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Introduction

A good understanding of the Nigerian legal system, like the comprehension of law itself, requires knowledge and skill in a number of disciplines. **Lord Denning** once observed that to become a good lawyer, one needs more than the law: a little bit of history, sociology and logic. **Kahn-Freund** is of the view that 'legal education should teach both law and its context: social, political, historical and theoretical.'

Accordingly, this course will not follow the Nigerian legal system traditional approach to the study of law which focuses on the institution of the law, predominantly the courts, where legal rules and principles are enforced. That approach assumes and analyses legal system and law as distinct from normal every day activity.

Instead, this course will consider law and the legal system as a socio-political institution, where legal system is studied in consideration of the values that law reflects and supports. It will also attempt to introduce an element of critical understanding and awareness into our areas of enquiry. I trust this pattern will better assist students in their study of law and resolution of legal problems. Indeed, it is critical and analytical thought that distinguishes a good student from a mundane one.

Meaning of a legal system

According to Collins' dictionary, a legal system is a set of laws of a country and ways in which they are interpreted and enforced. For our purpose, this means the totality of laws, rules and their machinery of administration in Nigeria.

Idea of a legal system

Let us begin with the immortal quote of **Thomas Jefferson** from the American Declaration of Independence. 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain

inalienable rights that among these are life liberty and pursuit of happiness. That to secure these rights, governments is instituted among men.'

Human rights and freedoms also known as natural or inalienable rights are generally referred to as fundamental human rights under the 1999 Nigerian constitution. These are moral principles of dignity and respect accorded to every human being and protected as legal rights under municipal and international law. They are said to be inherently attached to human life.

Of all the privileges of life, none is greater than the privilege of freedom. The blessing of freedom bestows upon every human being the ability to pursue his individual happiness to the fullest; his only inhibitions are those duties necessary to enable others do the same. Thus, individual freedom must be balanced with duties he owes to the society in which he lives.

But rights mean nothing if they cannot be enforced. **Sir William Blackstone** in his eighteenth century classic, Commentaries on the Laws of England, noted that "for in vain would rights be declared, in vain directed to be observed, if there is no method of recovering and asserting those rights, when wrongfully withheld or invaded."It is a lost labour to have laws if such are breached without consequences.

To achieve obedience to law, boundaries of rights and wrongs are established and ascertained by law. The law is also backed up by sanctions i.e. the evil that may follow the breach of the law. **Lord Denning**, in a public lecture, "Freedom under the Law" pointed out that "freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief. Every society must have the means to protect itself from marauders." Peace and security are 'themselves safeguards to freedom.' Inevitably, the quiet enjoyment and protection of all rights are dependent upon obedience to law.

Therefore, free societies are usually societies of laws and legal systems with rules prescribing standards of behaviour that binds a citizen to contribute his own part to the peace and subsistence of the society.

On another breath, **Hans Kelsen** argued that a viable legal system is based on a Grundnorm or basic norm. Grundnorm being the fountain of authority from which all other laws obtain their validity. The Grundnorm might be some dictates or propositions from a dictator, sovereign or constitution.

To understand the Nigerian legal system, one needs first to know something about the context in which our legal system operates i.e. our Grundnorm or constitution. By the way, a constitution is a set of rules which detail's a country's system of government. It establishes and validates the component institutions and principles in a legal system, and its ultimate authority depends on the political framework of the society.

What is law?

The concept of law is open to many definitions depending on the context of its use. Law, as known to jurists, is that which is announced in and enforced by courts. For the physicist, it means an established method of action. **Sir William Blackstone** defines law as "a rule of action prescribed by a superior to an inferior, which the inferior is bound to obey."

On his part, **Sir John Salmond** broadly defined law as 'the body of principles recognized and applied by the state in the administration of justice. 'In conclusion, law is a rule which prescribes human behaviour in a given society.

Nature and functions of law

One fundamental characteristic of all societies is the presence of some degree of order which permits interaction of its members. Although order is necessary, the form of its creation and maintenance differs from one society to another. Some societies have strictly enforced social rules, whereas others have relaxed social rules.

In our society, law plays an important part in the maintenance of order. However, it is worthy of note that law is not the only means of social control. It also involves questions of moral and political nature.

The most obvious way in which law contributes to peace and order is seen in how it deals with conflicts through the judicial institutions and procedures. Nonetheless, it is difficult to construe one single order but rather a variety of orders that law may seek to regulate. These include, among others:

Public order;

Political order;

Social order;

Moral order; and

Economic order.

The ability of law to shape different orders is itself shaped by wider political and social forces. In this dynamic, law is not a neutral force detached from society. Thus relationship between law and orders in any given society can only be understood within the context of the political and social ideology that supports the society. The orders will now be taken in turn.

Law and public order

Many will argue that the preservation of public order is the primary function of law. But maintaining public order is invariably not an exclusive preserve of law; some other factors such as pressure from peers and family play an important part as well. However, this is not comparable to the power of sanctions that law wields in preserving public order.

Nonetheless public order cannot be preserved at the expense of human rights and civil liberties. The ability of people to freely express their opinions and beliefs is an important aspect of life in a democratic society. Although some limits are necessary to prevent obscene and defamatory remarks that may incite religious or ethnic hatred, freedom of speech and thought still need to be maintained within those limits.

Law and political order

Another function of the law is to prescribe the political order of the country. This order is usually set out in the constitution. The Nigerian constitution sets out broad principles concerning who makes law and how, and allocates powers between the main institutions of the State, executive legislative and judiciary, both at federal and state levels.

Our constitution under **Chapter II** has also prescribed for democratic freedom, social justice and national unity to be the values upon which the country should be governed.

Law and social order

Law also enhances a country's 'social order.' Meaning of social order is a subject of debate and is not our beat here. What is clear, however, is that

there are differences between individuals in every society. This may arise from differences of ability, wealth or income, class or birth. More often the law may seek to protect this social order as reflected in our property and contract laws. However, the law should do better to promote a more dynamic social order.

Modern rules of law must have as their prime objective the promotion of equality of opportunity. Our laws and policies must be designed to combat discrimination on grounds of gender, ethnicity, faith and age.

It must be emphasized here that policies developed and enshrined in our laws, as found under Chapter II of the constitution, do not mean a thing in achieving such a noble feat. It takes a political will and sustained effort to unlock our society from the bind of the structures of insensitivity and corruption.

Moreover, the extent to which law and legal system can deliver social justice is limited. Social justice is more a political concept than a legal one. While there may be aspirations towards a more equal and just society the reality is that our society is far more unjust and unequal than any time in its short history.

Even if ability of law to foster social justice is curtailed, the law should do more in protecting the weak from the powerful and combating the cancer of corruption that has ruined everything we hold dear.

Law and moral order

The function of the law in providing support for the moral ordering of society is highly controversial, to say the least. Some theorists argue that the law should mirror those issues of morality that people think should inform the way we behave. Others argue that morality, which is subject to place and time, should not be a rule of law.

There are apparent difficulties in seeking to equate law and morality, especially, because of the fact that opinions may vary on a given moral issue. Nevertheless, many rules of law are founded on a moral view of a society. In fact, much of the law that seeks to regulate individual relationships is based in concepts of morality, like marriage laws.

Another good example of such laws is our common abhorrence for murder, reflected in rules of criminal law which outlaw such behaviour. Arguably, rules of criminal law that reflects some common morality may be more effective in

regulating people's behaviour than those rules which do not. Even so, the law cannot penalise all undesirable behaviours.

Law and economic order

The issues raised here are similar to those discussed under social order. In Nigeria our dominant economic philosophy is the market economy. Our laws recognize rights in private property. They define ownership rights as well lay down procedures for transfer of ownership from one person to another.

Mechanisms are also put in place to enforce those rights. The notion of property developed in law has assisted in the development of the capital market framework and has continued to sustain it.

As with its function in the maintenance of social order, the law is also instrumental in the creation and supporting of the economic order. However, the law has also device some means of taming the excesses of market capitalism. A great number of modern law creates regulatory boundaries within which capitalist entrepreneur must operate.

Some of these regulations protect the environment while others protect interest of consumers. For example, a 'cooling-off period' within which the consumer can change his mind or housing laws designed to protect tenants from capricious landlords, and of course employment laws.

Incidentally, the law that helped and prepared the ground for capitalist economy to flourish is also responsible for limiting the excesses of market capitalism that can arise from lack of regulations.

Other functions of law are:

Resolution of social problems

In response to an ill which afflicts society, politicians create or amend an existing law to resolve such a problem.

Regulation of transactions and human relations

The law also creates a framework to regulate transactions and human relationships, like contracts, activities of professionals like lawyers and doctors, marriages, age of sexual consent, prohibited degree of consanguinity (incest), as well as treatment of women and children.

Educative function of law

The law also helps to shape and change some antiquated attitudes which may hamper peaceful co-existence. Examples are antidiscrimination laws that create rights enforceable by individuals as well as sending a general signal that such attitudes are not acceptable.

The above enumerated examples of functions of law are by no means exhaustive. It is also noteworthy that these functions are contingent upon the stage of development of any given society and the challenges it faces.

Categories of law

Law can be categorized in different ways. For our purpose we shall use a dual form of categorization which allows for comparison. This, of course, does not eliminate the necessity of repeating the same terms that can mean different things, depending on the context in which they are employed.

Municipal law and international law

Municipal law, also known as national law, is applied within each individual nation. Nation-states jealously guard their sovereignty and do not allow any imposition from outside, including that of laws.

International law, on the other hand, concerns itself with relationships and disputes between nations. This law is derived from various treaties, bi-lateral agreements and conventions. Individuals or juristic persons are the main subjects of national law while international law deals mainly with states. One should also be aware that private international law is concerned with choice of laws while public international law deals with relationship between States and State actors.

Unwritten law and written law

The unwritten law or the common law is literally not unwritten but is contained in the records of court, law reports, and writings of lawyers handed down from antiquity. They are laws and customs so old that it is difficult to ascertain their beginning with precision. Moreover, their force and authority lies in the fact that they have been used 'from time out of mind.'

The written laws or statute laws, on the other hand, are laws enacted by the legislative body and derive their authority from the legislative process. These are Acts, Laws and Edicts.

Common law and civil law

These terms are used here to signify the two predominant but distinct legal systems which have different approach to law. Common law in this context refers to the system of law that originated from England and adopted by many commonwealth countries and the United States. Common law is known for being a case law or judge-made law.

Civil law, on the other hand, refers to the Continental European law derived from ancient Roman law. The main feature of civil law is the codification of its main principles. Examples of civil law jurisdictions are Spain, France and Niger Republic.

Common law and equity

Common law here refers to the law that evolved in England from customs and judicial decisions. The word 'equity' means fairness and it forms the basis on which it operates. Equity is developed by the Court of Chancery to mitigate the pains caused by the strict formality of the Common Law Courts. These terms will be discussed further under English law.

Private law and public law

Private law deals with relations between individuals that the State is not directly interested or involved. The role of the State in matters of private law is limited in providing forum for individuals to channel and enforce their grievances. Examples of private law are family law, property law, contract law, tort (negligence) and company law.

On its part, public law relates to the inter-relationship of the State and the general population, in which the State itself is a participant. Matters of public sphere are issues that relate to the public interest of the state and the general public. Examples of public law are constitutional law, administrative law and criminal law.

It can be seen from this analysis that the category to which a dispute is assigned is of utmost importance. Nevertheless, contract law is seen as a classic example of private, but the extent of public law interference in areas of consumer protection cannot be underestimated. Likewise, the allocation of domestic matters to sphere of private law has led to the clamour by women organization that the State has denied them access to its power to protect themselves from abuse.

Civil law and criminal law

Civil law forms part of private law and involves the relationship between individual citizens. Civil law plays the role of providing individuals with the mechanism to assert and enforce their rights. Thus the State provides the avenues, but it is entirely upon individuals concerned to activate the machinery. The main thrust of civil law is to settle disputes and provide remedies between individuals.

Criminal law, on the other hand, is an aspect of public law that deals with conducts which are considered unacceptable and punishable. This involves the enforcement of some particular moral codes which the State, as representative of society, seeks to enforce.

Distinction between criminal law and civil law cases

Criminal and civil cases are distinguished in different ways. The prosecutor commences criminal cases, whilst civil cases are commenced by the claimant.

The terminology employed in criminal cases is generally different from civil cases. A person is either found guilty or not guilty. When found guilty the person is punished and sentenced appropriately. In a civil matter, if a person is found liable, he will be ordered to put things right. This is done by an award of money as compensation, known as damages although other remedies may be ordered as well.

The standard of proof in criminal cases is usually higher. A criminal case must be proved beyond all reasonable doubt. Civil cases, on the other hand, are proved on the balance of probabilities.

A summary of differences between civil and criminal law

	Civil law:	Criminal law:
Object of law	To uphold the rights of individuals	To maintain law and order
Person Commencing the case	Individuals affected	Usually State through Police or Counsel
Terminology	Claimant	Prosecutor
Standard of proof	The balance of probability	Beyond reasonable doubt
Decision	Liable or not liable	Guilty or not guilty
Powers of court	Usually damages, injunction, specific performance of contract, rescission or rectification	Prison, fine, binding over, discharge etc.

Sources of Nigerian law

Having considered nature and categories of law, let us now proceed to the sources of Nigerian law. The Nigerian law developed gradually over a period of time. The methods of developing law are known as sources of law. Hence, the expression 'source of Nigerian law' may mean the origin of our law or the place it can be found. It is pertinent, however, to point out that the Nigerian law is deeply shaped by our colonial history.

If France had been our colonial master, civil law would have been our law. For this reason, Nigerian law sprang from the English law and our customary law. The divisions of these sources now form our principal sources of law, which are:

Legislation,

Case law,

English law,

Customary law, and

Islamic law.

Legislation

Legislation or statute is a law enacted by a legislative authority usually in a written form. By the way, this is sometimes referred to as primary legislation. Although, the common law and equity continue to be important sources of law in Nigeria, statutes are now our main source of law.

Our National Assembly has power under section 4(2) of the constitution to make laws for the peace, order and good government of Nigeria. Successive governments in Nigeria, both military and civilian, have in many ways impacted our social, economic and political lives through legislations. For this reason, most of our laws today are legislations.

Legislations or statutes are in writing and therefore are referred to as written laws as opposed to common law and customary laws that have been developed by judicial decisions. Examples of statutes are the constitution, Criminal Code, Penal Code, High Purchase Act and Copyright Act.

Statute is usually named and distinguished in accordance with the power and authority of its maker, as follows:

Maker	Name called
National Assembly	Act
State House of Assembly	Law
Federal Military Government	Decree
State Military Government	Edict
Local Government Council	Bye Law
Authority or Agency	Subsidiary Legislation

Delegated legislation

Delegated or subsidiary legislation is another source of law that is increasingly assuming importance in our country. This is a legislation made by an administrative person or body upon the power given by the constitution or any enabling statute. Examples of these persons, among others, are:

The President,

Governors,
Chief Justice of Nigeria,
Ministries,
Commissioners, and
Public corporations.

Case law

Case law or judicial precedent refers to the source of law where decisions of judges in the past create law for future judges to follow. The system of precedent is based on the Latin maxim ***stare decisis et non quieta movere*** which is usually shortened to ***stare decisis*** and which is translated as 'stand by what has been decided and do not unsettle the established.' This supports the idea of consistency and certainty in law.

Binding precedent

The ability of courts to develop common law principles and interpret statutes rests essentially on the publication of law reports. But not everything in law report sets a precedent. The contents of a reported case can be divided into two categories:

Ratio decidendi

Precedent is only relevant and binding when it is based on the rule of law on which the decision is found. Judges will outline reasons for their decisions and the rationale for a judgement by outlining the principles of law used.

These principles are the binding part of any judgement and are known as ***ratio decidendi*** which translates the reason for the decision. This is what creates precedent.

Obiter dicta

The remainder of the judgement is called in Latin ***obiter dicta*** (singular ***obiter dictum***), which means 'statement by the way.' Any statement that is not ***ratio decidendi*** is other things said and judges in future cases are not bound to follow it although it may be of persuasive influence if judges in later cases choose to follow it.

Distinguishing

The facts on which the ratio of one case is based hardly precisely replicate themselves in a later case. Thus lawyers wishing to argue that a particular precedent does not apply to the case at hand will seek to distinguish the two facts situations, thereby, hope that the earlier decision will not be followed.

Per incuriam

Given the large number of reported decisions, there may be situations where a decision reached in one case was reached in ignorance of other relevant decisions. The argument is then made that the precedent in question was made incorrectly.

Overruling

This is where a court in a later case decides that the legal rule or ratio in a previous case is wrong. This may occur when a higher court like the Supreme Court overrules the Court of Appeal or itself.

Reversing

This is where a higher court overturns the decision of a lower court on appeal in the same case.

Hierarchy of courts and precedent

In this country, courts operate a rigid hierarchy of judicial precedents. Every superior court is bound to follow any decision made by a court above it. The hierarchy of courts operate as follows:

Supreme Court

This is the final and ultimate authority in the hierarchy of courts. All courts in Nigeria are bound by its decision including itself, but may overrule itself.

Court of Appeal

All courts below it and itself are bound by its decision, except that it is free to choose between two conflicting decisions of its own.

High Court

This court binds itself and lower courts.

Magistrate Courts

They don't bind any court even themselves.

Courts of co-ordinate jurisdiction

When courts have equal status or powers they are said to be of co-ordinate jurisdiction. This may be divisions of same court operating in different parts of the country like the case of Court of Appeal or Federal High Court. Otherwise it may be two different courts with the same powers like State High Court and Federal High Court.

English law

Reception and application

Nigeria as a political and geographical entity is a creation of Great Britain. Nigeria was a colony of Britain that is the reason why we speak English as *lingua franca* and adopted common law as our legal system. These historical ties have also informed the value and respect we place on the English law.

The English law became applicable in Nigeria by virtue of our local statutes, like **section 32 of the Interpretation Act**. These statutes introduced the following English laws into Nigeria:

- a. Common law,
- b. Doctrines of equity, and
- c. Statutes of general application in force in England on January 1, 1900.

It must be stressed here that apart from the received English law, there were other English laws which directly applied to Nigeria. These were legislations made between January 1, 1900 and October 1, 1960 like Copyright Act, 1911, Nigeria independence Act, 1960 and Nigerian (Constitution) Order in Council 1960. Most of these laws have since been re-enacted while others have been repealed.

a. Common law

This law is so referred to reflect its origin as a law that developed from the general customs of people of England and Wales. It is a law that grew gradually over time from judicial decisions.

Although there was a legal system based on Anglo-Saxon law, it was the Norman conquerors of 1066 that transformed and organised the English legal system. The Norman Kings realized very early that they can better control the country when they control the legal system.

William the Conqueror setup the ***Curia Regis*** (the King's Court) and appointed judges to dispense justice among the nobles. Apart from this, judges were also sent to major towns to decide important cases on King's behalf.

In the time of **Henry II** the tours by the courts became more frequent. As a result, the country was divided up into circuits or areas for visit by the judges. Initially the judges would use local customs or the old Anglo-Saxon laws to decide customs. On their return to London the judges would discuss and decipher these customs and gradually these customs evolved into uniform or common law.

From this practice, common law quickly became the basis of English law, an unwritten law that developed from customs and judicial decisions. Meanwhile, phrase 'common law' is also used to differentiate between laws that developed by judicial decisions, from laws that have been created by statute. For example, murder used to be a common law crime while theft was statutory crime, although, all are now codified under our law.

Another meaning of 'common law' distinguishes between the rules that were developed by common law courts and the rules of equity which were developed by the Chancery Courts.

Read advantages and disadvantages of common law.

b. Doctrines of equity

The word 'equity' means fairness and good conscience. Equity developed because of problems in the common law. Historically the common law only recognizes certain types of cases which must be brought under a particular writ. Any form of action outside those recognized was not entertained. The law

grew so technical that any error in its formalities was an impediment to its remedy.

Claimants who could not obtain remedy in common law courts appealed to the King's conscience as fountain of justice. As the number of these cases rose, the King delegated this role to the Lord Chancellor. The Chancellor based his decisions on the principles of natural justice and fairness, making his decisions on what seems right and conscionable rather than strict adherence to established legal principles.

As the Chancery Court grew in importance, new rules and procedures were introduced to facilitate its task. These rules and procedures, such as *subpoena* that was to compel the attendance of a witness, later became entrenched and known as the doctrines of equity. The court also developed new remedies to compensate plaintiffs more fully than in court of law. These remedies are: injunctions, specific performance, rescission and rectification.

Maxims of equity

The following maxims set out the general principles that govern the operation of the doctrines of equity as well as the philosophy of the Chancery Court:

- a. Equity acts in personam.
- b. Equity does not suffer a wrong to be without a remedy.
- c. Equity follows the law.
- d. Equity looks to the intent rather than to the form.
- e. Equity looks on that as done which ought to be done.
- f. Equity imputes intent to fulfil an obligation.
- g. Equitable remedies are discretionary.
- h. Delay defeats equity.
- i. He who comes to equity must come with clean hands.
- j. He who seeks equity must do equity.
- k. Where there are equal equities, the law will prevail.
- l. Where there are equal equities, the first in time prevails.
- m. Equity, like nature does nothing in vain.
- n. Equality is equity.
- o. Equity will not permit a statute to be a cloak for fraud.
- p. Equity will not aid volunteer.

Fusion of common law and equity

The Chancery Court did not only ease the pains of litigants but also complemented the efforts of common law courts in dispensing justice. Nevertheless, their relations had not always been a smooth one.

Sometimes their relations were tense, and litigants were caught in this rivalry. Defendants who obtained judgement at law were restrained from enforcing it by the Chancery Court on pains of imprisonment. The law courts, in turn, devised writ of ***habeas corpus*** to obtain release of these judgement debtors.

The disaffection came to a head in the case of ***Earl of Oxford*** where conflict arose between the then Chancellor, **Lord Ellesmere** and then Chief Justice of the Common Pleas, **Sir Edward Coke**. On the advice of the then Attorney General, **Sir Francis Bacon**, **King James I (1603-1625)** ruled in favour of equity.

Since then equity takes precedence in case of conflict with common law. Until the Chancery Court was finally abolished by **Judicature Acts of 1873 and 1875** when both equity and common law came to be administered concurrently in the same court, however, still maintaining the primacy of equity in event of conflict.

c. Statutes of general application

The statutes of general application in force in England on January 1, 1900 are the third arm of laws received by the reception clauses. However, the responsibility of ascertaining and applying them has been entrusted with the courts.

In the case of ***A.G. v John Holt & Co (1910) 2 NLR at p. 21*** **Osborne CJ** gave some general guidelines on applicability of these statutes to be, when they were applied by all civil or criminal courts in England; or are applicable to all manner of persons in England.

Is an inapplicable statute to the whole of Great Britain a statute of general application? Please see ***Lawal v Yunan***.

Is a statute of general application repealed in England after January 1, 1900 applicable in Nigeria? See the case of ***Young v Abina***

As a rule of law, statutes of general application do not apply where there is a provision of a local statute. Likewise, courts are enjoined to apply them in consideration of local conditions and circumstances. For this reason, an Act may be inapplicable where machinery for its administration is absent, see *Halliday v Alapatira* and *Nyali Ltd. v Attorney General*, especially the dictum of **Lord Denning** at p. 652.

Does the reception date of January 1, 1900 also affect the common law and doctrines of equity?

Customary law

Customary law is a law that has emerged from customs, and customs are rules of human behaviour which regulate relationships in a community. **C. O. Okonkwo** described customary law as “a body of customs and traditions, which regulate the various kinds of relationship between members of the community in their traditional settings.”

Taslim Olawale Elias, CJN extrajudicially defined customary law as “a body of customs accepted by members of a community as binding upon them.” Customary law is the earliest and oldest source of Nigerian law, having existed since time out of mind and of course before the advent of the British rule.

For ages, customary law was the only law known to Nigerian communities and still continues to guide and regulate majority of activities of ordinary Nigerians. The most pronounced area is personal law including property rights, marriages and succession.

The Nigerian constitution under **section 315(3)** has recognized and encouraged the application of customary law as an existing law in Nigeria. However, it should be stressed that by virtue of **section 36(12)** of the same constitution, criminal law has been excluded from the ambit of customary law.

The section provides that “a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law.”

Sometimes it looks easy to classify customary law under one garment as if it were all encompassing phrase. It is not so. Customary law is as varied as there are communities in Nigeria. This same understanding is responsible for

classifying Islamic law as “native law and custom” under **section 2 of the old Native Courts Law of the Northern Region**.

From the onset, Islamic law is not a customary law but a divine law that guides people of Islamic faith. See **Quran 3:19, 3:8 and 5:3**. For the predominant people of northern Nigeria, Islam, more than a religion, is a way of life.

Customary law, on the other hand, has been defined by the Evidence Act as a “rule which, in a particular district, has from long usage, obtained the force of law.” Customary law has also been judicially defined as “a mirror of accepted usage” by **Bairamian FJ in Owoniyin v Omotosho** (1961) 1 All NLR 304.

Obviously, Islamic law does not share the attributes of customary law. In fact, if anything Islamic law is known to have supplanted many indigenous customs. Islamic law sources are written and well known, hence Islamic law does not lend itself to the strict rules of proof obtained under customary law.

Moreover, the Maliki School of Islamic Thought accepted and practiced in Nigeria has made Islamic law more homogenous across the Muslim communities, while customary law may differ even within one ethnic group.

This subtlety of customary law has been judicially acknowledged in the case of **Taiwo v Dosunmu** by the Supreme Court where it warned that “whatever similarities may have been found between customs of one area and another, the court can only proceed step by step and consider every alleged custom as the occasion arises.

Sources of Islamic law are: -

- a. Quran
- b. Sunnah
- c. Ijma
- d. Qiyas

Please read the sources of Islamic law.

Attributes of customary law are: -

- 1. Existence
- 2. Flexibility
- 3. Force of law

4. Acceptability
5. Unwritten

Existence

A customary law must be in existence at the material time it is sought to be relied on by the court as held in ***Kimdey v Military Governor of Gongola State***. See also the case of ***Lewis v Bankole*** where it was held that only “an existing native law and custom, and not that of by gone days” is enforceable.

Flexibility

Customary law is said to be elastic and flexible. Simply put, it changes with time and society. This was better stated by **Osborne CJ** in ***Lewis v Bankole*** where his Lordship observed as follows:

“Indeed, one of the most striking features of West African native law and custom, to my mind, is its flexibility. It appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics.”

In this attribute lies the trait of customary law’s survival. As it continues to evolve and adapt to exigencies of modern society it is maintaining its relevance and survival. This is evident in its striking adaptability to the issue of inalienability of land under customary law. In the words of **Ijebu-Ode Chief** “land belongs to a vast family, of which many are dead, few are living, and countless members are yet unborn.”

This has been judicially recognized by the Privy Council in ***Amodu Tijjani v Secretary of Southern Nigeria*** where the court stated that “individual ownership is quite foreign to native ideas.” This strict rule has since given way to absolute alienation of land due mainly to the mobility of modern society. On the evolution of customary law, see ***Re Abike & Others*** (1969) 2 All NLR 123.

Force of law

More than a custom, customary law must enjoy general application as an obligation. It must be binding among the people as a rule that commands obedience, see ***Ugo v Obiekwe*** (1989) 1 NWLR Pt. 99 p. 566 SC.

Acceptability

Naturally, for any custom to be applicable among a people it must be recognized and assented to by the people as their own. This has been the decision in the case of ***Eshugbayi Eleko v The Officer Administering the Government of Nigeria*** where **Lord Atkin** posited that “it is the assent of the native community that gives a custom its validity, barbarous or mild. It must be shown to be recognized by the native community whose conduct it is supposed to regulate.”

Unwritten

Customary law is said to be unwritten like the common law but when it is judicially recognized it assumes a written form in terms of record. It may also be found in text books. It is referred to as unwritten to distinguish it from a statute. **Elias CJN** in ***Zaidan v Mohssen*** put it this way:

“customary law is any system of law not being the common law and being a law enacted by any competent legislature in Nigeria, but is enforceable and binding within Nigeria as between the parties’ subject to its sway.”

It is evident from the foregoing that Islamic law is **corpus juris** comprised of both substantive and procedural laws. In contrast with customary law, Islamic law is written, generally accepted and applied strictly.

Validity and applicability of customary law

For a rule of customary law to be applied in a given case, it must be shown to be accepted and binding in the community it is sought to be applied. But it seems this is not enough. It must also satisfy some statutory requirements laid down as prerequisite for its application. Thus the laws that provided for the application of customary law, like **section 19 of the Supreme Court Ordinance No. 4, 1876**, further required that same shall not be “repugnant to natural justice, equity and good conscience or incompatible either directly or by implication with any law for the time being in force.”

The **Evidence Act under section 14(3)** added another requirement that a rule of custom must also not be contrary to public policy. The combined effects of these provisions are the 3 tests known as validity tests. Thus for a customary law to be valid, it must not be:

1. Repugnant to natural justice, equity and good conscience.
2. Incompatible either directly or by implication with any law for the time being in force.
3. Contrary to public policy.

Repugnancy

Understanding of the meaning and intent of the repugnancy test is not without controversy. It has been argued that the expression when considered as a whole is imprecise because each concept represented therein, “natural justice”, “equity” and “good conscience” has its known technical meaning. That notwithstanding, the courts have insisted in the conjunctive approach to its analysis.

Lord Wright, in *Laoye v Oyetunde* is of the opinion that the clause is intended to invalidate “barbaric customs.” But can the court refine a “repugnant” custom? *Nwokedi JSC* in *Agbai v Okoghue* thinks it can, and pronounced as follows:

“The doctrine of repugnancy in my view affords the court the opportunity for fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws.”

Lord Atkin, in *Eshugbayi Eleko v The Officer Administering the Government of Nigeria*, thinks otherwise and expounded:

“The court cannot itself transform a barbaric custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience.”

The question, however, is that according to what standard is custom measured either repugnant or valid? The courts have consistently argued that it is not against the English law standard. This makes it difficult to comprehend the notion of right and wrong that guide the courts.

The judicial mind for the test can only be discerned through the cases. In *Edet v Essien*, for example, the court held that a customary rule which gave custody of a child of one man to another because of non-refund of the custodian’s dowry was held repugnant to natural justice, equity and good conscience.

See also the cases of *Mariyama v Sadiku Ejo* and *Danmole v Dawodu* respectively. The cases of *Guri v Hadejia Native authority*, *Re Estate of Agboruja*, *Amachree v Goodhead* and *Bukar of Kaligari v Bornu Native Authority* are also instructive.

Incompatibility

The import of this test is that customary law should not apply to circumstances governed by a law or statute in force. Much as the meaning of this test may appear plain, in practice the courts were not in agreement. Therefore, they take each case on its facts.

In *Adesubokan v Yinusa*, for example, the court held that Islamic law of Maliki School is inapplicable where **Wills Act of 1837** apply, a statute of general application. In *Re Adadevoh* “any law” was held to include English law, comprising of common law, equity and statute of general application. This was in contrast with the decision in *Rotibi v Savage* where “any law for the time being in force” was held to mean local Nigerian statutes.

It is relevant to note that in our integrated legal system multiple laws of different hues often compete for space and thereby test the ingenuity of our courts. It is the beat of the courts to churn out these laws in a manner that best accords with reason and time.

Generally, customs and practices that discriminate against human beings and demean their dignity are held incompatible with a mature system of laws. The courts have consistently applied the provisions of statute to elevate human dignity and freedom.

This can be seen in the case of *Agbai v Okoghue*, where the Supreme Court held that a rule of custom which compels the Respondent to join an association against his religious beliefs contravenes his freedom of thought and religion under the constitution.

Also in *Ukeje v Ukeje* an Igbo customary rule which disentitles women from inheritance was declared unconstitutional. Likewise, Nneato Nnewi custom that precludes a woman from giving evidence was also declared unconstitutional for relegating women to second class citizens, see *Uke v Iro*.

Public policy

Public policy can simply be defined as common or general good. It measures customary practices with general welfare of the society. This same concept is reflected in the **preamble to the 1999 constitution** as “promoting good government and welfare of all persons.”

A priori, any practice or rule of customary law that is inconsistent with public good and security is invalid and liable to be set aside by the courts. Under this analysis, a custom that permits a woman to nominally marry a dead man and bear children in his name was held contrary to public policy, see **Okonkwo v Okagbue**. Also in **Helen Odigie v Iyere Aika**, a customary rule by which a married woman could marry a young girl to bear children for her was held contrary to public policy.

On the other hand, in **Amachree v Kallio**, a rule of custom that gave ownership of a river to one man and prevented others from using it was declared contrary to public policy.

Please note that in admitting or rejecting a rule of custom the courts have avoided the measure of English law standard. **Brown CJ** made this clear in **Rufai v Igbirra Native Authority**, where he adverted that a rule of custom may not be invalid because of its contrariness with the English law.

Proof of customary law

By **section 14(1) of the Evidence Act**, customary law may be proved either:

1. By judicial notice, or
2. By evidence

Proof by judicial notice

The term ‘judicial notice’ has been judicially defined in **Commonwealth Shipping Representatives v P.O. Branch Services** to mean “facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.”

By **section 14(2) of the Evidence Act**, a custom may be 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 courts assuming that the persons in that area consider it binding upon them.

However, in an earlier case of **Angu v Attah** it appeared that courts have taken judicial notice of customary laws which, through frequent proofs in the courts have assumed notoriety. Under this premise, in **Larinde v Afiko**, a judicial notice based on a single decision was rejected by the West African Court of Appeal for not amounting to 'frequent proof.'

However, in **Osinowo v Fagbenro** a rule of custom on forfeiture of occupancy due to misconduct relied on by the courts on three occasions was held sufficient to be judicially noticed.

It is noteworthy that the 'frequent proof' envisaged in the above decisions is not a requirement under the Evidence Act. The Act only required that the application of a custom is to such an extent to justify it been assumed as binding. Thus in **Cole v Akinyele**, where acknowledgement of a child born out of wedlock came up for determination, the court took judicial notice of a rule with only one previous judgement.

Regardless of this case, the Supreme Court in **Romaine v Romaine** is of the opinion that the line of authorities on this point indicates that a customary rule could be judicially noticed only after frequent proof and pronouncements by the court.

The 'same area' qualification as used in the Evidence Act was interpreted by the Supreme Court in **Taiwo v Dosunmu** to mean "an area in which some grounds appear for supposing the customs to be uniform", i.e. recognized by the courts in the area.

Proof by evidence

In proving a custom by evidence, reliance must be placed on **section 41(1)** and other relevant sections like **sections 57, 59 and 62 of the Evidence Act**. These sections essentially contemplate two types of evidence, which are:

- Witnesses, and
- Books or manuscripts.

Witnesses

Rules governing proof of customary law by witnesses is the same as in other facts. However, in these types of cases the law pays high regard to the opinions of persons knowledgeable in the relevant customary law. Chiefs and elders with knowledge and experience in the applicable customary law may qualify as expert witnesses.

But in the end, the courts have the discretion on the weight to be attached on their evidence. This will depend on the credibility of the witness, his knowledge of the law and other corroborative evidence.

This is because courts are familiar with expert witnesses giving evidence to favour the party that called them, as observed by **Osborne CJ** in **Lewis v Bankole**:

“So called experts are usually forth coming to bear testimony that corresponds exactly with the view put forward by the side on whose behalf they appear.”

The courts turn to give more credence to the trend of evidence than the credibility of the witnesses. Although the Supreme Court had in **Nwabuba v Enemu** vouched that traditional rulers are in a good position to know the true facts of a landed property and are unlikely to twist them.

The same court had cause to reprimand the Ooni of Ife, the custodian of Yoruba custom, for twisting facts for selfish ends, see **Adewoyin v Adeyeye**. It is pertinent to note also that the courts give probative value to traditional beliefs like oracles and juju, see **Akpodike v Abueze**.

Books and manuscripts

The law accepts books or manuscripts that a community recognizes as binding authority on their customary law. For instance, in **Adeseye v Taiwo** the court placed reliance on **Ajisafe's book on Law and Custom of the Yoruba People**. This notwithstanding, the West African Court Appeal in **Adedibu v Adewoyin** is of the opinion that such manuscripts must be in evidence before they could to be relied upon.

It is common knowledge that authors like **Nwabueze** and **T. O. Elias** are often cited as authorities by courts; see the cases of ***Olusesi v Oyelusi*** and ***Oyelowo v Oyelowo*** respectively. Moreover, the Supreme Court had held in ***Orugbo v Una*** that courts could seek aid from appropriate books of authority for their decisions.

Interpretation of statutes

It is generally accepted that the constitutional role of the judiciary is to apply the law. The function of creating law is the prerogative of the legislature. This view, with due respect, ignores the potential for judicial creativity that had become signature of the common law and judicial precedent. It equally ignores the measure of discretion enjoyed by the courts when interpreting legislations.

It is trite that even with the best efforts of the draftsmen; precision in meaning sometimes eludes them. This scenario makes the process of interpretation inevitable.

This is understandable in view of the fact that legislation is a form of linguistic communication and therefore shares in the general problem of uncertainty inherent in any mode of communication. This fact was reiterated by **Lord Denning** as he recognized that the 'English language is not subject to mathematical precision.'

Moreover, legislations are written in such a way that allows for their general application in various circumstances. This need is sometimes achieved at the expense of clarity and precision. **Lord Denning** in his book *The Discipline of Law* observed again that:

"The draft man...conceived certainty, but has brought forth obscurity, sometimes even absurdity."

In short, legislation involves an unavoidable measure of uncertainty that can only be remedied through judicial interpretation.

Rules of interpretation

For all the above reasons sometimes courts are called upon to interpret legislations. But should a statute be interpreted literally or more purposefully? The common law judges are unable to agree on which approach to adopt.

However, over the years the courts have developed these three different rules of interpretation:

- The literal rule
- The golden rule
- The mischief rule

The literal rule

Under this rule, the judge is required to give words their plain and ordinary meaning, even if doing so may result in undesirable or unjust outcome. The proponent of this idea was **Lord Esher** in *R v Judge of the City of London Court (1892)* where he stated:

‘If the words of an Act are clear then you must follow them even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed absurdity.’

The literal rule wrongly assumes that there is such a thing as a single, uncontentious literal understanding of words. This fallacy was manifested by the case of *R v Maginnis*, where the defendant, found in possession of drugs, was charged with intent to supply them. The defendant claimed that he intends to return the drugs to a friend who left them in his car.

In this case, all the judges, from first instance to the House of Lords, disagreed as to the literal meaning of the word ‘supply.’ In fact, each of the meanings of supply proposed by the various judges could be supported by dictionary entries. Therein lies the weakness of the literal rule.

The golden rule

This is generally considered as modification of the literal rule. The golden rule starts by looking at the literal meaning of words but then arrives at an interpretation which avoids an obvious absurdity. An example of this approach can be seen in *R v National Insurance Commissioner ex p Connor* (1981) where the legislation was silent on who caused the death; the court held that on grounds of public policy the widow was not entitled to a widow’s pension because she provoked it by killing her husband.

The mischief rule

This rule is the most flexible of the three, and gives more discretion to judges. The rule was originally set out in **Heydon's Case** (1584), where it was stated that in making use of the mischief rule, the court should consider four points:

1. What was the common law before the statute?
2. What was the mischief in the law which the common law did not provide?
3. What remedy has the parliament intended to provide?
4. What was the reason for parliament adopting that remedy?

The *locus classicus* for the mischief rule is the case of **Corkery v Carpenter**, where the defendant was found guilty of being drunk in charge of a carriage, although, in fact, he was in charge of a bicycle.

The Act actually prohibited being 'drunk while in charge of any carriage, horse, cattle or steam engine.' **Lord Goddard** in reaching this decision read a purposive meaning into the Act and held that for the purpose of public safety a bicycle is also a carriage.

Under this rule, by looking into the lacuna which informed the passing of the law, the court will interpret the statute to cover that gap.

Rules of language

In their construction of statute, judges look at other words to see if they affect the words or phrase in dispute. In doing this the courts have developed this set of rules:

- The *ejusdem generis* rule
- The express mention of one thing excludes others
- A word is known by the company it keeps

The *ejusdem generis* rule (of the same kind)

Under this rule, where there is a list of words followed by general words, the general words are limited to the same kind of items as the specific words. This rule is best illustrated in **Powell v Kempton Park Racecourse** (1899). Here the Betting Act 1853 made it an offence 'keeping a house, an office, room or other place for betting.' In fact, where he had been betting was outside.

The court held that the general words 'other place' in the Act refer to an indoor place as shown in the list of words so the defendant was not guilty.

It should be emphasized that there must be at least two specific words for this rule to operate.

Expressio Unius Exclusio Alterius (expressing one thing excludes another)

This rule is said to mean that the mention of one thing excludes another. The effect of this rule is that if a list of words in a statute is not followed by general words, the statute only applies to the words in the list.

In ***Tempest v Kilner*** (1846) the court had to determine whether the **Statutes of Frauds 1677** applied to the sale of stocks and shares. The Act required a contract for the sale of 'goods, wares and merchandise' of more than £10 to be evidenced in writing.

It was held that the list of words 'goods, wares and merchandise' was not followed by general words therefore only items mentioned in the statute were covered.

Noscitur a sociis (a word is known by the company it keeps)

This means that words must be looked at in the context used and interpreted accordingly. This involves looking at words in the same or other sections of the statute. The meaning of other words or parts of the statute will help understand the word in question.

In ***Muir v Keay*** (1875) the court considered **Refreshment Houses Act 1860** which dealt with licensing of 'public refreshment, resort and entertainment.' The defendant argued that his café did not need a license because he did not provide entertainment.

The court held that 'entertainment' did not mean musical entertainment but the reception and accommodation of people, so the defendant was guilty.

Aids to construction

In addition to rules of interpretation, there are other intrinsic assistance i.e. derived from the statute itself, and extrinsic assistance i.e. reference to sources outside the statute used by the court.

Presumptions

The courts may also make use of certain presumptions which like all presumptions are also rebuttable. The most important ones are: presumption against change in the law, i.e. unless specifically changed by the statute and presumption that *mens rea* is required in criminal case. There is also the presumption that legislation does not apply retrospectively.

End of first Semester

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