

## An Expository Dialysis of the Basis of African Customary Law in the Jurisprudence of Law

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### ABSTRACT

No subject under the sun has generated as much contention as the meaning of law. Determining the meaning of law has come to form the basis of jurisprudence. Many schools of thought have cropped up all in a bid to appropriately determine what meaning could be assignable to law. These schools advance variant postulations in the ascertainment of the concept of law. The question is: can customary law be said to have basis in the jurisprudence of law, especially given the position of early European scholars and jurists that African customary law does not qualify as law? What are the quotients of law in jurisprudence? Can African customary law not qualify as law in the light of these quotients? This paper employs doctrinal research methodology to, *inter alia*, dialyze the jurisprudence in order to locate the basis of African customary law. It was observed that jurisprudence of law is a matrix which squarely imbricates customary law even in its pristine forms; that a legal norm, irrespective of its texture or level of civilisation is distinguishable from social norm and cannot be dismissed or denied its existence in the pursuit, propagation or justification of certain ideology. Among other things, we recommended that in order to effectively engineer African society for maximum growth and development, Africans should look inwards and strive towards finding solutions to African problems.

**Key words:** Law, Africa, Customary law, Jurisprudence and legal pluralism.

### INTRODUCTION

Though the colonial philosophers and jurists denied African customary law the status of law, it is indubitable in this century that African customary law is law.<sup>1</sup> This is because a voyage into the jurisprudence of law reveals that, though most of the theories embody Eurocentric perspective of law, much of the basic elements of law identified by these schools are inherent in African customary law. What

is more, African customary law has lent a lot of its philosophical ideals to the world, in different aspects of environmental law, equity, rule of law, democracy and republicanism, checks and balance, arbitration, mediation and conciliation, etc.<sup>2</sup> This paper therefore attempts a dialysis of both the jurisprudence of law and African customary law with a view to ascertaining

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<sup>1</sup>Writers like Basden, M. M. Green, T. O. Elias, S. Johnson, Forte and Evans-Pritchard, Anda, Otubanjo, etc; devoted their strength to prove to the world that African customary law is nothing less than law in every sense of the world.

<sup>2</sup>See generally: T.O. Elias, *Nature of African Customary Law*, (Manchester: Manchester University Press, 1956); A. Ibidapo-Obe, *A Synthesis of African Law*, (Lagos; Concept Publication Limited, 2005) p. 32; M.M Green, *Ibo Village Affairs* (London; Sedgwick and Jackson, 1948) p. 78; E. C. Ngwakwe, *African Customary Law: Jurisprudence, Themes and Principles* (Abakaliki; AMA Publishers, 2013) p. 83; M. Fortes, *The Web of Kingship among the Tallensi* (1949); F. Otubanjo "Themes in African Traditional Political Thought" in Ayoade and Agbaje (eds), *African Traditional Political Thought and Institutions* (Lagos: CBAAC, 1989) pp 11-12.

whether the later has any basis in the former.

### **The Subject Matter of Jurisprudence**

Defining jurisprudence has posed baffle strife to jurists and philosophers. In fact, Finch cautioned that any attempt at definition may be 'at best misguided and at worst positively misleading.'<sup>3</sup> Egwummuo traced the etymology of jurisprudence to two Latin words: *jus* or *juris* - meaning 'of right' or 'of law' and *prudens* or *prudencia* - meaning 'foreseeing' or 'skilled' and concluded that jurisprudence means 'skilled or learned in the law'.<sup>4</sup> Allen sees jurisprudence as the scientific synthesis of the laws' essential principles.<sup>5</sup> Jurisprudence therefore is a science, a social science that embodies all branches of 'inexact knowledge' involving the study of social systems in an objective and methodical manner. According to Egwummuo, it collects and analyses facts and makes systematic deduction of principles from data relative to the workings of legal systems in order to justify jurisprudential claims based on more universal conceptions.<sup>6</sup> The exact borderline of the subject of jurisprudence is infinite. It crosscuts many disciplines as History, Philosophy, Sociology and Anthropology, Economics, psychology, Criminology, etc. When the question 'what is law' is posed, a pedestrian would think that his terms of reference is exhausted in the rendition of the meaning of law in one or two sentences as may be the case with defining Medicine, Architecture, Physics, Biology, Political Science, Sociology, etc. A jurist however knows that answer to this question has always transcended the expression of the meaning of law in one or two sentences. An effective determination of the meaning of law entails a voyage into jurisprudence with particular attention on the theories on the

<sup>3</sup> J. D. Finch, Introduction to Legal Theory (Sweet & Maxwell, 1974)

<sup>4</sup> J. N. Egwummuo, *Focus on Law and Jurisprudence* (Enugu: Academic Publishing Co., 2007) p. 1; RWM Dias, *Jurisprudence*, 5<sup>th</sup> edn (London: Butherworths, 1985) p. 1

<sup>5</sup> C. K. Allen, cited in Egwummuo op cit., p. 9

<sup>6</sup> J. N. Egwummuo, op cit., p. 9

meaning of the concept.<sup>7</sup> We shall explore the following schools as relevant to this paper:

#### **a. The Natural Law Theory**

The naturalists' perception of law has varied with its various exponents over time.<sup>8</sup> A common factor in their postulations however hinges on the fact that source or origin of law is located in God. Law accordingly is ordained by divine Supreme (God) and handed down to man. It is discernible by human reason or derived from human nature. Natural law is divine and reflects moral codes which are implanted in the heart of men by the creator directing them to do good and avoid evil.<sup>9</sup> To Aquinas, the natural law is but a participation of the eternal law in a rational creature, that is, the dictates revealed by reason reflecting on the natural tendencies and needs.<sup>10</sup> The primary principle of law accordingly, is that man should strive after what is good and avoid evil. Man decides what is good by reflecting on his own impulses and nature.<sup>11</sup> Natural law, therefore, is believed to direct men in conscience and thus, influence the formulation and determination of any

<sup>7</sup>Hart poses: "...few question concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question 'what is law'; even if we confine our attention to legal theory of at least 150 years and neglect classical and medieval speculation about the nature of law, we shall find a situation not parallel in any other subject systemically studied as separate and academic discipline. No vast literature is dedicated to answering the question what is chemistry? Or what is medicine as it is to the question what is law? No one has thought it illuminating or important to insist that medicine is what doctors do about illness or to declare that what is ordinarily recognized as characteristic central part of chemistry say the study of acids, is not really part of chemistry at all".

<sup>8</sup> Such exponent includes, Aquinas, St Augustine, Immanuel Kant, David Hume, John Finnis, etc.

<sup>9</sup> T. Aquinas, *Summa Theologica 1*, cited in R. V. M. Dias op. cit. pp. 472 - 473.

<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid*

positive law.<sup>12</sup> The naturalists believe that law constitutes the basis of human dignity, rights and duties of each human person irrespective of race, colour, age, religion or level of civilisation.<sup>13</sup> Locke points out that even

...The state of nature has law to govern it, which obliges everyone: and reason, which is that law, teaches mankind that being all equal and independent, no one ought to harm another in his life, health, liberty, or possession.<sup>14</sup>

According to Ngwakwe and Agbazuere, the natural law theory emphasizes the supernatural or non-human source of law, its transcendental or universal nature, the central role of human reason in adapting and applying law to social relations, and the goals of law in establishing or maintaining security, peace, rule of law, human rights guarantees, justice, social welfare, etc.<sup>15</sup> Natural law in its modern concepts means the basic elements of justice, guarantees of equality and other basic human right.<sup>16</sup> This

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<sup>12</sup> E. C. Ngwakwe, *African Customary Law: Jurisprudence, Themes and Principles* (Abakaliki: AMA Publishers, 2013) p. 44

<sup>13</sup> *Ibid*

<sup>14</sup> Ngwakwe *op. cit.* p.45

<sup>15</sup> E. C. Ngwakwe and A. C. B. Agbazuere, *Jurisprudence Interrogates African Law* (L & D Chocho Ventures, 2016) p. 4.

<sup>16</sup> This concept of equality and right influenced the writers of the declaration of American Independence, who in 1776 wrote; "...We hold these truth to be self evident, that all men are endowed with certain inalienable right, that among these are life, liberty, and the pursuit of happiness"; See American Declaration of Independence, available at <http://www.history-today.com/Robert-hole/am...>, visited last on 14<sup>th</sup> Jan 2016. The belief on the natural law also influenced the French Revolution of 1789 and Declaration of the Rights of Man.

theory has been criticised, especially by the positivists, on the ground that its terms and concepts are fluid and subjective. It is accordingly, a mere collection of notions varying from time to time and from society to society as to what is fair, just or good. This is to say that there is nothing universal in natural law theory and once universality is lacking, the foundation of this theory becomes destabilised and shaky.<sup>17</sup>

#### **b. The Positive School of Law**

John Austin, a core positivist, sees law as 'a rule laid down for the guidance of an intelligent being by another intelligent being having power over him.'<sup>18</sup> He argues that law, simply and strictly called, is law set by a political superior to a political inferior. This implies the existence of a political sovereign whom people in an organized political society are in the habit of obeying, on pain of sanction.<sup>19</sup> Ngwakwe and Agbazuere posit that positivism simply insists that law is man-made and represents command (of a superior to a subordinate in hierarchical political relations) with a threat of sanction for non-compliance.<sup>20</sup> From the foregoing postulations, the plank of the positivist theory is that law is a social construct. Elias illustrates that the exponents of command theory exposes that law is obligatory on the citizens of any given state and flows from the sovereign who enforces same with pains of sanction in the event of dereliction.<sup>21</sup> Hans Kelsen however insists that law as a social construct is normative in nature. These norms are implicitly prescriptive,

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<sup>17</sup> Aside these criticisms, the natural law has contributed immensely to the development of law and legal systems because ideas encapsulated in natural law theory have influenced both the evolution of positive law and its interpretation, since judges are usually swayed by the dictates of their consciences or moral sensibility in determining justice in all cases before them; Ngwakwe *op. cit.* p. 46.

<sup>18</sup> J. Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995) p. 18

<sup>19</sup> T. O. Elias, *Nature of African Customary Law* (Manchester University Press, 1956) p. 37.

<sup>20</sup> Ngwakwe and Agbazuere, *op. cit.*, 5.

<sup>21</sup> *Ibid*

hierarchical and interconnected. One norm is validated by another higher norm until the grundnorm of that legal system becomes the zenith of authority in such a system.<sup>22</sup> The positivists do not bother themselves with the ultimate end or future of the law. Elias, criticising this school, posits:

The analytical school ...would have nothing to do with either the past or the future of law: the one and the only task with which the jurist need concern himself is an analysis of what law is, here and now.<sup>23</sup>

In spite of all these criticism the positivist school has made enormous impact towards identification of the concept of law by making law more definite, empirical and to assume more coherent, discernible or predictable character and structure.<sup>24</sup>

### c. The Realist School

According to Hon. Justice Oliver Wendell Holmes - the chief exponent of this school, law is not a texture of subsisting rules from statute books, but a mere technique for

predicting what decision courts of law are likely to make in a particular case.<sup>25</sup> His conviction is that 'nothing more pretentious are meant by law, other than the prophecies of what the court will do in fact.'<sup>26</sup> Holmes presses further;

Take the fundamental question what constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from the principles of ethics or admitted axioms or what not which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws about the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind...<sup>27</sup>

Other proponents of this school see law in like terms. Salmond, for instance, defines law as the body of principles recognised and applied by the state in the administration of justice. States in this regard, act through the instrumentality of courts. Therefore the law consists of the rules recognised and acted upon by the courts in determination of justice.<sup>28</sup>

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<sup>22</sup> F. Adaramola, *Jurisprudence* (Durban: LexisNexis, 2008) p. 128

<sup>23</sup> Elias *op. cit.* p. 43; Similarly, it is apposite to point out that the positivism is therefore derived and anchored on the natural law because if law is the dictates of the whims of the political superior on the inferior to be obeyed on threat of sanction or what the judges will do to a set of facts placed before them, it deductively follows that if the superior commands thus, thou shalt not kill or thou shalt not steal, the tenets of these commands emanated from natural law theory. More so, the onus of determining breaches of these commands rest on the judges (what they will do to facts placed before them) In determining these issues of breach of sovereign command, the judges will usually bear the notion of justice, fairness and the concept of right (moral questions) in mind. Natural law theory therefore cannot be dismissed with a wave of the hand.

<sup>24</sup> Ngwakwe *op. cit.* p. 50

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<sup>25</sup> Elias *op. cit.* p.38

<sup>26</sup> Elias *op. cit.* p.38

<sup>27</sup> O. W. Holmes, *The Path of Law*, cited in J. M. Elegido, *Jurisprudence* (Ibadan: Spectrum Books Ltd, 1994) p. 97

<sup>28</sup> J. Salmond, *Jurisprudence* cited in T. O. Elias *op. cit.* p.39.

Gray believes that the 'law of a state or of any organised body of men is composed of the rules which, that is, the judicial organs of that body - lay down for the determination of legal rights and duties.'<sup>29</sup> This school has been credited with bringing the law within its domain with ultimate precision about legal rights and duties which crystallise after the courts have given it the force of law. The courts, therefore, give force to a set of rule so as to become law. This force lies in the enforcement of courts' decisions and orders. The school has nonetheless been criticised on the basis that realism hinges the concept of law on the courts. If the tenets of realism hold sway, then, many societies thriving without formal courts would be held to have no laws.<sup>30</sup> However, rules of law can subsist without a single system of judicature provided the essential requirements of justice are observed.<sup>31</sup>

#### d. The Utilitarian Theory

The 'father of English Jurisprudence' - Jeremy Bentham is noted for this theory. He asserts that the ultimate aim of law should be to guarantee greatest happiness for the greatest number of citizens.<sup>32</sup> In other words, law is that which maximises pleasures and minimises pains.<sup>33</sup> Illuminating on this theory, Malemi maintains that the central idea of the utilitarian theory is that every person is entitled to pursue his/her happiness, advantage, self-actualisation, and self-fulfilment with no interference by the state. The utility of any law therefore lies on the extent to which it guarantees happiness and reduced pains for the citizens. Whether any law is good or bad depends on its

evaluation with regards to its utility to individuals and the society.<sup>34</sup>

Harrison illustrates that Bentham premises his theory on the fact that it is in the habit of men to direct their actions towards gaining pleasures but not pain. He maintains that the fact that this self-interest is disguised as altruism or some similar selfless ideal is immaterial. Bentham identifies pleasure to include physical pleasures of all sorts - knowledge, riches, power, friendship, and good reputation and pain to include deprivation, enmity, bad reputation, malevolence, insecurity, fear, etc. All institutions devised by men, Bentham insists, are supposed to promote happiness and avoid pain. Their utility therefore should be determined based on the extent of their success in guaranteeing happiness to greatest number of the citizens.<sup>35</sup> The ultimate task of laws is therefore to secure maximum happiness of each individual, for the happiness of each will result in the happiness of all.<sup>36</sup>

#### e. The Sociological School

The sociological school sees law from the functional perspectives and builds their postulations around the central theme of the role of law in securing the social benefits of the community and in balancing competing interests.<sup>37</sup> Ihering believes that law is meant to serve human ends. This idea of human ends is subsumed in Bentham's principle of utilitarianism wherein he insists that law acts as a means of promoting greatest happiness of the greatest number in the society. Roscoe Pound propounded his social engineering theory of law where he firmly believes that law can be used to build a social structure that can satisfy maximum of wants with the most minimum of friction. It is one side of the process of social control and may well be thought of as a task or as a general series of tasks of

<sup>29</sup>The realist school insists therefore that a set of rules is not law until the courts of justice, being the institution of state saddled with the responsibility of interpreting and applying the law, have so acted on it and given same the status of law; J. C Gray, *The Nature and Sources of the Law*, 2<sup>nd</sup> Edn (1921) cited in Elias *op. cit.*

<sup>30</sup>Ngwakwe *op. cit.* p.51

<sup>31</sup>*Ibid*

<sup>32</sup> Adaramola, *op. cit.*, 254.

<sup>33</sup> Elegido, *op. cit.*, 43.

<sup>34</sup> E. Malemi, *The Nigerian Legal Method*, 2<sup>nd</sup> edn., (Lagos: Princeton Pub. Co., 2012), p. 52.

<sup>35</sup> R. Harrison (ed.), *Bentham: A Fragment on Government* (Cambridge: Cambridge University Press, 1988), p. 5.

<sup>36</sup> J. Bentham, 'An Introduction to the Principles of Morals and Legislation' cited in Dias, *op. cit.*, p. 427.

<sup>37</sup>J. Bentham, *op cit.*

social engineering, as an elimination of friction and precluding of waste, so far as possible, in the satisfaction of infinite human desires out of a relatively finite store of the material goods of existence. Law is the body of knowledge and experience with the aid of which this task of social engineering is accomplished.<sup>38</sup>

Duguit holds that law is an instrument for social solidarity. In an attempt to elucidate this, he propounded his principle of *regle de droit* (rule of law), which he believes is the only true basis of social order in any community. Individuals, he insists, owe it to themselves and to society to ensure the orderly progress of public as well as private affairs. The community, for this purpose, may be regarded as two complementary segments - the rulers and the ruled, and their lawful behaviour is guaranteed by the principle of social solidarity.<sup>39</sup> It is the duty of all members to sustain the absolute solidarity of their society. No one can assert any claim to civil rights except such as are deriving from a strict obedience to this principle. Any rule of social behaviour that conforms to it is a rule of law.<sup>40</sup>

Although the sociological school has been criticised because of failure to note that these said interests were not merely competing but contradictory and that even when some of these interests might not be antagonistic, antagonistic relations dominate;<sup>41</sup> the school has proffered an illuminating theory which emphasises on

<sup>38</sup>R. Pound, *Interpretation of Legal History*, (London: Cambridge University Press, 1923) p. 156.

<sup>39</sup>Duguit stresses that the community is divided into (a) the governors - those appointed to run the affairs of state and (b) the governed - those who in the interest of the common weal, give up part of their civic prerogatives to the governors. The relation is not one of subjection as implied by Austin but one of mutual interdependence inspired by a desire for division of labour. Each, and all, in the community are bound by the unalterable operation of this *regle de droit* principle; Elias *op. cit.* p. 41

<sup>40</sup>*Ibid*

<sup>41</sup>O. C. Eze, "Theoretical Perspective and Problematics" in O. C. Eze, ed. *Society and the Rule of Law* (Owerri: Totan Pub., 1987) p. 30; Ngwakwe *op cit* p. 53

the inseparability of meta-legal factors from the grey matter of law.<sup>42</sup>

#### f. The Economic Theory of Law

The Economic theory of law anchors its position of law on the social, political cum economic theory of Karl Marx. Marx and his associate Engels based their conception of law rather from the perspective of evolutionism and functionality. According to Engels, legal principles are merely the reflections of economic relations; although the jurist imagines he is operating with a *propr*i proposition, they are really but economic reflections.<sup>43</sup> Marx maintained that juridical relations are only a reflex of the real economic relations which determines the subject matter composed in each judicial act.<sup>44</sup> Law, according to Marx, is a superstructure imposed on an economic system. Economic system is therefore the pedestal on which this superstructure rests and is independent and antecedent to law.<sup>45</sup> Marx insists that every society is constituted by two classes of people - the dominant (bourgeoisies) and the dominated (the proletariats). Law, to him, evolves and lends itself as an instrument in the hands of the bourgeoisies for the subjugation of the masses.<sup>46</sup> Law is a product or a by-product of econometrics, thus, lacks any autonomy in itself and devoid of any capacity for social change.<sup>47</sup> Law, even after the Marxist's proletarian dictatorship is established, will similarly be utilized by the working class majority to crush and eliminate the capitalist minority.<sup>48</sup>

This school believes that state exists with class distinction and is responsible for unequal distribution of means of production and distribution. Law similarly developed side by side the state to aid the capitalist minority in intensification and perpetuation of its powers. The wealthy sought to protect

<sup>42</sup>Dias, *op. cit.* p. 398

<sup>43</sup>F. Adaramola, *Jurisprudence*, 4<sup>th</sup> edn (Durban: LexisNexis, 2008) p. 288.

<sup>44</sup>*Ibid*

<sup>45</sup>Dias *op. cit.* p. 399

<sup>46</sup>Dias, R. W. M., *Jurisprudence*, 5<sup>th</sup> edn (London: Butherworths, 1985) pp. 398 – 399.

<sup>47</sup>*Loc. cit.*

<sup>48</sup>*Ibid.* p. 399

their property from the poor. Law and state therefore lend themselves, in capitalist societies, as devices of obligation manipulated by the bourgeois minority to dominate and exploit the working class majority (serfs). According to Eze:

The socialist concept of law accepts as a starting point, man made(sic) law, that is, positive law as the only valid law thus rejecting natural law theories as idealistic, a priori, or metaphysical. But it goes beyond that to regard law as a system of social relations or a form of production relations. Law is an aggregate of rules of conduct or norms, yet not of norms alone, but also of community living, confirmed by the state authority and coercively protected by that authority.<sup>49</sup>

The socialist school sums up their theory by insisting that the communist or classless society will finally emerge and displace all the instrument of oppression and domination. According to Engels, the state and the law will 'wither away' and be replaced by an 'administration of things'.<sup>50</sup> Dias aptly points out that in as much as law reflects economic conditions as posited by the Marxists, it would be unfair to deprive law of all its creative force. For law can, and has played a creative part but always conditioned by its economic substrate. Even in the proletarian dictatorship, law should serve as a means to an end - to prepare the way for the classless society.<sup>51</sup> Since law is but a means to an end, it should on no account hamper the work of the proletarian state.<sup>52</sup>

<sup>49</sup> O. C Eze *op cit* p. 31; Ngwakwe *op cit* pp. 11, 53.

<sup>50</sup> Ngwakwe *op cit* pp. 11, 53.

<sup>51</sup> *Ibid*

<sup>52</sup> Elias *op. cit.* p.43

### **g. The Historical and Anthropological School**

The historical and anthropological school can be said to have some alliance with the natural law school and are opposed to the positivism. The bulwark of this theory resolves around culture and history of the people.<sup>53</sup> Von Savigny - leader of this school, argues that law is an aspect of the total common life of a nation, not something advertently made by the nation as a matter of choice or convention, but, like its manners and language, bound up with its existence, and indeed helping to make the nation what it is.<sup>54</sup> This school believes that no matter how further one goes into the history of a people, one must always find some form of law governing them.<sup>55</sup> Savigny observes;

It is by no means to be thought that it was the particular members of the people by whose arbitrary will law was brought forth ... Rather it is the spirit of the people living and working in common in all the individuals, which gives birth to positive law.<sup>56</sup>

Savigny, thus, propounded the spirit of the people (*volkgeist*) as the determinant of the nature of the system of law governing them. Law grows with the growth, and strengthens with the strength of the people and finally dies away as the nation loses its nationality, he maintained.<sup>57</sup> Dias points out against Savigny's theory that no legal system can wholly be autochthonous. So purity of law on the basis of common historical consciousness is idealistic.<sup>58</sup> Elias, aligning himself with Dias, opines that if law is of common consciousness, as claimed

<sup>53</sup> Ngwakwe *op. cit*

<sup>54</sup> F. K. V Savigny, *The System of Modern Roman Law* (1867) p. 72 cited in Elegido *op. cit.* p.81

<sup>55</sup> Dias *op. cit.* pp. 378; Ngwakwe *op. cit.* p. 55

<sup>56</sup> F.K.V Savigny *op cit*; Dias *op. cit.* p. 399

<sup>57</sup> Elias *op. cit.* pp 43 - 45

<sup>58</sup> O. C. Eze *op. cit.* p. 31.

(by Savigny) there would be no incidences of individuals breaking the law of which they are conscious and have consented to.<sup>59</sup> Aside all these criticisms, Savigny has, in this thesis, been able to establish that law cannot be effectively detached from the history and culture of the people. The history and culture of the people, reflected in their *volkgeist*, rather shapes and influences positive law, or borrowed (received) law.<sup>60</sup> The Anthropological school has similarly located law on the culture of the people usually with some traditions regarding its origin, validity and enforcement.<sup>61</sup> Even amidst criticism especially from the positivists, the Anthropological school has got the credit of recognising custom as a veritable source of law.<sup>62</sup>

#### **African Customary Law.**

Like every other concept in law, customary law has been variously defined. These definitions may be canalised into statutory, anthropological, colonial and African approaches of definition.<sup>63</sup> The colonial laws

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<sup>59</sup>Elias *op. cit.* p. 43; Elegido argues that the frequent phenomena of 'legal transplantation' many of which are successful and have taken place in this century also belies Savigny's thesis. For instance, Egypt adopted French Code, Turkey that of Switzerland and Japan that of Germany. Again many African and Asian countries have 'imported' massively French, English or Dutch law. See Elegido *op. cit.* pp. 82 – 83.

<sup>60</sup>This is especially true when one considers how the Gay Marriage Act rather prohibited same sex marriage in most African Countries even at the threat of sanction from the US government. The core reason for its failure to recognise gay unions can be attributed to the fact that same sex marriage is not just unknown to African culture but that the culture of the various ethnic groups making up Africa has from time immemorial criminalised sex against the order of nature. This is the power of *volkgeist* as propounded by Savigny.

<sup>61</sup>Dias *op. cit.* p. 378; Ngwakwe *op. cit.* p. 55.

<sup>62</sup>Dias *op. cit.* pp. 378-382; Ngwakwe *op. cit.* p. 56

<sup>63</sup>C. N. N. White, "African Customary Law: the Problem of Concept and Definition" in *Journal of African Law* (1965) Vol. 9 No. 2 p. 82.

influenced the statutory definitions<sup>64</sup> and offer a lot of limitation to the concept. The Customary Courts Law<sup>65</sup> of Old Eastern Region of Nigeria defines customary law as:

...a rule or body of rules regulating rights and imposing correlative duties being a rule or body of rules which obtain and is fortified by established usage and which is appropriate and applicable to any particular matter, dispute, issue or question.

The Evidence Act<sup>66</sup> defines custom as a rule which in the particular district, has, from long usage, obtained the force of law. The Black's Law Dictionary<sup>67</sup> similarly defines customary law as:

law consisting of customs that are accepted as legal requirement or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of social and economic system that they are treated as if they were law.

Emphasis in all these definitions hinges on 'custom' as a validating force for rules of conducts and as that which gives those rules obligatory quality in a particular

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<sup>64</sup>Since most of these statutes were enacted by the colonial authorities or imported and adopted as local statutes.

<sup>65</sup>S. 2. Each of the five states comprising this zone now has its own Customary Court Laws. S. 2 of the Ebonyi State Customary Court Law cap 47 Laws of Ebonyi State 2009 defines customary law in exact words.

<sup>66</sup>Cap E 14 LFN 2010 in S. 2 (1). This definition was adopted by the Supreme Court per Nwokedi JSC in *Agbai v. Okagbue* (1991) NWLR (Pt. 204) 391 at 416.

<sup>67</sup>7<sup>th</sup> Edn. (St Paul Minn: West Pub. Co.1999) p.391



district or locality.<sup>68</sup> It is a factual truism that customary law evolved from custom. But such custom has satisfied some necessary conditions to become law. For instance, such custom must have: sufficient measure of antiquity, been continuously in existence and known in the community and synchronised consistently with other body of customs and is certain and precise in scope.<sup>69</sup> The anthropologists maintain that customary law:

...consists of a variety of different types of principles, norms, and rules. Some of them state wide and general principles of morality and public policy to constitute an apparently enduring ideological framework for justice. Such principles of wide connotation ...can be adapted to changing conditions and standards.<sup>70</sup>

This definition especially implies that custom is culturally homogenous, uniform or identifiable among group of people or society. But this is certainly not so because there are over fifty independent states in Africa encapsulating over one thousand ethnic groups with distinct linguistics, climatic, socio-economic and religions conditions.<sup>71</sup> Judges have offered several definitions of customary law. In *Owoniyi v.*

<sup>68</sup> To this, Ngwakwe raises objection and maintains that even though at some point they are related, law and custom are not synonymous. While custom depends on acceptable practice, law exerts obligation. See Ngwakwe *op cit* p, 102; see also J. O. Assein, *Introduction to Nigerian Legal System* (Ibadan: Sam Bookman Publishers, 1998) p.15

<sup>69</sup>Ngwakwe *op. cit.* p 103.

<sup>70</sup>M. Gluckman,( ed), *Ideas and Procedures in African Customary Law* (London: Oxford University Press, 1969) pp. 9-10.

<sup>71</sup>*Ibid*

*Omotosho*<sup>72</sup> Bairaman F.J. referred to customary law as “a minor of accepted usage’. In *Aku v. Aneku*<sup>73</sup> the Court of Appeal defines custom or usage as:

The unrecorded tradition and history of the people which has ‘grown’ with the ‘growth’ of the people to stability and eventually become an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or subject matter to which it relates.

The Supreme Court<sup>74</sup> defines customary law as ‘the organic or living law of the indigenous people of Nigeria regulating their lives and transactions which controls the lives and transactions of the community subject to it’. In *Bakare Alfa v. Arepo*<sup>75</sup> the court referred to customary law as ancient rules of law binding on a particular community and which rules do change with

<sup>72</sup>(1961)1 All NLR 304. This was adopted by the Supreme Court in *Kimdey & Ors v. Military Governor of Congola State & Ors* (1988)2 NWLR (Pt. 77) 445; see *Zaidan v. Mohssen* (1973)11 SC 1 at 21 and *Exparte Ekpenga* unreported FSC. 204/1961 on 30/4/62, where Ademola C.J.F referred to customary law as “ the common law of the people”

<sup>73</sup>(1991)8 NWLR (Pt. 209) 280; See also *Ojisua v. Aiyebilehim* (2001) 11 NWLR (Pt. 723) 44 at 52; where Niki Toby JCA (as he then was) distinguished between custom and customary law.

<sup>74</sup>Per Obaseki JSC in *Oyewumi v. Ogunesan* (1990)3 NWLR (Pt. 137) at p. 137. This was given approval in *Dang Pam v. Dang Gwom* (2000)1WRN 51 at 63; *Yaktor v. Governor of Plateau State* (1997)4 NWLR (Pt. 498) 216 at 228-229.

<sup>75</sup>(1963) WNLR 95

the time and the rapid development of social and economic condition. Similarly in *Salau v. Aderigbibe*,<sup>76</sup> the court sees customary law as 'those rules of conduct which the people of a particular locality have come to recognise as governing them in their relationships between themselves and things.

The last two definitions see customary law as rules of conduct binding persons within a particular locality and maintain that these rules are of ancient antiquity. This is preferred because, though customary law evolves from the custom and usages of the people, customary law can at the same time be distinguished from custom.<sup>77</sup> Customary law composed of rules of conducts which are obligatory, and carries with it sanctions,<sup>78</sup> for effective administration while rule of custom are moral rules that do not create obligations and are not mandatorily enforced.<sup>79</sup> Secondly, rules of customary law must have existed from time immemorial and continued to exist up to the material time. This does not mean that it is so rigid that it cannot change to the current milieu.<sup>80</sup> Similarly, rules of customary law are applicable in a particular locality. This is to the effect that the customary law of a given society may be homogenous in that society but not with the other, even though, there may appear some resemblance. This is however contradictory to any suggestion that Africans constitute a group with common culture capable of producing a common customary law of Africa.<sup>81</sup>

Jurists opine that Africa only qualifies as a group for purposes of determining its customary law.<sup>82</sup> According to Allot;

The some-what paradoxical conclusion emerges that African law

therefore resemble each other... On the African continent the resemblance of customary laws do not suddenly cease as one crosses a particular linguistic, ethnic, or racial boundary... The theme of the synthetic view is unity in diversity.<sup>83</sup>

Customary law therefore is the common law of the people. It is the living (organic) law of the indigenous people which regulate their daily lives and transactions. It is organic because it is not inert. It is dogmatic in that it pedals the totality of the activities of the community wherein it operates. Rules of customary law import justice to the lives of all subject to it.<sup>84</sup>

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<sup>76</sup> (1963) WNLR 80

<sup>77</sup> Ngwakwe *op. cit.*

<sup>78</sup> Whatever is the form or variation of such sanctions does not matter.

<sup>79</sup> J. O. Assein *op. cit.* p.15

<sup>80</sup> A. A. Kalajo, *Customary Law in Nigeria Through the Cases* (Ibadan: Spectrum Books Ltd, 2000) p.1

<sup>81</sup> Ngwakwe *op. cit.* p. 104

<sup>82</sup> *Ibid*

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<sup>83</sup> A. N. Allot, *Essays in African Law* (London: Butterworth, 1960) p.63.

<sup>84</sup> A. A. Kalajo, *op. cit.* pp. 1-2.

## Basis of African Customary Law in the Jurisprudence of Law

### a. Theoretic Exposition

African customary law evinces matrixes of imbrications in the jurisprudence of law. For instance, the supernatural or metaphysical origin of law postulated by the naturalists is evidently encapsulated in customary law, where law is intractably intertwined with divinity.<sup>85</sup> The positivist's command of sovereign can be related to such African societies as are kingly or chiefly, although, the forms which the command assume also vary in such African societies as opposed to their European counterpart envisaged by the positivists. The realist insistence on judicial interpretation and applications also finds close affinity with customary law. African societies have judicial institutions that applied the law. Although, these institutions are informal in organisation, they nonetheless perform and are regarded no less than European formalised judicial institutions. The historical school postulation was holistically reflective of African customary law in that customary law owes its origin from the custom and culture of the people from time immemorial. The people, who profess and practice common culture often has common history. The balancing of conflicting interest by the sociologists fits squarely with the African customary law principles of communalism and social solidarity. Attainment of justice as a function of law is ensured in African societies where the basic underlying principle of justice is restitution and reconciliation and not retribution and punitive.<sup>86</sup> Law in Africa also serves as instrument for the promotion of economic relations. Thus, African customary law takes care of the socialist school fear of economic exploitation. African societies exist on the principles of communitarianism. Law in Africa expresses *communitarianism* and is couched in positives terms. In a word, customary law reflects collective will and interests and emphasises what shall be done against what shall not be done.<sup>87</sup>

### b. Exposition of Sources

<sup>85</sup>*Ibid*

<sup>86</sup>*Ibid*

<sup>87</sup>A. A. Kalajo, *op. cit.* pp. 1-2.

The meanings assignable to the expression 'sources of law' are varied<sup>88</sup>. Irrespective of what jurists hold of sources, we are concerned, in this paper, with sources of law as the origin or forces that have shaped the development of law and to which the content of law may be traced. That is, historical or material sources. Here, custom, religious beliefs, ideas of reasonableness, natural justice, conscience, public policy, and in civil law, professional practice and juristic opinions are all sources of law.<sup>89</sup> Written materials from which we obtain knowledge of what the law is or was at a given time, that is, literary sources of law is also contemplated here. In this sense, statutes, law reports, books of authority are regarded and relied upon as sources of English law which was transposed to her erstwhile colonies.<sup>90</sup> Salmond also defines sources in terms of the 'ultimate legal principle'.<sup>91</sup> Sources like statutes, judicial precedent and custom are envisaged here. According to Hart; "a source is simply the causal or historical influence of a given rule of law at a given time and place..."<sup>92</sup> Sources of law means those remote and immediate causes which explain the contents of law and with the organs through which the state either creates law or grants legal recognition to rules previously not authoritative.<sup>93</sup> Law in traditional Africa ossified from the following sources:

#### I Custom

<sup>88</sup>Four different meanings assignable to the expression depending on whether 'formal' or legal sources are being contemplated are identifiable. See M. C. Okany, *Nigerian Commercial Law* (Enugu: Africana – Fep. Pub. Ltd., 1992) p. 6; Appadorai *op. cit.* pp. 61 - 62

<sup>89</sup>H. L. A Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) p. 97; Ngwakwe *op. cit.* p. 35; Obilade *op. cit.* p. 55.

<sup>90</sup>H. L. A Hart, *op. cit.*, p. 97

<sup>91</sup>J. Salmond, *Jurisprudence*, 11<sup>th</sup> Edn. (London: Sweet and Maxwell, 1937) p. 137

<sup>92</sup>*Ibid*

<sup>93</sup>Appadorai *op. cit.* pp 61-62

This is the earliest source of law and originated from time immemorial. It is generally observed course of conducts which are either deliberately or accidentally repeated until ripen into habits.<sup>94</sup> Custom forms, to a great extent, the major source of law. Customary law governed most of our personal laws and is relied upon by the natives in conducting their affairs in remote villages. According to Park:

...But from a purely numerical viewpoint they (statutory and other received laws) are of less account than customary law... At present, however, the vast majority of the inhabitants of Nigeria conduct most of their activities in accordance with and subject to customary law; and if all courts of whatever status is considered, far more cases are decided under customary law than under any of the other laws in force in the country.<sup>95</sup>

Custom, thus, regulates most activities in the communities. In such a society, all the structures and institutions are either created or recognised by the custom for them to function. Therefore, the king's command, elders-in-council, age grades, legislations and proverbs which sometimes encapsulate legal principles, obligations to accept and obey the law are all rooted in custom.<sup>96</sup> Sanctions in customary law was in the form of fear of public opinion, opprobrium, social stigma or some kind of supernatural penalty. For instance, the Hindus advised 'sitting *dharna*' (a practice where the creditor sits at the debtor's doorstep and starve till the creditor pays the debt) as an effective debt

<sup>94</sup> Appadorai *op. cit.* pp 61-62.

<sup>95</sup> A. E. W Park, *Sources of Nigerian Law* (London: Sweet & Maxwell, 1964) p.65

<sup>96</sup> Ngwakwe *op. cit.*

recovery measure. It is believed that some supernatural penalty would follow if the debtor allows the creditor to starve.<sup>97</sup>

#### **ii. Religion (Divine Source)**

This source of law originated from God (divine theory of origin). Mankind in his relationship with God and his fellow beings has always been regulated by divine injunctions. In the primitive societies, custom and law are intricately woven with religion. All rules of life accordingly had religious sanctions. For instance, the early laws of Rome was a little more than a body of technical religious rules, a system of means for obtaining individual rights through the proper carrying out of certain religious formulas.<sup>98</sup> This source shares ideals with natural law. It is the basis of all laws in pre-colonial Africa.

#### **iii. Taboo**

This consisted of any conduct or behaviour or set of conducts or behaviours which are prohibited for religious or customary reasons. Taboos have their roots in religious beliefs and were vehemently observed to avoid evil or misfortune befalling the community, the family or the individual who breached the taboos himself. Taboos could also be associated with God (gods, deities), spirits or morality, etc.<sup>99</sup> Consistent observance of taboos over a long period of time hardens precepts of taboos into rule of law.

#### **iv. Legislation**

In traditional Africa, legislation may be legislation by king's decree, command or proclamation,<sup>100</sup> legislation by King-in-

<sup>97</sup> *Ibid*; Even in highly civilised societies, some customs began to receive the force of law with its enforcement by sovereign political authority. For instance, the common law of England consists mainly of customs accepted by the courts of law which in course of time consolidated into the common law of England.

<sup>98</sup> The personal laws of Hindu and Muslims, especially laws relating to inheritance and marriage are mostly influenced by religion.

<sup>99</sup> See Ngwakwe *op. cit.* pp. 79 – 80.

<sup>100</sup> In this situation, the instruments, orders, directives, proclamations, or judgment of the sovereign are bound to be obeyed by his inferior subjects. African societies of the kingly or chiefly form accord with

Council, institutional legislation, legislation by public assembly or judicial legislation.<sup>101</sup> Legislation is a source of customary law both in kingly and acephalous societies.

**v. Equity**

Jegede identifies two levels of meaning associated with equity.<sup>102</sup> In the most popular level of meaning, equity simply means right doing, good faith, honest and ethical dealings in transactions or relationship between man and man or whatever is right and just in all human transactions and relationships. The principles of fair dealings, rights and wrongs, to a great extent, shaped customary law

**c. Exposition in Terms of Structure and Form.**

In pre-colonial era, customary law formed the ultimate norm of the African law, thus, formed a complete means of regulating social behaviour and is structured in themes. Ngwakwe observes that:

political activities, for instance, necessitated rules that governed the relationship between the ruler (s) and the ruled, and among the ruled themselves.

this category while such societies as are acephalous or segmented do not since central administration and hierarchical organisational structures were lacking.

<sup>101</sup>A. N Allot cited in Ngwakwe op cit p. 81; the first and second types of legislation are mostly seen in centrally organised political societies like the kingly or chiefly societies. The third and fourth types of legislation are mostly popular in acephalous and segmented society while the last type is seen mostly in societies with vertically structured hierarchical judicial institutional systems. Judicial legislation gives rise to precedent. In pre colonial era, therefore, customary law regulated all aspect of the individual relationship inter se. The customary law evinces different aspect of law and acted as the grundnorm; Oyewo et al, *A Survey of African Law and Custom with Particular Reference to the Yoruba Speaking Peoples of South Western Nigeria* (Ibadan: Jator, 1999) p. 28.

<sup>102</sup>M. I. Jegede, *Principles of Equity* (Benin City: Ethiope Publishing Co., 1981) p.7.

Economic and commercial activities implied that there would be rules governing exchange, ownership and production relations. Similarly cultural, religious and educational activities resulted in rules governing beliefs and many other chains of relations. With the rules came concepts of rights, duties and obligation between several parties involved in a chain of social relations.<sup>103</sup>

Ngwakwe further expatiates;

The rights created by political relations accordingly give rise to administrative and constitutional law conceptions, religious relations to legal personality and education, cultural relations to marriage, family, succession and inheritance, economic relations to conceptions of property and land holding systems, etc. Sometimes, combinations of the relations produce one or several conceptions or vice versa.<sup>104</sup>

Such themes as contract, evidence, land ownership and holding, equity, property law, family law and succession, torts, criminal law, equity and trusts, environmental law, Planning law,

<sup>103</sup>M. I. Jegede, *op cit*, p.122.

<sup>104</sup>*Ibid*

constitutional and administrative law, *inter alia*, formed the gamut of African law.<sup>105</sup>

As for form, African customary law shows form akin to the received law, though, was largely unwritten in pre - colonial era. This does not in any way suggest that rules of customary law were uncertain as these rules were written in the hearts of elders and transmitted from one generation to another. The following are the forms of African customary law:

- i. **Body of Rules:** Law is identified as a body of rules. This means that law as a social norm encapsulates rules which regulate human behaviour in a particular society irrespective of nature and level of civilisation of such society. For instance, criminal law rules and its mode of enforcement are identical in both English and African societies save in the structure of courts. According to Green:

The commission of an offence which is...forbidden - would seem to involve the whole community and not merely the individual concerned. The individual who takes action do so on the part of the community. If there is any point in trying to apply the categories of criminal matters, then presumably offences against Ala and probably other such (forbidden) behaviour might be classified as criminal cases.<sup>106</sup>

- ii. **Normative in Character:** African customary law distinguishes legal

norm from norms of other categories. Legal norm is distinctive of moral and social norm by its inherent obligatory nature. This means that legal norms closes all windows of option or choice and leaves one with no option than to comply or face sanction, whatever the form. Customary law is also inherently normative in nature.

- iii. **Enforceability:** Customary law was enforced even in primitive societies as a regulatory norm. The king was assisted by the age grades, trade unions, palace guards, local army, etc, in law enforcement. Traditional courts composed of elders sat on ad-hoc basis to determine rights and obligations of the parties to disputes.
- iv. **Enactment:** in addition to the existing customary law which evolved with any given society, certain rules of customary law were enacted. How the law was enacted and the organ of state empowered to make law usually varied in different societies. The system of traditional government - fascism, totalitarianism, monarchy, gerontocracy, democracy, etc, determines the organ that made the law. Similarly, law was made by the king, the King-in-Council, tree-shade parliament, elders-in-Council, etc.
- v. **Territorial Scope:** The scope of operation of law is usually expended within the territorial borders of the society enacting it. Law does not have universal application.<sup>107</sup> This was also the case with customary law. The scope of these laws were limited within each traditional societies, though, with some similarities. According to Allot;
  - The some-what paradoxical conclusion emerges that African laws therefore resemble each other... On the African continent the

<sup>105</sup>Ngwakwe *op. cit.* pp.121 – 123.

<sup>106</sup>M.M. Green, *Ibo Village Affairs* (London: Sidgwick and Jackson, 1948) pp 101, 226-230

<sup>107</sup> E. A. Odike, *Principles and Practices of Nigeria Law* Vol. 1. (Abakaliki, WillyRose and Applesseed Pub.Co., 2009) p. 9

resemblance of customary laws do not suddenly cease as one crosses a particular linguistic, ethnic, or racial boundary... The theme of the synthetic view is unity in diversity.<sup>108</sup>

- vi. **Binding Force:** This in fact, distinguishes legal norm from moral norm. Legal norms are obligatory. Its binding force is unrestricted within the state. Legal norms bind all the members of a given society and continue to so do until it is either modified or abrogated. Customary law sanctions existed in form of public opprobrium, social stigma, supernatural and physical penalties and restitution.
- vii. **Certainty/Ascertainability:** certainty and ascertainability renders law predictable; again this certainty in law distinguishes law from morality. Rules of law are generally certain while rules of custom and morality are generally uncertain. In customary law, custom is distinct from law. Green similarly asserts that ‘...we shall see that ... in this society, law is distinguished from custom in the sense that it is enforced, directly or indirectly by the community, and that this distinction is recognized by the people.’<sup>109</sup>

### Influence of Colonial Laws on Customary Law

**a. Validity and Applicability of Customary Law:** colonial laws influenced African customary law in sundry ways. the received law, for instance, displaced indigenous system of law so much so that customary law which was supposed to be

the dominant and validating component<sup>110</sup> of African law is relinquished to the background. For instance, S.19 of the Supreme Court Ordinance of 1876.<sup>111</sup> provided;

Nothing in this ordinance shall deprive any person of the benefit of any law or custom existing in the said colony and protectorate, such law and custom not being repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any enactment of the legislature existing at the commencement of this ordinance or which may after words come into operation...

S.19 of the Supreme Court Ordinance therefore provided the criteria for validating customary law for purposes of application.<sup>112</sup> Accordingly, customary law must pass three test for it to be applied:

**(i) Non Repugnancy Test:** the court cannot apply or enforce any rule of customary law that is repugnant to natural justice, equity and good conscience.<sup>113</sup> A cloud of crisis appears unsettled over the meaning of the

<sup>110</sup>Just like the common law of England influenced case laws and statutes until changes (slight) of the renaissance.

<sup>111</sup>This ordinance is applicable to Nigeria. However, all Anglo African Colonies have their equivalent. The Francophone African colonies also their own peculiar ordinances.

<sup>112</sup>This provision was revised and re-enacted several times into colonial legislations. Even in modern period, it is still contained in several of our laws. The Evidence Act still have this provision in its S... where the last segment now talk of incompatibility with any law for the time being in force and added that such custom must not be against public policy.

<sup>113</sup>O. N. Ogbu, op cit p. 98; Ese Malemi, op cit p. E. A. Odike op cit p

<sup>108</sup>A. N. Allot, *Essays in African Law* (London; Butterworths, 1960) p.63.

<sup>109</sup>M.M Green, *Ibo Village Affairs* (London; Sedgwick and Jackson, 1948) p. 78.

phrase 'natural justice, equity and good conscience.

An attempt to interpret the phrase disjunctively by Speed J in *Levis v. Bankole* was rejected on appeal.<sup>114</sup> During the colonial era, judges in Africa were mainly foreigners propelled by colonial pride, self-righteousness and indignation towards African culture which was considered inferior and barbarous. This attitude reflected in their various pronouncements in cases where customary law was called to question. Thus, in *Laoye v. Oyetunde*<sup>115</sup> Lord Wright was of the view that the intendment of the repugnancy test was to invalidate 'barbarous' customs.

The view of Lord Atkin in *Eshugbayi Eleko v. Government of Nigeria*<sup>116</sup> that a barbarous custom must be rejected on the ground of repugnancy to natural justice, equity and good conscience, was concurring to the above. Conformity of customary law rules to the standards of behaviour acceptable to the advanced European communities does not appear to be the determinant of the test of repugnancy. Similarly a rule of customary law cannot be voided merely because it is inconsistent with the English law principles.<sup>117</sup> The phrase cannot also be used in technical senses.

**(ii) The Public Policy Test:** It is difficult to determine with legal precision what amounts to public policy within the meaning of the S. 14(3) of Evidence Act.<sup>118</sup> Per Borough J was perhaps faced with similar difficulty when he posits that public policy is "...a very unruly horse and when once you set astride it you never know

<sup>114</sup>Ibid; the Supreme Court maintained in *Okonkwo v. Okagbue* (1994) 9 NWLR (pt 368) at 301, that the phrase has not been interpreted disjunctively by the courts.

<sup>115</sup>(1934) A C 170, a Nigerian case.

<sup>116</sup>*Supra*, a Nigerian case too.

<sup>117</sup>*Onwuchekwa v. Onwuchekwa* (1991)5 NWLR (Pt. 194) 739; *Rufai v. Igbira N.A.* (1957) NRLR 178; *Mojekwu v. Ejikeme* (2001) I C.H.R 179 at 209.

<sup>118</sup> 2011 as amended.

where it will carry you".<sup>119</sup> Lord Denning however maintains that

...with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice, as indeed was done in *Nagle v. Feilden* [(1966) 2 Q.B. 633]<sup>120</sup>

Notwithstanding the dictum of his lordship above, uncertainty still surrounds the concept of public policy. It is probably because of this uncertainty that the court sparingly invoke the public policy test.<sup>121</sup> There is also the issue of whose public the policy is brought to bear in measuring customary law here. Is it the African or European public or hybrids of these?

**(iii) Incompatibility Test:** Rules of customary law cannot similarly apply if it is incompatible with any law in force for the time being.<sup>122</sup> Issues have also been joined as to the scope of the law contemplated here. In other words, does 'any law' include the received English law or only the local statutes? *Obilade*,<sup>123</sup> *Park*,<sup>124</sup> and *Ezejiofor*<sup>125</sup>

<sup>119</sup>In *Richards v. Mellish* (1824)2 Bing 252.

<sup>120</sup>In *Enderby Town football club v. Football Association* (1971) ch.591.

<sup>121</sup>Niki Toby op cit p.123 Eso JSC confirmed the difficulty in determining the real confines of the expression in the case of *Sonnar (Nig) Ltd & Anor v. Nordwind & Anor* (1987) 4 NWLR (Pt. 66) 520. But see *Okonkwo v. Okagbue* where the Supreme Court defined the phrase as meaning ideas in vogue for the time being in a community as to the conditions necessary to ensure its welfare so that anything injurious to public interest is against public policy.

<sup>122</sup>Niki Toby JCA (as he then was) gave judicial interpretation of the word 'incompatibility in the case of *mojekwu v. Ejikeme* supra as meaning 'not compatible, not consistent and contradictory'

<sup>123</sup> *Obilade* op cit p. 104.

<sup>124</sup> *Park* op cit p.77



are of the view that the expression 'any law' is limited to local statutes only.<sup>126</sup>

In *Molomo v Olusola*,<sup>127</sup> it was argued that S. 4 of the statutes of frauds prevented the application of customary law rule that writing was not required for disposal of land. The court did not however make any pronouncement on the issue. Ogbu is however of the opinion that written law in this context necessarily includes local laws<sup>128</sup> and, *afortori* the constitution. In *Agbai v Okagbue*<sup>129</sup> the court invalidated a rule of customary law based on community development efforts as unconstitutional. It has similarly been held that an existing native law and custom may be altered or abrogated *intoto* by a new but valid legislation which conflicts with it.<sup>130</sup> This is, with due respect, a destructive dilemma imposed on customary law by received laws.

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<sup>125</sup>Ezejiofor, *Sources of Nigerian Law*, op cit p.44.

<sup>126</sup>The court could not deal with the matter when it presented itself in the case of *Malomo v. Olusola* (1954) 21 NLR 1

<sup>127</sup>*Supra*. An *obiter* in *Re Adadevoh supra* is to the effect that 'any 'law...' includes the common law in *Rotibi v. Savage supra*, it was held *obiter* that the phrase excludes the received English law.

<sup>128</sup>If local laws are construed in the modern sense of the localized received laws (because virtually all the received laws have now been localized and incorporated into the laws of African states, then the received laws (influenced by the rules of common laws) are all inclusive; O.N Ogbu op cit p.108.

<sup>129</sup>(1991) 7 NWLR (pt 204) 291. <sup>129</sup> Rules of customary law which denies a woman the right of inheritance and the right to give evidence in land matter were invalidated as incompatible with the constitution in *Muojekwu v. Ejikeme* and *Uke & Anor v. Iro & Anor* respectively.

<sup>130</sup> *Yaktor v. Governor of (Plateau State 1997)* 7 4 NWLR (Pt. 98) 216.

## CONCLUSION

To wrap up this paper therefore we shall allude to the kernel features of law enunciated by Hart,<sup>131</sup> who enunciated the features having English law in mind, and state categorically that these features are, in no mean measure, inherent in African Customary law. From the dialysis of jurisprudence of law, we have also seen that customary law also came within the law expressed therein. We have also seen the destructive dilemma, a kind of sledge hammer which the received law imposed on the customary law. The relegation to background of place of customary law by the western-based law has displaced customary law, hence, even judges in Africa are influenced by the western philosophy while interpreting laws in Africa. For instance, in *Agbai v. Okogbue*<sup>132</sup> the court upheld personal right to freedom of association against a community's interest to health care development project irrespective of S. 45(1) of the 1999 constitution of Nigeria. The court must have presumed that "any law" in that section is exclusive of customary law. This has hindered to some extent, socio-economic development of the continent. The African Charter on Human and People's Rights enjoins African states to take into consideration the virtues of their historical traditions and the values of African civilization which should inspire and characterize their reflections on the concept of rights.<sup>133</sup> The people's world-view determines the law which forms the *corpus*

*juris* of their legal system. Africans have imbibed and over relied on the received laws at the expense of the African autochthonous system of law thereby denying the world of a third major legal jurisprudence. This is why African states hang on the balance struggling to attain certain level of economic and political stability because the set of laws operating within these states are chaotic in nature, thus, have failed to effectively engineer the society for maximum growth and development. This is why Kwame Nkrumah asked African law 'to fight its way forward in the general reconstruction of African action and thought, and help remold the generally distorted African picture in other fields of life...'<sup>134</sup> This is a clarion call on all African states. Answering this call will revive African values, accelerate African growth and development and pave way for political and economic stability of all African states. The time to answer this call is now.

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<sup>131</sup>Hart identified features of law as: rules forbidding or enjoining certain types of behaviour under penalty; rules requiring people to compensate those whom they injure in certain ways; rules specifying what must be done to make wills, contrasts or other arrangements which confer rights and creates obligations; court to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid and, A legislature to make new rules and abolish old ones. See H. L. A. Hart cited in Ngwakwe *op cit*, p. 25.

<sup>132</sup> *supra*

<sup>133</sup> Preamble to the African (Banjul) Charter on Human and Peoples Rights 1981

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<sup>134</sup> K. Nkrumah, "Law in Africa" *Journal of African Law*, 6(2), (1962), pp. 103-112