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De Minimis Principle: Defence or Guide?

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Abstract
Going through the historical evolution of criminal law, the courts have considered certain facts or sets of facts in any case that serve to exonerate a person from liability and they are now known as defenses to criminal liability. Slight injury is a defense in our laws and is only provided for in the Penal Code which refers to it as slight harm. In some climes, it could serve as a defense in civil actions. It is also referred to as the, de minimis principle. It is a codification of the maxim, "De minimis non-curat lex" which means "The praetor does not concern himself with trifles or very small matters". It is a common law principle the essence of which is to save judicial resources and prevent the system from getting bogged down with trifling or inconsequential matters. This article considered the de minimis principle as a defense and its role as a guide.

1. Introduction

Before the advent of the British, what later became known as Nigeria had what may be called customary criminal law. Each community had its own set of rules and regulations governing the conduct of its people. Sanctions were often imposed in degrees equivalent to the offense. In the northern part of Nigeria, there seemed to exist a more advanced law, i.e., the Sharia law. Over time, however, the Penal code[314] was introduced and was and still is applicable only in the northern part of Nigeria. The code contains various offenses, defenses, and punishments. Section 58 specifically provides for the defense of slight harm, which is the focus of this article.

Slight harm is also known as slight injury and *de minimis* principle, i.e., *de minimis non curat lex*. Translated into English, it means "the law does not concern itself with trifles:[315] It is a legal term meaning 'too small to be meaningful or taken into consideration, immaterial.'

It however seems that in Nigeria and for all of its years of existence, the provision in section 58 of the Penal Code[3] on slight harm has not been found worthy of expression in any Nigerian case and has attracted little or no mention by authors in criminal law. Nigerian courts are congested and the same applies to the Correctional Centers where persons awaiting trial and convicts are kept after sentencing if they are to serve term. Often, complaints are made about the length of time it takes

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[314] Penal Code Act, Cap P3, LFN, 2004
[315] Thomson Reuters<http://uk.practicallaw.thomson reuters.com> accessed 18 April 2018
[3] n2

to investigate and prosecute criminal cases in Nigeria. Because slight harm is provided for in our laws, one wonders whether some criminal cases that found their way to court ought to have made it at all. It has been said that the function of the maxim as a defense is to place outside the scope of legal relief the sorts of injuries that are so small that they must be accepted as the price of living in society rather than make a federal case out of it[316].

Since slight harm or the *de minimis* principle states that no person shall bear criminal liability for an act where given the nature, circumstances, and consequences of the act, and of the public interest, the act is too trivial, should taxpayers' money be used towards prosecuting and subsequently remanding the accused in prison, awaiting trial for offenses like stealing plantain?[317] Should taxpayers' money be expended investigating and prosecuting cases like these?

It is because of *de minimis* that it is said that, an act is not a crime even though it contains characteristics of a crime, when it is an act of minor significance, because of the lack or insignificance of the damaging consequences and the low level of criminal responsibility of the offender.[318]This article shall consider the defense of *de minimis* and the possibility of using it as a guide to filter or sift out cases unworthy of the precious time and resources of the criminal justice sector.

2. Historical Origins of *De Minimis*

Slight harm, ie.,*de minimis* has its roots in medieval England and the days of Kings and Chancellors. Chancellors are most frequently credited with contributing towards the development of the *de minimis* principle as we know it today.[319] In early English history, if one party wanted to bring a complaint against another party, he would present their case before the King's Royal Court.[320]However, if the dispute could not be resolved by having one side reimburse the other for damages, or if the party seeking the remedy could somehow not obtain relief from courts (i.e. Courts of Common Pleas, Kings Bench, and Exchequer), one would have to directly petition the King or the King's select Council to request a specific action[321]. By the end of the fifteenth century, petitions to the king and his council became too numerous and burdensome to administer, so the king was compelled to give up some of the responsibility for adjudicating the petitions to his chancellor. The chancellor usually occupied a senior position in the church and was generally regarded as the King's Chief political advisor.[322]

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[316] Per Justice, Robert Stegmann, Appellate Court, Illinois in *People v Durham*, cited in Duhaime's Law Dictionary. <www.duhaime.org> accessed on 19th April 2018

[317] Vanguard Newspaper online, 'Recession: Police detains mother, baby over plantain theft' by Monsuru Olowoopejo<https://www.vanguardngr.com-news >accessed on 8th June 2018

[318] E. Magen, 'De Minimis as a meaningful concept' (1996) 43 Hapraklit 38 - 56

[319] Jeff Nemerofsky, "What is a "Trifle" Anyaway?" *Gonzaga Law Review*, Vol 37: 2, 2001/02, page 316, citing Roscoe Pound and Theodore F.T Plunkett, *Readings of the History and System of the Common Law*, 217 – 18, 3rd ed, 1927, cited by

[320] Theoretically, all Kings and the Judges were royal appointees. Some of the Kings would occasionally sit in judicial matters.

[321] D.M Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* 13 (Cambridge University Press, 1890) cited by Jeff Nemerofsky, n1, page 1.

[322] Theodore F.T Plucknett, *A Concise History of the Common Law* 164 (5th ed. 1956), M.M. Knappen, *Constitutional and Legal History of England* 34, 1942, Cited in Jeff, Nemerofsky n189, page 1.

Delegating authority to the chancellor was a gradual process by which the chancery evolved from a purely administrative function to one that was judicial. Over time, petitions were no longer addressed to the king but to the chancellor. As the volume of petitions grew, the chancellor had to develop a faster method for resolving his increasing legal caseload.[323] The chancellor decided his cases based on equity and fairness rather than on technical compliance with writs and pleadings[324].

In addition to following the dictates of conscience, early chancellors were also learned scholars whose duty it was to protect the weak against the strong and the simple against the cunning[325]. The chancellor therefore exercised discretion freely, flexibly, and with special concern for the poor.

The Court of Chancery formulated several "maxims" to help steer its legal decision-making in resolving royal disputes. A maxim is the embodiment of a general truth in the shape of a familiar adage. The legal maxims developed by the Court of Chancery were more judicially oriented and are referred to as "maxims of equity." Maxims of equity are short statements that derive from a collection of general propositions drawn from Latin, Norman–French, English, Anglo-Saxon formal logic, medieval philosophy, the Bible, and even from common experience.[326] It is among these that the *de minimis* maxim exists.

One of the first modern references to it in a criminal context arose in the English case of *The Reward*[327] where a ship was stopped for transporting three tons of Jamaican logwood from Jamaica to the United States, at a time when the export of such wood was prohibited. The owner claimed that the wood was used only as damage, to stow sugar and rum; it was not intended for sale and thus was not shown on the manifest as cargo. Evidence was led at trial that the wood was marketable.

In sustaining the conviction, the court held on the following:

> *The Court is not bound to strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, De minimis non-curat lex. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing in the public interest, it might properly be overlooked.*

The Court found that the amount in question was not so trifling as to fall properly within the protection of the legal maxim.

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[323] Jeff Nemerofsky, "What is a "Trifle" Anyaway?" Gonzaga Law Review, Vol 37: 2, 2001/02, page 316, citing J.H. Baker, *An Introduction to the English Legal History*, (1971)46 – 47

[324] n8

[325] Robert Chambers, *A course of Lectures on the English Law*, 1767 – 1773 (Thomas M. Curley, ed., (1986)

[326] Stanley Mcquade, *Ancient Legal Maxims and Modern Human Rights* (1996), cited by Jeff Memerofsky, n189

[327] (1818) 165ER 1482, cited by Keith R. Hamilton, "De Minimis Non-Curat Lex" *Canadian Bar Association,* National Criminal Justice Section Committee on Criminal Code Reform, 1991

The maxim was first used in the United States in 1796[328] and was then ignored entirely by the court until 1865.[329]The U.S. courts do not always use the exact phrase "*de minimis*" and as such, it has developed a few synonyms. Some of them are, minimal, modest, and minuscule. It took many years for the *de minimis* doctrine to become a powerful force in the US Supreme Court jurisprudence, but today it is active in many areas. The expansions often occurred as the country moved through significant periods in its history.[330] It was through this evolution that it seems that some form of conclusions may have been reached on certain issues as regards *de minimis*.

3. Slight Harm as a Defense to Criminal Liability

As stated earlier, slight harm as a defense to criminal liability in Nigeria is only provided for in the Penal Code. It does not have a corresponding provision in the Criminal Code. Under the Penal Code, it is found in Chapter II which is titled Criminal Responsibility. In the said chapter II, it is provided for in section 58, titled "Act causing slight harm" which reads as follows:

> *Nothing is an offense by reason that it causes or that it is intended to cause or that it is likely to cause any injury if that injury is so slight that no person of ordinary sense and temper would complain of such injury.*

According to Richardson,[331] the section on slight injury is a codification of the maxim, "*Deminimis non-curat lex*". Section 31 of the Penal Code defines "injury" to denote harm illegally caused to any person, in body, mind, reputation, or property. Things that are noteworthy from the sections include:

1. "Nothing" in section 58 could denote an act or omission
2. The act or omission in question causes, or is intended to cause, or is likely to cause an injury.
3. The injury may be harm, not just bodily harm but harm to the mind, reputation, or property.
4. The test of what is slight injury is that of an ordinary man with an ordinary temper

Strictly speaking, *de minimis* is not a defense that excludes the unlawfulness of the defendant's conduct, but rather a decision of a court to allow unlawful conduct to go unpunished on account of its triviality. This is also the same for some other defenses, where even though the *actus reus* may be present, the court looks into circumstances that may exculpate the accused.

De minimis plays at least three distinct but related roles in a theory of criminal liability, before the sentencing stage. The three roles admit subtle variations and occasionally blur into one another. They are:

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[328] *Ware v. Hylton*, 3 U.S 199, 268(1796), Cited by Jeffrey Brown, "How Much is Too much? The Application of The *De Minimis* Doctrine to The Fourth Amendment", Mississippi Law Journal, Vol. 82:6 http://ssrn.com/abstract = 2143415 - accessed on 20/5/19

[329] *Mc Andrews v. Thatcher*, 70 U.S 347, 359 (1865). The court found that damage of 1/144th of a ship was *de minimis* calling it "nothing to speak of"

[330] fn17

[331] S.S. Richardson, *Notes on the Penal Code Law*, (4th ed, 1987) page 50

i. *De minimis* functions as a constraint on criminalization;
ii. It may appear as an element of a criminal offense; and iii.
It may serve as a true defense from liability.

As a constraint on criminalization, *de minimis* serves to limit the kinds of Penal offenses legislature should enact. As stated earlier, *de minimis* concerns often arise when a particular instance of criminal conduct is trivial, even though most other acts of that nature are not. If a problem is trivial, the heavy hand of a punitive sanction is not an appropriate mechanism to address it. A problem is small, not because few people engage in the activity that causes it but regardless of the number of such persons, if the problem is insufficiently serious to justify subjecting persons to punishment, a genuine *de minimis* entails that a penal statute should not be created in the first place.

4. Rationale, Development, and Applicability of the Doctrine

Courts of law exist to enforce rights and redress wrongs, not to encourage litigation; hence they will not ordinarily take jurisdiction of moot cases, nor take cognizance of vexatious suits.[332] It would be unnecessarily burdensome and tend towards delay of justice if courts were to require the mathematical precision of a micrometer. Therefore, it is necessary and expedient that the law should not be concerned with trivial matters. Many of the technicalities which have become a reproach to the administration of the law would have been ineffective, had courts resolutely refused to take cognizance of points that are unsubstantial, frivolous, and without merit.[333]

Prevention of crime is more important than punishment for the crime committed. Punishment is desirable only as it helps to prevent crime and does not conflict with the ends of justice.[334]It is the opinion of some that the purpose of punishment is to deter persons from the commission of crime, not to give society an opportunity for revenge.[335] If this were to be the guiding principle for our courts, then one would not see situations where people are sent to prison because they stole a bunch of bananas or ate a plate of food without paying.

The function of the *de minimis* doctrine is to place outside the scope of legal relief, the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society.[336] The maxim signifies that mere trifles and technicalities must yield to practical common sense and substantial justice to prevent expensive and mischievous litigation, which can result in no real benefit to the complainant but which may occasion delay and injury to other litigants.[337]

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[332] Frederick G. Mc Kean, Jnr, "*De Minimis Non Curat Lex*" University of Pennsylvania Law Review (1927) 429 <scholarship.law.upenn.edu>accessed 19th April 2018
[333] n21
[334] G. Vito, J. Maahs, and R. Holmes, *Criminology: Theory, Research & Policy,* Jones & Bartlett Publishers, 1994
[335] Gennaro, et al, quoting Beccaria's 1764 Essay on Crimes and Punishments.
[336] n8
[337] n8

When considered in all its ramifications, it is clear that slight injury is an excuse for criminal liability, in other words, a defense. From *The Reward*,[338] four elements must be established for an accused to be criminally excused:

i. An offense was committed; ii. The offense was of very slight consequence, the deviation was a mere trifle; iii. If the offence were continued in practice, it would weigh little or nothing on the public interest; and

iv. The accused is exposed to the infliction of inflexibly severe penalties.

In a modern context, one can envision at least three rationales for retaining the defense of *de minimis*:

i. It reserves the application of the criminal law to more serious misconduct;

ii. It protects an accused from the stigma of a criminal conviction and the imposition of severe penalties for relatively trivial misconduct; and

iii. it saves the courts from being swamped by an enormous number of trivial cases.[339]

De minimis is therefore an important defense used in cases where common sense would dictate that no criminal charges should have been laid in the first place. It is further to avoid the situation where more serious crimes take even longer to be dealt with due to these trivial issues taking up the court's time. This will result in the criminal justice system and the court system being brought into disrepute for not being able to deal with serious matters efficiently. Therefore, the essence of *de minimis* is that there should be a sifting to determine which cases or offenses that should be charged to court, after certain considerations.

In discussing the applicability of *de minimis* doctrine, there are factors most commonly considered by courts when applying *de minimis*. These include the size and type of the harm, the cost of adjudication, the purpose of the rule or statute in question, the effect of adjudication on the rights of third parties, and the intention of the defendant.[340]

Where the strict application of the right or law in question would yield especially "stark" results that do not seem justifiable given the trivial violation involved, a *de minimis* ruling is more likely. An example is where a court refused to permit the forfeiture of a 99-year lease and a $9,900 deposit over failure to make a timely payment of $25.01.[341][342]

In *State v Smith,*[30] the court dismissed a charge of shoplifting three pieces of bubble gum as *de minimis*. The argument behind this is that a trivial legal violation does not automatically become non-trivial if intentional. Nevertheless, courts do commonly consider the intent of the wrongdoer, not as an absolute bar to *de minimis*, but as one of several *de minimis* factors. The reason, however,

[338] (1818) 165ER 1482, cited by Keith R. Hamilton, "*De Minimis Non-Curat Lex*" *Canadian Bar Association,* National Criminal Justice Section Committee on Criminal Code Reform, 1991

[339] n27

[340] Andrew Incest, A Theory of *De Minimis* and a Proposal for its Application Copyright[21] Berkeley Technology Law Journal, 945 (2006)

[341] *Fellows v. Martin* 584 A. 2d 458, 464 (Conn. 1991)

[342] A. 2d 236, 237, 240 41 (N.J. Super. Ct. 1984)

may have more to do with utilitarian considerations than with moral culpability. Failure to hold people responsible for their intentional wrongs, no matter how minor, may lead to more of such wrongs, and the collective effect of these wrongs could be significant. Deterrence aside, it is also possible that society obtains greater utility from punishing one who intentionally does wrong than from punishing one who is negligent. The intent of the wrongdoer, therefore relates to *de minimis* primarily because application of the maxim may result in more legal violations, not because intentional legal violations are morally wrong.

5. Slight Harm – Defense or Guide?

In Nigeria, the case law on the application of the defense is almost non-existent. The authors think that a lot still needs to be done for the maxim to play a more prominent role in our criminal law. It will help to greatly reduce the problem of awaiting trial inmates in our prisons and also de-clutter the dockets of the courts. In 2000, some of the general reasons identified while calling for a change in the criminal justice sector in Nigeria were,

i. prisons were a low priority in Nigeria and a majority of its population at the time (and even up till now) was made up of poor and powerless people;

ii. imprisonment was all too easily used even for small offences, as a punishment of first instance rather than of last resort. [343]

2000

Twenty years later, the same problems still confront us as a nation; showing that little or nothing has been done or rather little or no success has been achieved in the area of prison reforms.

In our jurisdiction presently, slight harm is a defense to criminal liability in the sense that one can only speak about a defendant's conduct if it satisfies all the elements of the offense as defined.

In certain jurisdictions, such as the US, the police, prosecutors, judges, and juries already screen out trivial cases by exercising their unstructured discretion. This is applying the principle as a guide to screen out trivial cases from the court. Codifying the principle was a superior way of accomplishing the same end by adopting it as a stated legislative policy and openly vesting that authority in the courts. By doing so, according to Pomorski, the law puts a check on the unbridled discretion of the police as well as prosecutors.[344] For police and prosecutors, therefore, the *de minimis* can only play the role of a guide.

The power of the courts in this instance may seem to be applied as a check on the powers of the executive or exercise of the doctrine of separation of powers. In exercising this power, the court

[343] Civil Liberties Organization, Annual Report 2000, on the State of Human Rights in Nigeria. Ayo Obe, ed, Lagos,

[344] Stanislaw Pomorski, On Multiculturalism, Concepts of Crime, and the "*De Minimis*" defense, *BYU Law Review*, Vol. 1997, Issue 1, Article 8<digitalcommons.law.byu.edu> accessed 10th May 2019

may then be able to screen the cases, on their merits to know the ones that should be dismissed based on *de minimis* defense and the ones that should be convicted to act as a deterrent. The question that may however arise from the role of the court in this regard, is whether this will not defeat one of the major aims of the doctrine of *de minimis* which is not to congest the courts with trivial cases. If the courts still have to adjudicate on every case, will it not amount to an abuse of its process?

5.1 Earliest Stage of Application of the Doctrine

The criminal justice system in Nigeria has three components: law enforcement, which includes the police and other criminal investigative agencies, the judicial process (courts, Judges prosecutors), and corrections (prisons, remand homes). Criminal justice is a system of institutions and practices of government whose main focus is to mitigate and deter crime, uphold social control, and sanction individuals who violate the set laws of a specific state with rehabilitation and criminal penalties.[345]

Knowing the roles of the various components of the criminal justice system, one may be right in wondering the earliest stage at which the principle of *de minimis* should be applied. It should be borne in mind that the criminal justice system is s chain of different decision-making stages. It is only when *de minimis*is raised in court that it can act as a defense. Before it gets to court, it should act as a guide to the other players in the criminal justice sector whose duty it is to profile cases, i.e., the Police, Prosecutors, and the Attorney-General.

5.1.1 The Police and other Prosecutors

The Police are a citizen's first link or contact with the criminal justice system and play an important role. Any time an offense is committed or there is a threat or likelihood that a crime will be committed, it is the police that people contact. Therefore, to a large extent, the actions or inaction of the police is the first link in the criminal justice system determines how the players in the rest of the chain will perform. If the police do not carry out proper investigations or indeed after investigations, decide to charge every offender to court, the courts will collapse under their already existing caseload. When the cases get to court, after arraignment, most of the accused are remanded in one form of custody or another while awaiting trial. This is what has created the problem of prison congestion all over Nigeria and even beyond.

On the part of the Police, any person may make a report to a Police Officer that an offense has been, is being, or is likely to be committed.[346] By Regulation 333(iv) – (v) of the Nigeria Police Regulation,[347] every information or complaint relating to the commission of a crime is to be reduced into writing and entered into the Station Crime and Incidents Diary if given orally to the officer in charge of a police station.

Upon the receipt of a crime report, detectives are assigned to carry out an investigation. The investigation seeks to achieve many aims some of which are to:

i. Reconstruct what happened;

[345] Adesanya Michael Adebayo, Administration of Criminal Justice System in Nigeria, (Princeton Publishing Company, 2010)

[346] n34

[347] Made under Section 46 of the Police Act Cap P19, LFN 2004

ii. Determine the sequence of events;
iii Find out what the suspect did or did not
do; iv Establish the modus operandi; v
Determine what property was stolen vi
Reveal the motive,[348] etc.

The police may do some or all of the above and even more, depending on the type of offense committed. The information-gathering stage of any criminal investigation is important. In fact, it is information gathered at this stage that will help the police exercise their discretion on whether to charge the accused or not. Even though in our jurisdiction *de minimis* i.e., slight injury is strictly a defense as enshrined in section 58 of the Penal Code, the writers submit that the police can apply it as a guide in determining whether or not a suspect should be charged to court.

According to Adebayo,[349] after investigations into a case by the police, the police will decide the next line of action to take. There are three options open to the police at this stage.

The option will be determined by the available evidence gathered from the investigation of the case. Thus, the police have the discretion subject to the power of the attorney–general of the Federation or of the State under Section 174 and 211 of the 1999 Constitution respectively to decide whether to prosecute an accused person or not. In *Aroyewun v. COP,*[350] the court held that acting on any information, the decision to arrest, detain, and prosecute another on a complaint received from an informant is that of the police, not that of the informant. If the prosecution is uncertain or unsure, they should not arrest, detain, or prosecute an accused person. It is in recognition of the fact that the police can release a suspect unconditionally when it is discovered at the end of an investigation that no crime has been committed that the Criminal Procedure Law,[351] for example, provided in section 19 as follows:

> *When any person has been taken into custody without a warrant for an offense other than an offense punishable with death, the officer in charge of the police station or other place for the reception of arrested persons to which such person is brought shall, if after the inquiry is completed he is satisfied that there is no sufficient reason to believe that the person has committed any offense, forthwith release such person.*

The above can accommodate the exercise of discretion on the part of the police to also release persons who committed very minor offenses, using *de minimis* as a guide. This will greatly aid the speedy dispensation of justice in Nigeria and also achieve one of the aims of the *de minimis* defense

[348] Celestine I. Nmerole, Police Interrogation in Criminal Investigation (Halygraph Nig. Ltd, Minna, 2008) 109
[349] n34
[350] (2004) 16 NWLR (Pt898)414
[351] Cap C-787 Laws of Ogun State of Nigeria (Revised Edition) 2006, section 19, Administration of Criminal Justice Law of Lagos State, 2011

as seen in The Reward[352] case. This is especially so, considering all the hurdles that exist at almost every stage of the criminal justice system.

5.1.2. **The Attorney-General**

On the part of the Attorney-General, he has absolute discretion in deciding who to prosecute and for what offense, where several people committed the same offense. This can also apply to agencies of government that have prosecutorial powers, such as the National Drug Law Enforcement Agency.[353] They could decide not to prosecute if the quantity of the drug or banned substance found on a suspect is very little. Other things could be taken into consideration in arriving at the decision not to prosecute, such as the age of the suspect, etc. The same will apply to the Economic and Financial Crimes Commission and Independent Corrupt Practice Commission.

The Director of Public Prosecution (DPP) functions as the head of a directorate within the Ministry of Justice under the direct control of the Attorney General rather than as the head of a separate and distinct office. At the state level of the criminal justice system, the DPP has virtually exclusive responsibility for criminal offenses created by state laws to determine whether a particular case would be prosecuted or not.[354]Perhaps the decision that has the most profound effect on the criminal justice system is the decision to prosecute, thus, the decision to prosecute a suspect should never be made lightly. Such a decision immediately alters the course of the suspect's life and places further strain on the criminal justice system.[355]

According to Fola Arthur - Worrey,[356] the primary determinant ought to be the pursuit of justice and the avoidance of abuse of process. Police and prosecutors inevitably enjoy vast discretionary powers largely as a result of the extraordinary breadth of penal laws. These officials can hardly proceed in every case in which a person is thought to be violating the literal terms of a law, and thus have little choice but to use their judgment about which conduct is worth arresting and prosecuting.[357]

According to Douglas Husak, in the United States, although the principle they employ in exercising their discretion is not always clear, it seems obvious that police and prosecutors fail to arrest or to bring charges in circumstances they assess to be *minim*al, thus injustice is more readily avoided than in a system in which little or no discretion is entrusted to these officials.[358]

Superficially, at least, it seems that people should never be made to appear in court or face criminal charges for a *de minimis* infraction. If such persons are not charged to court, they cannot plead

[352] n16

[353] Cap 30 LFN 2004

[354] Fola Arthur-Worrey, The Prosecutor in Public Prosecution (Josadeen Nigeria Limited, 2014)

[355] n43

[356] n43

[357] Douglas Husak, "The *De Minimis* defense to Criminal Liability" culled from <http://www.law.berkeley.edu/1151.htm> accessed 18th April 2018.

[358] n46

guilty so in such a case, *de minimis* may not be a defense but a guide in determining when or when not to charge on the part of the police or prosecutor.

The United States provision for *de minimis* has been referred to as a mere extension of discretionary powers to dismiss charges beyond the office of the prosecutor. Their police, prosecutors, judges, and Juries already screen out trivial cases by exercising their unstructured discretion. Some people however have a different opinion about this. According to Valena E. Beety,[359] of the 1.6 million Americans in prison, most inmates are serving sentences for non-violent offenses. According to the writer, courts in the last thirty years have taken a lackadaisical back seat. Prosecutors are failing in their gatekeeping function. According to him, accountability lies at the heart of the criminal justice system. In the face of predominant prosecutorial power, court discretion can balance a system that indiscriminately undermines the future life choices of non-serious offenders through a simple arrest.

Conclusion

This article aims to throw more light on this overlooked defense that should be a potent weapon in our criminal law. It is a potent weapon in the sense that the use of it could go a long way in solving most of the problems tormenting the criminal justice sector in Nigeria, namely; congested caseloads in courts, prison decongestion and delay in criminal trials. Even though for now it exists only in the Penal Code, it is hoped that at the earliest review, a corresponding section should be included in the Criminal Code. While we await the review, the writers suggest that the defense can also act as a guide in sifting cases that should or should not get to the courts.

[359] Valena E. Beety, Judicial Dismissal in the Interest of Justice, Mission Law Review, Vol. 80, 2016