NOTE OF LESSON FOR LEGAL METHOD
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NIGERIAN CUSTOMARY LAW AS SOURCE OF LAW AND SECONDARY SOURCES

By
Dr. Grace A. Ahiakwo

1.0 Introduction

Nigerian customary law constitutes a significant source of law within the the country's legal system. It predates the modern Nigerian state and reflects the diverse customs and traditions of various communiities. It is a system of law that evolved from the tradition, culture or custom of the indigenous communities of Nigerian used to regulate the conduct of the people. It is the oldest source of Nigerian law, having existed in the various communities and groups long before the advent of the British into Nigeria. With the British colonization of Nigeria, the legal system was modified to incorporate customary law alongside the common law. Obaseki described customary law as the organic or living law. It is current, dynamic and adaptable.

Customary law applies primarily in personal matters, such as marriage, inheritance, land tenure, Customary arbitration and Chieftaincy affairs. In matters of inheritance, customary law often governs the distribution of property especially in cases where the deceased did not make a will. The Land Use Act vests all land in a State Governor, but customary rights of Occupancy are recognized, allowing individuals to hold and use land according to their customs.

1.1 Nature and Characteristics of Customary Law

a. Develops from Custom

Customary law, also known as native law is a body of rules and traditions accepted by community members as binding. Prof T.O. Elias described it

as a body of customs accepted by members of a community as binding upon them.

b. **Dynamic in Nature**

It is characterized by its organic nature, evolving and adapting to societal changes. The Supreme Court in Okogbue's case said, customary laws were formulated from time immemorial, as society advances, they are removed from its pristine social ecology. However, this organic nature also means it lacks uniformity, varying significantly across different ethnic groups and regions. It governs various aspects of life, including land ownership, marriage, inheritance and dispute resolution. Justice Niki Tobi JSC defined it as the customs, rules and traditions which govern the relationship of members of the community.

c. Customary laws are **largely unwritten** excluding Muslim law. They are gotten from the practice of the people and are often ascertained through witnesses from the community.

d. **Constitutional Recognition**- The Constitution at S 315 (3) -(4) (b) and (c) recognizes the existence and continued application of customary law (existing law), provided it does not conflict with other any other existing laws; a law of House of Assembly; an Act of National Assembly; or any provision of the Constitution. Futhermore the recognition of customary law within the Nigerian legal system is enshrined in Section 18 (3) of the Evidence Act, which acknowledges that customary law is applicable in cases where it is not repugnant to natural justice, equity and good conscience.

1.2 Muslim Customary Law

Muslim customary law, unlike the indigenous customary law, is largely written, more rigid and uniform and based on the Islamic faith. It is the Maliki school by Imam Malik of Medina that is prevalent in the northern part of Nigeria. The Islamic law is derived from four major sources.

The Qur'an: This is the holy book of the Islamic religion and it contains Allah's revelations to prophet Mohammed, who is regarded as the last and greatest of his prophets and messengers.

The Sunna: This is derived from the life of the prophet and statements made by him handed down from one generation to the next.

The Ijma: This comprises unanimous agreements amongst legal scholars to provide for areas not covered by the Qur'an and Sunna and to resolve discrepancies.

The Qiyas: This is the permissible juristic analogical reasoning on situations not covered by any of the above sources.

1.3 Application and Limitations of Customary Law

The application of customary law in Nigeria is complex. While it remains a vital source of law, it is subject to certain limitations and controls.

Before rule of customary law is to be applicable, it is required to meet some basic criteria necessary for its validity and acceptance. It shall not be enforced if it runs contrary to Section 14 (3) of Evidence Act.

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

b. The rule must not be incompatible either directly or by implication with any law for the time being in force.

c. The rule must not be contrary to public policy.

The constitution and statutory laws often supersede customary law where conflict arise. This ensures that customary law does not contradict fundamental human rights or principles of justice. The application of customary law aslo frequently depends of judicial interpretation and recognition highlighting the dynamic interaction between customary norms and formal judicial process.

The validity tests for customary law are not applied separately, but are applied jointly as one test in the determination of the cases that come to

Court. The implication is that where a custom fails any of the tests, it is not enforced.

1.4 Repugnancy Test

The Repugnancy test requires that a custom should not be contrary to Natural justice, equity and Good Conscience. Natural justice is divine or godly justice, rightness, fairness or right judgment. It has two main pillars to wit: *Audi alteram partem* and *Nemojudex incausasua*. *Audi alteram partem* is a latin phrase which means hear both party or the various sides in a dispute before giving judgment or decision; whereas, *Nemojudex in causasua* means no one should be a Judge in his own cause or be both prosecutor and judge in a matter in which he is a party or has interest or stake.

Equity means fairness, just, right or justice, to this end, a custom must be equitable or bring equity. Good Conscience means a clear conscience towards God and man. It is a conscience that is good and just towards everyone and the world as a whole, accordingly customs should be formulated with a good and clear conscience, not arbitrary, retrogressive, wicked, oppressive, malicious, or condemnable.

Repugnancy tests has been applied to various issues of customary law including; paternity and custody of children, right to freedom of association of a person, widow inheritance etc. See cases of *Edet v Essien, Agbai v Okogbue & Amacree v Kallio.*

In *Edet v Essien* (1932) 11 NLR 47, the applicant (the former husband of a woman) sought to get a child she bore for another man on the basis that she had not refunded his bride price as demanded by custom. The Court held that the custom that awards another man's child to a former husband was contrary to natural justice and repugnant to equity and good conscience.

In *Agbai v Okogbue* (1991) All NLR 137, defendants/appellants invaded the premises of the respondent in Aba, and seized and carried away his butterfly sewing machine, the respondent was a tailor by trade. The reasons for the invasion and seizure, according to the appellants, were that the appellants and the respondent weere members of the Umunkalu age grade in their village. The respondent was grouped under the age grade. The age grade had undertaken to build a health center for the village and had levied its members for the project. The respondent refused to pay up his levy of ₦109. The appellants contended, that grouping of persons into age grade, levying its members of financial contribution for their development and compulsory membership was a custom of their village, to this end, the respondent was bound to pay. The Court held that nobody can be compelled to associate with other persons against his will. Relying on section 26 of 1963, stated that the constitution guarantees every citizens freedom of choice, accordingly any purported drafting of any person into an association against his will even if by operation of customary law is in conflict with the Constitution and void. The Court further held doctrine of repugnancy affords the court opportunity for fine tuning customary laws to meet changed social conditions where necessary.

Meribe v Egwu (1934) The Supreme Court held that a customary law which permitted the marriage of one woman by another woman was repugnant to natural justice, equity and good conscience.

Mojekwu v Mojekwu (1997) The Court held athe a custom which allowed the surviving brother of a deceased intestate to inherit the landed property of the deceased to the exclusion of the widow and her daughters because she had no son, was repugnant to natural justice, equity and good conscience, and also unconstitutional for breaching the right to freedom from discrimination.

1.5 The Incompatibility Test

The incompatibility test requires that where a situation is governed exclusively by any law or statute for the time being in force, then customary law, is to give way for such law to take effect. Put simply, the rules of customary law should not clash with the provisions of the Constitution.

1.6 The Public Policy Test

Public Policy Test means public welfare, public good, and public interest, it extends to the security and welfare of the individual and the state in general. Anything that is not in the interest of the people and the state, is against public policy of government. In *Okonkwo v Okagbue* (1994), an alleged custom whereby a woman married a dead man, nominally in order to bring forth children for him, in his name was held to be contrary to public policy. Also in *Amachree v Kallio* (1913), The plaintiff under custom laid claim to ownership of an open navigable river and sought an injunction to restrain the defendant from fishing. The Court held: that the custom was contrary to public policy and the common right of the public to fish in open navigable rivers must be maintained on the ground of public policy and public interest.

1.7 Ascertainment of Customary law

There are two methods of proving or ascertaining customary law in Court. This include by **giving evidence** to establish it and by **judicial notice**. There is a belief that judges should know all of the laws in existence. This belief is cemented by sections 72 and 73 of the Evidence Act which states that a court should take judicial notice of all laws. This means that once a law is stated by a party, it is not needed for the party to attempt convincing the court that the law exists. This benefit does not extend to customary law as this status is denied from customary law by section 14

of the Evidence Act. **Customary laws are to be treated as a question of fact and not a question of law**. And so just facts are to be proved before a court, customary laws are also to be proved by the party asserting that such a customary law exists unless that customary law has been applied by courts so frequently that it has obtained judicial notice and has become accepted by the courts. Such a customary law would not need proof. Custom has to be proved as a fact by calling evidence, at least at the first instance, in order to establish its existence. *Ekpan v Uyo* (1986). The standard of proof required by law is proof by a preponderance of evidence.

The position was alluded to in the Gold Coast case of *Angu v. Attah* and the Federal Supreme court stated in *Giwa v. Erinmilokun* that it is a well-established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety, and has been so frequently followed by courts that judicial notice would be taken of it without evidence required in proof.

This may be justified with the fact that there exist too many customary laws for the judges to know all of them. And worse still, judges are trained in English law and not customary law; customary law is largely unwritten or unrecorded and judges hear of some of these custom for the first time, when a case is brought to court; witnesses and expert witnesses may present false testimonies to support non-existent custom.

1.8 Judicial Notice

Section 14(2) of the Evidence Act states that a custom may be judicially noticed by the court if it has been applied by a superior court or a court of

co-ordinate jurisdiction in the same area to the extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon that custom as binding in relation to circumstances similar to those under consideration. There have been questions over how many times a customary law must have been applied before it can be judicially noticed. While in *Cole v. Akinyele*, the court took judicial notice of a customary law which had only been previously applied in the one case of *Alake v. Pratt*, another court held in *Osinowo v. Fagbenro* that one case application was not enough. The Supreme Court has settled this in the case of *Romaine v. Romaine* by stating that a custom can only be judicially noticed after frequent use in several cases, and not in one case alone.

As to the geographical location, the cases being relied upon for the custom to be judicially noticed must be from areas which share a common custom with the same area in question. In *Taiwo v. Dosunmu*, the Supreme Court held upon appeal that a Ghanaian customary law cannot be applied in a case in Lagos. Because a custom is binding in area A does not make it binding in area B except it can be shown that they both share a common custom. In summary, the situation is not that may be easily resolved by a legislation specifying the number of previous decisions that are sufficient, to let another court take judicial notice, therefore, it is good enough to leave the issue of number of times to judicial discretion, to be exercised by court in the light of the circumstances of the particular custom in question.

1.9 Evidence of Customs

When a custom has not been judicially noticed, it has to be proved by the party asserting that it exists. Islamic laws are also to be proved. Provision

for this is made in section 14(3) of the Evidence Act. Sections 56 and 58 state how customary laws may be proved.

56(1) When the court has to form an opinion upon a point of…native law and custom…the opinions upon that point of persons specially skilled in such…native law or custom…are relevant facts.
56(2) Such persons are called experts…
58 In deciding questions of native law and custom, the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognized by natives as a legal authority are relevant.
From the foregoing, it can be seen that the law recognizes two ways by which customary law may be proved. It may either be proved by witnesses or by books.

Witnesses: Customary law may be proved through witnesses. The witnesses are to be chiefs or other individuals who may be reasonably expected to know the customary law of that area. The court is not obligated to accept such evidences given by witnesses, and may choose to not accept it the same way evidence to prove facts may not be accepted in cases. The court would form its own opinion based on the evidence before it. In *Nwabuba v. Enemuo*, the Supreme Court accepted evidence given by a traditional ruler as to the customary law of his area while in *Adewoyin v. Adeyeye*, the same court refused the Ooni of Ife's testimony concerning the Yoruba customary law of his region when it was given for selfish reasons.

Books: The court may accept books which the natives recognize as containing their customary laws for the ascertainment of customary laws. This has been done in cases like *Adeseye v. Taiwo* where Ajisafe's Law

and Custom of the Yoruba People was relied upon and *Oyelowo v. Oyelowo* where Nwabueze's Nigerian Land Law was relied upon. The court may also reject the opinion expressed in books as it did in *Idundun v. Okumagba* when the court doubts the validity of the law. It is not necessary that books are presented as evidence by the parties before the courts take notice of them as the Supreme Court stated in *Orugbo v. Una* that there is no law against taking notice of such books not presented by the parties.

NIGERIAN CASE LAW/JUDICIAL PRECEDENT AS SOURCE OF NIGERIAN LAWS

2.1 Case law refers to legal pronouncements made by Judges or rules laid by courts in the performance of their interpretative and adjudicatory functions.

2.2. When disputes are submitted before the court for adjudication, the Judges after thorough examinations of applicable laws, and hearing both parties interpret the laws and lay down rules.

2.3 Case laws also refers to the precedents and authority set by previous court rulings. A precedent or authority is a legal case that establishes principle or rule. The realist school of law (Justice Oliver Wendel Holmes) says that nothing becomes law until and unless pronounced by the Court. "*Prophecies of what the court will say or do and nothing more pretentious*"

Judicial Precedent originated from the phrasing of the principle in the latin maxim *stare decisis* meaning to stand by decisions and not disturb that which is settled. In legal context, this means that courts should abide by precedents and not disturb settled matters. The doctrine evolved in medieval England in the 1500 at a time when the law was formed and

judges wanted greater consistency and standardization. Medieval judges were often appointed not based on professional skills but on social status. The development of common law of stare decisis required that the judges make more rational and consistent decisions.

As time progressed, the decisions handed down from Britain during the Middle Ages became stable, consistent and just than compared with other legal systems. The doctrine of precedent is one of the principles that underpin common law. The judge was to locate and view legislation that may relevant and interpret same if necessary, the judge must also locate and review earlier ruling on the same subject matter that has same facts and circumstances and decipher whether those precedents will apply to the case and its facts and if there is no precedents applying to the case, he was to establish a new precedent that encompasses both an obiter dictum and ratio decidendi. Ratio decidendi of a case is the principle of law on which a decision is based. Obiter dictum means statements, made by way of illustration, examples, observations, analogue or even speculations which do not form part of the main reason for the judgment but may be persuasive. Ratio decidendi (binding precedents) are those from higher courts that lower courts must follow. Persuasive precedents, on the other hand are those from courts of equal or co-ordinate jurisdiction, it may influence but do not compel a court's decision.

The court hierarchy is critical for the doctrine of precedent to function effectively. The Supreme Court is the highest Court of Land in Nigeria. It is instructive to note that the decisions of the Supreme Court shall be final, see Section 235 of the CFRN. *Citec Int Estate v Francis* (2016), in this case, the Supreme Court pronounced that it cannot sit on appeal over its judgment. Note that where it is proven that the Supreme Court's decision was erroneous, the Court can depart or overrule its previous decision. See *APGA V Al-Makura* (2016) EJSC (Vol 37) 98 (SC).

The Court of Appeal and all other courts, including High Court, Customary Court of Appeal, Magistrate and Customary Court are bound by the Supreme Court decisions, also the High Court are bound to follow the decisions of Courts above it. In Customary Court of Appeal of *Edo State v Aguele & Ors* (2017) the question before the court was to determine whether the State High Court has jurisdiction to review the decision of the Customary Court of Appeal? The Supreme Court held that the High Court and the Customary Court of Appeal are Courts of co-ordinate jurisdiction. Hence State High may choose to follow the precedents. Note that the doctrine of judicial precedent does not apply rigidly to customary/Area courts.

Judicial Precedent fostered stability and enhanced the development of a consistent and coherent body of legal rules. It has preserved the continuity and manifest respect for the past. It ensures equal treatment for litigants similarly situated. It helps to maintain order within the judicial system. It spares the judge the task of re-examining rules of law or principles with each succeeding cases and gives a desirable measure of predictability of the law.

B. **SECONDARY SOURCES OF NIGERIAN LAW**.

3.1 Secondary sources are opinions of legal scholars, commentators, philosophers or jurists on what the law says. They do not carry a dominant legal weight or binding effect. The Legal authorities contained in the secondary sources are diluted and persuasive. Secondary sources are always referred to in legal research to buttress what the Law on the subject matter already says. Secondary sources can be classified into the following:

a. Textbooks

b. Articles including Journals, periodicals

c. Law Dictionaries

d. Magazines, Newspapers

e. Unpublished works- Projects, Dissertations, Thesis etc.

f. Government Reports.

3.2 TEXTBOOK AS SOURCE OF NIGERIAN LAW

Textbooks summarises a single or specific topics. They provide thorough discussions or treatment of a subject matter. Text books relies on other primary source of law and the author explains his view of the law. Textbooks further relies on case laws. Textbook has a superior force of a secondary source of law.

3.3 ARTICLES/JOURNALS AS SOURCE OF NIGERIAN LAW

An Article is a publication that contain summarized doctrine of law. The Author introduces the subject matter, traces the development, history and theories associated with the topic, cites primary laws relating to the topic and proffer his/her recommendations. We have Articles that are published in referred Journals which are subject to peer review. There are local, national and international journals. **Law Journals** are published articles that are comprehensive studies of contemporary legal issues and are generally written by legal scholars. Periodicals offer important commentary on Law. They may be published once, twice or quarterly.

3.4 LAW DICTIONARY AS SOURCE OF NIGERIAN LAW

Law Dictionary defines words or phrases as used in legal parlance, the meaning of which differ from the lay man's understanding. Law Dictionary contains meaning of latin maxims which can assist a legal researcher understand the law. Black Law Dictionary (10 edn) has served a very useful purpose.

3.5 NEWSPAPERS/MAGAZINES AS SOURCE OF NIGERIAN LAW

Newspapers and Magazines provide both the background information of a subject matter. The provide contemporary legal developments. They report news on every facet of human life. In Nigeria, we have The Punch, Vanguard, Guardian Premium Times and a vast majority of others. We also have legal Newspaper like Lawyers Weekly and Law Times.

3.6 UNPUBLISHED WORK AS SOURCE OF NIGERIAN LAW

Unpublished works include Undergraduate Long Essay/Projects, Dissertations and Thesis. They are written by Students and covers a wide range of topics. Most of the students devoted time to carry of field work, interviews or distributed questionnaires. Others carry out intensive desktop review on this vast areas. Thus this unpublished work can serve as an invaluable source of law.

3.7 GOVERNMENT REPORTS AS SOURCE OF NIGERIAN LAW

This is Government Reports on a particular projects like Development, Construction, Human capital empowerment in rural areas, Human Rights reconciliation reports amongst others. This can form an important source of law.