TASLIM ELIAS CHAMBER NOTE SERIES

NIGERIAN LEGAL SYSTEM I

Taslim Elias Chamber presents the first edition of its note series and casebook. The note series is divided into five separate documents for the five different courses in 200 level first semester. Then there is a casebook which combines cases from the five different courses in a general document. It is expected that using this note series, along with the regular textbooks and attending lectures should give the student an upper hand in their studies.

May the odds be ever in your favour.

Aliu Funmilola

Academic Secretary

Taslim Elias Chambers

For the 2016/2017 Executives

Recommended Textbooks

1. Asein, Introduction to the Nigerian Legal System
2. Obilade, The Nigerian Legal System

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- Cases between Nigerians
- Cases between Nigerians and non-Nigerians
- Choice of Customary Law

INTRODUCTION TO THE NIGERIAN LEGAL SYSTEM

A system connotes an ordered set of ideas, theories or principles interacting within the given framework. Nigerian Legal System comprises the totality of laws, legal rules and legal machinery operating within Nigeria as a sovereign or independent African country. For a valid system to exist there must be a basic norm or grundnorm, that is, a self existent principle from which all other principles or norms are derived from. It is the highest norm in a hierarchy of norms beyond which there can be no further inquiry.

A legal system can thus be said to comprise 'a set of legal norms which form a cohesive whole which is consistent in its application and further, that there are relations between such norms such that some are superior in rank to others or that some derive their validity from others. A legal system is an ordered set of laws sharing unique but common features. For the proper explanation of a legal system, we shall look at different theories on it.

Normative Hierarchy

This was promulgated by Hans Kelsen and it advocates the Pure Theory of Law, a branch of legal positivism movement. It emphasizes the importance of hierarchy as it relates to the validity of legal norms. He sees the legal system as a hierarchy of norms, such that a norm at one level will only be deemed valid if it derives its existence from another norm at a higher level till you arrive at a basic norm or grundnorm, that is, the apex of the hierarchy. This grundnorm has extra legal existence such that all other norms are traceable to it but its origin in itself is not traceable to any other norm. No individual rule of law stands on its own; its validity must be derived from another superior source. A legal system cannot exist if the laws don't have a common source. This theory is pure because it operates jurisprudence from other fields like ethics. It only focuses on the formal validity of laws not its functions or content. As long as the law is valid, it is acceptable. The justness of the law is not taken into consideration.

HLA Hart

In his book, the Concept of Law, Hart argued that the law is a system of riles and thus a legal system may be established by a union of primary and secondary rules. The laws that impose duties or define conduct are called primary duty imposing rules or primary rules of obligation. For these primary rules to function effectively there must be a set of rules to officials to administer these primary rules. Those rules are called secondary power conferring rules because some laws confer certain powers and privileges on some individuals. These secondary rules include

- Rules of adjudication (resolve legal disputes)
- Rules of change (allows laws to be varied)
- Rules of recognition (allows laws to be seen as valid)

Primary rules must be combined with these secondary rules for an effective legal system.

Nigerian Legal System

The Nigerian Legal System is based on the English Common Law and legal tradition by virtue of colonization and the attendant incidence of reception of English law through the process of legal transplantation. The Nigerian Legal System can be defined as the sum total of laws or legal rules operating within Nigeria as a sovereign or independent African territory. English Law has a tremendous influence on the NLS and forms a substantial part of Nigerian Law. **Section 45(1)** of the **Interpretation Act** states that

"the common law of England, doctrines of equity and the statutes of general application which were in force in England on 1st of January, 1900, are applicable in Nigeria, only in so far as local jurisdiction and circumstances shall permit."

Consequently, legal issues evolving from common law in England and codes of conduct are applicable in Nigeria.

Special Features of the Nigerian Legal System

1. Common Law Legal System

NLS aligns with that of the British mainly because of our colonial history.

2. Absence of Code

A code spells out what the law is and it is used in civil law jurisdictions. In common law legal systems, laws that govern issues are found in previously decided cases.

3. Judicial Precedents or Stare Decisis

This advocates the fact that decisions of higher courts of law are binding on all other courts below it. Nigerian Legal System attaches importance to courts based on their position on the judicial hierarchy. Nigeria has a well structured judicial hierarchy. The Supreme Court is the highest court and it occupies the apex position, having appellate and limited original jurisdiction. Courts below it include the Court of Appeal, State High Courts etc. This practice of obeying precedents enhances certainty and

application of law and minimizes influence of personal bias against settled principles of law.

4. Legal Reasoning

NLS legal reasoning is inductive in that it is based on common law where other cases are examined to know which ones have similar facts with the ones at hand since there is no code. But in civil law jurisdictions, codes are examined to look for parts relevant to the facts (deductive reasoning)

5. Accusatorial or Adversary System of Adjudication

Unlike some foreign jurisdictions that operate the inquisitorial system, NLS is accusatorial. In an inquisitorial system, the court partakes directly in dispute resolutions such that the judge probes into the matter to find out that truth. Nut in accusatorial systems, the courts maintain a neutral stand in disputes and relies on arguments and evidence presented by the parties and adjudicating solely on what is presented. If a judge asks too much questions, he is said to be 'descending into the arena' and this is against the principle of fair hearing as he is expected to maintain the balance and be impartial. In the case of **Elohor v. Osayande**, it was held that a judge must not do anything showing he has descended into the arena, as his sense of justice will be obscured.

6. Reception

We receive most of our laws from the English jurisdiction; they are not original.

7. Federation

Nigeria is divided into a centre government and component units. This system of federalism has affected Nigerian Legal System such that even after litigations at state apex courts, one can still appeal further to the federal apex court. It also leads to diversity.

8. Heterogeneity

Nigerian Legal System operates legal pluralism ie, the consequence of not being homogenous. Nigeria encompasses several varieties of people and tradition hence there is more than one system of law in a state with the result that the certain law is applicable to some people based on personal factors like race, religion or ethnicity.

9. Military Influence

Military interventions left an indelible mark on Nigerian Legal System. Successful military regimes assume executive and legislative but very limited judicial functions, they rule by Decrees and Edicts and they have been more active in the area of law reforms than civilian regimes.

10. Duality

Nigerian Legal System acquired dual structure of English Law and Customary Law. Islamic Law is usually treated as customary law. They are both subject to the provisions of English Law. Rules of customary law are treated with less dignity and have to be proved as facts.

MEANING OF LAW

Law means different things to different people as it is a very subjective concept but in the context of legal system, it may be defined as a set of rules guiding human conduct which is binding on a set of people in a territory and backed up by some sort of mechanism ensuring sustenance of its binding nature, in other words, sanction. The law must apply consistently.

Key Features of law include

- Idea of obligation (which is internal)
- Imperativeness (no other option but to obey)
- Sanctions (element of coercion)
- Normative
- Dynamic
- Body of rules

THEORIES OF LAW

POSITIVIST SCHOOL

Positive law is from 'posit' meaning 'to put' or 'to place'. Positive law is the law put, placed or imposed upon the people by the rulers. The chief protagonist of this theory John Austin propounded the Command Theory of Law in his book, 'Providence of Jurisprudence Determined' where he defines law as a command set by a superior being to inferior beings and enforced by sanctions. The superior being must possess command, sovereignty and sanction. Positive Law can thus generally defined as any law made by one legally empowered to make rules which are binding on the people. They are laws which are empirically verified e.g. statutes, constitution, case law, rules by administrative agencies etc. John's definition of law has 3 elements

NATURAL LAW SCHOOL

Chief protagonists include Plato, Aristotle, Zeno Grotius, Thomas Aquinas. This theory believes that law has a divine origin and for it to be valid, it must conform to certain objective moral principles based on the nature of man and dictates of reason. Natural law means what is fair, just and right. It believes there are some objective principles in man no matter his race or colour, telling him what is fair and motivating him to do that which is good and abstain from evil.

This theory believes there are certain generally accepted fundamental principles in man and these principles come from a supernatural force or an abstract universal truth. The principles can be deduced from nature of man or society through reasoning. Man, if guided by observation and reason, is capable of making good law aligning with the law of nature

PURE THEORY OF LAW

This was postulated by Hans Kelsen who believes law is a system of norms. A law is valid if it was created by a norm which itself was created by a higher norm within the legal order. This continues until we arrive at the grundnorm which is the basic norm from which all other norms are traceable to and which its own origin or validity is not traceable to any other norm. The main concern of this theory is that the legal validity of each rule is determined by reference to question whether it has been laid down in accordance with whatever requirements stipulated by the legal system. The norm forbidding murder is valid because it is laid down in the Criminal Code and this code i valid because it was enacted by the legislature which have the power to make laws according to **Section 4** of the constitution. The constitution is valid because it is the will of the people.

SOCIOLOGICAL SCHOOL

Eugene Ehrlich was the most prominent exponent and Roscoe Pound was another one. Others include Auguste Comte, Max Weber and Emile Durkheim. According to Ehrlich, law is based on facts of law, that is, how the people acted. There is a relationship between law and conduct. Society's conduct determines what the law is and not the rules laid down by the sovereign authority. Law here is doomed as a means of social control. One cannot know the law of a society from its formal rules rather he should study the society to appraise how the law is applied e.g. Nigeria has several Acts and structures to combat corruption but despite this, corruption is still pervasive in the society. Even the Child's Rights Act 2003 is barely respected.

HISTORICAL SCHOOL

This views law as a product from history of society. Chief exponent is Friedrich Carl Von Savigny. This theory believes in something called the spirt of the people, 'volkgeist', which binds people of a particular society. Before a law is made for a society, there must be a good understanding of the history of the people. For laws to be valid, they must accord with the history and way of life of the people, that is, their customs. This theory supports the pre-eminent status of customary laws which more than any other laws have grown from instinct of native communities. This theory favours evolution of law over a period of time and law should be a formal restatement of customs dominant in the society.

UTILITARIAN SCHOOL

Jeremy Bentham believes that for a rule to be valid, it must be able to achieve greatest happiness for the greatest number of people, that is, the concept of utility. Task of law is to promote communal utility. There are 4 main utilities: security, equality, liberty and abundance. The law must balance individual's interest with that of communal interest.

REALIST/FUNCTIONAL SCHOOL

Also called legal realism. It sees law from the point of view of what the courts will do in respect to a particular legal problem. Oliver Wendell Holmes sees law from the point of view of 'the bad man'. The bad man does not care about what the book says, all he cares about is what the courts will do about a particular problem. The school recognizes the law making power of the courts.

CLASSIFICATIONS OF LAW

Private and Public Law

Public law is concerned with the smooth running of state operations and governs relationship between states or between states and persons e.g. cons law, admin law, criminal law.

Private law on the other hand is concerned with laws regulating relationships between persons, conferring status, rights and obligations upon individuals or juristic persons e.g. contract law, tort law, property law, family law etc.

Sometimes a case may involve the two domains or can qualify for either e.g. A slaps B and his action may constitute tort of battery (private) or the crime of assault (public)

Civil Law and Criminal Law

Civil law is the law defining rights and duties of persons to one another and provides system where one who is injured by wrongful act of the other can be compensated for the damage which he has suffered. Civil law is concerned with competing private interests and obligations and arises mainly in unwritten or judge made laws. Civil actions are begun according to rules of civil procedure and the objective is compensation. Here people are usually 'sued' and one party is found 'liable' and the court will award damages. The party suing is called the plaintiff and the other party is the defendant.

Criminal Law is the law protecting the interest of the public at large by punishing certain acts harmful to the society. Here, people are 'prosecuted', one party is found 'guilty' and is then subsequently 'punished'. Party instituting the criminal action is the prosecutor while the other party is the accused.

Civil Law and Common Law

Civil here refers to the ancient state of Rome. It considered law beyond practical aspect and as a model of social organisation. It birthed the natural law school theory.

Common law arose from England and it focuses on resolving disputes. It is concerned with positive law and judicial precedence is respected.

Municipal and International Law

Municipal laws are laws emanating from a particular country and having force of law within its territory. It governs relationship between persons connected with the state or between such persons and the state itself.

International Law is the law that binds respective states and regulates their mutual co-existence and relationships. Sources of international law include international customary practices, treaties, bilateral agreements and conventions. Violations of these sources have no consequence unless treaty has been domesticated, that is, passed into law by the legislature. **Section 12** governs domestication e.g. The African Charter on Human and Peoples Rights is a treaty which has been domesticated, see **Abacha v. Fawehinmi.**

There is public international law which is concerned with state relationships. On the other hand, there is the private international law which regulates the conducts of persons in a particular state in relation to laws or persons of another state without really involving the sovereigns of respective states.

Substantive and Procedural Law

Substantive law is the law that defines the existence and extent of a right in a particular branch of law. It creates, defines, or limits legal obligations or rights (validity of contracts, elements of offences etc.)

Procedural law is concerned with the rules by which an action can be brought or disposed of. It is the process or method by which legal objective can be attained. It prescribes the method for enforcement of rights, duties, obligations and obtaining redress for violation of rights (law of evidence, civil or criminal procedure law)

Customary and Non-Customary Law

Customary laws are those laws indigenous to native communities and Islamic laws as well. For customary law to be valid, it must satisfy some tests. It must not oppose natural justice, equity and good conscience; it must not be incompatible with any law for the time being in force; and it must not be against public policy.

Non Customary Laws covers received English Law, (that is, the common law doctrines, equity and statutes of general application), local statutes and laws from judicial precedents.

SOURCES OF LAW

ENGLISH LAW

English Law has become a major source of law here in Nigeria due to our colonial history. Having imbibed common law tradition and a lot of jurists were trained in that law, our legal system veered towards English Law. Efforts have been made to incorporate English Law into our legal system either by force or local reception. Thus, according to their sources of validity, English laws can be classified into

- Those that apply by their own force (Extended English Law)
- Those that have been received into Nigeria by local statutes comprising common law, doctrines of equity and Statutes of General Application (SOGA)

Legal transplantation is the process of adopting rules in other legal systems. Nigeria has had a body of English Law imposed on it by colonial masters referred to as Received English Law. Although reception is by local legislation, it shouldn't be seen as a voluntary election of the people but rather something rooted in colonialism. Reception was inevitable because

- Existing customary law didn't favour the English
- Customary law was considered inadequate in the realm of business and trade
- Arrogance held in colonialism viewed English Law as the best and customary law as barbaric. English Law is better suited to retain colonial structure.

The first reception clause was **Ordinance 3 of 1863**. Reference date of ordinance was later changed to January 1 1900; it has remained the operative date ever since at least for the reception of English statutes. **Section 32** of the Interpretation Act says

> "Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England, the doctrines of equity, together with the statutes of general application that were in force on the 1st 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 within Nigeria."

This section rendered the laws subject to any federal law; they were in force so far only as limits of local jurisdiction and circumstances permitted.

Reception could be said to be general or based on a particular subject matter only. General reception includes

i. Common Law
ii. Doctrines of Equity
iii. Statutes of General Application

COMMON LAW

Originally called 'commune ley' is that part of English laws that was formulated, developed and administered by the old common law courts and based on the common custom of the realm. It is largely unwritten and judge made. Common law simply refers to the law developed by the English Courts namely the King's Bench, court of common pleas, Court of Exchequer. Originally there was no unified system of law in England. It was after the Norman Conquest that a centralised executive arose. King Williams settled disputes using local customs rather than new laws. There were justices representing the Crown who then gave themselves more judicial power by trying and judging prisoners.

Trials of civil cases were held at Westminster but parties could still take it to the local courts. Cases were decided at Westminster unless before that date, they were held at local courts. Justices then talked about various customs they had faced in cases and agreed on the good ones and discarded those considered objectionable. By so doing, the common law of England gradually developed.

Common law didn't always grant automatic access to courts. A complainant had to apply to a Chancellor for a writ after paying a fee The writ contained allegations of a wrong and directions for settlement; and it needed to cover the remedy sought else it would be rejected. Common law at this time was more concerned with form and procedure rather than just and equitable determination of human rights. Also, law hadn't expanded sufficiently to cover many areas of possible conflicts e.g. in the common law of contract, disputes were seen as private matters and thus not the concern of courts hence there are no writs regarding contractual matters. Litigants usually leave disappointed without obtaining redress.

Common law is a formulation of Her Majesty's courts based on prevailing customs and practises of the people and designed to meet demands of changing situations. Individuals also had trouble seeking redress against powerful people.

DOCTRINES OF EQUITY

Technicality and rigidity of common law and difficulties filing complaints against powerful people birthed this doctrine. Dissatisfied litigants petitioned the Crown and these petitions were considered by the King's Council comprising the Chancellor (King's Confessor and key member of Council). Petitions were channelled through the Chancellor but later on he received petitions directly and dealt with them in his own court – the Court of Chancery. He had a more flexible approach to the concept of justice than the common law courts. When a bill or petition was received, a copy was sent to the defendant, accompanied by a subpoena, commanding him to appear in court. The Chancellor, also a clergy, probed into truth of case and implored

defendant to correct his actions and clear his conscience. Hence the court was known as the court of justice and this form of justice was called equity.

However there's a difference between equity in its general usage as meaning fairness or justice and the technical usage referring to the body of rules developed in the Chancery Court which aimed at mitigating the harshness and technicalities of the common law. Equity rules were initially simple, applying differently to similar cases depending on the Chancellor's view of justice. Equity varied according to the Chancellor's foot. The following maxims reflect general juridical philosophy of equity courts.

i. Equity acts in personam
ii. Equity doesn't suffer a wrong without a remedy
iii. Equity follows the law
iv. Equity looks to intent not form
v. Equitable remedies are discretionary
vi. Delay defeats equity
vii. He who comes to equity must come with clean hands
viii. He who seeks equity must do equity
ix. Equality is equity
x. Equity wont permit a statute to be a cloak for fraud

There were often disagreements between common law courts and chancery courts. Common law courts queried Chancery Courts on their power to review their decisions. Disobeying defendants were often punished with imprisonment and this led to the creation of the writ of habeas corpus to get them released. This dispute resulted in a conflict between Lord Ellesmere (the Chancellor) and Sir Edward Coke (Chief Justice of the Common Law Court) in the **Earl of Oxford's Case.** The King decreed that in the event of a conflict between a doctrine of equity and a rule of common law, equity shall prevail. The Chancery Court was later abolished and equity and common law were practised in the same court with equity being superior.

STATUTES OF GENERAL APPLICATION

General application means statutes which, with reference to subject matter, can apply to all persons in England. These were in force in England on the 1st day of January, 1900. Courts were meant to apply those statutes that met criteria for application under general provision.

On determining geographical location for SOGA, in **Young v. Abina**, the West African Court of Appeal dismissed the notion that for a statute to be applicable, it must have applied in the whole of UK. The UK comprises Great Britain and Northern Ireland; Great Britain comprising England, Wales and Scotland. So if it was said that SOGA

applied to the UK, it would mean other countries outside England. But England was later accepted as the test of geographical entity in **Lawal v. Youman.**

The second requirement is that the statute in question must have been in force in England as at the 1st of January 1900, that is, the limiting date. It must also be one that was of general application on that date. Statutes which have been abolished in England should still apply here in Nigeria. Unlike common law and equity, statutes are identifiable with greater certainty in point of time.

When can a statute be said to be of general application in England?

Courts came up with different tests in respect to this question. Osborne CJ in AG **v. John Holt**, although with little success, came up with

- By what courts is the statute applied?
- To what classes of community does it apply?

If it is applied by all courts to all classes of the community then it is in force within the jurisdiction. If applied only by certain courts (statute regulating procedure) or to certain classes (e.g. Act governing a trade), probability is it wont be seen as locally applicable.

This test was not infallible as it was too restrictive. Many statute regulating procedures have been seen as applying generally. On the issue of statutes applying to all classes, it can be said that naturally statutes are enacted to regulate activities of a particular class. A statute need not apply to all classes before it can be of general application. It is satisfactory if it applies to all classes or all members of a particular class. E.g. Infants Relief Act was a SOGA despite applying only to infants. There are many statutes that may still be found applicable even if they don't meet the two requirements.

Conditions for the Application of English Laws

Foregoing test aims at identifying those enactments which may qualify as SOGA.

1. You cannot apply English laws when there is already a local legislation. Absence of local legislations on matters is the only way English law will be operative. SOGA cannot prevail over bye laws; they're local legislations.
2. Received statute applies only as far as local jurisdiction allows, that is, all received English laws are subject to local enactments. They can only be in force if indigenous system allows it. *See* **Halliday v. Apatira** where Bankruptcy Act could not apply because institutions for its enforcement were unavailable.
3. When applying statutes, courts are enjoined to make necessary verbal alterations as circumstances may demand. English statutes refer to names and places peculiar to England, reception statutes require them to be replaced with names

known to us. But the power to make necessary verbal alterations does not permit substantial modifications in the meanings of the statute under consideration. **Apatira v. Apanke.**

4. You apply English Law to sub-subject alterations
5. Equity will always prevail. You cant apply a common law principle which has been abolished in England.

All received English laws are subject to local statutes which may expressly repeal or render English law impotent. Where a local statute is inconsistent with English law, the local statute will prevail and the English Law will be inoperative.

A statute enacted before 1st of January 1900 but is repealed in England after 1900 will still be applicable even though it has been repealed in England unless it has been repealed in Nigeria. E.g. Statute of Frauds Act 1677 is still applicable in Nigeria even though it has been repealed in England.

Western Region Approach

In 1959, Governor of Western Region enacted a law which limited the reception of Nigerian common law. It decided to enact SOGA as local legislations. Because this was in 1959, they were able to include post 1900 developments in England (1900 – 1959). The Western Region comprises Delta, Edo, Ekiti, Ogun, Ondo, Osun and Oyo. For example, Partnership Act 1890 applies everywhere but Partnership Law of Lagos and other Western States provided for 'limited partnership' in line with the UK Partnership Act 1907. Also the Conveyancing Act 1882 is SOGA applying everywhere but the Property and Convenyancing Law is wider in scope in accordance with the English Law of Property Act 1925.

Exercise

If A and B were to establish a partnership limiting their liability, they could do so in any of the former Western Nigerian states because the limited partnership was a part of English statutory law by virtue of the 1907 Act. Western Nigeria Government in 1959 enacted a partnership law in line with the 1907 Act. It thus became possible to limit the liabilities of a partner in Western Nigeria. Other states e.g. Sokoto continue to receive English laws that are of general application as at 1st of January 1900 and as such, the English law of 1907 Act will not be applicable in Sokoto. Only the Partnership Act 1890 will be applicable as SOGA. But the Act has no provision for limited partnership and o the people cannot enjoy limited liability in Sokoto or any state other than Western Nigeria.

CONTROVERSY ABOUT THE LIMITING DATE

There are three main questions on this topic:

i. Content of common law received
ii. If the limiting date applies to common law and equity or jut SOGA
iii. Attitude of our courts to decisions of English Courts

Now, does the limiting date actually affect common law and equity? Does it mean that like SOGA, provisions on common law and equity made after 1/1/1900 would not be enforceable? Will it be just the ones in force on or before that date that would be enforceable? Or does such a clause affect SOGA?

A.N. Allot belonged to the group who felt that the limiting date should apply to common law and equity as well as SOGA. He felt that out Nigerian courts should not be obliged to apply English laws in all cases up to date and they would forever be bound by the English decisions of English courts if the limiting date didn't apply to common law and equity.

Park believed that the limiting date has no relevance to common law and equity but he understands Allot's view of enabling Nigerian courts to evolve their own common law but the emancipation of Nigerian law should be achieved by declaring that no English case, whatever their date, should be absolutely binding on Nigeria.

Professor Nwabueze found the entire argument irrelevant because he felt that when we received common law, it wasn't in the exclusive English context. He felt it was wrong to say our courts are absolutely bound by specifically English text/version of common law. His point being that no English decision of whatever date should ever be considered absolutely binding on Nigerian courts.

Bennion says he doesn't mean English decisions aren't part of our laws but that they are not binding on our own courts.

Professor Obilade does not believe that the limiting date has any relevance to common law and equity. In **Alli v. Okulaja**, he stated that decisions of the English courts are just a mere guide to Nigerian courts and they're free to be influenced by those English decisions as common law or equitable doctrine in certain matters. He also saw the section as a matter of grammatical construction.

Allot still believes that rules and principles embodied in what is called common law as at that date have become part of our laws since then and cant be seen as foreign laws.

Niki Tobi used our republican status, when Supreme Court overtook the House of Lords as the final court of appeal, as proof that we have departed from bindingness of English decision but this has been severely criticized

a. House of Lords was never a final court of appeal, but rather it was the Privy Council
b. Whether our courts are bound by English decisions is a matter of judicial precedent. It wasn't until **Johnson v. Lawanson** that it was clear that our courts are to be bound by decisions of Privy Council in appeals before 1963.
c. Application of English law was in virtue of our reception provisions and not because Nigeria was a territory to which legislative authority of UK extended.

Attainment of republican status therefore has no effect on whether our courts are bound by English laws or not. It is the feeling that our courts are bound by English decisions that led academics to emphasize that only those decided on or before a limiting date are binding.

Judicial Pronouncements

Jill Cottrell pointed out that courts have not even mentioned date of any English decisions as relevant in determining whether they find them binding or not. Sometimes they apply post 1900 decisions and it should be considered that they did that not because they found it binding but rather because it was persuasive in nature. It should also be said that many non-English decisions have been followed. Could they have been said to have been binding? See **Benson v. Ashiru** where an Australian decision was followed.

It has also been shown that our courts will depart from English precedents because they are not bound by them and the decisions don't look persuasive enough.

- **Alli v. Okulaja** (which did not follow **Edmeades v. Thomas Boards Mills**);
- **Eliochin v. Mbadiwe** (which did not follow **Rookes v. Barnard**);
- **Akinsanya v. UBA,**
- **Lidaju v. Lidaju**.

In **Alli v. Okulaja**, the plaintiff claimed 4205 pounds 17 shillings for damages suffered in consequence of him being run down by the defendant who had driven his car negligently. It was argued that the court cannot order the plaintiff to submit himself to medical examination by a doctor of the defendant's choice but the defendant counter argued that the court should stay proceedings until the plaintiff submits himself for medical examination of the defendant's arrangement in line with the English decision in **Edmeades v. Thames Board**. Federal Supreme Court dismissed the

appeal departing from **Edmeade's Case**. Our courts refuse to be bound by decisions of the English courts.

In **Eliochin v. Mbadiwe**, the plaintiff sued the defendant for unlawful entry into premises and an injunction restraining the defendant from more trespass. The plaintiff lawfully occupied premises and nothing in the statement of claim brings the case within the limited categories of **Rookes v. Barnard**. The Supreme Court isn't bound by decision of foreign courts and the decision in **Rookes v. Barnard** was of rather a persuasive effect.

In **Lijadu v. Lijadu**, the respondent and appellant got married but later dissolved their marriage. The respondent then went to the United States while the appellant lived in Nigeria at the house claimed by the respondent. The appellant said she contributed to the house development and since the marriage was dissolved in accordance with the law, the respondent was to pay her N50,000. English decisions, even of House of Lords, are only persuasive in Nigeria not binding.

Now that it is settled that courts have established that they are not bound by English decisions irrespective of the date, we have to consider whether they only said this out of vindication of Nwabueze's view. Their reasons for seeing themselves as non bound by English decisions are

a. Nigeria is a sovereign state and her courts cant continue to be bound by decisions of another sovereign state
b. No English court was ever part of hierarchy of courts in Nigeria as to suppose its decision was ever binding. Bindingness in English decisions isn't really something that can be affected by the republican status, hence it is either English decisions were never binding or they remain binding till date.

Courts have refused to state what view they take on the controversy and we are left to believe that English decisions were never binding and only had persuasive authority.

THE CONTROVERSIES

1. Whether the limiting date applies to unwritten laws, that is, common law and equity.
2. What effects do the common law and equity have on Nigerian courts? What is the attitude of Nigerian courts to English decisions?

Academic Views on 1st Controversy

a. Necessary intendment: Purposed of receiving English law was to enable legal institution of the receiving legal system to develop her own legal system. Hence it is not possible that the legislature could have intended English decisions to forever bind our courts.
b. Grammatical Construction: The language of the section does not imply that the date applies to common law and equity. Courts do not really say their pronouncements changes the law with effect from particular decisions.

Academic Views on 2nd Controversy

a. Since common law and equity are contained in judicial pronouncements, English decisions are forever binding on our courts – Agbede, Allot and Park
b. Reception of unwritten laws does not imply that cases in which these principles have been enunciated have become binding Nigerian courts – Obilade, Nwabueze, Bennion.

Judicial Perspectives

Many cases show that courts refused to be persuaded and decided outrightly that they are not bound by English decisions. See **Alli v. Okulaja; Eliochin v. Mbadiwe, UBA v. Akinsanya; Lijadu v. Lijadu.**

Adetoun Oladeji v. Nigerian Breweries: The appellant distributed the respondent's products for many years and they agreed either could terminate the contract by giving one month notice. The pre-1900 decision in Hadley v. Baxendale on remoteness of damage was not binding but that the Supreme Court was only persuaded and they CHOSE to follow it.

So do the courts favour the views of Obilade, Nwabueze and Bennion?

CASE LAW

Case law is a body of principles and rules of law which have been formulated and developed by courts in the process of adjudication. This means the judges, when interpreting laws, make relevant comments which influence amendments to such laws. Judges are not meant to make laws, as that is the primary duty of the legislature but they cannot be said to be fully detached from lawmaking process all together. Judges should therefore formulate fresh rules when the need for one arises. By doing this, they add to the corpus, that is, body and this act is sustained by the operation of the doctrine of judicial precedent. A precedent is an earlier decision taken as an example or rule for what comes later. Precedents are what they are because men are faced with a problem, 'have we not had this before or something like this?' Lord Wright.
Precedents are therefore followed because man feels the need to employ wisdom and experience of past as a guide for treating new problems. Judicial decisions bind both he judge himself and all the subsequent judges of lower courts and decide same questions of law. Doctrine of judicial precedent is principle of law on which a judicial decision is based. It is the case under consideration and the one being urged as authority for a particular of principle that should agree on legally material facts even if it's not all the details that are the same. It is the **ratio decidendi**, that is, the reason for the decision. It is the guiding principle leading to a court's decision in a case. Not everything said by a judge is the precedent, only those relating to material facts. Others which are said in the course of judgments are obiter dicta (a statement by the way)
It is the majority and not the dissenting judgment which forms the decision and ratio decidendi. To get the ratio decidendi, you use

Material Facts + Actual Decision = Ratio Decidendi

Courts sometimes make definitive pronouncements not directly relevant to issues under consideration, they don't bear directly upon the question. They are known as 'obiter dictum'.

Judicial precedent is based on '**stare decisis et non quieta movere'** which means, stand by a decision and not disturb that which is settled. The Supreme Court in **Nepa v. Onah** defined it to mean 'stand by your decision and that of your predecessors, however wrong they are and whatever justice they inflict.'

"Let decided things stand". This means that cases must be decided the same way when their material facts are the same. See the case of **Wilkinson v. Downton.**

A case will be termed as one of first impression if there are no previous cases that will constitute as ratio decidendi for the present case. The judge will then adjudicate using common sense, sound logic and a good understanding of the law. It will now be used

by future courts as it will be the original precedent. Finding the ratio decidendi starts with a mental process called abstraction.

Sometimes a judge will lay down a rule too wide for the case at hand and a later court may want to cut it down. (**Edegbenro v. NEPA**). This is called distinguishing. Restrictive distinguishing cuts down the ratio decidendi by treating as material what was previously immaterial. Non-restrictive distinguishing is when courts accept ratio decidendi but sees it does not fall within the ambits of the present case.

Obiter Dictum / Obiter Dicta

This literally translates to 'by the way'. It is a statement made by the way. A passing, incidental or collateral remark not bearing directly upon the question before the court as to affect the determination of the cause of action. It is not binding on the courts. It is more of a persuasive precedent and of persuasive authority. Dicta are of different kinds and of varying degrees of weight. Some are made as an almost casual expression of opinion upon a never mentioned point and can be disregarded. While some are of deliberate expressions of opinions given after consideration upon a point brought and argued before the court. Persuasive value depends on status of court and reputation of the judge making it. They are not binding but lower courts are advised to take them seriously especially the ones from the Supreme Court as held in **Ifediora v. Umeh**. Where reasoning is very sound, obiter dictum might persuade a future judge and become the foundation of the principle. Obiter dicta aren't part of ratio decidendi but are not completely useless.

Types of Precedent

1. Original Precedent: establishes a new rule of law and happens in cases of first impression where no existing precedent can be found. *See* **Zaidan v. Mohosen**
2. Derivative Precedent: Merely extends frontiers of an existing rule to accommodate similar or novel cases where there is no direct authority on the point under consideration. *See* **Chairman LEDB v. Olopinkwu**
3. Declaratory Precedent: They contribute little or nothing to the development of law except that they help to consolidate and strengthen authority of past decisions. They don't confer validity on a bad decision. A precedent followed previously may be overruled later if it had been given in error. *See* **Johnson v. Lawanson**

Precedents can also be seen as binding or persuasive. It is binding when the court is bound to follow but it is persuasive when the courts are not bound to follow the precedents. Decisions of courts higher in the judicial hierarchy are normally binding on lower courts.

A major criticism against stare decisis is that law is made to follow in the path of older cases denying courts opportunity to fashion out modern solutions to emerging problems.

Operation of the Doctrine

An important requirement for the workability of doctrine of precedents is an established judicial hierarchy. **Section 287** establishes the doctrine of judicial hierarchy in Nigeria. Our judicial hierarchy shall be considered.

1. Supreme Court
2. Court of Appeal
3. Federal High Court and State High Court
4. Customary & Sharia Court of Appeal
5. Magistrates Court
6. Customary & Area Courts

SUPREME COURT

Established under **Section 230**, the Supreme Court by **Section 235** is the court of last resort in Nigeri. It hears appeals from the Court of Appeal by virtue of **Section 233(1)** and exercises some amount of original jurisdiction in matters relating between the State and the Federation or between States in accordance with **Section 232(1).** It has also been granted additional exclusive original jurisdiction in any dispute between National Assembly and President, the National Assembly and House of Assembly or between the National Assembly and a State of Federation, by **Section 1(i)** of the **Supreme Court (Additional Original Jurisdiction) Act.**

The Supreme Court replaced the Privy Council in 1963 as the highest court. It should treat decision of Privy Council given before abolition of appeal as it would treat its own decisions. **Johnson v. Lawanson**, the court overruled a Privy Council decision (**Maurice v. Aminu**) and followed decision of the Federal Supreme Court (**Omasanya v. Anifowoshe**). In **Williams v. Akinwunmi**, the court overruled without differentiating between authority of its previous decisions and Privy Council.

Court assumed it was a successor to the old Federal Supreme Court. The modern Supreme Court has maintained that it isn't bound by the decision of any other court (**Eliochin v. Mbadiwe**).

The Supreme Court is loosely bound by doctrine of precedent which ensures certainty of the law, Cardoso v. Daniel, and foundation on which consistency of judicial decision is based. Where Supreme Court lays down a principle, it leads to stability to

regard it as a precedent for the way future cases are decided. Supreme Court respects the doctrine of precedents though it is not bound by precedents. The court veers from the path of precedents in special cases:

a. Where decision was given per incuriam; **Bakare v. Lagos State Civil Service Commission**
b. Where its found to be simply erroneous; Johnson v. Lawanson
c. Where it is capable of causing injustice; Aqua **Ltd v. Ondo State Sports Council**
d. Where it would curtail constitutional rights; **Oduola v. Coker**
e. Where court i of opinion that is in nevertheless in the general interest of justice to do so
f. Where court itself indicates it shouldn't be relied upon in a later case; Awolowo v. Shagari

Overruling of previous decision would be justified where case is

- Vehicle of injustice
- Given per incuriam
- Clearly erroneous in law

The Supreme Court comprises 5 Justices except in appellate hearings, for an appeal brought under **233(2)(b) or (c)** of the Constitution, or to exercise its original jurisdiction in accordance with section 232 of this Constitution, the Court shall be constituted by seven Justices.

Court of Appeal

It is established under **Section 237**. It sits in 10 judicial divisions and comprises at least 3 Justices in accordance with **Section 247**. It hears appeal, by virtue of **Section 240**, from the federal and state high courts, National Industrial Court, High Court of the Federal Capital Territory, Sharia Court of Appeal of the Federal Capital Territory, Sharia Court of Appeal of a state, Customary Court of Appeal of Federal Capital Territory, Customary Court of Appeal of a state and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly.

The Court of Appeal is ordinarily bound by the doctrine of precedent. There is unity of opinions and every decision of a competent panel in any division is to be treated as decision of court. There could be problems of danger of decisions in one division conflicting with the decision in another division but it can be easily resolved with improvement in area of law reporting and better community facilities.

The Court of Appeal is still believed to be governed by the rule in Young v. Bristol Aeroplanes on issue of departure. The Court may depart from its previous decision if

- It was given per incuriam
- It has to choose between two or more of its own previous decisions and overrule the others
- If incompatible with a decision of the Supreme Court.

The Court of Appeal is bound by its previous decisions unlike the Supreme Court which can depart from its past decisions. The danger of submitting to stare decisis was evident in **Shugaba v. Minister of Internal Affairs** where it felt compelled to follow its earlier decisions in **Eze v. Federal Republic of Nigeria**, although it was quite unsupportable. It does not even matter if decision of higher court was given per incuriam, lower courts are still bound to follow it. Court of Appeal is bound by decisions of Supreme Court. It cannot depart even by attempting an artificial distinguishing where its obvious that the decision is applicable.

But how should the Court of Appeal react in cases of conflicting decisions of Supreme Court on the same matter? One view holds that the court should follow the most recent of the conflicting decisions and see others as impliedly overruled. But it does not lie within its power to pick and choose from conflicting decisions. But what would happen in cases of irreconcilable differences where court was not notified of earlier decisions in subsequent cases? In decisions reached per incuriam, only the courts they originated from or higher court may alter them.

Although there is the argument that the Court of Appeal should be allowed to consider conflicting decisions and decide on which to follow. Lower court can refuse to follow later decision due to per incuriam or follow it because it is the most recent. Whatever is done should be done on what it views as what the law ought to be. **NEPA v. Onah**. This method is more liberal and better suited for achieving justice and judicial activism.

A third option is that of abstinence. In conflicting decisions of Supreme Court, the lower court may state a case for opinion of the Supreme Court on which to follow.

Customary & Sharia Courts of Apppeal

Sharia Court of Appeal is established by **Section 275**, while Customary Court of Appeal is **Section 280**. They hear appeals from the Sharia and Customary Courts in Islamic matters and customary native issues respectively. Decisions of these courts are not that reported and little is known about them. But since appeals from them go to Court of Appeal, they should be bound by decisions of that court which is required by law to include learned justices in the relative fields when sitting on appeals. They are also bound by Supreme Court decisions and are expected to abide by their own previous decisions departing only in compelling circumstances.

Federal & State High Courts and High Court of Federal Capital Territory

Together with the National Industrial Court, the High Courts have concurrent jurisdiction. They are all equal.

The High Courts are strictly bound by the decisions of the Supreme Court and the Court of Appeal. When a High Court departed from the decision of Court of Appeal which was exactly similar with the case on ground, it was frowned at by the Supreme Court. See **Dalhatu v. Turaki** which blatantly refused to follow the decision of **Onuoha v. Okafor** in a matter pertaining to internal affairs of a political party and declared that the Supreme Court amends its position in respect of such affairs. The Justices of The Supreme Court condemned this act calling it a show of 'gross insubordination' and such a judge was a 'misift in the judiciary'. The Supreme Court is the apex court and its decisions bind every other court. Such doctrine is essential to the practice of application of law and the attitude of the trial judge is the height of 'judicial impertinence', 'daring and most unfortunate.'

High Courts are expected to follow, though not bound, previous decisions unless they were given per incuriam, or considered wrong in law, or against stream of authorities, or if it is in the interest of justice. In **Obeya v. Soluade**, it was held that a High Court is not bound by decisions of another High Court being courts of co-ordinate jurisdiction although such decisions may just be of persuasive authority. An explanation for nonchalant attitude of High Court to the doctrine of precedent is absence of organized law reporting system added by sheer number of courts, volume of cases treated and inadequacies in some judgments. Decisions of State High Court on purely state matters are binding only on lower courts in that particular State, while they are only of persuasive authority to other States.

It should be noted that no court is really bound by its previous decisions, they are only expected not to depart from it but when they do, its for good cause.

Magistrates & District Court

These are inferior courts of record and are bound by decisions of superior court although there's the problem of ascertaining extant authority on any part point of law. Like High Court, they are not bound by their previous decisions but are not expected to depart from precedent except for good cause.

Customary & Area Courts

They are not really concerned with depth of precedence because they're mainly led by lay men who are not really that knowledgeable in general law to appraise decisions of the Supreme Court. Even the Supreme Court has cautioned that strict technicalities procedure or evidence shouldn't always be applied in Customary and Area courts if such would destroy the substance of case. Parties usually rely on facts without relying on judicial authorities. When presided over by legal practitioners, judicial precedence is more respected.

Foreign Decisions

It is acceptable for our courts to rely on English authorities while international provisions similar to the English equivalents. But Supreme Court has emphasized need to prefer Nigerian decisions if and where available to foreign ones. Leaning seriously on foreign cases is due to difficulty courts face in finding alternative local cases. Though the Supreme Court respects English opinions, they are of no avail on issues where its own pronouncements exist. They believe foreign authorities of greatest learning can't replace Nigerian case law which is rightly decided on any issue. It is no longer so that older common law is preferred to younger common law jurisdictions and it was implied that Nigerian court could be wrong for differences between Nigerian judgment and foreign ones.

Where local decisions adopt foreign opinion, it should be clear that it is the local decision that should be taken as binding authority not foreign opinion. Foreign cases are persuasive and not binding. **Okon v. State**

As for Privy Council, post 1963 decisions are to be treated like any other foreign decision, that is, persuasive. The West African Court of Appeal is of subordinate jurisdiction so its decisions are not binding on Supreme Court. WACA can be equated with the Court of Appeal.

Decisions Reached Per Incuriam

A decision is deemed per incuriam when it was arrived at by court in ignorance or forgetfulness of an authority, statutory or otherwise which is bindin on that court. This is an exceptional case in which the court making the error is not bound to follow its earlier decision due to such error.

Incuria means carelessness but per incuriam are actually per ignorantia, that is, in ignorance. But the former expression is preferred because it is impudent to suggest a judge is ignorant of the law.

A decision even if found to be per incuriam is still binding on subordinate courts, although the very court which it emanated from is free to depart from it. In **AG Ogun State v. Egenti**, a court attempted to depart from this practice by declaring a decision of Supreme Court on the issue of nolle prosequi was reached per incuriam and it had incurred the displeasure of the Court of Appeal. A lower court should not question the decisions of a higher court. The Court of Appeal stated it saw nothing wrong in lower courts making observations on aspects of a decision though still compelled to follow it as it would draw attention to some details for the Supreme Court. A recent indication shows the Court of Appeal may depart from per incuriam decisions made by the Supreme Court as seen in **Afro Continental v. Ayantuyi**. One would not advocate that the Supreme Court decisions should be treated as sacred as Justices of the Supreme Courts may err especially when there is no proper guidance from counsels. But any attempt to give the Court of Appeal or any other court liberty to depart from it might be going too far.

It is understandable that precedent may be so discomforting that lower court is tempted not to follow it but such would still be subject to appeal. Secondly, while lower courts may be right on error, their solutions in place for those reached per incuriam might not be the best. Where a lower court is faced with a per incuriam decision, it is advisable to scrutinize facts and re-examine the ratio decidendi. It may distinguish the case, if facts permit.

Distinguishing

General rule of the doctrine of precedence is that lower courts are to follow the decisions of superior courts even if it disagrees. They may however find a way out by distinguishing the case on ground from the one that is being urged as a binding authority.

Distinguishing is the process where a court rejects an earlier case either because facts are different or because the decision is too wide. Distinguishing can be restrictive or non-restrictive. Restrictive distinguishing is when the court limits the expressed ratio decidendi of previous case because the rule or principle is too wide compared to the issue on ground. This is common with courts of co-ordinate jurisdiction.

Non-restrictive distinguishing is where a court, without tampering with the ratio decidendi of previous case, finds a significant difference in the facts of both cases rendering principle of previous case inapt as authority for deciding subsequent cases. See **The Queen v. Governor of Eastern Nigeria Ex Parte Warri.**

When judges distinguish cases, they should back up their opinion rather than claiming that the facts are different. A High Court must state

- Ratio decidendi
- Facts proved
- Judicial reasoning in what way the cases differ.

This prescription curbs incidence of reckless disregard for precedent under the guise of distinguishing. This distinguishing has rendered idea of stare decisis useless because it means that a judge is only bound if he chooses to.

CONFLICTING DECISIONS OF THE SUPREME COURT

But what should the lower courts do in face of two or more conflicting decisions of the Supreme Court over similar issues? Should they

i. Pick ad choose which decision they prefer?
ii. Pick the later decision believing the earlier one to be impliedly overruled?
iii. Refer such conflict to the Supreme Court to let it resolve it?

Option 1: Picking and Choosing

NEPA v. Onah: The Court of Appeal was faced with whether issuance and service of a writ of summon outside a state without compliance with **section 97**....is fundamentally a breach of statutory requirement. Reference was made to **Adegoke Motors v. Adesanya** where Court of Appeal decision was in conflict with its other decision in **NNPC v. Jacobs**. The Supreme Court held that in absence of discernible ratio decidendi from decisions of a superior court and which has handed down conflicting decisions, lower court is free to choose which appears to be correct.

In **Onwumelu v. Duru**, reference was made to the Supreme Court case of **Piaro v. Tenalo** which conflicted with the Privy Council decision in **Higgs v. Nassauvian**. The Supreme Court then decided that a lower court is accorded a right to make a choice between the conflicting decisions.

On the question of whether the issue of jurisdiction can be raised at any stage of the proceedings was subject to conflicting decisions. In **Complete Communications v. Onah**, reference was made to **Niger Progress v. North East Line Corporation** where it was held that if issue of endorsement wasn't placed before lower court, Supreme Court couldn't entertain it. This conflicted with a plethora of decisions where issues bordering on jurisdiction can be raised at any time even at the Supreme Court. Niki Tobi JCA felt that he could pick and choose between the two conflicting decisions.

Option Two: Picking the later Decision

Professor Oyewo suggested that where there are two or more decisions of Supreme Court, the later one should be followed, if there was an implied overruling. In **Akinade v. Nasu**; the Court of Appeal was faced with conflicting decisions on whether preliminary point of law could be raised by the defendants without having filed his statement of defence. The Supreme Court in **Bambe v. Aderinsola** held that a party could raise it but in **Madu v. Onanuju** held that the party couldn't do so until his statement of defence had been filed. These later decision represents the state of the law. The Court of Appeal decided that when there are conflicting decisions of the Supreme Court, the later decision should be favoured.

But these cases failed to lay down set principles guiding lower court in choosing later decision. Should they merely just check the dates and follow the decision in the later case? Oyewo's suggestion of implied overruling is to be accepted as a solution and the Supreme Court must have fully considered the earlier case or facts which were governing facts in early case must have been regarded in a totally different manner in the later case. But on the contrary, above cases only seem interested in the question of which is the later decision.

Option Three: Reference to Supreme Court

In **Adesokan v. Adetunji**, Supreme Court stated that a lower court when faced with conflicting decisions of a higher court cannot effectively resolve such conflicts and the task of doing that is better left to the Supreme Court which can make a definitive and authoritative pronouncement on the matter. This was also applied in **Uwangu v. Ukachukwu** where question of whether a High Court had jurisdiction to entertain suits in respect of land situated in rural areas. Ubaezonu JCA stated that where a lower court is faced with conflicting decisions of the Supreme Court, it is best to refer it to the Supreme Court. Picking either of the decisions and rejecting the other would amount to a breach of the doctrine. What if the later decision was given per incuriam? Only the Supreme Court can resolve it well.

There has been no consistent approach. Oyewo's view is that in deserving cases, principle of implied overruling should hold and in other cases, the conflict must be referred to the Supreme Court. The Supreme Court says the lower court can pick but also says that they should refer the case to the Supreme Court. Oyewo feels picking and choosing is unreasonable and a negation of stare decisis. Such permission would erode uniformity in decision making. The doctrine states that the lower courts are to follow precedents regardless of what they think. But if a lower court picks one, would picking this one and rejecting the other not amount to declaring the one it rejected per incuriam?

On the suggestion of implied overruling, it may not be best as lower court may not be aware that the conflict has been resolved in another matter unless presented to the court. Also, most counsel, knowing a rule wont benefit them would not cite it and would only claim that their argument is the later decision and should be followed. Also, judicial attitude is nonchalant as it only cares about the date and not whether the former decision was considered when the later decision was given. Picking the later decision implies declaring the earlier decision per incuriam and this is ultra vires the powers of the lower court.

If implied overruling was followed in **Onwumelu v. Duru**, it should have followed **Onwuka v. Ediala** which was wrongly decided, instead of following the earlier case of **Piaro v. Tenalo.**

CONCLUSION

Conflicting decisions are better left to the Supreme Court as it ensures consistency, uniformity and upholds the doctrine of stare decisis which doesn't only bind any lower court to follow decisions of the higher courts but also forbids them from declaring decisions of the higher courts per incuriam. Picking and choosing would amount to a breach of the principle of stare decisis. Following the later decision might result in error as the later decision might have been given per incuriam. Conflicting decisions are better left for the Supreme Court to deal with it.

LOCAL ENACTMENTS

Formal source of law may be traced to the Constitution. The legal sources which is the accepted process by which laws are validated include the Constitution, Statutes, Judicial precedents and local customs. The principles legal sources of law in Nigeria include

- Constitution
- Local Statutes
- Case Law
- English Law
- Customary Law

Although international treaties may impose obligations on State that are members of them, they cannot be enforceable as laws within the municipal territory of the State concerned. In Nigeria, Section 12 provides that for any international treaty to have the force of law in Nigeria, it must have been domesticated, that is, passed into law by the federal legislature. And it is the statute implementing this treaty that is the source of law rather than the international law itself. See **Abacha v. Fawehinmi**.

CONSTITUTION AS A SOURCE OF LAW

It is the system of laws, customs and conventions which define the composition and powers of organs of the State and regulate the relations of the various state organs to one another and to the private citizen. All Nigerian constitutions have been written. Also it is supreme, having binding force on all authorities in the Federal Republic of Nigeria (**Section 1).** Unlike Britain where the parliament is supreme.

The Nigerian Constitution is a law of superior force, a literary or material source of law and a formal source, being the grundnorm and fundamental law of the land. It also contains a bundle of rights and duties as well as rules that may be enforced. **Chapter 4.**

NIGERIAN LEGISLATION

Legislation is the product of a deliberate and formal expression of rules of conduct made by relevant law-making authority. Depending on the political system and level of government. Legislation can be an Act of Parliament, a State Law, Federal Military Government Decree, State Military Government Edict or a Local Government Bye-Law. Local legislation is the most potent and adaptable of all sources of Nigerian Law. Legislation involves wider participation and this is achieved through representative democracy. The only major check on the exercise of legislative powers is the

Constitution. Although the legislature has power to alter any provisions of the Constitution through a special procedure according to **Section 9.**

Legislation may be primary or subsidiary. Primary laws are also known as statutes; they are enacted laws from the major legislative arm of government, either the National Assembly or House of Assembly. Subsidiary legislation is the legislation made by a person or body other than the sovereign parliament by virtue of powers conferred either by statute which is itself made under statutory power. This power is subordinate to the primary law and may be repealed. Its validity is from a primary law and it is of no effect if it cannot be traced to a parent or enabling law. Examples of subsidiary legislations include regulations, rules, bye-laws and so on. Two major legal limitations to subsidiary legislations are doctrine of ultra-vires and delegatus non potest delegare, which means a delegated power cannot be further delegated without express or implied authority. A subsidiary legislation must keep within the bounds of the powers conferred by the enabling law and any exercise of subsidiary legislative powers are inconsistent with the provisions of the enabling law will be void for being ultra vires either on substantive or procedural grounds. The second principle of delegatus non potest delegare works to prevent unauthorized sub delegation of delegated powers in certain instances. This delegated power should not be mistaken for other powers of a non-legislative nature which may also be conferred by statute.

Nigeria became truly federal on October 1, 1954 with the introduction of the federal constitution. Following the 1966 coup and introduction of a military government, traditional legislative bodies were replaced by military authorities. Federal laws were Decrees while Regional laws were called Edicts. In 1979, this changed and Decrees and Edicts became Acts and Laws. It was changed back to the military form in 1983 then back to constitutional democracy in 1999.

Legislative Process

The legislative powers of the Federation are vested in the National Assembly according to **Section 4(1)** while the legislative powers of the State are vested in the House of Assembly by **Section 4(6).** The National Assembly can make laws on maters in Exclusive List and Concurrent List while the House of Assembly can only legislate on matters included in the Concurrent List. However if any state legislation on concurrent list is inconsistent with federal legislation on same list validly enacted by the National Assembly on same matter, the law of the National Assembly will prevail and the state law will be rendered null and void to the extent of its inconsistency; **Section 4(5).** Where identical legislations are passed by both Federation and State, it is better to invalidate the State law not due to inconsistency but because the Federal law has covered the field. The legislative powers of the National Assembly or House of Assembly cannot extend to enacting laws which oust jurisdiction of courts; **Section**

4(8). In relation to crime, the legislature cannot enact laws with retrospective effect; **Section 4(9).** There is a process by which laws are passed.

Ordinary Bills (Section 58)

An Act of National Assembly starts as a bill and may be introduced in either House. It passes through these stages.

- First reading: The bill is read formally.
- Second reading: The bill is debated on and necessary amendments are made
- Committee Stage: Bill is referred to a committee for examination
- Report Stage: Bill is referred back to the House
- Third reading: The bill is passed through simple majority by the upper House and then sent to the lower House for voting. After the agreement is reached between the two Houses, it is given to the President for assent. If he withholds assent, the bill has to go through the two Houses again and if two-thirds majority of the House passes the bill, it becomes law and the President's assent is no longer needed. See **Section 58(3)(4) and (5)** and **National Assembly v. President.**

Money Bills (Section 59)

This goes through the same process as any ordinary bill. However if passed by one House and not the other within 2 months, the President shall convene a meeting of Joint Finance Committee to resolve differences between the two Houses and if it fails to resolve such, bill is presented to the National Assembly joint meeting and if passed, it then goes to the President for assent. In **AG Bendel v. AG Federation**, it was held that even if the Committee resolves the differences, the resolution is still subject to the approval of each House.

Legislative Process under Military

A distinct feature of military government is the arrogation of power to themselves. Unlike the civilian government deriving authority from the Constitution, the Military Government subdue the Constitution. They assume the power to amend or suspend all or any part of the Constitution. The hierarchy of laws was thus:

1. Constitution (Suspension and Modification Decree)
2. Decrees of Federal Military Government
3. Unsuspended provisions of the constitution
4. Acts of National Assembly
5. Edicts of State Military Government
6. Laws of House of Assembly

There's usually incomplete and unclear separation between executive and legislative functions. The demarcation between federal and state powers is thin and central government has unlimited power to legislate on all matters. State Governors are to obtain prior consent of Federal Military Government before making any law with respect to matters contained concurrent list.

RULES OF STATUTORY INTERPRETATION

It is well known that the duty of courts is to interpret and apply provisions of a law, statute or constitution. This is done through a process called statutory interpretation. It is the process of interpreting the law and there are two main goals of statutory interpretation:

- To discover the intention of the legislature (sententia legis)
- To discover the purpose of the law

Courts should not be concerned with alteration of words of a statute; merely to make it read the way it thinks it proper. The office of a judge is **jus dicere** not **jus dare**, that is 'state the law' not 'give the law' as stated in **Okumagba v. Egbe.**

Various tools and methods of statutory interpretation are available and it is left to the discretion of the judge which one he is to use. Three rules have been developed accordingly to provide a framework of interpretation. These rules are; Literal Rule, Golden Rule and the Mischief Rule. When compared, these rules are unalike so it is down to the discretion of the judge to apply which rule they see fit.

THE LITERAL RULE

This is the most basic approach and the starting point in interpreting statutes. When the literal rule is applied the words in a statute are given their ordinary and natural meaning. These simply means that, words in a statute, when clear and straightforward, are to be interpreted in their literal, plain and ordinary meaning. A judge should not look further than what is already provided in the statute as Lord Bramwell stated "…such an absurdity that you are to disregard the plain words of an Act of Parliament" in **Hill V. East and West India Dock**. The literal rule is often applied by orthodox judges who believe that their constitutional role is limited to applying laws as directly enacted by the Parliament. Such judges strive to avoid being seen as creating the law and usurping the powers of the legislative arm of government. This approach propounds that the literal meaning of the words in a statute, when clear and precise, are to be interpreted exactly the way they appear, without further interpretation.

This plain and straightforward approach has several advantages. The literal rule ensures that the people are able to take statutes at their face value. They are not subjected to the confusion of whether or not the statute is what it looks like. As Lord Diplock said, 'the acceptance of the rule of law…requires that a citizen… should be able to know in advance the legal consequences that will flow from [the statute]…the court must give effect to what the words… would reasonably understood to mean by those whose conduct it regulates.' In addition, the literal rule promotes the idea of separation of powers. Law making is left to those elected for law making. The judges

therefore are restricted in their role and are to interpret the enactments of the law makers as they appear. Lord Diplock in **Duport Steels Ltd v Sirs** claimed, 'Parliament makes the laws, the judiciary interprets them'.

The literal rule does not come without its weaknesses and one of the most primary defects is that it is based on the false assumption that a word will always have a plain meaning. English Language can be quite tricky and it has been discovered that certain words often have multiple separate meanings. Lord Reid in **DPP v Ottewell** affirmed that 'the imprecision of the English language… is such that it is extremely difficult to draft any provision which is not ambiguous in that sense'. Words can bear a meaning other than the more obvious one, therefore judges, albeit to differential degrees, can apply the meaning that they prefer on grounds of policy or principle. The literal rule has been criticized for being too rigid for it dictates that the plain meaning should be used even if it leads to a manifest absurdity. This rule would even require the literal meaning to be applied whatever the consequences and however unlikely they were to correspond with what Parliament intended. But what if it leads to complete absurdity and confusion? Or there's a miscarriage of justice due to the rule? **R v Harris** is an example of this where someone who bit off his victim's nose was held not guilty of 'wounding'. In **Adegbenro v. Akintola**, there was an issue on the correct interpretation of Section 33 of the 1960 Constitution which empowered the Governor to remove the Premier of the Region if it appears to him that he no longer commanded the support of the majority of the house of assembly. It was held that there was no reason to depart from the literal rule and the section was interpreted so as not to limit the Governor's absolute judgment. The case of **Whiteley v. Chappel** held yet a controversial and absurd result. In this case the defendant breached a section making it an "offence to impersonate any person entitled to vote", however the defendant impersonated a man who had died therefore rendering that person not entitled to vote and the defendant found not guilty.

It is very evident that the literal rule, when applied in its entirety can produce both absurd and harsh results. Where a dictionary definition gives two meanings, the literal rule will not work. It is therefore advisable that certain statutes should be interpreted beyond their literal meaning, especially when the application of the literal rule would lead to absurdity, injustice or ambiguity. All these defects led to the development of another approach to statutory interpretation.

THE GOLDEN RULE

This rule arose as a solution to the defects and problems of the literal rule. In order to overcome unjust and absurd outcomes the Golden Rule was introduced as a "modification of the literal rule". The golden rule is where "words are given their literal meaning unless it produces a result which is manifestly absurd". When the literal

and ordinary meaning of a statute will lead to obvious absurdity or a miscarriage of justice, the judge is permitted to adopt a secondary meaning or the less usual meaning of the words. This is based on the assumption that it cannot be the intention of the legislature to draft a legislation that will produce such absurdity. There are two approaches to this rule: the narrow and the wide approach. Under the Narrow approach the court "can only choose between the possible meanings of a word", that is, if one meaning is apparent that one must be adopted. Under the wider approach the courts are granted the right to "modify the words in order to avoid a problem", this situation arises where there is an obvious and clear meaning but this meaning would lead to an absurd result. This was effective in **Re Sigsworth** concerning a case where a son had murdered his mother. The mother had not made a will and under the Administration of Justice Act 1925 her estate would be inherited by her next of kin, i.e. her son. There was no ambiguity in the words of the Act, but the court was not prepared to let the son who had murdered his mother benefit from his crime. It was held that the literal rule should not apply and that the golden rule should be used to prevent the repugnant situation of the son inheriting. The golden rule was also applied in the case of **Adler v George** where it was an offence to obstruct a member of the armed forces in the vicinity of a prohibited place. The defendant was in the prohibited place rather than in the vicinity of it at the time of obstruction. The court applied the golden rule for it would be absurd for a person to be liable if they were near a prohibited place and not if they were actually in it. Similarly, in the case of **R v Allen** concerning the application of Section 57 of the Offences against the Person Act 1861, the court interpreted the words 'shall marry' as if they said 'shall go through the ceremony of marriage' because if the 'marry' had been interpreted literally the offence could never been committed, since no one married could never marry another.

The golden rule cannot be invoked for every inconvenience possible. It only applies when there's a logical inconsistency in statutes. Any other form of inconvenience resulting from other circumstances, for example, should the party concerned suffer any personal discomfort, would not suffice. The main aim of this rule is to avoid ambiguity otherwise created by the literal rule. However, this rule is problematic as Lord Bramwell in **Hill v East & the West India Dock Co** stressed, 'what seems absurd to one man does not seem absurd to another.' The rule is unpredictable as there is no clear definition of what constitutes absurdity. The golden rule provides no clear means to test the existence or extent of an absurdity. It seems to depend on the result of each individual case. Whilst the golden rule has the advantage of avoiding absurdities, it therefore has the disadvantage that no test exists to determine what an absurdity is.

THE MISCHIEF RULE

If the application of the literal and golden rule still doesn't show the intention of the legislature, then a third rule known as the mischief rule should be applied. This rule is otherwise known as the rule in **Heydon's case.** What is the "mischief and defect" that the statute in question has set out to remedy, and what ruling would effectively implement this remedy? It gives a historical approach to the interpretation of statutes as it seeks to go back in time and investigate what was happening before that particular statute was passed. What was the law meant to solve? It seeks to find the reason and purpose for the enactment of a particular law and it will then help in finding out the intention of the legislature. In the application of the mischief rule, the court should e guided by the following principles:

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

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

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

4. What was the true reason for the remedy?

The mischief rule can be said to be complex as the understanding of the legislation is left to the judge's discretion. Once the court has examined what the intention of parliament was in passing a specific act and "identified the mischief which the statute was seeking to correct" they must then interpret it in a way that covers the mischief. The latter was conveyed in case **Smith V Hughes** where Ms Smith acted contrary to S1(1) of the Streets Offences Act 1959 by soliciting in a street "for the purpose of prostitution". The defendant however argued she was not in breach as she was using her own premises to attract attention to passersby and not physically standing in the street. The judge looked at what the law was intending to remedy and it was held the act's intentions were to clean up to streets and prevent innocent people being pestered by prostitutes, thus rendering the defendant guilty as charged. Lord Denning provided an exemplary understanding of the mischief rule in the case of **Magor and St Melons V Newport Corporation.** He held that his purpose was to carry out the intention of parliament by "better filling in the gaps and making sense of the enactment ...by opening it up to destructive analysis". However it should be noted the mischief rule is only applied "where the other 2 rules fail to deliver an appropriate result"; this does not mean to say the mischief rule when applied produces an immediate and clear understanding of a statute.

It is clear that the mischief rule avoids absurd and unjust outcomes, promotes flexibility and interprets statutes how parliament intended it. However, the mischief rule is also problematic in that the mischief is only one consideration which the court will take into account, therefore it may not always be treated as being determinative of the issue. Lord Denning pointed out that identifying the mischief 'does not help very much, for the simple reason that Parliament may, and often does, decide to do

something different to cure the mischief'. For example, in the case of **Gorris v. Scott**, a statute specifying how animals were to be kept on board a ship was to prevent spread of diseases not drowning. A plaintiff suing someone else for breach of duty, when the latter violated statutory order resulting in the plaintiff's sheep being washed overboard, was rejected of remedy for he was seeking to solve a different mischief outside the intention of the legislature.

These three rules have been examined along with their advantages and disadvantages. It would be unwise to say the rules are completely perfect and without fault, as it is clear from the case law under the literal rule that this application can cause absurd and highly unjust results. As evident under the golden rule, the interpretation of a phrase or words absurdity may not coincide with the views of others and again can directly affect the outcome of a case dependant on the judges own view. And finally, the mischief rule, although easily applied to statutes to gain a more appropriate outcome, it may not be clear what the original draftsman's intentions were and thereby interferes with exactly what the enactment was set to remedy. These rules cannot be seen as 100% consistent, however in spite of their minor imperfections; they provide a reliable framework for courts to perform their constitutional role of statutory interpretations.

Apart from these major rules, the judge has several other options he is allowed to choose from when interpreting statutes.

EJUSDEM GENERIS RULE

This rule states that where particular words are followed by general words, the general words are interpreted to have a meaning of the same kind as the preceding ones already particularized. For example, where "cars, motor bikes, motor powered vehicles" are mentioned, the word "vehicles" would be interpreted in a limited sense (therefore vehicles cannot be interpreted as including airplanes, ships etc.). This rule has been applied in several instances for example **Nasr v. Buhari** where it was questioned whether the premises used partly as living accommodation and partly as a night club were premises within meaning of Section 1(1) of the Rent Control (Lagos) Amendment Act 1965 which defined premises as a building of any description occupied or used by persons for hiring or sleeping or other lawful purposes. The court held that 'other lawful purposes' must be confined in meaning to purposes similar to living or sleeping. Thus the said premises were not premises within the meaning of the act though partly used for living.

Similarly, in the English case of **Palmer v. Snow**, the court had to interpret the provisions of the Sunday Observance act 1677 which prohibited performance of

certain acts on a Sunday. The class of people who were prohibited was 'tradesmen, artificers, workmen, laborers or other persons whatsoever.' The court construed the phrase 'other persons whatsoever' to be limited to persons of the same genus as those expressly mentioned and could not therefore include farmers and barbers.

This rule is of great benefit to the courts and the citizens likewise. There is no requirement for the draftsmen to write an exhaustive list of everything that is included. It makes the drafting job easier as it would be cumbersome and time wasting including the list of all possible options. It is also an advantage that the Act can cover circumstances which might not have been covered by the draftsmen. And it also allows the Act to adapt to changes in society.

But, like its counterparts above, the ejusdem generis rule does not come without drawbacks. It is not always predictable what the judges will consider to be the same category as the specific words. It also allows for wide judicial law-making which is not desirable

THE NEW PURPOSIVE APPROACH

This is an approach under which common law courts interpret an enactment (i.e., a statute, part of a statute, or a clause of a constitution) in light of the purpose for which it was enacted. This approach favours a general and liberal approach to statutory interpretation and is kind of like a hybrid between the golden rule and the mischief rule. Lord Denning, in Seaford Court Estates v. Asher, formulated and argued:

"When a defect appears in an act of Parliament, a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of the Parliament and he must do this not oly from the language of the statute but also from a consideration of social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give force and life to the intention of the legislature."

Due to the inadequacies of the three above rules, modern judges have begun to look elsewhere for a guiding principle, and hence adopted a 'purposive approach'. Legislation may still be concerned with remedying specific 'mischief', but much of it is concerned with seeking to promote a positive social, economic and/or political objectives. This new purposive approach is advisable especially in a developing country like Nigeria where it is needed for courts to assume a supportive role in order to complement the legislature in their law making function. When there are gaps or defects in an Act, the courts should not run from their duty of reconstructing the purpose of the statute in order to fashion out a clear law better suited for public interest. Many statutes do not achieve their objectives without the judicial activism of the judges who are well placed to identify such gaps and remedy them appropriately.

While this approach is consistent with EU approach, gives effect to parliament's intentions and aims at promoting public interest, it has been severely criticized for failing to recognize the separation of powers between the legislator and the judiciary. The legislator is responsible for the creating the law, while the judiciary is responsible for interpreting law. As purposive interpretation goes beyond the words within the statute, too much power is bestowed upon the judges as they look to extraneous materials for aid in interpreting the law. This is the belief of an opposing school of thought who believe judges are not supposed to go beyond mere interpretation. This is the strict constructionist approach endorsed by Lord Sirnonds:

"the general proposition that it is the duty of the court to find out the intention of the Parliament…..the power and duty of the court to travel outside them on a voyage of discovery are strictly limited…..If a gap is disclosed, the remedy lies in an amending Act."

AIDS TO INTERPRETATION

When a statute is clear and unambiguous, there is no need for the court to go beyond its literal meaning for its interpretation. However, when the reverse is the case and the statute is quite ambiguous and uncertain, there are certain aids the judge could make use of in his interpretation. These aids could either be intrinsic/internal or extrinsic/external.

INTERNAL AIDS TO INTERPRETATION

These are the aids within a statute which can assist the judge in interpreting such statutes when they appear unclear. Internal aids include the following:

- Context
- Title {Long and Short}
- Preamble[1]
- Schedules
- Headings
- Proviso
- Definition Section[2]
- Conjunctive and Disjunctive Words
- Punctuation

Advantages of the Internal Aids

[1] Any interpretation contradicting the provisions of the preamble of a constitution will be discarded
[2] See Section 318 of the 1999 Constitution

- Long title can remind judges of what they are trying to achieve – mischief/purposive approach – Black-Cawson (1975)

- Preamble, objectives or puRposes sections help when applying mischief/purposive approach

- Schedules help understand the provisions of an act – easy to reference

- Definition section helps with interpreting words

Disadvantages of the Internal Aids

- Doubt as to whether punctuation should be taken into account – wasn't used prior to 1850

EXTERNAL AIDS TO INTERPRETATION

These are things found outside of the actual statute which may be considered by judges to help them understand the meaning of a statute more clearly. They include:

- Historical Settings
- Objects and Reason
- Text Books and Dictionaries
- International Conventions
- Interpretation Acts [3]
- Debate and Proceedings of the Legislature
- State of Things at the Time of the Passing of the Bill
- Judicial Interpretation of Words
- Law Commissions Report
- Hansard

Advantages of the External aids

- Dictionaries help when using literal approach

- Referring to acts can help with interpreting mischief

- Commission reports help when applying mischief/purposive approach

- Hansard is a very useful tool – *Davis v Johnson*[4]

[3] A judge is bound to follow the provisions of the Interpretation Act. In ***Bukola Saraki v. Code of Conduct Tribunal***, it was held that 2 members can sit a quorum

- Explanatory notes use more accessible language

Disadvantages of External aids

- Dictionaries do not help when looking at parliament's intention
- Interpretation Act is limited in scope and not very technical or specialised
- Commission reports can be erroneous – *Anderton v Ryan*

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[4] Hansard is the traditional name of the transcripts of Parliamentary Debates in Britain and many Commonwealth countries.

CUSTOMARY LAW

There is no universal definition of customary law however it is safe to define it as C.O Okonkwo did. It was defined as a body of customs and traditions which regulate the relationship between members of the community in their traditional setting.

Professor Elias – "A body of customs accepted by members of a community as binding upon them."

Professor Obilade – It consists of cutoms accepted by members as binding on them."

Prof. Niki Tobi – "Customs, rules and regulations governing relationships of members of a community."

Obaseki JSC in the case of **Oyewunmi v. Ogunesan** defined it as the organic or living law of the indigenes of Nigeria regulating their lives and transactions.

The Supreme Court per **Elias CJN** in **Zaidan v. Mohsen** stated that though common law isn't expressly enacted by any competent legislature, it is enforceable and binding within Nigeria.

It is the oldest source of Nigerian law. There is no uniform customary law and although Islamic Law is often treated in the same context as Islamic equivalent of indigenous customary law, it is not exactly "customary law". It does not even share the same attributes with customary law as it is largely written (The Qur'an). Islamic Law will therefore not be subject to strict rules of proof and evidence to which customary law is subjected to.

Note that Customary Criminal Law has been abolished by **Section 36(12)** of the Constitution which states that a person cannot be convicted of an offence unless such is defined and its penalty is explained in a written law.

The key elements of customary law are general acceptance, generally applicable, relates to way of life, general binding, regulation and enforceability. Customary law differs from tribe to tribe so it is safe to assume that there are as much customary laws as there are independent traditional communities.

CHARACTERISTICS

Some of the characteristics as noted by Niki Tobi JCA (as he then was) in **Ojisua v. Aiyebelehin** are

1. It must be in existence
2. It must be customary as well as law
3. It must be acceptable
4. It is largely unwritten
5. It is flexible
6. It is universally applicable, that is, it must enjoy general application among the people.

Must be in Existence

A custom or usage must be in existence before it can be regarded as customary law. It must also have been in existence at the material or relevant time. Time is important because if a custom is dead, it can no longer qualify as customary law. This element of existence is also important because all other characteristics are built upon it. It was stated in **Lewis v. Bankole** that the native law and custom enforceable must be existing natural law and custom and not that of the bygone days. Customary law does not owe its existence to enactments by parliament unlike the statutes. For common law to be applicable, it has to meet some basic criteria necessary for its validity and acceptance. Common law derives its existence from attitude of the people whose affairs it seeks to regulate.

Must be custom as well as law

There is a difference between custom and law. Custom reflects common practice of a people without necessarily having the force of law. Custom may exist without th element of sanction or coercion. Element of law in custom is important because it is that which in reality carries sanction in event of breach. While disobedience of a custom may attract some kind of societal punishment, it lacks rigid institutional sanction. A custom may become customary law recognized by the State through the codification process.

Must be acceptable

A custom must be acceptable by the community whose affairs it regulates. Bairamain in **Owoniyin v. Omotosho** described customary law as a mirror of accepted usage and

this conforms to the acceptability characteristic of customary law. It is only by local acceptability that effectiveness of customary law is largely determined.

Unwritten in Nature

Sources of customary law are often in interpretation given to it by the people and reliance is often on elders of the society for interpretation which may vary according to their interest. It was initially presumed that written transactions were unknown to customary law and this was based on the fact that the community was illiterate and those who wrote were given the benefit of English Law. But gradually native communities got exposed to written documents.

Should Customary Law be codified? Those who agree feel it would make the law more certain, uniform and precise. Those who disagree feel it would make the law more rigid, thereby losing its flexibility which is another important characteristic.

Flexible in Nature

It can be applied easily to particular situations at particular times, that is, it is easily adaptable to changing circumstances.

It is universally applicable

It must be generally applicable among people within the area of acceptability. Form and content may be similar but method of application may vary. However there is to some extent a large measure of uniformity of different customary laws in terms of substance.

VALIDITY OF CUSTOMS

The law has introduced certain tests and criteria which must be satisfied by every rule of customary law for it to be considered valid. This is in accordance with **Section 18(3)** of Evidence Act 2011.

a. It must not be repugnant to natural justice, equity and good conscience.

b. It must not be incompatible either directly or indirectly with any law for the time being in force

c. It must not be contrary to public policy.

Repugnancy Test

The phrase 'repugnant to natural justice, equity and good conscience' seems imprecise altogether. Natural justice and equity are well understood but good conscience is easier sought than realized. It was reasoned in **Laoye v. Oyetunde** that it may have been intended to invalidate some barbaric customs.

The controversy is and always has remained, by whose standards is a rule of customary law to be adjudged repugnant? A custom isn't void because it is inconsistent with English principles and it should not even be compared to standards of more advanced communities. Since there is no definite standard for the determination of repugnant laws, an examination of certain cases will show attitude of courts.

Edet v. Essien: A rule of customary law giving custody of a child fathered by a husband to another man merely because the dowry merely because the dowry paid by that other had not been returned.

Mariyama v. Sadiku Ejo: The court rejected a custom in which a child born ten months after a divorce belonged to the former husband of its mother.

Danmole v. Dawodu: The court rejected Yoruba rule of inheritance known as 'idi-igi' which allocates inheritance according to the number of wives a man has. It preferred the 'ori ojori' system where inheritance is shared equally amongs the children.

Guri v. Hadeija Native Authority: rule of Maliki School which disallowed accused people on trial for highway robbery from defending themselves was rejected.

Re the Estate of Agboruja: Court accepted the practice of 'widow inheritance' because it is based on the economy of an African social system in which the family is treated as a composite unit. See also **Amachree v. Goodhead; Mojekwu v. Mojekwu**.

A rule of customary law isn't repugnant because it denies one a right he'd normally be entitled to under general law. Also, a custom that doesn't permit economic, social or political growth of a people is contrary to the rule of natural justice, equity and good conscience.

Incompatibility test

For a rule of law to be valid and enforceable, it must not be incompatible or inconsistent directly or by implication with any law for the time being in force. In some Acts, its provided for as 'any written law' or 'any law'. In **ReAdadevoh**, 'any law' included rules of common law. In **Adesubokan v. Yinusa**, it included Received English Law, Statutes of general Application. In that case, a testator willed his property under the Wills Act 1837 in a manner contrary to Islamic law, his personal law. It was held that the provision of the Maliki School was invalid for being inconsistent with Section 3 of the Wills Act, that is, Received English Law

This requirement seems to subjugate customary law to higher orders of law. It has been criticized for stultifying rules of customary law. Any law has been interpreted to include common law and equity but the same cannot be said for SOGA. They have been expressly received and applied where there are no contrary local provisions and differ from locally enacted laws only in their source of authority.

Incompatibility may be direct or by implication. Section 36(12) of the 1979 constitution abolished all customary law offences not contained in a written enactment. No one is punihshable for any offence not part of our written laws at the time it was committed. See Aoko v. Fagbemi.

This test also featured in Agbai v. Okogbue where members of the age grade in a village seized the sewing machine of the respondent, because he refused to join their group. t was local custom that required him to join such group and not avoid the levy being demanded. This custom was held to be void due to it being inconsistent with provisions of the Constitution which provides for freedom of association and religion. See also **Ukeje v. Ukeje; Uke v. Iro**.

Public Policy (contained only in Evidence Act; Section 18(3) of Evidence Act 2011)

A custom shall not be enforced if it is contrary to public policy. A custom permitting two women to get married to each other was rejected in **Meribe v. Egbu.**

This test has always been with problems as there is difficulty in gauging limits of public policy and courts have often spoken of public policy without reference to Evidence Act. In **Amachree v. Kallio** the plaintiff sought an injunction restraining the defendant from fishing in the Calabar river without her consent. Even though the plaintiff had exclusive right to the river, it was held that common fishery in open rivers must be

maintained on grounds o public policy and interest. This was before the statutory provision in the Evidence Act was enacted.

Alake v. Pratt: contrary to public policy, when considering distribution of a man's estate, to place the children born outside wedlock on the same level with the legitimate children born within the marriage. In Re Adadevoh, it was contrary to public policy to enforce a custom encouraging sexual promiscuity.

PROOF OF CUSTOMS

How do we prove that a rule of customary law is authentic?

i. Oral evidence (witnesses)

ii. Documentary evidence (books)

iii. Judicial Notice

Section 16 of Evidence Act 2011 makes provision for facts of which the courts must take judicial notice of thereby dispensing with the need to prove such facts by evidence. An alleged custom is treated as a fact that has to be strictly proved not only by evidence of the one alleging it. There should be corroborating evidence. Only instance where strict proof may be dispensed with is where the particular custom has been judicially noticed. The burden of proving a custom lies on the party who asserts and seeks to rely on it (Section 16(2) of Evidence Act 2011). Customary law is treated as a question of fact as seen in **Angu v. Attah.**

Judicial Notice

A custom is judicially noticed if it has 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 of persons concerned in that area see the custom as binding.

In **Osinowo v. Fagbenro;** the plaintiff here, rather than call on evidence, relied on 3 earlier decisions in which a certain rule of customary law had been adopted. This was held sufficient for the court to take judicial notice of the custom.

In **Cole v. Akinleye,** the plaintiff's case was that under Yoruba customary law, acknowledgement of paternity of children born outside wedlock by a man made the children legitimate and entitled to share in his estate with children born of a legitimate marriage under the Marriage Act. The court was urged to take judicial notice of the rule based on an earlier decision in Alake v. Pratt where the court upheld the custom

as proved. But it is contrary to public policy when considering distribution of a man's estate, to place the children born outside wedlock on the same level with the ones born within the marriage as this encourages sexual promiscuity.

The geographical qualification of 'the same area' was interpreted in **Taiwo v. Dosunmu** whe relevant custom must have been approved and recognized by the courts in area where it is to be judicially noticed. Just because a custom always applies in Y does not mean it would be judicially noticed in Z. The Supreme Court here reversed the decision of the trial court taking judicial notice of a customary law rule on basis of Ghanaian cases when the rule was to be applied in Lagos.

Proof or Evidence of Customs (oral & documentary)

Section 18(1) stated that where a custom isn't judicially noticed, it may be established otherwise by evidence showing that those in the area regard the rule as binding on them. It is not enough for one to just claim that the custom exists. Sections 68 and 70 of Evidence Act 2011 provides that opinions of experts and native chiefs are relevant, that is, those with special knowledge, as well as books. Law recognizes 2 major sources of evidence in proof of alleged custom, which are witnesses and books or manuscripts.

Witnesses

The law permits opinions of those specially skilledin the native law or custom e.g. chiefs and others who may have special knowledge will be seen as expert witnesses. But evidence of experts aren't absolutely binding. Court always has discretion on the wight to be attached to each evidence. Problems with witnesses sometimes includes likelihood of bias as seen in **Inyang v. Ita**. Where there is a conflict in traditional history, demeanour of witness is of little guide. Courts may even be prepared in certain cases to be assisted by traditional belief in oracles or juju. Akpodike v. Abueze.

Books

Law permits the use of books or manuscripts in order to prove a rule of customary law. They are material sources of law and under general law, they are cited and relied upon where they have become authoritative treatises on subject under review. It is

enough if the book cited in support or as proof of customary law of a community is recognized by members of that community as legal authority. For example, Ajisafe's Law & Custom of the Yoruba People was relied upon in **Adeseye v. Taiwo**. For books or manuscripts to be admitted as proof, it must

- Form part of evidence in case
- Be recognized by natives as a legal authority

They are mere guides rather than strict rules of law. In **Orugbo v. Una**, it was held that a court has no legal duty to confine itself only to the authorities cited by the parties and it is free to use other books not cited by them.

Section 73(1) of the Act discusses instances when courts can take judicial notices of facts. **Section 73(2)** allows courts resort to appropriate books.

RELEVANCE OF PROOF IN CUSTOMARY COURTS

Strict proof of an alleged rule of customary law is unnecessary in customary court especially where they are presided over by persons indigenous to the area of the court's jurisdiction. But it would appear that courts are rather cautious in permitting admission of a rule of customary law otherwise than through evidence. Customary law is largely unwritten and therefore not easily ascertainable. Even where the dominant rule in one community is known, it may differ substantially from what obtains in another community in the same area.

LAW APPLICABLE IN DEFAULT

An alleged rule of customary law is not satisfactorily proved or where its held to exist in communities concerned but may not pass the three tests, sometimes happens. Section 14(1) places the burden of proving alleged customs on those alleging its existence. In default of its adoption by court, any claim based on the rule must fail. In some cases, courts invoke English law as a last resort. **Asani v. Adeosun**; where there is no rule for appointing the head of Islamic community, rules of common law should apply unless expressly excluded by Islamic Law. In other cases of invalidity, court can dismiss claim, apply any viable alternative raised or take refuge under English Law.

ISLAMIC LAW

This refers to the religious law based on Islamic faith and is applicable to members of the faith. It is the law of Islam, also called Moslem Customary Law or the Sharia. It isn't customary law but received law introduced as part of Islam. It was remarked in **Sidi v. Sha'Aban** that he who adjudicates not in accordance with what Allah ordained is a sinner. Islamic Law differs from customary law with its characteristics.

1. It is largely written: This is evidenced in the Holy Qur'an and the books of Hadith, unlike customary law which is unwritten and derived from recollection of tradition and interpretations by elders.
2. It is Rigid: It is rigid in its application; immutable and unchangeable e.g. Holy Qur'an of 114 chapters permits no addition or subtraction. It is fixed by the Almighty Allah unlike customary law which is flexible and easily adaptable to changes.
3. It is a divine law: It emanates from Allah and all other laws are subject to supremacy of the Islamic law.
4. Uniformity of laws: Islamic Law is universally applicable. Islamic Law in Northern Nigeria is the same elsewhere.
5. Not derived from custom: Unlike customary law, Islamic law is not derived from custom. Custom, known as 'urf' in Arabic is not accepted as a direct source of Islamic law.

SOURCES OF ISLAMIC LAW

1. Holy Qur'an

Derived from Qar'a which means 'to read'. This is the sacred book of Islam containing Allah's revelation to Prophet Muhammed (SAW). It contains all commandments and injunctions of Allah. It is the supreme law of Islam. Revelations were made through Angel Jubril to the Prophet. It contains 114 chapters and 500 verses deal with law. Any law or source inconsistent with provisions of the Holy Qur'an will be deemed null and void. The Qur'an teaches 4 basic principles: faith, worship, ethic and law. Other Holy Books include Injila (as revealed to Prophet Isa), Taorata (as revealed to Prophet Musa), Zabur (as revealed to Prophet Daouda).

2. Hadith/Sunna

This is the second source and it means a "way or rule or mode of life". It is the totality of the way of life and conduct of the Prophet comprising collected traditions or hadith of the acts and statements of Muhammed handed down over the years. Although the Sunnah emanates from the Qur'an, it goes beyond main principles of the Qur'an. It expounds the Qur'an. It is sometimes referred to as the living Qur'an. The Qur'an in several verses state that the Messenger should be obeyed. Hadith literally means 'a saying conveyed to a person or that which has happened and hence includes sayings and doings of the Prophet.' Hadith is of 3 kinds

i. Sahih
ii. Hassan
iii. Daif

Hadith and Sunna are basically the same as they relate to pronouncements, actions and activities of the Holy Prophet.

3. Ijma

Jama'a means 'to add'. Literally, it means consensus of opinion of Muslim jurists or scholars. It is rigid and flexible. Rigid because it comes from the absolute principles of Islam and flexible because it keeps track with changes in the Muslim society. Qur'an also states to obey those in authority. Ijma is binding on Muslims in so far as it doesn't conflict with the Qur'an.

- Ijma of companions of the Prophet
- Ijma of jurists
- Ijma of people

The first two are more authentic than the last.

4. The Qiyas

Qasa means to weigh or measure. It is a process of deduction by which the law of text is applied to cases which though not covered by the language of text or governed by reason of the text. Qiyas is analogical deduction based on Qur'an and Sunnah. Individual opinion resulting on deduction must be based on Qur'an and Sunnah.

Qiyas is very important, valid and authentic. Before it is valid, following conditions must be fulfilled

a. Original order in text to which analogy is sought must be capable of being extended

b. Where law of text in original order is beyond comprehension, analogy cant be applied

c. Original order of Qur'an/Hadith to which the Qiyas is to be applied mustn't have been abrogated or repealed

d. Result of Qiyas must not be inconsistent with Qur'an and Sunnah

e. Qiyas should to be ascertain law not determine meaning of words used

f. The cause must be a compelling factor; idea intended by Sharia; it should be apparent and not ambiguous.

Qur'an and Sunnah are binding sources; they are major and distinct and they are also divine sources. Ijma and Qiyas, though are human sources, are also binding but there is a greater emphasis on two earlier sources.

INTERNATIONAL LAW

International law refers to the law regulating affairs of sovereign states and in some cases non-sovereign states. The world is now a global village. International law makes one relevant, after leaving the country, one is subject to international law. Although international treaties impose obligation on States that are members, they aren't necessarily laws within territory of the State. **Section 12** provides that for any international treaties to have the force of law in Nigeria, it must have been domesticated. "No treaty between Federation and any other country shall have the force of law except to extent to which the National Assembly has enacted it into law." And when such has been domesticated, it is the statute implementing the treaty that is the source of law rather than the international treaty itself. They have preeminent status amongst domestic statutes but they are still domestic statutes nonetheless and are subordinate to the Constitution. In **Abacha v. Fawehinmi**, the respondent claimed his detention was a breach of his fundamental human right as guaranteed by Constitution and African Charter on Human and People's Rights (Ratification and Enforcement) Act. The court noted that the provisions of **African Charter on Human and People's Rights (Ratification and Enforcement) Act**, a treaty under OAU, had been enacted as part of Nigeria's municipal law in accordance with **Section 12(1)** of 1979 Constitution. But no matter how beneficial to the country an international treaty may be, it remains unenforceable if not enacted into law by the National Assembly.

SOURCES OF INTERNATIONAL LAW

1. Formal Source: this is the source from which a rule of law derives its force and validity.
2. Material Source: sources from which the matter is derived. It supplies the substance of law.

Article 38; Rule 1; Paragraphs a-d; Statutes of the International Court of Justice is the law establishing the International Court of Justice identified 8 sources of international law.

1. General Sources
2. International Customary Law/General Customary Law or Customs

3. Treaties
4. General principles of Law recognized by civilized nations
5. Judicial Decisions
6. Opinions of writers
7. Resolutions/General Assembly / Security Council
8. Codifications

The principal sources of international law are customs, treaties, and general principles recognized by civilised nations. While the subsidiary sources are opinions of writers and judicial decisions.

Customs

It is defined as constant, consistent and uniform usage accepted as law. In between nations, there's a practise which has existed for a long time and is generally acknowledged by law. Application of international law isn't automatic. Before international law will intervene in disputes, the parties must subject themselves to jurisdiction of the International Court of Justice (voluntary jurisdiction).

Treaty (also known as international covenants)

Treaties are international agreements between two sovereign states or between a sovereign state and a non sovereign state. It is governed by the maxim 'pacto sumt servanda'which means all obligations must be respected. Once you sign a treaty you're bound.

General Principles of Law recognized by civilized nations

These include equality, he who seeks equity must come with clean hands, fair hearing, fundamental human rights, justice delayed is justice denied and so on.

HIERARCHY OF SOURCES

Treaties are formulated to replace or codify existing customs and sometimes they may fall out of place and be replaced by new customary rules. It is difficult to say which source is superior as it depends on circumstances. General principles of law recognized

by civilised nations are in third place because they complement customs and treaties. Opinions of writers and judicial decisions are subordinate in the hierarchy.

NATURE OF NIGERIAN SOCIETY

The Nigerian society is a very diverse and heterogeneous society, that is, it is multi ethnic, multilingual, multi-religious etc. As a result of this complex diversity of Nigerian society, there are various beliefs, traditions, customs, laws etc. There is an agglomeration of laws. There could be conflict between English law and Customary law or even within the same Customary law, or between English law and Islamic law. Such conflict is called conflict of laws. Nigeria operates an integrated legal system and parties to a dispute may wish to rely on different systems of law. There could be conflict when parties involved in a transaction governed by one system enter into another transaction governed by a different system. There could even be conflict between federal and state law. On the Concurrent list, both federal and state government can legislate on matters contained there but what happens when there's a conflict between the two. **Section 4(5)** espouses the doctrine of covering the field. Law of National Assembly will prevail and the law of the House of Assembly will be void.

Customary Law will normally be applicable in the following:

i. Where parties are natives and transaction is subject to customary law

ii. Where transaction is between native and non native but substantial injustice will occur if customary law is not applied.

iii. Where statute provides that customary law should apply.

iv. When parties enter contract requiring customary law to appl

Customary law will not apply when

i. Parties agree that customary law will not apply

ii. When from the nature of transaction, it could not have been contemplated that customary law will apply, that is, the transaction is basically unknown to customary law e.g. writing a will as seen in **Adesubokan v. Yinka.**

INTERNAL CONFLICT OF LAWS

Because of abolition of customary criminal law, virtually all cases of conflicts are civil matters. You cannot use customary law to try a criminal case. While rules of customary law are subject to provisions of relevant statutes, it may sometimes be seen as an alternative and then raises conflict between customary law and a statute. But otherwise, a statute will normally override any conflicting rule of customary law.

CASES BETWEEN NIGERIANS

Section 20(1) of Cross River High Court Law states that no one should be deprived benefit of a rule of customary law that has passed the test of validity and this does not include those that are not normally entitled to the benefit of customary law, that is, foreigners. See **Labinjoh v. Abake**. The general rule in this case is that customary law applies to the matter in controversy between natives although there are two exceptions. In **Labinjoh's Case**, an "infant" in English law sense was sued for goods supplied to her but since she was an infant (under 21), she could not be sued in accordance with the Infants Relief Act. Even tough the parties were natives, customary law could not apply.

Exceptions

Section 20(3): No party shall claim benefit of local custom if it appears that such person agreed or must be taken to have agreed that his obligations in connection to such transaction should be governed by some law other than the local custom or that such transaction is unknown to the local custom. The two exceptions therefore are

i. When the parties agree that another law would apply
ii. Where the transaction is unknown to local custom

1. Express or Implied Agreement:

An agreement to be bound by English law may be expressly stipulated in the transaction. Courts may infer that it was the intent of the parties to be governed by English law in such transaction;

Griffin v. Talabi, the vendor issued to the vendee a document purporting to convey said land but it was defective and not able to transfer property under English law. The

court was urged to apply customary law since they were both natives but it was held that since the parties knew the transaction was under English law, they must have intended it to be governed by that said law.

Okolie v. Ibo, the court considered the lifestyle of parties (occupation), nature of transaction and commodity involved to determine the applicable law. This case involved two Ibo businessmen contracting a petrol station in Jos. English Law was chosen to be applicable over Islamic Law or Ibo customary law.

Nelson v. Nelson, a land was purchased by the eldest of three brothers with proceeds from sale of part of another land which they held under customary law. Despite use of English law in the new purchase, the other 2 brothers never intended to give up their interest under customary law. It was held that customary law hadn't been displaced by their acquiescence to the original conveyance being done in English form.

Villars v. Bafoe, the plaintiff got letters of administration under English law in respect of the deceased's estate. The defendant claimed right to the estate under native law and custom. The court held that the plaintiff' personal election to be bound by English law did not displace the rights of other members of the family under customary law.

Will election or choosing of English law bind the party choosing it against outsiders even where clear that outsider concerned wasn't a party to the agreement to be so bound? **Green v. Owo** is a case which answers the question affirmatively. It was held that as the plaintiff had agreed to be bound by English law, though the agreement was not entered into with the defendants, he remained bound by English law and could not claim benefits under customary law. Conveyance was in English form and was also unknown to customary law as it was in form of a public auction.

2. Transactions unknown to customary law

But what transactions can be deemed unknown to customary law seeing as rules of customary law have been adapted often to accommodate new changes in society and issues which were once unknown to customary law have received benefits of

customary law. In **Salau v. Aderibigbe**, a hire-purchase agreement was held to be unknown to customary law and only recognized by English law. In **Green v. Owo**; a public auction was unknown to customary law.

But wait, is a transaction unknown to customary law because it has no direct equivalent in local community or because it differs in details from transactions known in local communities. Secondly, is the transaction unknown because the subject matter is a strange object? Despite all these, this exception isn't completely useless. And the alien nature of transaction is an indication that parties could not have contemplated application of customary law in the transaction.

From all these it would be concluded that English law would apply

1. When a transaction is unknown to customary law
2. When parties agree transaction will be governed by English law
3. When parties are deemed to have agreed by conduct that English law would apply.

Koney v. Union Trading Company where the plaintiff ordered a machine from Europe and it was held that the English law would apply since head approached an European trader for goods and not a local trader.

CASES BETWEEN NIGERIANS AND NON NIGERIANS

The general rule here is that a transaction between a Nigerian and a non-Nigerian cannot be governed by customary law. English law governs such transaction. See **Koney's Case**

Exceptions

Customary law will apply in a transaction between a Nigerian and a non Nigerian where it appears that substantial injustice will arise if any other law other than customary law is applied. See **Nelson v. Nelson** and **Ajayi v. White.**

Sometimes the mode of marriage influences what type of law would apply under a dispute. Cole v. Cole held that when married under Christian tradition, English law would be applied. See **Savage v. McFoy;** and **Fonsesca v. Passman** where the plaintiff was a widow of Julio Foncessca and she claimed she'd married the deceased, a European, according to native law and custom but it was held that the plaintiff wasn't

a lawful widow of the deceased for the purpose of administering his estate. A European domiciled in Nigeria cannot be subjected to customary law. Another thing that influences law that would apply is lifestyle, **Smith v. Smith.**

CHOICE OF CUSTOMARY LAW

There were never really matters of conflict in the past, but now, the plurality of customary laws has brought about conflicting issues. General attitude was to adopt a person's religion e.g. Islamic law or ethnic origin to determine his personal law but it was argued in **Re Alayo** that there is no personal law in Nigeria and this was said to be correct in **Olowu v. Olowu**. The rules governing what customary law will apply now depend on subject matter. But the general rule is that law to be applied will be native law prevailing in area of court's jurisdiction or the law binding the parties.

CONFLICT BETWEEN ENGLISH AND ISLAMIC LAW

English law would apply in a transaction which is unknown or foreign to Islamic Law e.g. **Adesubokan v. Yinka**

Succession to Property

The general rule is that the personal law of the deceased will be held binding on the parties and this applies to the exclusion of customary law prevailing in area of court's jurisdiction. See **Ghamson v. Wobill.**

Tapa v. Kuka where Nupe law, being the personal law of the deceased, was applied in respect of his estate instead of the Lagos Yoruba law, though the property was in Lagos. It was held that in cases of intestate succession, the personal law of the deceased is the applicable law.

The court may apply law of the place of jurisdiction as alternative when the personal law cannot be established; Ekem v. Nerba.

Land Matters

Law applicable here is that of the place where the land is located. This aligns with the principle of **lex situs**, that is, law of the place where the land is situated; **Ukeje v. Ukeje.**

It can be agreed that

1. Where both parties are subject to single law different from the one prevailing in the area of court's jurisdiction, court would apply the law binding both parties, or, lex situs for land matters.
2. Where both parties are subject to different laws, court should apply the law parties agreed or presumed to have agreed upon.
3. Where there is no express or implied choice of customary law, courts should apply customary law to which the parties, subject matter and entire transaction are most significantly connected.

Osuagwu v. Soldier: Where law of the area of court's jurisdiction differs from the one binding the parties e.g. where a non Muslim is a party in a case before a Muslim court in an area where Muslim law prevails, native court will be reluctant to administer law prevailing in that area. If it tries the case at all, it will administer the law binding the parties.

In cases involving an individual born into one community but living the rest of his life in another community, his personal law would very likely be changed. A person may change his personal law by changing from one cultural group to another and this culturization by assimilation doesn't take place by just settling in another place. Such settlement must be for such a long time that the settler merges with the natives of the people.

Personal law by Niki Tobi is the law the deceased would normally be subject to when he was alive. When one lives his whole life in a place different from his place of birth, has chosen to be part of that community, been accepted as a member, acquired property by virtue of being a member of that community, married women belonging to that community, he is deemed to have chosen the law of that community as his personal law. Distribution of estate is done according to the personal law of the deceased at the time of his death. See **Olowu v. Olowu** where the deceased was an Ijesa man by birth but lived most of his life in Benin city, he married Benin women who birthed children, two of them which are the plaintiff and defendant. The deceased applied to be naturalized as a Benin citizen and so he was able to acquire a

lot of landed property in Benin. After dying intestate, the plaintiff sought to administer his estate according to Benin customary law but the defendant argued it should be according to Ijesa customary law. Benin customary law was held to be the applicable customary law as the personal law of the deceased. One may change his personal law by changing from one cultural group to another.

In a conflict between the constitution and other laws, the Constitution is supreme and shall prevail over any other law inconsistent with it and to which shall be declared void to the extent of its inconsistency. **Section 1(1) and (3).**