BAIL: A RIGHT OR A PRIVILEGE?: ANOTHER VIEW*

Abstract
This article interrogates the conclusion by a named writer in a scholarly journal to the effect that bail is a privilege and not a right. A major plank of that conclusion is the resort to the jurisprudential thought of the American jurist, Wesley Newcomb Hohfeld. Relying on Hohfeld's square of jural relations to the effect that right attracts a correlative duty, the writer argues that since, in an application for bail, the duty to grant or refuse bail depends primarily on the judge's discretion, the applicant's position in this regard is a privilege. This article offers a critique of this logic and, after an adequate exposition of Hohfeld's conceptual analysis, observes that the question under review is in itself a travesty of Hohfeld's square of jural relations. The article further finds that the question of whether bail is a right or a privilege cannot be raised in a Hohfeldian context. The proper Hohfeldian question would be whether bail is a right or a no-right or whether a judge has the duty or privilege to grant or refuse bail. The article also argues that the fact that bail is a conditional right cannot lead to the conclusion that it is a privilege. After exploring the definitional contours of privilege, the article concludes that bail is a right and not a privilege.
Keywords: Bail, Right, Privilege, Hohfeld, Jural Relations, Jurisprudence

1. Introduction

In his engaging article, "Bail: A Right or A Privilege?"[1]Anyogu argues that bail is a privilege and not a right. Among other grounds, he relied on the Hohfeldian concept of legal relations to buttress his view. Even though the writer had stated earlier that he does not intend "to indulge in any profound jurisprudential incursion into the meaning of rights",[2] he makes a bold jurisprudential stake by relying on Hohfeld's fundamental legal conceptions as applied in judicial reasoning. Interestingly, the writer concludes his article, with respect to application for bail, thus: A right attracts a correlative duty and if that duty depends primarily on the judge's discretion, clear legal thinking should identify the applicant's position as a privilege.[3]

In asserting that a right attracts a correlative duty, the writer relied on Hohfeld's formal analysis of "the lowest common denominators of the law". In justifying his view that bail is a privilege and not a right, the writer had earlier reasoned in a manner which could be constructed into a convenient logic in the following manner: (a) Grant of bail depends on judicial discretion, (b) Judicial discretion excludes any absolute claim to right, (c)

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[1] Z. Anyogu., "Bail; A Right or A Privilege?", *Unizik Law Journal,* Vol. 6, No. 1., pp. 240-254.
[2]*Ibid.,* p. 250.
[3]*Ibid.,* p. 254.

Therefore, bail is a privilege and not a right. The underlying assumption in proposing this reasoning is contained in the writer's introductory remarks thus:

> It is submitted that if a person is entitled to bail as a matter of course, then the grant of bail to such a person need not be dependent on the exercise of any discretion. To be entitled to some advantage as a matter of course suggests that such advantage is a right. Once the facts considered necessary for the articulation of such right are presented, the right is declared. *The question that does arise is this:- Is entitlement to bail a legal guarantee and therefore a right or is it a special legal exception i.e, a privilege?*[4] (Italics supplied)

This article interrogates the legitimacy of this logic both in the light of the narrow confines of Hohfeld's thought and a wider spectrum of jurisprudential thinking. Indeed, Anyogu sees privilege as "a special legal exception". Is this really what privilege means in law? Is this the meaning intended by Hohfeld? Indeed, is the question under discourse intelligible or legitimate within the context of Hohfeld's legal relations?

2. Jurisprudence of Legal Rights

A constellation of concepts has engaged jurisprudential imagination for decades. Concepts like rights, wrong, immunity, privilege, etc, have engaged the mind of jurists as they appear to harbour overlapping implications. Investigation into the meaning and nature of legal rights is one of the core or salient concerns of jurisprudence. As White explained, whatever else a "right" may be, it is not an entity and it cannot be reductionistically explained away by reference to other, associated concepts.[5] For him,

> Clearly 'right' (like 'duty' etc.) does not denote any entity, whether physical, mental, or fictional. Having a right is neither like having a ring nor is it like having an idea. Nor is denying the existence of certain rights like denying the existence of centaurs or of El Dorado….
>
> The notion of a *right* cannot, I have argued, be explained either as referring to or denoting any kind of entity – thought statements about rights can be true or false and because of this, be factual – or as being equivalent to or mutually implicative with any of the notions with which it commonly keeps company, such as duty or obligation, ought, liberty, power, privilege, or claim. Nor can it be reduced to the notions of right

[4] *Ibid.*, pp. 240-241.

[5] John Warwick Montgomery, *Human Rights and Human Dignity*, (1986) United States of America, Probe Ministries International, p. 65

> or wrong. *This is not to say that the notion of a right cannot be explained or understood by reference to these other notions. On the contrary, this, I have argued, is the only way to understand it*. But the notion of a right is, I contend, as primitive as any of these other notions and cannot, therefore, be reduced to or made equivalent to any one or any set of them. Nor can it be explained as being a complex or system of these. To interpret the nonconceptual relations between a right or a liberty, a power, a privilege, a duty, etc. as part of the notion of a right is to make the same sort of mistake as it would be to interpret the relations between right, good, ought, duty, obligation, as parts of any one of these notions.[6] (Italics supplied).

Scholars like Hohfeld, Dworkin, Hart, etc, have advanced different thoughts and theories about the nature of legal and moral rights. Of concern to us is the theory advanced by Hohfeld because it presents a relational dimension between right and privilege. A second reason for concentration on Hohfeld's analysis is the adoption of the correlative relationship between right and duty by Anyogu. Hohfeld defines right as an enforceable claim to performance (action or forebearance) by another.[7] Salmond defines it as an interest, respect for which is a duty, disregard of which is a wrong.[8] This definition by Salmond was also adopted in *Osborn's Concise Law Dictionary*. Holland defines it as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.[9] Generally speaking, there are different kinds of legal rights recognized in jurisprudence. They are: perfect and imperfect rights, real and personal rights, rights *in rem* and rights *in persona*, proprietary and personal rights, inheritable and uninheritable rights, rights in *re-propria* and rights in *re-aliena*, principal and accessory rights, legal and equitable rights, primary and secondary rights, public and private rights, vested and contingent rights, servient and dominant rights, municipal and international rights, rights at rest and rights in motion, ordinary and fundamental rights. We do not intend to go into the details of what each right entails as the exercise will not be relevant to our inquiry. As we are concerned with the issues of "right" and "privilege", it is pertinent to look at the definition of the remaining component of our discourse. What then is a privilege?

3. Meaning of Privilege in Law

Anyogu tended to treat privilege as "a special legal exception". *Osborn's Concise Law Dictionary* defines it as: "An exceptional right, immunity or exemption belonging to a person by virtue of status or office, e.g. the immunity from arrest of diplomats or Members

[6] *Ibid.*, pp. 65-66.
[7] L.B. Curzon, *Op. cit*., p. 221.
[8] *Ibid.*, p. 221
[9] Woodley, M., (ed.), *Osborn's Concise Law Dictionary* (Twelfth Edition) 2013, India, Sweet & Maxwell, p. 365

of Parliament."[10] In defamation cases, privilege is a defence. Privilege is contained in the law of evidence as reason not to give certain evidence. An example is the privilege accorded legal practitioners from giving evidence with respect to official communication between him and his client. In this regard, section 192(1) of the Evidence Act 2011 provides thus:

> 192.(1) No legal practitioner shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment:
> Provided that nothing in this section shall protect disclosure –
> (a) any such communication made in furtherance of any illegal purpose; or
>
> (b) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

Salmond defines privilege as: "The sphere of activity within which the law is content to leave one alone."[11]Hohfeld defines it as: "The legal relation of A to B when A (with respect to B) is free or at liberty to conduct himself in a certain manner as he pleases; when his conduct is not regulated for the benefit of B by the command of society; and when he is not threatened with any penalty for disobedience".[12] Thus, Hohfeld regards privilege as a relational concept involving two persons. Within the context of our inquiry, a judge is not at liberty to conduct himself as he pleases while treating an application for bail. His judicial discretion is bound to follow laid down principles. To this extent, it cannot be said that a judge has the privilege to grant bail. It is a duty imposed by law which cannot be carried out in breach of the relevant principles.

4. Bail as a Constitutional Right

In his article, Anyogu raised the following poser: "If entitlement to bail is dependent on the exercise of discretion, would the applicant to bail be correct in asserting that he is entitled to a right? There are no ready answers."[13] We argue that bail is a right guaranteed by the constitution to every citizen of Nigeria, without exception. According to Adetifa,

[10]*Ibid*., p. 323
[11] L. B. Curzon, *Op. Cit*., p. 221
[12]*Ibid.*, p. 221.
[13]Anyogu, *art. cit*., pp. 249-250.

> The principle upon which an accused person standing trial in Nigeria can be granted bail is laid out by the 1999 Constitution (as amended), statutory laws such as the Criminal Procedure Act ("CPA"), Criminal Procedure Code ("CPC"), the Administration of Criminal Justice Act 2015 (applicable in the Federal Capital Territory and Federal High Court of Nigeria) which have been judicially interpreted widely in numerous case laws, serving as a guide to Judge in the granting of applications for bail.
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> The statutory provisions of CPA, CPC & ACJA cumulatively provide that a person charged with an offence other than capital offence which is punishable with death is entitled to be admitted to bail. *Where the offence is a capital offence, the accused is not entitled to and would not be released on bail except by a Judge of the High Court in certain circumstances*..[14] (Italics supplied).

The writer concludes thus:

> … though bail is a constitutional right, it is trite law that the grant or refusal of bail is at the unfettered discretion of the court and such discretion must be exercised judicially and judiciously. A person charged with a capital offence in Nigeria punishable with death will not ordinarily be entitled to bail except he places materials before the court to persuade the court to the exercise of its discretion in his favour. Sections 35(1)(c) and 35(7) of the 1999 Constitution (as amended) clearly intended to make the provision of the Constitution on the right to liberty of a citizen not absolute.

Thus, in capital offences, the accused is "not entitled to" bail except by a Judge of the High Court in certain circumstances. We argue that where the circumstances are fulfilled the accused becomes entitled to bail. That is why the judicial discretion of the Judge of the High Court is subject to appellate review. To this extent, it could be said that the accused person's right to bail remains inchoate or qualified until certain circumstances are met.

The exception created by the law with respect to bail in capital offences is only "conditional" and "not absolute". The provision avails every accused person and not to a select few. If privilege is "a special legal exception" as postulated by the writer, it then

[14] See Sections 340(1), 341(1-3) CPC; Sections 118, 119 CPA; and Sections 158 ACJA; A. Adetifa: Bail in Nigeria (3): A Matter of Right or Not. Website: www.legalnaija.com/2016/05/adenike-adetifa-bail-in-nigeria-3.html?m=1. Accessed on 20/8/2016 by 1.08pm.

follows that bail is not a privilege as it is not available to a special class of persons only. It is not special. It is, so to speak, "a legal exception", but not "a special legal exception". In other words, being of general application, it is not a special legal exception like executive immunity. The fact that granting of bail is subject to the exercise of judicial discretion has not impaired that constitutional provision. Indeed, as highlighted by the author himself, the exercise of judicial discretion itself is subject to review by higher courts. It is subject to certain principles of law which must be satisfied. Indeed, if the exercise of judicial discretion is a privilege, it will not be subject to judicial determination. The fact that an entitlement is subject to the determination of a court does not make it less than what the constitution or substantive law provides. Thus, one's right to own property cannot be reduced (or is it upgraded) to a privilege because it is subject to the determination by the court. A determination by the court, after all involves evaluation of evidence which could be assailed by an appellate court.

5. What does "entitlement to" mean jurisprudentially?

To be entitled to something is to have a right to it. As White explains: "Liberty opens something to me, duty or obligation closes something, power makes me capable of it, whereas a right gives me a title to it." [15] Thus, when the relevant criminal laws provide that an accused is "entitled to" bail, then bail is a right. As Montgomery observed, the concept of "title" or "entitlement" is *relational*: it always implies a source of justification of the title in question.[16] According to White,

> To have a right is necessarily to have it in virtue of something, either of some feature of one's situation or of having been given it by someone who had the right, authority or power to give it. In the latter case we can ask 'Who gave you the right to V?'; in the former, "What gives you the right to V?'. I shall call this second question a request for the 'ground' of the right, though writers on this topic have in fact used a battery of phrases, including 'based on', 'at the root of', 'give rise to', springs from', 'resulting out of', etc.[17]

Bail is a basic right of every citizen of Nigeria who is charged with a criminal offence by virtue of section 35(1) of 1999 Constitution and Criminal Procedure Act. Thus, every person is entitled to his personal liberty except as stipulated by the Constitution and or statute.[18]

[15] J.W. Montgomery, *Op. Cit.*, p. 78
[16] *Ibid.*, p. 79
[17] R. Alan, White, *Rights* (Oxford: Clarendon, 1984) cited in J.W. Montgomery, *Op. Cit.*, p. 70
[18] See *Alaya v. State* (2007) 16 NWLR (Pt. 1061) 483 and *Onyirioha v. I.G.P.* (2009) 3 NWLR (Pt. 1128) 342.

In view of the foregoing, it is tautologous to use the phrase "entitled to bail as of right". If we are entitled to bail, it simply means that we have a right to it. It goes without saying that if an accused person before conviction is entitled to bail, it then means that bail is a right. To that extent, it could be safely said that bail is a right. If a convict is not entitled to bail except the court sees reasons for granting same, it could be said that bail bears a dual character. It is a right before conviction. It is not a right after conviction. Yet that does not make it a privilege.

6. Criticism of the Position of Dr. Z. C. Anyogu

In this article, I argue that Anyogu's analysis is an inversion of Hohfeld's categories. It is indeed the opposite of what Hohfeld meant by his square of jural relations. According to Harris, "within these squares, every horizontal represents a correlation, and every diagonal an opposition." [19] Some other authors include three relations. Curzon, for example, represents Hohfeld's legal relations into (a) jural correlatives, (b) jural opposites, and (c) jural contradictories.[20] Thus, a jural relationship could be vertical, horizontal or diagonal.

Hohfeld's Square of Jural Relations

Right	Duty	Power	Liability
Privilege	No-Right	Immunity	Disability

What is the effect of these relationship dimensions in Hohfeld's square of jural relations to the discourse at issue? Diagonally speaking, privilege is the opposite of duty. Vertically speaking, right is the contradictory of privilege. Horizontally speaking, duty is the correlative of right, whilst no-right is the correlative of privilege. In other words, where there is privilege, there is no duty as the two are opposites being diagonal. But where there is a right, there is duty as the two are correlatives. Anyogu in trying to import "privilege" into the correlation between right and duty is reasoning outside or contrary to Hohfeld's square of jural relations. In order to understand the point that is being made here, one needs to understand what Hohfeld meant by "correlatives" and "privilege". According to Harris, "to say that X has a 'duty to' entails that he has his duty as against someone, Y, who has the correlative right; and also that he has no privilege not to as against Y."[21]

In Hohfeld's thought, privilege implies simply "absence of duty" since privilege and duty are opposites. And duty implies "absence of privilege". Jural Correlatives represent the 'presence of' in another. Thus, right is the presence of duty in another and liability is the presence of power in another. On the other hand, Jural Opposites represent the 'absence of' in oneself. Thus, no-right is the absence of right in oneself and disability is the absence of power in oneself. In Hohfeld's construct or system of fundamental legal concepts or jural relations, duty is the jural correlative of right, and no-right is the jural correlative of privilege. According to Harris:

[19] J.W. Harris, *Legal Philosophies* (1997) London, Butterworths, p. 84.
[20] L.B. Curzon, *Jurisprudence* (1988) London, Pitman Publishing, pp. 222-223.
[21] J.W. Harris, *Op. Cit.*, p. 84.

> Correlativity is essential, as part of the law's lowest denominators, on the assumption that every judicial questions concerns two people. For then we ask, not 'Was such-and-such conduct required, prohibited or permitted by law?' but rather 'Was some complainant (civil plaintiff, tax collector, public prosecutor or whoever) entitled to demand that another person do or forebear, or was he not so entitled? Whether I am at liberty to blow my nose will never come to court; but if it did – say, I was an actor claiming compensation for unfair dismissal and my inappropriate nose-blowing was alleged as a proper ground for my dismissal – then the issue would be whether as to some other person I was or was not privileged to do it. *Lightning cannot be joined as a defendant. It is only where my legal relations have been allegedly changed by someone's voluntary act that the question whether they were validly changed or not will arise; and the issue will always be between two persons, deciding whether there was power/liability, or disability/immunity*. [22] (Italics supplied)

Within the context of our inquiry, the Hohfeldian "privilege" would enure to the Judge and not the applicant for bail. Thus, if the Judge has the privilege (conferred by law) to consider the issue of bail or not, then there is no-right to bail. But if the Judge has a duty to consider the issue of bail, then bail is a right. The question whether bail is a right or a privilege is a wrong poser within the Hohfeldian context. To ask this question is to import an implication not envisaged in Hohfeld's square of jural relations. Within the context of Hohfeld's analysis, the proper question would be whether bail is a right or a no-right? Or whether the act of granting bail by a judge is a duty or a privilege? To this extent, Hohfeld's square of jural relations is jurisprudentially irrelevant to the present inquiry. We give credit to the writer, Anyogu, who provided us with the relevant tool for analysis by referring us to the case of *Osuji& Anor. v Commissioner of Police*[23] where the court per Holden C.J. held thus:

> Bail is *a right* before conviction unless there are special reasons to prevail it. Bail after conviction is *not a right* and there must be special reasons for granting it. A person who has not been found guilty of an offence is prima facie entitled to his liberty. (Italics supplied).

In other words, the court looked at the nature of bail through the Hohfeldian binoculars or prism. In the aforementioned case, the court stipulated the circumstance under which bail

[22] *Ibid.,* p. 88
[23] (1974) ECSLR 448 at 449.

can be a right or not a right. It did not envisage a contrast between bail being a right or a privilege, but a contrast between bail being a right or a no-right. This reasoning is in tandem with the Hohfeldian square of jural relations. As Lazarev pointed out:

> The principal aim of Wesley Newcomb Hohfeld's project was to clarify juridical relationships between the relevant parties. Hohfeld presents us with an analytical scheme which splits rights into four different categories of jural relationships and exemplifies a number of analytical distinctions between various legal positions. Importantly, Hohfeld's analysis of rights lies in the descriptive exercise of the legal positions which are connected with each other by means of logical relations of entailment and negation. Hohfeld's analysis is engaged in an analytical and definitional enterprise and does not concern itself with substantive or empirical enquiry into the concept of a right. It follows that Hohfeld's ambition was to provide a conceptual understanding for our use of right, duty etc in practice, thus facilitating a better understanding of the nature of our rights. It was not, however, to inform us what rights, duties etc are or should be or what their moral foundation is or what is necessary for something to count as a right, duty etc. He does not, therefore, say anything about the justification of rights.[24]

It will be recalled that Anyogu, apart from relying on Hohfeld's square of jural relations, equally sought to justify his conclusion that bail is a privilege and not a right by relying on the concept of judicial discretion in granting or refusing an application for bail. His attempt to marry the two grounds, that is Hohfeld's analysis and judicial discretion as contained in the very last statement of his article, has already been criticized. It remains to evaluate the propriety of his submissions with respect to the issue of judicial discretion.

7. Bail: A Right or A Privilege?

To answer this poser, it is proper to seek for answers outside the purview of Hohfeld's analysis. Anyogu argues that bail is not an absolute right. But the fact that a right is not absolute does not make it a privilege. Grant of bail may be dependent on judicial discretion, but the exercise of judicial discretion itself is not absolute. It must follow some laid down principles. Thus, if judicial discretion is not exercised properly, bail will be granted. Indeed, the question posed by Anyogu appears inappropriate in the light of our foregoing submission. In summarizing the debate on whether bail is a right or a privilege, Oraegbunam stated thus:

[24] See N. Lazarev, "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights", *Murdoch University Electronic Journal of Law*. Website: www.austlii.edu.au/au/journals/MurUEJL/2005/9.html. Accessed on 20/8/2016 by 7.56am.

> There has been a controversy, mainly among legal scholars, and practitioners on whether bail is a right or a privilege. However, *most people settle with the view that bail pending trial is a right due to the presumption of innocence as guaranteed in section 36(5) of the 1999 Constitution, while bail pending appeal is a mere privilege* given the fact that the accused is now a convict. But few voices still maintain that bails of all types are only a privilege. Anyogu seems to belong to this camp… (Italics supplied).[25]

In this article, we have proffered criticism on the position taken by Anyogu. We equally align our position with the opinion that bail pending trial is a right. Our grouse appears to be with the statement that "bail is a privilege" in some or all circumstances as maintained by one or the other camp. We suggest that within the Hohfeldian context, the question is not whether bail is a right or a privilege but whether it is a right or not a right. To pose otherwise is akin to asking whether bail is a right or an immunity; or whether bail is a right or a power; etc. Adetifa reasons in a similar manner when he entitled his article: "Bail in Nigeria (3): A Matter of Right or Not".[26] Unfortunately, he did not give any answer to the poser. All he did was to stipulate conditions for the grant of bail as provided by the law.

It may well be argued, in favour of Anyogu, that he did not employ the word "privilege" in the Hohfeldian sense.[27] But even at that, we are bound by his own working definition of privilege as "a special legal exception". As we had earlier submitted, bail as provided by law does not fall into this categorization as it does not apply to a special class of people like in the case of immunity. It applies to everybody, but comes into effect on fulfillment of certain conditions.

8. Conclusion

We set out in this article to interrogate the conclusion made by Anyogu with respect to the question: "Bail: A Right or A Privilege?" As the writer relied on the American jurist Hohfeld for his analysis, we questioned the propriety of that question within the context of Hohfeld's square of jural relations. We concluded that the question cannot even be raised as it would amount to a travesty of the square of jural relations constructed by Hohfeld. Indeed, the proper question is not whether bail is a right or a privilege, but whether bail is a right or not a right. We conclude that bail is a right given the constitutional provision to that effect. The fact that such a right is conditional cannot impair that constitutional provision. It

[25]Ikenga K.E. Oraegbunam, "Critical Reflections on some issues on Prosecution, Sentencing and Execution of Capital Offences in Nigeria" in *The Premier Bar Journal (PBJ*), Vol.2, No.2, 2015, p. 49

[26] See A. Adetifa: Bail in Nigeria (3): A Matter of Right or Not. Website: www.legalnaija.com/2016/05/adenike-adetifa-bail-in-nigeria-3.html?m=1. Accessed on 20/8/2016 by 1.08pm.

[27] Whether a certain situation is a right or a privilege has arisen in different circumstances. In Canada, for example, driving is said to be a right and not a privilege. But certainly the privilege meant here is not in the Hohfeldian sense.

is our submission that bail is not a privilege in the sense assigned it by Anyogu. It is only after an apposite meaning is given to the term "privilege" can we visit anew the question whether bail is a right or a privilege.