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Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria

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Abstract

Colonialism became a fact of life in many African countries. An effect of colonialism especially in the former British colonized countries was the transplantation of the British legal system, which led to recognition of both systems and the gradual relegation of the indigenous system otherwise called customary law. The use and effect of these customary laws became dependent on the permissive extent of the general law. In its regulated state, its operation became dependent on the satisfaction of the rules of common law equity and good conscience. Other rules as to the amenability of customary law and proof became established. Notwithstanding the relegation of the rules of customary law vis-à-vis the general law, these rules have survived to date. Islamic law which was usually regarded as a variant of customary law is beginning to have its separate status. This article shall examine the impact of colonialism on customary law especially in the post colonial Nigerian state.

Résumé

Dans bon nombre de pays africains, le colonialisme a fini par devenir un état de fait. Une des conséquences de ce dernier, particulièrement dans les anciennes colonies britanniques, a été le greffage du système judiciaire britannique au système local, suivi de la reconnaissance de ces deux systèmes local et britannique, et enfin, la relégation progressive du système indigène communément appelé droit coutumier. L'usage et l'effet de ce droit coutumier ont fini par être liées à l'interprétation autorisée de la loi-cadre. Son application dépendait du respect des règles d'équité et de bonne conscience de la loi-cadre. D'autres règles relatives à l'étendue de pouvoir du droit coutumier ont également été établies par la suite. En dépit de la marginalisation des règles du droit coutumier en

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faveur de la loi-cadre, celles-ci continuent d'être observées aujourd'hui. La loi islamique, qui était considérée comme une variante du droit coutumier est en train de bénéficier d'un statut spécifique. Cette communication se penche sur l'impact du colonialisme sur le droit coutumier, particulièrement dans l'État nigérian post-colonial.

The colonisation of Nigeria

Nigeria as we know it today is a by-product of British colonialism. Prior to the advent of the British, the geographical expression now known as Nigeria was made up of several settlements, each with its own distinct identity, administrative techniques, and methods of governance. The British became the colonial overlord of what ultimately became known as Nigeria following its colonisation. The British Germans, French, Portuguese and Italians made it their business to subjugate various African territories then inhabited by the progenitors of today's Africans.

The presence of the British in the various territories now known as Nigeria started in phases. The contact of the British with the coastal areas was made possible by trade with the indigenous people. The trading areas included Lagos, Benin, Bonny, Brass, New Calabar (now Degema) and Old Calabar (now Calabar). Consuls were appointed by the British for the purpose of regulating trade between themselves and the indigenous merchants. The British appointed the first consul in 1849. Consular courts were thus established. The jurisdiction of the consular courts extended to then Dahomey, now Benin Republic to the Cameroons.[1] It thus covered the whole of the coastal area of modern Nigeria.

With the cession of Lagos to the British in 1861, Britain established its authority over Lagos.[2] Lagos became a British colony. English law was introduced to Lagos in 1863 with effect from March 4, 1863. By virtue of the Supreme Court Ordinance No 11 of 1863, the first Supreme Court of the Colony was established. The court was conferred with civil and criminal jurisdiction. In 1866, the British placed under one government, then known as the Government of the West African, the settlements which consisted of Lagos, the Gold Coast, Sierra Leone and Gambia.[3] Appeals from the courts established for Lagos lay to the West Africa Court of Appeal[4] from where appeal lay to the Judicial Committee of the Privy Council.

The Gold Coast Colony which consisted of the settlements of Lagos and Gold Coast was established in 1874 as a separate and single government.[5] The Supreme Court of Lagos was established in 1876 as a Supreme Court of Record by virtue of the Supreme Court Ordinance, No 4 of 1876 with jurisdiction and powers similar to those of Her Majesty's High Court of Justice in England. This court was to have jurisdiction in the Colony of Lagos and

other neighbouring territories over which the British Government wielded power. The court was empowered to administer the common law, the doctrines of equity and statutes of general application in force in England as at July 24, 1874.[6] With respect to customary law, the Ordinance provided that nothing should deprive any person of the benefit of any law or custom existing within the jurisdiction on the condition that such law or custom was not repugnant to natural justice, equity and good conscience nor incompartible with any local statutory provision.

It can be seen from this provision that the British did not do away with the established or existing local or customary laws. These laws were only required to pass the test of repugnancy. Thus, it was a case of the indigenous people submitting to the rule of the British and the English legal system. The British in turn made provision for the continuance of these indigenous laws and institutions to the extent permitted by English ideas and institutions.

In 1886 a separate government was established for the colony of Lagos and a new Supreme Court Ordinance, similar to that of 1876 was put in place. This Ordinance regulated British authority over what was then known as the Colony and protectorate of Lagos. The Oil Rivers protectorate which was established in 1885, which consisted of Benin, Brass, Bonny, Old Calabar, New Calabar and Opobo, was formally inaugurated in 1891.[7] It was extended and renamed the 'Niger Coast Protectorate' in 1893. This area was previously administered by Consuls through the Order in Council of 1872, the purport of which was to ensure peace between the British government, the local chiefs and the British subjects who included 'all persons, natives and others, properly enjoying Her Majesty's (the Queen of England's) protection in the specified territories'.[8] In 1899, by virtue of Order in Council 1899, a Consul-General was appointed for this area. The decisions of the consular courts were subject to appeal to the Supreme Court of the Colony of Lagos.

In 1899, by virtue of the Southern Nigerian Order in Council 1899, the Niger Coast Protectorate and the territories of the Royal Niger Company South of Idah were amalgamated. Both became known as the 'Protectorate of Southern Nigeria' with effect from 1 January, 1900. The High Commissioner established a Supreme Court by virtue of the Supreme Court Proclamation No 8 of 1900. The jurisdiction of this court was akin to that of the Supreme Court established by the Supreme Court Ordinance 1876 except that the English statutes which were made applicable to Nigeria were those in operation as at 1 January, 1900 instead of 24 July, 1874. The date 1 January, 1900 has been of historical importance to this day.

The establishment of the Protectorate of Southern Nigeria had one implication with respect to native courts. The native courts that were in

existence, even in the Colony and Protectorate of Lagos, were basically indigenous courts not established by any statute. By virtue of the Native Courts Proclamation No 9 of 1900, native courts were statutorily established. The Native Courts Proclamation No 25 of 1901 replaced it and stipulated the civil and criminal jurisdiction of the established statutory native court in a district, the jurisdiction of which was exclusive of any other court established by traditional authority. Ultimately, the erstwhile indigenous native courts established by traditional authority gave way to those established by statute.[9]

The colony and protectorate of Lagos and the Protectorate of Southern Nigeria were amalgamated in 1906 to become the Colony and Protectorate of Southern Nigeria. With respect to native courts, the Native Courts Proclamation No 7 of 1906 came into being with provisions similar to those of the Native Courts Proclamation 1901.

With respect to the Northern part of Nigeria, some British firms traded along the banks of River Niger. They later formed a coalition and received a Royal Charter called 'The National African Company'. This was in 1886. The company was later renamed 'The Royal Niger Company. The effect of this Charter was to give the company the power to administer justice in the territories of its operation. The Charter enjoined the company to observe the 'customs and laws of the class or tribe or nation' of domicile with respect to dispensation of justice. The company was in existence until its charter was revoked in 1899.

With the revocation of the Charter of the Royal Niger Company in 1899, the British established the Northern Nigeria Order in Council 1899 with effect from 1 January, 1900. The protectorate of Northern Nigeria was thus established. This comprised the territories where the Royal Niger Company had authority and influence north of Ida. The British established a High Commissioner for the purpose of administering this area. The High Commissioner issued the Protectorate Courts Proclamation 1900. By this Proclamation, a Supreme Court, provincial courts and cantonment courts were established. The Supreme Court was empowered to hear and determine civil and criminal cases. The court had power to administer the common law of England, the doctrines of equity and the statutes of general application, which were in force in England on 1 January, 1900. It also had power to administer customary law. Native Courts were established by the Native Courts Proclamation 1900.[10]

On 1 January, 1914, the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were amalgamated. With this development, Nigeria as a nation came into existence. The Supreme Court Ordinance No 6 of 1914 was issued with jurisdiction akin to those of the

amalgamated sub-divisions. The court was empowered to observe and enforce rules of common law of England, equity and statutes of general application which were in force in England on 1 January, 1900. The courts which were established were the Supreme Court, the Provincial Courts and the native courts.

The application of customary law

Prior to the emergence of British control in the various parts of what is now known as Nigeria, indigenous methods of governance and administration of justice prevailed. The British officials were not oblivious to these customary laws and institutions. For example, with respect to the coastal areas, notwithstanding the establishment of the Consular courts and the courts of equity before the British took over the administration of the area in 1872, indigenous courts were allowed to operate in the administration of justice in this area between the indigenous people. Even with the take-over of the British with respect to the administration of this area in 1872, the British allowed indigenous courts to operate. The same can be said of Lagos even after it was ceded to the British. The Supreme Court Ordinance No 11 of 1863 allowed the customary laws to operate subject to the satisfaction of the rules of natural justice, equity and good conscience and compatibility with the law for the time being in force. Subsequent Supreme Court Ordinances did not change this position. Indeed, when the Royal Niger Company was to be given its Charter, the company was enjoined to pay regard to the 'customs and laws of the class or tribe or nation' of its domicile.

While it may be maintained that with respect to the Protectorate of Southern Nigeria by virtue of the Native Courts Proclamation No 9 of 1900 and the Native Courts Proclamation No 25 of 1901 which replaced that of 1900, the hitherto indigenous courts established by traditional authority were abrogated and replaced by Native Courts established by statute. This step was taken for the purpose of regulating the courts that could be established and the composition of those courts. These laws did not change the tenor of customary law or the permissive expression given to customary law which from the beginning had to satisfy the tests of repugnancy.

With the emergence of Nigeria as a nation in 1914 following the amalgamation of the Colony and Protectorate of Southern Nigeria with the Northern Protectorate, and the appointment of Lord Lugard as the Governor General, it became necessary for the British to determine the type of administrative technique it wanted to adopt. The adoption of the indirect rule system gave credence to the recognition and application of customary law and established indigenous institutions. Lord Lugard, the first Governor General of Nigeria, stated British policy in this regard thus:

> Institutions and methods, in order to command success and promote the happiness and welfare of the people, must be deep rooted in their tradition and prejudice.[11]

With this attitude, the place of customary law in the operation of laws in Nigeria was assured. It should however not be forgotten that the Supreme Court Ordinance No 6 of 1914 allowed the operation of customary law only where the rule of customary law to be enforced was not repugnant to natural justice, equity and good conscience and was compatible with the law for the time being in force.

At the point of amalgamation in 1914, three courts had clearly emerged. These courts were the Supreme Court, Provincial Courts and the Native Courts. The Supreme Court had original and appellate jurisdiction with respect to civil and criminal cases. By virtue of the Provincial Courts Ordinance No 7 of 1914 there were established provincial courts similar to those in existence in the Protectorate of Northern Nigeria. The Native Courts Ordinance of 1916 graded the native courts into four. The four grades were A, B, C and D. The Native Courts Ordinance No 5 of 1918 established native courts in the Protectorates by warrant. The Native Courts Ordinance of 1933 increased the civil jurisdiction of the native courts.[12] With respect to the Colony of Lagos, the Native Courts (Colony) Ordinance No 7 of 1937 established native courts. These courts were to be established by warrant in the Colony outside the township of Lagos. The Native Courts had civil and criminal jurisdiction. Appeals from the native courts lay to the magistrates' courts. The Native Courts (Colony) Ordinance 1943 amended the Native Courts (Colony) Ordinance 1933.

By virtue of the Nigeria (Constitution) Order in Council 1954, Nigeria became a Federation with a Federal Constitution with effect from October 1, 1954. The new Federation consisted of three regions, Western, Eastern and Northern, and a Federal territory, Lagos. The Western and Eastern Regions established 'Customary Courts' while the Northern Region established Native Courts. The Moslem Court of Appeal which was established by the Northern Region in 1956 was replaced by the Moslem Court of Appeal with respect to appeals in civil and criminal cases governed by Moslem law.[13] On 30 September, 1960, the Sharia Court of Appeal was established to replace the Moslem Court of Appeal. Following the promulgation of the Penal Code Law in 1959, the criminal jurisdiction of the native courts was abrogated.

From the above, it can be asserted that customary law was a system of law recognised by the British throughout the period of colonialism.

The post-colonial status of customary law

The subjection of customary law to the tests of repugnancy continued throughout the period of colonialism. This position also continued after independence. Each region had been empowered to administer customary law. The Evidence Act, Cap. 62, Laws of Federation of Nigeria, also gave effect to this provision. The High Court Laws also recognised customary law. For example, the High Court Law of Northern Region 1963 which was applicable to the whole of Northern Region provided in section 34 thus:

> 34(1) The High Court shall observe, and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit or any such native law or custom. Such laws and customs shall be deemed applicable in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.
>
> No party shall be entitled to claim the benefit of any native law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law or that such transactions are transactions unknown to native law or custom.
>
> In cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience.[14]

With respect to Western Region of Nigeria, Section 12 of the Laws of Western Region of Nigeria 1959 provided thus:

> 12(1) The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompartible either directly or by implication with any written law for the time being in force, and nothing in this Law shall deprive any person of the benefit of any such customary law.
>
> Any customary law shall be deemed applicable in causes and matters where the parties thereto are Nigerians and also in causes and matters between Nigerians and non-Nigerians where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable.
>
> No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively

> regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.
>
> Where the High Court determines that customary law is applicable in any cause or matter, it shall apply the particular customary law which is appropriate in that cause or matter having regard to the provisions of section 21 of the Customary Courts Law.[15]

The provisions of these regional courts are now contained in the appropriate High Courts Laws of the various states carved out of these Regions[16] including the Eastern Region.

One other issue that is pertinent to the consideration of customary law is the method of proof of customary law in our various courts. In this regard, it is necessary to have recourse to the Evidence Act. The Evidence Act, now Cap. 112 Laws of Federation of Nigeria,[17] provides in Section 14 thus:

> 14(1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence; the burden of proving a custom shall lie upon the person alleging its existence.
>
> A custom may be judicially noticed by the court 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 the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.
>
> Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them:
>
> Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

The application of customary law in post-colonial Nigeria may be considered from these provisions. Some of the assertions that would be made with respect to these issues and cases decided on them have endured over time both before and after colonialism. It therefore shows that some of the issues that would be herein discussed with respect to customary law have endured in perception, application and effect, thus covering both the colonial and post-colonial periods.

From a consideration of the above, certain issues stand out clearly and they may now be considered for the purpose of giving focus to customary law in Nigeria.

(1) Meaning and characteristics of customary law

The Supreme Court in Ohai v. Akpoemonye[18] approved its decision in Zaiden v. Mohssen[19] when it defined customary law as:

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

From this definition, it is clear that customary law is not a prescriptive system of law. It is evolutionary. It grows with the people. The people to whom a particular customary law relates give it shape and determine its content. Customary law is not static, it may therefore change. This is what gives it dynamism. It is not a set of rules of by-gone days but it reflects the rules of conduct accepted by a set of people in the regulation of their affairs within the permissive extent of the law. As the court rightly pointed out in Owonyin v. Omotosho[20], 'it is a mirror of accepted usage'[21]. Osborne CJ also gave focus to customary law when he held in Lewis v. Bankole[22] thus:

> One of the most striking features of West African native custom... 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 character.[23]

(2) Meaning of the repugnancy doctrine

One effect of colonialism regarding indigenous or customary law was the subjugation of customary law. Customary law right from 1863 when the first Supreme Court Ordinance was put in place has always been relevant subject to the permissive extent of 'the common law, doctrines of equity and statutes of general application' in force at different periods. The determination of this expression, usually referred to as the repugnancy test, has not been without difficulty. The issue whether each of the key phrases in this expression should be interpreted disjunctively or conjunctively has been recurrent.[24] However, the view of Daniel may be accepted as representing a functional approach. He said:

> When we look for the meaning of equity in the broad sense we are told that it is equivalent to natural justice. When we try to ascertain the meaning of natural justice we are told that it is practically equivalent to equity in the popular sense. Then both are said to mean natural law. At this juncture we re-enter the realm of uncertainties, but one thing is being made clear: it is that the theory of assigning specific meanings to each of the phrases in the content is untenable. Even though equity is not synonymous with good conscience...yet it can be said that the meaning of equity in the broad sense embraces almost all, if not, all, the 'concept of good conscience'. Therefore

> in the phrase 'equity and good conscience' the words 'good conscience' can be regarded as superfluous.[25]

Whatever may be the argument with respect to the meaning of the repugnancy doctrine, cases have given clarity to this expression. For example, in Edet v. Essien,[26] a case decided before Nigeria became independent, Essien had paid dowry on Inyang when Inyang was a child. Some years later, Edet having obtained her parent's consent to marry her, also paid dowry on her. After their purported marriage, they had two children. Essien claimed the children as his on the grounds that since his dowry had not be refunded, he was still married to Inyang and entitled to her children. The court held the claim valid under customary law but the Supreme Court in the exercise of its equitable jurisdiction held that this rule was against natural justice, equity and good conscience having regard to the facts of this case. In Mariyama v. Sadiku Ejo,[27] the issue before the court was the interpretation and operation of the Igbirra native law and custom to the effect that a child born within ten months of the divorce was the former husband's child. In the instant case, the wife having been separated from her husband for several months prior to the divorce had a child ten months later by her new husband. The Igbirra Central Court awarded the child to the former husband. On appeal, the High Court held that this rule was repugnant and thus restored the child to its natural father although the court did not strike down this customary law. It merely failed to apply the customary law having regard to the facts of this case. Furthermore, in Ejanor v Okenome,[28] the plaintiff/respondent sued in the Ubiaja Magistrate's Court of then Bendel state of Nigeria seeking a declaration of paternity and the return of a child who was in the custody of the defendant/appellant. The defendant/appellant was married to the plaintiff/respondent according to Ishan customary law. She later deserted him to live with her father. While living with her father, she became pregnant by another man although her marriage had not been legally dissolved. The plaintiff/respondent at no time visited the wife throughout the period of desertion. There was evidence that as the marriage was still subsisting at the time the child was born, the plaintiff/respondent was the father of the child according to Ishan customary law. The trial Magistrate accepted the customary law and held that the plaintiff/respondent was to be deemed in law to be the father of the child as against the natural father. On appeal, the defendant/appellant contended that the magistrate was wrong in concluding that the plaintiff/respondent was deemed in law to be the father of the child as there was no evidence that he was the biological father. The court held thus:

> that according to Ishan customary law, the paternity of a child born by a wife at a time when the customary marriage had not been dissolved by the refund

> of dowry paid belonged to the husband even though he was not the biological father;
>
> that the court should not declare as repugnant to natural justice, equity and good conscience a particular customary law accepted by the members of a community as regulating their lives.

In The Estate of Agboruja[29] the court had to determine whether the system of leviratic marriage under customary law by which the wife of a deceased member of the family could be given or married by another member of the family should be allowed or whether it was against natural justice, equity or good conscience. The court, in the case, approved the system of leviratic marriage as stated above notwithstanding the fact that the system had to do with the personal status of a woman. Ames P. upholding the system held thus:

> ... the custom by which a man's heir is his next male relative, whether brother, son, uncle or even cousin, is widespread throughout Nigeria. When there are minor children it means that the father's heir becomes their new father. This is a real relationship and the new fathers regard the children as their own children. Whenever this custom prevails, native courts follow it, and no doubt somewhere or in this large country this is being done everyday.

The court held further:

> ... there can be nothing intrinsically unfair or inequitable even in the inheritance of widows, where those who follow the custom are pagans and not Mohammedans or Christians. The custom is based on what might be called the economics of one kind of African social system, in which the family is regarded as a composite unit.

The determination of whether a particular customary law is repugnant or not should not be based on the comparison of the English or Western system with the indigenous system or social value. A customary law can only be justifiably disallowed from being applied where its effect or its content will be an affront to reason, patently immoral or basically unjustifiable. The Privy Council had to contend with this issue in Eshugbayi Eleko v. Officer Administering the Government of Nigeria & Anor[30] when it held thus:

> Their Lordships entertain no doubt that the more barbarous customs of earlier days may be under the influences of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form, they are still recognised in the native community as custom, so that in that form to regulate the relations of the native community inter se. In other words, the court cannot itself transform a barbarous 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'. It is the assent of the native community that gives a custom its validity, and therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.[31]

With respect to the quoted portion of the decision of the Privy Council, some comments need be made. There is no problem with the portion of the quotation to the effect that 'a barbarous custom of earlier days may become milder and still retain its essential character of custom; in the milder form, such customary law must still be recognised by the native community as their custom'. The other points made by the court may be questioned. If the court cannot transform a barbarous custom into a milder one, who determines whether a particular customary law is repugnant to natural justice, equity and good conscience? If the answer is that the court determines the particular customary law that is repugnant to natural justice, equity and good conscience, then the last conclusion – that it is the assent of the people that gives a custom its validity – must be qualified with the caveat, that is, subject to satisfying the requirement of 'natural justice, equity and good conscience'.

(3) Who is amenable to the rules of customary law

The definition of customary law shows that it is a personal system of law. It applies to whoever wishes that his affairs be regulated by the particular customary law in issue. The determination of when and those to whom customary law applies has been controversial. Some issues however appear to be settled.

With respect to a transaction or status that takes its source, use and effect from customary law and between persons who are indigenes or natives of a particular geographical expression to which the customary law relates, there is no problem with respect to the application of the relevant customary law subject to the satisfaction of the repugnancy test. Where a transaction is wholly unknown to customary law and a different system of law has been chosen, there is no problem. Ex facie customary law will not apply. The same goes for a transaction between foreigners especially where a different system of law, like the general law, has been chosen.

However, in respect of a transaction between a foreigner and an indigene of a particular place, where there is evidence that the parties have agreed that customary law should regulate their relationship, the particular customary law of choice should be respected especially if the transaction or status is known to customary law for the following reasons:

- The 1999 Constitution of Nigeria provides that nobody should be discriminated against by reason of circumstances of his birth.

- Most of the High Court Laws provide that nothing in their respective laws should deprive any person of the benefit of any such native law and custom.
- Just as a foreigner can make use of a particular customary law thereby leaving aside his own law for that purpose, a person who belongs to a particular community may also decide to adopt another system other than that which his indigenous law regulates notwithstanding the recognition of such a status by his indigenous law. As the court pointed out in Coleman v. Shang[32]: 'We are of the opinion that a person subject to customary law who marries under the Marriage Ordinance does not thereby cease to be a native subject to customary law by reason only of his contracting that marriage. The customary law will be applied to him in all matters save and except those specially excluded by statute and any other matters which are the necessary consequences of marriage under the Ordinance'.[33]

(4) Exclusion of application of customary law

A person has the right to exclude the application of a particular customary law which ordinarily should apply to him as his personal law by reason of choice of another system of law even if wholly opposed to the system of law which otherwise would have applied to him. In Apatira v. Akanke[34], the testator was a native of Nigeria. He lived and died a Moslem. He made a will in English form but the will did not comply with the requirements of the Wills Act with respect to signature and attestation. It was argued on behalf of the plaintiffs that the will should nevertheless be admitted to probate as a will under Moslem law since it was sufficiently attested under the Moslem law. The court held that the will was intended to be a will according to the general law notwithstanding that the deceased was a Nigerian and a Moslem. The will was thus held invalid as it did not comply with the Wills Act.

(5) Change of a person's customary law

Customary law being a personal system of law is a system of law of choice. Usually, customary law attaches to a person by reason of one's birth. Thus, the customary law of a place to which one is biologically attached is regarded as one's customary law. It is like what is regarded as 'domicile of origin' in conflict of laws. It is very enduring. It attaches to one wherever one is. Unlike in the case of conflict of laws, where by reason of choice with requisite capacity, animus manendi and physical presence, one can change one's domicile of origin, in the case of one's customary law or customary law of origin this cannot be changed easily. However, an incident in Benin, now in Edo state of the Southern part of Nigeria, has introduced a new ele-

ment to the idea of customary law in Nigeria. This was in the case of Olowu v Olowu.[35] In this case, the issue before the court was the proper customary law or personal law of the deceased - Ayinde Olowu, at the time of his death. The estate of the deceased was the subject matter of litigation between the parties. The deceased was a Yoruba of Ijesha origin by birth. He married Benin women, settled and established a home in Benin City. During his lifetime, the deceased applied to the Oba of Benin to be 'naturalised' as a Bini, that is, to be conferred with Bini status under the Benin native law and custom which permitted the conferment of such status. The Oba gave his assent to the request and the deceased became a Bini subject by reason of which he was subject to all the rights enjoyed by and obligations imposed on an indigene of Bini under the Benin native law and custom. As a result of the change in his status, the deceased was able to acquire a lot of landed property in Benin City. On account of the above facts, the trial judge held that the deceased had voluntarily relinquished his cultural heritage as a Yoruba man and had become a Bini by 'naturalisation'. The trial court further held that the Benin native law and custom were the proper personal law of the deceased at the time of his death and accordingly that the Benin native law was the proper law for the distribution of his estate consequent upon his death intestate. The Court of Appeal dismissed the appellant's petition upon which there was a further appeal to the Supreme Court. Bello JSC, who gave the lead judgment held inter alia:

> The word 'naturalisation' which takes place when a person becomes the subject of a state to which he was before an alien, is a legal term with precise meaning. Its concept and content in domestic and international law have been well defined. To extend this scope so as to include a change of status, which takes place under native law and custom, when a person becomes a member of a community to which he was before a stranger, may create confusion. I would prefer to describe a change of status under customary law as culturalisation with its attendant change of personal law which may take place by assimilation or by choice.[36]

In the earlier case of Rasaki Yinusa v T. T. Adebusokan,[37] Bello J. (as he then was) held:

> Subject to any statutory provision to the contrary, it appears from both cases that mere settlement in a place, unless it has been for such a long time that the settler and his descendants have merged with the natives of the place of settlement and have adopted their ways of life and custom of the place of settlement and have adopted their ways of life and customs, would not render the settler or his descendants subject to the native law and custom of the place of settlement. It has not been shown in this case that the parents of the

> testator and the testator himself had settled for such a long time in Lagos and have adopted the Yoruba ways of life and if he had died intestate his estate would have been subject to 'Idi-Igi' distribution. On the contrary, the evidence of an old friend and compatriot of the testator shows that the latter had always regarded himself as a native of Omu-aran... therefore the testator was a native of Omu-aran subject to the native law and custom of Omu-aran in the Kwara state.

From this judgment, it could be asserted that what is required to change one's personal law – customary law – is settlement in the new place and adoption of the ways of life of the people in the new place of settlement. In this regard, such a person must not regard himself as a stranger but must integrate himself and regard himself as one of the people in his new place of abode. The requirements that could make this possible were satisfied in the case of Olowu v. Olowu as he married Bini women, gave Bini names to his children, owned landed property in Benin and also applied to the Oba of Benin to be accepted as one of his subjects.

(6) Proof in customary law

Section 14 of the Evidence Act38 deals with the evidential requirement of customary law. From the provision of Section 14 of the Evidence Act, the following issues could be deemed established:

- Customary law could be used as a basis for the establishment of a particular set of circumstances. For a customary law to be used as such, it may either be noticed judicially or proved to exist by evidence.
- The burden of proving a custom lies on the party alleging its existence.
- For a custom to be judicially established it must have 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 the class of persons concerned in that area look upon it as binding in relation to circumstances similar to those under consideration.
- Where the last point cannot be established, evidence has to be called to establish that the particular custom forms part of the law governing particular circumstances and that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them.
- The custom that is being asserted must not be contrary to public policy, natural justice, equity and good conscience.

From the above, it could be stated that customary law must either be proved or judicially noticed.

(7) Methods of proof in customary law

Where a particular customary law has not been judicially noticed, it has to be proved. Sections 57 and 59 of the Evidence Act of Nigeria are relevant in this respect. Section 57 of the Evidence Act provides thus:

> 57(1) When the court has to form an opinion upon a point of foreign law, native law and custom, or science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, native law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts. (2) Such persons are called experts.

Section 59 of the Evidence Act further provides that:

> 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 recognised by natives as a legal authority are relevant.

Thus, where customary law has to be proved, it then becomes a matter of fact to be proved by evidence or to be proved by experts. Section 59 of the evidence Act gives a clue with respect to those who may be regarded as experts. These persons include native chiefs, or other persons having special knowledge of native law and custom (assessors) and any book or manuscript recognised by natives as a legal authority.

Judicial decisions have helped in further explaining the position. In Ifabiyi v. Adeniyi[39] the Supreme Court had to consider the use of proof in this case. It held thus:

> Customary law or native law and custom... is a matter of evidence to be decided on the facts presented before the court in each case. Indeed, customary law is a question of fact which must be proved by evidence if judicial notice is not available through decided cases of the superior courts.[40]

The Supreme Court in reaching its decision in this case held inter alia:

> ...As the only piece of evidence led in support of the claim put forward by the respondent was only that of lone witness where no evidence of custom was established, there was no credible evidence upon which to base the decision.[41]

In Angu v Attah[42], the Judicial Committee of the Privy Council stated the position of things correctly in a statement that has remained a locus classicus. The Judicial Committee of the Privy Council held thus:

> As in the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native law and customs until the particular customs by frequent proof in the courts have become so notorious that the courts will take judicial notice of them.

The decision of the Supreme Court in Ifabiyi v. Adeniyi[43] on the rejection of a lone witness accords with that of Ademola CJF in R v Chief Ideliaguaham Ozogula II.[44] In that case, the court held thus:

> It was of the greatest importance that the native law and custom be strictly proved. It is correct that a custom is not proved by the number of witnesses called, but it is not enough that one who asserts the custom should be the only witness.

It should be pointed out that in as much as customary law is a matter of fact to be proved by evidence, where a customary court is presided over by a chief or where the members of a court are knowledgeable in the customary law of a particular area, it is not necessary to prove the relevant customary law before them. In Ababio v Nsemfoo,[45] the court, while it paid regard to the rule stated in Angu v Attah maintained that:

> ...although there is nothing to prevent a party from calling witnesses to prove an alleged custom, if the members of a native court are familiar with a custom it is certainly not obligatory upon them to require the custom to be proved through witnesses.

This point had earlier been made in the Rhodesian case of Chitambala v R.[46] In this case, Somerhough J. held thus:

> Now it seems clear to me that a native court whether of the first instance or of appeal may be presumed to know the native law and custom prevailing in the area of its jurisdiction in the same manner that the judges of the High Court are presumed to know the common law.

In Onyejekwe v. Onyejekwe,[47] the Supreme Court of Nigeria held that where a particular native law and custom 'has been so frequently followed by the courts... judicial notice would be taken of it without evidence required in proof'.

It should also be noted that the Evidence Act permits that for the purpose of establishing a particular customary law, the following are also relevant: the opinion of assessors, and books or manuscripts recognised by natives as expressing the requisite customary law.

These are persuasive sources

(8) Developments with respect to Islamic law in Nigeria

Hitherto, Islamic law was regarded as part of customary law. For example, section 2 of the Katsina State High Court Law 1991[48] provides that 'customary law' includes Islamic Law. However with the promulgation of the various Shariah Penal Code Laws in some states in the Northern part of Nigeria, Shariah or Islamic Law can no longer be regarded as part of customary law. For example, section 29(3) of the Kano State Shariah Penal Code Law 2000[49]

provides that 'Islamic and Muslim laws shall be deemed to be statutory laws in all existing laws in the state'.

Section 29(4) of the Kano State Shariah Penal Code Law 2000 further provides that 'The provisions of existing laws in the state which define customary law to include Islamic or Muslim law are hereby accordingly amended and such provisions shall be deemed statutory laws wherever they occur'.

It could therefore be said that to the extent that the various Sharia Penal Code Laws now regard Shariah or Islamic law as statutory laws, they cannot now be regarded as part of customary law[50] as previously defined, at least in the states of Nigeria that have promulgated the various Shariah Penal Code Laws.

Conclusion

The established indigenous laws and institutions were relegated to a lower status following colonialism. Although it cannot be denied that right from the period the British government registered itself as the colonial overlord of what came to be known as Nigeria, it did not deny the existence of various indigenous laws and institutions, yet it should be asserted that the British as Nigeria's colonial overlord did not hide the improbability of allowing the indigenous systems and institutions to take the pride of place in the hierarchy of laws. Following the colonisation of Nigeria by the British, the British legal system and culture including method of governance became established. The transplantation of the British legal system became a fact of life. Even when the British recognised the need to allow 'the natives to govern themselves by their own laws', such permissive expression was halted or at least demarcated by the level of tolerance of the transplanted legal system, value and method of governance. The repugnancy test which the British put in place for the purpose of determining when the application of a rule of customary law was to be halted was an expression of indeterminable phrases. No one knew beforehand when the application of a customary law could be halted. To say that without more ado however is to look at just one side of the coin. The introduction of various English laws brought about progress and development. Hitherto obnoxious laws and rulers were made to see the light of progress. When Nigeria ultimately obtained her independence, the English legal system had become entrenched to the extent that it became difficult to uproot it from Nigerian soil. Indeed, instead of uprooting the English system, it became adopted, watered and tended. Developments a few years after independence showed the unsuitability of the political system under which Nigerian leaders operated. It later gave way to another system of democracy known as the presidential system of government. The English legal system

has however endured till today as the general law. The customary law which became relegated since 1863 has not been able to assert itself beyond the permissive extent of the repugnancy test. Some of the Muslim states of the north are reclaiming the prior status of their Muslim law. Its status as a variant of customary law is being given its quietus through the various Shariah Penal Code Laws. For the supporters and advocates of customary law as the basic law which ought to be observed and given pre-eminence, it has been a notable experience.

Notes

1. A. O. Obilade, The Nigerian Legal System, Sweet & Maxwell, Second Impression 1981, pg. 18.
2. The British concluded the Treaty of Cession with King Dosumu (Docemo) in 1861. This had the effect of ceding Lagos to the British Crown.
3. A. O. Obilade, Ibid.
4. With respect to the West Africa Court of Appeal of this period, the judges were those of the Supreme Court of Sierra Leone.
5. WACA was no longer a court of the settlements of Lagos and Gold Coast as a result of the development in 1874.
6. Obilade, Ibid. See also Agbede I. O. Legal Pluralism, Shaneson, 1991 pg. 2.
7. Obilade, Ibid.
8. Obilade, Ibid.
9. Obilade, Ibid.
10. Obilade, Ibid.
11. Sir Frederick D. Lugard, The Dual Mandate in British Tropical Africa, London, 1926, pg. 215.
12. With respect to the jurisdiction of the native courts in relation to civil and criminal matters. See Gubba v. Gwandu Native Authority [1947] 12 WACA 141 and Maizabo v. Sokoto Native Authority [1957] NRNLR 133. The conferment of criminal jurisdiction on the native courts and the effect of the sentences which they passed especially with respect to Islamic law issues led to the promulgation of the Penal Code Law in 1959 for the regulation of criminal activities in the Northern part of Nigeria. The jurisdiction of the native courts was limited to civil matters.
13. Obilade, Ibid.
14. Cap. 49 Laws of Northern Nigeria, 1963.
15. Cap. 44 Laws of Western Region of Nigeria 1959.
16. See for example section 34 of the High Court Law of Katsina State Cap. 28 Laws of Katsina State 1991.
17. Section 14 Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990. It is necessary to point out that the Evidence Act has been in operation since June 1, 1945.

18. [1991] SCNJ 73 at 77. See also Adah v. Adah [1998] 6 NWLR (pt 552) 97; Oyebisi v. Governor of Oyo State [1998] 11 NWLR (pt 574) 441.
19. [1973] 11 SC 1.
20. [1961] 1 All NLR 304.
21. at pg. 309.
22. [1908] 1 NLR 81.
23. at pp 100 - 101.
24. See Lewis v Bankole [1908] 1 NLR 81.
25. Daniels, Common Law in West Africa pg. 270 at pp. 270 - 271.
26. [1932] 11 NLR 47.
27. [1961] NRNLR 81.
28. [1976] 1 U. T. L. R. (pt III) 378.
29. [1949] 19 NLR 38.
30. [1931] A. C. 662.
31. at pg. 673.
32. [1959] GLR 390.
33. at pg. 401. See also Ademola Yakubu, 'Opting to Contract a Polygamous Marriage: A Consideration of McCabe v. McCabe'. [1998] Vol. 5 No. 1, Abia State University Law Journal, pg. 49.
34. [1944] 17 NLR 149.
35. [1985] 12 SC 84.
36. at pg. 88.
37. [1968] NNLR 97. Cited in Olowu v. Olowu at pp. 88 - 89.
38. Section 14 Evidence Act, Cap. Laws of the Federation on Nigeria, 1990.
39. [2000] 5 SCNJ 1.
40. at pg. 11.
41. at pg. 11.
42. [1916] PC 74 - 28.43.
43. Supra.
44. [1962] WRNLR 136.
45. [1947] 12 WACA 127.
46. [1957] NRNLR 29 at 39.
47. [1999] 3 SCNJ 6. See also Agbabiaka v. Saibu [1998] 10 NWLR (pt. 571) 534 Daku v. Dapal [1998] 10 NWLR (pt. 571) 573; Okene v. Orianwo [1998] 9 NWLR (pt. 566) 408); Ejimeke v. Opara [1998] 9 NWLR (pt. 567) 587; Ahuchaogu v. Ufomba) [1998] 12 NWLR (pt. 577) 293.
48. Cap. 59 Laws of Katsina State 1991.
49. Kano State Sharia Penal Code Law, 2000.
50. See section 2 of Katsina State High Court Law, Cap. 59 Laws of Katsina State 1991.