irreconcilable with “the concept of incarceration and the needs and objectives of penal institutions” hence a prisoner has no reasonable expectation of privacy in his prison cell, including protection from “shakedown searches which are designed to root out weapons, drugs, and other contraband”¹⁸. However, these lawful and necessary derogations from certain fundamental rights of prisoners do

¹³ G Rock, (2009) *Prisoner's Rights Handbook I*, Angus Love ed., Pa Institutional Law Project

¹⁴ *Ruffin v Commonwealth*, 62 Va. 790, 796 21; Gratt 790, 796 (1871)

¹⁵ WT Westling, and P Rasmussen, (1985) Prisoners' Access to the Courts: Legal Requirements and Practical Realities, 16 *Loy. U. Chi. L. J.* 273. Available at: <http://lawcommons.luc.edu/luclj/vol16/iss2/3>. Accessed 16 July, 2019

¹⁶ N Rodely, (2000) *Treatment of Prisoners under International Law*, Oxford University press. 4th Ed

¹⁷ *Price v Johnston*, 334 U.S. 266, 285 (1948)

¹⁸ See the cases of *Hudson v Palmer*, 468 U.S. 517, 519-520 (1984); *Proudfoot v Williams*, 803 F. Supp. 1048, 1051 (E.D. Pa. 1991)

not *ipso facto* strip them of other basic rights enjoyed by the rest of the citizens as entrenched in the Constitution. Since the middle of the last century, courts in different jurisdictions have recognized and upheld the residual fundamental rights of prisoners.

According to Lord Wilberforce in *Raymond v Honey*¹⁹, under English law a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by implication.” In *Minister of Justice v Hofmeyr*²⁰, the South African Supreme Court held that the prisoner retains all his personal rights save those abridged or proscribed by law, and that the extent and content of a prisoners rights are to be determined by reference not only to the relevant legislation, but also by reference to his inviolable common-law rights. This is also the legal position in Nigeria since 1996 when the court held in *Nemi v The Attorney-General of Lagos State*²¹ that prisoners retain all the fundamental rights and are entitled to enjoy such rights like other free citizens except where such rights are properly denied them under the law. According to the court, even a condemned convict awaiting execution remains entitled to these residual human rights until lawful execution.

In addition to international covenants on human rights²² and national constitutional provisions on fundamental rights²³, the prevailing judicial recognition of the rights of prisoners is a necessary corollary to a host of international covenants which prescribe the basic rights of prisoners. The International Covenant on Civil and Political Rights provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human persons²⁴. And as proclaimed by the United Nations Human Rights Committee, the respect for the dignity of such persons deprived of their liberty must be guaranteed subject to the restrictions that are unavoidable in a closed environment²⁵. Prescriptions in the United Nations Standard Minimum Rules for the Treatment of Prisoners²⁶, the

¹⁹ (1982) 1 All ER 756

²⁰ 1993 (3) SA 131 (C)

²¹ (1996) 6 NWLR PT 452 P.42, per Uwaifo, JCA

²² See the African Charter on Human and Peoples' Rights 1948; the European Convention on Human Rights, 1950; the American Convention on Human Rights, 1969; the African Charter on Human and Peoples' Rights, 1981

²³ For example see Chapter 4, Constitution of the Federal Republic of Nigeria 1999 (as amended)

²⁴ 1966, Article 10

²⁵ General Comment No. 21

²⁶ 1955

European Prison Rules²⁷ and the Kampala Declaration on Prison Conditions in Africa²⁸ are all to the effect that persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.

Thus, across the world prisoners now have recognizable rights under the law, and this has reflected on the trend in penological objective of imprisonment. There has been a remarkable shift away from the objective of imprisonment as a retribution for offenders. The trend is that imprisonment should focus on reformation and rehabilitation of offenders with the ultimate goal of re-absorbing them into the society as better citizens. As noted elsewhere, it is against this philosophy that prisoners need to be treated as the human beings that they are and should not be subjected to degrading and inhuman treatment which could make them embittered and with wounded psyche to visit more harm on the society after their release²⁹. But the mere recognition that prisoners retain some basic rights is not enough unless such rights can be enjoyed by the prisoners, enforced and protected against violations.

3. Do Prisoners Have Right or Legal Capacity to Sue or be Sued?

The traditional approach to legal capacity refers to a person's mental or physical fitness to act or perform; the ability to exert legal powers or exercise legal rights³⁰. Thus, any person the law declares to be an "idiot," "lunatic," "of unsound mind" or suffering from any mental or intellectual deficiency is therefore considered as legally incapacitated and unable to exercise legal rights³¹. Legal capacity is

²⁷ 2006, Rule 2

²⁸ 1996

²⁹ MA Araromi, (2015) Prisoners' Rights under the Nigerian Law: *ibid*

³⁰ M Bach and L Kerzner, (2010) *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, Toronto: Law Commission of Ontario. Available <http://www.lcocco.org/disabilities/bach-kerzner.pdf> (accessed 20 July, 2019),

³¹ E Flynn and A Arstein-Kerslake, (2014) The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?, *Berkeley Journal of International Law*, Vol.32, Issue 1; Note that the Committee on the Convention on the Rights of Persons with Disability 2006 (CRPD) disagrees with this traditional approach. The CRPD argues that mental capacity and legal capacity are separate and unrelated, and that any restriction on legal capacity on the basis of mental capacity negates the principle of equality, equal recognition before the law and non-discrimination. See Committee on CRPD, General Comment No.1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1; There is a growing argument on the validity of mental criterion for legal capacity. For the basis and scope of this argument see A Dhanda, (2006–2007) Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future, *Syracuse J. Int'l. & Com.*, 34: 429; E Flynn and A Arstein-Kerslake, (2014) The Support Model of Legal Capacity: Fact, Fiction, or Fantasy? *ibid*;

fundamental to personal freedom and self-determination; the freedom to make everyday choices such as where to live, what to eat, what to wear, where to go, the relationships to keep, amongst others. Without this freedom a person would lack legal capacity – including the right to exercise legal capacity. Therefore, legal capacity is a legal concept, a construct, assigned to people of majority age with sound mind and mental condition which enable them to exercise legal rights and discharge legal obligations³².

Accordingly, prisoners of majority age with sound mind and mental condition have legal capacity. However, in terms of the legal capacity to institute action for the protection or enforcement of their civil rights the prisoners are almost always incapacitated. This legal incapacity has been judicially noticed as early as 1941 when the United States' Virginia Supreme Court of Appeals pointed out the disabling capacity of prisoners to exercise the right to sue or enter defense when sued. The court noted thus;

The process at the institution of a suit is issued in order that the defendant may appear and defend. When it is served upon a convict, he is notified to do that which is impossible. The law commands him to appear and defend his interests, and the law of the same state which notified him to appear has him safe under lock and key so that he cannot appear. To say that this is due process of law is indeed to 'keep the word of promise to the ear and break it to the hope.'³³

Most statutes establishing the prisons systems or correctional institutions provide for the service of court process on prisoners,³⁴ and this is presumptive of prisoners' legal capacity to be sued. Like correspondence from family members and loved ones, it is reasonably conceivable that prison authorities would deliver civil summons to the prisoners concerned. However, the crucial issue is whether

This article however sticks to the traditional grounding of legal capacity in the notions of mental and intellectual abilities.

³²O Lewis, (2011) *Advancing legal capacity jurisprudence*, ibid

³³ Per Justice Brown in *Ex Parte Hull*, 312 U.S. 546, 594 (1941)

³⁴ In addition to the Nigerian Prisons Act provision on service of processes on inmates, Order 9, rule 7 of the High Court of Lagos State Civil Procedure Rules 2019 provides that where an originating civil summons is to be served on a detainee or prisoner who is a defendant, service on the head or other officer in charge of the station, facility or prison where the defendant is, or on an officer of the agency in charge of the station, facility or prison shall be deemed good and sufficient personal service on the defendant.

prisoners have the ability and freedom to prepare, and mostly importantly, enter appearance in court to assert or dispute a civil claim involving their right to property. More than any other impediments, access to court lies at the heart of analysis of prisoners' right or legal capacity to sue or enter defense for the protection of their constitutional rights.

The circumstances of imprisonment and the imperatives of prison institutions disable prisoners' freedom in ways that emasculate their ability to have access to the courts. Right of access to court is closely related to the fundamental principle of fair hearing and due process of law contained in the constitutions of most country, particularly democratic societies. This principle formed the basis of the 1941 landmark case of *Ex parte Hull*³⁵ which originated the enforcement of prisoners' right of access to courts in the United States. In that case the US Supreme Court struck down a prison statute requiring prisoners to have their petitions for the enforcement of their civil rights approved by prison officials before they could be submitted to the court.

The Court held in *Hull* that prisoners have a right of access to the courts after imprisonment, and this decision marked the passage into an era of judicial recognition of prisoners' civil rights. During the late 1960's and throughout the 1970's, the US Supreme Court carved out the basic parameters of the prisoners' right of access to the courts for the purpose of civil rights action³⁶. Besides the US, many developed countries now have robust jurisprudence on prisoners' right of access to court³⁷. But for the most part this access right has been mainly related to civil rights action about unconstitutional conditions of confinement, physical attacks by prison officials and other prisoners, confiscation of prisoners' property by prison officials, and arbitrary prisons regulations³⁸.

In many developing countries in Africa, prisoners' access right for civil rights action is still only in the letter and not in the spirit of the constitutions creating the

³⁵ 312 U.S. 546, 594 (1941)

³⁶ See the cases of *Johnson v Avery*, 393 U.S. 483 (1969); *Younger v Gilmore*, 404 U.S. 15 (1971); *Bounds v Smith*, 430 U.S. 817, 821-22 (1977)

³⁷ N Rodely (2000) *Treatment of Prisoners under International Law*, *ibid*

³⁸ For a review of decided cases in the US see Hanson, R.A and Daley, H.W.K (1995) *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, NCJ-151652; In the UK see N Loucks, (2000) *Prison Rules: A Working Guide (The Millennium Edition fully revised and Updated)*. Prison Reform Trust, London: 2000

right³⁹. For example, in Nigeria the case of *Nemi v The Attorney General of Lagos State*⁴⁰ recognized prisoners' residual constitutional rights but fell short of establishing prisoners' right of access to court. After more than two decades since the watershed case of *Nemi*, prisoners' access right jurisprudence is yet to emerge in Nigeria. It is worthy of note that even in the developed jurisdictions prisoners' right of access to court for the protection or defense of their civil or constitutional right to private property has not been clearly established⁴¹. Only few civil rights can be more zealously guarded than the right to protect one's property in a court of law. None of the civil rights would be secure if any person could be deprived of his private property without given an opportunity to meaningfully defend same⁴².

Prisoners have the right to own property and their imprisonment does not and should not dispossess them of their property without access to court for the purpose of protecting and defending this right. But unfortunately, the reality of imprisonment is that it disables prisoners' legal capacity to assert or defend their right to property. This reality may be represented by a factual situation in which a prisoner's land or some other personal property is being encroached upon or appropriated by a free citizen or some other outside entity. There is no guaranty under the law that such prisoner would have access to court to assert the right to his property, notwithstanding the fact that the prisoner has the legal right. There is a host of legal impediments against prisoners' right or legal capacity to sue or enter defense when sued in civil claim relating to their right to property. These impediments involve the statutory period within which to exercise legal capacity in civil action and the mandatory requirements for the commencement of civil claims.

³⁹J Sarkin, (2009) Prisons in Africa: An Evaluation from a Human Rights Perspective, *Sur International Human Rights Journal* vol. 9, 2

⁴⁰ (1996) 6 NWLR PT 452 P.42

⁴¹ The US has about the most advanced jurisprudence on prisoner's civil rights actions. But almost two decades after *Bound v Smith*, 430 U.S. 817 (1977) expanded prisoners' access right in an unprecedented manner (that the State should not only refrain from obstructing prisoner petitions to the courts, but should "shoulder affirmative obligations to assure all prisoners meaningful access to the courts"), this right was however abrogated in *Lewis v Casey*, 518 U.S. 343 (1996). In the *Lewis* case the US Supreme Court rejected the legal position in *Bound vs. Smith* and other similar lines of cases, holding that prisoners should not have access to courts for legal matters beyond habeas corpus and civil rights actions (and not other civil right suit like the right to private property). The *Lewis* standard is where the law currently stands in the US. For a summary of the legal position in the UK, see Loucks, N. (2000) *Prison Rules: A Working Guide (The Millennium Edition fully revised and Updated)*, *ibid*

⁴² Like in other democratic constitutions, this right is guaranteed under Section 44 of the Constitution of the Federal Republic of Nigeria 1999 (as amended); See also the Fourteenth Amendment to the United States Constitution

4. Legal Impediments to Prisoners' Legal Capacity

The realization of rights depends on more than the formal recognition of legal rights – it requires the promotion of personal autonomy as well as the access and support that persons need to exercise those rights. This also requires consideration of the impediments against the exercise of those rights, including unequal and implied presumptions about the legal incapacity of a person. The attribution of the status of legal incapacity based on functional capacity – that is, if a person suffers from impairment, or once a person has been identified with a particular functional incapacity, he or she is presumed to be legally incapacitated⁴³. This scientific justification of legal disempowerment to exercise the right to personal autonomy and equality in cases of persons who are minor or suffer from any form of impairment may well be extended to prisoners on the basis of physical disability.

The circumstances of imprisonment include physical restraint on personal autonomy and the absence of freedom to make personal choices. Prisoners are a group of persons who undermined or are alleged to have undermined the legal order and public safety. They are deemed as social deviants that need to be rehabilitated and reformed. They are therefore confined to a regimented institution where most of their fundamental rights are lawfully abridged, and in particular, their freedom of personal autonomy and the right to relate with the outside world largely curtailed. The lives of prisoners are subject to the dictates of prison officials and institutional regulations. They are physically disabled from making any private visit outside the prison institutions. Though they may be mentally and intellectually sound, prisoners suffer physical disability that deprives them of the capacity to pursue their personal interests outside their confined zones.

Like minors and mentally challenged persons, they are dependent on third party – the prison institution – for everyday life activities and engagements. Therefore, the grounding of legal capacity in the notions of mental and intellectual abilities alone does not account for cases of physical disabilities that totally undermine legal capacity to act or perform in one's own interest. Unlike infants and persons with mental disabilities who are reasonably protected by law⁴⁴, prisoners are without any special law that addresses their disability with respect to their capacity to access the courts for the protection or assertion of their legal right and interest in property.

⁴³ L Kerzner, (2006) *Mental Capacity Through a Disability Law Lens*, in M.A. McColl, L. Jongbloed (eds.) *Disability and Social Policy in Canada*, Toronto: Captus, 336-356 at 338

⁴⁴ R Lang, (2009) *The United Nations Convention on the Right and Dignities for Persons with Disability*: *ibid*

Constitutional provisions on fair hearing and due process of law are yet to find practical expression in prisoners' capacity to access the courts in civil suit. Even in the most advanced jurisdictions like the US, prisoners do not have rights of access to courts where the suit is other than criminal appeals and civil rights actions that have nothing to do with right to property⁴⁵.

For instance, the US case of *Bound v Smith*⁴⁶ which followed *Payne v Superior Court*⁴⁷ in the expansion of prisoners' access right in civil claim for proprietary interests was essentially rolled back by the US Supreme Court in *Lewis v Casey*⁴⁸ which now represents the law. *Lewis* held that prisoners do not have access to courts for legal matters beyond habeas corpus and civil rights actions to challenge conditions of confinement, inhuman treatment by prisons officials or arbitrary prison regulations⁴⁹. So, while prisoners' right to property is recognized as a basic constitutional right that is untrammelled by imprisonment, in reality they are physically incapacitated from having access to the courts for the protection and defense of this right. The reality also affects even the legal capacity of an innocent and free citizen who has cause to sue a prisoner for civil claim based on ownership or proprietary interest in property. The reality of prisoners' legal incapacity to sue or enter defense when sued in civil claims is exemplified by some legal provisions that determine successful institution of civil claim in most jurisdictions.

4.1 Limitation of Actions

The law of limitation of actions involves legal provisions that limit the period of time available to a person to initiate a civil claim against another person. Though the law recognizes a cause of action of a party, it however restricts the right of the party to a specified period within which to enforce such a right of action through the judicial process. Therefore, under limitation of action laws, there is a specific

⁴⁵ Civil rights actions may be brought by prisoners pursuant to section 1983 of the US Civil Code. They are thus referred to as Section 1983 Litigations and they only involve the Amendment rights or constitutional provisions on fundamental rights of prisoners; For a comprehensive Report on Section 1983 Litigations in the US, see Hanson, R.A and HWK Daley, (1995) Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation, *ibid*

⁴⁶ 430 U.S. 817 (1977)

⁴⁷ (1976) 17 Cal.3d 908

⁴⁸ 518 U.S. 343 (1996)

⁴⁹ The same year *Lewis v Casey* was decided, the US Congress enacted the Prison Litigation Reform Act 1996, which dramatically altered prisoners' litigation landscape, restricting prisoners' access to federal court in a variety of ways; See M Schlanger, (2003) Inmate Litigation, *Harv. L. Rev.* 116, No. 6: 1555-706. Available at: <https://repository.law.umich.edu/articles/1296>. Accessed 20 July, 2019

period of time allowed for a person to exercise his or her legal capacity to sue in a civil claim. Such period starts to run from the date of the occurrence of the facts giving rise to the cause of action, and the aggrieved party must bring an action against the defendant before the stipulated period lapses.

If the party fails to commence legal proceedings within the time allowed by the relevant statute of limitations, the defendant can successfully avoid any potential liability on the legal ground that the plaintiff is out of time or that the action has become statute-barred⁵⁰. Depending on the cause of action, limitation law may prescribe a period ranging from one month to twenty years within which a party may access the courts for a civil claim⁵¹. For prisoners, while they have the legal right to institute civil actions their inability to institute such actions within the period prescribed for the type of claim means that they would permanently lose the right to enforce the cause of action by judicial process.

For the plaintiff that has a cause of action against a defendant who is in prison, the implication of the law of limitation is that failure to sue the prisoner within the time limits for the cause of an action would judicially bar the action forever. This is more so because under most laws of limitation of action the fact that the defendant was a prisoner during the relevant period of limitation is not an exception⁵². Although, in most jurisdictions there is no law that prevents a party from bringing a civil action against another party who is in prison. But the fact of imprisonment coupled with some other mandatory legal requirements such as pre-action notice and pre-trial conference may effectively incapacitate a prisoner from suing or been sued in a civil claim.

⁵⁰ Law Reform Commission, (2009) *Limitation of Actions, Consultation Paper* (LRC CP: 54), p. 111

⁵¹ In Nigeria, each State of the Federation has its own Statutes of Limitation, including the Federal Capital Territory, Abuja. For examples, section 8(1) of the Limitation Law of Lagos State 2003 (Lagos) and section 9 of the Limitation Act of Abuja 2004 (Abuja) provide three years for action for negligence; section 8 of the Lagos Law and section 7 of the Abuja Act provide six years for civil action founded on simple contract. Action upon instrument under seal, including the recovery of land, is twelve years under both Lagos (section 12) and Abuja (section 11) laws. Under section 2(a) of the Public Officers Protection Act 2004, action against public officers is three months.

⁵² Most statutes of limitations recognize the presence of fraud or abuse of office, and the absence of good faith or legal powers as exceptions. Specific exceptions may also be found in statutes of limitation. See Law Reform Commission, (2009) *Limitation of Actions* (ibid)

4.2 Pre-Action Notice

While a cause of action may exist, there is the mandatory legal requirement of pre-action notice in most jurisdictions. A pre-action notice is some form of legal notification or information required by law to be issued to a defendant before a plaintiff can commence legal proceedings in the court for a civil claim. Failure to comply by the party who is under the legal obligation to put on notice the other party before the commencement of legal action would deprive the court the jurisdiction to hear the case on its merit⁵³. The purpose of pre-action notice is to ensure that the plaintiff affords the defendant the opportunity of amicable settlement of the case without the need for judicial intervention.

In some jurisdictions such as Nigeria, a writ of summons to commence a civil action must be accompanied by evidence of a pre-action notice which must detail the active attempts made by the plaintiff at settling the matter with the defendant out of court, and setting out the claims or option for settlement with the defendant⁵⁴. Omission to serve this required notice would result in the nullification of the action before it even begins⁵⁵. It is highly doubtful whether the imperatives of the prison system would allow prisoners and outside parties to exchange pre-action correspondence or meet physically for possible amicable settlement of a case before the aggrieved party can commence legal action. Even if the parties are able to comply with this legal requirement through their lawyers, there is yet another impediment against the legal capacity of prisoners to proceed with a civil claim.

4.3 Pre-Trial Conference

The pre-trial conference came into existence as a means to ameliorate the inordinate delay and unnecessary and burdensome expense so often connected with the trial of a law suit. Pre-trial conference was thus designed to narrow the issues, to avoid trials in cases where trial would not be necessary, and to expedite a fair trial by which all controversies may, so far as is possible, be disposed of only upon their merits⁵⁶. The pre-trial conference is not a trial of the action. It was originally intended to be a procedural device by which the court might call the parties and their lawyers before it and remove, by agreement and admission, every

⁵³ See the cases of *Amadi v NNPC* (2000) FWLR Pt.9, p.1527; *Ministry of Education, Anambra State v Asikpo*, (2014) 14 NWLR (pt. 1427) pp.351; *Mekaowulu v Ukwa West Local Govt Council* (2018) LPELR-43807(CA)

⁵⁴ For example, see Order 5, rule 2 of the High Court of Lagos State Civil Procedures Rules 2019

⁵⁵ *Ibid*, Order 5, rules 3 and 4

⁵⁶ See the case of *G. Heinemann Brewing Co. v Joseph Oat Corp.*, 871 F.2d 648 (7th Cir, 1989)

encumbrance to a speedy trial on simplified issues⁵⁷. But in many jurisdictions today pre-trial conference has been made mandatory by statutes or rules of courts⁵⁸. It is now commonly provided in statutes or rules of courts that where a party or his lawyer fails to attend pre-trial conference or is substantially unprepared to participate in the conference or fails to participate in good faith the court shall; in the case of the claimant dismiss the claim, and in the case of the defendant enter judgment against him where appropriate⁵⁹. Prisoners certainly do not have the freedom to attend pre-trial conferences in civil proceedings where they are necessary parties. This is particularly disabling where the action, like many civil claims, is contentious and requires evidentiary hearing from the parties themselves. While prisoners have the legal right to attend court in civil actions the reality is that there is no provision for prisons institutions to actualize the right, especially when it is not related to criminal proceedings.

These various legal impediments underscore the proposition in this article that prisoners lack the legal capacity to sue or enter defense when sued in civil actions that involves their right to property or any other proprietary interests. Prisoners' right of access to the courts for this purpose remains a mirage – a right that only appears in the constitutions but disappears in reality. In addition to the above legal impediments, most prisoners, particularly in the developing world, lack sources of income and economic power. They are therefore not in the position to donate a power of attorney or hire the services of lawyers to represent them in civil action where their proprietary right or interest is at stake. While they are unable to sue, they stand to lose the right to their property in a default judgment due to their inability to enter effective defense when sued.

5. Recognizing and Addressing Prisoners' Legal Disability

There is need to recognize the legal disability of prisoners with respect to their legal capacity to protect or defend their constitutional right to property. This legal disability deprives them of equal protection under the law. The State has a legal obligation to ensure equal protection of all citizens. The principle of equal protection under the law is inhumanly undermined when a group of citizens is unjustifiably denied some basic rights which the rest citizens enjoy. There is therefore the need to recognize the legal disability of prisoners which impede their

⁵⁷ ET Crawford, (1946) Legal Problems of the Pre-Trial Conference , 31 *Cornell L. Rev.* 285 (1946). Available at: <http://scholarship.law.cornell.edu/clr/vol31/iss3/2>. Accessed 10 July, 2019

⁵⁸ See for example Order 27 of the High Court of Lagos State Civil Procedure Rules 2019

⁵⁹ These are the wordings of the provision of Order 27, rule 5 of the High Court of Lagos State Civil Procedures Rules 2019

legal capacity to seek the protection and defense of their proprietary rights and obligations on an equal basis with other citizens.

Beyond the letters of the constitutions which provide for access to the courts for all citizens, it is necessary to recognize that the imperatives of prison institutions and the restricted freedoms of prisoners engender a peculiar legal disability for this group of citizens to access the courts. The recognition is necessary if the legal disability of prisoners is to be ultimately addressed towards ensuring their active legal capacity to realize their basic rights. While this certainly requires appropriate legal and institutional reforms, it is within reasonable contemplation that the unfairness and the hardship imposed on prisoners by their legal disability may be addressed through equitable remedies⁶⁰ such as equitable tolling and equitable rule of *contra non valentem*.

5.1 Equitable Tolling

One of the legal impediments against prisoners' legal capacity to sue or be sued is Statutes of limitations which establish a time limit for suing in a civil case, based on the date when the right of action accrued. Statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared⁶¹. But they have particularly grave implications as they extinguish the right to judicially pursue a cause of action though the cause of action subsists. Thus, the practical effect of limitation statutes is that it denies parties the legal capacity to exercise subsisting legal rights. However, rights guaranteed by the constitution are of little value unless there is adequate opportunity for the exercise of such rights.

Therefore, statutory limitation periods must provide parties with adequate opportunity to avail of the rights protected under the constitution. Equitable tolling serves as a powerful tool to circumvent a statute of limitations. It is an equitable remedy that interrupts the running of a statute of limitations in certain and appropriate situations. Equitable tolling allows a court to resuscitate untimely claims and proceed on the merits against a defendant despite a countervailing

⁶⁰ Originally developed by the old English Court of Chancery in constructive competition with the common law courts, equitable remedies are now applied throughout all common law jurisdictions and most civil law jurisdictions; See Palmer, V.V (1999) *May God Protect Us from the Equity of Parlements: Comparative Reflections on English and French Equity Power*, 73 *TUL. L. REV.* 1287

⁶¹ SM Malveaux, (2995) *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 *GEO. WASH. L. REV.* 68, 74-75

statute of limitations⁶². As part of the equitable canon since the eighteenth century, equitable tolling has allowed the court to rely on its equitable jurisdiction and proceed to evaluate a resurrected case on the merits⁶³. Equitable tolling therefore follows the tradition of courts of equity that sought to relieve hardships occasioned by adherence to unfair and rigid legal rules.

The decision of the courts to toll a statute of limitations reflects a sense of equity that parties, like prisoners, should not be exposed to purposeful manipulation of a limitation period by the other parties in a more powerful or stronger position, such as free citizens as compared to prisoners. So, while a statute of limitations works in one party's favour to thwart stale claims, equitable tolling makes the court to prevent a miscarriage of justice on a case-by-case basis where circumstances beyond the other party's control prevent the commencement of action within the stipulated time. Through the centuries the courts have recognized a variety of situations where a statute of limitations should toll so that one party does not unfairly benefit from the disabling situation of the other party⁶⁴ such as prisoners. In most jurisdictions, it is legally recognized that a statute of limitations should toll when a plaintiff is under a legal disability at the time the cause of action accrues⁶⁵. Such legal disability includes where a person against whom a cause of action may be maintained is a minor, insane, or absent from the state or jurisdiction during the running of the applicable limitation period⁶⁶. Under the common law discovery rule, a limitation period does not begin to run until the plaintiff discovers or reasonably should have discovered the injury giving rise to the claim⁶⁷. It must be pointed out that in these instances the inability of the parties to sue or defend a civil

⁶²D Rudolph, (2017) *Workers, Dignity, and Equitable Tolling*, *ibid*

⁶³VV Palmer, (1994) *May God Protect Us from the Equity of Parlements: ibid* Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 *TUL. L. REV.* 7, 64 & N.233

⁶⁴ Pogorzelski, H.M (1998) *For Whom Does the Statute Toll?; Serious Concerns About Our Antiquated Texas Tolling Statute*, 17 *REV. LITIG.* 589, 601

⁶⁵ See HM Pogorzelski, (1998) *For Whom Does the Statute Toll?* *ibid*; Ballard, E.R (2006) *It's About Time: Enforcing Human Rights Through Equitable Tolling*, 32 *N.C. J. INT'L L. & COM. REG.* 311; Council, D.J (2998) *Equitable Tolling Revisited in Michigan: The Dangerous Abolition of a Necessary Insurance Doctrine*, 54 *WAYNE L. REV.* 1389 ; Smoak, S.R (1999) *Limitations on the Tolling Statute: A Temporary Solution to a Permanent Problem in South Carolina*, 50 *S.C. L. REV.* 861, 867

⁶⁶ See generally KJ Rampino, (2009) *Annotation, Tolling of Statute of Limitations During Absence From State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Non-residence*, 55 *A.L.R.3d* 1158

⁶⁷ See See , HM Pogorzelski (1998) *For Whom Does the Statute Toll?*; *ibid*

claim during the limitation period constitutes a legal disability that deprives them of legal capacity hence they are considered as deserving of the grace of equitable tolling.

Statutes of limitations can thus be tolled for prisoners who, by reason of their incarceration, are in a situation where they cannot sue or defend a civil action, or may not even be aware of the occurrence of the cause of action during the relevant limitation period. Equitable tolling is about fundamental fairness and universal justice, particularly in the interest of parties who lack legal capacity within the applicable period of limitation. Equitable tolling can and should suspend the running of relevant limitations period against prisoners who, by reason of incarceration, are legally incapacitated in bringing a civil action or maintaining a defense in the adjudication of their proprietary rights and interests during the period of their imprisonment.

5.2 Equitable Rule of *Contra Non Valentem*

An extra-codal equitable rule that instills necessary flexibility and “correcting equity” (*équité correctrice*)⁶⁸ in a codified system is derived from the Franco-Spanish maxim: *contra non valentem agere non currit praescriptio*, which literarily means: “statutes of limitations do not run against parties incapable of acting”⁶⁹. *Contra non valentem* is a foremost principle of natural law and justice, and is therefore applicable to every system of jurisprudence that does not have contrary statutory provisions⁷⁰. As an ancient rule of equity, *contra non valentem* grounds equitable tolling. But unlike equitable tolling, the effect of *contra non valentem* is not to suspend the running of limitation period rather, to set aside an already expired period of limitation; a form of restitution of the expired period. The rule is however commonly used to toll statutes of limitation from running when parties “are incapable of acting”⁷¹.

⁶⁸ BW Janke and F Licari (2011) *Contra Non Valentem* in France and Louisiana: Revealing the Parenthood: Breaking a Myth. *Louisiana Law Review*, vol. 71, p. 504

⁶⁹ For a review of the origin of this equitable rule see BW Janke and F Licari, (2011) *Contra Non Valentem* in France and Louisiana: *ibid*

⁷⁰ *ibid*

⁷¹ BW Janke, and Licari, F. (2008) Comment: Revisiting *Contra Non Valentem* in Light of Hurricanes Katrina and Rita, 68 *LA. L. REV.* 498, 505–12

The nature of statutes of limitations is rigid, and for that reason, a strong body of jurisprudence supports the need for *contra non valentem*⁷². No system can endure without flexibility and so the utility of *contra non valentem* is easily comprehensible as an injection of flexibility into a legal regime that is otherwise rigid. The prevailing legal regime for prisoners' rights is rigidly laconic; straight-faced constitutional provisions and judicial recognitions of prisoners' residual rights, but failure to respond to the denial of the rights. By reason of incarceration, prisoners are incapable of acting and so they lack the legal capacity to sue or defend their proprietary rights and interests. Prisoners suffer legal disability, if not in absolute, but in relative terms that meet the standard of reasonableness for the application of the equitable *contra non valentem rule*. That standard of reasonableness is that prisoners are incapable to act or perform (they are *contra non valentem agree*) during the period of their incarceration.

6. Conclusion

Prisoners who possess the requisite mental and intellectual abilities are deemed to have legal capacity to sue or be sued. Prisoners are also considered to retain their constitutional rights that are not inconsistent with the conditions of their imprisonment. In particular, prisoners are believed to retain the right to property and the right to have access to the courts for the protection and defense of their residual constitutional rights. But in reality, prisoners are effectively disabled from exercising the right or legal capacity to institute civil action or enter defense for the purpose of protecting or defending their right to property.

There is need therefore, to recognize the reality that prisoners suffer a legal disability by reason of incarceration. This recognition would expand the scope of the existing concept of legal disability to admit of prisoners. However, since in reality prisoners suffer a legal disability which impedes their right or legal capacity to sue or be sued during the period of incarceration, equitable remedies may be called in aid to relieve the unfairness and hardship imposed by the disability.

⁷² Civil and Common laws countries such as France and the US respectively have built a strong body of jurisprudence over time supporting *contra non valentem* equitable rule. It has been codified in France under the Revised French Civil Code, 2008