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OFFENCES OF TREASON AND TREASONABLE FELONY IN NIGERIAN CRIMINAL JURISPRUDENCE

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Abstract

Treason and treasonable felony occupy central and highly sensitive positions in Nigerian criminal Jurisprudence, representing some of the gravest offences known to law. These offences strike at the very heart of the State, threatening its sovereignty, constitutional order, and political stability. In spite of these, not many works have been done to explain and enlighten members of the public on the important of the two concepts. This paper examined the offences of treason and treasonable felony within Nigerian Criminal Law, exploring their conceptual foundations, statutory basis, essential elements, judicial interpretation, and contemporary relevance. The significance lies not merely in the punishment they attract but in their fundamental objective: The preservation of the Nigerian State as a legal and political entity. While treason and treasonable felony are closely related, they differ significantly in terms of their nature, scope, and degree of execution. Treason represents the most serious form of disloyalty, involving direct acts of aggression such as levying war against the State or assisting the enemies. It is a completed offence and carries the ultimate penalty of death. Treasonable felony on the other hand is an inchoate offence that criminalizes preparatory acts, intentions, or conspiracies aimed at unlawfully overthrowing the government. Although less severe, it remains a serious offence punishable by life imprisonment.

Keywords: Felony, Offences, Treason, Treasonable Felony.

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Introduction

Historically, the law of treason is deeply rooted in English common law, having been inherited during the colonial era. The transplantation of these principles into Nigerian law reflects the British legal tradition, particularly the emphasis on protecting the Crown and later the State from internal and external threats. Following independence, Nigeria retained and codified these principles within its statutory framework, most notably under the Criminal Code Act applicable in Northern Nigeria. The importance of these offences in Modern Nigeria cannot be overstated. In a country faced with various security challenges, including insurgency, separatist movements, and political unrest, the law on treason and treasonable felony serves as a crucial mechanism for maintaining national unity and stability. At the same time, their application raises important constitutional questions, particularly regarding the balance between national security and fundamental human rights. The offences are among the gravest offences in Nigeria criminal law, as they strike at the very existence, sovereignty, and stability of the State. These offences are rooted in the need to preserve constitutional order and national security, and they reflect Nigeria's inheritance of English common law principles on offences against the State. They are primarily codified under the Criminal Code Act (applicable in southern Nigeria) and the Penal Code applicable in the North.

While both offences relate to disloyalty to the State, treason is the more serious offence involving actual acts of war or aggression against the State and is punishable by death, whereas treasonable felony criminalizes preparatory acts, intentions, and is punishable by life imprisonment. The first major case of treasonable felony was *Federal Republic of Nigeria Vs Chief Obafemi Awolowo & 24 others* (1962) LLR117.¹ In November 1962, Chief Awolowo and 24 members of his party were arrested and charged with treasonable felony. They were accused of conspiring to overthrow the Federal government by violent means. The prosecution argued that Awolowo and his associates had sought foreign support, including training in Ghana and the purchase of arms abroad, to stage a coup against the government. Even though Chief Awolowo argued that the charges were politically motivated designed to neutralize him as an opposition leader. He was sentenced to ten years imprisonment. Another landmark case on treasonable felony was *Enahoro Vs the Queen* (1965).² where Enahoro was convicted of plotting to overthrow the government (1961-1962). The Supreme Court reduced his 15-year sentence to 5 years, establishing the principle that a "lieutenant" should not receive a harsher sentence than the alleged leader.

However, in the case of *Isaac Adaka Boro Vs The Republic* (1966) JELK 91497 (SC),³ the accused persons were sentenced to death for levying war against the State in order to intimidate or overawe the Head of State. The Republic is an embodiment of the people and represented by the government, therefore it is assumed that anyone who attempts to overthrow the government is equally attacking the citizens. Attacking the State or trying to overawe it through war or trying to overthrow it is categorized as treason. On the other hand, performing acts that are related to treason is regarded as treasonable felony. The major difference between treason and treasonable felony is the fact that while treason is punishable by death, treasonable felony is punishable by imprisonment.⁴

¹ *Federal Republic of Nigeria V Obafemi Awolowo & 24 others* (1962) LLR117

² *Enahoro V The Queen* (1965)

³ *Isaac Adaka Boro V The Republic* (1966) JELR 91497

⁴ Section 37 of the Criminal Code, Section 410 to 415 of the Penal Code.

Conceptual Framework of Treason and Treasonable Felony

The Black's law dictionary (10th edition) defined treason as: The offence of attempting to overthrow the government of the State to which one owes allegiance, either by making war against the State or by materially supporting its enemies.⁵ According to the provision of the Criminal Code, anyone who levies war against the State in order to intimidate or overawe the President or governor of a State is guilty of treason and should be punished by death.⁶ The Criminal Code also categorises as treason anyone who conspires with others, either within or outside Nigeria, to levy war against Nigeria.⁷ It is also treason to instigate a foreigner to invade Nigeria with an armed force.^{8,9} If a person who is under the age of 18 is involved in treason, such a person would not be executed but would be detained at the pleasure of The President.¹⁰ If a pregnant woman participates in treason, the procedure stated in Section 376 of the Criminal Procedure Act should be followed. See also S39(2) of the Criminal Code.¹¹ It is immaterial whether the persons involved in the act of treason are civilians or military personnel. Also, the number of persons carrying out the act is not a factor in determining the offence. The essence of waging the war must be for general or public purpose, if it just for private reasons, it would best be regarded as a riot or public disturbance. No person can be convicted of treason unless he pleads guilty or there are more than two witnesses to attest to the fact that he committed the offence.¹²

In the same vein, the 10th Edition of Black's Law Dictionary described treasonable felony as, "An act that shows an intention of committing treason, unaccompanied by any further act to carry out that intention. This offence usually results in life imprisonment rather than the death penalty."¹³ Acts which constitute treasonable felony in Nigeria are contained in the provisions of Sections 40 to 43 of the Criminal Code. Section 40 of the code provides that anyone who becomes an accessory after the fact to treason or has knowledge that some people want to commit treason but doesn't report to the appropriate authorities, is guilty of treasonable felony and would be punished by life imprisonment. Section 41 of the code provide for life imprisonment for anyone that forms an intention to carry out the offence of treason. It is instructive that a person that has been discharged and acquitted of the offence of intention to commit treason cannot be charged for treason. It is also a treasonable felony for anyone to prepare, advise, aid or participate in any act of war against a traditional chief or a band of citizens.¹⁴

According to Section 43 of the Criminal Code, a person cannot be tried for treason or treasonable felony if the offence is tried two years after the commission of the act. From the above it is obvious that treason refers to acts that directly challenge or attack the sovereignty and territorial integrity of Nigeria. Under Section 37 of the Criminal Code Act, treason includes levying war against Nigeria. The phrase "levying war" has been interpreted broadly to include any organized and armed insurrection intended to intimidate or overawe

⁵ Black Law Dictionary, 9th Edition

⁶ Section 37(1) Criminal Code

⁷ Section 37(2) Criminal Code

⁸ Section 38 Criminal Code

⁹ *Enahoro V State* (1965) Vol 1 AnLR

¹⁰ Section 39(1) Criminal Code

¹¹ The procedure stated here is one that concerns the reduction of capital punishment to life imprisonment in the case of a pregnant woman

¹² *Omishade V Queen* (1964) LLJR.SC

¹³ Bryan Garner, *Black's Law Dictionary 10th Edition* (USA's Thomas Reutus, 2014) P1730

¹⁴ Section 42 Criminal Code

the government. Treasonable felony, on the other hand is an inchoate or preparatory offence captured under Section 41 of the Criminal Code Act. It arises where a person forms the intention to remove The President or a Governor otherwise than by constitutional means and manifests that intention through an overt act. This distinction has been judicially recognized in *Nnamdi Kanu V Federal Republic of Nigeria* where the court considered whether broadcasts, political agitation, and organizational activities could amount to treasonable felony. The Court emphasized that mere expression of political views is not sufficient unless accompanied by conduct demonstrating a real intention to destabilize or dismember the State.¹⁵

Statutory Basis of the Offences

The Primary Statutory provisions governing treason and treasonable felony in Nigeria are found in the Criminal Code Act and the Penal Code. Under Section 37 of the Criminal Code Act, treason is committed where a person:

- i. Levies war against Nigeria
- ii. Instigates a foreign invasion of the Country
- iii. Assists an enemy at war with Nigeria

These provisions reflect the traditional understanding of treason as an offence involving direct hostility against the State. Section 41 of the Criminal Code Act provides for treasonable felony. It criminalizes situations where a person forms an intention to remove The President or a Governor otherwise than by constitutional means and manifests that intention through an overt act. The requirement of both intention and overt act ensures that the offence does not extend to mere thoughts or opinions. In Northern Nigeria, the Penal Code contains analogous provisions under Sections 410-413. These sections address offences such as waging war against the State, conspiracy to commit such acts, and aiding enemies. Although the languages differ slightly from the Criminal Code, the underlying principles remain consistent. A community reading of these statutory provisions form a comprehensive framework for addressing threats to State security, covering both completed acts and preparatory conduct. The highlights of Section 37 of the Criminal Code Act includes:

- i. Levying of war against the State
- ii. Instigating foreign invasion, or assists enemies during wartime

This section underscores the seriousness of acts that directly threaten national existence. Meanwhile section 41 of the same Act for treasonable felony criminalizes the formation of an intention to unlawfully remove the government, where such intention is manifested by and overt act. The emphasis here is on the combination of intention and action, even where the ultimate objective is not achieved. Similarly, under the Penal Code, particularly Sections 410-413, offence analogous to treason and treasonable felony are recognized, including waging war against the State, conspiracy to commit such acts, and aiding enemies. Although the wording differs slightly, the underlying objective remains the protection of State sovereignty.

Elements of Treason in Nigerian Law

To establish the offence of treason, the prosecution must prove both mental and physical elements of the crime.¹⁶

¹⁵ *Nnamdi Kanu V State* 2015/FHC/CR/383

¹⁶ *State V Oladipo Diya & Ors* 1998

- i. **Mens Rea (Intention):** The accused must possess a clear intention to overthrow the government or undermine the sovereignty of Nigeria. This intention must go beyond mere dissatisfaction or criticism of the government. It must reflect a deliberate aim to challenge the authority of the State through unlawful means.
- ii. **Actus Reus (Overt Act):** The intention must be accompanied by an overt act, such as organizing an armed rebellion, participating in an insurrection, or providing assistance to enemy forces. The overt act serves as tangible evidence of the accused's intention.
- iii. **The Two-Witness Rule:** A distinctive feature of treason is the requirement that the overt act be proved by the testimony of two witnesses. This rule, inherited from English law, serves as an important safeguard against wrongful conviction. Given the political sensitivity of treason charges, the law demands a higher standard of proof to ensure fairness.
- iv. **Burden of Proof:** As with all Criminal offences, the prosecution must prove the case beyond reasonable doubt. This high standard reflects the severity of the offence and the consequences of conviction.

Therefore, for a charge of treason to succeed, the prosecution must establish both the mental and physical elements of the offence. There must be a clear intention (*mens rea*) to overthrow the government or undermine the sovereignty of Nigeria, and this must be accompanied by an overt act (*actus reus*), such as organizing an armed rebellion or collaborating with enemy forces. As aforesaid, a unique evidentiary requirement in treason cases is the "Two-witness rule", which mandates that the overt act must be proved by the testimony of two witnesses. This rule, inherited from English law, reflects the seriousness of the offence and serves as a safeguard against wrongful conviction in politically sensitive cases. The strict approach to offences against the State is evident in *Asari-Dokubo V Federal Republic Nigeria*, where The Supreme Court underscored that where national security is threatened, the courts may prioritize the security of the State over individual liberty.¹⁷ In that case, the denial of bail in a treasonable felony charge was upheld, demonstrating the gravity attached to such offences.

Elements of Treasonable Felony

Treasonable felony differs from treason primarily in that it does not require the actual execution of war or insurrection. It is sufficient that the accused forms the intention to unlawfully remove the government and manifests that intention through an overt act, such as conspiracy, incitement or preparation for rebellion. This principle was reinforced in *Lufadeju & anor V Johson* (SC 247/2001) 2007 NGSC where the Court held that preparatory acts and conspiracy to overthrow the government, even without actual execution, are sufficient to ground liability for treasonable felony.¹⁸ The offence therefore captures early-stage threats to State stability. Similarly, in *Nnamdi Kanu V Federal Republic of Nigeria*, the Court examined whether public statements and organizational conduct could amount to an overt act, thereby illustrating that modern manifestations of the offence may extend beyond physical violence to include coordinated activities capable of destabilizing the State.¹⁹ Albeit, treasonable felony is less severe than treason, it still requires proof of the following elements:

¹⁷ *Asari-Dokubo V Federal Republic of Nigeria* (2007) 12 NWLR (Pt 1048)

¹⁸ *Lufadeju & anor V Johnson* (SC347/2001) 2007 NGSC

¹⁹ *Nnamdi Kanu V State* 2015/FHC/CR/383

- i. **Intention:** The accused must have the intention to remove the government unlawfully. This intention must be directed at achieving political change through unconstitutional means.
- ii. **Overt Act:** Unlike treason, the overt act in treasonable felony does not need to amount to actual warfare or rebellion. It may include preparatory actions such as organizing meeting recruiting supports, or making plans to overthrow the government.
- iii. **Inchoate Nature:** The offence is inchoate, meaning it does not require the completion of the intended act. The law intervenes at an early stage to prevent potential harm.
- iv. **Scope of Conduct:** Modern interpretations of treasonable felony recognize that threats to State security may arise in various forms, including political agitation, propaganda and coordinated activities. However, Courts remain cautious to ensure that only conduct posing a real threat is criminalized

Distinction Between Treason and Treasonable Felony

The distinction between treason and treasonable felony lies primarily in the degree of execution and seriousness of the act. Treason is a completed offence involving actual acts of war or aggression against that State. It represents the highest level of disloyalty and carries the most severe punishment. Treasonable felony, on the other hand, is a preparatory offence. It captures conduct that falls short of actual treason but indicates an intention to commit such acts. This distinction creates a continuum of liability, allowing the law to address threats at different stages. By criminalizing both completed and preparatory acts, the legal system ensures comprehensive protection of State security. Therefore, the distinction between treason and treasonable felony lies in the degree of execution and gravity of the act. Treason involves the actual carrying out of acts such as levying war or assisting enemies, whereas treasonable felony involves preparatory acts or intentions that fall short of actual execution. Thus, while treason is a completed offence punishable by death, treasonable felony is an inchoate offence punishable by life imprisonment. The law thereby creates a continuum by life imprisonment; and a continuum of liability, ensuring that both actual and potential threats to State security are addressed.

Punishment and Policy Justification

The punishment for treason under Nigerian Law is death, reflecting its status as the highest crime against the State. Treasonable felony, though less severe, attracts life imprisonment, emphasizing the seriousness of even preparatory acts against lawful authority. The rationale for these severe penalties lies in the need to deter acts capable of destabilizing the nation. This position is supported by judicial reasoning in *Asari Dokubo Vs Federal Republic of Nigeria*, where the Court emphasized that national security considerations justify stringent measures in dealing with such offences. As aforementioned, the justification for these harsh penalties lies in the need for deterrence. Acts of treason can have catastrophic consequences, including loss of life, destruction of property, and collapse of governmental structures. By imposing severe punishments, the law seeks to discourage individuals from engaging in such conduct. Stakeholders in the justice sector and human rights groups have criticized the severity of punishment. They argue that death penalty may be disproportionate and that the broad scope of treasonable felony could lead to abuse.

Procedural Safeguards and Judicial Attitude

Despite the severity of these offences, Nigerian Law provides safeguards to ensure fairness. The requirement of proof beyond reasonable doubt, the two-witness rule in treason, and judicial scrutiny of evidence all serve to prevent abuse. At the same time, Courts remain

cautions not to criminalize legitimate political dissent. In *Nnamdi Kanu Vs Federal Republic of Nigeria*, the Court highlighted the need to distinguish between constitutionally profited expression and acts that prove a real threat to State Security. These safeguards are important to mitigate the miscarriage of justice. They include:

- i. The requirement of proof beyond reasonable doubt
- ii. The two-witness rule in treason cases
- iii. Judicial scrutiny of evidence
- iv. The right to legal representation

Equally, Courts have emphasized the importance of distinguishing between legitimate political dissent and criminal conduct. In a democratic society, individual have the right to express their views and advocate for change. The law must therefore ensure that such activities are not unjustly criminalized. The bottom line is that the Courts must recognize the need to protect national security. Where there is credible evidence of a threat to the State, the judiciary may adopt a stricter approach.

Contemporary Relevance and Challenges

In Contemporary Nigeria, offences of treason and treasonable felony remain highly relevant in light of secessionist agitations, insurgency, and political instability. However, their application raises concerns regarding potential misuse for political purposes and the risk of infringing on fundamental rights. The challenge lies in maintaining a balance between safeguarding national security and protecting democratic freedoms. Courts have therefore adopted a measured approach, ensuring that only conduct that clearly transcends lawful dissent is punished. Another challenge is the evolving nature of threats. In the modern era, threats to State security may take new forms, including cyber activities, misinformation campaigns, and non-violent forms of resistance. The law must adapt to these changes while maintaining its core principles. The key issue is achieving a balance between security and freedom. While the State must protect itself, it must uphold democratic values and respect fundamental rights.

Conclusion

Treason and treasonable felony remain central to Nigerian Criminal Jurisprudence as mechanisms for protecting State sovereignty and constitutional order. While treason addresses direct and overt attacks on the State, treasonable felony captures preparatory conduct that signals potential threats. Judicial decisions such as *Asari-Dokubo Vs Federal Republic of Nigeria* demonstrate the Courts role in interpreting these offences in a manner that balances national security with fundamental rights. Ultimately, the continued relevance of these offences depends on their careful and restrained application within Nigeria's Constitutional democracy. The continued relevance of the offences depends in careful and restrained application. The law must strike a delicate balance between safeguarding the State and protecting individual freedoms. Courts play a crucial role in maintaining this balance by ensuring that only conduct posing a genuine threat is punished. Ultimately, the offences of treason and treasonable felony reflect the States inherent right to self-preservation. At the same time, they highlight the importance of upholding the rule of law and democratic principle in the pursuit of national security.

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