SOURCES OF NIGERIAN LAW AND THE RELEGATION OF CUSTOMARY LAW IN PERSPECTIVE

By

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I. *Introduction*

Grammatically, the word "source" has different meanings which include "an origin, a beginning".[1] Along this line, the phrase "*sources* of Nigerian law" is open to different meanings based on context of use.

In one respect, a *source* of Nigerian law connotes the *literal* or *material source* which means the physical material in which a law is contained and can be found or referred to. Literal or material sources of Nigerian law thus include statute books, law reports, gazettes and such similar materials that are the documentary repositories of law. Secondly, sources of Nigerian law can be *historical.* Historical source means the "antecedent events or remote causes that induced or influence the law. This includes the writings and opinions of jurists as well as old customs."[2] Thirdly, "sources of Nigerian law" can be the *formal* source. Formal source of Nigerian law refers to the foundation or platform on which the whole Nigerian legal order stands. This is the basis from where all laws derive their ultimate validity and binding force. The formal source of law, basically, is the *grund norm.* Fourthly, a source of Nigerian law can mean *legal source.* Legal source is the recognized and accepted process and procedure for validating laws by which ordinary rules or prescriptions get transformed into binding and enforceable laws. Legal source of Nigerian law includes Received English Law, statutes, judicial precedents and customs. While the discussion of "sources of Nigerian law" in the context of this paper touches on all the diverse *sources* noted above, greater emphasis would be on the *formal* and *legal* sources.

II. *Sources of Nigerian Law: Indigenous Pre-colonial Society*

One feature of law in the aspect of regulation human actions is that members of the society to which it applies regard the law as the standard of behaviour. Every society, at any stage of development would ordinarily have rules and norms which the members of the society regard as the binding standard of behavior. Along this axis, law symbolises and reflects the ways of life, beliefs or practices of members of the community to which the law applies. In that respect, law made for one community may not effectively apply in a different community which has unrelated and distinct ways of life, beliefs or practices.

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[1] *The Cassell Compact Dictionary*, (New ed.) (London: Cassell, 1998), 1058

[2] John O. Asein, *Introduction to Nigerian Legal System* (2nd ed.) Lagos: Ababa Press Ltd, 2005), 22

Prior to the advent of colonialism, the various communities constituting the present-day Nigerian geo-polity had diverse systems of law and socio-political practices regulating their respective affairs. Put in the context of that era, the network of law and practices constituted the Nigerian *legal order*. That legal order consisted principally of customary law together with beliefs and practices devised by the indigenes. Put contextually, in indigenous pre-colonial Nigeria, customary norms and practices constituted the central sources of law in the different societies. With the indigenous legal order or system being a creation of the people for themselves, the level of embrace and reverence for it was relatively high with regard to regulation of human conducts, especially with regard to prevention and control of crimes.[3]

III. *Colonialism: Modification and Expansion of the Sources of Law in Nigeria*

African countries came under the colonial control of various European powers, with Nigeria falling under the control of Britain. Colonialism brought about the incursion of foreign norms, values and laws of the colonizing masters. Inherently primed to supplant the ways of the natives,[4] the colonial *new order* affected and brought about the relegation and suppression of traditional practices underpinning the indigenous Nigerian legal order. Colonial rule in Nigeria had a general impact of radical alteration of the traditional or indigenous legal system which manifested in ways that include the following:

(a) Transplantation and imposition of laws and norms made for foreign societies with different ways of life and values.
(b) Making of laws for the African societies by foreign colonial masters who were mainly influenced by their own ways of life while they regarded the African ways of life as primitive and unwholesome.
(c) The subjugation of customary law and traditional values to the laws made under circumstances (a) or (b) above.
(d) Fundamental alteration and illegalization of traditional principles and values formulated and operated for many generations and to which members of the societies have been accustomed.

In summation, the colonial relationship between Nigeria and England engendered the introduction of supervening English law and legal system into Nigeria.[5] This took different modes; in one vein, Nigeria as a component of the British Empire was subject to laws generally applicable to all parts of the Empire. More specifically, English Law in its different genres was

[3] S. Bamidele Ayo, *Public Administration and the Conduct of Community Affairs among the Yoruba in Nigeria* (Oakland: ICS Press [Institute for Contemporary Studies, Oakland, California], 2002), 193; see also, O. Oko Elechi, 'Human Rights and the African Indigenous Justice System, (A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8-12, Montreal, Quebec, Canada) 9-10, 14

[4] Akin Ibidapo-Obe, 'The Dilemma of African Criminal Law: Tradition versus Modernity', in Akin Ibidapo-Obe, *A Synthesis of African Law*, (Lagos: Concept Publications, Ltd, 2005), 106-107, 108

[5] A.O. Obilade, *Nigerian Legal System*, (London: Sweet & Maxwell, 1979), 4

formally introduced and made applicable in Nigeria with the commencement of Ordinance 3 of 14th March 1863.[6]

In perspective, colonialism and the concomitant introduction of English Law made English Law to become and remain a prominent and predominant source of law in Nigeria up to the present times. Summing up the rise and predominance of English law in Nigeria, a learned writer has noted: "One of the notable characteristics of the Nigerian Legal System is the tremendous influence of English Law upon its growth. The historical link of the country with England has left a seemingly indelible mark upon the system: English Law forms a substantive part of Nigerian Law."[7]

With the advent of colonialism, the sources of law applicable enlarged from mere customary law, as made and generally accepted by the indigenous people, to include Received English Law. Nigeria has gone through diverse political structures from the colonial times up to the present times. After the amalgamation of the Northern and Southern parts of the country in 1914, it was governed by the British colonial administration as a unitary state. In 1954 it became a federation of three Regions and the Federal Territory of Lagos. Under this structure the country was granted independence by Great Britain in 1960. In 1963 it was re-structured into a federation of four Regions and the Federal Territory of Lagos. Yet, in 1967, the country was further divided into 12 states. Further political division of the country continued up to the present federal structure of 36 states and an autonomous Federal Capital Territory of Abuja.[8]

Since their respective emergence, the regional, states and the federal components of the Nigerian nation have had legislative powers in accordance with the provisions of pertinent laws including the country's Constitutions. With the conferred legislative powers, the different components have been making laws which created another source of law in Nigeria – *Legislation*, or more appropriately, *Nigerian Legislation*, to distinguish this source from British legislations that were components of the Received English Law obtained from Britain.

A concomitant effect of the introduction of English Law into Nigeria is the adoption and operation of English judicial and adjudicatory system, which has the principle of *judicial precedent* as a component. Necessarily, this also made *judicial precedent* or 'Case Law' a source of law in Nigeria.

IV. *Contemporary Era: Sources of Nigerian Law*

Altogether, Nigeria has four sources of law operating in the country these are:

(a) English Law

(b) Nigerian Legislation

(c) Judicial Precedent or Case Law

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[6]Ibid. at 8

[7] Ibid at 4

[8] For further information on the political evolution from colonial time see G. Ezejiofor, 'Sources of Nigerian Law' C. O. Okonkwo, *Introduction to Nigerian Law*, (London: Sweet &Maxwell, 1980), 7-8

(d) Customary Law[9]

One question that has been flagged in some forums is whether the Nigerian Constitution or International Treaties, to which Nigeria is a party, constitute additional *sources* of law in Nigeria.[10] Without equivocation, the sustainable legal position is that these are not distinct sources of Nigerian law. First, in legal context, despite its incontestable supremacy over and above other Nigerian laws, the Constitution, generically, is an enactment and thus falls within the ambit of Legislation as one of the sources of Nigerian law. Asein, quite agreeably, sums up the situation as to what constitute sources of Nigerian law in the following words:

> The principal legal sources of Nigerian law are: (a) The Constitution; (b) Local Statutes; (c) Case Law (d) English Law, comprising Acts or Orders in Council applying directly to Nigeria, statute, the common law and doctrine of equity; (e) Customary law.
> The first two sources will be considered together, *especially as the Constitution is indeed a local enactment, albeit of a different character and importance…*[11]

Relating to the standing of international treaties as a source of Nigerian law, Asein aptly analyses the situation thus: "In the case of Nigeria, any international treaty to have the force of law, must have been domesticated…It is the statute implementing the treaty obligation that is the source of law rather than the international treaty to which it gives effect."[12]

Against this background, the well-established four sources of Nigerian will be discussed in detail in the following sections. The discussion will start with the English Law; perhaps, it bears stating that the sequence of discussion has nothing to do with the relative importance or supremacy of the four sources. The sequence is simply a matter of author's style.

IV.I *English Law*

As noted earlier, due to Nigeria's colonial link with Britain, English Law has been a significant source of Nigerian law. Generally, English Law constituting source of Nigerian law can be divided into two classes. These are: (a.) the English laws made to apply directly to Nigeria (as a colony and dependent entity) by their own force, or by imperial extension to Nigeria as a component of the British Empire; these consist of statutes and subsidiary legislation (b.) The English laws received into Nigeria by local statutes which comprise of the common law, doctrines of equity and statutes of general application (SOGA).

IV.I (a.) *The English laws made to apply directly to Nigeria as dependent entity*

The origin of Nigeria as a unified political entity is traceable to the amalgamation of the Colony and Protectorate of Southern Nigeria with the Protectorate of Northern Nigeria on January 1,

[9]Ibid. at 55
[10] See John O. Asein, supra note 2 at 23-24
[11] Ibid at 23[emphasis added]
[12] Ibid. 'Domestication' of an international treaty connotes the process of enacting the content of an international treaty into a Nigerian legislation through the usual procedures of law-making by the Legislature.

1914 to form *the Colony and Protectorate of Nigeria*[13]. A protectorate is considered as a foreign territory "under British protection", while a colony constituted part of the sovereign British state.

The Crown had prerogative powers under common law to make laws for the colonies. Furthermore, based on the provisions of the Foreign Jurisdiction Acts 1890-1913 and the Colonial Laws Validity Act of 1865 the Crown could also legislate by Order-in-Council for any colony, protectorate or trust territory under its dominion.[14] Essentially, the Crown was the main mechanism of legislation in colonial Nigeria and other territories under British control. Through the foregoing arrangement, series of British legislations made by or under the authority of the Crown came to constitute components of Nigerian law.

The attainment of internal self-government by Nigeria, preparatory to independence, did not alter the power of the Crown to legislate for Nigeria. Also, by virtue of the *Colonial Law Validity Act* of 1865, the local Nigeria legislatures under self-government could not alter any of the imperial statutes. [15]

Nigeria became independent on October 1, 1960 by means of the *Nigeria Independence Act* 1960. Among other effects, the *Nigeria Independence Act* abolished the *Colonial Laws Validity Act* 1865 with respect to Nigeria and provided that no Act of the United Kingdom Parliament passed on or after October 1, 1960 shall extend to, or be deemed to extend to, Nigeria or any part of it. It also conferred on the Nigerian legislatures the power to repeal or amend any Act of the United Kingdom Parliament extending to the country. The powers of the British Crown to legislate for Nigeria from that date also terminated. The provision of a number of British enactments extending to Nigeria as Her Majesty's dependent territory were modified to take account of the new status of Nigeria as a sovereign nation. Subject to these modifications, the existing British Acts extending to Nigeria were to continue in force until or unless repealed or amended by the local legislatures.

IV.I (b.) *British statutes received into Nigeria by local legislatures*

In substantially similar language, the existing legislatures at regional and federal levels in post-independence Nigeria enacted laws by which English statutes were received into and made operative within their respective jurisdictions. For example, at federal level, the *Interpretation Act*[16] in section 45 provides as follows:

> (1) Subject to the provisions of this section, and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in

[13] See T. O. Elias, *Nigeria: The Development of its Laws and Constitution*, (London: Stevens, 1967), 21-23
[14] See John O. Asein, supra note 2, at 100
[15] See *Colonial Laws Validity Act* 1865, s. 2; Instructions to the Governors of the Protectorate of Nigeria; *Foreign Jurisdiction* Act 1890, s. 12

[16] Cap. 89 of Laws of Nigeria 1958

> so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.[17]

Clearly, an English statute that would be applicable in Nigeria must have been in force in England on January 1, 1900; it is irrelevant that it has been repealed in England by another English statute after that date.[18] However, there have been needs to clarify some issues on the 'general applicability' of received English statutes.[19] The *Interpretation Act* and related receiving statutes do not define what make a statute to be of general application. Consequently, Nigerian courts have had to grapple with ascertaining this issue with various tests or guidelines evolving. For example, engaging the question of general applicability of English statutes, Osborne C.J. in the case of *Attorney-General v John Holt & Co*.[20], stated as follows:

> No definition has been attempted of what is a statute of general application . . . and each case has to be decided on the merits of the particular statute sought to be enforced. Two preliminary questions can, however, be put by way of a rough, but not infallible test, *viz:* (1) by what courts is the statute applied in England? And (2) to what classes of the community in England does it apply? If, on January 1, 1900, an Act of Parliament were applied by all civil or criminal courts, as the case may be, to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If, on the other hand, it was applied only by certain courts, (e.g. a Statute regulating procedure), or only to certain classes of the community (e.g. an Act regulating a particular trade), the probability is that it would not be held to be locally applicable.

The Osborne C. J's guide while accepted over the years has not been immune from criticism. One criticism has been that the guide was unduly restrictive, excluding a number of statutes which ought to be included. It is noteworthy that over the years a wide range of English statutes have been held by the courts to be of general application and, therefore, in force in Nigeria.[21] It is important to note that the fact that an English statute satisfies the criteria of general application does not mean that such statute summarily becomes enforceable in Nigeria. There are some other factors to be considered in the enforceability of a statute of general application. Okonkwo succinctly highlights the pertinent factors thus:

> It is provided that imperial statutes apply within the jurisdiction only so far as local circumstances permit. This recognizes that not all statutes which qualify, as of general application in England, can be exported to Nigeria. For example, such an Act cannot operate in Nigeria if its subject matter does not exist in the country. But a statute which meets the test will not be denied operation simply because its application would be difficult or inconvenient. Again, to facilitate the application of the Acts they are read with such verbal alterations as may be necessary to make the same applicable in the circumstances. Finally, the application of any English statute is subject to any relevant local enactment. Such an enactment may expressly or by implication exclude the operation of a particular imperial legislation.[22]

[17] When this was enacted, Lagos was a Federal Territory for which only the Federal Legislature could legislate. See also High Court Law of Eastern Nigeria. s. 14 (Cap. 6 Laws of Eastern Nigeria 1963): High Court Law of Northern Nigeria, s. 28 (Cap. 49 Laws of N. Nigeria 1963).
[18] *Young v. Abina* (1940) 6 W.A.C.A.180
[19] See G. Ezejiofor, supra note 8 at 4-6
[20] (1910) 2 NLR 1 at
[21] Ibid at 5
[22] Ibid at 6

IV.I (c.) *Common Law and Equity*

Along with statutes of general application, the common law of England and the doctrines of equity were also received into Nigeria. The common of England connotes the basic law of the land which evolved out of the general and local customs prevailing among the various English communities in the early centuries.[23] Put differently, common law represented the jurisprudential formulation of Her Majesty courts based on the customs and practices relatively general or common among the people of England in the early eras of the kingdom. Through systematic application by Her Majesty's judges, the rules of the common law, over time, became formalized, rigid and highly technical.

The rigidity and technicality of the common law had some consequences which included the following. There was unavailability of appropriate writs or remedies for some grievances. Where judgments were even obtained in the common-law courts, less powerful litigants had difficulties in enforcing such judgments against powerful and influential defendants. Generally, due to the technicality and rigidity the common-law system became largely unsatisfactory and many litigants could not obtain redress for legitimate grievances which occasioned pervasive feeling of injustice.

Affected litigants started to petition the Crown as the fountain of justice to exercise prerogative. With time, it became the practice to channel the petition for equity to the Chancellor to attend to as he deemed appropriate in the overall interest of justice and fairness. In adjudicating on the petitions, the Chancellor, usually a clergy, would dig into the truth of the petitioner's claim and implore the respondent to make good his wrong to clear his conscience. Thus, the chancellor's court or Court of Chancery also came to be known as a court of conscience with the flexible form of fairness-oriented justice known as *equity.* By and large, compared with the technicality and rigidity of common law, the rules of equity were relatively simple at the early stages, largely depending on the Chancellor's perception of justice in each particular case. However, with operation of *judicial precedent* equity attained some measure of certainty and, eventually, rigidity.[24]

IV.II *Nigerian Legislation*

According to the Black's Law Dictionary, *legislation* is that genre of law made through the process of making or enacting positive laws "in written form, according to some type of formal procedure, by a branch of government constituted to perform this process."[25] Outlook of a country's legislature would depend on the system of government in that country. Whatever its designation, it is fundamental that the legislature enjoys the legal recognition and empowerment to legislate. If not, the laws made by it would be invalid and unenforceable.

Broadly, legislations can be *primary* or *subsidiary.* Primary legislations, usually called statutes, are law made by the principal legislative organs of government. For example, in the current Nigeria democratic setting the principal legislative organs consist of the National Assembly at

[23] For detailed information on the evolution of the English Common Law, see generally John O. Asein, supra note 2, at 102-104

[24] See generally, John O. Asein, supra note 2 at 104-106

[25] Bryan A. Garner, *Black's Law Dictionary* (8th ed.) (St. Paul, MN: Thomson West, 2004), 918

Federal level and State House of Assembly at State level. A subsidiary legislation is legislation made by a person or body other than the sovereign parliament of the State or Federation by virtue of powers conferred by statute which is itself made under statutory powers.[26]

Subsidiary legislation has been necessary and literally inevitable in the modern political dispensation due to some factors. One, the intricacies and ramifications of modern government are such that the constitutionally empowered principal legislatures do not have the time or the expertise to make all the laws needed for the affairs of the modern state. This situation made it necessary for the legislatures to delegate powers to government officials, departments or other bodies to make subsidiary laws in the form of regulations, bye-laws and orders to supplement their own enactments. Because it is made by powers delegated by statutes made by the principal legislatures, subsidiary legislation is popularly known as *delegated legislation.*

Politically, Nigeria has the Federal, State and Local Government as the three tiers of government whose legislatures make law in the country. Legislation made by each of these tiers has different designations or nomenclatures, varying with the operative political systems. Federal legislation, in civilian democratic setting, is known as *Act*, while it is known as *Decree* in military setting; in the colonial era, Federal legislation was known as *Ordinance.* A state legislation in civilian democratic setting is known as *Law* and as *Edict* under military rule. Local Government legislation or delegated legislation is known as *Bye-Law* or *Regulation.*

IV.III *Judicial Precedent or Case Law as a Source of Law*

Judicial precedent or *case law* as a source of law refers to the body of principles and rules of law which over the years have been formulated or pronounced upon by the courts as governing specific legal situations.[27] The general impression is that judges do not make laws but merely pronounce on and apply them to the facts of cases before them; after all, law-making is the primary assignment of the legislature, not the judiciary. However, in applying laws in their adjudicatory engagements, judges sometimes widen and extend the scope of a rule of law, and sometimes create an entirely new principle.[28] In that manner, in addition to administering it the law, courts develop the law.

The doctrine of binding judicial precedent plays a central role in the law-making operations of courts. A product of the Common Law, the kernel of binding precedent or *stare decisis* is that decisions of superior courts in the system are binding and must be followed by lower courts. Put simply, what a superior court has decided on an issue becomes law on the issue which lower courts are bound to follow even if they have reasons to disagree with the superior court's position.[29] A key element in the operation of the doctrine of judicial precedent is that the case under consideration and the one cited as binding authority should agree on legally material facts

[26] See generally, *Barclays Bank of Nigeria v Ashiru* (1978) 6-7 SC 99.
[27] John O. Asein, supra note 2 at 73.
[28] See e.g. *Central London Property Trust Ltd v High Trees House Ltd*. [1947] KB 130 in which British House of Lord established the doctrine of promissory estoppel as an exception to the enforceability of promises not supported by consideration.
[29] See, e.g. *Salako v. Salako* [1965] L.L.R. 136, where Adefarasin J. stated that he did not approve of the Yoruba custom of 'idi-igi', but nevertheless ordered its application for he felt bound by the Supreme Court decision in *Danmole v. Dawodu* [1958] 3 F.S.C.46 upholding the custom.

even if not on points of detail. The material facts which dovetail into the decision of the superior court constitute the *ratio decidendi*. "The *ratio decidendi* represent the reasoning or principle or ground upon which a case is decided after considering the facts of the case, the issues calling for a decision and the answers to those issues."[30] Thus, that a court is bound by a decision connotes that the judge is under an obligation to apply the *ratio decidendi* of the case to the facts of the case before him unless he is able to distinguish such facts from those of the previous case. Where there is a dissenting judgment, in cases where multiple of judges sit on a case, as in appeals, the majority position constitutes the *ratio decidendi.* And where there are conflicting decisions of a superior court, the lower court is at liberty to choose which of the conflicting decisions it would embrace.[31]

In the course of reaching a decision a court may propound some illustrative hypothetical scenarios or make pronouncements not directly relevant to the issues under consideration. These propositions and pronouncements are known as *obiter dicta*. In the case of *Bello v Udoye*[32] *obiter dicta* have been explained as passing, incidental or collateral remarks not bearing directly upon the question before the court as to affect the determination of the cause of action.[33] Generally, while *dicta* are not binding in the operation of *stare decisis,*[34] they can have significant persuasive effect in some circumstances.[35] However, the persuasive value of obiter dictum would by and large depend on the status of the court from where it emanates as well as the caliber and reputation of the judge making it and the circumstances in which the dictum was made.

An established and well-defined judicial hierarchy of the courts is important for an effective working of the system of judicial precedent. In this respect, the hierarchical structure of Nigerian courts consists of the Supreme Court as the highest court with its decisions binding on lower courts. The Court of Appeal follows the Supreme Court in ranking; its decisions are binding on other courts below it in hierarchy. Following the Court of Appeal are different superior courts which include Federal and State High Courts, the Customary and Sharia Courts of Appeal as may be existing.[36] These calibers of courts are more or less of coordinate jurisdiction; their decisions are legally binding on courts lower in hierarchy. Following at a lower level are Magistrates' Courts which are inferior state courts handling civil and criminal matters in line with statutorily prescribed jurisdictions. At the lowest rung are Customary, Native, District or Area Courts of diverse grades.[37]

Generally, the fact that the decision of a higher court was reached *per incuriam* or considered questionable on other grounds is not a ground for a lower court to depart from the decision. As Lord Hailsham L.C noted in the case of *Cassel v Broome*[38] a lower court is not even entitled to question the opinions of a court in the upper tiers.

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[30] John O. Asein, supra note 2 at 76
[31] *National electric power authority v Onah*, [1997] 1 NWLR, 680
[32] (2004) 19 W.R.N 58 at 79
[33] See also *Slack v Lees Industrial Cooperative Society* [1912] 1Ch. 431 at 451
[34] See *Okafor v Ezeigbo* (1966-67) 10 E.N.L.R 203 at 206
[35] See ibid.
[36] The Customary and Sharia Courts of Appeal serve to hear appeals from customary and area courts respectively.
[37] For more detailed analysis of the hierarchical relationship between the courts, see John O. Asein, supra note 2 at 79-92
[38] [1972] 2 N.W.L.R 645 at 653

Foreign decisions, whatever the level or status of the courts delivering such, are not binding on Nigerian courts. However, foreign judicial decisions, as *persuasive authorities*, can still be invoked and adopted by Nigerian courts if they have relevant and strong jurisprudential values. Tobi, JSC aptly summarizes the situation of foreign decisions vis-à-vis Nigerian courts in the case of *Araka v Egbue*[39] as follows:

> Foreign decisions will continue to be useful in the expansion of the frontiers of our jurisprudence, but this court cannot invoke such decisions where it thinks they are contrary to the judgments of the court which are correctly decided. Of course, this court will not hesitate to use any foreign decision if it is correct, even though contrary to our decision, if the court comes to the conclusion that its decision is wrong. In such a case, this court will, in the light of the foreign decision, overrule itself and choose to go by the foreign decision which is correctly given. *Subject to the above, the state of the law that foreign decisions are persuasive authority will remain and for all times and forever.*[40]

IV.IV *Customary Law*

Customary law has been described by a learned writer as a body of customs and traditions, which regulate the various kinds of relationship between members of the community in their traditional setting. [41] As noted at the early stages of this paper, customary law is the oldest source of law in Nigeria. It had been the law regulating socio-political and other conducts in indigenous societies long before colonialism.

While not enacted by any legislative body in Nigeria, customary law is valid and enforceable as a valid source of law in Nigeria. The basis of its validity and enforceability is the acceptance by members of the community or group to which it applies that the customary law is obligatory and binding among them.[42] Thus, any custom which does not command such acceptance does not qualify as *law;* it stands as ordinary "social observance" or "mere custom" which any person may or may not respect. Customary law is flexible and dynamic in character and is therefore adaptable to changes in the society from time to time.[43]

Customary law varies among the different communities in Nigeria. "It must not be thought that there is only one body of customary law for all the Nigerian communities. This is far from the truth. As a matter of fact, there are as many customary laws as there are independent communities in the country. This means that, even within a tribe, there are many customary laws."[44] Another characteristic of customary law is that it is *unwritten.* This connotes that customary law cannot be found embodied in a literary source like statutes which are formally enacted and contained in specific literary sources that can readily be referred to or consulted. In essence, the operation of customary law is entrenched in the oral traditions of the people to which it applies, especially as evinced by elders and other such groups deemed versed in the customary law. It is noteworthy that over the years there have been diverse arrangements in different parts of Nigeria for the compilation of pertinent customary law rules into documentary forms.[45] However, the documentation does not give the customs the intrinsic binding effect of

[39] [2003] 33 W.R.N, 1
[40] Ibid at 19 [Emphasis added].
[41] G. Ezejiofor, supra note 8, at 41
[42] See *Eshugbayi Eleko v. Government of Nigeria* [19311 A.C. 662 at p. 673
[43] *Levis v Bankole* (1909) I N.L.R. 100
[44] G. Ezejiofor, supra note 8, at 41
[45] Ibid at 42

statutes. The 'documentary customary laws', at best, amount to a ready source of information on the existing and operating customs of a place which can make for easy reference.

Customary law as applicable from the colonial era to the current dispensation has been devoid of the inherent validity and unfettered legal potency it enjoyed in the pre-colonial traditional settings. The validity and operation of customary law is now contingent on some conditions and requirements as discussed below.

In the first instance, the existence of a customary law has become an issue of facts to be proved before a court before it can be applied in any legal dispute.[46] Except in the exceptional situations where a court has taken *judicial notice*[47]of a customary law due to previous applications, any person relying on such customary law must establish or prove its existence as facts in issue by means of cogent evidence. The person can do the proving by means of direct evidence of witnesses knowledgeable in the area of the customary law in question or by some other means such as books. The basis for this procedure is that the judge is regarded as not being aware of the customary laws even if he comes from the area where the customary law in question applies. However, unlike customary law, there is no need to prove any of the other three English law-oriented sources of Nigerian law in court as the judge is summarily deemed to have knowledge and awareness of them.

Secondly, after proving the existence of any customary law by evidence, the customary law would be further subjected to legal *tests of validity* before it can be deemed valid and applicable.[48] The tests of validity are:

(i.) Repugnancy Test

(ii.) Incompatibility Test

(iii.) Public Policy Test[49]

The *repugnancy test* connotes that any customary law "repugnant to natural justice, equity and good conscience" would be held invalid and unenforceable as law.[50] The *incompatibility test* connotes that any customary law that is" incompatible with any law for the time being in force" would be invalid and unenforceable as law. In operation, the effect of this test is that any customary law that conflicts or incompatible, directly or indirectly, with any of the other three

[46] See generally John O. Asein, supra note 2, at 120-129

[47] This is a process where, due to previous and frequent applications of a customary law, a court would be deemed to have knowledge and awareness of it such that there is no need to prove its existence afresh before the court where the customary law comes into question.

[48] See, A.A. Kolajo, *Customary Law in the Nigeria through the Cases*, (Ibadan: Spectrum Books Ltd, 2005), 14; see also ibid at 129-138.

[49] *Repugnancy test* connotes that any customary law "repugnant to natural justice, equity and good conscience" would be held invalid and unenforceable as law. The *incompatibility test* dictates that any customary law that is" incompatible with any law for the time being in force" would be invalid and unenforceable as law. The public policy test implies that any customary law that is" contrary to public policy" would be invalid and unenforceable as law. For detailed reading on the tests of validity, see John O. Asein, supra note 2, at 129-138. See also, A.A. Kolajo, ibid, at 13-24.

[50]On this basis, the courts have nullified different customary law rules which were hitherto held sacrosanct and impeccable among the people in the traditional pre-colonial settings. See e.g. the case of *Edet v Essien* (1932) 11 NLR 47. See also the relatively more recent case of *Okonkwo v Okagbue*, (1994) NWLR (368) 301

sources would be invalid and unenforceable.[51]The public policy test connotes that any customary law that is "contrary to public policy" would be invalid and unenforceable as law.[52] Public policy is flexible and has been described as "an unruly horse which once one gets astride it no one knows where it would end".[53] In this respect, 'public policy' has such a dynamic latitude that , based on the inclination of the government at a particular time, it can be invoked or adapted to strike down a customary law that is not caught in the web of the other two tests of validity. A key point of note in the *validity tests* is that the procedure was essentially a legal devise of the colonial masters; it is thus hardly debatable that it was influenced by values of the colonial rulers which were alien to indigenous African people.

V. *Conclusion*

Customary law was the main source of law in the indigenous pre-colonial Nigerian societies. The advent of English colonial rule brought about a scenario where other sources of law, based on the English law, came to be sources of law in Nigeria with Nigeria now having four sources of law as discussed above.

Laws are not made just to exist. The underlying rationale and expectation for the existence of law are effective control of human conducts and maintenance of law and order. It is therefore essential that the sources of law in any country should be able to satisfy the expectation of effective social control and maintenance of law and order to avoid state of anarchy. This leads to the question of how effectively the existing sources of Nigerian law have achieved this purpose.

Question of the effectiveness of any law depends on the level of reverence people have for it or how well the law deters the people from the prohibited conducts. With the level of insecurity, insurgency, violence and other forms of crimes committed with arrant impunities on daily basis, it is arguable that the contemporary sources of Nigerian law as presently constituted and operated have not been effective in preserving law and order. Comparatively, studies have shown that preservation of law and order was more effective under the indigenous customary law system of the people.[54] This can be adduced to the central factor that the customary legal order was a creation of the people for themselves, as compared with the alien English law system that predominates the Nigerian legal system; hence the level of embrace and reverence for the indigenous customary law system was relatively high, especially with regard to prevention and control of crimes. Flowing from this was that the mechanism of law under the indigenous legal order involved both physical and supernatural agencies, with some fearsome deities playing roles in the enforcement of laws.[55] Ostensibly, the fear of incurring the wrath of 'no non-sense'

[51] See e.g. the case of *Malomo & Ors v Olusola & Ors*, (1955) 15 WACA 12; see also the case of *Okoriko v Otobo* (1962) WNLR, 48.

[52]See e.g. the case of *Re Adadevoh*, (1951) 13 WACA 304; see also the case of latter case of *Meribe v Egbu* (1976) 3 SC 23

[53]*Enderby Town Football Club v Football Association Ltd* [1971] 1Ch 591 at 606, per Denning M.R

[54]S. Bamidele Ayo, *Public Administration and the Conduct of Community Affairs among the Yoruba in Nigeria* (Oakland: ICS Press [Institute for Contemporary Studies, Oakland, California], 2002),193-194.

[55] See generally Babafemi Odunsi, 'Crime Detection and the *Psychic Witness* in America: An Allegory for re-appraising Indigenous African Criminology' in Oche Onazi (ed.), *African Legal Theory and Contemporary Problems – Critical Essays* (Dordrecht, Holland: Springer, 2012) 265-288. See also

incorruptible supernatural forces propels people to respect societal laws and norms. That eminent Nigerians resort to traditional practices such as oath-taking at shrines,[56] instead of relying on conventional courts, as dispute-resolution mechanism attests to the potency and level of confidence in the customary law system.

It is trite that customary law system in Nigeria and the jurisprudential practices thereunder are now subjected to tests of validity with the English oriented laws as benchmarks. It would also seem preposterous to canvas that Nigeria should jettison the English oriented sources of law and re-embrace customary law as the pivotal source of Nigerian law. However, it is crucial that the country's sources of law are made meaningful and effective through official probity and determined enforcement at all levels. With that, there may resurrect the desired respect and deterrence impact for the laws which ultimately would temper the disturbing levels of lawlessness and acts of anarchy that have been plaguing the country for long.

[56]See e.g. Nonso Okafo, 'Law Enforcement in Postcolonial Africa: Interfacing Indigenous and English Policing in Nigeria' International Police Executive Symposium Working Paper No 7, May 2007, 5 relating to the widely reported 'Okija incident' of 2004 in which police recovered many human skulls and decaying bodies at the site of a shrine in eastern part of Nigeria. A state governor and highly placed politicians allegedly patronized the shrine in respect of some agreements they entered into.