# NIGERIAN LEGAL SYSTEM

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PART ONE

INTRODUCTION

CHAPTER 1

1. The Nature Of The Nigerian Legal System

The Legal System in Nigeria today evolved principally out of legislation and

activities that took place in this entity at least in the last hundred years.

Before the advent of the colonialists, the indigenous people of Nigeria had their own form of administering justice.

The various ethnic groups administered their form of justice through local customs. The situation did not stop with the advent and the introduction of English Law but resulted in application of both forms of Laws. It shall be seen in subsequent chapters that this co-existence of English Law and Local Laws whether in terms of unwritten customs or Legislation has remained a feature of our Legal System. The various sources of Nigerian Law have had this attribute of being influenced by pre-independent activities.

The Customary Law has always been with the indigenous people. The components of English Law, Common Law and Equity have had their origin influenced similarly by Customs albeit of the English people. Precedent which includes a system of scouting around for previous practices cannot be said to be an entirely strange idea to any institution since it has always been natural for individuals at cross roads to try to find out what others had done in similar situations in the past.

Also, some legislation we have had cannot be said to be entirely novel in their origin since we sometimes have customs, Common Law or Equity being translated into legislative form. Therefore these sources cannot be separated from each other and from our historical background.

The court structure too has not been a novel idea brought about by civilization. Courts had been held by Local Chiefs, Obas, Obisetc to administer justice on their subjects.

However it shall be seen that the present court practices in terms of decorum and rules of evidence have been greatly influenced by external forces. The courts have grown in number and in the nature of duties being performed.

Our constitutional practice has a direct bearing on the appointment of personnel and the jurisdiction of the courts especially the superior courts of records.

In terms of personnel of the law comprising lawyers and judges and the legal profession in which these people trained, its influence by English Law though quite substantial in the past is now being completely indigenised.

In order to have a good idea of the Nigerian legal system therefore, there shall be a detailed consideration of the historical development of the

Nigerian legal system, the Nigerian legal system as an entity in terms of administration of justice, the judicial set up and the Legal profession.

The various sources of Nigerian legal system shall be dealt with in detail to see their present scope of application. Also, the various courts in the present system from the superior courts of record to the inferior courts of records will reveal how the present wheel of the machinery of justice is grinding.

A cursory consideration of the question "What is legal system" may result in a conclusion that Legal System is the enforcement of laws. Legal system however entails more than that. It encompasses the system of administration of justice including the making of laws, the judicial set up of the country and the legal profession.

(a) Administration of Justice

One of the distinctive qualities of one society from the other is the administration of justice. The system and type of justice meted out in a country is greatly influenced by the political set up, ideological belief, religious faith, and the orientation of the participants in the process. Some societies and countries have moved from a principle of 'an eye for an eye' evidenced by the institution of life imprisonment as maximum punishment. The Nigerian legal system operated the adversary system of administering justice. Under this system the accused person is generally presumed innocent until proven guilty.

The judge should be an unbiased umpire. See Uzo v The Police (1972) 11 SC 37 andOkoduwa v The State (1988) 2 NWLR 76. This presumption places the burden of proof upon the state to prove the guilt of the accused person. See Onagoruwa v The State (1993) 7 NWLR 49 where it was held that in case where there is no sufficient evidence to link the accused with statutory elements of the offence he must be discharged and the court has no business searching and scouting around for evidence where it cannot be found.

Such action would be inconsistent with our adversarial system of administration of justice. It would be inquisitorial in design and execution.

The case of Ogunlowo v Ogundare (1993) NWLR also emphasises whatis expected of the court in this type of system. "In our adversary system of justice, the role of the judge is that of an impartial umpire. He cannot make a new case for either party where the case each had brought to the court has collapsed."

The system is therefore designed to guarantee the application of the fundamental rules of fair hearing reflected in the two maxims "let the other party be heard" and "you cannot be a judge in your own case." (audialterampartem&nemojudgx in causasua). Administration of justice has moved from a situation where it was placed in the hands of individuals or ethnic communities to the hands of modern day government.

(b) The Judicial Set-up

Moving from the enactment of laws, one of the means justice is administered is through the judiciary. The 1999 Constitution in section 6 vests the judicial powers for the federation and for the states in courts established by the constitution for the federation and the states respectively. The courts mentioned in the section constitute the only superior courts of record in Nigeria. The courts are the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the Sharia Court of Appeal of a State and the Customary Court of Appeal of a State and any other court that the National Assembly may so designate by law. See section 6(4) of the 1999 Constitution.

The judicial set up reveals a situation where Federal and State jurisdictions are exercised concurrently throughout the country. Also civil and criminal jurisdictions are exercised concurrently throughout the country. Also civil and criminal jurisdictions were simultaneously exercised by these courts without dichotomy.

This is unlike the situation in countries like England where some courts like the County Court exercise purely civil jurisdiction. The Nigerian judicial set-up has therefore tended to be very complex. Contributing to this is the sources from which our law emanate. The sources of Nigerian law include, English Law, Nigerian Legislation, Customary Law, and Law of Precedent or Case Law. All these types of laws are enforced by the courts. When it is realised that customary law is very diverse in its presentation the result can easily be imagined.

(c) The Legal Profession

This includes the process of legal education and the practice of the profession after being called to the Nigerian Bar. We have come a long way from the pre-independence era where qualification for legal practice in Nigeria was to be called to the English Bar or enrolled as a solicitor in England. With the introduction of the Legal Practitioners Act of 1962, legal education and practice is now basically controlled by Nigerian legislation and this has also given room for differences between the position in Britain and Nigeria. Upon being called to the Nigerian Bar, the legal practitioner is

enrolled as a barrister and solicitor of the Supreme Court of Nigeria. He therefore automatically qualifies to practice as a banister and solicitor.

There is no dichotomy of legal practice here unlike what obtains in Britain. The Nigerian practitioner can also practice throughout the country as he suffers no geographical limitation. A newly qualified legal practitioner can set up legal practice immediately upon enrolment as he is not expected to undergo any period of practical training or pupillage. In 1978, a mandatory period of five years pupillage was prescribed for lawyers by the Regulated and other Professions (Private Practice) Prohibition Decree before a newly qualified legal practitioner could set up independent practice. This has since been abolished by the Regulated and other Professions (Private practice) Prohibition Decree of 1984. The Nigerian legal practitioner can also have audience before any court of law once he complies with Section 8 (2) Legal Practitioners Act which requires payment of a practice fee by all lawyers. These amongst others are the distinctive features of a legal profession in Nigeria.

# CHAPTER 2

# HISTORICAL DEVELOPMENT OF THE NIGERIAN LEGAL SYSTEM

## 2.1 The Period Before 1862

Evidence abound in history to show that long before the advent of British Colonialists, there existed in the entity now called Nigeria a system or systems of administration of justice. Although during this period justice was administered mostly in an informal manner, as there were no system of courts as they exist today. The law prevalent in this pre-colonial era was the customary law in the south and the Islamic or Moslem law in the northern part of the country. Whilst the Moslem law operative in the north was that of the Maliki School which was written and administered by scholars versed in the Holy Koran, the customary law of the south was unwritten and therefore vague and not easily ascertainable.

In the southern part where the customary laws of various ethnic groups were administered, there were no formal courts for settling disputes but rather resolution of disputes was carried out by the paramount chief or king and his councillors or advisers. Disputes were usually settled in the king's court or palace and there were no arranged sanctions for violation of customary law neither were there institutionalised law enforcement agencies as we have today.

The situation in the northern part was better because with the acceptance of Islam came the Moslem systems of government, law and adjudication which were largely organised and institutionalised. The modern system of justice as we have them today came with the advent of colonization in the mid - 19th century.

During this period, trading activities between foreigners and the indigenous people had started in Lagos and other coastal towns. With these economic activities came the need to settle disputes that arose in the course of commercial interactions, which the existing traditional machinery of justice were not adequate enough to cope with. The European immigrants could not adjust to a society whose laws were unwritten, unorganised, and therefore unascertainable, since they were coming from a country where their legal rights and obligations were determined by formal courts and trained judicial personnel.

The customary system of justice was so defective to cope with the demand of modern business and commercial activities developing during this period that it made the need for modernised system of justice very pressing indeed.

To cure this defect therefore the first consul was appointed in 1849 by the British Government principally to settle disputes that arose between the British merchants and the indigenous traders.

The consul constituted himself into a court known as the consular court. In other territories beyond Lagos known as Bight of Biafra or Oil Rivers where there was no consular court, other courts known as equity courts were established jointly by the foreign traders and the indigenous traders to resolve disputes arising among themselves. These courts were very popular as they based their decisions on general notions of justice, but it had nothing to do with principles of equity as it is known today.

The consular courts together with the equity courts constituted the first English type of courts in existence before the annexation of Lagos in 1861. It must be noted however that the customary system of justice still continued during this period in all the trading areas including Lagos, but its jurisdiction was limited to disputes involving indigenous people only.

## 2.2 The period from 1862 -1899

The territory of Lagos came under British rule in 1862 and with it came the establishment of modern system of administration of justice. English law was introduced by the Ordinance No. 3 of 1863 and this was followed by the

establishment ofa Supreme Court with civil and criminal jurisdictions by the Supreme Court Ordinance 1863.

This was later replaced by the Court of Civil and Criminal Justice based in Lagos. During this period the settlements of West Africa comprising of Lagos, Sierra Leone, Gold Coast (Now Ghana) and the Gambia were placed under one government known as the Government of West Africa settlements.

Consequently a Court of Appeal for the whole of the settlements known as a West African Court of Appeal (WACA) was established with its seat in Sierra Leone. All appeals from the aforementioned settlements lay to the West African Court of Appeal. Further appeal lay from the WACA to the judicial committee of the Privy Council in England. Trial by jury in criminal cases was introduced during this period.

In 1874 a unitary government was formed consisting of Lagos and Gold Coast Colony. WACA no longer formed a part of the court hierarchy for this new colony.

1876 for the colony of Lagos. This consists of a full court (i.e. a Court of Appeal), a divisional court with original and appellate jurisdictions and the District Commissioner's Courts. The law applicable then comprised of English law, equity and statutes of general application which were in force in England on 24th July 1874. At the period, the Royal Niger Company which was established by charter was empowered to administer justice with due regard to the customs and laws of the indigenes who were parties to a suit in the areas over which it had jurisdiction provided that such laws and customs were neither repugnant to natural justice, equity and good conscience nor incompatible with any local statutes.

It is note worthy that the introduction of English law into the British Colony of Lagos marked a turning point in the history of the Nigeria Legal System.

2.3 From 1900 -1913

During this period, the protectorate of Southern Nigeria was established by an amalgamation of the Niger Coast Protectorate and the territories of the Royal Niger Company by the Southern Nigerian Order-in-council 1899. Under the new protectorate the system of justice was re-organised once more. A High Commissioner was appointed and empowered to legislate by proclamation. Pursuant to this he established a supreme court with original and appellate jurisdictions in criminal and civil matters. Furthermore, for the first time Native Courts were established by statute.

These courts were to take over the administration of customary law from the pre-existing indigenous courts whose jurisdictions had hitherto not been disturbed. Consequently, two categories of Native Courts were established by the Native Courts Proclamation 1900. These were Minor Courts and Native Councils presided over by District Commissioners. Commissioner's Court was also established as an arm of the Supreme Court. The Native Councils had both original and appellate jurisdictions and were empowered to make rules embodying any customary law in their districts and make bye - laws for the good governance of the natives in their jurisdictions.

One notable feature of the native courts of this period was that although the

courts were referred to as "Native Courts", their authority derived from English law. The Native Courts of this period were therefore not genuine native courts.

There was infact a law in 1901 which provided that the jurisdiction of the native courts was to be exclusive of any traditional authority. This move by the then British Government dealt a heavy blow on the pre-existing indigenous courts which by 1901 proclamation became illegal courts.

The Colony and Protectorate of Southern Nigeria

In 1906 the colony of Lagos and the protectorate of Southern Nigeria were unified to form the colony and protectorate of Southern Nigeria. The native court system of the colony and the protectorate like that of the Southern Protectorate was defective in many respects. It was alleged that native court clerks often received bribes and that they even tried cases. Under a 1906 proclamation however, the native courts were to henceforth exercise their judicial functions under the instruction of the Chief Justice or any other judge of the Supreme Court. Notwithstanding this effort the native court system was a failure.

The Protectorate of Northern Nigeria

Under an enabling law of 1899 the protectorate of Northern Nigeria was established to take effect from 15' of January 1900 and it comprised the territories of the Royal Niger Company North of Idah. A High Commissioner who was empowered to establish courts was appointed over the new protectorate. Pursuant to this, four categories of courts were established namely:

(a) A Supreme Court,

(b) Provincial Courts (one in each province),

(c) Cantonment Courts, and

(d) Native Court (which was by a separate proclamation).

The Supreme Court was a court of first instance as well as appellate court just like the one in the Southern Protectorate. The Provincial Court was presided over by a Resident with an Assistant Resident and a Justice of the Peace as members. The cantonments Courts were established for various local cantonments or local government areas and were presided over by cantonment magistrates. The Native Courts on the other hand were presided over by one or more persons appointed by a Head Chief or an Emir with the

approval of the Resident. Where there was no Head Chief or Emir the Resident was empowered to appoint members of the court.

2.4 January 1914-September 1960

The beginning of this period was an important landmark in the history of Nigeria as a whole as on 15th January, 1914, the colony as well as the Protectorates of both Southern and Northern Nigeria were amalgamated to become the colony and protectorate of Nigeria. This was when the present Nigeria as a political unit came into existence. Immediately after the amalgamation, three types of courts were established for administration of justice for the country as a whole. These were the Supreme Court, the Provincial Court and the Native Court established by the Ordinance of 1918. Despite the Native Court ordinance, however, no native court was established for the colony of Lagos until 1938.

In 1933 the court systems in Nigeria were once again overhauled. The provincial courts were abolished and high courts and magistrate courts were established for the protectorate. These courts did not have jurisdiction in cases relating to title to or interest in land which was the exclusive jurisdiction of the Native Court. In some cases appeal lay from the decisions of a native court to a magistrate court while at other times appeal lay directly from a native court to the High Court. The High Court served as an appellate court to the Magistrate Court, whilst appeals from the High court and the Supreme Court lay to the West African Court Appeal, which was re-established in 1928 as an appellate court.

In 1943 another reformation of the legal system was carried out. A new Supreme Court for the entire country was established pursuant to 1943 Supreme Court Ordinance. The new Supreme Court was to apply English Common Law, Doctrines of Equity and Statutes of General Application in force in England on 15' January, 1900. Note however that the Supreme Court of this period was still a court of first instance but was presided over

by experienced legal practitioners. In the same year the whole country was divided into several magisterial districts and magistrates were appointed to preside over them. These courts replaced the ones established in 1933. The jurisdiction of the Native Court was extended and the Children and Young Persons Ordinance 1943 was enacted. Juvenile courts were established for the first time to take care of cases involving children and persons below 17 years of age.

In 1954, Nigeria became a Federation by virtue of the constitution that came into being that year. The new Federation comprised of 3 regions namely the Northern, the Western and the Eastern regions with Lagos as a Federal territory. These regions were granted a measure of autonomy in governance and administration of justice. Under the new constitution new system of courts were established.

A Federal Supreme Court having jurisdiction over the whole country was established while high courts and magistrate courts were established for Lagos and also in each of the regions. Statutory courts referred to as customary courts were established in the western and eastern regions whilst the North had what was referred to as native courts. These native courts in the North were empowered to administer both Moslem law and non-Moslem law concurrently. Furthermore, a customary court of appeal known as Moslem Court of Appeal was established in 1956 to hear appeals from the native courts.

This was later replaced by the Sharia Court of Appeal in 1960, which was established to hear appeals from native courts involving Moslem Personal Law only. In that same year a court of resolution was established to resolve jurisdictional disputes between the High Court and the Sharia Court of Appeal.

Another important landmark reached during this period was the enactment of the Penal Code which was applicable only in the Northern region. It replaced the criminal code which until then was in force throughout the whole country. District Courts vested with civil jurisdiction only was also established by virtue of District Court Law 1960; still in the same year the Criminal Procedure Act 1960 which came into force provided for the establishment of magistrate courts with criminal jurisdiction. Appeals from the decisions of the Federal Supreme Court lay to the Judicial Committee of the Privy Council.

Under the 1954 Constitution the WACA ceased to be in the hierarchy of courts in Nigeria.

## 2.5 October 1960-January 1966

Nigeria became an independent state within the Commonwealth on 15‘ October, 1960. The legal structure in the country remained largely the same as before independence. Nigeria was still a dominion under Her Majesty’s Government even after independence until 1963 when the monarchy was abolished and Nigeria became a full republic. A fourth region known as Mid Western region of Nigeria was created out of the existing western region. New constitutions for each of the three regions came into existence and one for Mid-Western Nigeria was not enacted until 1964.

The Privy Council remained the highest court of the land until same was abolished in 1963 and the Federal Supreme Court which was renamed Supreme Court of Nigeria became the court of last resort in Nigeria. The 1960 Constitution introduced judicial service commissions at the federal and regional levels to advise on the appointment of judges

The 1963 Federal Constitution that came into being abolished the customary criminal law by providing that no person was to be convicted of any offence unless the offence was defined by a written law, the penalty for it prescribed therein. The constitution of each region prescribed a Court of Appeal to be established in each of the regions. This was to serve as an intermediary court between the High Court of the regions and the Supreme Court of Nigeria. However, no such court was established during this period. The constitution had a comprehensive provision for the appointment of members of the judiciary including the Chief Judge of Nigeria who was to be appointed by the president on the advice of the prime minister. Note that during this first republic, Nigeria operated the parliamentary system of government modelled after the British Parliamentary system. Also during this period the customary systems were reformed. The native courts known as “Area Courts” were established in the Northern region and were put under the control of the native authorities.

## 2.6 January 1966-1979

In 1966 the young republic of Nigeria suffered a major setback when the military struck by way of a coup d’ etat and the political order in Nigeria was dismantled. On assuming power in January 1966, the first thing the military did was to give the new military government a legal backing by suspending a substantial part of the existing constitution and promulgated laws establishing their legitimacy and superiority.

Pursuant to this, the Constitution (Suspension and Modification) Decree No. 1 of 1966 was promulgated. This Decree suspended and modified some provisions of the Federal Constitution and those of the regions.

Consequently, a government known as the Federal Military Government came into existence and by virtue of the new decree military governors were appointed for each of the regions. It is important to note that under the new decree the jurisdiction of the courts were ousted in certain respects and to back up this, S.1. of Decree No. 1, 1966 provided inter alia that "No question as to the validity of this or any other decrees or edict shall be entertained by any court of law in Nigeria". See the celebrated case of Lakanmi&Anor v A. G. West S.C. 58/59 of 4/4/70. See also the case of Adamolekun v. The Council of University of1badan (1967) All NLR 213.

On 24th of May of the same year another decree was enacted which changed the name "Federal Military Government" to "National Military Government and among other things abolished the existing regions.

The new decree demolished the federal structure of Nigeria and replaced it with a unitary system of government. Nigeria was divided into provinces with all the powers concentrated at the centre.

Dissatisfied with this new political arrangement another military revolution occurred again on July 29, 1966. The new military government restored the federal system of government consisting of four regions and a federal territory of Lagos. During this period there was political unrest in various parts of the country in the Northern, Western and Eastern regions following the events that occurred during the second military revolution of July 29. These waves of political unrest which engulfed virtually every part of the country eventually culminated into a civil war in 1967.

Shortly before the break out of the civil war, the entire country was divided into 12 states by virtue of the States (Creation and Transitional Provisions) Decree of 1967. Significantly, in the same year, a Court of Appeal was established for Western Nigeria. In 1973, a Federal Revenue Court (now known as Federal High Court) was established which handed mainly fiscal matters. The Federal Capital Territory Decree of 1976 established the federal capital territory at Abuja. Still, in the same year, the title of "Chief Justice" of a state was changed to "Chief Judge."

To reduce the workload of the Supreme Court, an intermediary court known as the Federal Court of Appeal was established to adjudicate over the entire country. The Western Region Court of Appeal, which was established earlier, was abolished in 1976 by the same decree that established the Federal Appeal Court. In 1977 the Land Use Decree now referred to as Land Use Act, came into force with significant provisions affecting the status of land and capacity to own land.

Another military take over occurred in 1975, in which the new government among other things announced a transition programme that would restore democratic order once again in 1979. In furtherance to this, a constitutionwould usher in the second republic. The pre-existing 12 states were increased to 19 states in anticipation of the take-off of the second republican constitution.

In 1979 a new constitution came into force, which was more extensive in its various provisions than the former constitutions, and the federal status of Nigeria was entrenched once again. Under the new democratic rule there was a departure from the former parliamentary system of government to presidential system pattered after the American Presidential Constitution. During this period more branches of the Federal Court of Appeal were established nation-wide and more Judges appointed to bring Justice nearer to the grass-roots.

## 2.7 From 1979 to Present day

The Second Republic survived until 1983 when another military revolution ousted the civilian regime and suspended the constitutional provisions and modified them by virtue of the Constitution (Suspension and Modification) Decree 1984. One of the changes during this new military regime was the change in the authorities vested with appointment and removal of judges

The Federal Court of Appeal was renamed Court of Appeal. The new regime barely existed for about two years when another military coup was staged in 1985 ushering in a new legal order and system of administration with various enabling decrees promulgated while others were repealed - e.g. the widely detested Public Officers (Protection Against False Accusations) Decree 4 of 1984 was abolished.

From independence to this period, the country witnessed a total of 5 military revolutions within the short period of the nation's existence as an independent sovereign state. Each of these military revolutions affected the legal system one way or other. In 1984 two additional states were created bringing the total number of states to twenty-one (21).

Another constitution was enacted in 1989 in preparation towards returning the country to civil rule once more in 1992. The 1989 Constitution, which was supposed to be an improvement of the 1979 Constitution, was rejected on the ground that it did not represent the will of the Nigerian people. In 1990 the laws of the federation were revised and published for the first time since

1958. New additional states were created in 1991 bringing the total number of states to thirty while Abuja remained the federal capital territory.

The transitional programmes continued until 1993 when ban on partisan politics was lifted and presidential election took place on June 12 1993.This was subsequently annulled on the ground of alleged election malpractice. The annulment of the election generated a lot of controversies and was followed by civil disturbances in almost every part of the country, which ultimately led to the exit of the military government and an interim national government was put in place. No sooner was this government installed than the question as to its validity came to the fore and the interim government was declared an illegal system in a celebrated decision of a High Court in Lagos State. The interim government lasted only three months after which the Abacha military regime came into power. The civilian governors in the states were sacked and military administrators appointed in their place to take over affairs of the various states.

The title of president used by the former military leader was changed to "head of state". This new military regime promised a brief transitional programme that would bring in civil rule and accordingly, another constitution was recommended for the country. Pursuant to this, a constitution drafting committee was inaugurated in 1998 with representatives from all the constituents in Nigeria With the demise of the Military Head of State in 1998 another transition programme was put in place by the AbdusalamiAbubakar regime that came into power. Several new political parties were formed out of which five were registered officially. A new constitution was enacted which came into force on 29th of May, 1999, and consequently ushered in the 4th Republican government headed by President OlusegunObasanjo.

Since then there have been 3 democratically elected Presidents namely: Umaru Musa Yar'adua (29 May 2007 – 5 May 2010), Dr Goodluck Jonathan (6 May 2010 – 29 May 2015) and MuhammaduBuhari (29 May 2015 to date).

There have been some major law reforms including the following:

- The 2004 revision of the laws of the Federation
- The passing of the National Industrial Court Act 2006 purporting to elevate the National Industrial Court (NIC) to a superior court of record, but the Supreme Court in NUEE v BPE declared this to be in violation of s. 6(3) and (5) of the 1999 Constitution.

- The consequent passing of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act of 2010, which established the NIC as a superior court of record at par with the High Court. See s. CC: 254 A. See s. 254C which gave expanded exclusive jurisdiction over labour and employment matters to the NIC.
- The Electoral Act of 2002 gave way to that of 2006 and now that of 2010 as amended.
- New parastatals were created to fight financial crimes - EFCC and ICPC
- The old Evidence Act was repealed and a new Evidence Act of 2011.The new Act made provisions for admissibility of computer generated evidence
- Administration of Criminal Justice Law of Lagos was passed.
- Administration of Criminal Justice Act was passed in 2015.

## PART TWO SOURCES OF NIGERIAN LAW

## CHAPTER3

ENGLISH LAW

3.0 Introduction

English Law constitutes a source of Nigerian Law. As a source, it is made up of (a) The Extended English Law and (b) The Received English Law.

3.1 Extended English Law:

Comprised of statutes made in England and applied directly to Nigeria by their own force or by the order of the British Government. The basis of their application was the Colonial Law Validity Act of 1865 from which the colonial masters derived their authority to legislate for the colonies. Extended English Law was in effect statutes enacted by the British Parliament to have the force of law in Nigerian before independence due to our colonial status. Being a British colony the country was pinned to the full legislative authority of Britain. Upon independence in October 1960 however, and by virtue of the Nigeria Independence Act of 1960, Nigeria became a fully independent sovereign nation, thereby depriving the British Government of the power to legislate for Nigeria. The Independence Act also empowered the Nigerian Legislature to repeal or amend any Extended English Law extending to Nigeria. Examples of Extended English Law that have been repealed in Nigeria include:

(1) The West African Fugitive Offenders Order in Council 1923;

(2) The Copyrights Act 1911.

3.2 Received English Law:

Comprised of English Law received into Nigeria through local legislation. The rules are received in the laws of the courts permitted to apply such law and in subsidiary legislation.

See (a) S. 26 & 29 High Court Law of Northern Nigeria 1963. Cap. 49;

(b) S.15 (1) and (2) High Court Law of Eastern Nigerian 1963;

(c) S. 12 High Court Law, Lagos Laws 1973. Cap 52;

(d) Law of England Application Law, Western Region of Nigeria Law 1959. Cap. 60;

(e) S. 45 Miscellaneous Provisions Act;

(1) S. 28 Interpretation Act 1962;

(g) Law (Miscellaneous Provisions Law), Lagos Law 1973. Cap 65;

S. 32(1) Interpretation Act, Laws of the Federation of Nigeria 1990 Cap. 192. (in force in the country as Federal Law.) The provisions of the statutes are similar. S. 32 (1) Interpretation Act 1990, Law of the Federation provides (1) "Subject to the provisions of this section and except in so far as other provisions are 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 Ist day of January 1900 shall in so far as they relate to any matter within the legislative competence of the federal legislature be in force in Nigeria."

(2) Such imperial laws shall be in force so far only as the limits of local jurisdiction and local circumstances shall permit and subject to any federal law.

For the purpose of facilitating the application of the said imperial laws, they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstance."

The implication of all these provisions is that the following forms of English Law were being received into the country: (1)Common Law (2) Doctrines of

Equity (3) Statutes of general application that were in force in England on 1 st January 1900.

Content Of The Received English Law In The Western States Of Nigeria: The former Western Region (now Oyo, Ogun, Ondo, Osun, Ekiti Edo and Delta states) received English Law via the Law of England

English Common Law and the doctrines of equity. However in terms of statutes, the region had selected English statutes which the government considered necessary to continue to be in force and enacted them as local legislation. These laws were enacted in twenty one laws; the process was completed by enacting the Law of England (Application) Law. Cap. 60 WRNL [ 1959] which in section 3 provided that the common law and the doctrines of equity should be in force in the region and provided in S. 4 that no imperial Acts shall be in force within the region.

3.2.1 Common Law: The term 'Common Law' was introduced by the colonialists to mark a distinction between the general written law of the universal church from rules peculiar to the provincial church. In later years common law courts of England namely, the Court of Common Pleas (which dealt with cases where the King was particularly concerned) and the Court of Exchequer (which dealt with revenue) empowered by law to administer the law and custom of the realm. Under the guise of enforcing this and apart from administering the few legislations by the king, the royal judges took the local customs that were found and bound them together into a national law. It consisted of general and local customs carried through the realm by the assize judges on their circuits. Common Law is therefore based on customs. Thus the law was 'common' and different from what was special or extraordinary - e.g. Roman law.

Common Law gradually developed through the technique of argument, exposition and speculation by the advocates who appeared before judges. In a case where a novel situation is being presented the advocate and the judge would scout around for the most similar case available. On finding this, arguments are received as to whether the two cases can be similarly treated or distinguished.

This technique is a character of common law which can only be sustained by adequate reporting of previous decisions because the essence of common law is that it grows through judicial decisions reported by lawyers. The rules of common law are found in judicial decisions. Under the operation of common law, a decision of a court operates retrospectively describing what the law isor had been rather than what it shall be. The use of the doctrine of precedent has gradually turned common law into a rigid system.

In a Aide sense therefore, common law means the legal system and habits of legal thought evolved by English men. In this sense it can be contrasted with systems of law derived from other jurisdictions e. g. Roman law. It is thus a label for one kind of legal system.

In the narrow sense, common law is the result of the system of precedents used in old common law courts. It refers to all the unenacted portion of English laws contained in judges' decisions but excluding those rules formerly devised and administered by the Court of Chancery. It is thus used to distinguish rules derived from judicial decisions of superior courts in contrast to those arising from statutory law. Note however that not all judge-made laws are derived from common law, some derive from equity which are of distinct historical origin. This is the common law as a source of Nigeria law.

3.2.2 Doctrines of Equity: Equity refers to the body of rules administered by the former English Court of Chancery. Its development is connected with many factors. For instance in the 13th century, England judges saw their duty as enforcing what justice demanded. By the 14th century however, emphasis was laid on the application of the law. Since justice according to the law may not necessarily be fair, its application sometimes resulted in injustice despite the fact that a man's case had been fairly tried and the law accurately applied. This tended to narrow down common law into a rigid system since it was being dominated by technicalities. The need for a more flexible machinery of justice eventually arose.

In the 14th century, a litigant was sometimes deprived of remedies at common law through the activities of mighty subjects. Juries and even judges were sometimes intimidated by these powerful men into arriving at decisions far from being justiceable. These conditions gave rise to dissatisfaction and prospective litigants started addressing petitions for justice to the King, who delegated the answering of such to the Lord Chancellor. The Chancellor, as an ecclesiastic, exhibited a different idea of justice from the common law judges and a more acceptable system of j ustice began to evolve in preference to common law. The guiding principle of chancery was conscience which meant that justice would be given to a petitioner if good conscience entitled him to a remedy. In this respect it may be said that equity was developed by the old English Court of Chancery to mitigate the rigidity of common law. The

work of chancery is therefore supplementary to common law.

Note that the early idea of justice has since suffered an eclipse. Even though chancery was still said to be a court of equity, just like common law, it hadceased to be a fluid thing and had become a set rules manifested by the

use of decided cases in the establishment of the principles of equity in courts of law. The rules of equity, like those of common law are now found in judicial decisions. In Nigeria, courts administer common law and equity together and a conflict in both is resolved in favour of equity.

Scope Of The Limitation Date In Received English Law: English Law was received via various High Courts, all Laws similarly worded. A question that had been raised was whether the date, 1st January 1900 contained in the statutes applies to all aspects of the received English Law or whether it applies only to statutes of general application. The controversy was especially fuelled by the provision of S. 15 High Court Law of Eastern Nigeria 1963. The section provides:

"The common law of the doctrine of equity and the statutes of general application which were in force in England on the 1 st of January 1900... "

(1) Dr. Allot believed the limiting date of 1 s' January 1900 applies to all aspects of the received English Law. His argument was based on:

(a) S. 83 of the former Gold Coast Ordinance which was similar to S. 15 High Court Law of Eastern Region.

(b) He also based the argument on an isolated obiter dictum of Petrides J. in Solomon v African Steamship Co. 9 NLR 99 which was to the effect that "the statutes of limitation ..... were statutes of general application in force in England on January 1, 1900 and they, in common with other statutes of general application which were in force on that date, are together with the common law and the doctrines of equity which were in force in England on the same date in force within the jurisdiction of this court....."

(2) On the other hand the following arguments were used against the suggestion that the limitation date applies to all aspects of the received English Law.

(a) In the High Court Law of Northern Region S. 28 which received English Law is arranged in paragraphs which clearly show that the date applied only to statutes of general application and not common law and the doctrines of equity.

The Federal Act and the Lagos Law which received English Law used the words TOGETHER WITH instead of AND that was in the Eastern Region provision.

(c) The Western region received only the common law and the doctrines of equity by virtue of the law of England (Application) Law, 1959 and this contains no limitation date.

(d) Professor Park argued that Dr. Allot's position does not reflect actual judicial practice as Nigerian Courts have always followed pre and past 1900 English decisions. Following cases used to buttress this in law of contract and tort. UAC v. SakaOwoade [1955] AC 130 which applied the common law doctrine of vicarious liability as enunciated in CAPS v Grace Smith & Co. [1912] AC. 716.

In the law of contract is the case of Ajayi v R. T. Briscoe [ 1964] 3 All ER. 556 which followed the equitable principle of promissory estoppel as enunciated in the case of Central London Property v High Trees House Ltd. 1947 K.B. 120.

(e) Common Law being common sense is a dynamic concept and cannot be tied to a particular period in history.

These parts show that the limitation date does not apply to common law and doctrines of equity but only to statutes of general application.

Note (1): Though Common Law and doctrines of equity are applicable in Nigeria, they are only of persuasive authority as Nigerian Courts are not bound by them.

3.2.3 Statutes Of General Application

The meaning to ascribe to the phrase "statutes of general application" was a source of divergent opinions among judges and academicians. Many tests were laid for the determination of whether a statute is of general application.

(1) The first of such tests was that which provided that a statute must be in force throughout the United Kingdom i.e. (Britain, Scotland and Ireland). It was applied in the case of Re: Estate Of James Sholu II NLR. 36 where the court held that the Land Transfer Act 1$97 was not a SWM;

of general application because it was not in force in Scotland and Ireland. However this test has been rejected because the statute itself speaks of statutes of general application in force in England and not the United Kingdom. The above case was later over-ruled in the case of Young v Abina[ 1940],WACA 180 where the same Land Transfer Act was held to be a statute

of general application as it applied to the estates of persons dying in England after January 1, 1898.

(2) Another test propounded for the determination of statutes of general application is that the statute must be applied generally throughout the colonies. This was submitted by counsel in the case of A. G. v John Holt & Co. [1936] 2 NRL 1. This test implies that an Act must be in force in all the colonies to qualify as a statute of general application. For instance before a Nigerian Court can apply a statute it must ascertain that the same statute is being applied in all other colonies like Ghana, Gambia, etc. Before Ghana can apply the same Act, it must ascertain that Nigeria and the Gambia are applying it.

A different test was stated by Osborne C.J. in the case A. G. v John Holt & Co. [1936] 2 NRL 1(supra) in the following words:

"Two preliminary questions can be put by way of a rough but not infallible tests - (1) By what courts is the statute applied in England? (2) To what classes of the community in England does it apply. If on the 1st of January 1900 an Act of parliament was applied by civil and 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 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".

Judicial authorities have faulted this test, in IGP v Kamara [1934] 2. WACA 185, the Summary Jurisdiction Act 1848, which applied only to magistrate courts, was held to be a statute of general application. Similarly in Riberto v Chahin [1845],14 WACA 476, the Common Law Procedure Act of 1852 which regulates only procedure was held to be statute of general application. These cases contradict Osborne's first test that an Act applied only by certain courts (e.g. Act Regulating Procedure) would not be of general application.

Despite the criticisms against the test by Osborne C.J., it has been submitted that an Act which passes his test (i.e. a pre-1900 English statute which applied to all classes of the community in England) would indisputably be of general application. See Lawal v Younan[ 1961 ] I ANLR 245 where the Fatal Accidents Acts 1864 were held to be statutes of general application. Braithwaite v. Folarin [1938] 4. WACA 76 where the Fraudulent Conveyances Act 1571 was held to be a statute of general application. "The statute in question is in view a statute of general application, applying as it seems quite generally to ordinary affairs and disputes of men without any qualification, or speciality restricting its application". Similarly in Young v Abina[ 1940],WACA 180 (supra), the Land Transfer Act was held to be a

statute of general application and the court went on to say that "it is difficult to see how a statute could be of a more general application."

[n response to Osborne's criteria that a statute must be applicable to all classes A the community in England before it can be a statute of general application, it was argued that it would be sufficient for an Act to apply to all members of the particular class which it governs, through the geographical generality of England. An illustration is an Act which purports to regulate the activity of lawyers / doctors in England. To be of general application, it must actually regulate medical practice throughout the whole of England and its application should not be limited to London alone. It is immaterial that the Act is restricted to the class of people constituting the medical profession alone.

In the light of all these suggestions and cases, it was concluded that there is no general authority in the case law mentioning any complete specific criteria for the determination of statute of general application. Each statute is considered on its own merit. But a statute most likely to be held to be of general application if it was in force on 1 s` January 1900 and

(a) In respect of the subject matter it applies to all classes of the community in England OR

(b) It applies to all members of the particular class that it purports to govern in England.

Section 32 (2) Interpretation Act similar to S. 45 (2) Law Miscellaneous Provisions Act:

"SUCH IMPERIAL LAWS SHALL BE IN FORCE SO FAR ONLY

CIRCUMSTANCES SHALL PERMIT AND SUBJECT TO ANY FEDERAL LAW."

The implication of this section is that not all pre 1900 statutes of general application were automatically exportable to Nigeria e.g. an Act establishing the Anglican Church as the Church of England or an Act dealing with snow in England.

Note however, that the fact that circumstances in Nigeria which cause difficult questions to arise in relation to an Act was held to be no reason to exclude it on this ground. See Lawal v Younan [ 1961 ] I ANLR 245 (supra) it was submitted that Nigeria customs of family relations would raise many difficult questions in the application of Fatal Accidents Act and that the court should exclude them as being unsuitable in local circumstances. The Act enables the widow of a man killed by the tort of another to sue the other for

the tort on the condition that the widow does not remarry before proceedings commenced. Counsel submitted that the practice of levitate whereby a widow is inherited by her deceased husband's brother will bar the widow's right under the Fatal Accidents Act. The judge admitted that these may be true but held that it is not enough ground to hold that the Fatal Accidents Act does not apply. 32(3) Interpretation Act, 1990 Laws of the Federation similar to section 45(3) Law Miscellaneous Provisions Act:

"FOR THE PURPOSES OF FACILITATING THE APPLICATION OF THE SAID IMPERIAL LAWS THEY SHALL BE READ WITH SUCH FORMAL VERBAL ALTERATIONS NOT AFFECTING THE SUBSTANCE AS TO NAMES, LOCALITIES, COURTS, OFFICERS, PERSONS, MONEYS, PRACTICE AND OTHERWISE AS MAY BE NECESSARY TO RENDER THE SAME APPLICABLE TO LOCAL CIRCUMSTANCES."

This provision enables the court to substitute words in England for Nigeria e.g. Nigeria for England, Lagos for London, etc. The alteration is never allowed to affect the substance of the enactment. Only verbal alterations are allowed. See Apatira v. Akanke [1944] 17 NLR 149. The Wills Acts requires two witnesses to be present at the same time and counsel urged the court tooverlook this irregularity using the provision above. See also Adeoye v Adeoye, [1962] NLR 63; Obilade's Nigerian Legal System, (2) Park's source Of Nigeria Law.

2.4 Survey Of The Application Of English Statutes In Nigeria Today

A cursory look at the receiving enactments would suggest that a wide variety of English statutes were received into our legal system. However Professor Obilade correctly stated that only rarely is an English Act both of general application in England and not prevented by local circumstances from operation n Nigeria.

Between February 1986 and March 1987, a review of pre-1900 English Statutes of General Applications which had continued to be in force in certain parts of the country was undertaken by the Nigeria Law Reform Commission. The need for a review was necessitated by the fact that most of the Acts had been repealed and replaced with modern and more relevant Acts even in England. Yet they continue to be applied here in Nigeria. It was considered beneath national independence to continue to apply old and obsolete English Acts.

The procedure adopted by the commission in view of the controversy and the uncertainty as to which English Act is of general application was to examine each pre-1900 English Act which is prima facie of general application and in force in Nigeria. Special attention was paid to the

relevance of the Act to present Nigeria circumstances and a decision was taken as to whether or not the Act should be repealed and not re-enacted at all or whether the whole or part of the Act should be re-enacted with or without amendment and in what form. This may be in the form of a new Edict or Decree incorporating the relevant provisions of one or more English statutes or in the form of an amendment to an existing enactment.

The next question was whether the repeal in the case of the states should be by way of an amendment of the provisions of the states' High Court law by which these statutes were received into the legal system or whether a separate Edict should be enacted for this purpose. The second option was considered more desirable as it will ensure a clean break from the colonial past. This was the method adopted by the former Western region which enacted into law, the Law of England (Application) law cap. 60. 1959 edition of their laws.

At the end of the review, all the pre-1900 English statutes in force in Nigeria

which were neither relevant nor appropriate or which were not in consonance with norms of Nigerian society were recommended for repeal or amendment as the case may be. Such English laws that were amended will be in force

# CHAPTER 4

# CUSTOMARY LAW

## 4.1 **Introduction**

Customary Law is one of the sources of Nigerian Law. The customary law of a community is a body of customs and traditions that regulate the various kinds of relationship between members of the community. See TO Elias' "Nature Of African Customary Law."

"Custom is a particular way of behaviour which because it has long been established among members of a social group or tribe, can develop and acquire the force of law or right."

It consists of customs accepted by members of the community as binding. (See TO. Elias, in his Essay on "Nature of African

Customary Law") Customary law consists of "The body or Rule which are recognised as obligatory by its members."

It must be noted from inception that the use of the word 'custom' does not presuppose that there is a uniform set of customs prevailing throughout the country. It is merely a blanket description covering many different systems.

## 4.2 **Types Of Customary Law**

Customary law in Nigeria maybe divided in terms of nature and source into 2 classes namely:

(1) Ethnic customary law

(2) Moslem (Islamic or Non-Indigenous Customary) Law

**Ethnic Customary Law:** This aspect of customary law is indigenous, applies to members of a particular ethnic group and is unwritten. There are several of such customary laws in the country due to the multiplicity of tribes or ethnic groups. For example we have the Ijesha, Ife, Benin, Enugu customary laws. This type of customary law usually operates within the area occupied by a particular tribe. However, the ethnic customary law of an area, is usually similar to that of another area where the indigenous people live: for example, the customary law on the issue of marriage in Igboland may be the same as that in another area where the Igbo people are predominant.

**Moslem Law:** As a source of Nigeria Law, Moslem law is regarded as customary law.However, unlike the ethnic customary law, Muslim law is written and its source is basically foreign. It is also called Islamic law or the Sharia. Moslem law can apply throughout the country because it is not founded in any particular locality. Thus one can describe Muslim law as religious law based on the Muslim faith and applicable to members of the faith.

In Nigeria, it constitutes received customary law introduced into the country as part of Islam.

Because it is in written from, it is comparatively rigid. Its content is not readily affected by social changes unlike ethnic customary law. The sources of Moslem law are:

(1) The Holy Koran

(2) The practice of the prophet (sunna)

(3) The consensus of scholars,

(4) Analogical deductions from the Koran and the practice of the prophet.

## 4.3 Characteristics of Customary Law

a) **Acceptance as an obligation by members of the community** - whereas the criteria of validity of modern laws depends on its being enacted by a sovereign or supreme legislature, that of customary law rests rather on its acceptance by the community whose affairs it regulates. Such members must consider the custom as obligatory on themselves. See EsugbayiEleko v Government of Nigeria [ 1931 ] AC 662 at 673.
Consequently, any custom or tradition, which does not command such acceptance, lacks the character of law, but is a matter of mere social observance and the individual can afford to be indifferent about it.

Customary law may also be described as an expression of behaviouristic patterns among a people. As was said in the case of Owoniyin v. Omotosho [1961] ALL NLR 304 at 309, it is a mirror of accepted usage; see Ogunlowo v Ogundare [ 1993] NWLR where the court held that customary law is a mirror of accepted usage and cannot be decreed or legislated out of or into existence; see also Okonkwo v

Okagbue [1994] 9 NWLR30" ..... for a custom to have the force of law it must be approved by consent of those who follow it."

b) **It must be in existence at the time of application**-an abandoned custom therefore has no legal validity since such would not command acceptance.

In the case of Lewis v Bankole [1908] NLR 83, Speed C.J. stated that "the native law and custom which the courts enforce must be existing native laws and customs and not that of bye gone days". In other words, an alleged custom that has not established itself as the accepted norm or pattern of behaviour or where though once accepted has been abandoned, has no legal validity. See Alfa v Arepo [1963] WNLR 95.

c) **Customary law is flexible**- because of its unwritten nature, it changes from time to time to reflect changing social and economic conditions. See Alfa v Arepo [1963] WNLR 95.(Supra).

The flexible nature of customary law was stressed in the case of Lewis v Bankole [1908] NLR 83 by Osborne C.J. when he said:

> "one of the more striking features of West African native custom ..... is its flexibility. It appears to have been always subject to motive of expediency and it shows unquestionable adaptability to attending circumstances without entirely losing its character."

## 4.4 Establishing Customary Law

Customary Law may be established in 2 ways:

(1) By proof

(2) By judicial notice

The means of establishing customary law in non-customary courts are provided for in the Evidence Act. S. 16 Evidence Act 2011 provides:

(1) "A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence".

(2)"The burden of proving such a custom is upon the person alleging its existence".

S.17 Evidence Act provides that "A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record."

S. 18 (1) Evidence Act – "where a custom cannot be established as one judicially noticed, it shall be proved as a fact."

**(A) Proof Of Customary Law Before Non-Customary Courts**

Before these courts, customary law is a question of fact. Therefore, unless a custom has been judicially noticed, a person seeking to establish its existence must prove it by adducing sufficient evidence in support. Fadiora v Aboride [1992] 6 NWLR (Pt. 246) pg. 221.

"Native law and custom is a matter of evidence to be decided by facts presented before the court in each particular case unless it is of such notoriety and has been so frequently followed by the courts that judicial notice would be taken of it without evidence required in proof." See S. 16(1) E.A. (supra).

There are 3 methods of proving customary law in non-customary courts.

1. **Proof By Witnesses**

**Types of witnesses:**

(a) Witnesses of Fact -This cover people who are able to testify that a particular thing was done in a particular way. See SS. 18 (2)& 73 Evidence Act.

(b) Witnesses of Opinion - See S. 68 of Evidence Act "when the court has to form an opinion upon a point of foreign law, native law or custom ... the opinion upon that point of persons specially skilled in such foreign law, native law or custom ... are admissible"

**Note (1):** On number of witnesses needed to prove: Queen v. Chief Ozogula ex parte Chief Ekpenga [1962] WNLR which held that though the proof of customary law is not by the number of witnesses called, yet it is not enough that he who asserts the custom should be the only witness.

See also Fadiora v Aboride [1992] 6 NWLR (Pt. 246) pg. 221. "Native law and custom must be strictly proved not by calling many witnesses but by producing evidence independently of those who assert the existence of that custom."

**Note (2):** Courts sometimes deem it necessary to call chiefs who are versed in the customary law to give evidence. See Lewis v Bankole [1908] NLR 83 (supra) Pg. 84-99; Apoesho v Awodiya [1964] NNLR.8.

The mere fact of being a customary court president does not make one an expert in customary law especially since customary courts are now a creation of statute. See Edokpolor v Idiehen [1961] WBKR. 11.

2. **Proof by the use of Books**

S.70 E.A. states that "in deciding questions of customary law and custom…any book or manuscript recognised by as legal authority by people indigenous to the locality in which such law applies, are admissible."

**Note:** The conditions which a book must comply with under the section was laid down in the case of Adedibu v Adewoyin [1951] 13 WACA 191:

(1) The book or manuscript must be part of the evidence before the court.

(2) The book or manuscript must be shown to be recognised by the indigenous people concerned as an authoritative document stating one or more customs accepted by them as binding upon them.

Note: (Difficulty in satisfying the above conditions has led to la iberal application. See for example Adeseye v. Taiwo [1956] FS C 84 where the court to establish the custom in question used two books not tendered in evidence.

See also Suberu u Sunmonu [1957] 2. FSC 33; Oyekan v. Adele [1957] 1. NNLR. 872 at 888; Balogun v. Balogun [1920] 10 NLR 36 at 50.

3. **Proof by the use of Assessors**
   Provisions are made in the various high court laws except east, for the use of assessors.
   An assessor is a person, usually an expert, in the subject matter under consideration, who sits with the judge(s) and assists him from his special knowledge.

   **Note (1):** Assessor not considered a member of court because he takesno part in the decision making process.

   **No to (2):** Criticism against the use of assessors lies in the fact that their opinion is given not in the open court but in

the judge's chambers thereby depriving parties opportunity to challenge them.

Note following points as well:

(1) A party proving a custom must prove that it governs the circumstances or situation under consideration.

(2) Where there is a custom and an exception one party may prove the general and the other proves the exception.

A party who proves a general custom is not duty bound to prove the exception. See Ademola v Tijani [1952] 12. WACA 87.

(4) Where both the general custom and exception are valid the decision lies on the court as to which to apply.

See Adeniji v Adeniji [1972] 1 All NLR 298 at 305 - 306 court held "the Idi-igi method of distribution of the estate of a deceased person is an integral part of the Yoruba native law and custom; (2) that since it is a universal method, it should be adopted expect where there is a dispute among the descendants of the estate as to the proportions in which such estate should be divided; (3) where there is such a dispute the head of the family is empowered to, and, should decide whether Ori-ojori ought in the particular cases, to be adopted instead of Idi-igi and that such a decision must prevail." See also Danmole V Dawodu [1958[ 3. FSC 46.

Where the party fails to prove the general custom and the other party establishes an alternative, the alternative custom would be applied.

## (B) Proof Before Customary Courts

The Evidence Act does not apply to customary courts by virtue of S. 256 (1), hence the provision under the Evidence Act relating to establishment of customary law does not apply to them.

Establishment of customary law before these courts is therefore, governed by customary law itself.

Proof of customary law before customary courts can be divided into two:

1. **Proof of customary law of the Area of Jurisdiction of the court**

   Where the applicable customary law is that of the area of jurisdiction of the court and the members of the court are versed in that law, proof of that law is not necessary. See Ababio II v. Nsemfo, [194] 12 WACA. 127, where WACA states that, "the rule in Angu v Attah..... was intended to apply to what may be described as British courts before which it is sought to prove a particular custom. There is no ground for extending the application to native courts of which its members are versed in their own customary law although there is nothing to prevent a party from calling witnesses to prove an alleged custom, it is certainly not obligatory upon it to require the custom to be proved through witnesses."

   **Note (1):** The rule in Angu v Attah [1916] PC (1874 - 1928) 43 is that rules of customary law are to be proved by evidence before the court.

   **Note (2):** The rule in Ababio's case is also applicable where only one member of the court is versed in the customary law. See Ehigie v Ehigie[1961] ANLR 871 .

   **Note (3):** Contrary decision to the principle in Ababio's case has been given. See Edokpolor v Idiehen [1961] WBKR. 11 (supra) held that customary law should always be proved before customary courts. See also Fijabi v. Odumola [1955] NMLR 133.

   Ehigie v Ehigie[1961] ANLR 871 (supra) -held the view of Fatayi Williams J. that the ends of justice would be better

served if customary law which has not been "so frequently applied before the courts as to be well-established and notorious" is proved before the courts.

**Conclusion**- Where the customary law is that of the area of jurisdiction of the court and the court or at best one member of the court is versed in that law proof of that customary law is not necessary. Where the contrary is the case, establishing it by calling witnesses becomes necessary.

## (C) Judicial Notice of Customs

The notoriety of certain facts makes it unnecessary for them to be proved in everyday life. Judicial notice is taken of them. The Evidence Act provides for circumstances in which a custom may be judicially noticed

### (a) Judicial Notice before non-customary courts

Formally provided for under by S. 14(2) of the old E.A. "a custom may be judicially noticed by the court if it had been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or class or persons concerned in that area look upon the same binding in relation to circumstances similar to those under consideration."

Arguments resulting from the above provision

The use of the word "MAY" denotes that it is still discretional upon whether or not to take judicial notice of a custom even after it has satisfied the conditions in S. 14(2) Evidence Act. See Obilade's Nigeria Legal System.

(2) The Supreme Court held in the case of Taiwo v. Dosunmu[1965] ANLR 417 , that the phrase "in the same area" means an area in which some grounds appear for presupposing

the custom to be in uniform." Note in this respect that uniformity of customs is different from mere similarity.

The court of superior or co-ordinate jurisdiction referred to in S. 14(2) Evidence Act must be one having jurisdiction in the geographical area where it is contended that the custom applies. For instance, the Magistrate court and High courts in a state have jurisdiction throughout the state. Therefore the magistrate court can rely on the High court's decision of that state in taking judicial notice of a custom.

(4) The question of the extent to which a custom is applied before judicial notice can be taken of it was subject to some disputation. The case of Angu v Attah (supra) had held that frequent proofof a custom in the courts is necessary before a custom can be judicially noticed. This was decided before the enactment of the Evidence Act.

Since the enactment of the Act, however, some learned authors have submitted that there is nothing in the Evidence Act requiring frequent proof of a custom before it is judicially noticed.

Note however the case of Giwa v Erinmilokun [1961] 1 All NLR 294 at 295 which was decided after the enactment of the Evidence Act yet still followed the position requiring frequent proof. See also Larinde v Afiko [1940] 6 WACA 108; Osinowo v Fagbenro [1954] 2 ANLR 3; Odufuye v. Fatoke 1977. 4 SC 11.

See Cole v Akinyele [1960] 5 FSC 84 where court relied on the sole decision in Alake v Pratt without any other evidence and took judicial notice of the custom. The court accepted to judicially notice the custom that under Yoruba native law, legitimacy depends on acknowledgment of paternity of the child born out of wedlock by the father. "The court based its reason for doing this on the fact that there was massive evidence in support of the custom in the earlier case."

Note the following: Supreme Court pronouncements on the issue.

(1) Olagbenmiro v. Ajagunbiade 111 [1990] 3 NWLR 37 held ”A solitary instance of the application of customary law to the facts of a particular case does not entitle that custom to be judicially noticed. However, where one decision in a case establishing the existence of a particular customary law satisfies the requirements of S. 14(2) Evidence Act, that solitary decision may be judicially noticed.”

Mohammed Bello, ON, had this to say in the same case:

“It appears to me there is no inconsistency in the judicial notice based on S. 14(2) Evidence Act. The discretion to take judicial notice of a custom under the subsection is upon condition that the custom has been acted upon by a court in the same area to an extent which justifies the court asked to apply it in assuming that persons or class of persons concerned consider the same binding. Consequently, unless a solitary instance of the application of a custom satisfies the requirements of the subsection that custom is not entitled to be judicially noticed.”

“It seems to be that as a general rule the insistence on the custom being acted upon in several cases would be acceptable. In m} view the operative consideration is that the members in the samewould be more readily justified in assuming that if that custom has been acted upon in several cases but I think there are situations in which such a situation can be reached when the custom has been upheld in one case. This in my view is where the custom concerned has itself acquired a notoriety” per Nnamani JSC.

(2) In the case of Oko v. Ntukidem [1993] NWLR, the Supreme Court held that a single application of a custom is not enough to justify it to be judicially noticed.

“It was neither shown by evidence nor judicial pronouncement over a period of time that rivers are natural boundaries between lands belonging to different communities. The trial judge to

support his findings cited no authority. The court may take judicial notice of a custom when such has been established on other occasions before courts. A solitary application of a custom to the facts of a particular case is therefore not sufficient to confer the requested notoriety on such a custom - per Will JSC at pg. 135. This case settles the issue of the number of times the custom must have been applied before it is judicially noticed."

**NOTE:**

**THE OLD EVIDENCE ACT WAS REPEALED IN 2011 AND S. 17 OF THE EVIDENCE ACT, 2011 provides that ""**a custom may be judicially noticed when it has been adjudicated upon **ONCE** by a superior court of record.

Also Note The Following:

Judicial notice of customary law is an alternative method of establishing customary law. The other method is proof by calling evidence.

(2) Judicially noticed custom is a question of law while custom proved by evidence is a question of fact.

Once a judicially noticed custom ceases to be valid and the change in custom is proved, the court must cease to take judicial notice of it.

See Salami v Salami [1959] WRNLR. 10; Danmole v. Dawodu [1958] 3 FSC 46.

In the latter case, the Federal Supreme Court allowed evidence to be adduced to show that the judicially noticed custom of Idi-Igi - distribution of estate per stripes (succession) has ceased to be the current custom and therefore been replaced by the Ori-ojori (per capita).

**Judicial Notice In Customary Or Area Courts**

The provisions of the Evidence Act do not apply to customary courts. Therefore,customary law governs judicial notice before a customary court.

Where a customary court is versed in the customary law that applies in its area of jurisdiction, the court is entitled to take judicial notice of the custom. The court is deemed to know the law and establishing the custom by calling evidence becomes unnecessary.

## 4.5 **Validity Of Customary Law**

After the establishment of a rule of customary law in the court, the next step is to determine if the custom is valid before it can be applied.

The rules governing validity of customary law are contained in the various High court laws and the Evidence Act.

See S. 26(1) HCL of Lagos State [2003; Cap. H3 as amended by H/C (Amendment Law) 2012; S.20(1) HCL Cap. 61 Laws of Eastern Nigeria; S. 13(l) HCL of Western Region and S. 18(3) Evidence Act 2011.

Proviso to this section states:

"In the case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice equity and good conscience."

See S. 26(1) HCL Lagos State, which provides that:

"The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice equity and good conscience or incompatible either directly or by implication any law for the time being in force."

The provision in the above section is similar to that contained in the laws of the various States. Combining the provisions of these statutes, the validity of a custom is determined by its ability to overcome orpass three tests. If it passes the three tests then it is declared valid and subsequently applied.

These three tests are:

i The Repugnant Test

ii the Incompatibility Test

iii. The Public Policy

**The Repugnancy Test**

Repugnant means contrary or contradictory to; offensive; repulsive or arousing disgust.

Natural justice under the law has two technical meanings:

(1) The right to fair hearing (hear both sides - audialterampatem).

(2) No man should be a judge in his own case (nemojudex in causasua).

The term equity similarly has two meanings. In its broad or popular sense, it is equivalent to natural justice or morality. See Snells, Principles Of Equity, 27th Edition.

The technical meaning deals with the doctrines of equity.

In the case of Moses v Macfarland [1970] Burr. 1065 "natural justice" was held to mean equity and natural law. Lord Mansfield in that case, held that the words natural justice were here clearly not used in their modern sense but synonymous with natural law in the same way that the used word equity did not refer to

technical equity i.e. the Equity of the Chancery Court but to ins naturale. In other words natural justice and equity in this passage mean the same thing.

Therefore the phrase "repugnant, to natural justice equity and good conscience" is not interpreted disjunctively i.e. the phrase is not divided into its component parts. See Okonkwo v. Okagbue [1994] 19 NWLR (Pt. 368) pg. 301 where it was held that equity in its broad sense, as the repugnant doctrine was equivalent to natural justice.

In the case of ESHUGBAYI ELEKO V THE OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA[1931] AC 662 the word 'barbarous' was held to be synonymous with the repugnant doctrine by Lord Atkin when he stated ... the court cannot itself transform the barbarous custom into a milder one, if itstill stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience."

A similar decision was reached in Laoye v. Oyetunde [1944] AC 170 where Lord Wright expressed the view that the phrase was intended to invalidate barbarous customs.

Note that the fact a customary law rule denies a person of a right to which he would have been entitled under English law is not sufficient to invalidate the rule. See Rufai v. Igbira Native Auth [1957] NNLR 179;Ashogbon v Oduntan [1935] 12 NLR 7.

Here it was held that there was nothing repugnant in a rule that rendered a family member liable to forfeiture of his share of family land if he committed any serious form of misbehaviour or misconduct such as adultery within the household or disrespect to senior members.

In DANMOLE V DAWODU[1958] FSC 46, it was held by the trial judge that the Idi-Igi custom on succession was repugnant to natural justice, equity and good conscience. The judge felt that the custom, which allows the property of the deceased to be distributed among his children per, strips rather than per capita

was inconsistent with the modem idea of equality among the children.

This was rejected by the Federal Supreme Court, stating "the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy."

Therefore the decided cases that use the phrase is interpreted to mean fair and just or conscionable. A customary law that is unfair or unjust is repugnant to natural justice, equity and good conscience.

1. **Succession:** The courts have refused to uphold rights of succession to property where such is based on inhuman or intolerable practice. Hence customs based on the concept of slavery have been held to fail the test. In Re: EffiongOkon Atta [ 1931 ] 10 NLR 615. The court held that it was repugnant to natural justice, equity and good conscience for the head of the house to inherit his former slave's estate under customary law.
   See also Re: KwekuDamptey [1930] 1 WACA 12. In Ogiamienv Ogiamien [1964] NNLR 24 R, the Supreme Court upheld the established Benin custom of primogeniture which allows the eldest son to inherit thewhole of his father's intestate estate to the exclusion of the other children. The Supreme Court was of the view that the custom implied that it is the responsibility of the eldest son to look after the younger ones.
   See also in Amachree v. Kallio [19141 2 NLR 108. It was held that a customary law, which would enable a community to claim sole fishing rights in open tidal water to the detriment of neighbouring communities, was repugnant.

   Also in Nzekwu&Ors v. Nzekwu&Ors [1989] 2 NWLR (Pt. 104) pg. 737 the Supreme Court held that an Onitsha custom which postulates that a person has the right to

alienate property of a deceased person in the lifetime of his widow is barbarous and uncivilised and should be regarded as repugnant to natural justice, equity and good conscience.

## 2. **Custody Of Infants**

In cases pertaining to custody of infants, the guiding principle is the welfare of the child. The courts have persistently refused to recognise or countenance any trading or trafficking in children under the cloak OF customary law.

In the case of Loromeka u Makegbo [ 1957] B. WALR 306, a custom which required the widow of a man to hand over her children and the dowry paid on her to her deceased husband's brother if she refuses a levirate marriage was held to be repugnant.

InEdet v Essien [ 1932] 11 NLR 47.Essien had paid dowry on Inyang while she was still a child ... however, another man Edet, married Inyang after obtaining her parents' consent. Essien then laid claim to the two children of the unionbetween Edet and Inyangon the ground that until the dowry was refunded to him the children belonged to him. His claim actually represented the position of customary law on that issue. The court held that a native law and custom, which permitted such a state of affairs, must be overruled as being repugnant to natural justice, equity and good conscience.

In Mariyama v SadikuEjo [1961] NRNLR 81, an Igbira customary law rule which provided that a child born within 10 months of a divorce belonged to the former husband was held to be repugnant.

In the case of Okonkwo v. Okagbue (supra), the appellants were the children of a man (Okonkwo) who died in 1931. The deceased had two sisters who were the 1st and 2nd respondents. Both were married but childless. At about 1968, the respondents married the 3rd respondent for and on behalf of their late

brother. As a result of this marriage the said wife had six children who all bore the name of late Okonkwo, paraded themselves as his children. The respondents contended that they contracted the marriage in accordance with Onitsha native law. On the issue presented on appeal to the Supreme Court it was held inter alia that a custom that allows a woman to be married to a deceased man as in the instant case cannot be said to be in good conscience.

More so, because a dead man cannot give his consent, nor could he consummate with any person purported to have been married to him. Marriage being a union of two living persons to be meaningful must have the husband physically in existence so that the marriage can be consummated. What at best happened in the case was a union between a woman and two men. The custom was held to be repugnant to natural justice, equity and good conscience and contrary to the public policy.

Note that the court cannot modify a repugnant customary law. It must be applied as it is presented to the court or rejected in tote. If it is modified then the modified version cannot be said to be customary law because it will lack the necessary assent of the community.

See Lord Atkin's dictum in EsugbayiEleko v. Government Of Nigeria (supra) when he said "the court cannot itself transform a barbarous custom to a modem one. If it still stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience".

**THE TEST OF PUBLIC POLICY**

S. 18(3) E.A.

What then is public policy? The term public policy may not have an absolutely fixed definition because opinions differ as to its meaning and content. In the case Richardson u Emllish [1824] 2 130 ER 294being 229 at 252, it was said that "public policy is an unruly horse and when once you get astride it you never know

where it will carry you." This was repeated in the case of Cole v Akinyele (supra).

In the case of Okonkwo v Okague (supra), it was held that public policy means the ideas which, for the time being, prevail in a community as to the condition necessary to ensure its welfare, It went on to hold that public policy is not fixed and stable. It must therefore fluctuate with the circumstances of the time. Thus new heads of public policy come into being and old heads undergo modification.

In the case of Wilson v Carnley [1908] I KB 729, a promise of marriage made by a man who, to the knowledge of the promisee was at the time of making of the promise married was held to be void as being against public policy.

In Cole v Akinyele (supra), the rule of legitimisation by acknowledgment of paternity was held invalid on the ground of public policy. The judge quoting the dictum in Re: Adadevor[ 1951] 13 WACA 304, that a rule of customary law which would encourage promiscuous intercourse is contrary to public policy.

**THE TEST OF INCOMPATIBILITY**

See S.26(1) HCL of Lagos for illustration. "The High court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience or incompatible either directly or by implication with any law for the time being in force."

Any law used in that section means any local or Nigeria legislation. It does not cover English law (Common law, Equity and SOGA). This is because the two systems of law are almost always contradictory and if the validity of customary law is based on its compatibility to English law, hardly would any local customs be applied. See Malomo v. Olusola [1954] 21 NLR 1. Also Rotibi v. Savage [1944] 17 NLR 77.

A rule of customary law is incompatible with a local statute or subsidiary legislation if the local enactment is manifestly intended to govern that subject matter to the exclusion of customary law. See Salau v Aderibigbe[ 1963] WRNLR 80.

Where the manifest intention as indicated by express terms is to modify or abolish a customary law rule it gives rise to a case of direct incompatibility. See Abolition Of Osu Caste System Law E.R. Laws Cap. 1996.

Where there is no inconsistency between the co-existence of a customarylaw rule and a local enactment, then there is no incompatibility. But where notwithstanding the fact that a local enactment does not expressly abolish or modify a customary law rule, their co-existence is inconsistence with the manifest object of the local enactment, then the customary law would be invalid.

## CHAPTERS NIGERIAN LEGISLATION

### 5.1 Introduction

Nigerian legislation is made up of statutes and subsidiary legislation.

Statute: A statute is an enactment by the legislature that is, that arm of government responsible for making laws.

Subsidiary legislation: These are laws enacted in exercise of powers given by a statute. e.g. Legal Practitioners' (Remuneration for Legal Document And Other Land Matters) Order, 1991, which was made in exercise of power conferred on the legal Practitioners' Remuneration Committee by section 15 (3) of the Legal Practitioners' Act, 1975.

Subsidiary legislature is important because it saves time and trouble of going back to its legislative house when there is need for change.

Note that English subsidiary legislation has been received into Nigeria.

5.2 Types Of Nigerian Statutes

(a) Ordinances:

Between 1914 and 1954, Nigeria was one entity under a unitary government. The Statutes enacted by the central legislature before 15th October, 1954 were termed ordinances. Also as a result of the amalgamation of the country in 1914, the legal system of the two entities were merged. In 1916, all the pre-enacting statutes of these units were revised and pre-enacted as ordinances. Hence, ordinances were those statutes passed or deemed to be passed by the central legislature before October, 1954 when Nigeria became a federation.

(b) Act

An Act is an enactment made or deemed to be made by the federal legislature before January 16, 1966 or by the National Assembly between October 1979 and December 1983, and May 1999 to date.

Also, where there is an enactment which takes effect under the constitution as an Act of the National Assembly, such will be deemed to be an Act. Prior

to independence, the enactment of the federal legislature were designated Ordinances but acquired the title of Acts upon independence. All Acts in force in Nigeria by 31st January, 1990 are now published in volumes by the Law Reform Commission. The equivalent of Acts at state Level (i.e laws made by state House of Assembly or deemed to be so made) are referred to as Laws.

(c) Decrees

A Decree is an enactment made by the Federal Military Government. It is enacted by the highest military body e.g the Supreme Military Council or the Armed Forces Ruling Council (AFRC). Under a military regime, Decrees are the most superior law of the land.

Where there is any unsuspended part of the Constitution, such part that is in operation apply only by virtue of Decrees. See Constitution (Suspension and modification) Decree 1966 (No 1) of 1966.

Lakanmi&Anor v A. G. West S.C. 58/59 of 4/4/70 [1971] I U.I.L.R 21 . In the case, by virtue of the public officers and other persons, (investigation of assets) Edict No. 5, 1967, the Military Government of Western Region, condemned the acquisition of certain properties by certain people and forfeited their asset to the government. When challenged by the country, the Federal Military Government backed up the measure with the Forfeiture of Assets etc (Validation) Decree No 45 of 1968. The case went to the Supreme Court and it concluded that the legislature went beyond legislative capacity, that they were in fact legislative judgment and therefore null and void.

The Court further held that "we have come to the conclusion that the decree is nothing short of legislative judgment and exercise of legislative power. It is in our view ultra vires and invalid."

Consequently, the Federal Military Government immediately enacted the Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970 by which it set aside the Supreme Court judgment by providing that any decision whether made before or after the commencement of the Decree by any court of law..... which has purported to declare the invalidity of any decree or any edict (in so far as the provisions of the edict are not inconsistent with the provisions of a

Decree) or the incompetence of any government in the federation to make the same is or shall be null and void and of no effect whatsoever as from the date of the making of the Decree.

See also Adamolekun v Council Of The University Of Ibadan [1968] NMLR253; Adejumo v. MG.L.S [1972] I ALL NLR 189; A.G Ondo State v AG Ekiti State [2001] 17 NWLR (Pt 743) 706.

(d) Edicts

An Edict is an enactment made by a state military government. Where there is any inconsistency between an edict and a law made by parliament or Federal Military Government, the edict is void to the extent of its inconsistency.

5.3 Some other aspects of Nigerian Legislation

Note the use of the following

(i) Principal legislation

A Statute is referred to as the principal law in a statute amending it eg Legal Practitioners' (Amendment) Decree 1992 which amended the Legal Practitioners' Act Cap 207 LFN. The Cap 207 is the principal law.

Also, Legal Education (Consolidation etc) (Amendment) Decree 1992 which amended the Legal Education (Consolidation, etc) Act, Cap.206 LFN. The Cap 206 is the principal law.

(ii) Enabling law or enabling legislation
A statute under which a subsidiary legislation is made is referred to lawas an enabling legislation eg the Legal Practitioners' Act, 1975 *vis a vis*the Legal Practitioners' (Remuneration for legal documentation and other land matters) Order, 1991.

5.4 The Constitution as a part of Nigerian Legislation

The Constitution is a part of Nigerian Legislation because it has all the makings and trimmings of legislation and also because it is the source of the existence and power of the various organs of government. Where there is any inconsistency between the constitution and any action purported to be done as a result of power conferred under any such law, such would be void to the extent of its inconsistency with the constitution.

See generally:

1 Section 1 1999 Constitution.

2 Uzodima v. C.O.P [1982] 1 N CR 27- Where the Supreme Court held that any provision which forbids lawyers from representing an accused in a court of law is null and void being inconsistent with the constitution.

The court was referring to S.28 of the Area Court Edict, 1967 and S. 390 of the Criminal Procedure Code, which provides inter alia that legal practitioners have no right of audience in Area Courts. It was held that these provisions were inconsistent with S.36 (6) (c) of the 1979 Constitution which gives every person a right to represent himself or by the counsel of his own choice.

3 Momoh v Senate of The National Assembly [1981] 1 NCR 21.

4 AG Ondo State v AG Federation & 35 ORS [2002] 6 SC (Pt. I ) 1 - which declared some aspects of the Corrupt practices and Other Related Offences Act, 2000 inconsistent with the 1999 Constitution.

5.5 Nature Of Legislation

Legislation is politically the most revolutionary and progressive as well as most radical source of law dealing with moral, economic and social issues, ills and ailments at all stages and levels of the society. Nigerian legislation has been used for the above purpose. For example,

(a) The Trade Disputes Decree, 1976 was passed when strikes by employees of labour became rife because of the wealth brought about by the oil boom era in Nigeria.

The Robbery and Firearms (Special Provisions) Act, 1974, which was promulgated to deal with high spate and problem of armed robbery which became rife after the cessation of the Nigerian civil war.

(c) Exchange Control (Anti Sabotage) Decree, 1984 which had to be passed to deal with smuggling of currencies into and out of the country, such acts having caused Nigerian economic hardship.

(d) Corrupt Practices And other Related Offences Act, 2000 which was passed to checkmate corruption, which is regarded as the bane of present day Nigeria.

It is therefore obvious that legislation is the most important instrument of legal development.It affects all other sources of law as it can alter or amend their content.

Also, local legislation mirrors the aspirations of society. Using the Eastern Region as an example, there was a system called the Osu caste system. The repugnancy of that system was shown in the enactment of law against it.

Trial by ordeal is another example by SS 207-211 Criminal Code Cap. 4: LFN. "Trial by ordeal of sasswood, esere-beem or other poison, boiling oil fire, immersion in water or exposure to checks of crocodiles or other wild animals or by any ordeal which is likely to result in the death of or injury to any party to the proceeding is unlawful." This shows the aspirations of the society to move to a more civilized and less barbarous system of administering justice.

5.6 Canons Of Interpretation Of Statutes

Statutory Interpretation is the process by which the courts seek to ascertain the meaning of legislation, through the medium of the authoritative forms in which it is expressed.

The proper construction to be given to the provisions of a statute is invariably the burden of the courts and this duty is discharged through statutory interpretation. The primary duty of the court is to arrive at the true intention of the legislature based on the letters of the statute which are merely the external manifestations of the former.

As a general rule, courts cannot under the guise of reformulating the intention of the law maker, tamper with the law as enacted or impose its own conceived version of what the intention should be. See Okumagba v Egbe[ 1965]1 All NLR 62.

In order to resolve an ambiguity in a statute, the courts are guided by some rules. These rules are guides rather than strict immutable rules. The rules of interpretation include the following:

(a) Literal Rule

This is that rule of interpretation that demands that the words used in a statute must be interpreted according to their literal or plain meaning.

In The Sussex Peerage case, Tridal CJ said: "The only rule for the construction of Acts of Parliament which passed the Act if the words of the statutes are in themselves precise and unambiguous, then no more can be

necessary than to expand those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law giver."

The literal rule was applied in the following cases.

1. Adegbenro v Akintola [ 1962] 1 All NLR 465;

2. Okumagba v Egbe[ 1965]1 All NLR 62;

3. Ojokolobo v Alamu [1987] 3 NWLR (Pt. 61) 377; AG Federation v. Ijewere 4 NWIR (Pt. 37) 659;

4. Garba v FC.SC [1988] 1 NWLR (Pt. 71) 449;

5. Praying Band Of Lands v Udokwu [1991] 3 N.W.L.R (Pt. 182) 716.

Note that where the words used are of a trade, profession or business or technical nature such are construed in the light of the particular trade, profession or business. See Bronik Motors Ltd v. Wema Bank Ltd [1983] 1 SCNLR 296.

A Strict application of this rule has been known to sometimes work hardship. See R v Bangaza (1962) 5. F. S. C1; Akintola v Adegbenro [1962] 1 ALL NLR 465.

Where words have been judicially defined, their ordinary meaning will give way to their legally or judicially defined meaning.

(b) Golden Rule:

This modifies the literal rule and was laid down in Becke v Smith [ 1836] 2 M& W 191 OR (1836)150 ER 724. Per Parke B "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the word used and to the grammatical construction, unless it is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance in which case, the language may be varied or modified so as to avoid such inconvenience but no further."

In applying the golden rule, words of a statute are ignored or those not there are read into it.

See Generally:

1. R. v. Eze (supra)

2. R. v Princewell [1963] 2 All NLR 31

3. Adamolekun v Council Of University OfIbadan [1967] 1 All NLR 213

4. PDP v 1NEC [1999] 7 SCNJ 297 at 374

Note: The golden rule can only be used when applying the literal rule will create an absurdity.

(c) The Mischief Rule.

Also known as the rule in Heydon's Case. In the SUssex Peerage case, it was held as follows "If any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble and the mischief which they intend to redress.

The courts are guided by the following when applying the mischief rule:

1. What was the law before the statute was passed?

2. What was the mischief for which the law did not provide?

3. What remedy did the legislature resolve and appoint to cure the mischief?

4. What was the true reason for the remedy?

The Court is thereafter to interpret the ambiguous section in such a way as tosuppress the mischief and advance the remedy.

See Generally: Gorris v. Scot [1874] LR 9 Ex 125; Balogun v Salami (1963) 1 All NLR 129; Akerele v IGP [1955] 21NLR 37;Ifezue v. Mbadugha (1984) 1 SCNLR 427; Savannah Bank Of Nig Ltd & Anor v. Ajilo And Ano. [1989] 1 NWLR (Pt. 97 )305; Emelogu v State [1988] 2 NWLR (Pt. 78) 524; Wilson v. AG Bendel State [1985] 1 NWLR (Pt. 17) 572.

(d) Ejusdem Generis Rule

Where particular words are followed by the general words are interpreted restrictively to have a meaning that is of the same kind or genus as the preceding ones already particularized.

See Generally

1. Nasr v Bouari [1969] 1 All NLR 37;

2. Shell Petroleum Dev. Co Nig. Ltd v FBIR. [1996] 8 NWLR 256;

3. AG Federation v Ijewere [1986] 4 NWLR (Pt. 37) 659;

4. Board Of Customs And Excise v. Viale [1970] 2 All NLR 53;

5. Jammal v A.C.B. [1973] 11 S.C.77

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Note: There must be a distinct genus before the rule can be invoked.

(e) The Purposive Approach:

This is a general and more liberal approach to statutory interpretation. It is a hybrid, the golden rule and the mischief rule. It was formulated in Seaford Court Estates Ltd v Asher [1949] 2K.B. 481; and followed in Magor And St. Mellons Rural District Council v. Newport Corporation [ 195012 All ER 1226 at 1236.

The Purposive Approach takes into account the words of the legislation according to their ordinary meeting, the context of the words used, the importance of the subject matter, the scope and purpose of legislation and the background of the legislation.

See Generally

1. Pepper (Inspector Of Taxes) v. Hart [1993] 1 AU ER 42 at 50

2. PDP v 1NEC [1999] 7 SCNJ 297

3. Buchanan And Co Ltd v. Babco Forwarding & Shipping (UK) [ 1977] 2 WLR 107

4. Braithwaite v GDM [1998] 7 NWLR (Pt. 557) 307

5. V.C.R.A.C Crabbe: The Doctrine of Separation of Powers and the Purposive Approach to the Interpretation of Statutes - (Nigerian Institute of Advanced Legal Studies Lecture Series, 2000).

## CHAPTER 6 JUDICIAL PRECEDENT (CASE LAW)

6.1 Introduction

Judicial precedent constitutes one of the sources of Nigerian law. Judicial precedent also means case law and it refers to that body of principles an rules of law which over the years have been formulated or pronounced upon by the courts as governing specific legal situations. This supports the fact that judges do make law.

"Judges do more at times apply existing rules and sometimes they create i entirety new principles. Courts then have the power of developing the new a the same time that they administer it!" Salmon on Jurisprudence

When any civil or criminal matter is heard, the judge's decision would consist of many aspects. He decides what is to happen to the plaintiff and defendant he gives his reasons for his findings of fact, and he will give his reasons for an, legal ruling of the issues involved e.g. Negligence. Those reasons are precedent for other courts of equal jurisdiction to follow in the interest of consistency and for the inferior courts to follow as matter of obligation.

Judicial precedent is therefore the principle of law on which a judicial decision is based. It is the ratio decidendi. That is, the reason for the decision. Any other pronouncement is obiter dictum and is not binding. E.g., the judge suggests that he would have decided the case in the same way even if the facts had been somewhat different.

Judicial precedent is the material facts and decision of the earlier court. Judicial precedent can this be defined as that principle of law that states that decisions of higher courts of the land are binding on the lower courts in the land. Also decisions of courts of coordinate jurisdiction are for all intents and purposes binding as between those courts. See Global Transport Oceanico S. a. & Anor v Free Enterprises Nig. Ltd [2001] 2 S.C. 154; Osakwe V. Federal College of Education (Technical) Asaba (2010) 10 NWLR (Pt. 1201) 1 at 34.

The part of the judgment which is binding on lower courts and courts of coordinate jurisdiction is the ratio decidendi of the case. This is the principle

of law on which a judicial decision is based. The part of the judgment called obiter dictum is not precedent. Obiter dictum is any other pronouncement on law made in the course of a judgment. See Bamgboye v University OfIlorin [1991] & N WLR (Pt. 207) 1 for distinction between ratio decidendi and obiter dictum. See also Agbai v Okogbue [1991] 9/10 SCNJ 49; Oshodi v Eyifunmi [2000] 7 S.C. (Pt. 11) 145.

Note: that a settled hierarchy of courts and an efficient law reporting system is a pre-requisite for the effective working of the doctrine. See Royal Exchange Assurance v Aswani Textiles Ind Ltd. [1991] 12 NWLR (Pt. 176) 636 on operation of the doctrine.

The general rule under the doctrine of stare decisis is that a lower court is bound to follow the decisions of a higher court in the hierarchy except:

(a) Where the decision of the higher court has been overruled; or

(b) Where the decision of the higher court is in conflictwith the decision of another court which is above that of higher court in the hierarchy: or

(c) Where there are two conflicting decisions of a higher court or of courts of equal standing the lower courts are entitled to choose which to follow.

Note:

The doctrine of stare decisis is limited to the extent in which a court is able to distinguish the case before it from the case, which it is being prompted to follow by precedent. See Reed v Lyons & Co (1947) A.C. 1567.

A lower court is bound to follow a decision of a higher court even if the decision of the higher court was wrongly decided See N.E.P.A. v Onah [1997] I.S.C.N.J. 220; Emerah& Sons Ltd v. AG. Plateau State (1990) 4 NWLR (Pt. 146) 788.;**OGBORIEFON V OGBORIEFON CA/I/218/03 delivered on 2nd day of March, 2011**

## 6.2 TYPES OF PRECEDENT

### (a) Binding precedent

Binding precedent is when a court in which a precedent is being advanced is bound to follow it. That is, the judge is under an obligation to apply the ratio decidendi of the case before him unless he is able to distinguish such facts from those of the case at hand.

(b) **Persuasive precedent**

Precedent is said to be persuasive when it is within the powers of the lower court in which it is being urged to choose to follow or depart from a decision.

## 6.3 DETERMINING THE RATIO DECIDENDI OF A CASE

The following points are considered in determining the ratio decidendi of a case.

The reasons for the decision as stated by the judge

The principle of law stated by the judge as that on which the decision is based.

(c) The actual decision in relation to material facts See Agbai v Okogbue [1991] 9/10 SCNJ 49 (Supra).

## 6.4 ADVANTAGES OF THE DOCTRINE OF STARE DECISIS

See Generally- Eperokun v. University Of Lagos (1986) 4 NWLR (Pt. 34) 162 at 193 per Oputa J. S.C. on the advantages of the doctrine of stare decisis. Other points include.

(a) The doctrine frees the law from arbitrariness

(b) It enables the court to maintain consistency, certainty am scientific development of the law. This is because if each new case is decided without any consideration of prior cases, law would loose its scientific characteristic as the possibility of prediction, which is the basis of science, would disappear.

(c) It saves the judges time and helps to obtain justice

(d) It makes it possible to make logical conclusions on the current position of the law.

(e) It places a sense of obligation on the inferior courts to follow the decisions of the superior courts thereby ensuring uniformity of standards. The uniformity of standards helps to maintain respect for the legal profession.

(f) It enables the legal expert to exclude the layman from his field since it is too technical for the layman to approach.

(g) It enables lawyers to find the law and advise their clients accordingly.

(h) It helps to keep public confidence in the judiciary since they know that like cases would be decided alike.

## 6.5 DISADVANTAGES OF STARE DECISIS

(a) It helps to perpetuate a bad decision.

(b) Where the law reporting system is defective, the application of the doctrine also becomes defective.

(c) There is no guarantee that all relevant authorities have been exhausted in arriving at a decision

(d) It shows that judges do make laws. This is the responsibility of the legislature.

(e) The doctrine operates only to the extent that a judge is not able to distinguish the case before him from the earlier precedent that he is being asked to follow.

### 6.6 Res Judicata

A judgment being delivered consists of a statement of the facts, a statement of the issue or issues to be determined, a discussion of relevant principles and the actual judgement, decision or order of the court.

The last aspect is binding on the parties to the case only. It is not binding in subsequent cases between other parties. As between the parties to the case, the subject matter is Res Judicata i.e. finally decided. It is a settled issue between them which cannot be litigated between them in any other court.

### 6.7 Differences Between Res Judicata And Stare Decisis

(a) Res judicata normally binds only the parties and their successors or privies whereas stare decisis binds everyone including those not before the courts in other cases.

(b) Res Judicata applies mainly to matters of fact while stare decisis applies to points of law.

(c) Res Judicata takes effect after the time allowed for appeal has lapsed whereas stare decisis takes effect immediately the judgement is delivered.

d. Res Judicata applies to all courts while stare decisis applies only to the higher courts established to apply adjective common law.

**Courts To Which The Doctrine Of Judicial Precedent do not apply**

The doctrine being of common law origin operates only in courts, which apply adjectival common law. The customary court laws of the various states empower customary courts to administer customary law in so far as they are not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any written law for the time being in force. Therefore, the doctrine of judicial precedent, which is of common law origin, is inapplicable to Customary Courts, Area Courts and Sharia Courts of Appeal. The Sharia Court of Appeal is empowered to administer Muslim law of the Maliki School as customarily interpreted at the place where the trial at first instance took place.

See Olalekan v Commissioner Of Police (1961) NMLR 215- where the Supreme Court held that the absence of any mention of common law as one of the applicable laws in the customary courts of Western Nigeria excludes its application in the customary courts

See also Ogo v Ogo1964 NMLR 117 - where it was held that the Eastern Nigeria customary courts are not bound and expected to observe strict common law rules of pleading practice

6.8 The Doctrine Of Judicial Precedent And The Hierarchy Of Courts

(a) The Supreme Court of Nigeria is the highest court of the land. It stands at the apex of the Nigerian Legal System. The Court of Appeal follows it in line. The Supreme Court's position is similar to the English House of Lords' position in the English hierarchy of courts.

The decisions of the Supreme Court and the Court of Appeal are binding on all the other courts to which the doctrine of judicial precedent applies.

(c) There is no complete separate set of Federal courts. Federal laws establish federal courts but courts established by States laws are given jurisdiction over federal matters by federal laws.

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(d) The High Courts in each state are courts of coordinate jurisdiction. Their decisions are not binding on each other whether exercising Federal or State jurisdiction.

(e) Where the High Court of a state is exercising Federal jurisdiction, its decision is binding on the Magistrate Court of that state and on the Magistrate Courts of other states where such courts are exercising federal jurisdiction.

All the magistrate courts of a state are courts of co-ordinate jurisdiction. Also the magistrate court of one state and the magistrate court of another state are of co-ordinate jurisdiction. Therefore, their decisions are not binding on each other but only constitute persuasive authority.

Where a decision of a higher court is given per incuriam, a lower court will still be bound to follow such. See Ossom v Ossom (1993) NWLR 678, where it was held that a lower court may depart from its previous decision given per incuriam, but that it cannot decline to be bound by decisions of a higher court even if those decisions were reached per incuriam.

The Supreme Court forms part of the hierarchy of federal courts with respect to federal matters and part of the hierarchy of state courts with respect to state matters.

6.8.1 The Supreme Court Of Nigeria

As the Court at the apex of the Nigeria hierarchy of courts, the decisions of the Supreme Court binds all other courts to which the doctrine of judicial precedent applies. The court occupies the position of Judicial Committee of the Privy Council before the abolition of the later in 1963. The Supreme Court would normally treat its previous decisions with greatest respect but it should depart from such decisions where justice demands. Therefore previous decisions of the court are not absolutely binding on it. See Johnson v Lawanson (1971) 1 All NLR 56-where the supreme court overruled the privy council's decisions in Maurice Goualin v Aminu.

(b) Instances when the Supreme Court can overrule itself:

The Supreme Court can depart from its previous decisions:

(i) Where the judgment is obtained by fraud or deceit either in the court

or of one or more of the parties misleads the court; (ii) Where the judgement is a nullity;

(iii) When it is obvious that the court was misled into giving judgment under a mistaken belief that the parties consented to it;

(iv)Where the court is of the opinion that it is in the interest of justice. See Generally

1. Aqua Limited v. Ondo State Sports Council (1988) 10-11 SCNJ 26.

2. Oduola v Coker (1981) 5 S.C. 197.

3. Bucknor-Maclean v Inlaks (1980) 8-11 SC 1.

4. Shell B.P v. Jammal Engineering (Nigeria) Limited (1974) 1 All NLR 542.

5. Owumi v. PZ Nigeria Ltd (1974) 1 All NLR (Pt. 11) 107.

6. Adegoke Motors Ltd v Adesanya (1989) 5 SCNJ 80.

7. Igwe v. Kalu (2002) 7 SC (Pt 11) 236 at 244.

8. Abu vOdugbo (2001) 7 SC (Pt. 1) 168.

9. Oko v. Oko 1974 3 SC.

10. Idehen v. Idehen (1991) 6 NWLR (Pt 198) 382.

The position of the Supreme Court is analogous to that of the English House of Lords. The House of Lords was formerly bound by its previous decisions until the passing of the Practice Direction on the 26" of July 1966 - The direction provides.

"Their Lordship regards the use ofprecedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as the basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore, to modify their present practice and while treating former decisions of this court as normally binding to depart from a previous decision when it appears right to do so."

### 6.8.2 The Court Of Appeal

The Court of Appeal is next in line to the Supreme Court and it is bound by Supreme Court's decisions. The Nigerian Court of Appeal stands in a position analogous to the English Court of Appeal in the English hierarchy of courts. The Nigerian Court of Appeal follows the position of the English Court of Appeal in the treatment of its previous decisions. The English Court of Appeal (civil divisions) is bound by its own previous decisions subject to three exceptions stated in Young v. Bristol Aeroplane Co. 1944 KB 178.

These exceptions are:

(a) The court is bound to refuse to follow a decision of its own, which though not expressly overruled, cannot in its own opinion, stand with a decision of the House of Lords.

(b) The court is entitled and bound to decide which to follow of two conflicting decisions;

(c) The court is not bound to follow a decision of its own if it was satisfied that the decision was given pre incuriam.

In considering whether these exceptions are exhaustive, the Court of Appeal in University Of Lagos v. Olawoye appeal no FC/L/6/81, recited the statement of Lord Cozen-Hardy M.R. in Velasquez Ltd v Inland Revenue Commissioners (1914) 3 K.B. 458 as follows:

"When there has been a decision of this court upon a question of principle, it is not right for this Court, whatever its own views may be, to depart from the decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunals…who have powers to settle the law, and hold that the decision, which is binding upon us is not good law."

This view is retrogressive, as great term would be incurred ifthe courts have to wait for a final settlement by an ultimate tribunal in all cases.

However, the three exceptions stated in the Young's Case are applicable to the Nigerian Court of Appeal in the determination of civil cases by virtue of the decision of the West African Court of Appeal is Osumanu v Seidu (1949) 12 WACA 437.

In criminal matters, the position of the Court of Appeal with regard to the doctrine of judicial precedent is that of the English Court of Appeal as stated in R v. Taylor (1950) 2 K.B. 368 that the English Court of Appeal is not

bound by its own previous decision but the court is very reluctant to depart from them.

This position has been adopted as part of our law in Nigeria through the decision in Motayo v Commissioner OfPolice 14 WACA 114, where it was held that"this court will adopt in criminal matters the principle enunciated in the court of criminal appeal in the case of R v. Taylor (1950) 2 K.B. 368 and is not invariably bound by its previous decisions."

Note: The Court of Appeal is bound by the decisions of the Judicial Committee of the Privy Council given before it ceased to be part of the Nigerian hierarchy of courts. The Court of Appeal would treat previous decisions of the Federal Supreme Court and the West African Court of Appeal as its own previous decisions since they occupied equal position in the hierarchy of courts when those courts formed part of the Nigerian hierarchy of courts.

Note:: When the Court of Appeal is confronted by two conflicting decisions of the Supreme Court, it could either.

(a) Choose the later decision as it would be seen to have impliedly overruled the earlier decision; or

(b) It may choose any of them.

(c) May state a case to the Supreme Court.

However, on the authority of Osakwe V. FCE (Supra) it is the latter decision that the Court of Appeal must follow.

### 6.8.3 The Federal And State High Courts

Apart from the differences in their respective jurisdiction, the Federal High Court and the State High Court are very similar and generally exhibit the same attitude to the doctrine of precedent.

They are strictly bound by the decisions of the Court of Appeal and the Supreme Court. See A. G Ogun State V Egenti (1986) 3 NWLR 256; Atolagbe v Awuni (1997) 9 NWLR 536.

With respect to state matters (matters within the legislative competence of a state), the High Court of a State does not form part of the hierarchy of courts for any other state. This is because as in other federations, a state is regarded as a foreign country in relation to another for purposes of the doctrine of precedence. Therefore, decisions of the high Court of a state given in the exercise of state jurisdiction are not binding on any court in another state. See Olawoyin v AG Northern Region (1960) NRWLR 63 where it was held that a judge of the High court is not bound by the decision of other courts of co-ordinate jurisdiction.

In exercise of federal jurisdiction the High Court of one state binds the magistrate and district courts of other states.

A High Court judge is not bound by his previous decisions nor is he bound by a decision of another judge of the court. When two or more judges constitute the Northern Nigeria High Court sitting as a court of appeal, it is equivalent to the divisional court of the High Court of England such divisional court whether exercising civil or criminal jurisdiction adopts the principle in Young v Bristol Aeroplane (Supra). Accordingly High Court in the North sitting as a court of appeal and constituted by two or more judges is bound by its previous decision subject to the exceptions in Young v Bristol Aeroplane (Supra).

The high court is bound by decisions of the West African Court of Appeal and the Federal Supreme Court given before their abolition. These courts were equivalents of the present Court of Appeal. Also the High Courts are bound by the decisions of the Judicial Committee of the Privy Council given when that court formed part of the Nigerian hierarchy of courts.

### 6.8.4 Magistrates Courts And District Courts

These being inferior courts of record are bound by the decisions of superior courts. Magistrate courts are not bound by their own previous decisions nor are they bound by decisions of other magistrate courts whether or not in the same state. See generally Board Of Customs & Excise v Bolarinwa (1968) NMLR 350.

### 6.8.5 Customary Courts /Area Courts

They are not concerned with the doctrine of precedence as these courts are presided over by laymen, not sufficiently knowledgeable in the general law. See Osu v. Igiri (1988) 1 NWLR 221 at 230.

## 6.9 Position Of English Courts Decisions & Decisions Of Other Foreign Courts

No English court or any other common law court forms part of the Nigerian hierarchy of courts. As such, no Nigerian court is bound by a decision of any English court under the doctrine of judicial precedence.

Consequently, the decision of English courts and other foreign courts are merely persuasive authority in Nigeria as Nigerian courts are to apply rules that in their opinion constitute the correct rules of common law, or equity and not necessarily rules stated as common law or equity by particular foreign courts. It was in furtherance of these objectives that the High Court of the former Western State held in Alli v Okulaja (1970) 2 All NLR 35 - that itwas not bound by any decision of the English court of Appeal at page 44, Berkley J. had this to say:court of appeal of England, this country now being an independent sovereign state."

He stated further that the judgment of an eminent judge in England would certainly be of most persuasive authority and would be followed except the court feels otherwise strongly against the ratio decidendi of such decision.

See also Eliochin (Nigeria) Ltd v Mbadiwe (1986) 1 NWLR (Pt. 14) 47; Oladiran v State (1986) 1 NWLR (Pt. 475); Ajomale u Yadnat (No. 2)(1991) 5 NWLR (Pt. 191) 266; Nishizawa v Jethwani (1984) 12 S.C.

The position is the same with the common law of other countries especially those whose statutory rules are also identical in wording with corresponding rules in force in Nigeria e.g. the Nigerian criminal code was based on the Queensland criminal code (Australia) and so both have identical provisions. Cases decided by Queensland courts on the interpretation of those identical provisions are therefore of persuasive authority in Nigerian courts.

## 6.10 Position Of Works Of Academics And Textbook Writers

It should be noted that these are merely persuasive and a judge is not bound to follow such opinion.

## 6.11 Position Of International Obligation

Where an international obligation has been willingly acceded to by Nigeria, and has been incorporated into our laws, such has the force of law and is binding. See Abacha v Fawehinmi (2000) 4 S.C. 400.

## 6.12 Distinguishing

Note: what a judge must do when he wants to refuse to follow a decision of a higher court by distinguishing that case from the case at hand.

See Board Of Custom & Excise v Bolarinwa (supra).

# CHAPTER 7

# INTERNAL CONFLICT OF LAWS

## 7.1 Introduction

As stated in earlier chapters, Nigeria is made up of a vast geographical area comprising of various tribes and ethnic groups. These tribes all have their different cultures and traditions binding individuals subject to or belonging to each tribe. It has been emphasised that the sources ofNigerian law include English law and customary law. The question that naturally comes to mind is when or how do the courts determine which law governs a particular situation or a particular person between those two different systems of law. Also assuming that it is customary law that is applicable to a situation, the issue of which particular customary law should be operated comes into focus. These are the situations necessitating the rules on conflicts of laws. The scenario presents two types of situation before the law.

(1) Conflict between English and customary law.

(2) Conflict between different systems of customary law.

## 7.2 Conflict Between English Law And Customary Law

The applicable law of this can be found in the various high court laws. These provisions are quite similar but for the differences in the classification ofparties for the purpose of determining who should be bound by the law.

### 7.2.1 Classification Of Parties

(a) Western States: The high court law applicable to the then Western States classifies parties as Nigerians and Non Nigerians. See Western Region Law Cap. 44 and S. 3 High Court Law of Mid Western States.

(b) Eastern States: The high court law applicable to the then Eastern states classifies parties as "personsofNigerian descent and persons who are not ofNigerian descent" see. S.20 High Court Law ofEastem Nigerian.Eastern Nigerian Law 1963.

(c) Lagos &The North-The law here classifies parties as natives and non natives see S. 26 High Court Laws of Lagos State, 1973 Cap. 52.

The next question then is, who is a native and non-native. The old interpretation Act in S. 3 cap. 89 defined the word native as follows:

"Native includes a native of Nigeria and a native foreigner. Native ofNigeria means any person whose parents were members of a tribe or tribes indigenous to some Nigerians and the descendants of such persons; and includes any person one of whose parents were members of such a tribe: Native foreigner means any persons (not being a native or Nigeria) whose parents were members of a tribe or tribes indigenous to some part ofAfrica and the descendants of such persons and shall include any persons one of whose parents were members of such a tribe.

t "A non native means any person who is not a native ofNigeria or a native foreigner."

Note: This old interpretation Act is used because there is no definition of native and non native in the present interpretation Act 1990. But the definition in the old Act is similar to that contained in the latter regional laws.

From the definition given above, it can be deduced that a Nigerian fall under the definition ofnatives, Africans, other than Nigerian fall under the definition of native foreigner while any other person apart from the above would come under the definition of non native.

7.2.2 The Law

We shall use the High Court Law of Lagos State as a guide for the applicable rules S. 26(2) HCL of Lagos provides:

"Customary law shall be deemed applicable in causes and matters where the parties there are natives and also in causes and matters between natives and non natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rule of court which would otherwise be applicable."

S. 26 (3) "No party shall be entitled to claim the benefit of any customary law ifit shall appear either from express contract or from the nature of the transaction out of which any suit or question may have arisen that such a party agreed that his obligations in connection with such transactions should

be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law."

These two sub-sections contain the various rules applicable to disputesbetween native and non natives and disputes between natives.

7.2.3 Case Of Disputes Between Natives

General rule

From the above, the general rule as provided in S.26(2) HCL of Lagos and similar to other regional laws is that disputes between natives are governed by customary law. See Labinjoh v Abake (1924) 5 NLR held.

"The general rule is that ifthere is a native law and custom applicable to the matter in controversy and if such law and custom is not repugnant to natural justice, equity and good conscience or incompatible with any local ordinance and if it shall appear that it is intended by the parties that the obligations under the transaction should be regulated by English law, the matter in controversy shall be determined in accordance with such native law and custom."

Exception

1. From the provision of S. 26(3) HCL of Lagos an agreement to be bound by English law removes the matter from the ambit of customary law. See also Griffith v Talabi (1948) 12. WACA 371, and Oko v. Oloto, 20 NLR 121.

Note the following points

(a) An agreement to be bound by English law operates only in respect of the particular subject matter for which it is made and not all other transactions entered into by the party who made the agreement. See (1) Nelson v. Nelson (1951) 13 WACA, 248 contrast; (2) Cole v Cole (supra) and (3) Asiata v Goncaclo. See importantly (4) Smith v Smith (1974) 5 NLR 105; (5) Hastrup v Coker, (1927) 8 68; (6) Re. Enodi (1945) 18 NLRpg 1; (7) Bamgbose v Daniel (1954) 3 NLR. 561.

Where a party had agreed to be bound by English law in a transaction, he cannot claim the benefit of customary law in a dispute concerning that transaction even though the dispute is between him and another person who was not privy to the agreement. See Green v 01wo. 1936. 13. NLR 43.

(c) An agreement to be bound by English law binds only the person

who made the agreement and his successor in title. It has no effect on a person who was not privy or party to the agreement. See Pillars v. Baffor (1909) REN. 549.

(d) An agreement to be bound by English law maybe expressly made by the parties to be implied by the courts from the transaction or conduct of parties. See Green v Owo (1936) 13. NLR. 43.

2. A second exception to the general rule is that transaction unknown to customary law would be governed by English law See S. 26(13) HCL of Lagos State, 1973. It is undisputable that in present dayNigeria, activities abound with hitherto were unknown to customary law. Various forms of contracts have arisen with the computer age, various technological developments resulting, for instance, in novel areas like creation of copyrights, automobile, immigration, fashion etc. Many of these situations cannot be handled by customary law, as customary law has no rules governing them. In cases involving such novel areas of existence, English law would be applied by the courts even though the dispute involves purely natives. A transaction of a nature not considered to be subject to any existing native law and custom accepted in the community as binding is a transaction to which customary law does not provide e.g. a transaction to which the use of a promissory note was essential has been held to be unknown to customary law. See Bakare v. Coker (1935) 12 NLR 15. Note following:

(a) Where a conveyance in English form constitutes an essential part of a transaction, the transaction is unknown to customary law, see Green v Owo (supra).

(b) The fact that the subject matter or situation concerned has come to the knowledge of the local community does not mean the transaction is known to customary law. See Salawu v Aderibigbe (1963) 1 NNLR 80.

(c) Hitherto, the use of writing automatically removed a transaction from the purview of customary law. See Egbuche v Chief1dido 11 NLR 441 held that an agreement in writing concerning the sale of land removes the matter from the control of customary law. However in Rotibi v Savage (1944) 17 NLR 77 the absolute position was objected to by Waddington J. when he warnedagainst the application of the principle that a document imports English law "where the documents amount to no more than the kind of `paper' which most natives nowadays like to have as evidence ofa money transaction and which at this day is, I suppose, quite a familiar object in most native courts and frequently bearing an impressive array of stamps."

### 7.2.4 Cases Of Succession And Inheritance

The two exceptions above discussed constitute the only statutory exceptions to the general rule that cases between natives are governed by customary law. However the problems of choice of law is also often presented in cases of inheritance and practice shows that the courts sometimes apply English law to these cases despite the fact that statute does not govern them.

(a) The making ofa Will in English form has often led to the application of English law to the estate of the deceased native. See Apatira v Akanke (1944) 17 NLR 149. The deceased's Will suffered a technical flaw which rendered it invalid under the Wills Act and counsel argued that it should be admitted to probate under Islamic law, it was held that since the testator had clearly intended his Will to take effect under English law, it was to be judged by the standards of that law. See also Vaughan & Ors v George (1942) 16 NLR 85; Sogbesan v Adebiyi (1941) 16 NLR 26. Contrast above cases with Balogun v Balogun (1935) 2. WACA 290 Jacobs v. Oladunni Bros (1935) 12 NLR 1.

Despite the seeming conflict in the various line ofcases, the trend of the court was that it inferred an intention for English law to apply to a Will under the then Wills Act 1882, simply because the making of a will in writing is unknown to customary law, provided this can be done without rendering nugatory the provisions of the Wills Act. See Adesugbokan v. linusa (1973) UILR 25.

Suits on intestacy also come within the ambit of situations where English law is applied.

(i) Decisions at first reflected a tendency to create an absolute rule that English law should govern the estate of a native who died intestate who had been married in a Christian churchshould have his property distributed in accordance with English law and not customary law. See also Adebola v Kola Folaromi (1981) 3 NLR 89; Hastrup v Coker (supra); see especially Bamgbose v Daniel (1954) 3 NLR 561

(ii) Some decisions given here however seem to show that the type of marriage entered into is only one of the many factors to be considered in determining the applicable law. See Ajayi v. White 1946 18 NLR 41; Smith v Smith (supra); Onwudinjoh u Onwudinjoh (1957) 11 ERNLR 1.

### 7.2.5 Cases Between Natives And Native Foreigners

From the definition of native earlier, we have realised that native foreigner means Africans apart from Nigerians. They are also considered to be Nigerians and thus the rules applicable to Nigerian apply to them.

7.2.6 Cases of Disputes Between Natives And Non-natives

As earlier stated non native defined as a person who is not a native ofNigeria or a native foreigner i.e. a person who is not a Nigerian, or African, e.g. a Briton, American etc.

The Law

General rule -The general rule as decided from S. 26(2) HCL of Lagos, 1973 is that cases between natives and non natives are governed by English law. See Koneyyi v United Trading Co. (1934) WACA 188, held by West African court of appeal that under the relevant law a case between a native and a person who was not an African is governed by English law.

EXCEPTION

The only exception is derivable from 5.26(2) HCL of Lagos 1973 and it is to the effect that customary law would be applied to cases between natives if the application of English law would cause substantial injustice to either party. See Nelson v Nelson (1951) 13 WACA 248.

QUARAE

(i) What would be the result if the native had agreed that the transaction should be governed by English Law? Can the court still apply customarylaw on the ground that substantial injustice would be done to him by the application ofEngtishlaw.

(u) Would the fact that substantial injustice shall be done to the non-native make the court apply customary law? See Obilade: Nigeria Legal System pg 156.

Note

(a) It appears that a non native is not allowed to claim the benefit of customary law as there is no equivalence that where a non native agrees to be bound by customary law, then customary law would apply. Cases where such benefit would have arisen have been declared invalid in some court decisions. See FfonesCapasman (1958) NRNLR 47; Savage v Macfoy (1909) REN 504.

The exception on substantial injustice is limited to cases between natives. It does not apply to cases between non-natives. Compare Osuro v Anjorin (1946) NLR 415.

7.3 Conflict Between Different Systems Of Customary Law

It is now a truism that customary law differs from community to community. The exigencies of commerce, social interaction and modernization have also rendered it imperative that there should be interaction between the various ethnic groups. Throughout the country most of the inhabitants of a particular locality still belong to one or more ethnic group. However, in every areaminority groups exist whose origin lie in different communities, where a dispute concerns one or more of such minorities, and it is decided that customary law applies, the question arises as to which particular customary law should govern it i.e. the local law or the personal or individual law of the person involved e.g.

1. If a Kaduna man lives in Ile-Ife for a period of 30 years and got married in Ile-ife to a lady from Aba and dies interstate, what law should govern the succession to his property.

2. If an Ibibio man got married to an Ilesha woman and the marriage was celebrated in Ilesha, what law should the court apply in an action for the dissolution ofthat marriage if the actions is filed in Ilesha?

3. If two Igbo men from Aba enter into a contractual relationship in Kaduna assuming that customary law applies, what law should the court apply?

There are the types of situations that the rules relating to conflict between different systems of customary law would try to regulate.

Where customary law is the applicable law, the rules for determining the applicable customary law should be found in the following enactments.

1. Former Western and Mid Western States. See S. 20 Customary Law WRN law 1959 and customary court law of Mid Western State, including states created out of this region.

2. Northern States. See S. 20 and 21 Area Courts Edict 1968 of Plateau State for example.

3. Eastern States-Magistrate Courts Law E.N. Laws 1963 Cap 8, including states created out of this region.

In allthejurisdictions inthecounty when customary lawis applicable the courts are directed to apply either the law prevailing in the area of jurisdiction of the courts or the law binding between the two parties. The question then is what constitutes the law prevailing in the area of the court's jurisdiction.

The Law Prevailing In The Area Of Jurisdiction Of Court

See R. v florin Native Court ExparteAremu (1950) 20 NLR 144, where Ademola CJ rejected the view that there could be more than one law prevailing in the court's area and held that prevailing means predominant. Hence the predominant law would be the prevailing law. For instance, in the Ile-Ife there are other ethnic groups residing there apart from the indigenous people. e. g. Hausas. Ife population itself may constitute 80% of the entire population but Ife customary law would be prevailing customary law in the city. Ifthe minority law is applied, it will be applied as the law binding between the parties.

Individual Or Personal Law

The succession cases throw some light on how the individual law of a party is determined. The cases indicate that a man's individual or personal law is that of community to which he belongs. See Re Estate OfAlayo (1946) 18 NLR 5, where it was held that where an Ijebu woman of the Islamic faith and married under the faith died intestate in Lagos, the applicable customary law is Ijebu customary law on the ground that she was a native of Ijebu. Tapa v Kuka (1945) 18 NLR 5, held that the law applicable to the estate of a deceased Nupe Mohammedan in Lagos was that of a Nupe and not the law that prevailed in Lagos.

Note (1) Where a community applies both Islamic or Moslem law and ethnic customary law, the test applied to determine the applicable law is the attitude of the person involved. See Asiata V. Gongallo (1900) NLR 41 Moslem law was applied to the estate of a deceased intestate resident in Lagos because in his life time he considered himself subject to Moslem law. Seealso-Mariyam v SadikuEjo(1961) NRNLR 81.

(2) A person resident in a community whose law is different from that of his community may cease to be ordinarily subject to the latter if he integrates himself into the community in which he had settled and regarded himself as subject to that community law.

7.3.2 Western And Mid Western States

S. 20 Customary courts law WRN Law 1959.

(a) Land Cases

The general rule is that the lexsitus is the applicable law i.e. customary law of the place where the land is situate. See S. 20 (1) customary court law WRN Law 1959.

Exception

The lex sites would be inapplicable in a situation where under the lexsitus a party's right to occupy land by devolution on death is affected but under the rules of inheritance of any other customary law to which the party in question is subject, he would have been entitled to beneficial interest in the land or in the proceeds of the sale of the land. In this case the lex sites cannot deprive him of any such beneficial interest except the right to occupy the land S. 20(4) customary courts law WRN 1959.

(b) Succession

See S. 20(2) Customary Courts Law WRN Law 1959 and S. 23(2) Customary Courts Law of Mid Western Region which provide:

"In cases and matters sing from inheritance the appropriate customary law shall, subject to subsection (1) and (4) ofthis section, be the customary law applying to the deceased."

Therefore in succession cases the applicable law is the personal law of the deceased.

Exceptions

() S. 20(2) CCL WRN Law 1959-Land causes.

(a) S. 20(4) CCL WRN Law 1959-Cases of beneficial interest.

(c) Other Civil Maters Apart From Land Or Succession

See S. 20(3) customary courts law WRN Law 1959. The following are the applicable rules:

In civil cases and matters where (1) both parties are not natives of the area of jurisdiction, the court of law binding between the parties applies.

If the transaction which is the subject of the cause or matter was not entered into in the area of jurisdiction of the court, the law binding between the two parties applies.

Where one of the parties is not a native of the area of jurisdiction of the court and the parties agreed that their obligation should be regulated wholly or partly by the customary law that applied to that party the appropriate customary law shall be the customary law binding between the parties.

Note:(1) In Nos (i) and (ii) above the law binding between the parties may also be law of the area of jurisdiction of the court. (2) In all other civil causes and matters the appropriate customary law should be the law of the area of jurisdiction of the court. See S. 20(3) (B) Customary Courts Law of Western States 1959.

7.3.3 Northern States

The law governing this situation in the Northern States is found in the various Area Courts Edicts of these states with identical provisions e.g. Area Courts Edict No. 1 1967 of Kano State or Area Courts Edict 1963 of Plateau State.

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GENERALRULE

The general rule in the Northern States is that an Area court shall apply the native law and custom prevailing in the area of the court's jurisdiction or binding between the parties. See S. 20(1) area court edict 1968 plateau state. This general rule governs mixed civil causes.

EXCEPTIONS

See S. 21 Area Court Edict 1968 Plateau state which governs mixed civil causes. A mixed civil cause is a cause in which two or more of the parties are normally subject to different systems of customary law. Example, a cause to which an Efik man and an Ijesha man are parties. The following rules apply in such cases.

(a) Succession - S. 21(1) Area Courts Edict 1968 Plateau State which provides that in mixed succession cause other than land, the court is to apply the principle of natural justice, equity and good conscience. In practice the courts therefore apply the individual or personal law of the interstate.

Note: In unmixed succession causes, the general rule in S.20(1) applies and in this instate, the personal law of the deceased is also applied. See Ghamgon v Nohil (1947) 12 WACA 181.

Land Causes

See S.21(2) Area courts edict of Plateau state which provides that all land causes whether mixed or unmixed are to be governed by the lex sites

(c) Other Civil Causes

S.21 (1)(a)-(e) governs all other situation of mixed civil causes. The applicable law is:

(a) The particular native law and custom which the parties agreed or intended or may be presumed to have agreed should regulate their obligations in connection with transactions which are in controversy before the court.

(b) The combination of any two or more native law or customs which the parties agreed or intended or may be presumedto have agreed or intended should regulate their obligations as aforesaid

OR

If the court is unable to determine the agreement or intention of the parties as stated above, then.

(c) The court shall apply the particular native law of custom or combination of customary law, which it appears to the court, having regards to the nature of the transaction and to the circumstances of the case, to regulate the obligations of the parties.

Unmixed civil causes other than land or succession causes are governed by the general rule in S.20 (1) i.e. the law prevailing in the area of jurisdiction of the court or binding between the parties. See Osuagwu v Soldier (1995) NRNI 39.It involved an action between two Igbo residing in Kaduna in which the plaintiff claimed the value of a box of clothing, which he alleged he had entrusted to the defendant of safe keeping. In the Alkali court at Kaduna, the Alkali applied Islamic law and awarded damages to the plaintiff. The defendant appealed on the ground that Islamic law should not have applied and the contention was accepted by the high court.

(d) Cases Before The Sharia Court Of Appeal

S. 11 (e) Sharia Court of Appeal Law, NNLaws 1963 empowers the Sharia Court of Appeal in each state to (whether or not they are Muslims) have by writing under their hand requested the court that heard the case at first instance to determine that case in accordance with Islamic law. In such case, the principles earlier set out will be inapplicable.

7.3.4 Eastern States

There are no specific provision in the Eastern State but only the general rule that the court should administer either the law prevailing in the area of the courts' jurisdiction or binding between the parties. We may however borrow a leaf from the specific principles in other regional laws in determining the applicable law e.g. land cases- lexsitus, succession causes, personal law of the deceased. See Tapa v. Kuka (1945) 18 NLR 5. In other cases apart from these, the following may be applicable rule.

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Where the personal law of both parties are the same but differ from the law of the area of the court's jurisdiction then the personal law would normally be binding between them. See Osuagwu v Soldier (supra).

Where one party's individual law is the territorial law while the other's is not, then failing any indication of agreement or intention to the contrary, the court would normally apply the territorial law.

Where the parties are subject to different individual laws each of which is different from the territorial law and there is no indication of agreement or intention as to which law shall apply then if the cause of action has sufficient connection with the area of the court's jurisdiction to give jurisdiction to hear the case, the territorial law in most circumstances would be deemed to apply.

PART THREE LAW ORGANISATION

CHAPTER8

ORGANISATIONS CONNECTED WITH ADMINISTRATION OF JUSTICE

8.1 Law Reform Commission

The Nigerian Law Reform Commission was established by the Nigerian Law Reform Commission Act No 71979 now Cap 313 Laws of Nigeria, 1990. The duty of the Commission is stated in S. 5 of the Act to this effect.

"It shall be the duty of the Commission generally to take and keep under review all federal laws with a view of their systematic and progressive development and reform in consonance with the prevailing norms of the Nigerian society including, in particular, the codification ofsuch laws, the elimination of anomalies, the repeal of obsolete, spent and unnecessary enactments, the reduction in number of separate enactments, the reform of procedural laws in consonance with changes in the machinery of the administration ofjustice and generally the simplification and modernisation of the law. "

In the exercise ofits statutory functions the Commission is expected to receive and consider proposals for reforms that may be referred to it by the Attorney General of the Federation or it may initiate its own reform measures and programmes, and submit its reports to the Attorney-General of the Federation for the consideration of the National Council of Ministers. The commission is given power to consider proposals for the reform of state laws from any state, group of states or all the states and report to the appropriate Attorney General or Attorneys General.

The commission may also provide experts advice and information to Federal Government Ministries, Departments or other institutions at the instance of the Federal Government with regard to proposals for the reform or amendment of any branch of the law.

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Pursuant to its programmes of law reform, the commission may hold public sittings, organise or attend seminars and conference in Nigeria, or enter into correspondence with other law reform agencies or participate in relevant conference in or outside Nigeria.

The commission is wholly subvented by the government

The commission has undertaken a large number ofprojects since its inception. Example include - Reform of the Marriage Act. Reform of the statutes of General Application and recently the workshop on the reform of the Evidence Act.

8.2 Institute Of Advanced Legal Studies

Established by the Nigerian Institute of Advanced Legal Studies Act 1984, it is a body corporate with perpetual succession and common seal and may sue and be sued in its corporate name. The management of the institute is undertaken by the Nigerian Institute of Advanced Legal Studies Council which is made up of the following numbers:

(a) A chairman appointed by the Head of Federal Military Government or President

(b) A representative of the Ministry of Justice

(c) A representative of the Ministry charged with responsibility for higher education.

(d) Six Deans or heads of faculties or other formations of Nigerian Universities offering graduates level programmes.

(e) The Director of the Nigerian Law School.

(fl One member of the judiciary nominated by the Chief Justice of Nigeria.

(g) The president of the Nigeria Bar Association.

(h) Five persons of whom one shall be a woman to be appointed by the Head of the Federal Military Government or President.

(i) The Director-General of the Institute.

FUNCTIONS OF THE INSTITUTE

S. 4 NIALS Act, 1984 as found in the Laws of the Federation provides for its functions:

(a) To provide information, supervision, guidance and advice to post graduate students and other researchers who are working for post graduate degree of any university in the field of law and related subjects.

(b) To conduct research into any branch of the law or related subject with a view of the application of the results thereof in the interest of the country.

(c) From time to time to organise, host, arrange and conduct national or international seminars, symposia, conference, workshops, lectures on any branch of the law or related subject.

(d) To prepare and publish books, records, reports and journals as may seem desirable for the dissemination of research findings, seminars, symposia, conference, judicial workshops and lectures.

(e) To co-operate with Nigerian Universities, Nigerian Law School, the Nigeria Law Reform Commission and such other bodies (whether in Nigeria or elsewhere) engaged in any major field relating to lawreform, development or research in the mobilisation of the country's research potentials for the task of national development and dissemination of research fording for the use of policy makers at all levels.

To carry out such other activities as are necessary and expedient for the full discharge of any of its functions under or pursuant to the Decree.

Under S.9 of the Act, the Council is given power to create such academic posts as it may deem necessary for the efficient performance of its functions.

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