NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 211

COURSE TITLE: NIGERIAN LEGAL SYSTEM 1

COURSE GUIDE

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Introduction

This Course is designed to introduce you to the Nigerian Legal System, which forms a vital part of the total package for your degree course. The Course is designed to equip you with a sound foundation of legal knowledge and enable you to cope with the legal needs of a plural society that is faced with a rapid political, social economic and cultural development.

While lawmakers make the laws, it lies with draftsmen to reduce their intention in legal form and in the English language. As words may not have one meaning, but several meanings, some discrepancies or ambiguities arise either from inelegant draftsmanship, or from over-ambitious attempt to cover every possible situation and because of the dynamism of the society. The need arises therefore for a proper application and enforcement of statutes in order to avoid hardship and miscarriage of justice. To meet these challenges, Courts have developed conventional principles of interpretation and construction. It is important that the students should be acquainted with these rules and how they have been applied by superior Courts. Through interpretation of statutes, the law has proved itself a powerful tool of political, economic and social engineering. This has posed the question of choice between conservatism and liberalism or at least take a position in the continuum. You too must, at the end of this lecture, be able to make your choice.

You will discover in the course of study that ‘Equity’ was introduced in the interest of fairness and justice where common law was inadequate and has failed to do justice. Now however, Equity itself is stereotyped. This leads to the question (which the students also must be prepared to answer) as to whether or not, Equity has passed child bearing. Is there or is there not a need for “new equity”? You are free to elect a conservatist or activist stance but the choice must demonstrate sufficient understanding and must also be founded on law and good reason.

The Nigerian Legal System is a reflection of the fundamental character of the structure, the institution, and the intellectual life of the society in which it operates. The extent to which it is home grown or alien therefore goes beyond mere dictates of national pride. The study of Sources of Law enables one to discover how much of our law is “home grown” or foreign. You will demonstrate understanding of ‘Repugnancy and incompatibility’ tests and standards in relation to our customary law.

This course consists of 26 Units of study and adequately takes care of the conveniences of the students and sequence of the Course Outline. This Course Guide offers you in a nutshell, what the Nigerian Legal System is about and gives you an insight into the course materials which

have been deliberately compressed (without sacrificing the meat in the pie) in order to ensure you are able to cover them within the time allotted to them.

You will find some useful self-examination questions, and tutor-marked assignments in the Course Guide. It is advisable that students should attempt them as strictly as possible under real examination conditions. One may caution that many students who fail examinations on a legal system do so because they answer questions out of “common sense”. You are beginning to learn the Law, its institutions, enactments and enforcement processes. Problems that arise from them are legal problems. Their solutions must be founded not in common sense but in law itself.

What You Will Learn In This Course

This Course is about the Nigerian Legal System. It is a 200 Level compulsory course for students who are registered for Bachelor of Arts (Law) or Bachelor of Law Degree Programme. It is a useful study also to anyone who does not intend to complete the degree course but wants to learn about Administration of Justice in Nigeria. This Course is particularly concerned with “Law” as a component of a legal system. It comprises two semester papers, namely: LAW211 and LAW 202. Each of them is a 4-Credit Unit course, implying a minimum study time of 4-hours per week, for the duration of each of the two semesters.

In the course, LAW 202, we shall discuss the Institutions, Agencies, and Persons who administer and enforce the law. Attempts have been made to define each legal term we come across. You should familiarize yourself with the terms, as you are likely to come across them frequently as the Course progresses. It may be baffling that ‘Law’, as old as it is. In history, has no definition of universal acceptance. Law and Legal System have meant different things in different continents and at different times depending on their world view. Try to acquaint yourself with the varying notions of law across the Continents, attempt also to proffer reasons for the discrepancies and domesticate your learning by reference to what obtains in reality in your environment.

Classes of law are legion and few will be discussed in some detail. This will give you an added advantage of a better understanding of the functions of law in the society; its prospects and the possibility or otherwise of “withering away” as some philosophers have hypothesized.

Importance Of Cases

This study guide, like any textbook on any aspect of law, makes references to important judicial decisions as well as to some statutory enactments. Any statement of law has its foothold on a case or statute, which forms its authority. The issues you need to know about important cases or statutory provisions are adequately set out in the study guide or any average textbook. However, you may want to refer to the statute or law report itself in order to better understand specific aspects.

You refer to a case by the names of the parties to it e.g. Police v *Ajidagba for cases from a Police Division, C.O.P. v Mandilas & Karaberis for case from State CID; IGP v. Akerele for cases originating* from the Force CID, State (or DPP or Queen or Attorney-General) v. *Service Press Ltd. for cases instituted by Office of the Attorney-General.* Civil cases are identified by names of parties: e.g. Aoko v. Fagbemi, *Lekanmi v. Attorney-General (Western States) etc.*

It is an added advantage to e able to learn and quote the correct names of cases. Please note, that it is dangerous to give wrong names. If you are sure of their correct names, give them. If you are not, it may suffice to give the facts and the ratio decidendi. In that event, you may indicate the case by 'x' v. 'y' or (?) v. (?) and proceed to give the facts and decisions. Do not invent cases; but feel free to make illustrations of the point(s) as you wish.

Course Aims

This Course aims at providing the participants with basic knowledge and understanding of the "Law" in relation to the Nigerian Legal System. The approach is to give a bird-eye view of a legal system, followed by detailed study of each of its components beginning with "law". You will learn in the Course, among other things, some definitions of legal terms, ideas of law, enactments, interpretation and functions among other things. In essence, the aims of the Course include:

- Definition or description of 'Legal System'
- Scope and extent of a legal system
- Historical exploration of the 'Nigerian' Legal since 19th Century
- 'Law' which Nigerian Legal System operates
- Description of how the "Law" developed from the English law
- Outline of the development of law as a prelude to understanding its role in Colonial Nigeria and Post-Independence Nigeria.
- Devolutionary nature of the Legal System
- Plural nature of the Legal System

- Outline of the situational and environmental influences culminating in devising a Criminal Procedure Code (CPC) in Penal Code areas and a Criminal Procedure Act (CPA) in the other areas.
- Introduction to techniques of interpreting

  (a) Constitution
  (b) Statutes

Course Objectives

At the completion of the Course, you should be able

(i) To understand the nature and origin of applicable law.
(ii) To discuss the extent to which the legal system is home-grown or alien and the extent to which the operative legal system conforms or departs from the traditional justice administration.
(iii) To appreciate the interdependence of the different justice administration agencies at Federal level and as between the federation and the states.
(iv) To identify the problems in the law, and its enforcement.
(v) To provoke a choice between judicial conservatism and activism; and
(vi) To point to the direction of improvements in the Nigerian Legal System.
(vii) To demonstrate an understanding of the sources of Nigerian Law and the principles of judicial construction and interpretation.

Study Units

There are twenty five study units in this course, as follows:

Module 1

Unit 1 Idea of Law
Unit 2 Positivist School of Thought
Unit 3 Other Schools of Thought:
Unit 4 Nigeria Legal System under the Military Rule
Unit 5 Nigeria Legal System under the Military Rule cont'd

Module 2

Unit 1 Nigeria Legal System under the Military Rule cont'd
Unit 2 Functions of Law in the Society

Unit 3 Classification of Law
Unit 4 Classification of Law cont'd
Unit 5 Laws and Morals

Module 3

Unit 1 Laws and Morals cont'd
Unit 2 Sources of Law
Unit 3 Meaning of Statute
Unit 4 Statutes of General Application
Unit 5 Received Law

Module 4

Unit 1 Doctrines of Equity
Unit 2 Conflicts between Common Law and Equity
Unit 3 Judicial Precedents
Unit 4 Disadvantages of Judicial Precedent
Unit 5 Subordinate Legislation

Module 5

Unit 1 Construction and Interpretation of Statutes
Unit 2 Literal Rule
Unit 3 Mischief Rule:
Unit 4 Ejusdem Generis Rule
Unit 5 Other Rules of Construction and Interpretation

Course Marking Scheme

The following table lays out how the actual course marking is done.

Assessments	30% of course marks
A Final examination 70% of	overall course marks
Total	100% of course marks

It is instructive to learn to question, rather than taking things for granted; to speak or write and backed by authorities rather than speculating or merely applying common sense to essentially legal issues.

In conclusion, we hope you will enjoy this course. Wish you good luck.

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MODULE 1

Unit 1 Idea of Law
Unit 2 Positivist School of Though
Unit 3 Other Schools of Thought
Unit 4 Nigeria Legal System under the Military Rule
Unit 5 Nigeria Legal System under the Military Rule cont'd

UNIT 1 IDEA OF LAW

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
 3.1 Conceptual Clarification
 3.1.1 Components of a Legal System
 3.2 What is Law?
 3.3 Features of Law
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

The question 'What is Law' has perplexed legal philosophers over the centuries. The term has not succeeded at acquiring any specifically limited and technical meaning that is universally acceptable for all times. Understandably, writers have begun to question the wisdom of spilling so much ink and consuming so much time, and energy on arid definitional exercise which is of no conceivable utility to the judges, legal practitioners or anyone concerned with the life of the law. After all "Law is not a brooding omnipotence in the sky but a flexible instrument of social order". It cannot be divorced from the political, economic and social experiences in the life in the society, which it is meant to serve.

On other hand, other philosophers have contended that a short definition of the subject under discussion is of essence. It seeks to clarify from the outset the most basic of all legal concepts – the concept of law itself. Early legal philosophers and legal writers know little of Africa and did not have continent in their contemplation when they wrote. Yet Africa, it is claimed, is the cradle of humanity from where homo sapiens spread to other parts of the world or from where various skills that enabled other hominids to evolve in their own turn were diffused. It is necessary

therefore to re-examine the concept of Law critically and re-assess objectively their various legal expositions in the light of the African and local situations and in contemporary times.

The lecture also affords opportunity to look deeper into some definitional discrepancies and the factors responsible for them.

2.0 OBJECTIVES

By the end of this unit, you should be able to

- Define Law
- Compare Law with other Phenomena
- State the different ideas of Law, and their affiliation with each country's political, economic and social values.
- Describe and define the concept of law in Africa.

3.0 MAIN CONTENT

3.1 Conceptual Clarification

A legal system has been described as:

(a) the aggregate of legislations and accepted legal principles and the body of authoritative grounds of judicial and administrative actions, e.g. the law of the land.
(b) the Institutions (i.e. the Police, the Courts and Tribunals, the Prisons) which are involved in the administration of Justice
(c) the process or machinery for administration of justice i.e.

(i) Basic structure of the Court system
(ii) Basic procedure involved in a civil or a criminal proceeding.
(iii) Process of submitting disputes to law.
(iv) The manner in which the substantive law is applied.

(d) The Persons in the law – judges, magistrates, legal practitioners, Attorneys-General or Solicitors-General, The Nigeria Police Force, Registrar of Court, Sheriff and Bailiff, The Nigeria Prisons etc.

3.1.1 Components of a Legal System

A legal system comprises the law, the institution, machinery and the process for administration of justice (civil and criminal) and the persons

in the law. It is sum total of all rules. Each of these components may now be defined briefly:

SELF ASSESSMENT EXERCISE 1

How do you describe "a legal system"?
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3.2 What is Law?

The word 'law' implies in Latin: the command of him who is invested *with sovereign power. It has been defined or described in various ways* but only a few will be discussed here:

Law has been defined as follows:

(a) "A set of rules governing human activities and relations". This definition appears extremely wide, accommodating rules of every game, of clubs, even of gangs of thieves.
(b) "A rule of action prescribed or dictated by some superior which some inferior is bound to obey" and is applied indiscriminately to all kinds of actions, whether animate or inanimate, rational or irrational (Blackstone), or
(c) A command set either directly or circuitously by a sovereign individual or body to members of some independent political society in which his authority is supreme (John Austin)
Note these observations:
Blackstone & Austin's definitions seem to be silent on omission or inaction. Description of Law as a rule of action is wide enough to cover: Rules of a father to his son, or rules of a husband to his spouse which are no law.
(d) A body of principles recognized and applied by the state in the administration of justice (Salmond).
Does the State not apply moral principles, which do not answer the descriptions of law?
(e) Rules, which the Courts will follow, the prophesies of what the courts will do, in fact, and nothing more pretentious (Oliver *Wendell Home). This is a classic egg and the chick case.*
(f) Rules, which the Courts – the Judicial Organs of that body – lay down for the determination of legal rights and duties (John *Chipman Gray). In other words, law means the rules of Court.*

(g) An aggregation of legislations and accepted legal principles and the body of authoritative groups of judicial and administrative actions.
This is more a description than a definition.

(h) A general body of such rules of conduct expressing the will of the ruling class as are established by legislation and such customs and rules of community life as are sanctioned by the government; the application of which body of rules is secured by the coercive force of the state for the protection, consolation, and development of the social relations and the public order, beneficial and desirable for the ruling class (Vyshinsky: Soviet Civil Law).

(i) a general body of such rules of human conduct established or sanctioned by the government power, the execution of which rules is secured by the coercive power of the state (V. Gsovski: *Soviet Textbook of Civil Law)*

Admittedly, Law is a complex word with multiple meaning and none of the meanings enjoys a universal acceptance. Probably, definitional discrepancies may have been historical, ideological, social or cultural or mere battle between words and meanings. It appears that problems of language may never be solved. New words keep creeping into usage and older ones acquire new meaning. Since the general elections, 1979 (not earlier), What is two-thirds of nineteen states has agitated and still will agitate many Nigerians for a time but it now settled law

You should be conversant with the notion of law in different countries and be able to define 'law' in several ways, and discuss the merits and demerits of each of them as well as justify their choice.

SELF ASSESSMENT EXERCISE 2

The term "Law" may be defined as
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3.3 Features Of Law

Law is distinguished from other phenomena

(a) Body of Norms

Literally, a norm is a model or a standard accepted (voluntarily or involuntarily) by the society or other large group against which society judges someone or something.

It refers to the actual or set standard determined by the typical or most frequent behaviour of a group. An example of a norm is the standard for right and wrong behaviour.

In legal theory, Hans Kelsen maintains that laws are norms, that a society's legal system is made up of its norms, each legal norm deriving its validity from the other legal norms. In essence, the validity of all laws is tested ultimately against the basic norm (also termed the grundnorm).

(b) Imperative

The Imperative theorists believe that law consists of the general commands issued by a country or other political community to its subjects and enforced by courts with the sanction of physical force. They contend that if there were rules predating or independent of the country, those rules might closely resemble law or even substitute for it, but they are not law.

(c) Sanction

Sanction is derived from a Latin word 'sancio' meaning, "to ordain, confirm or forbid under penalty". It is a penalty or coercive measure that results from failure to comply with a law, rule or order. Violation of Statute attracts physical sanction as a matter of law. Sanction for a moral wrong is ostracism or some other while excommunication and hell may follow a violation of religious norm. In international law, sanctions against a renegade nation may take the form of economic or military coercive measure by one or more countries to force it to comply with international law. Truthfulness is a moral norm only and observance of religious rites a religious norm. The duty of Courts is to apply law, neither moral nor religious norm. However, morality is a validity criterion. Besides, every Nigerian is a moral being endowed with a concept of what is right or wrong, although the concept may not be consensual e.g. for psycho-social reasons. John Austin states that every rule of law is backed by sanction but it would appear that law predates sanction. In most cases a sanction is a legally authorized post-conviction deprivation or some pecuniary loss imposed upon a party and in favour of the injured party, by reason or in consequence of judgement of a court of law. It must be recognized also that there are laws without sanctions.

Certain classes of people in certain situation are exempted from sanctions even though their conduct would have attracted liability under normal circumstance.

4.0 CONCLUSION

In this introductory unit of this course, you have learnt some legal terms and their definitions. Several references were brought into the fore in trying to define what law really is, drawing inspirations from different continents and from Nigeria. In the absence of any universally acceptable definition of law, you learnt the features which can assist you in identifying 'law' when you come across one. You are perhaps challenged into attempting your own definition of law, having fully understood the merits and demerits of those you have learnt.

5.0 SUMMARY

The task of arriving at an adequate definition of law is often the most controversial and difficult part of the study of the subject.

You should be able to evaluate some of the definitions we have proffered. Blackstone's definition was a precursor of Austin whose definition for example is one of "a law", or "a rule of law" rather than law itself. Any command that meets the definitional requirement is a law irrespective of its ethical merits or lack of it.

Justice Holmes' application of a future tense and reference to "prophesies" in his definition were dimensions in an already complex field. Note also that Gray introduced the following new consideration:

i. The laws of a state
ii. The law of an organized body of men.
iii. Legal rights and duties

The Naturalists reject any definition which excludes reference to moral principles or permit unjust laws. These considerations led Professor Glanville Williams to suggest that the only intelligent way to deal with the definition of a word of multiple meaning like "law" is to recognize that the definition, if intended to be of the ordinary meaning, must itself be multiple. Such a definition would presumably read: "law may be defined as …, or … or…".

This approach, he explains, would not offend anyone. Besides, the advantage of comprehensiveness is offset by the lack of specificity.

So far, we have discussed the ideas of Law and a Legal System across the continents pointing out the definitional discrepancies. In the next lesson, we shall examine these discrepancies further and relate them to different schools of thought. In the process we are able to enumerate the factors responsible for the dichotomy.

6.0 TUTOR-MARKED ASSIGNMENT

1. Justify the assertion that legal philosophers do not always agree on a common definition of law.
2. From your understanding of our discussion. Explain why the following should be regarded as law or should not be so regarded:

(i) Customary Law
(ii) The Ten Commandments
(iii) The Command of an armed robber to his victims: "Your life or your property"
(iv) A Will
(v) The rules of a husband to his spouse or of a father to his son.

7.0 REFERENCES/FURTHER READINGS

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V. Gsvoski: Soviet Text Book of Civil Law

UNIT 2 IDEA OF LAW: SCHOOLS OF THOUGHT

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3.2 Natural Law
3.3 Realist School of Thought
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

In the last lecture, we saw that some Schools of thought have expressed divergent ideas of law. In this lecture, we shall continue our examination of Ideas of law as conceived by other schools of thought.

2.0 OBJECTIVES

At the end of this lecture, you should be able to:

- Relate any idea of law to its origin and school of thought
- Identify areas of similarities and of differences
- Relate your knowledge of the different Ideas of Law to law in your environment in pre modern and modern times.

3.0 MAIN CONTENT

3.1 Positivist School of Thought

Positivist idea of law and legal system is that it is a closed logical system. It does not admit of anything metaphysics – anything that is not law. Its test of law is enforcement and command. It is immaterial that the law, as it is, is unjust, immoral, ethical or unethical, obeyed or violated. Emphasis is on formalism, not the contents of the law. John Austin states that every rule of law is backed by sanction, and that sovereign is not a creation of law but is Supreme protestas, above the law and enjoying habitual obedience from the bulk of the population. He maintained that every law is a command or rather, laws and rules are species of command – be it in form of order, command, request, prayer

or other. A purported command is no command unless it is accompanied with force or threat of force.

Jeremy Bentham believes that sovereignty is under the law and law is to be based on utilitarian philosophy of pleasure and avoidance of pain. Professor H. L. A. Hart states that Law is nothing but a set of rules and its function is law itself, not moral. For a legal system, he identified a union of Primary and Secondary rules. The primary rules are rules of obligation, - substantive law e.g. law governing theft, marriages, succession etc. Secondary rules, on the other hand, are ancillary or procedural. Both have external and internal aspects. External aspects refers to the way the ordinary man sees law (normative aspect), while internal aspects is the belief in the efficacy of the law before it is enforced by officials and courts, who are part of the law and also operate it. This seems to be an introverted view of law and a marked departure from positivist idea of law. According to Hans Kelsen, Law is a norm, not a rule. A norm is an 'ought' proposition existing in an inverse pyramid, such that one norm derives its validity from a higher norm – parent norm – and ultimately from the first fundamental norm, the grand-norm, which turns out to be non-legal (metaphysics). He concluded that Law is a closed legal system.

The positivist idea of law has been criticized for several reasons. Even the positivists themselves are in disarray and are not consensual on what law is. Law is far older than concepts of enforcement or sanction. It is not clear whether the positivist mean that sanction must accompany law or qualify it. We must recognize that it is not every rule or law that has sanction attached to it. For example Wills Act 1837 is a law but it contains no penal sanction.

In Nigeria, concepts of 'command' and 'sovereign' may be strange. Sovereignty belongs to the people from whom government through the Constitution derives all its powers and authority. (See The Constitution 1999, S. 14(2)(a))

Positivist notion of Law also has no place for traditional or customary law, nor does it recognize International Law as law. Yet, history has no record of "lawless" pre-legal state in any part of Africa. Law is a gapless system of rules governing all human interaction.
Prof. Hart belongs to the Positivist school. He has expressly denied that customary law is law and his reasons are that:

(i) coincidence of habit of a community does not make a habit law,
(ii) the people in the community were only "being obliged" and incurred no legal sanction for disobedience,

(iii) the people were not obligated or 'under obligation', under pain of punishment for default.

(iv) in underdeveloped communities, primary rules exist, specifying duties and obligation and proscribing particular conduct but there are no secondary rules stipulating how and by whom primary rules are to be formulated, modified or extinguished. Other positivists (one of them Prof. Fuller) admit that customary law is law; not just being a model of rules but an instrument of human interactions.

SELF ASSESSMENT EXERCISE 1

In your own words and as a positivist, state the criteria for a valid law
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3.2 Natural Law School

Natural law is law of nature which dictates natural ordering of things, or a law higher than positive law purporting to invalidate positive law. It is law common to all mankind. It is derived from God and from reason professing the principle of natural justice, and universal acceptance. It consists of absolute principles, immutable, transcending time, space and dynamics of social change. On the basis of philosophical ethical idea based on nature and reason, the naturalist considers law as what is just, good and equitable. It offers a standard to which man-made law (positive law) should conform. Cicero in Du Re Publica stated that natural law could not be altered or abrogated, not even by the senate or by the people. The focus of natural law was to meet man's divine character and his secular social needs. Its major concern were

(i) the universal and permanent underlying basis of law
(ii) the relationship of Law and justice and
(iii) the problem of social stability

According to Plato, everything that exists is a creation of the mind, and nothing exists outside the mind. Law is a state of concrete things – an imperfect reproduction of the idea. Aristotle added that law belongs to reason and man is by nature endowed with reason. In adapting to new needs natural law turned out to be a blend of Roman edicts of practor *peregrinus, jus gentium or equity. The teachings of Christian fathers* (Ambrose Augustine, St. Thomas Aquinas) as well as the sociological

principle of right of self-preservation derive from natural law. It is also called Divine Law, the Law of Reason, the Unwritten Law, the Universal Law, the Eternal Law (lex aecterna) or Moral Law).

3.3 Natural Law, Legislation, Social Contract Etc.

The National Assembly enjoys the power to pass anything into law or do anything except to "make a man a woman and a woman man". In the process of their legislation, lawmakers may be guided by appeals to higher order, Justice and Truth. However, the search of mankind for absolute justice is an endless one. For one thing; once a legislature has enacted a law, it is neither competent for anyone nor even the law court to challenge the Act, not being a delegated legislation or a by-law on the ground that it is unjust or contrary to natural justice. Furthermore, Locke and Grotius, in their social contract theories, have rejected natural law, but recognized certain human rights that are inherent or inalienable and not given by man qua man.

Natural law also derive from social solidarity, and Hart's minimum contents of law, as well as Faller's morality are manifestations of Natural law as can be found in the 1999 Constitution. Examples are Rights to own property, Right to free speech, and other human right provisions.

In modern times also concepts of natural law are assuming new dimensions and are manifesting in such contents as due process of law, Quasi-contracts, concept of reasonableness and of natural justices, Rules of Administrative Tribunals and conflict of law. Incidentally, attacks against as well as defences for Roman Catholicism and Lutheranism and of the overthrow of the church as were Apartheid law and the Colour Bar in America were founded also on natural law.

SELF ASSESSMENT EXERCISE 2

Natural law is
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Realist School of Thought

The pragmatic doctrine of the Realist school of thought was that the value of any assertion was to be estimated in accordance with its practical bearing upon human interests on enforcement process, system of Courts and social aids. The Realists idea of law therefore is that law is a means of meeting desirable social ends. The test of law then is: capability to serve desirable ends. The court was regarded as the touch stone of law. Law is the Law of the law Court, implying that the judge has a creative role. In essence, Judicial precedent is law. Its life is by experience not logic and is not to be treated "as if it contains only axioms and corollaries of a book of mathematics".

The realist concept of law is suggestive that States or Communities without courts of law are lawless. But we know of no record of breakdown of law and order in the early chiefless societies in any part of Africa where there were neither determinate superior nor law courts. Even in many communities today in Nigeria, there are no law Courts and yet are peaceful and orderly as urban centres with wide range of Courts.

The Realist notion of law is suggestive also that the following are law:

(i) the Judges rules
(ii) contracts and contractual obligations which Courts take cognizance of
(iii) customary law
(iv) international law
(v) religious or moral law, which one can predict, or which the courts will recognize even if it has not.

One of the pitfalls of the realist idea of law is that it arrogated to judges the power to make law on a legal process. Generally, the duty and function of judges is to interpret the law so as to accord with accepted theories of social justice and social values. Judicial law making, if at all, is an exception rather than the rule. At any event, it should be remembered that one is a judge only by reference to law.

The Realist's approach has extended law to the field of psychology or psycho-analysis placing both litigations and legal practitioners in the centre of the legal stage (Lloyds). This flows out of the necessity of predicting judicial behaviour and analyzing the minds of those upon whom the law may operate. It adds little to ones knowledge of law. After all, predictions may be right or wrong. Judges may be strongly 'weighed' by a number of factors e.g. a 'troubled mind', state of digestion, or social prejudices. All these make the boundaries of law

more complex and its definition farther elusive; such that "Law never is, but always about to be."

SELF ASSESSMENT EXERCISE 3

(i) Mr. Justice Holmes view of law is

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(ii) John Austin's view of law is

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4.0 CONCLUSION

In this unit, you studied the idea of law as conceived in different schools of thought. We considered the notion of law from the perspectives of the classicists, positivists, naturalists and realists schools of thought. We differentiated one thought from another. You have to think of associating with one school or several but with justification.

5.0 SUMMARY

In this lecture, we have examined the idea of law in England (Positivist notion) and in America (Realist notion). The former sees law as a command. To the latter, it is a judicial prediction. Neither considered the idea of law in Africa. We shall examine other ideas of law in the next lecture before leaving the topic for another.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the view that custom is a source of law from

1. Positivist point of View
2. Realist point of View

7.0 REFERENCES/FURTHER READINGS

Austin The Province of Jurisprudence Determined, 1932

Elias T. The Nigerian Legal System, 1963

UNIT 3 IDEA OF LAW: SCHOOLS OF THOUGHT CONT'D

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Contents
3.1 Other Schools of Thought
3.1.1 Traditionalists
3.2 Environmentalist
3.2.1 Historical
3.2.2 Social Perspective
3.2.3 Informal Law or Indigenous Law
4.0 Conclusion
5.0 Summary
6.0 Tutor Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

This is the concluding lecture on the concept of law. Discussions have mainly centred on ideas of law in other jurisdiction, thus swing validity to the saying that he who pays the piper dictates his tune. But any discussion of idea of law in other jurisdictions enables one to recognise, compare and contrast definitional discrepancies across the continents. The discourse provides some insight into the factors responsible for the dichotomy and equips one to be able to assess the good and weak parts of our traditional system.

2.0 OBJECTIVES

At the end of the lecture, you would be able to:

- Demonstrate an understanding of what law is.
- Articulate the influence of political, social and economic order on the idea of law.
- Appreciate the merit and demerits of each idea of law.
- Relate our understanding of law to the traditional legal order.

3.0 MAIN CONTENT

3.1 Other Schools Of Thought

3.1.1 Traditionalists

The Traditionalists regarded law as a means of providing stability and certainty and social change. Because most early writers and philosophers did not have Africa in contemplation, and knew little or nothing about the African informal legal systems, there has been little literature on it. With the advancement in learning, later writers began to distinguish the following:

(a) behaviour which the people in the community habitually observes, non-observance of which does not threaten public peace (folkways) and
(b) rules of conduct of deeper importance, a violation of which attracts censure and coercion.

The truth is that every breach of customary law both a taboo and a threat to the order of things. Although Traditional law is not law by positivists' standards, it is recognized as law by the Naturalists School of thought. The common law being Judge made law answers the description of law in the Realist notion.

Schepera Tswana law and customs recorded that "the Chief was himself at once a rule, judge, maker and guardian of the law." One may add that the traditional head legislated upon full consultation with his chiefs. Sometimes, he is not making law but merely declaring what the law had always been from the time of their ancestors.

SELF ASSESSMENT EXERCISE 1

What is the difference between (a) Idea of law and (b) Role of Law?
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SELF ASSESSMENT EXERCISE 2

Compare and contrast Customary law and Natural law
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3.2 Environmentalists

Here, Law is a system of social control and orderly process for social change and adaptability. Lloyd states that the world is a complex place and law is an abstraction, influenced by Capitalism, socialism, feudalism and traditions or other ideologies in their respective spheres but nearly all emphasizing the idea of social control, orderly process and justice. Here then is one of the reasons for discrepancies in the meaning and concept of law. Environment dictates the tone of morality, and this differs among world countries.

3.2.1 Historical School

Historians have said that Law develops from evolution of customs which become accepted by the society. The Common law, which forms part of law operating in Nigeria, was itself the crystallized custom of ancient peoples of England. Several of our local customs have similarly gained recognition and have either been acted upon by Courts or enacted into law e.g. Sharia Law. Quite a large junk however, has remained unwritten. Today, most of our laws derive from the statute, and relatively little from customary law.

3.2.2 Socialist Perspective

Historical evolution takes place through the resolutions of the 'inherent contradictions' in society, the most important of which is the conflict of class interests. Karl Marx states that both the law and the state in capitalist societies are instruments of compulsion and are used by the wealthy minority to oppress and exploit the working class majority. He objectified the state as an "abstract and mystical entity moving and acting with a mind and soul of its own". The theory recognizes that the state in one thing and it is institutionally different from the country. The ideology recognises the Police, the military and the courts as mere state apparatuses.

In essence, Law is an embodiment of class interests – i.e. the interests of the peasantry, elitists, working class and the urban dweller (i.e. the worker). Vyshinsky expressed the view that the motives of the law was to protect the vested interests that are desirable to the ruling class; but Gsovki is silent on the motives of law – its materialist and selfish tendency and self preservation of the ruling class.

3.2.3 Informal Law or Indigenous Law

It is necessary that we speak more concerning informal law or indigenous law in Nigeria. Formal laws are enacted laws or laws that have their source in legislation – the written law, e.g. the Constitution, statutes like the Criminal Law, Companies and Allied Matters Act, Matrimonial Causes Act, Banking and Other Financial Institutions Act etc. Informal law, on the other hand is the implicit law that grows or develops through time. It is unwritten and therefore expresses itself, not in words but in a course of action (Rotibi v. Savage). Example is the customary law – a system of law consisting of customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a socio-economic order that they are treated as if they were law. In Saka Salamu v. Alimi *Aderibigbe (1963), the Court described customary law as those rules of* conduct which the persons living in a particular locality have come to recognize as governing them in their relationships with one another and between themselves and things, but the things to which customary law relates, were things which were closely connected with customary way of lives and which existed or were usually kept in the locality in which their owners or possessors lived.

Until the advent of the Europeans, the customary law was indigenous law – a mixture of law, customs, morals, etc (Clifford). But western legal philosophers defined law narrowly and did not consider the unwritten customary law. Some of them have denied that customary law was law in the strict sense, and this was because they were either absolutely ignorant or lacked knowledge of how to set about investigating customary law.

The features of Customary law identify the customary law as:

(a) an instrument of natural justice, of peace, not an instrument for the application of strict penal law. Its objective is to set things right so that life within the community can go on peacefully and harmoniously as before. (Narebor)

(b) It is such as had existed in the locality from time immemorial "to which the memory of man runneth not to a contrary". Welbeck v. *Brown (1882).*
English practice pegged this at 1189 AD or as at the commencement of the reign of King Richard I.

(c) It can be noticed judicially or can be proved by evidence to exist (Evident Act)

(d) It is flexible. The more barbarous customs of earlier days, may under influence of civilization, become milder without losing their essential character as custom: Eleko v. Officer Administering *the Government of Nigeria (1931)*

(e) A mirror of accepted usage and of culture. Owoniyin v. Omotosho *(1961)*

(f) It is the organic living law of the indigenous people, regulating and controlling their lives, and transactions. Justice Nareborsays it imparts justice to the life of all subject to it.

(g) It is neither static nor immutable. It changes with time, applies to persons and things, within or outside the locality provided parties agree that their relationships should be so governed or that the law should apply to the particular transaction. This is often the case in issues of customary marriages, intestate inheritance, customary land titles. The Court in Bakare Alfa & Ors v. J. Arepo *(1963) confirmed that customary laws are rules binding on a* particular community and which rules do change with the times and with the rapid development of social and economic conditions.
Examples are old customary practices of trial by ordeal, discrimination against Osu family, extraction of exorbitant bride price.

(h) The overall guiding principle is that a customary law must not be repugnant to natural justice, equity and good conscience: Lewis v. *Bankole (1908) and Ashagbon v. Odutan (1955)*

It needs to be added that Islamic law is written but the ethnic customary law is not.

In the Northern States, like in Ghana, customary law is original law and statute has to be tested with the customary law as the background. In other parts of Nigeria, customary law is invalidated if it is incompatible with statute. This explains why criminal code operating in the south had to give way for the Penal Code in the north – showing clearly that Islamic law has distinguished itself from ethnic customary law.

4.0 CONCLUSION

This unit is a continuation of unit 2 and concludes our discussion of the idea of law. You learnt about the idea of law as conceived by the traditionalists and Environmentalists. You are now equipped to be able

to subscribe to and identify with the idea of law which most appeals to you.

5.0 SUMMARY

We have now concluded an attempt to explain the term law and a legal system. In the process, we have considered a number of ideas of law across the continents. We saw that each of these explanations is open to criticisms for one reason or another. These ideas have been propounded mostly by eminent Euro-American jurists and philosophers who must have trained and laboured in secularised system of Civil law and Common law jurisdiction. Their ideas of law must of necessity be different from those from systems that are interwoven with customs and traditions and ethno-religious ideas. This problem is not peculiar to law. It exists in other disciplines and probably explains why a lot of Economists, Scientist, to name a few, do not border to define their subject. They probably regard definition as sterile.

There is no consensus among jurists on the proper scope or extent of the subject "Law". To one, Law may refer only to law applicable in the Court. To another, it may be the whole body of moral, religious or Customary law and Sharia Law.

SELF ASSESSMENT EXERCISE 3

Definition of law is sterile and of no benefit. Comment
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Indeed, much juristic ink has flown in an endeavour to provide a universally acceptable definition of law but with little sign of attaining that objective (Prof Lloyd). The choice of definition may sometimes be influenced by personal ideology or attitude of the chooser. Thus, the style of definition may very well depend on individual world view of capitalism, socialism or other or whether general outlook is religious or positivist. Philosophers wrote at different times or ages in the same or at different countries. The state of learning has not been static and what was once good or valid in the pre-contemporary times have become suspect and are now being questioned.

Discrepancies also arise from disparity in economics, educational, social and political advancement and new political institutions and Ideological

orientation. This in part explains why ideas of Law change from one society to another, and from one generation to another even within the same society. It also explains the emergence of and quest for new legal machinery. Moreover, writers have faced different sets of prejudices. Moral values and standards may be different and often changing. Over the ages, different sets of facts and of question and different problems have arisen. There is a continuous quest for a transformed and better society, quest for ideal law, which has justice and improved standard of living for all as its central core. In essence the province of law as a flexible instrument of social transformation and social is subject to constant review.

6.0 TUTOR MARKED ASSIGNMENT

1 (a) Compare and contrast the theories of sovereignty put forward in England and in Nigeria.
(b) 'No Law, no Sovereign; No Sovereign, no Law' Comment critically on this aphorism.

2. What difficulties are likely to be encountered by Jurists in endeavouring to frame a satisfactory definition of law?

7.0 REFERENCES/FURTHER READINGS

Westermarck: Moral Ideas

The Constitution of the Federal Republic of Nigeria, 1999

Cardozo B.: The Growth of the Law, 1924

H. L. A. Hart: The Concept of Law

Fitzgerald P. J.: Salmond on Jurisprudence

UNIT 4 THE NIGERIAN LEGAL SYSTEM UNDER THE MILITARY GOVERNMENT

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
 3.1 The Military
  3.1.1 Pre-contemporary Times
  3.1.2 Modern Times
  3.1.3 Duties of the Armed Forces
 3.2 Statutory Powers of the Armed Forces
  3.2.1 Superior Orders
  3.2.2 Military and Public Service
  3.2.3 Armed Forces and Public Disturbance
 3.3 Armed Forces and Threat to National Safety
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

The geographic entity now called Nigeria was in early history an aggregation of widely disintegrated independent settlements. By development, and conquest, the settlements metamorphosed into kingdoms, empires, and principalities, which the British constituted into Protectorates of Northern Nigeria (1900) and the Colony and Protectorate of Southern Nigeria (1906). Both protectorates amalgamated in 1914 to form the present day Nigeria. Monarchial rule was established from (1841-1960), Parliamentary (1960-63), Republican (1963-65), Military dictatorship 1966-79, 1983-1999, except for the brief diarchy in August-September 1992 and Presidentialism 1979-83 and from 1999 to date.

Before the advent of the colonial era, the political machinery and legal institution were indigenous to the people. The prevalent law was the customary law. Colonization brought in its train new legal machinery known to the colonizing powers. English types of courts were set up and they applied the Common Law of England, and the doctrines of Equity

2.0 OBJECTIVES

The objective of this course is to equip the students with background knowledge of the duties, powers and liability of the members and officers of the armed forces. This is to serve as a prelude to dealing with the peculiarities arising out of a revolutionary situation in relation to administration of Justice.

3.0 MAIN CONTENT

3.1 The Military

3.1.1 Pre-Contemporary Times

The diverse settlements that fused into Nigeria had a sort of local armies and soldiery. Their weapons were bows and arrows, spears, swords, daggers, shields, clubs and dane guns. History has recorded a number of encounters among these tribal native soldiers and between them and British forces. Examples: Bini Expedition, Ijeba expedition, Fulani Wars, Gbrohimi expedition.

Britain did not have any standing Army until relatively recent times. There were the feudal armies raised by the system of land tenure, then the king's commission of array – a form of conscription into the army, under King Edward I and compulsory military service during the wars of Roses, Oliver Cromwells "Ironsides" ruled during the commonwealth. The kings kept personal bodyguards. The Bill of Rights 1689 prohibited the maintenance of a standing Army.

3.1.2 Modern Times

Prior to 1955, The Army Act, Air Force Act and other Acts governing the Reserve and Auxiliary Forces allowed the State to maintain the Army and the Air Force in peace time. The Act was passed from year to year and later at five yearly intervals, authorizing the crown to maintain an Army in time of Peace upon an annual resolution passed by Parliament to that effect. The Navy was maintained under the Royal Prerogative and by voluntary enlistment. The Bill of rights provided a constitutional safeguard against maintenance of the Army and Air Force in peace time without parliamentary approval. Now however, the Constitution of the Federal Republic of Nigeria provides for establishment of the Armed Forces for the federation, which shall consist of an Army, a Navy, an Air Force and such other branches of the armed forces as the Act of National Assembly may establish.

3.1.3 Duties Of The Armed Forces

The purpose of the Armed forces is to

(a) defend Nigeria from external aggression
(b) maintain its territorial integrity and secure its borders from violation on land, sea or air.
(c) suppress insurrection and act in aid of civil authorities to restore order when called upon to do so by the President but subject to such conditions as may be prescribed by an Act of the National Assembly and
(d) perform such other functions as may be prescribed by the Act of the National Assembly.

The Army Act charged the military with

(i) the defence of and maintenance of order in Nigeria
(ii) such other duties as may be, from time to time, defined by the Head of State e.g. performing such military duties or undertaking course of instruction training or employment outside Nigeria.

SELF ASSESSMENT EXERCISE 1

What are the duties of the Armed Forces of Nigeria?
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3.2 Statutory Powers Of The Armed Forces

The armed Forces and Police (Special Powers) Act 1967 conferred on members of the Armed forces and Police Officers, the power of arrest without warrant, and power to enter and search any premises at any time without a warrant. The Chief of Staff of the Armed Forces or the Inspector General of Police may also exercise power to order the detention in prison or police station, of trouble makers until the order is revoked. The Act also conferred on every member of the Armed Forces the powers and immunities of a police officer.

As citizens, the members of the Armed Forces have powers to arrest without warrant, any person who in his view commits an indictable offence or who, prima facie, commits at night, a misdemeanor. They or their servants may arrest any person they find committing an offence involving injury to their property.

The President is the Commander-in-Chief of the Armed forces. He enjoys the power to determine the operational use of the armed forces and may in writing delegate such powers and impose such conditions as he thinks fit.

3.2.1 Superior Orders

Members of the Armed forces have a duty to obey implicitly, the orders of their superior. Both Lord Mansfield and Lord Loughborough are in agreement that "a subordinate officer must not judge of the danger, proprietary, expediency or consequence of the order he receives; he must obey, nothing can excuse him but a physical impossibility, … The first, second and third parts of a soldier is obedience."

The Mutiny Act proves that a refusal to obey military orders of ones superior officer is a capital offence triable before a Court Martial, but under the Army Act, a soldier may only obey "lawful commands". However, a superior order per se is an invalid defence especially where the orders are unlawful. In R. v. Smith (1900) it was held that if a soldier honestly believed he was doing his duty in carrying out superior orders and if the orders were not manifestly illegal, he would be immune from responsibility. The basis for this decision is explainable on other grounds of mistake or lack of mens rea.

It would appear, however, that if an order is manifestly wanton and reckless, any soldier who carries out such superior orders would be liable even before the normal court. In The State v. Pius Nwaogu & *Anor, the two accused persons were 'biafran' army. They received* orders from a major to apprehend the deceased soldier – deserter. The first accused pleaded a superior order that the deceased be produced "dead or alive". The Court per Agbakoba J. has this to say, … a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly lawful. This proposition may seem harsh but principles of law are evolved for general application although … the test in each case must be objective…The order to eliminate the deceased was given by an officer of an illegal regime; his orders therefore are necessarily unlawful and obedience to them involves a violation of the law and the defence of supreme orders is untenable.

Although the Supreme Court affirmed the judgement it was on different grounds. The Supreme Court was silent on vital issues such as

(i) what the attitude of court would be, if the order were from a superior officer of a "lawful" regime.
(ii) whether there are no situations when an officer of an illegal regime can give a lawful order

(iii) acid test of the “unlawfulness” of a superior order of an officer of a lawful or unlawful regime.

Willes J, in Keighley v. Bill (1866) expressed the view that superior orders are an absolute justification in time of actual war … unless they were such as could not legally be given … An officer or soldier, acting under the orders of his superior not being necessarily or manifestly illegal would be justified by his orders.

3.2.2 Military and Public Service

Section 318 of the Constitution of the Federal Republic of Nigeria, 1999 defined “Public Service of the Federation as:
“the service of the federation in any capacity in respect of the government of the federation and includes service as members or officers of the armed forces of the federation or the Nigeria Police Force or other government security agencies established by law”.

3.2.3 Armed Forces and Public Disturbance

Many a time the military are called upon to quell riots or suppress public disturbance. Example is the military action in Kano, Kaduna and Yola during the Matsaitine Riots, the military operation in the Niger-Delta. It is the duty of the government, all executive officers and the general public to take appropriate measures as are necessary to bring public disturbance under control but such measures must neither be cruel nor excessive. The Civil War began with Police action and limited military intervention before it escalated into full scale military operation. In these situations, the military are called in, not because they are soldiers, but as members of the public who are more skilled in the use of firearm.

SELF ASSESSMENT EXERCISE 2

What do you know of the Duty and Powers to quell public disturbance.
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3.3 Armed Forces and Threats to National Safety

When the nation is under threat, the executive organ of government may use prerogative powers of a more or less unlimited extent to counteract the threats. The amount of force is determined by the gravity of threat offered. Extreme measures as are necessary in the particular circumstance may be permitted and operatives may be excused of any irregularities and liabilities by subsequent Act of Indemnity.

Where immunity has not been conferred, the court is competent to enquire whether or not the Executive and the military had acted in excess of what the emergency demanded and perhaps redress any tort committed. In Ex Parte Marais, the appellant was detained in South Africa by the Military authority during extreme crisis. He unsuccessfully sued the military. The Privy Council also dismissed his appeal and it would appear from the reasoning of the Lord Privy Councilors that the Executives and the military who are on the spot are best judges of what extra ordinary measures should be taken.

4.0 CONCLUSION

The Armed forces of Nigeria assumed the rulership of Nigeria in 1966 – 79 and 1983 – 99 except in August – September, 1992. In this unit, you learnt about the impact of the Armed Forces Administration had in the Nigerian legal system, which it employed in situations of public disturbances and threat to National safety and survival. Perhaps you can hazard a comparism of the development of Nigerian legal system under military and under civil dispensation.

5.0 SUMMARY

In this introductory lecture on the Military Government and the Nigerian Legal System, we have defined the technical terms, and looked into the powers, duties and liability of officers or member of the armed forces in the official and private capacities. In the next lecture we shall deal with the nature of military administration.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by the term “Military”? Explain its statutory duties.
2. “A soldier is bound to carry out orders from his superior however wrongful”. Do you agree?

7.0 REFERENCES/FURTHER READING

Elias T.:The Nigerian Crisis in International Law, NLJ Vol. 5 (1971)

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UNIT 5 THE NIGERIAN LEGAL SYSTEM UNDER THE MILITARY GOVERNMENT CONT'D

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
    3.1 Military Government
    3.2 Legislative Authority
    3.3 Executive Authority
    3.4 Judicial Authority
    3.5 Legal Implications of Military Government
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

The Armed Forces of the Federation ruled Nigeria from 1966-1979 when it was succeeded by a democratically elected government. This government was toppled in 1983 when the Armed Forces again assumed power until 1992 when the Military Ruler "stepped aside". The succeeding Civilian-Military diarchy was dismissed few months later and the military perpetuated itself in power until 29 May 1999 when democracy was eventually restored.

During the military hegemony, a portion of Eastern states attempted unsuccessfully to secede. But the secession bid collapsed in 1970, after three years of armed struggle.

These events have had serious implication for the legal framework with which the Nigeria Legal system operated. This is the focus of this lecture.

2.0 OBJECTIVES

At the end of the lecture, you are expected to be able to assess the validity or otherwise of Military incursion into governance of the Federal

3.0 MAIN CONTENT

3.1 Military Government

The term, “Military Government” refers to a government, which acquires the power to govern as a result of a successful revolution or a coup d’etat. A revolution is an abrupt political change not within the contemplation of the Constitution. It is a successful rebellion, an overthrow of existing government usually resulting in some fundamental political change. A revolution need not necessarily be violent. It can also arise by peaceful methods.

On January 16, the acting President of the Federation, Dr. Nwafor Oriza in a nation-wide broadcast was heard to say:

> “I have to night, been advised by the Council of Ministers that they had come to the unanimous decision voluntarily to hand over the administration of the country to the Army Forces of the Republic with immediate effect … It is my fervent hope that the new administration will ensure the peace and stability of the Federal Republic of Nigeria and that all citizens will give them their full cooperation”
>
> The Military was also heard to respond; saying:
> “the Government of the Federation having ceased to function, the Nigerian Armed Forces have been invited to form an interim military government for the purpose of maintaining law and order and of maintaining essential services. This invitation has been accepted and I, General J. T. U. Aguiyi Ironsi, the General Officer Commanding the Nigerian Army have been formally invested with the authority as Head of the Federal Military Government and Supreme Commander of the Nigerian Armed Forces.”

Thus, in January 1966, the Armed Forces of Nigeria assumed effective control of government machinery and began a chain of governments, bringing about a fundamental restructuring of the Nigerian Polity.

SELF ASSESSMENT EXERCISE 1

i. What is “Military Government”?
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ii. Describe how the military came to power in Nigeria.

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There were a number of successive military governments. That is one revolutionary regime overthrowing another revolutionary regime. Such were the changes in July 1967 and 1975, December 1983, August 1985 and September 1992. There were also a number of failed coups. Similar events were taking place across Africa: Congo (1961-2), Egypt (1952), Sudan (1958), Southern Rhodesia (now Zimbabwe) (1965), Ghana (1966), Sierra Leone (1968), Uganda (1966), Lesotho (1970) etc.

In some other jurisdictions which also experienced to some disorder, the Army had behaved differently. After Mikhail Gorbacheu had been unseated, there was a vacuum but the Armed Forces resisted the temptation to assume power in USSR. After the Court had annulled the election of Mrs. Indira Gandhi, there was a state of emergency. In fact the Indian army were invited to take over governance but they declined on the ground that their role is not to govern but to protect the internal and external security of India.

We shall attempt to examine the legal basis of military intrusion and the value the regimes have placed on the legal system and its institutions.

3.2 Legislative Authority

Upon ascension to and assumption of state power, the military rulership immediately promulgated a decree. The example is the Constitution (Suspension and Modification) Decree – otherwise called Decree No. 1 of 1966.

The decree provided that

(a) the provisions of the Constitution of the Federation mentioned in Schedule 1 of the Decree were suspended.
(b) the provision of the Constitution, which are not suspended shall have effect subject to the modifications specified in Schedule 2.
(c) (i) the Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever
(ii) the Military Governor shall not have power to make laws with respect to any matter included in the Exclusive Legislative List

(iii) except with the prior consent of Federal Military Government, the Governor of a State shall not make law in respect of any matter included in the concurrent legislative list.

(iv) subject to the fore-going the military governor of a state shall have power to make laws for the peace, order and good government of that state.

(d) The decrees conferred on the Military, powers to make laws "with respect to any matter whatsoever" for the whole of Nigeria or any part of it.

The Decree also provided that:
"This Constitution shall have the force of law throughout Nigeria and if any other law (including the Constitution) is inconsistent with this Constitution, this Constitution shall prevail and that other law shall, to the extent of inconsistency be void. Provided that this Constitution shall not prevail over a decree and nothing in this Constitution shall render any provision of a decree void to any extent whatsoever"

(e) No question as to the validity of this or any Decree or by any Edict shall be entertained by any Court of Law in Nigeria. The Military dismissed the pre-existing legal order, and its legislative organs and conferred upon themselves wide powers, and prescribed for themselves, their roles, and functions.

The Constitution (Suspension and Modification) Decree No. 1 of 1984 and the Constitution (Suspension and Modification) Decree No. 107 of 1993 as well as the Federal Military Government (Suspension and Enforcement of Powers) Decree No. 12 of 1994 were replications of Decree No. 1 of 1966. These decrees constituted the legal bases of the respective dispensations. Each gave the enacting military regime its constitution comprising:

(i) The Constitution ((Suspension and Modification) Decree
(ii) The Unsuspended provision of the existing Constitution
(iii) Any Modification by subsequent Decree.

SELF ASSESSMENT EXERCISE 2

Account for the similarities and differences between Decrees No. 1 of 1966, No. 1 of 1984, No. 107 of 1993 and No. 12 of 1994
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The implication is that the Constitution 1963 which hitherto was supreme, has ceased to be. The New regime owed no allegiance to it. The Constitution (Suspension and Modification) Decree together with the Unsuspended provision and other modification to the pre-existing constitution more or less constituted prevailing self-imposed restraints on the Military Administration.

3.3 Executive Authority

In the Military Regime, the executive authority of the Federal Republic of Nigeria vested in the Head of the Federal Republic of Nigeria. He exercised the powers either directly or through persons or authorities subordinate to him. He is empowered to delegate conditionally or unconditionally executive function of the state to the military governor. The Military appointed the members of Supreme Military Council, which made laws and a Federal Executive Council which carried out executive functions.

General Murtala Mohammed/Obasanjo regime (1975-79) similarly vested executive authority on the Head of the Federal Military Government, such authority being exercisable by him in “consultation with the Supreme Military Council”. The question whether there has been any consultation with the Supreme Military Council with respect to any exercise of the executive authority of the Federal Republic of Nigeria shall not be enquired into in any court of law. (S. 5(2))

The Head of Federal Military Government may delegate to the Governor of a state executive functions falling to be performed within that state in relation to any matter. The Military Government or other delegated authority is at liberty to delegate to another (S. 7(6)).

SELF ASSESSMENT EXERCISE 3

What is the effect of military rule on the Executive organ of State?
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3.4 Judicial Authority

Judiciary is the branch of governance invested with judicial powers, the system of Courts, the body of judges, the Bench, that branch of government, which is intended to interpret, construe and apply the law. The Federal Military Government set up an Advisory Judicial Committee consisting of the Chief Justice of Federation, Chief Justices of the Regions, the Grand Kadi of the Sharia Court of Appeal and the

Attorney-General of the Federation. The Solicitor-General served as its Secretary. The Supreme Military Council, after consultation with the Advisory Judicial Committee appointed judges of Superior Courts (i.e. The Supreme Court, the West State Court of Appeal, the Northern States Sharia Court of Appeal and the Court of Resolution and the High Courts of the Federation). This procedure was further altered by the Constitution (Amendment) Decree No. 5 of 1972, which conferred on the Head of State, the power to appoint and dismiss the Chief Justice of the Federation.

Any Court of Law, authority or office which was established, and any appointment which was made and any other thing which made pursuant to the Constitution, the provision of which had not been suspended or modified are deemed to have been duly established.

The Constitution (Suspension and Modification) Decree preserved Chapters III and VIII of the Constitution: Chapter III contained Fundamental Rights provision. This included Sec. 22, which provided that

"In the determination of his civil rights and obligations, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

In its Chapter VIII, the Constitution provided for:

- Establishment of the Supreme Court and of High Court of Lagos
- Appointment and Tenure of Office of Judges of the Supreme Court and judges of the High Court (with minor amendments)
- Questions as to Interpretation of the Constitution
- Appeals to Supreme Court from High Courts and from Sharia Court of Appeal and Court of Resolution.
- Finality of determinations of the Supreme Court
- Powers, Practice and Procedure of Supreme Court
- Appeals to High Court of Federal Territory from subordinate courts
- Special provision as to Regional Courts of Appeal.
- Oath to be taken by Judges

Despite the overwhelming military nature, the government elected as a matter of deliberate policy to honour not only civil liberties (apart from few restrictions on political liberty) but also conditions of a free society and rule of law, avoiding situations of police state and regimentation of individual life. See the case of Government of Lagos State v. Ojukwu *(1986).*

The Military bound themselves to observe the United Nations Declaration of Human rights which enjoined member-countries to protect human rights by the Rule of Law if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.

SELF ASSESSMENT EXERCISE 4

What do you know of the Judiciary during the Military dispensation?
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3.5 Legal Implication of the Military In Governance

The Constitution (Suspension and Modification) Decrees, among others, formed the bases of prospective actions of the Military government and served as the source of authority from where the Military derived them power and capability to abrogate or re-enact the Constitution. The decrees were silent about where the Military acquired the power to make the enabling decrees. Is the offer of governmental power by Dr. Nwafor Arizu and acceptance by General Ironsi a transfer of power? Similar question may be asked about change of power between General Babangida and Chief Sonekan and between the latter and General Sanni Abacha? What about that of Generals, Yakubu Gowon, Murtala Mohammed/Obasanjo, Mohammadu Buhari/Idiagbon and Ibrahim Babangida which were military action per excellence?

Answers to these questions may be classified into three different classes:

(i) Those espousing the claim that the Military administration is a continuation of the preceding civil dispensation, denying that there was any change in the legal order of the nation. See the case of State v. Nwoga & Okoye, Suit No. E/34C/66; Jackson v. *Gowan & Ors NBJ Vol. 8 (1967)*
(ii) Those espousing that the military administration is revolutionary. See Doherty v. Balewa (1961), ANLR. 604, Lekanmi & Anor. V. *Attorney-General (WS) & Others (1970), Ogunlesi & Ors v. Attorney-Genral (Federation) (1970), The Council of University of Ibadan v. Adamolekan (1967).*
(iii) Those who recognize the new order and still espousing that both the military administration and its agencies must conform to the rule of law.

The Judicial picture of the nature of military administration has not made matters clearer, as we shall see in the next lecture.

4.0 CONCLUSION

In further consideration of the Nigerian legal system under the Federal Military Government in this unit, you revisited the vexed issue of separation of powers and the legal implication of a Military Government. You are probably thrilled when thinking of the events in January 1966 – whether it was a transfer of power or a revolution – and how the Military used the Nigerian legal system to resolve it. Can you draw any similarity or dissimilarity with the period with Dr. Ngige served as Governor of Anambra State (2003 – 6)?

5.0 SUMMARY

A revolution occurs whenever the legal order of a nation is nullified and replaced by a new order in an illegitimate way - that is, in a way not prescribed by the first legal order itself. Opinion of the nature of military administration has been divided; among

(i) advocates of abrupt change of existing legal order for unlimited government of force,
(ii) advocates of continuity of existing legal order despite military intervention
(iii) advocates of subjection of military to rule of law, despite the change.

6.0 TUTOR-MARKED ASSIGNMENT

"The plain truth of the matter is that the basis or sources of the military government's absolute power is force. A military government is a regime of force. It rules by the "barrel of the gun" not by the peoples consent. What is of far greater significance is that the authority exercised by the Military government does not derive from the people" (Professor Nwabueze)

Describe the nature of Military Administration in Nigeria.

7.0 REFERENCES/FURTHER READINGS

Kasumu A. B.: The Supreme Court of Nigeria, 1956-1970

Elias T.: The Development of the Law and Constitutio 1967

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MODULE 2

Unit 1 Nigeria Legal System under the Military Rule cont'd
Unit 2 Functions of Law in the Society
Unit 3 Classification of Law
Unit 4 Classification of Law cont'd
Unit 5 Laws and Morals

UNIT 1 THE NIGERIAN LEGAL SYSTEM UNDER THE MILITARY GOVERNMENT CONT'D

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
  3.1 Legitimatisation of Military Power
    3.1.1 Creation of Additional Courts
  3.2 Ouster Clauses
  3.3 Enforcement Authority
    3.3.1 Centralisation of State Power
  3.4 Multiplicity of Legal System
    3.4.1 Limitation of Powers
  3.5 Nigerian Legal System and the Civil War
  3.6 Military Court Martial
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
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1.0 INTRODUCTION

In the previous lectures on the Military and the Nigerian Legal System, we outlined the Constitutional and other statutory powers, and obligations of the Armed Forces. We saw that in January 1966, the Armed Forces took over the government of the federation, having sacked the legislatures. For nearly 25 years, since Independence, the military ruled. During the period there were five successful coups, four attempted ones producing six military heads of State. We have discussed the implications in relation to the legislative, executive and judicial functions.

The major features of a military government include rigidity, discipline, regimentation, authoritarianism, straight-jacket uniformity, and obsession against dissent. From the outset, the military government

asserted its supremacy, declaring its decrees superior to the Constitution and every other law.

In this lecture, we shall examine the administration of justice under the military particularly on both sides of the great divide during the secessionist struggle and the extent to which the personnel of the armed forces were subject to civil and military discipline and court martial.

2.0 OBJECTIVES

- The objectives of the lecture is that you should understand,
- predominance and supremacy of the military in legislative, executive and Judicial matters
- the operation of the Nigerian Legal System in the Eastern states and the rest of the federation during the war years.
- Court Martial

3.0 MAIN CONTENT

3.1 Legitimatisation of Military Power

The first step every military regime immediately took on seisure of power was to assert its authority and supremacy. If quickly set up a Ruling Council which made law by decrees, which it made superior to the Constitution and every other law. The Executive Council of each State similarly made laws by Edicts. These are inferior to Decrees as well as to the unsuspended provisions of the Constitution and existing Acts of the National Assembly. They are however, superior to existing laws of the State including By-laws.

Professor Nwabueze asked one important question, where did the Federal Military Government get the power to enact Decree I of 1966 or No. 1 of 1984 or other decrees of similar nature. The basis of that power must be some power "anterior" to it. Professor Nwabueze said: "The plain truth of the matter is that the basis or sources of the military government's absolute power is force. A military government is a regime of force. It rules by the "barrel of the gun" not by the peoples consent. What is of far greater significance is that the authority exercised by the Military government does not derive from the people" The more acceptable reason is based on the doctrine of implied mandate which is to the effect that all its powers and authority derive from the people of Nigeria on whom sovereignty resides; and to whom every government must be subservient.

3.1.1 Creation of Additional Courts

During the military regimes, additional courts were created, e.g.

(i) Federal Revenue Court for Revenue matters (Federal Revenue Court Decree No. 13 of 1973)
(ii) Federal Court of Appeal to entertain appeals from Federal Revenue Court and the High Courts of the states. From this Court, appeals now lie to the superior Court.
(iii) Armed Robbery Tribunal, an extra-judicial body headed by a high court judge and assisted by two officers drawn from the Armed Forces and the Nigeria Police. The military governor exercised power to confirm or disallow sentence imposed by the Tribunal.
(iv) The Western State Court of Appeal for the Western state, and one Court of Appeal for the Federation were established by the Military administration. Titles of Heads of Judiciary were renamed Chief Justice of Nigeria (Federation), Chief Judge (States).

See The Constitution (Suspension and Modification) Decree 1966
Constitution (Basic Provision) Decree 1975
Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970
State Creation and Transitional Decree, 1967, 1976 etc

Both Decree No. 1 of 1966 and No. 32 of 1975 allowed judicial officials to operate and function in the normal way. But the Supreme Military Council, on the advice of the Advisory Judicial Committee appointed for the federation of Nigeria, the President and judges of the Federal Revenue Court, the Chief Judge and judges of the High Courts of the States, Grand Khadi and other judges of the Sharia Court of Appeal of the states, the President of the Customary of Court of Appeal.

SELF ASSESSMENT EXERCISE 1

Account for changes in the Court system by the military government
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3.2 Ouster Clauses

Courts cannot enquire into the validity of any Decree once it qualified as a “Law”.

For example, the Constitution (Suspension and Modification) Decree 107 of 1993 provided that:

"No question as to the validity of this Decree or any other decree, made during the period 31st December 1983 to 26 August 1993 or made after the commencement of the Decree or of an Edict shall be entertained by any Court of Law in Nigeria"

(See Section 5) Also see Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994: which provided that: "No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to *be done under or pursuant to any Decree or Edict and if such* proceedings are instituted before, on or after the commencement of this Decree – such proceedings shall abate, be discharged and made void. The question of validity of an edict may be entertained only on the ground that it is inconsistent with a decree and the consequence is that such edict is void only to the extent of inconsistency.

SELF ASSESSMENT EXERCISE 2

Give as many statutes as you can which contain ouster clause(s).
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3.3 Enforcement Authority

Federal Military Government enjoys enormous powers. For example, it can enforce its powers over all persons and authorities and the country. It can arrest and detain, at its pleasure, any suspected persons with or without warrant. It can also restrain persons from enjoyment of their property where property are questionable.
See the Kikelomo Lekanmi's case
Also the case of Dr. Ohonbamu.

- Dr. Ohonbamu, was a Lagos University Don. He made a publication in the Gowon's Dailies, alleging that General Yakubu Gowon's Military Governors were corrupt; and he was arrested for making publications likely to embarrass the government or its officials. He repeated this allegation adding that he had facts to support his allegations. The military then passed a retroactive decree that in charges of this nature, the truth of the matter shall not be a defence. Faced with such helpless and hopeless situation. Dr. Ohonbamu apologized to government and the matter died.

3.3.1 Centralisation of State Power

(a) The head of the Federal Military Government (or the President) and Commander-in-Chief of the Armed Forces was head of the legislative organ e.g. Supreme Military Council or its equivalent and the Executive Organ – Federal Executive Council or its equivalent. He appointed their members. Some military and Police officers served in both Supreme Military Council and **Federal Executive Council, which were legislative and executive** organs respectively.

(b) The Military blended both the Executive and the Legislative together but permitted the Judiciary to co-exist with it. The Constitution (Suspension and Modification) Decree preserved all the constitutional provisions relating to the judiciary and vested in courts, the judicial powers of the Federation. However, the Head of Government, or Military Governor of State exercised certain judicial functions. They served as appellate authority in some specified legal proceedings and they could nullify, confirm or amend lawful sentence of courts or of Judicial tribunals. See Armed Robbery and Fire Arms Decree and the Armed Robbery and Firearms Appeals Tribunal Decree.
See Lekanmi Kikelomo v. AG (WS) 1970, - a classic case of judicial sentence

Also Governor of Lagos State v. Ojukwu (1986), Lekwot v. *Judicial Tribunal (1993), Ken-Saro Wiwa v. AG (FRN) (1995)*

SELF ASSESSMENT EXERCISE 3

To what extent has the doctrine of separation of power been sustained in the military dispensation.
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3.4 Multiplicity of Legal System

(a) The Constitution (Suspension and Modification) No. 5 Decree 1966 abolished Federalism, and the regions. It renamed regions, provinces and Nigeria a Republic. Government of federation became National Military Government. The Military effected a restoration of the status quo ante some six months later. In quick succession, Nigeria, which had been split into three regions in 1951-4; and into four in 1963 was further subdivided into 12

(1967), then into 19 (1976), 21 (1987) and now 36 states each with its legal system – and all in a unitary constituency.

3.4.1 Limitation of Powers

At the sound of Martial music which usually heralded a revolutionary military government, there is general presumption that the nation was being subjected to the rule of might as against the rule law. No jurist, Sargues, as Han Kelsen, would maintain, that even after a successful revolution, the old Constitution and the laws based thereupon would remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Its power is immediately uncontrolled or unlimited. It could put an end to the existence of the totality of the Constitution, and exercise all governmental powers. Rather than doing so, the Regime might elect to proceed to spell out its organs of government and their duties and powers, (as in Decree 1 of 1966, 1 of 1984 etc). Even so there is fear of rule by tyranny or by share force of arms and the new government usually diffused such stereotype notions by express pronouncement that it intends that the rule of law should prevail. It is arguable in the circumstance that the Federal Military Government is limited by the conditions of law-making that are imposed by the instrument which itself regulates the power to make law

SELF ASSESSMENT EXERCISE 4

The Military Government enjoys unlimited powers. Discuss
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3.5 Nigerian Legal System and the Civil War

In 1966, Isaac Adaka Boro raised up a Delta Volunteer Service in support of .his demand for secession of Niger-Delta area from the Federal Republic of Nigeria. He was arrested for treason, tried, convicted and sentenced to death. The Supreme Court confirmed the sentence: The Republic v. Isaac Adaka Boro & 2 Ors, SC 377/1966 of *5th December '66 (unreported).*

In obedience to demands of his consultative Assembly and Advisory Council, Chiefs and Elders, the Military Governor unilaterally declared Eastern Nigeria a Sovereign and Independent State of Biafra on 30 May 1967. This led to the Civil war of unity from 6 July 1967 to 12 January 1970. During the war years, Professor Nwabueze explains:

"the Nigerian Legal System remained in operation, at least, that part of it that regulates ordinary social life of the people in the secessionist. State Rebellion is not to be regarded as destroying a society and the rules of law that regulate social intercourse".

Bulk of law in operation in the East remained essentially Nigerian laws and Nigerian Legal System specially such that were necessary for good order, or in the ordinary course of social, commercial and matrimonial disputes, among others. Acts necessary to peace, and good order among citizens, which would be valid if emanating from a lawful government would be regarded, in general, as valid when proceeding from the actual, though unlawful government (Texas v. White 74 vs. 227). Such Acts would include for example Acts sanctioning descent, conveyance and transfer of property etc.

The personnel of the law who had been lawfully there before the secession are deemed to be there lawfully for preservation of law and good order. In Ogbuagu Ifegbu & Ors v. Ota Ukaefi & Others (1971) *ECSLR 184. Oputa J. (as he then was), said that "during the civil war* and in-spite of the Civil War, it was necessary to maintain law and order even in the areas controlled by the illegal regime. It may be because of this the Federal Military Government did not revoke the appointment of the Judges of the former Eastern Region sitting within the rebel enclave. In any event, in the courts in the area controlled by the illegal regime it was Nigeria law that was administered.

A distinction should to be drawn between

(i) acts, even of an illegal regime, necessary for the preservation of peace and good order among the citizens and
(ii) acts which aid and foster the rebellion.

The Privy Council has said that during a rebellion, the seceding states continued to exist as states (Madzionbamuto v. Lardner-Burke (1968) 2 *SA). The decision was based on the doctrine of necessity but the Privy* Council rejected de facto status of a rebel regime. (Hora v. Lockheard *(1873) 17 Wall 570). In Williams v. Briffy, the United States Supreme* Court held that in such situations, Acts that did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the Constitution are, in general, to be treated as valid and binding. The Court added.

That No one may seriously question the validity of judicial or legislative Acts in the insurrectionary states, where they were not hostile in their purpose or mode of enforcement to the authority of the National

Government and did not impair the rights of the citizens under the Constitution.

Acts which were fully executed in biafra are fait accompli and the attitude of Federal government was to let sleeping dogs lie. However inchoate matters were a nullity. The superior Courts in the secessionist state were styled "the High Court of Biafra" and were illegal Institutions: Uttah v. Independence Brewery Ltd (1974) 2 SC 7; *Okwuosa v. Okwuosa (1974) 2 SC 13.*

The Administrator of the East Central State appointed by the Federal Government enacted into law the Judicial Acts Validity Edict 1970 purporting to validate the decisions or orders of Court in secessionist enclave. But the Supreme Court in Ogbwagu and Ifegbu & Ors v. Ota *Ukaefi (1971) 1 ECSLR. 184 declared it null and void because the* subject matter lay within the domain of the Federal Military Government.

In order to solve certain social problems, the Federal Military Government passed the Marriage (Validation) Decree No. 46 of 1971 validating marriages celebrated before duly appointed registrars of marriage offices during civil war. Children of such marriages are accordingly legitimated.

SELF ASSESSMENT EXERCISE 5

In "biafra" all its laws, courts and judicial decisions are illegal, null and void and of no effect whatsoever. Discuss, support your argument with decided cases.

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3.6 Court Martial

Court martial are empowered to try persons who are subject to military law. Examples of persons subject to military rule are,

(i) officers of the regular or Reserved Forces
(ii) Service Pensioners who are called out,
(iii) certain citizens employed by any of the forces on active service,
(iv) women in the Nursing Corporation, etc.

A Court Martial exercises jurisdiction over special offences bordering on:

(i) breaches of military discipline like desertion,
(ii) absenteeism,
(iii) fraudulent enlistment,
(iv) shameful conduct on the face of the enemy,
(v) conduct, disorder and neglect to the prejudice of good order and military discipline.
(vi) criminal offences except treason, homicide or rape,
(vii) criminal offence whatever that may be committed on active service.

Before a Court Martial can validly sit, there must be a convening order issued by the appropriate Authority (Army Act 1881). Rules of Evidence apply in Court Martial as in ordinary courts. The Army Act expressly provides that certain of its provisions shall apply to civilian employees. The term “members” of the Armed Forces is not as clear as it seems. Are they strictly officers and personnel of the armed forces? Does the term include persons employed in civil capacity by any of the Armed Forces. The answer is not beyond controversy.

The constitutional provisions seem to subject ‘members’ and officers of the armed forces to both civil and military law, particularly in matter of discipline, trial and punishment. In Dawkins v. Lord Rokeby (1873), it was held that the civil court would not interfere with the military authorities, acting within their jurisdiction and that cases involving questions of military discipline and military duty alone are cognizable only by military tribunal and not by a Court of Law.

Thus matters that are purely military in nature are outside the purview of ordinary Courts. But a cause of action arising from a breach of a right, which is expressly conferred by Statute on military personnel as a citizen falls within the competence of the Courts. In Samuel Bamdele *Loye v The General Officer Commanding 2nd Division & Anor (1976),* the Inspector General of Police, detained the plaintiff for an undisclosed reason and his Counsel commenced habeas corpus proceeding, Kayode Eso CJ found as a fact that the plaintiff was not a soldier, and held that his detention was wrongful.

Remember that a member or officer of the armed forces is subject to the ordinary law of the land, and also subject to military law. This is a requirement of the doctrine of the “rule of law”. Accordingly the fact that he is subject to military law and triable in the Court Martial confers no immunity from the general law or jurisdiction of the normal courts.

SELF ASSESSMENT EXERCISE 6

i. What is a Court Martial?

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ii. What is your view is the jurisdiction of a Court Martial?
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iii. How may a Court Martial be convened?
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A civil court will not interfere with the sentence of a Court Martial acting within its jurisdiction even if it was wrong, but it would if the Court Martial acts in excess of its jurisdiction. In Wolfe Tones Case *(1798): the Civil Court granted a writ of habeas corpus discharging a* sentence of death by a Court Martial in Dublin Ireland, because it acted in excess of its jurisdiction. In Dawkins v. Lord Paulet (1869), an action arising from report, which had been made against a military officer was refused by a Civil Court even though it acted in error or even possibly maliciously. This decision is open to questions on the ground that it conflicted with a rule of natural justice that a Court must not be guilty of malice or improper motive. Perhaps it is safe to maintain that the civil Court may feel reluctant to interfere with decisions of Court Martial unless by reason of non-jurisdiction. For example, the Civil Court would issue a writ of prohibition against a Military Court martial on the ground that it has not been properly convened and therefore enjoyed no jurisdiction.

4.0 CONCLUSION

In this unit, you saw how the Military Dispensation used the Nigerian legal system to legitimatize its powers, to centralize state powers in itself and create a multipilicity of the legal system and tribunals and activate court martials. You also saw how the Nigeria legal system fared in active war situation and immediate post war era. No doubt, you have been equipped to subscribe to the rule of law and limitation of power, if at all, in the military dispensation.

5.0 SUMMARY

The military is a recognized institution of society with defined function of defending the national integrity. They are disposed to obsession against dissent and towards rigidity, discipline, regimentation and authoritarianism.

Military intervention in governance prima facie signifies a negation of democracy, rule of law and constitutionalism. It immediately raises fears of: overthrow or subversion of the constitution: forcible movement away from limited to unlimited powers and from force of law to law of force. It meant intolerance of opposition, of debate or delay and of press freedom; suppression of political parties and substitution of the ballot with the bullet; as well as termination of the legislatures and subordination of the judiciary.

In the midst of these fears, the eastern part of the Federation attempted to break away and the country was faced with "a legal regime" in the North, West, and Mid-West and "illegal regime" in the East. This event had significant implications for the Nigerian Legal System – Nigerian Law and machinery for administration of justice remained in force. The Courts allowed sleeping dogs lie in matters that had been concluded within the secessionist states. Others like Marriages and births were saved by specific Acts of Central Government validating them; but matters that were pending or on appeal could not be sustained for want of jurisdiction.

Generally, the Judiciary, the Legal System and administration of justice remained constant in every regime. However, the value placed on them varied from one regime to another.

6.0 TUTOR-MARKED ASSIGNMENT

1. Describe the Independence of the Judiciary under the Military regimes.
2. Discuss the nature of legal system and administration of justice in Nigeria during the period 1966-1970.

7.0 REFERENCES/FURTHER READINGS

Kasumu, A. B.: The Supreme Court of Nigeria, 1970

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UNIT 2 FUNCTIONS OF LAW IN SOCIETY

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
 3.1 Functions of Law in the Society
 3.1.1 Concept of Man
 3.2 Protection of Interests
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 3.2.2 Preservation of Life
 3.2.3 National Security and Public Safety
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 3.3.1 Maintenance of Justice and Fairness in Society
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1.0 INTRODUCTION

Society cannot exist without rules of social order. Hence every civilized society has its publicly recognized authority for declaring, administering and enforcing its laws. Can you for a moment visualize a State without law and any enforcement system (if such state ever existed). Suppose the Nigeria Police Force were to observe one day public holiday? What would you find?

The state of normlessness or lawlessness is shade or two worse than the perpetual state of warfare and reign of terror and fear. This is a mirror of the state of nature where as Thomas Hobbes stated in The Leviathan: "each man was his own master; personal force alone determined each man's position. Life in these conditions was "solitary, nasty, brutish and short".

This leads one to appreciate the fact that the society cannot exist without rules of social order – law. The picture of a State without law helps to bring to the fore, what the functions of law would be in the society.

2.0 OBJECTIVES

The objective of this lesson is that you should be able to

- Evaluate whether or not law is an instrument of class
- domination or a way to mystify power relation.
- Evaluate the purpose and functions of law vis-à-vis the
- prospects that it would "wither away" at certain stage of
  development.

3.0 MAIN CONTENT

3.1 Functions of Law in the Society

3.1.1 Concept of Man

Man, by nature, is passionate, coveteous and if he is left to himself, the world would resemble the devils workshop, where the logic of the fist would reign.

The original state of man was one of disorder, force or violence. (Bodin) and man is the most criminal creature made by God (Schophenhauer). Man is a sinner and what he produces (overt act) is part of the original sin and man's spirit of rebellion strikes against almost all authority and every institution in contemporary culture. (St. Augustine)

Seneca expressed the view that in his primitive state, men lived together in peace and happiness, having all things in common; there was no private property, there was no coercive government. Order was of the best kind for men followed nature without fail and the best and the wisest men were their rulers; who guided and were gladly obeyed as they commanded wisely and justly. As time passed, the primitive innocence disappeared, men became avaricious and dissatisfied with the common enjoyment of the good things of the world and desired to hold them in their private possession. Avarise rent the first happy society asunder and the kingship of the wise gave place to tyranny so that men had to create laws which should control their rulers.

In essence, men agreed to give up voluntarily their unfettered individual rights and submit to the authority of a sovereign, a "Leviathan". There is no agreement as to whether this social contract arose from fear and force *(Hobbes) or in an atmosphere of enlightenment and reason (Locke and Rousseau). What perhaps is less controversial was the felt need to* prevent or put an end to reign of warfare, terror and fear and to maintain or usher in security, convenience and an ordered community.

SELF ASSESSMENT EXERCISE 1

Imagine a State without law; or a day in the life of a nation when the Police observe a work-free day. Give a picturesque description of what one is likely to observe or experience.
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Some of the functions of the law in the society can be subsumed as follows:

3.2 Protection Of Interests

Von Ihering has said that, "the purpose of law is the protection of interests". But what is "interest and whose interest? The good of the individual is not itself an end, but only a means of securing the good of the society. In essence, the society is a higher conception than the individual so that the individual can desire the common interest in addition to his own. Andrei Vyshinsky's view is that law and the state are one so that any criminal act is a danger to the regime and the state. He thought that emphasis on individual was a mere cloak to shroud the exploitation of workers by the bourgeoisie. In the western philosophy, function of law is to hold a balance between interests of the individual and those of the state.

3.3 Preservation of Life, National Security And Public Safety And Social Welfare.

Law protects the rights, duties of people, be it political, social, economic or cultural.

3.3.1 Preservation of Life

According to Sohn, law is the sum of rules, which regulates the life of the people, or creates social order and organization that are necessary for preservation of life and ordered control of the life of the community. He explained that the private law governs the rights and duties of individuals while public law regulates the relationship between the individual and the state.

Von Ihering sees the function of preserving life from the angle of striking a balance between egoistic and altruistic motives. He said that the purpose is the universal principle of the world. The purpose of

human violation is the satisfaction derivable from acts. The purpose of law is the protection of interests. It is the function of law to regulate the combination of egoistic and altruistic motives; to reconcile the interest of the individual and the collective interests of society. Law therefore should be moulded to serve practical purposes.

3.2.3 National Security and Public Safety

Emergency powers to incarcerate persons who commit or are suspected of having committed an offence, and to stop and search without warrant any receptable suspected to contain explosives, firearms and ammunition, exist for purposes of national security and public safety. Moreover, both the military and the police have powers to order the detention of "trouble maker" whose freedom is reasonably considered prejudicial to the society.

SELF ASSESSMENT EXERCISE 2

The purpose of law is the protection of interests (Ihering). Discuss.

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Thus, Law confines potentially dangerous mental defectives, murder-accused who are guilty but insane or not guilty by reason of insanity, in order to protect the public at large.

In International perspectives, Law prescribes the sovereignty of each State, safeguards each against external attacks, and allows measures necessary for protection of its citizens.

3.3.3 Social Welfare of State

(i) The Constitution and various statutes enhance freedom. It is by Law Slave Trade and Slavery extraction of executive bride price or discrimination against Osu caste were abolished. Law frowns at arbitrary arrest and detention, and guarantees right of freedom of movement, speech and association. Writ of habeas corpus or Fundamental Rights Enforcement Proceedings are provided by law where ones freedom is curtailed wrongfully.
(ii) Tax laws provide money for social amenities.
(iii) Traffic laws provide for orderliness on the highways
(iv) Law of contract encourages business transactions and allows them to strive.

(v) Law of tort protects proprietary rights and freedom of property, and commands compensation, damages or other remedies in case of trespass.
(vi) Arbitration laws and rules of courts provide ways of setting disputes when they arise.
(vii) Law Performs normative and social functions by pointing to direction of wrong committed by members of the public and helping or supporting state functionaries, operators and machinery of society.

3.4 Maintenance of Justice and Fairness in Society

Some writers equate law with justice, contending that Law ought to be just. Jus Naturale, jus gentium and Equity and its body of rules were developed out of the desire and search for justice, fairness and good conscience, for all peoples. Kelsen denies there is a natural law or immutable principles of justice to which the judge or legislator can appeal. Nevertheless, "justice is an absolute requirement" and the judges in applying the law must be fair, impartial and devoid of personal prepossession or idiosyncrasy. Furthermore, legal history has shown that:

(i) Some basic standards are common to every society. Every society criminates murder, theft, rape,
(ii) Province of law and morals is uncertain in certain 'marginal' forms of belief e.g. incest, abortion, infanticide.

Both law and ethics are relative. This explains why incest which was not criminal before 1907, suddenly became one in 1908. Suicide in England (not in Nigeria) was criminal in 1960, but it ceased to be so in 1961. Homosexual conduit is now an ex-crime in so far as it is between consenting adults. Wandering used to be a crime in Nigeria until comparatively recent times. Only three out of Ten Commandments are crimes yet all the commandments both crimes and non-crimes are very important to Christian civilization. The Constitution provides that no one may be condemned unheard and for equal opportunity and reasonable time for defence and very importantly for fair trial. The provision is available for all – both high and low, rich and poor, the saint and the offender and even the tiresome zealot in the minority group.

One must recognize that there appears to be some dichotomy between "Justice according to Law" and "Justice in the Law" (in theory or practice). The common desire is that the law ought to be just.

SELF ASSESSMENT EXERCISE 3

Select a leading case which you consider to be unjust.

(a) state why you think it is unjust.
(b) give reasons for thinking that the Court should have decided otherwise.

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3.5 Law Is an Instrument of Change in Society

(a) Law as a Transforming Agency

Notion of law changes from society to society, from one generation to another even within the same society. The reason is that it tries to maintain the established social order and at the same time, effect social change to meet modern requirements of a new society, taking cognizance of and responding to new learning, new facts, different set of prejudices, disparity in sets of questions people ask daily, in sets of values, economics, education, social achievement and ideological orientation and very importantly quest for ideals of justice and for a transformed and better society. Roscoe Pound says that the chief end of law is social control and a legal system attains the ends of the legal order by "social engineering" which meant, satisfying, reconciling, harmonizing and adjusting overlapping and often conflicting and competing interests in the society, namely individual interests, public interests and social Interests. In this way, law seeks to conserve societal moral welfare and safety as well as regulate the process and smooth ordering of society.

(b) Advancement of Economic Growth, advances economic growth by:

- confering legal tender on local currents
- securing indigenous participation in or ownership of raw materials.
- encouraging the drive towards egalitarianism
- fostering the interest of local entrepreneur e.g. Nigerian Enterprises Promotion Act etc.

(c) Promoting Of Socio-Cultural Development:

Law contributes to the following:

(i) Advancement of workers social security and better working conditions. Examples National Provident Fund, Cooperative *Societies, Community Banks, Factories Act, Workers Compensation Acts.*
(ii) Advancement of Education
Universal Primary Education (UPE), Universal Basic Education (UBE), National Open University of Nigeria (NOUN) etc. See also various universities legislations
(iii) Liberalization of divorce. See Matrimonial Causes Act
(iv) Improved general living conditions e.g. Motor Traffic Legislations, Price Control Law, Rent Control Laws, NEPA and its semi-autonomous status.

(d) Law Promotes Legal Order

Law originated from customs in the form of rules for settlement of disputes, e.g.-Rights to claim from Insurance Companies

- Rights of workmen and next of kin.

3.4.1 Moulding Future Conduct

- Law teaches how to organize affairs and avoid litigation
- Guides human behaviour determinately or indeterminately
- Guides people’s decision to act or omit to act.

Arouses Expectation e.g. Rule of law for Africa (Delhi Declaration *(1959)), Lagos Law (1961), The Constitution (1999)*

Fear of sanction of supernatural nature or of the penal sanctions control peoples actions and behaviour. Both in pre-literate societies and modern, the law has continued to speak and warn against its own violation
.

3.4.2 Intervention between State and the Citizens

It is both in the interest of the government and all persons in Nigeria that the law is even handed between them. See the Constitution, Sec. 6 Aggrieved persons have access to the writ of habeas corpus and Fundamental Human Rights Proceedings. Law also encourages Arbitration and Peaceful Resolution of disputes. It discourages self-help.

The Rule of law assures that everything is done according to law; that government is conducted within the framework of recognized rules and principles which restrict discretionary powers and that disputes as to the legality of acts of government are decided by judges who are wholly independent of both legislatures and executives. See Garba v. Federal *Civil Service Commission where the Supreme Court held that:*

> "The military in coming to power is usually faced with the question as to whether to establish a rule of law or rule of force. While the latter could be justifiably a rule of terror, once the part of law is chosen, the mighty arm of government, the militia, which is an embodiment of legislature and executive, must in humility bow to the rule of law thus permitted to exist."

The rule of law knows no fear. It is never cowed down. It can only be silenced. But once it is not silenced by the only arm that can silence it, it must be accepted in full confidence to be able to justify its existence.

3.4.3 Law Enforces Its Supremacy

Law is superior to the State, the Executive and the judiciary and to all other norm. It deters one from doing what it proscribes, confers rights, imposes responsibility on government and citizens. It commands its own obedience.

4.0 CONCLUSION

You have had an exciting unit on the function of law in the society as expoused in various schools of thought. You also learnt of the conflicting views of human kind, different categories of interests and different facets of security or insecurity and of a felt-need for 'order' and for 'justice'. You should critically be thinking of law as an instrument of change in your community and in Nigeria.

5.0 SUMMARY

The functions of law in the society is infinite. Law ensures survival of the society, sustains accepted standards of public morality of the day, provides the substratum for social-economic emancipation, a desire to live, and necessity for living in society. Pollock states: Order, not compulsion is the fundamental character of law. Whatever the stage of civilization, every community has its means for declaring, administering, and enforcing the law, and publicly appointed or recognised bodies (e.g. Courts of Justice), which administer such rules.

It is a sad commentary therefore that the society still experiences immorality, disorder, and different kinds of crimes. The reason perhaps is that the ruling minority creates laws in accordance with the ideology of its class, which is not in harmony with the socio-economic reality and the desires of majority. Coercion has proved ineffectual in sustaining such laws that do not conform with the common fundamental desires of the people. Moreover, a government determined to abandon democratic courses often finds ways of violating the laws. So are human beings, in response to varying motives and circumstances. Nonetheless, laws have continued to be of great value in preventing a steady deterioration in standards of freedom and encroachment on individual rights.

6.0 TUTORED-MARKED ASSIGNMENT

1. What are the different views that are held relating to the functions of law in the society?
2. Consider the relationship between law and justice in the Nigerian Legal System.

7.0 REFERENCES/FURTHERREADINGS

Salmond, J.: Jurisprudence

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UNIT 3 CLASSIFICATION OF LAW

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
 3.1 Classes of Law
  3.1.1 Imperative Law
  3.1.2 Physical Law
  3.1.3 Natural Law
  3.1.4 Conventional Law
  3.1.5 Customary Law
  3.1.6 Technical Law
 3.2 International Law
  3.2.1 Substantive Law
  3.2.2 Procedural Law
  3.2.3 Civil Law
4.0 Conclusion
5.0 Summary
6.0 Tutor Marked Assignment
7.0 References/Further readings

1.0 INTRODUCTION

It is not possible to enumerate accurately the number of the different kinds of law. Laws are various. You will recall in our attempt to define law what Blackstone thought law was. He said that law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. The scope and extent of this definition or description of law suffices to inform you that law can be used in a wide range of senses. We can only attempt to identify a number of them.

2.0 OBJECTIVES

The objective of this course is that participants should be able to trace the source of law; and its authority and so be able to distinguish legal rules from metaphysical or external rules or legal from non-legal source and what is law from non-law.

3.0 MAIN CONTENT

3.1 Classes of Law

There are no criteria for classifying law, laid down in Statute or specified by Court. Different writers have classified aw at their discretion and by different methods.

For example, law may be classified according to the mode of development as follows:
Common law
Equity
Legislation (including delegated legislation)
Custom
The Law Merchant
Canon Law
Legal treaties

Another method of classification of law is into:
Law in action (i.e. legislation, law reform and judicial precedent)
Criminal law
Law of Contract
Law of Tort
Law of Property
Negotiable Instrument

Other writers have taken a global view of law and have classified law as follows:

3.1.1 Imperative Law

Commands of a sovereign or rules of action imposed on people by some authority that enforces obedience. John Austin expressed this in terms of a Command set, either directly or circuitously by a sovereign individual or body to a member or members of some independent political society in which his authority is supreme. Examples are the law of the land – Civil Law.

3.1.2 Physical Law

This covers a wide range of laws including Laws of Gravitation; of Motion, of Nature, of Nations. It also includes law of mechanics. These laws are expressions of uniformities founded upon observations of regularity and harmony in the universe.

3.1.3 Natural Law

Also called Lex Eterna and it includes:

(i) Physical law of nature e.g. law of gravitation
(ii) Principle of what is right or wrong; Ideal form of law, Higher law. A system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice. At different times natural law took the forms of divine law, law of reason, unwritten law, universal law, eternal law and moral law.

3.1.4 Conventional Law

Law of agreement; Rules of games and sports, clubs or society.

3.1.5 Customary Law

Code of conduct, mores; - law which men set for themselves voluntarily and obey under pain of censure or coercion. They are rules, which in a particular community, has from long usage obtained the force of law. It includes Islamic Law and those local customs, which are not repugnant to natural justice, equity and good conscience or incompatible with any law for the time being in force or contrary to public policy. It is law per *excellence being a reflection or mirror of the common consciousness of* the people.

3.1.6 Technical Law

The rules guiding persons who are engaged in a particular trade or profession if they are to practice that calling effectively well. Examples are Rules and regulations, which guide Legal Practitioners, Engineers, Architects etc in the fulfillment of their trade practices or professions.

SELF ASSESSMENT EXERCISE 1

The features of Imperative laws include

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The characteristic features of Customary Law

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3.2 International Law

This refers to the Law of nations; Common law of Nations; the principal subjects of which are nation-states, Particular Law of Nations between two or more countries. This type of law may be enforced by:

(i) economic sanction
(ii) severance or break-up of relations or ties
(iii) Arbitration by the International Court of Justice at The Hague or othertribunal e.g. War Tribunal established by United Nations Organisaton (UNO)
(iv) Use of Force or military action.
International Law itself is divided into

(a) conflict of laws (or private international law as it is sometimes called) and
(b) public international law (usually just termed International Law).

3.2.1 Substantive Law

This is part of the law that creates, defines and regulates legal relationships, powers, rights, and obligations and liabilities of parties e.g. Criminal law and Penal Code, Laws of Contract, of Agency, of Commercial Transactions or business Associations etc. Substantive law prescribes those rules of civil conduct, which declare the rights and duties of all who are subject to the law.

3.2.2 Procedural Law

Laws of Procedure are rules that prescribe the steps that require to be taken for purpose of having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves. Also called Adjectival law as it prescribes enforcement process and practice in Courts. Examples of procedural or adjectival laws are Criminal Procedure Act, Criminal Procedure Code, Evidence Act, etc.

The distinction between Substantive law and Procedural Law must be clearly drawn. Glanville Williams states:
"so far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of Procedure defines the modes and conditions of the application of the one to the other".

In essence, procedural law relates to remedial agencies and procedure by which rights are maintained, their invasion redressed and the methods by which such results are accomplished in Courts.

3.2.3 Civil Law

Civil law deals with rules for dealing with rights and duties between individuals. It is concerned with disputes between citizens, the purpose being to enable people to enforce their rights, to redress a grievance or to recover property for their own benefit. Municipal law or law of State is an example of Civil Law. The terms may also be used so as to distinguish the laws under reference from the Criminal Law e.g. Laws of Tort; of Contract; Law of Courts, Military law, Canon law, etc.
See the Federal Republic of Nigeria Constitution, 1999, See 33 & 45.

SELF ASSESSMENT EXERCISE 2

Examples of Substantive Laws are

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iii. …………………………………………………………………….
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Examples of Laws of Procedure are

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v. ……………………………………………………………………….
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The difference between substantive law and Procedure law is

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4.0 CONCLUSION

You have reopened the discussion on law in this unit. The focus was classification of law. You noticed how difficult it has been to departmentalize law. You probably faced challenges when one addresses some particular laws and attempt some form of classification in order to increase your understanding of "law".

5.0 SUMMARY

We have dealt with ten different types or classes of law. These classes are neither exhaustive nor necessarily co-terminous. A substantive law or procedural law may be imperative law and vice versa. Mercantile law or lex mercantile is based on mercantile customs and usages but it developed independently of the Common law. Imperial law is a formal law, co-existing with informal law in most communities in Nigeria. Despite these evidences of interrelationship, it is still possible to differentiate one class from another class of law; giving examples or illustrations of each of them. In the next unit, we shall conclude the lesion on the classes of law.

6.0 TUTOR MARKED ASSIGNMENT

What differences are there, if any, between

1. Customary Law in Nigeria and
2. Customary Law of England

7.0 REFERENCES/FURTHER READINGS

Ogwuerike: Concept of Law in English-Speaking Africa

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UNIT 4 CLASSIFICATION OF LAW (CONT'D)

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Classes of Law
    3.1 Public International Law
        3.1.2 Private International Law
        3.1.3 Positive Law
        3.1.4 Municipal Law
        3.1.5 Public Law
        3.1.6 Private Law
    3.2 Received Law
        3.2.1 Case Law
        3.2.2 Moral Law
        3.2.3 Islamic Law
        3.2.4 Unwritten Law
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Questions
7.0 References/Further readings

1.0 INTRODUCTION

In the last lecture, we enumerated 10 classes of law. Try to recall them. If you are unable, turn to the lecture again and refresh your memory.

In this lecture, we shall conclude our discussion of the different classes of law. At every stage, you are advised to compare and contrast with other classes you have already learnt more particularly your local laws.

2.0 OBJECTIVES

The objective of this lecture is to widen the students' scope of the idea of law to encompass not only its definitions, and connotations, but also its classes or types. It is hoped that the students should be able to compare and contrast each class with the law in pre-modern and in modern Nigeria.

3.0 MAIN CONTENT

3.1 Classes of Law

3.1.1 Public International Law

This includes Conventions, Treaties, laws which regulate the relationships among sovereign states. It regulates among states, matters of trade and economic activities, Postal and Telecommunication, Civil Aviation, Law of the Sea, (including Maritime Law); War, Diplomatic relations among others.

3.1.2 Private International Law

Also referred to as "Conflict of Laws" A system of law, which regulates matters, which possess some international flavour or foreign element between private persons. Examples are the Rules, which the Court applies in dealing with matrimonial cause involving citizens of different countries or international trade between persons of different countries. Private International law defines the appropriate law applicable to person of different nationalities, or in a cause having some foreign element, or by which issues of jurisdiction, rights and duties are determined. It prescribes the conditions for determining the competency of court, recognition of foreign judgement and its enforcement.

3.1.3 Positive Law

The term literally means: law established by human authority. 'All law is positive that is not natural'. Positive law is a system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some non-political community. Typically, it consists of enacted law.

3.1.4 Municipal Law

Whole law or whole body of law of a state; distinct from a rule of International Law. Blacks Dictionary calls it the Ordinances and other laws applicable within a city, town or other local government entity. It is the internal law of a nation as opposed to international law.

3.1.5 Public Law

Laws regulating the relationship between individual and governments; individual and the State; one state and another or state and federation. It includes:

1) Constitutional Law

This is concerned with the structure of the Legislative, the Executive and the Judicial Organs within the state and their relationships with one another.

2) Administrative Law

This is concerned with the body of general principles governing the exercise of powers and duties of public authorities (ministerial and local government agencies) within the state and their relationship with individuals.

3) Criminal Law

Criminal law which is the principal law of crimes and criminality.

4) Public International Law, Supra.

This deals with the law of nations and international orgainsations.

3.1.6 Private Law

Private law regulates the relationships between individuals rather than between the state and individuals. Among its numerous branches are:
Commercial papers;
Law of Property
Laws of Agency,
Law of Trusts
Law of Contract,
Law of Tort
Family law
The most important branch is the law of contract.

Law regulating breach of duty fixed by law towards one another, which breach gives rise to civil action.

SELF ASSESSMENT EXERCISE 1

Compare and Contrast

Public Law	Private Law
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ii.……………………………..……	…………………………………….

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iii..………………………………	…………………………………….
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iv. ………………………………	……………………………………
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3.2 Received Law

In relation to Nigeria, Received Law implies Common Law of England, doctrines of equity, statutes of general application in force in England as at 24 July 1874 (later varied to 1st January, 1900) or other enactments of Westminister Abbey which were received into Nigeria by local statutes. Refer to Ordinance No. 3 of 1863, Supreme Court Ordinance of 1914 and the High Court laws of each State.

3.2.1 Case La w

This is the body of law which has been built up through authoritative and binding precedents, which is usually contained in Law reports. It is also called Judge-made Law because it is a rule or principle laid down by a judge in the process of judicial administration that is binding. Judges however deny that they make laws. They only declare what the law has always been. Case law depends on the doctrine of binding precedent otherwise known as stare decisis. The principle or rule laid down which formed the basis of judgement is the ratio decidendi as opposed to obiter dictum.

3.2.2 Moral law

Expression of the principles of morality – ideal conception of natural justice. Moral law is a collection of principles defining right and wrong conduct; a kind of a standard to which any action must conform if it is to be right or virtuous. We shall dwell more on this in the next lecture.

3.2.3 Islamic Law

Islamic law is an epitome of Islamic thought, a system of law in which legal rules, ethics, religion, rituals and politics are closely interwoven. It is sacred law, an all-embracing body of religious duties.
It is the totality of Allah's commands that regulate the life of every Muslim in all its aspects. Its analogical deductions cover myriads of situation that arise in the normal course of human life.

A. Justice

According to Allah's command, Islamic law maintains that whoever violates the law must face grievous punishment. Islamic law provides for stiff sanction for evil doers.

Justice is giving to each his due, the doing of good and charity to kith and kin and forbids all shameful aids, injustice and rebellion.

Allah commands justice and it is administered in the name of Allah – Al Adii (the Just and Giver of Justice "to Judge justly")

B. Sources

The sources of Islamic law:

i. The Holy Quran
ii. The Sunnah

(a) Secondary Sources: namely:

(i) Al-Ijma
(ii) Al Ijtihad
(iii) Istihsan Istislah
(iv) Istishap
(v) Sadd-al Dharat

The Holy Qu'ran is the first primary source. The Sunnah is usually regarded as the second source – the practice of Prophet Muhammed. Al Ijma is the consensus idea of Ulama and Qiyas functioning as an integrated structure whose adherents agree on the norms, rules, and values which are to be uniformly respected and observed. Ultimately, Allah the Sovereign, is the law Giver.

C. Islamic Law and Other Religions

Idea of Islamic law corresponds with those of other religions. However, there are also differences among them. Even Islamic law has not itself been uniform at any point of its development nor within any territory. There are different sects of Islam – Ibadis sect, Shiites sect, etc. This has also brought about new Arabs Muslims society, new administration of justice, Islamic jurisprudence and new Islamic law. These varieties may be explained in terms of politics, administrative background, individual concepts of the life of the Prophet, and the rule of U_manyyads (the first dynasty in Islam) as well as individual. World view of the turbulent period of the Caliphs of Medina.

D. Idea Of Law

Sharia is the path to be followed, the path revealed by Allah, the Creator. His messenger Prophet Muhammed which adherents should follow. Thus Sharia originates from the Command of Allah. It is the ideal code of conduct, and pure way of life which regulates the relationship of man and Allah and of man to man.

(a) Imperative Command Theory

Law as understood in western philosophy is a command set either directly or circuitously by a Sovereign individual or body to members of some independent political society in which his authority is Supreme. In the Context of Islamic law, the political superior is the Almighty Allah, the law giver, who himself enforces his law in such manner as He prescribes.

The imperative Theory of law is concerned with law as it is; not law as it ought to be. Conversely, Islamic law or Sharia is concerned not only with law as it is but with law as it ought to be. Islamic law would not recognize anything that is not founded on Qu'ran or examples of the Prophet. It would not also recognize a legislation which tends to restrict the field in which the sacred law is applied in practice or interfere with the traditional form of Islam.

(b) Pure Theory of Law

Hans Kelsen considered not as a rule but a norm deriving its authority from another norm and ultimately from a parent norm known as grund norm. The basic legal norm of positive law may be the first Constitution. In Islamic law, the basic norm from every other norm derives ultimate authority and validity is God, Almighty or divine revelation.

Ab dur Rabman has said that the fundamental principle on which rests Islamic legal system is that the laws of Islam are firmly based upon the Sharia and is in the interest of the people as a whole. The fountain head is the Quran and Sunnah, the Wahy al Jah (the revelation per se), Wahy al Khafi (the hidden revelation) etc. Quran and Sunnah are gifts to Ummah that is collectively responsible for administration of Justice.

3.2.4 Unwritten Law

Like the common customs of the realm or of old English people, Nigerian customary rules other than Sharia law are lex non scripta. They are unwritten and this quality distinguishes it from Statute law which is written.

SELF ASSESSMENT EXERCISE 2

Common Law means
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Equity means
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Statute of General Application means
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Moral Law means
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4.0 CONCLUSION

In unit 3, you learnt 10 classes of law. In this concluding unit on classification of law, you dealt with additional classes of law in order to enrich you further. You learnt enough to be able to compare and contrast the classes – one with another.

5.0 SUMMARY

We have seen the different categories of law. What we have attempted to discuss so far are not exhaustive but are samples only. These categories are not mutually exclusive as one class of law may belong to more than one category of law. But our concern in this Course has been the whole law of the land – the entire body of laws we cal the Nigerian Law. Any further reference to the term "Law" would therefore mean the whole body of Nigerian laws.

6.0 TUTOR MARKED ASSIGNMENT

1. Describe the various ways the term "Civil Law" may be used.
2. Attempt to define law and make a critical examination of the definition of your choice.

7.0 REFERENCE/FURTHER READINGS

Devlin P., The Enforcement of Morals, 1968

Elias: Groundwork of Nigerian Law 1954

Obilade: The Nigerian Legal System

UNIT 5 LAW AND MORALS

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Definition of Terms
3.1.1 Law and Morals
3.1.2 Relativity of Morality,
4.0 Conclusion
5.0 Summary
6.0 Tutor Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

Blackstone tells us that law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. The definition appears broad enough to accommodate most species of law. But we need to recognise two ideas running through the definition of law.

i. the imperative idea that law is a rule laid down by legislative organ of a politically organized society, deriving its force from the authority of the sovereign.
ii. the ethical idea that law is a rule of right and justice, deriving its authority from its intrinsic reasonableness or conformity to ideals of right and merely recognized, not made, by the sovereign.

It quite often happens that ethical notion of law disapproves of something which imperative notion permits as a concession of human frailty (can you think of examples?). The medium between ethical and metaphysical speculation, and empiricism or that very point at which both ideas converge or diverge is of utmost importance for the following reasons:

(i) It is important to Jurists in advancing the purpose and end of the law, to wit: “maintenance of justice within the political community by means of the physical force of the state”.
(ii) It is relevant to Reformers who, based on their conception of justice and the relationship between law and justice, aim at pointing out the defects in the existing system of law as a prelude to their improvements.

(iii) It is also of particular relevance to judges who, although do not consciously attempt to make the law to conform to any ideal ethical standard, still of necessity appeal to the practical morality prevalent in the society.
(iv) Ii is important to the public at large, being indicative of literal level in relation to a particular behaviour or conduct.

In this lecture therefore, we shall focus on Law and Ethics, (or Moral Law), their relationship as well as both the fundamentalists and the Relativists point of view.

2.0 OBJECTIVES

At the end of the Course the student should be acquainted with the historical development of the dichotomy between ethical and metaphysical speculations and empiricism. The controversy has become a recurrent factor in the face of continuous changes in societal values, custom, powers, rules, laws, politics and economics. The student is expected to follow the trends and be able to make up his or her mind whether law should correspond with morals, whether law should enforce morals etc.

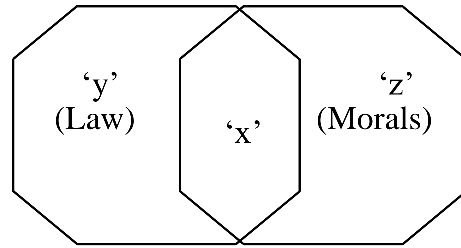
3.0 MAIN CONTENT

3.1 Definition of Terms

(i) Ethics: This is the science of morals or moral principles or of morality, moral norms or standard of conduct.
(ii) Morality: Conforming with recognized rules of correct conduct.
(iii) Moral: Derived from Latin word: mos: custom or habit that a particular people have come to adopt or recognize to be convenient for the needs of a given society.
(iv) Morals: Person’s or community’s conduct or habit in relation to the distinction between right and wrong.
(v) Mores: Rules of conduct, violation of which leads to deep sense of offence and outrage and is regarded as a threat to society and likely to attract censure and coercion.
(vi) Folkways: customs that are habitually observed, the violation of which is not seen as a threat to the society.

3.1.1 Law and Morals

The Relationship between Law and Morals is illustrated below



These are two intersecting circles – one circle represents ‘Law’ and the other ‘Morals’. Both circles are not congruent. This implies that the province of law does not correspond with that of morals. The circles do overlap. This implies that Law and morals overlap – breaking both provinces into:

x – Area of congruity.
y – Area that is law devoid of morals and vice versa.
z – Areas of morality unknown to law
Let us look at the sub-sector in greater detail.

X – Area Congruity

This is the area common to both spheres, where Law and Morals coincide or are congruent. Examples are conduct that are both criminal and immoral e.g. murder, rape, robbery, stealing. In each of these conduct, there is identity between law and morals.

Y – Area Of Law Simpliciter

The area in the ‘law’ circle which does not overlap with the ‘morals’ circle depicts behaviour generally regarded as criminal but not immoral. Examples are parking offences or driving at excessive speed limit in order to save life.

Z – Area of Morality Simpliciter

The area in the ‘Morals’ circle which does not overlap the ‘Law’ circle represents conduct that are immoral, but not criminal. Examples are lying, gluttony.

Another division of behaviour or conduct is into:

(i) offences mala in se.
These are conducts that offend both religious and moral susceptibilities and Law e.g. Armed robbery
(ii) offences mala prohibita.

These are conducts that are not offensive to morality e.g. Parking offences.There are also distinctions between strict liability offences and mens rea offences. Strict liability crimes remain proscriptions whether or not the behaviour is offensive to morality. There is presumption against strict liability crimes so that such offences are created by the clearest intentions.

Sanction

Breach to law and breach of moral norms attract distinctive sanction or punishment. Thou shall not kill is a religious norm. Whoever kills commits sin and may suffer the sanction of hell. Fornication is immoral and whoever commits it runs the risk of being physically ostracized. Stealing is a legal wrong for which the thief may be liable to a physical sanction of imprisonment or other penalty prescribed by law and within the limit so stipulated also by law. The Courts in Nigeria are Courts of law.

3.1.2 Relativity of Morality

This has to be illustrated through decided cases. In Mohammed v. Knott *(1969), M aged 26, Nigerian Muslim, married a girl, Nigerian, aged 13* according to Muslim rites. The couple went to England where they cohabited. Following a complaint lodged by their neighbours, the police took the girl into custody, and brought her before the Juvenile Court alleging that she, being 13 was exposed to moral danger and therefore was in need of good care and guidance. The Court found for the police. It held that exposure to moral danger had been proved and that child marriage was repugnant to any decent minded English man.

But the personal law of both parties in Mohammed v. Knott, recognizes the type of marriage in question; and reasonable person wearing the Nigerian pair of spectacle would not be heard to contend that a spouse is exposed to moral danger in situations where she was only performing her wifely duties.

Under our law, stealing is said to occur where a persons, without the consent of the owner, fraudulently and without a claim of right made in good faith, TAKES and CARRIES away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

SELF ASSESSMENT EXERCISE

Think of the following three situations, where:

i. a 30 year old man steals from old and feeble woman.
ii. a middle aged man steals from a complete stranger almost of the same age.
iii. one spouse of Christian marriage steals from the other spouse while their marriage subsists.
iv. one spouse of a traditional marriage steals from the other while their marriage subsists.

How do you describe the morality of each theft or stealing

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ii. …………………………………………………………………
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iii. ………………………………………………………………….
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iv. ………………………………………………………………….
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Certain inferences may now be drawn from what we have said so far concerning law and morals:

(i) Both law and morals impose certain standards of conduct. Absolute freedom includes freedom to steal, kill, rape etc. and if society is to survive some minimal standard of behaviour must be imposed. The Nigerian legal system tries to set up a high but not too high attainable standard like most other jurisdictions all over the world.
(ii) Law and Morals support, reinforce and complement each other. Fears of detection, prosecution and punishment by law deter people from crimes and criminality. People also abstain from crime not merely out of fear of law but purely on moral grounds. Sometimes, both fear of law and morality play on each on other to induce conformity.
(iii) Both law and morals presuppose the existence of each other. The legal system identifies and defines the concepts of ownership, and possession in stealing. The Moral Code helps man to distinguish wrong from right conduct.
(iv) Law and morals are closely related, being mutually concerned with such elements as:

a. rights, duties, obligations, proscriptions

b. rules or norms or body of rules or norms for human conduct.

It has been argued that there is no distinction between law and morals. Post War Nazi Germany, Apartheid of South Africa and Colour Bar in the United States of America would tend to support this view. There is some force also in the contention that law and morals are separable. Both at times merge and at other times diverge. It has been argued that immoral law is no law (see Blackstone and Austin's definition of law). But it would appear that morality is a validity criterion. It is important therefore that a clear distinction has to be made in order to avoid confusion.

Positivists, like jurists, have maintained that law is not moral. Law is national or rather universal. Morals or morality is relative, sectional, binds only those who adhere to it and varies by reason of

(i) religion (e.g. as between Muslims and Christians or even among different groups of Moslems and Christians).
(ii) Psychology (e.g. twins have different psychological make up)
(iii) Status e.g. the poor and the rich, ethnicity, persons who live in the Government Residential Areas (urban) and those in Tudun Wada. Sabo gari (Rural) areas.

Environment dictates morality.

4.0 CONCLUSION

You have begun to see law and other related concepts, beginning with morals. The relationship between law and morals is ever topical and one is glad that you have followed the trend, noting their areas of convergence and divergence and in particular the relativity of morality. You have enough stuff to assist you in taking your position in the continuum.

5.0 SUMMARY

Man is a moral being endowed with concepts of what is right or wrong. Both concepts of right and wrong are not consensual but are harmonious and may be influenced by a number of factors – psychological, social, environmental, religious, ethnicity, urbanization. There is absence of homogeneity in morals. It is apt to conclude in the words of Westermarch, ethical relativist:

Philosophers and theorists of the law would do better service to humanity if they tried to persuade people not only that their moral ideas

require improvement, but that their laws, so far as possible, ought to come up to the improved standards, than they do by wasting their ingenuity in sophisms about the sovereignty of law and its independence of the realm of justice".

But there appears to be a bedrock of common morality in the society – a common denominator. The positive law comes into being through moral law which requires men to behave in certain ways for the sake of achieving a more stable and tolerable human existence. Before law came, there was already in existence a moral order and the purpose of the legal system was to implement and enforce that moral order.

This is an introduction into the age long controversy between law and religion, law and morals or predominance of one over the other. In the next lesson, we shall undertake an in-depth analysis of theoretical or philosophical basis of each side of the divide.

6.0 TUTOR MARKED ASSIGNMENT

There is no distinction between Law, Religion and Morals. Discuss

7.0 REFERENCES/FURTHER READINGS

Salmon, J: Jurisprudence Pound, R.:

Philosophy of Law

Hart, H. L. A.: The Concept of Law

MODULE 3

Unit 1 Laws and Morals cont'd
Unit 2 Sources of Law
Unit 3 Meaning of Statute
Unit 4 Statutes of General Application
Unit 5 Received Law

UNIT 1 LAW AND MORALS CONT'D

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
 3.1 Natural Law
 3.1.1 Analytical Positivism
 3.1.2 Functions of Law and Morals
4.0 Conclusion
5.0 Summary
6.0 Tutor Marked Assignment
7.0 Reference/Further Readings

1.0 INTRODUCTION

In every society there are different kinds of norms e.g. religious, moral and legal norms etc. In the last lecture we saw that law and morals are closely related. The Biblical injunction "Thou shall not kill" is a religious norm as it is also a moral or a legal norm.

Positivists and Jurists have persisted in separating law from moral or religious norms and philosophers have differentiated between law and religion, law and sin. Writers have contended that morals should serve as validity criterion of law. In this lecture, we shall be examining the various views.

2.0 OBJECTIVES

- At the end of the lecture, you should be able to:
- recognize law as a vehicle for promoting and maximizing human happiness
- on that premise, determine whether or not and to what extent the law should be used to enforce private morality.

3.0 MAIN CONTENT

3.1 Natural Law

Natural law connotes good conscience, equity, and natural justice. Natural law postulates absolute principles, or universal unchangeable rules which transcend time, space and dynamics of social change. In its evolution, it took the form of reason and divine law; and expressed itself in two basic forms:

(a) as a divine law, it invalidates positive law
(b) it sets a standard to which positive law should conform e.g. Natural human rights, due process or other minimum conditions one cannot do without if life is to be decent.

3.1.1 Analytical Positivism

Positivism is concerned with form of law, with law as it is (expository jurisprudence not its contents, nor with justice, morals, ethics or law as it ought to be (censoral jurisprudence) or other discipline – be it unjust, or immoral.

Their hallmarks of law are:

(i) Sovereign or sovereignty: He is Supreme and enjoys habitual obedience from the citizenry.
(ii) Command:
Sovereign Act from determinate human to inferior.
(iii) Threat of force (sanction)
Emphasizes the coercive nature of law if disobeyed.

The positivists have denied that anything short is law. Thus societal acceptability of law is not a validity criterion but merely goes to question of obedience or observance of law. Some positivists e.g. Hans Kelsen believed that law does not derive from any sovereign but derived authority upon hierarchy of norms and ultimately from the parent norm – grund norm (e.g. the Koran, or the Constitution).

Lloyd said that law is an abstraction distinguished between law properly so called from law improperly so called.

Law properly so called

This includes divine law and human law which in turn includes law strictly so called and positive morality.

Law improperly so called

This includes law by analogy and law of metaphysics. The former includes positive morality. Lloyd's self contradiction in finding positive morality partaking of law properly so called and law improperly so called, explains the complexity of the world. Pure law theorists have expressed the view that sociology, religions, history etc are impurities and have nothing to do with law.

In order to give law a universal nature applicable to all nationalities, different nations began to invent a variety of new forms of complementary law e.g. praeto prerigimus, jus naturale or Equity. Conversely, positive law which in the middle ages was synonymous with God's Law began to divorce in the age of rationalism. Modern writers acknowledge that law has become a variable – varying with social values of each particular society, and therefore an instrument of balancing competing interests and shifting towards social justice of what is equitable and just in the society.

3.1.2 Functions of Law and Morals

Read over earlier discussions concerning the functions of law in the society. You will recall that the purpose of law includes:

(i) the protection of interests. (Von Ihering)
(ii) "the maintenance of justice…" (Salmond)
(iii) promotion and maximization of human happiness (John Mills)
(iv) perpetuation of class interests (Marxist)

Lord Devlin has argued that ideally, there should be a complete correspondence between law and morals, and law should be used to enforce and uphold the community's moral standards. Lord Devlin was concerned with conduct that provokes wild feelings of reprobation, mixture of intolerance, indignation and disgust wherever it occurs and the criterion is whether or not the act in question affects the society.

Professor H. L. A. Hart identified two types of rules in the society – primary and secondary and also their internal and external aspects. He argued that in pre-legal (primitive) societies, there were only primary rules, prohibiting particular conduct and secondary rules of recognition developed as the societies became complex and therefore legal.

John Locke and Lady Barbara Wootton believe that Law and Morals are different, and their functions also separate. For example Wootton maintained that Law should be confined only to immoral conduct that threatens the security and existence of the society and the state and no

further. John Locke argued that religion or sin is a matter of an inner morality while law governs man's external conduct.

Fuller on the other hand argues that Law and morals cannot be separated because law is not just a model of rules but an instrument of human interaction. Law has certain inner morality, which serve as validity criteria: Morals make law what it is. Fuller suggested that law ought to conform with certain demands of morality; namely:

(i) Law must be general and consistent
(ii) Law must be promulgated or publicised
(iii) Law must be prospective
(iv) Law must be comprehensive
(v) Law must not be self-contradictory
(vi) Law must be capable of performance or observance
(vii) Law must be stable, not subject to frequent change
(viii) Law must be congruent with official action or actual administration.

The total failure of any of Fuller's directives did not lead to a bad system of law but in a non-law.

SELF ASSESSMENT EXERCISE 1

Lon fuller gave certain criteria which law must fulfill to be law. What were those criteria?
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Stephen, a criminal law Judge, in his opinion says

> "it does not belong into the magistrate to make use of his sword in punishing everything indifferently that he takes to be a sin against God. Covetousness, uncharitableness, idleness and many other things are sins by the consent of men, which no man ever said would be punished by the magistrate. The reason is because they are not prejudicial to other men's rights nor do they break the peace of the society".

In essence, the distinction between law and morals is not absolute. Law should respect private conduct, and intervene only when it jeopardises

public peace or injures a third party. Stephens laid down four validity criteria; namely:

(i) Law should not be meddlesome
(ii) Law should not proceed from an unfounded evidence
(iii) Law should not punish anything which public opinion, as expressed by common practice of the society, does not strenuously and unequivocally condemn.
(iv) Law should scrupulously respect privacy

Wolfenden Report of a UK Commission on whether or not homosexual practice should be legalized requires a brief mention. During the Victorian era, homosexual practice was a crime, but lesbianism was not. Wolfenden Commission reviewed that matter in 1959 and following its recommendation, homosexuality in private by consenting adults was legalized on the basis that law generally and criminal law in particular should absolutely protect the morality of the society.

Mill, an advocate of utilitarianism said that law is a vehicle for promoting and maximizing human happiness and should therefore respect private morality, however disgusting. In this opinion, things done in private should not be the business of the law.

The Marxists repudiate class character of morality, which they believe is dictated by the prevailing economic order. They deny that there is any morality of the society, arguing that the morality of the society is no other than the morality of the class in power.

SELF ASSESSMENT EXERCISE 2

Stephen stipulated certain validity criteria for legal rules. What are these rules?
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We are in position to contribute critically to the question: whether the legal system should or should not be used to enforce morality, and in doing so, we should, as Professor H. L. A. Hart has warned, not allow emotions to overrun reason.

Lord Devlin's proposition that the function of law is to uphold the morality of the society received judicial support in the important case of *Shaw v. DPP (1962), otherwise called the Ladies Directory. The* defendant in the case published a 28 pages book advertising female prostitutes, their names, telephone numbers, addresses, and sexual

services. He was arrested and charged with conspiracy to corrupt public morals punishable at Common Law. It was doubted if at the time such crime existed. The defendant was convicted. His appeal to the House of Lords failed. Viscount Simons said, obiter:

> "In the sphere of criminal law, I entertain no doubt that there remains in the Courts of law, a residual power to enforce a supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral *welfare of the State and that it is their duty to guard it* against attacks which may be more insidious because they are novel and unprepared for … The law must be related to the changing standards of life, not yielding to every shifting impulse of popular will but having regard to the fundamental assessment of human value and purposes of society … when Lord Mansfield, speaking long after the Star Chamber has been abolished, said (In R. v. Denanlle *1763) that the Court of kings Bench was custos morum* (i.e. guardian of morals) of the people and had the superintendency of offences contra bonus mores (contrary to public morals or morality) he was asserting, as I now assert that there is in that Court a residual power where no statute has yet intervened to supersede the common law to superintend those offences which are prejudicial to public welfare".

The House of Lords revisited Shaw v. DPP in Knuller Publishing, *Printing, and Promotions Ltd. v. DPP (1973) and DPP v. Withers (1975) but did not overrule it.*

SELF ASSESSMENT EXERCISE 3

Morals should be enforced by the law. Do you agree?
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Some doubts have been expressed if Shaw v. DPP would apply in Nigeria. Does the Supreme Court of Nigeria have any residual power to punish conduct that threatens not only the safety and order but also the moral welfare of the State?

The Constitution of the Federal Republic of Nigeria, 1999 provides:

"subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law: and in this sub-section, a written law refers to an Act of the National Assembly, or a Law of a State, any subsidiary legislation or instrument under the provision of a law". (Sec. 3:6(12))

It might seem too simplistic to conclude that Shaw v. DPP may not present any problem in the Nigerian Legal System merely because the Constitution has provided that no Nigerian shall be punished for any offence unless it is written.

Shaw v. DPP was concerned with a controversial social problem; the type which springs up from time to time in Nigeria. The renunciation by judges of Constitutional powers to create new criminal offences may not be absolute. – Firstly, as a rapidly developing nation, Nigeria faces new situations, which may stretch existing law. Secondly, Judges may expand or restrict certain criminal defences either to fit changing circumstance or to piece out worrisome gaps in the existing law.

For example, in R (1992), the House of Lords confirmed the decision of the lower Court, convicting a husband for raping his wife. Rape is an unlawful sexual intercourse of a female without her consent. Hitherto, a man could not be found guilty of rape on his wife unless a separation order containing a provision that the wife be no longer bound to cohabit with her husband has been made by the justices. (Clarke (1949) 33 Cr App. R. 216. The late removal of the immunity which husbands previously enjoyed is equivalent to creating new offences, to meet a new social challenge.

Quite lately too, the House of Lords has laid down some principles, which should guide English Courts when faced with situations of possible development or expansion of new defences. See C. v. DPP *(1996).*

Nonetheless the general rule in Nigeria is that the National or State Assembly enacts laws; and the Courts construe and interpret them; "declaring" what the law has always been.

4.0 CONCLUSION

In this unit, you dealt more exhaustively on specific aspects of law and morals. You saw law and morals in the perspective of natural law and

analytical positivism. You will note that law and moral have continued to recur because of their functions in the Society.

5.0 SUMMARY

i. You have studied the functions of law and morality.
ii. Viscount Simons has said that judges are custos morum and as such have a residual power to punish not only legal acts but also immoral acts.
iii. Contrary views also have been expressed.

6.0 TUTOR-MARKED ASSIGNMENT

1. What, in your opinion, are the differences and similarities between morals and law.
2. Positive law thinking is inimical to (a) morality (b) democracy . Discuss.

7.0 REFERENCES/FURTHER READINGS

King: Basic Concept of Harts Jurisprudence, 1963

UNIT 2 SOURCES OF LAW

CONTENTS

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        3.1.1 Classes of Sources of Law
        3.1.2 Formal Source
        3.1.3 Material Source
        3.1.4 Authoritative and Binding Source
        3.1.5 Other Source
        3.1.6 Theories of Sources of Law
        3.1.7 Consensus Theory
        3.1.8 Conflict Theory
        3.1.9 Other Theory
        3.1.10 Autochthonism
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

We are beginning to look into the Sources of Law. It is perhaps important to distinguish Sources of Laws from Sources of Law. When we look at law as series rather than as a system, we may refer to Source of Law, which may include sources within and outside the law properly so called. In this lecture, we are concerned with a legal system and our focus is on legal Sources of Law. We shall look into some theories, some of which appear to ally with Social Contract Theory or Marxism as the case may be: Autochthonism will receive some attention so as to evaluate how home grown or alien our Sources are and the essence, if any, of change.

2.0 OBJECTIVES

The objective of this lecture is that at the end, you should be able to understand the meaning of terms used, the classes, and the theories of sources as well as the autochthony of law.

3.0 MAIN CONTENT

3.1 The Meaning of the Term "Source(S)"

The term "Source(s)" (also termed fons juris) may mean the origin and authoritative statement from which the substance of the law is derived. It may also be described as: "something (such as a Constitution, Treaty, Statute, or Custom) that provides authority for legislation and for judicial decisions. A source of law is the point of origin for law or legal analysis.

You may have observed lawyers in Court, when they make statements and refer the Court to particular decided cases, the Law Reports where such cases can be found, to some Act or Statute and pointing to a particular chapter, part or section. We say that the Law Reports and the Statute or Act so cited are sources of his authoritative statements or law.

In literature of jurisprudence, the problem of "Source(s)" relates to the question: Where does the Judge obtain the rules by which to decide cases? In our present context: Where do we obtain the law we have been talking about – the law constituted in the Nigerian Legal System? In this sense of the sources of law, Fullers has listed the following: statutes, judicial precedents, custom, the opinion of experts, morality and equity. Fuller probably was concerned with "Sources of Laws" rather than Sources of Law – where the law generally draws not only its content but also its force.

In the context of legal research, the term "Sources" connotes

(i) the origin of legal concepts and ideas
(ii) governmental institutions that formulate legal rules
(iii) published manifestation of the law

3.1.1 Classes of Sources of Law

Sources of Law may be classified into formal or material, and the latter further subdivided into historical, legal, authoritative and binding, or other sources.

3.1.2 Formal Source

A formal source is what gives validity to the law.
Upon what authority is the National Open University established?
Upon an Act of the National Assembly,
Who gave the National Assembly authority to legislate?
The Constitution,
Where does the Constitution derive its power?
The general will and power of the people of Nigeria.

This is the Ultimate Source. Thus the formal source of law may be traced to the "common consciousness" of the people, or the "Divine Will".

3.1.3 Material Source

Here we are not concerned with basis of validity as we did in our discussion of "formal source" of law. We are concerned here with the origin of the substance of the law – Where the law derives from or the authoritative source from which the substance of the law has been drawn. This may be

(i) Historical

This may comprise the writings of lawyers, e.g. the rules and principles of foreign law. The writings do not form part of the local law until they are formally received or enacted into law. Prior thereto, they serve as persuasive authority.

(ii) Legal

These are sources that are recognized as such by law itself. Examples are statutes, Judicial Precedent and Customary Law

3.1.4 Authoritative and Binding Source

This refers to the origin of the legal rules and principles, which are being enacted or formulated and regarded as authoritative and binding. Examples are legislations (Received law and Local statutes), judicial precedents (Common law and Equity; and local precedents) and Customs (Customary law).

3.1.5 Other Sources

These are non-formal sources or origin of legal rules that lack authority, but are persuasive merely.

Professor Elias considered the "Source of Law" in terms of the main-spring of its authority and classified this into six categories; namely:

(i) Local Laws and custom
(ii) English Common law, the doctrines of English Equity and Statutes of general applications in force in England on 1st January, 1900.
(iii) Local legislation, and the interpretations based thereon
(iv) Law Reports

(v) Textbooks and Monographs on Nigerian Law
(vi) Judicial Precedents

There is no hard and fast rule on classification of Source. What is of essence is knowing or identifying the sources themselves and the theories that have been proffered.

3.1.6 Theories of Sources of Law

Legal writers have proffered sources of law, which may neatly be discussed under three headings:

3.1.7 Consensus Theory

This theory conceives of a legal system as a product of consensus idea of society, functioning as an integrated structure, whose members agree on the norms, rules, and values, which they have mutually and voluntarily agreed should be uniformly respected. In Nigeria, sovereignty and supremacy reside on people, not their ruler and these people are represented by the members of the House of Assembly, House of Representatives and the Senate, who make laws on their behalf. In the traditional chiefly and chiefless societies, the monarch and chiefs declare what the law has always been from time immemorial, and where they are in doubt, they consult, The Book, the Quaran, or the Oracle.

3.1.8 Conflict Theory

The conflict theory is to the effect that the society is made up of series of conflicting and competing groups, and law and legal system is a dictate of the wealthy and powerful in the society to perpetuate their positions, and class interests.

Whether the lawmakers are wealthy or go into lawmaking in order to acquire wealth or get wealthier is arguable. However, there is freedom of expression at the floor of the Houses and immunity from liability from what goes on there. Dictates of wealth or power, does not therefore appear real or apparent in passing of bills into law.

3.1.9 Other Theo ry (Middle Course)

There is a middle course between Consensus theory and conflict theory. This middle of the road approach argues that Legal system is the handiwork of those exercising political and legal powers of state, not necessarily to protect their own class interests, but expressing the definition of the privileged group, their values, notions and morals.

3.1.10 Autochthonism

Legal Theorists have raised further argument of how much of our laws and their sources are autochthonous. Autochthonism or autochthony pertains to the nativity of the law. That is to say, the extent to which the law is or is not indigenous or native to the land in which it operates. Are the sources of Nigerian law indigenous (autochthony) or foreign (alien)?

An autochthonous legislation, for example, may be one which does not trace its validity to any foreign legislature; rather it is home-grown and rooted in the country itself. Autochthony has two aspects:

(i) Formal Autochthony
This relates to the "Source(s)" from which the law or the Court, derives its authority as law
(ii) Substantive Autochthony
This refers to the contents of the legislation or law e.g. the frame of government which the Constitution has established.

Autochthony envisages

(i) a new birth, some kind of break in legal continuity.
(ii) Enactment by virtue of an authority native to it or inherent in the local enacting body.

Exponents of Africanism have extended these requisites to include attempts to refashion their Constitution and to reflect authentically the African traditional ideas of government and powers.

Professor Wheare thinks that a break in legal continuity is a perquisite to making a Constitution (or any law) if it is to be credited with fully autochthonous source. The essence of the break is to remove the semblance of having been made in any way under authority of the Metropolitan power.

Professor Robsin has expressed a contrary view, emphasizing that what is of much more importance is the continuous acceptance of the Constitution (or law) by the people subject to it.

Lets examine the autochthony of our Constitution for an illustration:
The Preamble to the Independence Constitution 1960 states:

"The Queen's Most Excellent Majesty-in-Council, Her Majesty, by virtue and in exercise of powers in that behalf by the Foreign Jurisdiction Act 1890(a) or otherwise in Her Majesty vested, is pleased

by and with the advise of Her Privy Council, to order, and it is hereby ordered as follows:

(i) "This order may be cited as the Nigeria (Constitution) Order in Council, 1960."
Upon Attainment of Independence, both Nigeria and the United Kingdom renounced the metropolitan power to make laws for the new Independent State of Nigeria which thereafter became vested with powers, however limited to amend, replace, the Imposed Constitution and other laws.

The Preamble for 1963 Constitution provides
"Having firmly resolved to establish the Federal Republic of Nigeria …

We the people of Nigeria, by our representatives here in Parliament assembled, do hereby declare, enact and give to ourselves the following Constitution …

This Constitution 1960 metamorphosed into the FRN Constitutions 1963, 1979 and 1999 with some amendments.

SELF ASSESSMENT EXERCISE 1

Account for the autochthony of the Nigerian constitution
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Let us consider some examples from other jurisdictions.
Dr. de Valera's government of Eire, 1937 prepared a draft Constitution, and presented to the Parliament for approval. Upon approval, he submitted the draft Constitution to the people in a plebiscite, which adopted it.
Further example can be found in Papua New Guinea

SELF ASSESSMENT EXERCISE 2

Compare the enactment of the Constitution of Nigeria and of Eire: What difference do you observe.
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4.0 CONCLUSION

Unit 1 considered the relationship between law and morals. Morality is not the only concept related to law, there are others, e.g. Justice, State etc which you learnt in previous years. You may need to revisit them. Our focus, however, is 'the sources' of law in Nigeria. You learnt the meaning of the term 'Source', then its classification as well as the theories behind it and the extent to which the classes are home grown or alien.

5.0 SUMMARY

We have tried to examine the term:

"the sources of law" rather than "sources of laws". The theories relating to sources range from consensus to conflict and middle of the road approach. These have been discussed. It is an open question whether the sources of our Constitution and laws are autochthonous (home-grown) or alien.

Contemporary writers including Professor Nwabueze have contended that the importance of legal autochthony relates more to the contents of the law rather than the origin of the Constitution (or any law) or substantive autochthony.

The argument for legal autochthony tends to excite nationalistic sentiments and perhaps pride. Legal autochthony is not to be desired for its own sake. Rather it is to be seen as a means of effecting changes in the Constitution (or any law).

6.0 TUTOR-MARKED ASSIGNMENT

Give an account of the difficulties met with in attempting to formulate a satisfactory classification of laws.

7.0 REFERENCES/FURTHER READINGS

Elias, T: Law in a Developing Society

Elias T.: Nigeria Legal System

Obilade: Nigeria Legal System

UNIT 3 SOURCES OF LAW STATUTES

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1. Meaning of Statute
3.1.1 Forms of Statute
3.2 Creation of Statute
3.3 The Other House
3.3.1 Executive Assent
3.3.2 Veto: National Assembly or State Assembly
3.4 Parts of Statute
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3.5 Decrees and Edicts
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

We are about to look at the specific sources of law. In this lecture, we are concerned with Statute, which now forms the major source of law in force today in Nigeria. Professor Elias recorded the following types of legislation as sources of law:

a. Ordinances of Settlement of Lagos (1862-74)
b. Ordinances of the Gold Coast (1874-86)
c. Ordinances of the Colony of Lagos (1886-1906)
d. Proclamations of the Protectorate of Southern Nigeria (1900-06)
e. Ordinances of the Colony and Protectorate of Southern Nigeria (1906-13)
f. Proclamations of the Protectorate of the Northern Nigeria (1900-13)
g. Ordinances of the Colony and Protectorate of Nigeria from 1st January 1914 onwards
h. Laws passed by Regional (now States) Houses of Assembly since 21 December 1951
i. Acts of the Federal Parliament (now National Assembly) enacted since 1st October, 1960)

Following the amalgamation of the North and South, and with the emergence of Nigeria, the pre-existing laws (ordinary and proclamations) were collated into one Volume. Regulations, Orders-in-Council, Rules and Legal Notes were similarly consolidated into another volume. This Unified Law 1914 was reviewed and published in four Volumes in 1923 and in twelve volumes in 1950. They are currently published as The Laws of Nigeria or Laws of the Federation and Lagos

2.0 OBJECTIVES

The objective of this lesion is that you should be acquainted with

- Statutes as a source of law
- What Statutes are
- The different statutes that have formed our law since colonial times.

3.0 MAIN CONTENT

3.1 Meaning of Statute

Statute is a law passed by a legislative body. Some legal writers have expanded the term beyond those rules, which are promulgated by the legislatures and are prepared to include:

- any positive enactment to which the State gives the force of a law, whether or not it has gone through the usual stages of legislative proceedings or has been adopted in other modes expressing the Will of the people or other sovereign power of State .

Technically, the term statute is restricted to:

(i) acts or laws enacted by the legislature.
(ii) Subsidiary legislation: that is: Rules, orders of Government Departments and designated officials in exercise of powers conferred on them by statute.
(iii) By-laws
It has been suggested that Treaties also are statutory laws as they have the force of law when so declared by the legislatures.

3.1.1. Forms of Statute

The principal forms of statutes are:

(a) Ordinances

Ordinances are imperial laws enacted before independence. Ordinances, which were still in force at Independence have been designated: 'Acts' (Designation of Ordinances Act, 1961)

(b) Acts

Act of National Assembly means any law made by the National Assembly and includes any law, which takes effect under the provisions of the Constitution as an Act of the National Assembly. With effect from 1st October 1960, any law made by the federal legislature became known as Acts.

(c) Laws

Laws enacted or having effect as if enacted by the legislature of a state of the Federation.

(d) Decrees

Decrees are laws promulgated by the Federal Military Government. Decree 107 of 1993 defines it as "an instrument made by the Federal Military Government and expressed to be, or to be made as, a Decree"

(e) Edicts

Edict is law made by Executive Council of a State of Federation and any instrument having the force of law made thereunder.

(f) Subsidiary Legislation

Laws made under the authority of statutes, order, rules or regulation made in exercise of powers conferred by an Act. It includes orders and regulations made by Ministers or Commissioners in exercise of legislative authority.

SELF ASSESSMENT EXERCISE 1

Differentiate between (a) Statute (b) Decree (c) Edict (d) Law (e) Subsidiary legislation

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(g) Codification

This is the process of collating, compiling, arranging and systematizing into an ordered code, the laws of a given jurisdiction. It would appear that prior to 1954, Britain made law directly for Nigeria. Since 1954, both the Federal and Regional (now states) governments exercised independent legislative authority. The local enactments were first codified in 1923, revised in 1948 and reproduced in 12 volumes in 1958. In 1958-77, editions of supplements and subsidiary enactments began to be produced on annual basis. The last revision and Codification of Laws of the Federation was 1990

(h) Administrative Agency Regulations

The Rulings and Regulations by or for the Federal and State Commissions, Boards etc in exercise of their Legislative, Executive, or Judicial powers, are sources of law and are growing. These relate to but do not correspond with delegated or secondary legislations. They are rules, made by persons or bodies other than the Legislatures but are authorized to do so.

3.2 Creation of Statute

The procedure for creating a statute is strict and in the following stages.

(a) Bill

Proposed law placed before the National or State Assembly as the case may be a potential Act or law prior to becoming law Usually commenced at the Lower House but occasionally in the Upper House.

(b) First Reading

A member of the House or a Minister introduces the Bill. The bill is read.

(c) Second Reading

The Bill is read a second time.
The House discuses the principles, debates it and upon assent by a majority, the Bill goes to one of the standing Committees for purpose of examining it in detail.

(d) Committee Stage

The Committee discusses the bill in detail, examines it, clause by clause, amends where necessary

(e) Reporting Stage

The Standing Committee reports to the House, its findings and recommendations. The Bill may be further amended, as appropriate.

(f) Third Reading

A final debate on the Bill takes place at the floor of the House. A vote is taken on it; if it fails to receive a majority vote, the Bill is defeated. If it does, then it is passed to the Governor for assent it is a State proposed Law. It is passed to the other House when it is a Federal proposed Law.

SELF ASSESSMENT EXERCISE 2

Describe the process of creating a Statute

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3.3 The Other House

The same process as in the first House is repeated. The proposed law is admitted for debate. If it is rejected, it dies. If it is approved, it goes to the Presidency for assent.

3.3.1 Presidency or Office of the Governor of a State: Executive Assent

The Assembly forwards the proposed law requiring his assent to the President or Governor who may or may not assent. On assent, the Bill passes into Law. It becomes a Federal Act or a State Law as the case may be. Otherwise, it is returned to the National or State Assembly without assent.

3.3.2 National Assembly or State Assembly

A proposed law which has been denied executive assent may still become law upon a two-thirds majority vote of the Assembly.

SELF ASSESSMENT EXERCISE 3

What is the meaning of "two-thirds majority" vote of the Assembly.
Support your answer with authority.

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Time

(a) A public Bill becomes stale
- if it does not complete every stage of the procedure and enacted into law during the particular session
- when the National or State Assembly is dissolved.

A Bill which has elapsed may commence de novo.

(b) A private Bill may spill over several sessions.

3.4 Parts of A Statute

Generally a Statute is divided into five parts

(a) The Long Title

`E.g. "An Act to make provision for establishment of a National Open University of Nigeria"

(b) The Short Title

More convenient to cite, "National Open University of Nigeria Act"; Education Board Act, etc

(c) The Preamble

- States the purpose of passing the Statute.
- Often introduced by the word "whereas" but not in all cases e.g. "Whereas sometimes now the offence of female prostitution and human trafficking has been rampart, and

"Whereas it is desirable to arrest the offence by increasing the penalty for the offence…"

The preamble to The Constitutions of the Federal Republic of Nigeria is as follows:

1963 Constitution:

"Having firmly resolved to establish the Federal Republic of Nigeria, with a view of ensuring the unity of our people and faith in our fatherland …
'WE' the people of Nigeria by our representatives here in Parliament assembled, do hereby declare, enact and give to ourselves the following Constitution."

1979 Constitution:

WE the people of the Federal Republic of Nigeria, HAVING firmly and solemnly resolved: To LIVE and TO PROMOTE … DO HERBY MAKE, ENACT, AND GIVE TO OURSELVES the following Constitution."

1999 Constitution:

"WHEREAS, the Federal Military Government of the Federal Republic of Nigeria ……………………………………………;…….

WHEREAS, the Federal Military Government in furtherance of its commitment to …………………………………………..…….
now therefore, the federal military government hereby decrees as follows: …"

The modern trend is to use "WHEREAS" once followed by one paragraph after another.

(d) Commencement

This is the date found immediately after the long title.
May be introduced e.g. by stating

"This Act shall come into operation … (date)
- Date is inserted usually in square bracket …(date)
- Followed by schedule or part of Statute containing details of enacting sections.

(e) Body

- The enacting sections, the content of the law and most important part of statute

(f) Schedules

Reservoir for miscellaneous issues.

3.4.1 Advantages of Statutes

(i) Statute law may overrule any existing rule of law whether it is statutory or judicial decision. It can amend, or repeal existing laws or decisions. For example, Decree No. 28/1970 invalidated the Supreme judgement in Lekanmi's Case. In this way, the National Assembly perpetuates its supremacy.
(ii) In the process of enacting a new law, the legislature is likely to take into account public opinion and social policies.
(iii) The National or State Assembly exercises unlimited power to legislate on any thing within its legislative competence.
(iv) Statute law is within law. It is available.
(v) The effective date of statute can be set by the statute itself.

3.4.2 Disadvantages of Statutes

(i) Legislation may be rushed, without adequate attention to details or to its consequences e.g. Homicide by Reckless or Dangerous Driving (Summary Trial and Punishment) Edict 1968 (Western States).
(ii) The legislators are incapable of accurately anticipating every conceivable type of fact situations.
(iii) Statutes may be bukky, and difficult to arrange in any logical manner. See the Companies and Allied Matters Act, 1990.
(iv) Terms used in the statute may be difficult to ascertain, and may require interpretation, which may not be forthcoming
(v) Statute may experience delay because the parliament's time is crowded and many items of national or state importance clamour for attention.

SELF ASSESSMENT EXERCISE 4

What are the advantages and disadvantages of a Statute? Give illustrations/examples.

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3.5 Decrees and Edicts

The power of the Federal Military Government to make laws is exercisable by means of Decree signed by the Head of State and Commander-in-Chief of the Armed Forces. Decrees and Edicts do not undergo the legislative process required of statutes. It suffices that the document or gazette containing the proposed law is duly signed by the Head of State in case of a decree or by the Military Governor in case of an Edict.

4.0 CONCLUSION

This unit and the next conclude the discussion of "Sources of Law". Its focus is the primary source of law in Nigeria to-day – legislations and you have been led through the stages of law-making. Can you visualize the stages, one after the other?

5.0 SUMMARY

In this lecture, we have discussed the Statute as a Source of Law in force in Nigeria today. A large proportion of the Nigerian Law derives from the Statute in the form of Acts of National Assembly or law of a State Assembly. Statutes are enacted laws, legislations. Unless they observe the recognized process of enactment, statutes may lack legality. It is such an enunciation or promulgation of principles as confers upon them the force of law. It is such a declaration of principles as constitutes a legal ground for their recognition as law for the future by the tribunals of the State. Legal rules, once declared by a competent legislature, are binding. However, Statutes are subordinate to the Constitution and drive their authority from it in a democratic dispensation.

6.0 TUTOR MARKED ASSIGNMENT

1. Trace the history of Lawmaking by Statute in the Nigerian Legal System.
2 (a) Distinguish between Codifying and Consolidating enactments, giving examples.
(b) What are the benefits of Codification

7.0 REFERENCES/FURTHER READINGS

Obilade, O.: Nigerian Legal System

Elias T.: Nigerian Legal System

UNIT 4 SOURCES OF LAW: STATUTES CONT'D

CONTENTS

1.0 Introduction
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3.0 Main Content
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3.1.1 Literal Rule of Interpretation: General Application
3.1.2 Generality as to Geographical Coverage
3.2 Subject Matter
3.3 Parties
3.4 Classes of Statutes of General Application
3.4.1 Statutes Applying directly to Nigeria
3.4.2 Limits of Local Circumstances
3.5 Foreign Jurisdiction Act
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Questions
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1.0 INTRODUCTION

In the last lecture, we discussed the Statutes of the National and State Assemblies as a source of Nigerian Law. In this lecture, our focus is on legislations other than local Statutes. Examples of such other legislations are general Acts of British parliament, which are in force in England. Some of them are sources of Nigerian Law and among these are general statutes in force in England at specified dates. The term "Statutes of general application in England" did not lend itself to easy interpretation. Must they be statutes which applied only in England? What about statutes, which operated beyond England e.g. Statutes which applied not only in England but also in the United Kingdom or British Empire. Some Statutes are founded on public policy, e.g. statutes regulating procedure and are as a matter of practice often pleaded e.g. Statute of Limitation. The problem is compounded by the fact that Parliament has not laid down any definite yardstick for determining whether a Statute is of General Application or not. But the question must of necessity be determined and the responsibility of doing so is borne by the Court. How this has been done will be seen in the course of this lecture.

The importance of Statute of General Application as a source of Nigeria is dwindling. The reason is that local Statutes are increasing and covering, most of the grounds earlier covered by the British Parliament. However it still remains a source of law in Nigeria. Other foreign

legislations from which Nigeria law derives its origin or sources – will also receive attention.

2.0 OBJECTIVES

- At the end of this lecture, the student shall have been able:
- To identify the different foreign Statutes that form part of Nigerian law.
- To ascertain the scope and limits of the application of these foreign Statutes.

3.0 MAIN CONTENT

3.1 Statute of General Application

The Supreme Court Ordinance, 1914 introduced into Nigeria as part of its Received Law, "the Statutes of General Application which were in force in England on 1st January 1900. The Courts were to apply such statutes "so far only as the limits of the Local jurisdiction and local circumstances" would permit. The Parliament did not attempt any definition of the phrase: "Statute of General Application". The Court decided each case on the merit of the particular statute sought to be enforced. To this end, two preliminary questions may be put by way of rough, but not infallible guide:

(i) By what Court is the Statute applied?
(ii) To what class or classes of the community does it apply?

3.1.1 Literal Rule of Interpretation

The plain and ordinary interpretation of the clause: "Statute of General Application in England which were in force in England on 1st January, 1900" meant what it says: an Act of Parliament applying generally in England only at the date specified. A Statute of General Application refers literally therefore to Statutes which were

(i) enacted by the Imperial Parliament at Westminister Abbey
(ii) applicable in England and Protectorates
(iii) applicable to all classes of English community and all Courts (both Civil and Criminal)

A Statute is an Act of Parliament. Generality of Statutes may be inferred from generality of application to:

(i) persons or class of persons whom the Act applies,
(ii) cause
(iii) geographical coverage.

3.1.2 Generality as To Geographical Coverage

(a) Statute Applying to England only
This may include the following:
(i) Statutes which Applied in the British Empire
e.g. Statutes which were applicable in the British Empire – British Colonies and Protectorates (now the commonwealth).
(ii) Statute which Applied in the United Kingdom (i.e. England, Ireland, Scotland).
In Chief Young Dede v. African Association Ltd (1910).The Court expressed the view that the phrase Statute of General Application in England included Statutes applying to the United Kingdom.
Also in Reshola (1932), Young v. Abina (1940)
(iii) Statute applying to the Colonies:
See Att.-Gen. V. John Holts & Co. (1910)

SELF ASSESSMENT EXERCISE 1

Account for Statutes of General Application in terms of Territorial Coverage.

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3.2 Generality as To Subject Matter of Statutes

The plaintiff in Dede's Case (1910) claimed the right and title to a parcel of land situate in Brass (Rivers State). The defendant pleaded the Statute of Limitation and plaintiff denied that the Statute was of a general application. The Land Transfer Act 1875 and 1897 were also pleaded. Held Land Transfer Act could only apply to England, not land in Nigeria. The Court was silent on the Statute of Limitation.

SELF ASSESSMENT EXERCISE 2

Explain the term "Statutes of General Application in the context of the subject matter of the Statutes
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3.3 Generality as To Parties

In an action between a European and a native, English Statute on the subject matter or cause applied provided no injustice was done: Fisher *& Co. v. Swanikier (1889). This is also the case if from the nature of the* transaction it was intended that the obligation of the parties would be regulated by the English Law: Quarley v. Arkena (1895). Fisher & Co v. *Swanikier (1889) and Quarley v. Arkena (1895) seem to have been* decided on the assumption that the generality of the Statute concerned had been settled. If the Statute applied in all Civil and Criminal Courts (as the case may be) and to all classes of the community, there is a strong likelihood that such statute would be enforced within the jurisdiction as a statute of general application. If on the other hand, it applied to certain courts (e.g. Statute regulating procedure) or only to certain class of the community (e.g. Statute regulating a particular trade) the probability is that it would not be held to be locally applicable.

SELF ASSESSMENT EXERCISE 3

Give account of 'Statute of General Application' as it is related to 'parties'.
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Examples of Statute of general application are:
Conveyancing Act 1881
Forfeiture Act 1870
Wills Acts 1837 and 1852
It is not a statute of general application if it applied in certain courts or to certain class of the community e.g. Administration of Estate Act 1925
See also: IGP v. Kamora (1934), Labinjo v. Abake (1924) and Adam v. *Duke (1927)*

3.4 Classes of Statutes Of General Application

Brett FJ classified Statutes of General Application into two:

(a) Statutes concerning property and conveyancing

Examples

The Wills Act 1837
Conveyancing Act 1881
Settled Land Act 1882

(b) Statutes relating to Commercial Transactions:

Examples

Infant Relief Act 1874,
Bills of Exchange Act 1882,
Partnership Act 1890,
Sales of Goods Act 1893

3.4.1 Statute Directly Applying To Nigeria

Some Statutes that were enacted by the British Parliament were made directly applicable to Nigeria and they applied in Nigeria. An example is the Nigeria Independence Act 1960 or The Nigerian (Constitution) Order in Council, 1960. The fact of Independence does not repeal the Statutes.

There are other groups of Statutes that were enacted on or before 1st October 1960 and have not been repealed by appropriate legislative authority in Nigeria and are therefore still in force.

Generally, the question whether a Statute is of general application is determined by examining the provisions of the State itself.
Examples are:
The Evidence Act
The Criminal Procedure Code
The Criminal Procedure Act
See also Att.-Gen. V. John Holts & Co. (1910) and IGP v. Kamora *(1943)*

3.4.2 Limits of Local Circumstances

Remember we are talking about Acts of Parliament which were in force some two centuries ago. Then consider the following'

(i) Statutes which applied on 1st January 1900 and repealed in England after1900
(ii) Statutes which were enacted before 1900, and repealed also before 1900 but only after the colony had received the Statute
(iii) Statutes which have turned anachronisms having been afflicted by the needs of time, social requirements and change.

Judicial attitude in each of these situation has been as follows:
The Court in Stephen v. Pedrocchi (1959) rejected the argument that a repeal by English Parliament of a Statute of General Application after the reception date in Nigeria makes the law inoperative. In Young v.

Abina (1940), it was held that the Land Transfer Act 1897, which was repealed in England in 1925 remained part of Nigerian Law. See also *Ribeiro v. Chahim (1954)*

The Act of Independence 1960 does not alter the position of old laws and cases decided thereon. Probably also, a Statute applying in all civil or criminal courts (as the case may be) and to all classes of the community may pass the test of generality: e.g. Limitation Act. Statutes of General Application as at 1st January 1900 applied "so far only as the limits of the local jurisdiction and local circumstances" permitted. They are subject therefore to local needs and requirements. See: the Interpretation Act, the High Court Laws (Eastern States) and the High Court Laws (Northern States)

Local circumstances may exclude an English Statute from the corpus *juris. But the fact of that exclusion does not operate to reduce these* general Statutes into a flexible instrument of social order based on national socio-economic values. The application of English statute may be rejected in the following situations:

(i) where application of the English Statute would produce manifestly unreasonable result which is contrary to the intention of Statute: See Lawal v. Younan
(ii) where subject matter of Statute does not exist in the colony
(iii) where the Statute requires special Administrative and judicial machinery which does not exist in the locality: See Halliday v. *Alapatira (1881)*
(iv) where local phrases do not exist to permit of meaningful formal verbal alterations: Adeoye v. Adeoye (1962)
(v) where statute has been framed for reasons affecting life in England. See Jex v. McKinney (1889)
(vi) where local traditional laws do not conform with English Rules and strict application would cause considerable hardship to both or either of the parties. See Balogun v. Balogun *(1935), Green v. Owo (1936) and Mills v. Renner (1940). Also see contrary view: Chief Young Dede v. African Assoc (1910)*
(vii) where the transaction in question is entirely governed by local law and custom
(viii) where Statute applied only in certain Courts or only to certain classes e.g. a Statute regulating procedure merely

See also: Att. Gen. V. John Holts & Co. (1910), Sunmonu v. *Raphael (1927), Orisharina v. Mefun (1937) etc*

SELF ASSESSMENT EXERCISE 4

Account for limitation to application of "Statute of General Application.

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3.5 Foreign Jurisdiction Act

The Foreign Jurisdiction Acts, 1890-913 conferred powers on the Crown to make Rules for British colonies. Such Rules enacted by the crown pursuant to delegated powers must be distinguished from Acts of Parliament applying to the colonies. Such Rules are of specific application and are also a source of Nigerian law. Although they may not constitute such important source as Statute of General Application, they are not subject to local conditions. They would thus appear to be arbitrary enactments since prevailing circumstances were hardly taken into consideration. The Crown also might have little or no knowledge at all about the social life and institution of the subject people and the community.

4.0 CONCLUSION

Unit 3 dealt with local statutes, while this unit focuses on foreign legislations in force in Nigeria, and the criteria employed in identifying which foreign statutes are of general application and therefore in force in Nigeria. Can you now identify some of them? It is important to know the authority for receiving these laws into Nigeria.

5.0 SUMMARY

Generally, the question whether a Statute is of general application is determined by examining the provisions of the Statute itself:

Examples: The Evidence Act. See IGP v. Kamora (1943), Lawal v. *Younan (1961), Young v. Abina (1940) and Braithwaiti v. Folarin (1938)*

Sources of Nigerian law include Statutes of General Application; and Rules enacted by the Crown under the Foreign Jurisdiction Act 1890 – 1913. The term Statute of General Application has not been defined by the Parliament and it is left for the Court to fill the lacuna. In doing so, certain limitations have also emerged. By and large whether a Statute is

of general or limited application must be decided by examining the provisions of the particular Statute

6.0 TUTOR MARKED ASSIGNMENT

1. Give an account of the incidence and limitation of "Statutes of General Application" in the Nigerian Legal System.

7.0 REFERENCES/FURTHER READINGS

Elias. T.: Nigerian Legal System

UNIT 5 SOURCES OF LAW
RECEIVED ENGLISH LAW: COMMON LAW

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Received Law
3.2 Content of Reception Enactments
3.3 Common Law
3.4 Criteria for Incorporation into Common Law
3.5 Problems associated with Common Law
4.0 Conclusion
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6.0 Tutor-Marked Assignment
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1.0 INTRODUCTION

After the cession of Lagos in 1861, English law was introduced into the Lagos Colony and later into Nigeria as a whole. The part of English Law that operated then (and still operates) in Nigeria is what is referred to as the Received English Law. The Common Law is an integral part of that received English law and is the subject of this lecture.

2.0 OBJECTIVES

When two objects come into contract with each other, one must leave an impact on the other. At the end of this lecture, the student should be able to evaluate the impact of metropolitan power in the Nigerian Legal System, beginning with the law in operation.

3.0 MAIN CONTENT

3.1 Received Law

The Received English law, as a source of law, includes:

(a) The Common Law
(b) The Doctrines of Equity
(c) Statutes of General Application in Force in England.
(d) Statutes and Subsidiary Legislation on specified matters.
(e) English law enacted before 1st October 1960 and extending to Nigeria.

SELF ASSESSMENT EXERCISE 1

Explain the term "Received English Law"

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By the middle of 19th century, British and other merchants had come to West Africa to trade under Royal Charters, bringing along with them, their own laws. Following the occupation and Cession of Lagos (1861) and its declaration as a Colony, there was a succession of Ordnances. One of them – Ordinance No. 3 of 1863. This ordinance decreed that, "All law and Statutes which were in force within the realm of England, on 1 January 1863, not being inconsistent with any Ordinance in force in Lagos Colony or with any Rule made in pursuance of any such ordinance, were deemed and taken to be in force."

Ordinance No 4 of 1876 also expressly provided that the Common Law, the doctrines of Equity and Statute of general application which were in force in England on 24 July 1874 shall be in force. This provision was extended to the Southern Protectorates by Ordinance 17 of 1906 and to the Northern Protectorates by Proclamation No. 4 of 1900. The Supreme Court Ordinance 1914 was passed following the amalgamation of Northern and Southern Protectorates on 1st January 1900 and emergence of present day Nigeria. This Ordinance repealed and re-enacted Ordinance No. 4 of 1876, putting into operation in the whole of Nigeria, the English Common law, the doctrines of Equity and statute of general application, which were in force England on 4 March 1863 (as regards Lagos Settlement) and 1st January 1900 (as regards Nigeria as a whole).

Modern Nigerian legislations have similarly incorporated the Received English law into the Nigerian Legal System. Examples are:

The Law (Miscellaneous Provision) Act and The Interpretation Act (both in force throughout Nigeria).

The law (Miscellaneous Provision) Law and the High Court Law of Lagos State, Law of England Application Law, applicable in the former Western Region (i.e. the present Edo, Delta, Osun, Ekiti, Ondo, Ogun, Oyo States).

The High Court law of former Northern Nigeria, in force in all the 19 Northern states.

The High Court law of former Eastern Nigeria in force in the Eastern States.

3.2 The Content of Reception Enactments

The provisions generally are identical in all the reception enactments. See an illustration of reception enactment contained in the law of Lagos State:

> "…Subject to the provisions of this section and except in so far as other provision is made by any Federal or State enactment, the Common Law of England and the doctrines of equity together with the Statute of General Application that were in force in England on the 1st day of January 1900 shall be in force in Lagos State"

"(2) The Statute of general application referred to in Subsection(1) together with any other Act of Parliament with respect to a matter within the legislative competence of Lagos State which has been extended or applied to the Lagos State shall be in force so far only as the limits of *local jurisdiction and local circumstances shall permit and subject to* any Federal or State Law.

"(3) For the purpose of facilitating the application of the said Imperial Laws they shall be read with such formal verbal alteration not affecting the substance as to names, localities, courts, officers, persons, monies, penalties, and otherwise as may be necessary to render the same applicable to the circumstances."

The provision of the Law of England Application Law incorporating the Received law was re-enacted as Western Nigeria Law 1959 and in subsequent editions.

The reception enactment in other parts of the federation are similar in content, but there are some few discrepancies:

(a) The High Court Law of the Northern States, received into the 19 Northern States:
- (i) Common law
- (ii) doctrines of Equity
- (iii) Statutes of general application in England on 1st January 1900 There was no reference to the Common Law of "England".

(b) High Court Laws of Eastern Nigeria received
- (i) the Common Law of England,

(ii) doctrines of Equity and
(iii) Statutes of general application on 1st January 1900.

(c) All the Reception enactments adopted "the doctrines of "Equity" except the West that expressly mentioned "the doctrines of Equity in England".

SELF ASSESSMENT EXERCISE 2

Comment on the implications of the discrepancies observed in the English law reception clauses for a unified legal system.
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SELF ASSESSMENT EXERCISE 3

To what extent is English Law part of Nigerian Law?
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3.3 Common Law

In Anglo-Saxo England, there were seven kingdoms each with its own different Laws and Customs and Court systems. Custom formed the basis of the law of each of the kingdoms, hence the aphorism: lex et *consuetude angliae (Law and Custom of England). But the customary* law in say Webtex differed widely from that in Mercia or East Angliae. After the Norman Conquest in 1066, a system of Common Law Courts developed out of the Kings Council (the Curia Regis), and Common law began to grow from decision of these judges of the Curia Regis and the Royal Courts especially in 12th and 13th centuries. Once a local custom became part of the Common law, it ceased to be a mere custom and became case law or judge-made law applicable to the whole of the realm. By the Middle Ages, the local systems had disappeared, giving way to a body of rules common to the whole of England.

Common law therefore refers to the body of law derived from judicial decisions rather than Statutes or the Constitution. It is that part of the law which is contained in decisions of the English Superior Courts. It is neither written nor set out in Acts of Parliament nor in the various forms of subordinate legislations. Thus Common law originated from the unwritten immemorial practices, usages and ancient customs of the early

English communities as developed and unified by the Royal Courts during the three centuries following the Norman Conquest to become the basic law of England.

As the "Common customs of the Realm" and the principles that were built around it by the Royal Judges of old, Common law is much older than Parliament itself as well as the law Courts both of which in turn are older than Parliament. It is a complex system of law – both civil and criminal, neither codified, collated nor arranged in a simple and logical order. It remained an authoritative record of judgement of judges found in authoritative records, law reports, and text books.

Remedies available at common law were restricted and included:

- Possession of land or items of value
- Compensation
- Severe punishment for crimes

It is important to note that Common law had its roots deeply ingrained in the national ideas, and ways of life and institutions of the British people. Justice Coke tells us that in his time, kings judges were sworn to execute Justice according to the law and custom of England. In Blundell *v. Catterall, 1821, Best J. said: "The practice of a particular place is* called a custom. A general immemorial practice throughout the realm is the Common Law"

SELF ASSESSMENT EXERCISE 4

Account for the development of Common law.

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3.4 Criteria for Incorporation into Common Law

A local custom must satisfy the following conditions before it could be incorporated into Common Law:

(i) It must be reasonable
(ii) It must be of immemorial antiquity
(iii) It must not be in conflict with the Statute law
(iv) It must be observed as of right
(v) It must have been known to the parties concerned
(vi) It may be inconsistent with Common law.

Similarly, a general custom must meet the following criteria

(i) It must be reasonable
(ii) It must be generally followed and accepted throughout the land
(iii) It must have existed from time immemorial
(iv) It must not be in conflict with Statute law
(v) It must not be in conflict with the Common law.

It is evident that general customs were fundamental in the development of Common law in the early times

SELF ASSESSMENT EXERCISE 5

Explain how a custom may develop into Common Law.

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3.5 Problems Associated With the Common Law

The Common law over the centuries had turned out to be:

(a) Rigid

Rules became archaic, antiquated; inflexible, partly because of the effect of Precedents and partly because of the Provisions of Oxford 1258 which prevented the issue of writs except where there was a recognized form of action.

(b) Inadequate

Available writs covered narrow grounds. A person aggrieved in tort or contract might not succeed in bringing action for redress unless it fitted existing form of action and these were severely limited. In other words, where there was no form of action, there was no remedy for injuries. A great number of causes of action could not be redressed and these were increasing. For example, Common law failed to recognize the tort of Nuisance, the Institution of Trust, Mortgagor's Equity of redemption etc.

(c) Harsh

Judges applied the law – just or unjust. Its concern was procedure and form, and these were technical.

(d) Unjust

Common law remedies could not meet the ends of justice in many cases. The only remedy available was damages and in many cases it was inappropriate relief; particularly where restitution was possible and desired. Common law would not order specific performance, injunction, rescission, where damage was inappropriate. Furthermore the cost of action sometimes was prohibitive, sometimes exceeding claims.

(e) Corrupt

The Regime was characterised by bribery and corruption, oppression and bias. Very powerful and influential barons could overawe or intimidate the Court to give judgement in their favour. Judges were poorly paid.

(f) Declaratory

Common law can only be authoritatively declared by superior courts and only to the extent that it was necessary to do so for the purpose of deciding a particular case.

(g) Dependent on Chance

No authoritative text on Common law. It is not made in vacuo but derived from the principle of law as declared by judges in the course of deciding particular cases. Its development has always depended upon the incidence of cases and availability of appropriate writ

(h) Delay

Unless appropriate writ is taken, the whole process is repeated; and at high costs. Adjournments were too easily granted, and justice delayed is justice denied.

(i) Procedure

Proceedings were unsatisfactory and expensive. Take for example, a case of divorce on the ground of a wife's adultery. Common law procedure demanded the following steps

(i) Action in a church Court for judicial separation:
(ii) action of criminal conversation" by the aggrieved party to recover damages from the adulterer in the Common Law Court.
(iii) A private Act of Parliament to dissolve the marriage, which alone cost at least £500 by the 18th century.

If there was error in procedure, the whole process is repeated.

(j) Restricted Jurisdiction

English Common law applied only if the case does not fall within certain reserved matters of local customary law such as land tenure, succession and inheritance, marriage and the family and local chieftaincy cases.

4.0 CONCLUSION

This unit is a continuation of the proceeding unit. Both are centred on "Received English law". You addressed the "common law" in greater detail in this unit. You also learnt how law grew in England, the Reception enactments and the criteria for incorporation into the Nigerian legal system as well as the problem associated with this. You are making tremendous progress, having studied both local and foreign sources of Nigerian law. A little step more.

5.0 SUMMARY

The actual life of the law has not been logic; it has been experience. Common law is derived from the common customs of the Realm and from the principles, which the Judges of the Curia Regis have built around it in the Royal Courts of old. It has been introduced into Nigeria since 1863 and it remains a source of Nigerian law.

6.0 TUTOR MARKED ASSIGNMENT

Trace the history of Common Law and its reception into the Nigerian Legal System.

7.0 REFERENCES/FURTHER READINGS

Elias, T.: Law in a Developing Country, 1972

Elias T.: The Nature of African Customary Law, 1956

Park A.: The Sources of Nigerian Law, 1963

MODULE 4

Unit 1 Doctrines of Equity
Unit 2 Conflicts between Common Law and Equity
Unit 3 Judicial Precedents
Unit 4 Disadvantages of Judicial Precedent
Unit 5 Subordinate Legislation

UNIT 1 RECEIVED ENGLISH LAW: DOCTRINES OF EQUITY

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Doctrines of Equity
3.1.1 Equity Defined
3.2 Origin of Equity
3.2.1 Intervention of the Chancellor
3.3 Development of Equity
3.4 Relationship between Common Law and Equity
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further readings

1.0 INTRODUCTION

By the operation of Ordinances and the various High Court Laws of the States of the Federation, doctrines and principles of Equity as practiced in England have become a source of Nigerian law.

Equity is a word with many meanings. We shall examine some of them. It has to be noted from the outset that although the bases of equitable jurisdiction were the principles of justice and conscience, equity is not synonymous with justice. The field of Equity has been delineated by a series of historical events, not by priori theory or any plan as we shall see presently.

2.0 OBJECTIVES

At the completion of the lecture, you should be able

- To recognize that the Chancery (and indeed every Court) has ceased to be a Court of conscience, but a Court of law.
- To appreciate the fact that it is incompetent to event equitable jurisdiction merely because the "Justice" of the case before the Court requires it.
- To trace the historical development of the principles of Equity, the reasons for them, their achievements and their later affliction.
- To defend and support with authorities, the assertion that Equity had come, not to destroy the law, but to fulfill it.

3.0 MAIN CONTENT

3.1 Doctrines of Equity

The term 'Equity' is best understood and explained by studying the history of the high Court of Chancery, how it came to exercise what is known as its extra-ordinary jurisdiction and the principles upon which it acted. Meanwhile, let us examine what Equity really is.

3.1.1 Equity Defined

Equity has been referred to as: fairness, natural justice, good conscience, good judgement or morality; It means what is fair and just, moral or ethical. In its juristic sense, equity is law applied in the High Court of Chancery, and variously described as:

(a) a system of law or body of principles originating in the English Court of Chancery and superceding the Common law and statute law,
(b) a system of justice which was developed in and administered by the High Court of Chancery in England in the exercise of its extra ordinary jurisdiction.
(c) a branch of law which, before the Judicature Act, 1873 came into force, was applied and administered by the Court of Chancery.

In popular usage, Equity reflects even-handed impartiality. In legal theory, it is a system of doctrines and procedures which developed side by side with the Common law and Statute law, having originated in the doctrines and procedures evolved by the old court of chancery in its attempts to remedy some of the defects of the common law and temper the harshness produced by a too-rigid application of its rules.

SELF ASSESSMENT EXERCISE 1

Describe "Equity" in your words
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3.2 Origin of Equity

In the last lecture, we talked about the problems of the Common law. Can you enumerate some of the problems, without reference to your reading manual? It suffices to say that the defects and injustices of the Common law were grievous and were such that cried for remedy. Persons who became aggrieved resorted to petitioning the king, the fountain of justice, to do justice "for the love of God and in the way of charity". A petitioner could have been aggrieved, to name a few, because

(i) his case was beyond ordinary mechanism
(ii) the jury had been misled, corrupted, intimidated or inflexible
(iii) Common law Court was incapable of providing a remedy
(iv) action was tainted with fraud, and breach of confidence.

3.2.1 Intervention of the Chancellor

The Chancellor was the most important personage, next to the king. He was the king's secretary of state for all departments, Head of the judiciary, Chief Judicial Officer, often a Cleric, Speaker of the House of Lords, Chairman Judicial Committee of the Privy Council, Cabinet Minister, Custodian of the Great Seal – all roled together. Maitland described him as "The King's Prime Minister".

The Lord High Chancellor, as the "keeper of kings conscience" assumed extra-ordinary jurisdiction; attended to those petitions and dispensed justice on the bases of what is fair, equitable or just. If for example 'A' owned a Pinkacre, conveyed it to 'B' to hold it upon trust for C, the common law offered no remedy against 'B' if he misappropriated Pinkacre either for his own or for his cronies and not for C's benefit. But the Court of chancery would work on B's conscience, and enforce the trust against B for the benefit of C who is the beneficial or equitable owner.

The conscience of the Chancellor controlled the decisions he would give in exercise of his wide discretionary power. By the first half of 19th century, the Court of Chancery had assumed jurisdiction from Exchequer and operated as a separate Court, developing systematically, a new system of rules and principles that became known as Equity. It was a British legal experience. It can be said then that in its origin.

Equity was the exercise by the Chancellor of the residual discretionary power of the king to do justice among the subjects in circumstances in which for one reason or another, justice could not be obtained in a Common Law Court.

SELF ASSESSMENT EXERCISE 2

Account for the origin of "Equity"

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3.3 Development of Equity

The 20th century was a period of great development of equitable jurisdiction to meet a host of new problems of industrial, international, and imperial expansion, emergence of new concepts of property settlements and administration of companies and partnership. Equity in response, developed in three directions:

(a) Exclusive Jurisdiction

In its exclusive jurisdiction, Equity developed the following, among other things:

(i) new Equitable interests e.g. equitable lien, restrictive covenant, Estate contracts and equitable easement
(ii) new Rights e.g. uses and trust by which the chancery compelled the Trustee to hold the trust property for the benefit of the beneficial owner.

(b) Concurrent Jurisdiction (New Remedies)

The Chancellor did not regard himself as administering a new body of law. Rather he gave relief in hard cases by developing new remedies. The objective was to ameliorate injustice inherent in technicality of the Common law. He reinforced common law rights and in order to ensure complete justice, the Chancery provided additional remedies, to wit:

(i) Injunction, Mareva Injunction, Anton Villa Orders
(ii) Specific Performance
(iii) Rectification
(iv) Rescission
(v) Appointment of Receiver or Order of Accounts

(c) Auxiliary

Equity also invented new procedure in order to ease the rigours of defective procedure at Common law Examples include:

(i) Delivery up and inspection of document and cancellation
(ii) Compelling or allowing defendant to give evidence
(iii) Subpoena centum librarum

SELF ASSESSMENT EXERCISE 3

What, in your opinion, is the contribution of Equity to law.

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3.4. Relationship between Common Law and Equity

By the 15th century, the Chancery had become an entity of its own. Its jurisdiction had vague, undefined and as wide as subject matter of petition before it. To some extent Chancery inevitably found itself in opposition to Common law courts and Parliament. Furthermore, both the Common law and the principles of Equity continued to be administered in two separate courts – Common Law Courts and the Chancery.

Chancery issued common injunction against common law judgements that were considered not in consonance with fairness and justice. Disobedience of injunction attracted imprisonment. The effect was to render the judgement of the Common inoperative. In Throck-morton v. *Finch (1598) and Heath v. Rydley (1614), Coke LJ held that* imprisonment for disobedience of injunction was unlawful. In the latter case, the Court was vehement that "if any Ccurt of equity doth inter meddle with any matters properly triable at the Common law or which concern freehold, they are to be prohibited" (i.e. liable to be subject to the "Writ of Prohibition".

But the Chancery did not inter-meddle with Common law. It merely acted in personam, directing that the individual, on equitable grounds, must not proceed to sue at law or enforce a judgement already obtained at law.

Earl of Oxford Case (1615)

In a competition between Justice Coke, Head of Common law court and Lord Ellesmere, the Chancellor, King James I. ruled in favour of the Chancery.

Common Law Procedure Act, 1854

The Act gave Common Law Courts a limited power of granting equitable remedies.

Chancery Amendment Act, 1858 (Lord Cairns Act, 1858)

Gave chancery power to award damages either instead of or in addition to an injunction or a decree of specific performance

Judicature Act (1873-5)

Abolished existing Courts of Queens Bench, Exchequer, Common Pleas, Chancery, Probate, Divorce and Admiralty. It established the Supreme Court of Judicature now divided it into Court of Appeal, and High Courts with the latter subdivided into three divisions: Chancery, Queen Bench and Family. Admiralty matters were assigned to the Queens Bench Division, and Probate matters to the Chancery. Each Division exercised both legal and Equitable jurisdiction.

Impact of Judicature Act on Equity

In its origin, equity shared the same universal quality of being a fluid notion of what is just or equitable: The Chancery gave or withheld relief not according to any procedure but according to the effect produced upon the chancellor's own individual sense of right and wrong by the merits of the particular case before him.

Lord Seldon, one of the greatest Equity lawyers could say: "Equity is a roguish thing. For law, we have a measure, equity is according to the conscience of him that is chancellor and as that is longer or narrower so is equity "'tis for all as if they could make the standard for the measure of a chancellors foot".

SELF ASSESSMENT EXERCISE 4

Account for the effect of Judicature Act on law and equity.

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Another distinguishing feature is that Equity operated outside the law. Basically, therefore it was a gloss or appendage to common law and not a rival or competing system. In Re Diplock (1948), the Court held that plaintiff asserting some equitable right or remedy must show that his claim has "an ancestry founded in history and in the practice and precedents of the Court administering equity jurisdiction.

The Chancery issued writs which commenced an action at law. It could vary existing writs or invent new ones. But these did not create new forms of action. Only the Common law decided whether or not the writs disclosed any claim recognised by the law.

The Judicature Act expressly provided that Equity shall prevail over Common law where both conflict in respect of the same subject matter. The Supreme Court Act 1925, S. 25(11) provides as follows:

Generally, in all matters not herein before particularly mentioned in which there is any conflict or variance between the rules of equity and the Common law, with reference to the same matter, the rules of Equity shall prevail".

The fusion of administration did not necessitate a wholesale modification of the rules either of law or of equity. Common Law and Equity remained two streams flowing into one channel but their waters do not mix. Their rules remain separate and distinct. Equity had transformed from jurisdiction based upon the personal interference of the Chancellor into a system of established rules and principles.

Today, every Court administers law and equity on the basis that in the event of a conflict between their rules, equity shall prevail.

4.0 CONCLUSION

Another part of received English law which you learnt in this unit is the "Doctrine of Equity" you can now define the term "equity" and explain its origin, and development. Your attention was drawn to the important relationship between common law and equity. It is satisfying to hear some of you chanting different equitable maxims. That's good. You'll feel better if you put some in practice, and cite some cases in support.

5.0 SUMMARY

The lecture has been on the development of the doctrines of Equity. Any definition of Equity has been in Maitland's words "a poor thing to call a

definition". We have, at best described the term 'common law' as unified in the three centuries after Normad Conquest, while equity developed more particularly in the 19th and 20th centuries, creating new interests in its exclusive jurisdiction, offering new remedies in its concurrent jurisdictions and inventing new procedural rules in its auxiliary jurisdiction. The effect of the Judicature Act 1873-5 is to remove possible friction, to empower each Court to apply both Common law and rules of Equity with the latter prevailing where there is conflict between both.

In the next lesson, we shall whether the Judicature Act succeeded at extirpating conflicts between Common law and Equity. Attempt will be made to locate such conflicts and how it was resolved. We will conclude with a critique of Equity today and perhaps hazard a guess at Equity tomorrow.

6.0 TUTOR MARKED ASSIGNMENT

Common Law and Equity may be seen as sometimes mutually reinforcing, sometimes complementary to each other and sometimes mutually antagonistic. Discuss with examples, each of these three situations.

7.0 REFERENCES/FURTHER READINGS

Snell's: Principles of Equity

Martin, Hambury and Maudsley: Mode is Equity

UNIT 2 RECEIVED ENGLISH LAW: DOCTRINES OF EQUITY CONT'D

CONTENTS

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3.2 Equitable Doctrines and
3.2.1 Equitable Maxims
3.3 Equity in Nigeria
3.3.1 Equity Today
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further readings

1.0 INTRODUCTION

We have looked at the principles of Equity as a source of law in Nigeria. The principles were initially capacious and this was good enough for socio-economic expansion as well as the newly evolving interests like, new conveyancing methods, settlement of property is such a way as not only to keep them out of the reach of creditors and avoid feudal dues and services but also to enable clerics to hold land contrary to the Statute of Mortmain. The trust concept remains the greatest and most distinctive achievement of Equity. In recognizing the interests of the cestui que trust, the Chancery was not creating new body of law. It merely gave relief where this would otherwise be impossible by reason of fraud, breach of confidence, or because the instant case was beyond ordinary mechanism, and common law could not provide a remedy.

Chancery was helpless in plaints that were beyond the scope of existing forms of action. Thus a person who was asserting an equitable right, or claiming equitable remedy had a burden of showing that the right or claim has been founded on an existing form of action. It is not sufficient that because one thinks that the 'Justice' of the present case requires it, one should invent such a jurisdiction for the first time. Hence, Jessel, M. R.'s aphonism that the Court is not, a Court of Conscience, but a Court of Law. Now however, the Court is both a Court of law and a Court of Equity – a Court of complete jurisdiction.

It remains to attempt to identify areas where conflicts have risen and examine the prospects that Equity today will still respond to new

interests that continually evolve in a dynamic society characterised by rapid socio-economic advancement.

2.0 OBJECTIVES

The objectives of this lecture include:

- Identifying areas of conflict between Common law and Equity
- Recognition of the limitation of Equity and
- Examining the prospects of new equitable reliefs and remedies in contemporary society.

3.0 MAIN CONTENT

3.1 Conflicts Between Common Law And Equity

Four instances of conflict between Common law and Equity may be noted

(i) Equitable Lease - Walsh v. Lonsdale (1882)
(ii) Variation of Deed - Berry v. Berry (1929)
(iii) Executors Liability for Assets - Job v. Job (1877)
(iv) Contribution between Sureties - Lowes & Sons v. Dixon & Sons *(1885)*

Let us illustrate the application of the Judicature Act, 1873-5 in the face of conflict between Common law and equity with the case of Walsh v. *Lonsdale (1882). In this case, the defendant entered into an agreement in* writing to grant to the plaintiff, a lease of a mill for seven years. The agreement provided that the rent was payable in advance, if demanded. No grant by Deed as required by law for grant of a lease exceeding three years was ever made. The plaintiff entered the property, paid rent quarterly, not in advance. He became in arrears. The defendant – landlord demanded a year rent in advance but he was not paid. He distrained and Plaintiff brought an action for illegal distress and his action failed.

A landlord may distrain or issue a distress upon a tenant who is in arrears and in doing so, may take and sell sufficient goods of the tenant (with certain exceptions) as are necessary to pay the arrears.

The distress in question would have been illegal at Common law because no seven-year lease had been granted and the yearly legal tenancy, which arose because of the entering into possession of mill did not include the provision of payment of rent in advance. The reason is that a yearly tenancy which arises in these circumstances includes only

such terms of the agreement as are consistent with a yearly tenancy. An agreement to pay a year's rent in advance is not consistent with a yearly tenancy.

In equity, however, the agreement for the lease was as good as a lease. The tenant was held liable to pay a year's rent in advance and distress was held legal.

The case was decided before the Judicature Act 1873-5 but the same result would have occurred were it decided under the Act. The reason is that the Judicature Act was procedural. The rights in law and in equity came under the Act and were recognised in a single trial. Walsh v. *Lonsdale was decided on the equitable maxim: treating as done that* which ought to be done.

Walsh v. Lonsdale would apply to the following cases:

(i) cases involving a legal claim
(ii) cases of contract for which equity may decree specific performance e.g. contract to convey or create legal estate.
(iii) cases of contact to sell, grant lease, easement or mortgage.

Having carefully assimilated the rationale of the decision in Walsh v. *Lonsdale, and how equity overruled the common law, you should read* up other cases of conflict and attempt to explain the reasoning of Equity in superceding the common law.

3.1.1 Limitations

Certain limitations exist in the Rule that Equity Rules prevails over Common Law. Some of them are:

(a) Matters dealt with by the old Chancery were assigned to the Chancery Division while Queen Bench dealt with matters formerly before the Common law courts.
(b) In matters of practice (but not in matters of principles) the more convenient practice is usually followed: Newbiggun Gas Co. V. *Armstrong (1879), Hamson v. Duke of Rutland (1893)*
(c) Distinction between legal and equitable rights has been preserved.Gentle v. Faulkner (1900)
(d) Distinction between legal and equitable remedies also persisted Joseph v. Lyons (1884) and Manchester Brewery Co. v. Coombs (1901)

SELF ASSESSMENT EXERCISE 1

Are there exceptions to the rule that where both law and Equity conflict over the same matter, Equity prevails?

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3.2 Equitable Doctrines

The 18th and early centuries were period of legislative stagnancy and Equity became a great force that moulded the progress of the Law to meet conditions of social life. It is in the process Equity developed the following doctrines.

(i) Conversion
(ii) Election
(iii) Satisfaction
(iv) Performance
(v) Ademption
(vi) Marshalling of Assets

3.2.1 Equitable Maxims

Around the equitable doctrines, Equity built up some basic principles, - some truths or rule called maxims.

Some examples of the maxims of Equity are

1) Equity follows the Law

Equity developed Equitable Estate in real property, borrowing the rules which applied to legal Estate. However, equity will depart from the law where conscience calls for it.

2) Equity acts in Personam

Equity does not interfere with Common law or its judgements. It merely directed that the individual, on equitable grounds, must not proceed to sue at law or enforce a judgement already obtained at law. It acts on the conscience of the individual under pain or threat of imprisonment.
Rochefoucaulde v. Boustead (1897), Smith v. Clay (1757), Penn v. Lord Baltimore (1750), Ewing v. Orr-Ewing (1883)

3) Equity looks at the Intent, rather than form; Walsh v. Lonsdale *(1882)*
4) Equity looks on that as done which ought to be done; Howe v. *Lord Dartmouth (1802), Walsh v. Lonsdale (1882)*
5) He who comes to equity must come with clean hands; Webster v. *Cecil (1861), Overton v. Bannister (1844)*
6) He who seeks equity must do equity: Lodge v. National Union *Investment Co. (1907)*
7) Delay defeats equity; Allcard v. Skinner (1887)
8) Equity aids the vigilant and not the indolent etc; Mills v. *Haywood (1877)*
9) Equity does nothing in vain; Re Hummeltenberg (1923)
10) Equity does not suffer a wrong to be without remedy.

These are illustrative only. There is no certainty as to the number of equitable maxims, but there are much more.

SELF ASSESSMENT EXERCISE 2

i. What is the basis of Equity jurisdiction?
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…………………………………………………………………

ii. What maxim lies at the foundation of equitable jurisdiction?
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3.3 Equity in Nigeria

Ordinance No. 3 of 1863: Introduced into Lagos Colony, the principles of English Courts including the doctrines of equity.

Both Supreme Court Ordinance No.4 of 1876: and the Supreme Court Ordinance of 1914 permitted the Supreme Court to apply rules of Equity and Common law and where both conflict, in respect of the same matter, equity prevailed. The ordinances also provided that the Courts shall apply local laws and customs "not repugnant to justice, equity and good conscience". Native Courts and other minor Courts applied local laws and customs "not opposed to natural morality and humanity. The High Court Law, 1955 (Western Nigeria) also provided for enforcement of native laws and customs when "not repugnant to natural justice, equity and good conscience.

Although, these provisions have been repealed, they have largely been reproduced in modern local legislations: e.g. The Supreme Court Act 1990, The Magistrate courts Law of States, The High Court Law of each State etc.

3.3.1 Equity Today

In Smith v. Clay (1767), the Court said that In the early times, nothing could call forth the Court of Equity into activity but conscience; and when these were wanting, the court was passive and did nothing. By the 19th century, equity had developed into a system based on rules and precedents rather than on individual conscience. Its authority as a source of law began to rest on the doctrine of binding precedent, otherwise known as stare decisis.

The doctrine of stare decisis is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudication, unless it be for urgent reasons and in exceptional cases. The rule became "keep the rationes decidendi of past cases". The result is that what began as irregular formless process of petitioning the crown became a regular system of courts with recognized jurisdiction.

Most conservative Judges apply law as it is even when it ceases to be in consonance with social and economic realities and the pertinent question that arises is whether equity can still be relied upon to align the law with socio-economic changes of the time.

In Re Telescriptor Syndicate Ltd (1903), Buckley was heard to say:
This court is not, as I have often said, a Court of Conscience, but a Court of law.

But Lord Denning in "Need for new Equity" has said that Equity is not a closed shop.

Action for fraud and careless misstatement. In early law, a careless misstatement of fact resulting in pecuniary loss did not constitute deceit. The law is silent on the question whether such a statement might be actionable on the alternative ground of negligence. In Derry v. Peek *(1889), a statute permitted a tramway company to use steam power with* the consent of the Board of Trade. The directors falsely stated in the prospectus that the Statute gave the company the right to use steam power. On the basis of this statement, Plaintiff bought shares and suffered pecuniary loss. He sued in fraud (action of deceit) for damages.

The House of Lords held that the directors were not liable because they honestly believed what they said in the prospectus to be true. A person can only be liable for fraud where the false statement he has made was made

(i) knowingly
(ii) without belief in its truth or
(iii) recklessly, careless whether it is true or false

In essence, a careless misstatement of fact resulting in pecuniary loss did not constitute deceit.

Le Lievre v. Gould (1893), Candler v. Crane, Christmas & Co (1951) and Old Gate Estate Ltd. v. Toplis (1939) and Heskel v. Continental *Express Ltd. (1950) have confirmed that "negligent misstatement can* never give rise to a cause of action". The opinion is now strong that these cases were wrongly decided. Parliament also passed the Misrepresentation Act, 1967 and The Companies Act 1948 (UK) nullifying the effect of Derry v. Peek.

However, in Hedley Bryne v. Heller & Partners (1963), the House of Lords found the defendant liable for pecuniary damage caused to a third party by their careless misstatement. The law Lords recognised that liability for fraud and for negligent misstatement are not co-extensive. Liability lies on fraud where a statement is made intentionally or recklessly and in certain circumstances for negligent misstatement.

In Central London Property Trust Ltd. v. High Trees Houses Ltd (1956), the Court estopped a party to a contract from going back on his words and from withdrawing a promise he has made in circumstance where the promisee has acted in reliance to it.
Thus the infliction of damage, pecuniary and otherwise by means of careless false statements has received piecemeal recognition.

It is probable, in the circumstance that the principles of equity may yet apply but only where there is no express rule either of English law or local customary law.

4.0 CONCLUSION

You have concluded the units on equity with particular note on the effects of the Judicative Acts 1873 – 1925. You noted what happens when common law and equity conflict. How did the courts resolve this? Try to be conversant with the decided cases on the topic. It will yield good dividends if you do.

5.0 SUMMARY

i. We have concluded are discussion of the doctrine of Equity.

ii. You have learnt the different meanings of the word "Equity" as a system of natural justice and a system of rules by which the Chancery ameliorated the Common law defects.
iii. The basis of equity jurisdiction has been the conscience, bad faith, breach of confidence, or trust, fraud and want of remedies.
iv. The maxim that lies at the foundation of equitable jurisdiction is: Equity acts in personam; Equity will not suffer a wrong to be without remedy.

6.0 TUTOR MARKED ASSIGNMENT

Give account of the conflicts between Common law and Equity. Support your account with decided cases.

7.0 REFERENCES/FURTHER READINGS

Snell's: Principles of Equity

Martin, Hambury and Maudsley: Mode is Equity

UNIT 3 SOURCES OF LAW: JUDICIAL PRECEDENTS

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Judicial Precedents
3.1.1 Nature of Judicial Precedent
3.2 Ratio Decidendi
3.2.1 Obiter Dictum
3.3 Stare Decisis
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

The term "Precedent" has several connotations. There are precedents in conveyancing, in pleadings but our present focus is on "Judicial Precedent" as a source of law. A case appears to become a precedent only for such a general rule as is necessary to the actual decision reached, when shorn of unessential circumstances. It is the decision on which some authority is attached.

From the earliest time, it has been argued that Precedent is declaratory of existing law, rather than creating new law. This was based on the fiction that the Common law and customs of the realm was "locked up in the breasts of the Judges" to be drawn forth as and when required. Salmond has expressed the view that both at law and in equity the declaratory theory must be totally rejected if we are to attain to any sound analysis and explanation of the true operation of judicial decisions. Now, however, it is little denied that precedents both declare law and also make law. Since the latter half of the 18th century, the doctrine of binding force of precedent also has been recognized in the law courts. The result is that the study of many branches of law now resolves itself into the study of decided cases.

2.0 OBJECTIVES

- The objective of this lecture is that at the end, you should be able
- To define the terms: 'judicial precedent', 'ratio decidendi', 'obiter dictum', 'doctrine of stare decisis' etc.

- To demonstrate sound understanding of the background of judicial precedent as a source of law in Nigeria.

3.0 MAIN CONCLUSION

3.1 Judicial Precedents

May mean a decided case that furnishes a basis for determining later cases involving similar facts or issue. It is a judicial decision, which contains in itself a principle considered as establishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. It is also called Case Law or Judge-made Law. The inference one is likely to draw is that a judicial precedent is the making of law by a court in recognizing and applying new rules in the process of administering justice.

But judges are not legislators and the Court is not synonymous with the legislature. It is the province of legislature and legislators to make law and of the judges and Courts to interpret them, and declare what the law had always been. In the process judges may lay down a rule or principle of law, and still deny that they make law.

3.1.1 Nature of Judicial Precedent

When a dispute arises, it may be brought to Court for determination. At times the dispute before the Court may be what interpretation to give to a statutory or constitutional expression, considered to be doubtful meaning. Parties on both sides then call their witnesses one after the other. They testify. Documents may be examined. On conclusion, the Judge sums up the facts, addresses himself to the facts, and applies the law to them. He gives a verdict. The process may be punctuated with preliminary matters of law and the judge frequently has to rule on them as they arise. All these offer the Judge avenue to make authoritative pronouncement.

Precedents are not made in vacuo. In arriving at his decision, the Judge may adopt a deductive or inductive approach. Where there are fixed and certain legal rules governing the matter in dispute, judicial approach is merely deductive. Inductive method applies where there are no settled legal rules applicable directly by simple deduction. The latter offers greater potentiality to make law and tends to put the Court in position of a law making machinery. On this premise also, the realist’s definition of law as “the prophesies of what the Court do in fact”, becomes meaningful.

SELF ASSESSMENT EXERCISE 1

What do you understand by the Term: "Judicial Precedent"
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Types of Precedents:

There are two types of precedents

(i) Authoritative Precedent or Decision, which are binding. (See later)
(ii) Persuasive Precedents
- Decisions of superior courts that are not binding
- Textbooks and monographs

Since Nigerian Law is mainly to be found in Statutes, it can be said that disputes are decided on basis of law, rather than precedent. However, precedents make sense out of the language of the statute. They reconcile the irreconcilable statutory provisions.

Matthew Hale explained that judicial decisions do not make a law properly so-called (for that is the function of only the king-in-parliament) … they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is. The result is that certain law becomes comprehensive or intelligible when both Statute and Case law are read together. While Criminal law entirely depends on Statute, Contract and tort rests on Case law.

3.2 Ratio Decidendi

When it is said that a decision is binding or more fully a binding authoritative precedent, what is meant is that the principle of law on which the decision was based or the reason for the decision is binding. This principle is the ratio decidendi – "the reason for deciding"
Note particularly that the ratio decidendi consists only of the principle or rule of law on which the Courts decision is founded. It may by extension refer to:

(i) the rule that the deciding Court or Judge intended to lay down and apply to the facts

(ii) the rule that a later Court concedes him to have had the power to lay down. There are two steps involved in ascertaining the ratio decidendi of a case

(i) Determining all the facts of the case as seen by the Judge

(ii) Determining which of those facts were treated as material by the judge

The concrete decision is binding between the parties to it but it is the abstract ratio decidendi which has the force of law as regards the world at large (Salmond). Thus, the only thing in a Judge's decision, which is binding as an authority upon a subsequent judge, is the principle upon which the case was decided. (Sir George Jessel)

3.2.1 Obiter Dictum

Decisions in a case sometimes go beyond the facts of a particular case and may contain expressions for opinion on related matters. Such an expression may be intended to be a guide in a future case. It is a persuasive precedent in a future case and known as obiter dictum: - "something said in passing" or "by the way". In other words, obiter dictum is a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential, though it may be considered persuasive. Obiter dictum may compromise the following:

- a remark made or opinion expressed by a judge in his decision incidentally or collaterally and not directly upon the question before the Court.
- any statement of law enunciated by the judge or Court merely by way of illustration, argument, analogy or suggestion.
- Extra-judicial expressions of legal opinion.

Ratio decidendi and Obiter dictum

The ratio decidendi of a judgement is the principle of law stated in the judgement on which the decision in the matter is based. In contrast, a statement of law is obiter dictum, if it does not form the basis of courts decision in the case being tried; it does not bind, but at times enjoys persuasive force. An example is a dissenting judgement.

In Donoghue v. Stevenson (1932) Plaintiff-retailer bought and consumed a bottle of ginger beer and the question was whether the manufacturer owed the consumer a duty to exercise care in making of the ginger beer. It was held that he did. The reason is that the manufacturer must have contemplated that the ultimate consumer of the ginger beer might be injured if proper care was not taken so long as there is no probability of

an intermediate examination. Lord Atkin proceeded to formulate the 'neighbour principle'

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour and the lawyer's question 'who is my neighbour' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour: The answer seem to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

In this case, the neighbour principle, although a formidable principle enjoys only a persuasive authority. It is obiter.

A case cited may be binding in a subsequent case if both cases are materially identical. When a judge indicates that the case cited is not binding, he is saying that the material facts of that case and those of the present are different; and he comes to that conclusion by distinguishing both. Thus much of legal argument consists of producing past cases which involved the same facts.

SELF ASSESSMENT EXERCISE 2

Explain the terms

i. Ratio decidendi
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……………………………………………………………………
……………………………………………………………………

ii. Obiter dictum
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Give examples of each, using decided cases
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………………………………………………………………………….

3.3 Stare Decisis

Stare decisis means "to stand by things decided" or keep to the rationes *decidendi of past cases. It is a doctrine of judicial precedent that a Court* is bound to follow earlier judicial decisions of a superior Court in the same hierarchy, when the same points arise again in litigation. Simply put, the doctrine of stare decisis is that when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudication, unless it be for urgent reasons and in exceptional cases. Such exceptional reason, according to Lord Reid, may arise when the ratio decidendi of a previous case is obscure, out of accord with authority or established principle or too broadly expressed.

Stare decisis imposes an obligation on lower courts to follow the relevant decisions of superior Courts as a matter of law. The purpose is to make for certainty and stability in regard to the law in the absence of a system of codification. Lord Halsbury explained that if every doubtful question were to be allowed to be reconsidered, there would be great uncertainty in the administration of justice resulting in "disastrous inconvenience" London Street Tramways v. LCC (1898). However, Salmond has warned that the extent to which the doctrine of stare *decisis ensures legal certainty can be exaggerated.*

And Lord Wright aptly put his view this way:
"The instinct of inertia is as potent in Judges as in other people. Judges would not be less anxious to find and follow precedents than ordinary folk are. No Court will be anxious to repudiate a precedent. It will do so only if it is completely satisfied that the precedent is erroneous. If the Court is so satisfied, it is a humiliation which ought not to be put upon it to reproduce and perpetuate an error"

4.0 CONCLUSION

In this unit on judicial precedent, you learnt a few technical terms: ratio *decidendi, obiter dictum stare decisis etc. Judicial precedent as a source* of law lost primacy to statutes, and both have their merits and demerits which you are now aware of.

5.0 SUMMARY

This lecture is an introduction into judicial precedent. In it, we have attempted to define such terminologies as obiter dictum, ratio decidendi,

stare decisis etc. The Courts have also been described in brief in their hierarchical order.

In the next lecture, we shall delve into greater details and point out the merits and disadvantages of judicial precedent, as a source of law.

6.0 TUTOR MARKED ASSIGNMENT

1. Discuss the doctrine of “stare decisis”
2. What is the importance of the principle of ‘in pari materia’

7.0 REFERENCES/FURTHER READINGS

Blacks Dictionary

Obilade, O.: The Nigeria Legal System

Snells Equity

Martin & Ors: Modern Equity

UNIT 4 SOURCES OF LAW: JUDICIAL PRECEDENTS CONT'D

CONTENTS

1.0 Introduction
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3.1 Disadvantages of Judicial Precedent
3.2 The House of Lords
3.3 Judicial Committee of the Privy Council
3.4 National Courts
3.4.1 The Supreme Court
3.4.2 The Court of Appeal
3.4.3 The High Courts
3.5 Exceptions to the Rule
3.6 Precedents and Change
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Questions
7.0 References/Further Readings

1.0 INTRODUCTION

In the last lecture, we began the discussion of Judicial Precedent as a source of Nigerian law. We explained the different terminologies you are likely to come across as you make further progress on the topic. Examples of such terms are 'precedent', doctrine of stare decisis, ratio *decidendi, obiter dictum etc. You should familiarize yourself with the* terms.

In this concluding lecture on judicial precedents, we shall see what advantages judicial precedents have in relation to our laws. It makes for certainty, stability and predictability. It also has a number of disadvantages. Errors are perpetuated. A Rule of Law or principle may congeal too prematurely etc.

It is the higher Courts that establish the ratio decidendi for the lower Courts in the same hierarchy to follow. The doctrine of stare decisis, however is not absolute. There are occasions as we shall see when the Courts may legitimately decline to follow a ratio decidendi that has previously been laid down. The discourse will be rounded up with a brief reference to response of judicial precedent to socio-economic change in a dynamic society.

2.0 OBJECTIVES

At the end of this lecture, you should be able to demonstrate a full understanding of:

- Precedent as a source of law
- Its advantages and disadvantages
- The circumstances under which a lower Court may refuse to follow an authoritative precedent.

3.0 MAIN CONTENT

3.1 Disadvantages of Judicial Precedents

Judicial precedent has the effect of limiting judicial discretion. Unjust legal principle can continue in being for many years until a later case per chance makes it possible to limit its scope or a statute is passed to remedy the situation. This was what informed Jeremy Betham to describe judicial precedent as: 'dog's law', only known after events have taken place. That is to say that an individual who has behaved in a particular way may find himself a subject of costly "test case" so that the law can be ascertained for the future. It may even lead in some cases to a premature crystallization of rules when in fact they were still only in a formative stage. In effect, the future and healthy development of law is slaughtered on the altar of history. Furthermore, a judicial error may be perpetuated until rescue comes if at all from the legislature and public opinion perhaps through media activism.

Professor Goodheart also observed that:

> "there is obvious antithesis between rigidity and growth, and if all the emphasis is placed on absolutely binding cases then the law loses the capacity to adapt itself to the changing spirit of the times which has been described as the life of the law".

Maitland states:

> "it is perhaps the main fault of Judge-made law that its destructive work can never be clearly done of all vitality and therefore of all potent harmfulness, the old rule can be deprived, but the moribund must remain in the system doing latent mischief":

In order to avoid having to follow a binding precedent, judges and counsels may seek distinctions in the facts of cases. In some cases, such

distinctions have no real substance but have the effect of complicating the law or creating illogicality. The only theory on which it is possible for one decision to be an authority for another is as follows:

- that the facts are alike, or
- if the facts are different, that the principle which governed the first case is applicable to the variant facts.

The judge decides whether the situation was comparable or not. If it is, he must follow the earlier decision. If not, he states the ground on which he distinguishes the two.

SELF ASSESSMENT EXERCISE 1

Account for the following

i. The merits of Binding force of Judicial Precedent
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ii. The disadvantages of the binding force of Judicial Precedent
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Reported decisions have grown so great that it is only possible to ascertain what is law on a given topic by searching through a large number of law reports. Even if an area of law has been codified, case law then begins to develop around the interpretation of its individual sections.

3.2 The House of Lords

In Bright v. Hutton (1852) House of Lords confirmed that it cannot decide something as law today, and decide differently the same thing as law tomorrow; because they would leave the inferior tribunals, and rights of the Queen's subjects in a state of uncertainty. But the Lord Chancellor, Lord St. Leonard told his colleagues that they were not bound by previous decision they had given. Lord Campbell emphasised the absoluteness of this doctrine in Beamish v. Beamish (1961) where he said that the law laid down by a previous decision of the House of Lords is "clearly binding on all inferior tribunals, and on all the rest of the Queens subject. If it were not considered as equally binding upon your lordships, this House would be arrogating to itself the right of altering the law and legislation by its own separate authority."

But See St. John Peerage Claim (1915) and Viscountess Rhonddas *Claim (1922), where the House of Lords departed from its previous*

decisions. In London Street Tramways v. LCC (1898), the House of Lords firmly established the principle that it was bound by its previous decision. But it was prepared to depart from an earlier decision made in ignorance of existing Statute. In a Practice Statement 1966, Lord Gardiner, speaking for the Law Lords of Appeal said, "Their Lordships nevertheless recognize that the rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of law. They propose, therefore, to modify their present practice and, while treating former decisions of the House as normally binding to depart from a previous decision when it appears right to do so". The House of Lords has ceased to be longer bound to follow its own previous decisions.

3.3 Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council is an advisory Committee and the last Court of Appeal in Nigeria before 1963. Decisions of the House of Lords and of the Privy Council do not bind each other. Both respect each other's decisions and the decision in one could have persuasive influence in the other. The Privy Council's decision binds all Courts below it e.g. the West Court of Appeal, and the National Courts. National Courts, in general practice, also follow the decisions of Privy council on appeals from other countries where it is in pari materia with the case before them.

3.4 National Courts

These include the following:

3.4.1 The Supreme Court

The Supreme Court became the final Court of Appeal in Nigeria in 1963 when appeal to the Privy Council was abolished.

The Constitution 1999 has provided that no appeal shall lie to any other body or person from any determination of the Supreme Court. Thus the decision of the Supreme Court is binding on all courts in Nigeria but it is not in turn bound by decision of any Nigerian Court. It is not bound by its own previous decision nor by the decisions of the Privy Council after 1963, but it would normally feel reluctant to depart from either of them.

The practice of bindingness or non-bindingness of its own previous decision is not statutory. It appears therefore that the future action of the Supreme Court is not fettered. What it decides is law and binding until it is abrogated by the National Assembly. It can be said then that the

Supreme Court enjoys a measure of "Judicial sovereignty" comparable to some extent to parliamentary sovereignty.

Although judicial precedent is an indispensable foundation on which to decide what is the law, the Supreme Court recognizes that there may be times when a departure is in the interest of justice and proper development of the law. According to Obaseki, JSC, it is settled law that this court (the Supreme Court) has jurisdiction to depart from its previous decisions. It has been restated in Paul Odi & Anor v. Gbaniyi *Osafile & Anor (1983) where the court affirmed that there is unanimity* that the Supreme Court, as a court at the apex of the judicial hierarchy in the country, has the jurisdiction and power, sitting as the full court of seven justices to depart and over rule previous erroneous decisions on points of law given by a full court on constitutional question or otherwise. This is a confirmation of the authenticity of the statement that the Supreme Court is infallible because it is final but it is not final because it is infallible.

But we should not fail to mention that in criminal matters, prerogative of mercy supercedes the decision of the Supreme Court.

SELF ASSESSMENT EXERCISE 2

What is the implication of a declaration of the Supreme Court in Nigeria tat it is not bound by its previous decisions?
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3.4.2 The Court of Appeal

The Court of Appeal is bound to follow the decisions of the Supreme Court. All the other Courts similarly follow its decision. In Young v. *British Aeroplane Co. (1944) Lord Green said that the English Court of* Appeal is bound to follow previous decisions of its own as well as those of Courts of coordinate jurisdiction. This will not apply where the liberty of the subject is involved: (R. v. Taylor (1950)) or where the legal point in issue in the previous case had not been argued by both sides: (R. *v. Ettridge (1909)). The Court of Appeal is not bound by its previous* decisions where:

(a) there are two or more conflicting decisions
(b) though not expressly overruled, it is at variance with a decision of the Supreme Court.
(c) the precious decision was given per incuriam.

SELF ASSESSMENT EXERCISE 3

Discuss the role of Court of Appeal in the operation of the doctrine of precedents.
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3.4.3 The High Courts

The High Courts and other sub-ordinate Courts are bound to follow the decisions of Courts superior to them in the hierarchy and their decisions are binding on the inferior courts provided also they are in the same hierarchy.

3.5 Exceptions to the Rule

A Court may decline to follow a binding precedent in a situation where:

i. it is able to distinguish the case before it on its facts from the facts of binding precedent. Foakes v. Beer (1884) and the *High Tree Case (1947)*
ii. the ratio in the precedent is considered to be obscure.
iii. the precedent is in conflict with a fundamental principle of law; Younghusband v. Luftig (1949), Young's Case
iv. there is split judgement, appeal being lost on the basis of the maxim "semper praesumitur pro negante: (things are always to be presumed in favour of he who denies.
v. the decision is reached in ignorance. In London Street Tramways *v. LCC, the Court was ignorant of some enactment or a rule having* a statutory force. Also see Re Dean (1889)
vi. cases are decided sub silento: Re Dean (1889)
vii the precedent was arrived at "per incuriam" i.e. through lack of care as where the precedent, which would have affected the decision was not brought to the attention of the Court. Young v. *British Aeroplane Co. (1944), Fitzsimmons v. Ford Motors Co. (1946)*
viii. the Court declares that the ratio of the precedent cited was too wide (treating part as obiter) or decided on its own special fact.
ix. the previous decision is one of several conflicting decisions made by a court at the same level (one becoming precedent and binding, others obiter and not binding). Younghusband v. *Luftig (1949)*

x. the rule of law contained in the previous decision is overruled either by statute or a higher court. Hack v. London Provident *Building Society (1883), Curtis Moffat Ltd. v. Wheeler (1929)*

Even when faced with any of the above situations, which may call for a departure from previous decision, it is not automatic that the superior court must depart or follow earlier decision as the case may be. The Judge has to weigh a number of conflicting factors, namely:

- The need to render law definite, certain, stable
- Evils of uncertainty
- Whether existing law is absolute or inoperative having become "animated by a different spirit and assumes a different course"
- Justice of the matter: sometimes, common error may stand for justice
- Anxiety that the law should grow, or be perfect
- Benefit of modification,
- Rights of parties who may have acted on the faith of cases of long standing.
- Eminence of Judge(s) who decided the earlier case.

In Admiralty Commissioners v. Valverda (owners) 1935, the House of Lords declined to reverse a decision of long standing where serious injustice would arise in so doing.

SELF ASSESSMENT EXERCISE 4

In what circumstances may a Court decline to follow a judicial precedent laid down by a superior Court.

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Explain the effects in relation to precedents, of

(a) Over-ruling (b) Reversal

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3.6 Precedents and Change

But how, we may ask, does law respond to changing circumstances, e.g. changes and usages of merchants and commercial transactions? The National or State Assembly and the Nigerian Law Reform Commission are ill-adapted to modify, repeal or promulgate laws as and when required by changing circumstance. Salmond states: “A binding precedent cannot be disregarded on the ground that it was based on industrial and social conditions that have changed”. In Bright v. Hutton *(1852) Lord Campbell said “after there has been a solemn judgement of* the House, laying down any position as law, this is binding upon the rights and liabilities of the Queen’s subjects until it is altered by the Act of Commons, the Lords and the Sovereign on the throne”. The Law Lords decision in Radclifte v. Bibble Motor Service (1939) was abolished by the Act of Parliament.

In appropriate cases, Courts resorted to subtleties, finding grounds however tenuous for distinguishing the case before them from a similar case, which they had already decided.

See

(i) Bradley v. Carritt (1903) and Kreghinger v. The New Patagonia *Meat Company (1914)*
(ii) Chandler v. Wbester (1904), French Marine Case, 1921 and *Fibrosa’s Case 1943)*
(iii) Foakes v. Beer (1884) and The High Trees Case (1947)
(iv) Shaw v. Gould (1865)
Re Bischoffsheim (1948)
(v) Earl v. Lubbock (1905) and Donoghe v. Stevenson

4.0 CONCLUSION

In concluding the units on judicial precedent you learnt that the courts would not readily repudiate a precedent. They may do so if certain conditions prevail. You should by now be familiar with such situations and how courts go about it. Attempt to recall specific cases of departure from precedents. While courts in the same hierarchy may be bound by precedents, other courts are not. Congratulations if you are able to locate the situation of different courts in your state. You all recall that the Supreme Court is infallible because it is final but not final because it is infallible, hence its decisions bind all courts in Nigeria except itself.

5.0 SUMMARY

Precedents are either authoritative or persuasive. It is possible for a precedent to be persuasive in one Court and authoritative in another. See *DPP v. Smith (1961). Decisions of Superior Court that are not of the* same hierarchy are not binding. Judgements of Courts of coordinate jurisdiction do not bind one another and it requires a Superior Court to resolve any conflict between their decisions. A precedent, once overruled, ceases to be law retroactively except in matters already res *judicata or matters of Accounts which have been settled (Henderson v. Folkestone Waterworks Co. (1885). Conversely, a precedent that is* repealed by stature terminates on the date of repeal.

Precedents apply only among Courts in the same hierarchy. The decision of the Supreme Court binds all courts in Nigeria. It is no longer bound by the decisions of the House of Lords or the Judicial Committee of the Privy Council but there is no gain saying that it would treat any of their decisions with the greatest respect and rejoice if it could agree with them. The Court of Appeal is bound by its own decisions, but the High Court is not.

Judicial precedent has tremendous merit. It enjoys a great measure of fidelity, certainty and reasonable preducability and consistency. According to Lon Fuller

“one may often accord respect to a precedent not by embracing it with a frozen logic but by drawing from its thought the elements of a new pattern of decision”.

Judicial Precedent is a material source of law and wields considerable influence on growth of law.

6.0 TUTOR MARKED ASSIGNMENT

1. Do you consider that the doctrine of binding force of precedents should be abolished?
2. In any system where judicial precedents are authoritative, the courts are engaged in forging fetters for their own feet. (Salmond)

7.0 REFERENCES/FURTHER READINGS

Blacks Dictionary

Obilade, O: The Nigeria Legal System

Snells Equity

Martin & Ors: Modern Equity

UNIT 5 SOURCES OF LAW: MISCELLANEOUS

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Subordinate Legislation
3.1.1 Sub-Sub-delegation
3.2 Treaties
3.3 Conventions
3.4 Law Reports
3.5 Text Books
3.5.1 Journals
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Questions
7.0 References/Further Readings

1.0 INTRODUCTION

This is the concluding lecture on the Sources of Nigerian Law. Here we are concerned with miscellaneous sources which, hitherto, have not been mentioned. Even so our discussions do not pretend to exhaust all the sources of law. We have at best dealt with the most important. You probably will get more as you read up any standard textbook on the Nigerian Legal System.

2.0 OBJECTIVES

The objective of this lecture is that you be acquainted with rules or orders from sources which are often ignored yet they are acquiring growing importance as sources of law. You also would have recognized the position of textbooks as a source of persuasive authority.

3.0 MAIN CONTENT

3.1 Subordinate/Delegated Legislation

This is a rule or order, having legal force, issued by an Administrative Agency or a local Government. It is also termed Agency Regulation or Subordinate Legislation.

The methods of effecting a delegated legislation are too numerous to mention. But they can be classified according to which authority has been given the powers to issue the delegated legislation; namely:

(i) Public Corporation
(ii) Order in Council
(iii) Local Authorities
(iv) Ministers
(v) Rules Committees
(vi) Sub-Delegated Legislation

Thus, a delegated legislation is an enactment by some official or body other than the National or State Assembly. However it can be repealed by the body, which enacted it or by the Legislature.

Examples of Delegated Legislations are:

(i) Measures passed by colonial legislature
(ii) Orders-in-Council
(iii) Rules and Orders issued by Minister
(iv) Local Government By-Laws
(v) Rules of Court Procedure by the Rules Committee

The Rules enacted by these bodies are delegated legislations and have force of law and are sources of the Nigerian Law.

3.1.1 Sub-Delegation and Sub-Sub-Delegations

The general rule is delegatus non-delegare (a delegate can not re-delegate). Sometimes however, an enabling Statute may permit the person or body to whom it has granted certain powers to delegate also to a third party and so on and so forth. When that happens, there is said to be sub-delegation or sub sub-delegation and delegation and legitimate orders issuing from exercise of such sub-delegation or sub-sub delegation have the force of law.

SELF ASSESSMENT EXERCISE 1

i. What do you understand as “delegated legislation”?

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ii. What are the advantages and disadvantages of delegated legislation?

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3.2 Treaties

A treaty is an international agreement concluded between states in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Blacks Dictionary described it as a formally signed and ratified agreement between two nations or sovereigns, between two or more States in written form governed by International Law. It is not only a law in each State but also a contract between the signatories. There are a variety of names, which can be and sometimes are used to express the same concept as treaty; e.g. accord; convention, covenant, declaration, pact, protocol, act, charter and concordant.

Treaties are a more direct and formal method of International Law creation. By means of treaties, nations terminate wars, settle disputes, acquire territories, determine special interests, establish alliances and create international organizations. Rules which emerge as between States pursuant to a treaty are part of sources of Law in Nigeria. Treaty law is the proposition that treaties are binding upon the parties to them and must be honoured or executed bona fide.

The question whether a Treaty constituted a binding agreement would depend on "all its actual terms", and the circumstances in which it had been drawn up and on the situation involved in the case among other things.

SELF ASSESSMENT EXERCISE 2

Account for the formulation, validity and termination of treaty.

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3.3 Conventions

A Convention is a generally accepted rule or practice, usage or custom, which has become binding. The National and State Assemblies, or some particular trade, for example, have established practices and are expressly or presumed to be incorporated into legal transaction. For example, He who makes a contract in any particular trade, or in any particular market, is presumed to intend to conform with the established usages of that trade or market, and is bound by those usages which accordingly are read into contract".

The Law implies certain terms into contracts to complement expressed intentions. Some times the law calls it presumed intentions.

Conventions develop first as a question of fact: whether or not there is a particular usage. It grows as the Court begins to take Judicial Notice of the particular trade customs, practice or conventions. In some cases, the Case Law which has recognized a convention may become so notorious that it is embodied in an Act or Statute. Bills of Exchange Act is an illustration. However many conventions are not so enacted but are recognized and are required to meet the following conditions

(i) It must exist
(ii) It must be legal
(iii) It has not been expressly excluded
(iv) It must be known

Convention is a living Source of Law. See Bechuanaland Exploration *Co. v. The London Bank (1898)*

SELF ASSESSMENT EXERCISE 3

Define "Convention" and explain your definition.
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3.4 Law Reports

There are a number of law Reports and they serve as a Source of Law. A few will be discussed here.

1) The Nigerian Law Report (NLR)

These Reports contain important decisions of Superior Courts, during the period 1880-1947. By superior Courts at the time, we mean:

(i) the divisional Courts
(ii) the Full Court
(iii) the Judicial Committee of the Privy Council (simply called The Privy Council)

The decisions of inferior Courts were not published. These courts were Magistrates, Provincial Courts and Native Courts. Now they are magistrate and divisional courts, customary or Sharia, and native courts.

2) West African Court of Appeal (WACA)

The Supreme Court (Amendment) Ordinance, No. 46, 1933 substituted the West African Court of Appeal for the Full Court as ultimate judicial arbiter in the then British West Africa, next to the Privy Counncil. This Court had been established for Sierra Leone by an Order in Council of 1867. At the time, appeals in the Colony of Lagos lay to the Privy Council from the Supreme Court, (Order in Council of 1877). It was not until the passing of the West African Court of Appeal Ordinance No. 47 of 1933 that appeal began to i.e. from decisions of the Supreme Court to the West African Court of Appeal and from there to the Judicial Committee of Privy Council. Since 1933, the West African Court of Appeal also published its Reports. The West African Court of Appeal Reports covered the period 1934-54 and Report of appeals from the Supreme Courts of the Gold Coast, Sierra Leone, Gambia and Nigeria – all former British colonies in West Africa.

3) Judicial Committee of the Privy Council

Since 1933, Appeals lay from West African Court of Appeal to the Judicial Committee of the Privy Council and the cases heard before it began to be published in the Appeal Cases of Law Reports in England. Some of them were reprinted in the Nigerian Law Reports.

4) State Law Reports

Many States of Nigeria have their machinery and Form for printing in series, the Law Reports of Cases decided in their States or emanating from their States; Examples are:

Lagos Law Reports (LLR)
Northern Nigeria Law Reports (NNLR)
Western Nigeria or Western States Law Reports (WNLR or WSLR)
Eastern Nigeria Law Reports (ENLR)
East Central State Law Reports (ECSLR)
These are illustrations only, State Reports exist in virtually every State of the Federation.

The Federation of Nigeria also has its reports covering important cases decided at the Court of Appeal or the Supreme Court. An example is All Nigerian law Reports (All.NLR or ANLR)

5) Private Reports

Private Law Reporting has been known in Nigeria since the 19th century. Examples of these are:

P. Awoono-Renner Reports, Notes of Cases etc in the Gold Coast and Nigeria.

H.W.H. Redwars Comments on some Ordinances of the Gold Coast Colony with Notes on decided cases including some Nigerian cases

J. A. Otumba – Payne's Lagos Almanak

Today private law reports have improved considerably in number and in quality. Example is the Gani Fawehimi's Nigeria Weekly Law Reports (NWLR). Judgements of the Supreme Court of Nigeria by Lawbreed Ltd., etc. These law reports are cited in law Courts, Journals and Text Books and constitute a Source of law enjoy persuasive authority in Nigerian Courts.

SELF ASSESSMENT EXERCISE 4

Enumerate the Private and Official law Reports that you know.
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3.5 Text Books

The various Law Reports in Nigeria are records of the same cases in different styles. They may not be readily available. Text books and monographs help to fill the gap and they attract persuasive authority of officially reported decisions of superior Courts.

You would recall that Common Law is part of our Law. It is unwritten. Ancient books were consulted and cited as authority. Examples were:

(i) De Legibus et Consuetudinibus Angliae by Glanvil.
This was written in the 12th century and represented a comprehensive state of common law. it was regarded as first scientific Treatise on English Law.
(ii) De Legibus et Conscientudinibus Angliae & A Note Book by Bracton
(iii) Romanism: Pleas of Crown (Criminal Matters), Roman Laws of Bailment
(iv) Coke's Institute of Laws of England
Coke determined the course of the development of more modern law and his works are authority.

(v) Blackstone's Commentaries on the Law of England is still cited today and they enjoy strong persuasive authority in Nigeria.

On the local scene some of the Text books and monographs enjoy some measure of authority. Examples are:

- Ward Price: Land Tenure in the Yoruba Provinces 1939
- Dr. Meek C. K: Law and Authority in Nigeria 1941
- Dr. Johnson O.: History of the Yorubas 1921
- Ruxton F.: Maliki Law, 1916
- Folarin C.: Native Law and Custom in Egba Land
- Ajabafe A.: Law and Customs of the Yoruba People 1924
- Irving R.: Titles to Land in Nigeria, 1916
- Otumba Payne J.: Lagos and West African Almanak 1875-1894
- Dr. Azikiwe N.: Land Tenure in Northern Nigeria, 1943
- Justice Coker GB.: Family Property Among the Yorubas 1938
- Dr. Elias, T.: Nigeria Land Law and Custom 1951-62
  Impact of English Law upon Nigerian Customary Law 1958

The list is not exhaustive but illustrative.

3.5.1 Law Journals

Nigerian Lawyers individually or in groups do undertake publications of Review of decided cases. They also publish Results of Researches into topical legal issues and are consulted.

Examples are:

The Nigerian Law Journals
The Nigeria Law Quarterly Review.

4.0 CONCLUSION

This unit considered miscellaneous sources of Nigerian laws, which in the main are secondary. Treaties are growing in importance subordinate legislations are increasing in response to political and socio-economic demands. Conventions remain a neglected source of law which should not be. Suffice it to say that it is not possible in this course to exhaust the sources of law but what you have learnt in this module is sufficient for your present programme.

5.0 SUMMARY

You have concluded your study of the sources of Nigerian laws. The sources of Nigerian law are inseparable from the sources of English Law. This can only be explained in terms of logical aftermath of a long

consolidated occupation, control and subjugation by the alien metropolitan power, despite its benevolence.

6.0 TUTOR MARKED ASSIGNMENT

1. Consider the role of text book writers as creators of persuasive precedents.

7.0 REFERENCES/FURTHER READINGS

Blacks Dictionary

Obilade, O.: The Nigeria Legal System

Snells Equity

Martin & Ors: Modern Equity

MODULE 5

Unit 1 Construction and Interpretation of Statutes
Unit 2 Literal Rule
Unit 3 Mischief Rule
Unit 4 Ejusdem Generis Rule
Unit 5 Other Rules of Construction and Interpretation of Statutes and Interpretation of the Provisions of the Constitution

UNIT 1 CONSTRUCTION AND INTERPRETATION OF STATUTES

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
- 3.1 Definition of terms
  - 3.1.1 Construction
  - 3.1.2 Interpretation
  - 3.1.3 Construction and Interpretation Distinguished
- 3.2 Statute
  - 3.2.1 Necessity for Construction and Interpretation
  - 3.2.2 Guidelines in Legal Draftsmanship
- 3.3 Approach to Construction and Interpretation
  - 3.3.1 Analytical Approach
  - 3.3.2 Functional Approach
  - 3.3.3 Progressive Approach
  - 3.3.4 Unified Contextual Approach

4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Questions
7.0 References/Further readings

1.0 INTRODUCTION

This is our first lecture on the rules of judicial construction and interpretation of Statutes. In early times each Government Department employed its draftsman. Today, Statutes are drafted by Parliamentary Counsels or private legal practitioners knowledgeable in legal draftsmanship.

Ideally, the draftsmen of the Statutes are required to use the minimum number of words consistent with clarity of meaning. This idea has not always been the case. There has always been a dichotomy between

printed words and the dictates of reasonableness; and the task of striking and preserving a balance have continuously tasked the Nigerian judges. In this regard the Supreme Court seems to recognize or adopt the need to give words a broad meaning except where the context indicates that narrower meaning was called for.

2.0 OBJECTIVES

The objective of this lecture is that at the end, you should:

- Know the meaning of Construction and Interpretation and their essence.
- Appreciate the challenges before the Court – necessity to meet the ends of justice; and enforce "today" the Will of the legislators as gathered from the words used in the Statutes "some centuries ago".
- Differentiate between analytical approach from functional approach and unified contextual approach from progressive approach and chart your own path.

3.0 MAIN CONTENT

3.1 Definition of Terms

3.1.1 Construction

Judicial Construction is the process of interpreting or explaining the sense or intention of a writing, usually a Statute. Construction, as applied to written law, is the art or process of discovering and expounding the meaning and intentions of the Legislators with respect to its application to a given case. This applies especially where the intention is doubtful either by reason of apparently conflicting provisions and direction or by reason of the fact that the given case has not been explicitly provided for in the Statute.

3.1.2 Interpretation

This is the process of determining what a Statute or a legal document means: the ascertainment of its meaning. Interpretation is the art or process of explaining and expounding the intended significance of the language used in the written law; that is the meaning, which the lawmakers designed it to convey to the public.

Rupert Cross says there is more to interpretation in general than the discovery of the meaning attached by legislators to their words. Even if, in a particular case their meaning is discoverable with a high degree of

certitude from external source, the question whether it has been adequately expressed remains a thorny issue.

3.1.3 Construction and Interpretation Distinguished

Some modern works have drawn a distinction both Construction and Interpretation. For example William Lile says that there is perhaps such a distinction etymologically. Some writers have treated interpretation as:

(i) something, which is only called for when there is a dispute about the meaning of a Statutory word or expression. On the other hand they regarded Construction as:

a) a process to which all Statutes, like all other writings, are necessarily subject when read by anyone, or

b) a process which mainly relates to the ascertainment of the intention of the Legislators.

Other writers have used both words interchangeably. However, there has been no explanation of the distinction between interpretation and construction. It had not been inferred from matters dealt with, under each head. It has not been accepted by the profession. The distinction, if any, lacks an agreed basis. For practical purpose also, any such distinction had been ignored because the real object of both construction and interpretation is merely to ascertain the meaning and the Will of the lawmaking body in order that it may be enforced.

SELF ASSESSMENT EXERCISE 1

Explain the terms:

(a) Construction (b) Interpretation

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3.2 Statute

Statute means the laws that are embodied in:

(i) Acts of the National or State Assembly or
(ii) Orders issued by Government Departments or Ministries by virtue of powers conferred on them by Statute.

3.2.1 Necessity for Construction and Interpretation

Statutes have been described as Mere skeletons and bare bones. For an illustration: when the Legislature says that certain things be done within a "reasonable time" or without "unreasonable delay". What exactly does the Lawmaking body mean? Statute has not defined the term "Reasonable" or "Unreasonable". Through interpretation which the Court ascribes to them, they acquire life and meaning and become operative and enforceable. Most of the laws applying in Nigeria are codified and written and thus putting on the Court an onerous duty of construction and interpretation.

Drafting of Statutes, as important as it, has not been treated with the seriousness it deserves. In the early times each department employed its draftsmen. They may choose to use words or phrases of wide meaning; or omit words or expressions they believe were necessarily implied. Statutes were therefore open to confusion, ambiguity and much overlapping. The duty devolves on Parliamentary counsels in modern times but they are few, ill-equipped and poorly remunerated. They have their problems as well – they are haunted by fear of legal challenge, and criticism particularly when drafting politically contentious legislations.

Statutes are difficult to draft. This problem has been compounded by the increasing volume of legislations being passed by the lawmaking body in respond to the dynamism of the society and to its rapid development. It is less surprising therefore that some statutory expressions are inelegant, or improper. They omit to define the terms as used and at times when they do, they may be inaccurate or inadequate. "Ill-penned enactments, put the judges in the embarrassing situation of being bound to make sense out of nonsense and to reconcile what is irreconcilable": *(per Lord Campbell in Fell v. Burchett 1857)*

Intention of the Statute or of the lawmakers, at the time of passing the Statute, may not always be clear. A way has to be contrived to reach that intention. (See Awolowo v. Minister of Internal Affairs (1962)

The interpretation of statutory expression will always be different so long as words are different. Some words have multiple meanings and sometimes depend on the context in which they are used. Some change with time. New words keep creeping into usage, for example the question whether "linoleum" is to be deemed "furniture". Wilkes v. *Godwin (1923) Scrutton, LJ confessed: that he "never gives a decision* upon the Rent (Restriction) Acts with any confidence".

The style of Statutes has also differed from age to age and swings from one extreme to the opposite extreme. In early times Statutes were

obscure and terse in meaning. By the period 16th to 18th centuries, statutory language became verbose.

Disputes which come before the Court for adjudication have increased tremendously and are various and differ from one case to another. This gives rise to numerous sometimes conflicting legal problems.

Lord Denning explained it all saying:

"it must be remembered that it is not within human powers to foresee the manifold set of facts which were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were"; (Scaford Court Estates Ltd. v. Asher (1940)

Modern life in increasingly complex and laws must of necessity reflect its political, social, and economic situations which are themselves so complicated that "laws cannot in any language or in any style be reduced to kindergarten level, any more than can the theory of relativity". The problem is worse for a society like ours with a literacy level of 45.0-55.0 per cent.

Words have meaning. They are raw materials of the law, the tools of Legal Practitioners and of the Judges. Some words have diverse meanings and particular meanings in particular circumstance. Sometimes, Statutory expressions are brief and unable to cover every situation. At other times, they are ambiguous and wieldy. In their attempts to be comprehensive, lawmakers and draftsmen become over ambitious and this leads to imprecise statutory expressions.

At times, statutory provisions are faced with new situations, which the lawmakers did not anticipate. Examples are advent of new technology or new invention. This imposes a challenge as to how and to what extent existing laws should take cognizance of such development, which were not in contemplation when existing laws were enacted. What should be the appropriate judicial attitude towards reception of evidence of Internet and computer communication or use of breatherlizer in case of drunken driver in Nigeria. It seems impossible for the law making body to think of all possible situations that may arise in relation to a particular matter at any time. Yet the law must be devoid of hardship, improper application and enforcement of law and the possibility of miscarriage of justice.

In these situations, the need may arise to fill certain gaps but who fills the gaps is not free from controversy. See Magor and St. Mellons RDC *v. Northern Corporation (1952), Also London Transport Executive v.*

Beeks (1958). Current Judicial Opinion is that judges cannot. Only the legislature can and this may take a number of years if at all. Okumagba *v. Egbe (1965)*

What about the printers devil or drafting error or slip. The matter is worse that the legislature has not deemed it fit to regulate the Judicial methods of statutory construction and interpretation. The result is that judges proceed with statutory interpretation and construction with all the diffidence, hesitancy and reservation that each subject demands.

Meaning of words depends on the context in which they are used and the purpose of judicial construction and interpretation remains one of importance – one of finding out the intention of the Legislatures, secreted in the wording of the Statute itself.

3.2.2 Guidelines in Legal Draftsmanship

Montesquieu has suggested certain guideline for draftsmen in order to minimize errors and problems of interpretation and construction: These are

1. The Style of enactment should be both concise and simple.
2. The terms chosen should be absolute, not relative as far as practicable and devoid of individual differences of opinion.
3. Laws should confine themselves to real and actual issues, avoiding the hypothetical.
4. Law should not be subtle since they are made for persons of mediocre understanding.
5. Law should not confuse the main issue by any exceptions, limitations, or modifications, except those that are absolutely essential.
6. Law should not be argumentative or controversial. The practice of giving detailed reasons for a law gives rise to avoidable controversies.
7. Law ought to be maturely considered, and of practical utility. They should not shock elementary reason and justice

SELF ASSESSMENT EXERCISE 2

Account for importance of Construction and Interpretation.
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What are the directives of Montesquieu to those framing Statutes.
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3.3 Approach To Construction And Interpretation

The approach of the Court to the problem of constructing or interpreting, a statutory word, phrase or clause may be:

1) Analytical Approach

This is applying the law as it is, not as it ought to be. It is also referred to as Authentic approach. It is adopted in the following situation.

(i) where the particular statute itself has expressly defined the expressions, words or phrases used.
(ii) where one Statute defines the meaning to be attached to some expressions, clauses, phrases or words in other Statutes
(iii) where the meaning of the Statutory expression etc has been established in a previous case.

The object of an analytical approach is the stability of the law.

2) Functional Approach

Here, the approach of the Court is to interpret the Statute by adopting either of the following two methods:

(i) where the drafters must have intended what the words used mean, the Court restricts itself solely to finding the true meaning of the words used. This course is almost identical with analytical approach.
(ii) where the judge has to find out the intention of the lawmaking body in order to give effect to it.

In this approach the Court may be guided by

(i) the social purpose of the Statute
(ii) the policy of the Statute
(iii) free intuition

In essence, the functional approach seeks to effect changes in the law so as to meet the needs and circumstance of the society. At all events, the emphasis is on effecting the intention and purpose of the Statute.

3) Progressive Approach

The Court treats all rules of Interpretation as valid, referring to them as occasion demands, and not assigning any reason for choosing one rather than the other.

4) Unified Contextual Approach

The Judge first considers the ordinary meaning of the statutory word or expression in the general context of the Statute before proceeding to consider other rules.

4.0 CONCLUSION

This unit marks the beginning of an important aspect of a legal system – how courts construct and interpret statutes. Note the term "Construction" and "Interpretation". What the court tries to do is to meet the ends of Justice by interpreting today the words of statute that were enacted, 20, 50 or 100 years ago. No law specifies what should be done or how it should, but it has to be done. However in doing so, the courts have developed certain canons some of which you have studied in this unit. Others can be met in subsequent units.

5.0 SUMMARY

This lecture has introduced to you, the construction and interpretation of Statute, and why this is necessary. You are now set to meet with the rules one after the other.

6.0 TUTOR MARKED ASSIGNMENT

What various approaches to Construction and Interpretation of Statutes have been or may adopted by the Courts.

7.0 REFERENCES/FURTHER READINGS

Thorton, G.: Legislative Drafting 1978

Bennion, A.: Statute Law 1990

UNIT 2 PRINCIPLES OF CONSTRUCTION AND INTERPRETATION OF STATUTES: LITERAL RULE

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 The Rule
3.2 The Dangers of the Rule
3.2.1 Exceptions to the Rule
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

"Some of our elaborate rules for judicial construction and interpretation of Statutes cannot well be accounted for except on the theory that Parliament generally changes the law for worse, and that the business of the Judges is to keep the mischief of its interference within the narrowest possible limits": (Pollock).

The implication is that the operation of the Statute very well depends on the functions of judges. The statute is a prescription of the National or State Assembly, but the reaction to it – its observance or non-observance - is a question of interpretation and construction. In Other words the function of interpretation and construction is to abridge the dichotomy between both.

Further, the volume of legislation in modern times has considerably increased. The result is that there is heavy work load on drafters and little time at their disposal.

Professor Allen is nearly right that "nothing could be further from the truth than the notion that the Parliament has only to express its will in appropriate form, and all legal and social consequences follow as the night the day". The contention that rules of Interpreting and constructing Statute law may be different from those for constructing and interpreting the Constitution adds more perplexity to an already complex issue. Except where otherwise indicated, what follows are the canons of construction and interpretation of Statute law.

2.0 OBJECTIVES

At the end of this lecture, you should be able to

- appreciate the primacy of literal rule
- recognize contrary view espousing a whollistic view of all the rules and choosing that which best serves the ends of justice.
- apply the literal rule
- evaluate the advantages and disadvantages of the rule.

3.0 MAIN CONTENT

3.1 The Rule: Literal Rule of Construction and Interpretation

It has been argued that the first and primary rule of construction and interpretation of Statute is the literal Rule and that it is only when this fails that other rules may be considered; not the reverse. The Literal Rule demands that statutory words be construed in their ordinary and popular meaning or in their usual grammatical sense. That is to say, the meaning of the statutory words as found in the dictionary. In commercial transaction, trade words in relation to a business attract what they ordinarily mean in the particular trade. Technical words are given their usual technical meaning. Statutory words or expressions are taken to have been used in the sense, which they bore at the time when the statute was passed.

Once the meaning of the statutory word or expression is clear, the judge is bound to give it that meaning. It is immaterial that such interpretation entails hardship, inconvenience, incongruity or repugnance. In British *Guardians v. British Waterworks (1914), it was held that a Statute must* be applied literally, even where such construction might lead to injustice, or some hardship.

In R. v. Bangaza (1960), the expression that called for construction and interpretation was S. 319(2) of the Criminal Code which provides as follows:
"where an offender, who in the opinion of the Court, has not attained the age of seventeen years has been found guilty of murder, such offender shall not be sentenced to death but shall be ordered to be detained"

At the time of committing murder, Bangaza was under the age of 17 years, but at the time of his conviction for murder he had attained the age of 17years. The Court, applying the Literal Rule of Interpretation, held that it was clear from the wording of the provision, that the relevant age was the age at the time of conviction and not the time of the offence.

The Trial Judge refused to take cognizance of other statutes which have prescribed – time of offence as the determinant factor, e.g. the Constitution (1960) Section 21-23, (1999) Section 36, The Criminal Code prescription as it were, would appear to be inconsistent with the Constitution because it provided for sentence in futuro but this has not been so declared. It took the law making body to resolve the apparent conflict by passing into law, the Criminal Justice (miscellaneous Provision) Decree No. 84, 1966, making the offence time, the deciding factor.

In interpreting and construing Statute, identical words are deemed to have the same meaning wherever they occur in the same statute. If a Statute itself provides special meaning for words used, or gives directives as to the technique or principle of law to be applied, the Court will be slow to depart from them.

The duty of Court is to apply the law, by construing and interpreting the language of the Statute in the normal sense. If it requires amendment, that is the business of the Nation or State Assembly. The lawmaking body passed the Criminal Justice (Misc Provision), Decree in order to correct the hardship that arose in the decision in R. v. Bongaza. The Misrepresentation Act 1967 (UK) was passed to nullify Derry v. Peek; the same way Decree No. 28 of 1970 was promulgated to nullify the Supreme Court decision in Lekanmi v. Att.-Gen (Western States). In *Adegbenro v. Akintola (1963), the Constitution, 1963 allowed a* Regional Governor to remove a Premier of the Region (now States) "If it *appears to him" that the premier no longer commands the support of the* legislature. The Judicial Committee of the Privy Council, disallowing the premier's appeal held that removal is subject only to the Governors unfettered discretionary power and not by vote of no confidence being passed by Parliament. The decision of the Privy Councilors in this case was annulled by amending the Constitution of Western Region, which amendment restricted the power of Government to remove the Premier from office to a resolution passed at the floor of the House of Assembly to the effect that the Premier no longer commands the support of his legislators.

Allen explains:

As precedent is only an instrument of judicial logic, and serves as a means to the ascertainment of a principle, so literal construction is only an instrument of the same process and serves for the ascertainment of the general purpose of the statute or ratio legis.

The term 'ratio legis' refers to "the scope or determining the cause of a Statute law. That is to say, the end or purpose which determines the

lawgiver to make it, as distinguished from the intent or purpose with which he actually makes it.

In Fisher v. Bell (1961), a Restriction of Offensive Weapons Act 1959 proscribed under pain of punishment, the "offer for sale" of certain weapons including "Flick knives". It was held that goods on display do not constitute an offer for sale.

The Court of Appeal (UK) applied the technique of Literal Rule of interpretation in the case of Prince of Hanover v. Attorney-General *(1955).*

In that case, Appellant, born in 1914 and descending from Princess Sophia claimed that he was a British citizen based on a British Statute of 1705. The Statute provided as follows:

"Princess Sophia, Electress and Duchess Dowager of Hanover and the Issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be, to all intents and purposes whatsoever, deemed, taken and esteemed natural born subjects of the United Kingdom".

The Court of first instance rejected the Claim on the ground that it was an absurdity to extend United Kingdom citizenship to descendants of the princess ad infinitum. In reversing the judgement of the lower Court, the Court of Appeal adopted the literal rule, giving the statutory expression its grammatical meaning. The expression was clear and unambiguous. Secondly, the Judge is required to take his mind back to the period immediately following the passing of the Statute and close his eyes to the effects arising from the fact that the Statute is now outdated and Parliament inadvertently did not repeal it.

In Aper Aku v. Plateau Publishing Co. Ltd. (1985), the plaintiff, who was the Governor of Benue State, sued the defendant for libel. It was contended for the Defendant that as the governor himself could not be sued by reason of his constitutional immunity, he could not also sue for equitable reasons. Rejecting this argument, the Court held that the Constitution only conferred immunity rather than a disability. The duty of Court is to interpret, and of the lawmaking body to amend.

Also in the Leading Smelting Co. v. Richardson (1762), it was held that the Statutory word "coal mine" appearing after 'Land' meant what it says: and excludes other mines even though "land" in its usual meaning includes all mines.

Tindal, CJ summed up the position in Sussex v. Pearage as follows:

"If the words of the Statute are in themselves precise and unambiguous, then no more than can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver"

SELF ASSESSMENT EXERCISE 1

(a) What is literal rule of construction and interpretation?

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(b) Explain how it has been applied with reference to decided cases.

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4. The Dangers of Literal Construction

The defects of the literal rule include:

- tendencies towards conservatism.
- A clug in the wheel of social change through the law.
- Likelihood of an interpretation that is contrary to the intention of the legislature
- Possibility of enforcing outdated but unrepealed law despite the realities of modernisation
- Construction may shock common sense and justice, more so, as it ignores the essence of keeping with the spirit of the time.
- Perpetuation of hardship, inconvenience and incongruity. For example, where a Statute of general application has been repealed in England because it has become anachronistic, the Statute is still may be law in the erstwhile colonies: See Young v. *Abina (1940), Ribeiro v. Chahin (1954). In Stephen v. Pedrocchi (1951), the Court held that a repeal of a Statute of general* application after the reception date in Nigeria does not make the law inoperative in Nigeria.

In British Guardians v. Bristol Waterworks (1914), the Court insisted that a Statute must be applied literally and words given their ordinary and popular meaning, even where the result of doing so might lead to injustice.

Sandiman v. Breach (1827)

The Court was asked to construe and interpret the Sunday Observer Act 1677 which provided as follows:

"no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any labour, business, or work of the ordinary callings upon the Lords' Day.

It was held that the term "other persons whatsoever" does not include a coach proprietor.

5. Exceptions To The Rule

The Court may dispense with the Literal Rule in the following situations.

(i) where the statutory expression in question is so faulty that no sense can be made of it at all.
(ii) if applying the rule is so unreasonable in the particular context that it cannot possibly be regarded as corresponding to the Will of the legislature.

SELF ASSESSMENT EXERCISE 2

Account for the merits and demerits of the literal rule. Are there exceptions to the rule.

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It is natural and desirable that Statutes should be understood. Where it is not, it is equally natural and reasonably desirable that there is an efficient tool of interpretation and simple devices to elucidate them. Bennion has said that there are a thousand and one interpretation criteria, and not all of them present themselves in anyone case but those that do yield factors that the interpreter must figuratively weigh and balance.

Two issues may be noted with regard to the application of literal rule. The argument that:

(i) the Court in all cases must first resort to the literal rule and it is only when this fails that the Court may have recourse to other rules.
(ii) the contrary view that the Court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it.

Incidentally, the Court is not under any duty to give reasons for choosing one rule rather than the other; and neither statute nor case law has given any guideline.

4.0 CONCLUSION

The methods which courts have used in interpreting and constructing statutory provisions are variously described as canons, rules or 'principles' of interpretation/construction. They are not in any particular order or priority. Each rule has its advantages and disadvantages. Whether the court should apply the literal rule first and foremost or take a holistic view of the rules and apply that which best serves the ends of justices is not generally agreed on. However, where the words are clear and unambiguous, the words themselves best declare the intention of the law givers.

5.0 SUMMARY

The Statute defines individual rights and obligation. When a dispute comes before the Law Court, the Judge determines the facts and applies the law to the facts. His objective is to ensure that the law is enforced properly and there is no symptom of miscarriage of justice.

To this end, the Judge must look at the words of the Statute, in relation to the issue before him. When the words or expressions are clear, and free from ambiguity, he applies the literal rule.

Literal rule involves the following rules:

(i) the words used should be taken in their usual meaning
(ii) they should be taken to be used in the sense which the word or expression bore at the time the Statute was passed.
(iii) the same words have the same meaning in the same Statute

The Judge does not enjoy the power to add to or remove or reconstruct or extend the statutory phrases or clauses in order to fit the circumstances of the particular case. Inadequacy or anachronisms are inadequate reasons for the judge to depart from this rule.

6.0 TUTOR MARKED ASSIGNMENT

What do you know of the Literal Rule of statutory Construction and Interpretation?

7.0 REFERENCES/FURTHER READINGS

Thorton, G.: Legislative Drafting 1978

Bennion, A.: Statute Law 1990

UNIT 3 PRINCIPLES OF CONSTRUCTION AND INTERPRETATION OF STATUTES CONT'D

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1.0 INTRODUCTION

This is a continuation of the last two lectures on Construction and interpretation of Statutes. A line of judicial decisions support the view that the first approach is to apply the literal rule and that it is only when this fails that other rules are considered. No one knows what goes on in judicial hearts in his commitment to justice, which tool he choose and in what order if any. In this lecture we shall discuss mischief and the Golden rules of Construction and Interpretation.

2.0 OBJECTIVES

The objectives of this lecture include:

- Conception classification of the term mischief
- Application of the Mischief Rule
- Application of the Golden Rule
- Differentiation between Mischief and Golden rules

3.0 MAIN CONTENT

3.1 Mischief Rule

This rule permits judges to construe and interpret the Statute in such a way as to suppress the mischief, which the Statute seeks to remedy and to promote the remedy. However, the Rule does not permit the Court to construe and interpret Statute by reference to extrinsic considerations

(Hilder v. Dexter (1902). It seems however that such a consideration is admissible not for the purpose of arriving at meanings of statutory expression but to explain the State of law at the time it was passed.

In Heydon's Case (1584), it was held that in applying the Mischief Rule, it is the duty of the Court to discuss and consider four things:

(i) The law as it stood before the passing of the Statute.
(ii) The mischief or defect for which the law did not provide prior to the Statute.
(iii) The remedy which the Statute has provided to cure the disease.
(iv) The true reason for the remedy.

The concern of the judge: at all times, is:

"always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions from continuance of the mischief and Pro privato commodo, and to add force and life to cure and remedy according to the true intent of the makers of the Statute pro bono publico".
The judge cannot add words that are not contained in the Statute so as to supplement the Statute. See also:

- *Eastern Photographic Materials Co. Ltd. v. The Comptroller General of Patents (1898)*
- London and County Property Investment Ltd. v. AG (1953)
- Barnes v. Jarvis (1953)

3.1 The Activist View

In Seaford v. Asher (1949), Denning LJ (as he has then was) expressed the view that a Judge:

> "must set to work on the construction task of finding the intention of the Parliament, and he must do this not only from the language of the Statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was laid down in Heydon's guide today".

In Magor and St. Mellons RDC v. Newport Corporation (1950) Lord Denning maintained the view that as judges:

"we sit here to find out the intention of Parliament and of minister and carry it out and we do this better by filling the gaps and making sense of the enactment than by opening it up to destructive analysis".

3.2 Conservatist Or Orthodox Stance

The orthodox view is expressed in the case of Magor and St. Mellons *RDC v. Newport Corporation (1950). When it came up on appeal to the* House of Lords. The Law Lords rejected the Activist stance. They criticized Lord Denning's statement as:

> "a naked usurpation of the legislative functions under the thin guise of Interpretation"

A similar view was expressed in Wimbledon Justices Self Assessment *Exercise Parte Derwent (1953)*

SELF ASSESSMENT EXERCISE 1

Differentiate between orthodox and liberal application of the mischief rule

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3.2 Mischief Rule and Tortuous Act

Suppose, the National Assembly, by an Act, created a statutory duty and prescribes a sanction (say a fine) for any breach:

(a) the Problem of construction is whether or not the National Assembly intended that the penalty it imposed shall be sole remedy?
(b) whether the injured party is entitled to claim damages since a breach of statutory duty is also a tort?

In answer to these problems, the Court must ascertain the policy of the Statute and, in doing so employ the mischief rule of construction and interpretation. [Groves v. Wimborne (1898)] [Compare: Gorris v. Scott *(1874)]*

Where a Statute may create a duty and imposes a fine for its breach, it is a question of construction and interpretation whether or not the lawmaking body intended the penalty be the sole remedy. In Groves v. *Wimborne (1898), the Factory Act prescribed a fine of £10 on a Factory* owner who failed to fence off dangerous machinery. The defendant in this case neglected the statutory duty, and plaintiff was injured. The

question was the extent of liability of the Defendant. Should it be the prescribed fine of £10 only. Could he or could he not also be liable to damages for tort?

The Court applied the Mischief Rule of interpretation in deciding whether, in the particular instance, a breach of statutory duty will amount to a tortious act for which the injured party may additionally recover damages in tort. It held that the Lawmakers could not have intended that the imposition of small fine should be sole remedy. In *Goriss v. Scott (1874), a Statute imposed a small fine for failure to* provide pens in order to segregate cattle on board. Defendant did not provide pens and plaintiffs cattle were swept overboard. It was held that the intention of Parliament was to segregate cattle to prevent the spread of disease among them and not to safeguard the cattle from dangers of rough seas.

In summary, the mischief rule of construction and interpretation permits the judge not only to consider how existing law stood when the Statute in question was enacted; the defect(s) (or mischief) for which it had failed to provide, the remedy proffered and the reason for the remedy but also to construe or interpret the statutory expression in a manner that suppresses the mischief and advances the remedy. The Court may refer to the legal history and the surrounding circumstance, in order to identify with the policy of the Statute.

SELF ASSESSMENT EXERCISE 2

What guidelines did Heydon's Case (1584) lay down for application of the mischief rule.
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3.3 The Golden Rule of Construction and Interpretation

This Rule was enunciated in the case of Beeke v. Smith (1836). In the case, by Baron Park, expounding the rule said:

> "It is a very useful rule in the construction of a Statute to adhere to the ordinary meaning of the words used and to the grammatical construction unless that is a variance with the intention of the legislature, to be collected from the Statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further".

The Golden Rule allows the Court first to adopt an analytical approach and to vary or modify the statutory expression only in extreme cases where such approach would lead to manifest absurdity or repugnance. The House of Lords extended the rule further saying that in employing the Golden Rule, the Court should place itself as nearly as possible in the situation of the drafters of the Statute: (Grey v. Pearson (1857)

The House of Lords, applying the Golden Rule in Re Sigsworth (1935) prevented a murderer from inheriting an intestacy of his victim, although he was her son; and only heir as he would have been entitled to do on a literal interpretation of the provision of the Administration of Estate Act 1925.

In Awolowo v. Federal Minister of Internal Affair (1962). Certain person, including Chief Awolowo were charged for treasonable felony; and he briefed Dingle Foot QC, a leading member of English Bar who was a non-Nigerian to defend him. Dingle Foot QC was prohibited from entering Nigeria by the Minister of Internal Affairs purporting to act under S. 13 of the Immigration Act. By this action, the Accused sought a declaration that:

(i) The Constitution allows him and he is entitled to be defended by a Counsel of his choice.
(ii) The Minister acted maliciously in prohibiting the Counsel of his choice from entry into Nigeria.

Dismissing the action, the Court held that the Immigration Act vested on the Minister an absolute discretion and his intention is irrelevant.

3.4 Intention of the Legislature

To give effect to the will or intention of the Legislature is the primary objective of judicial construction and interpretation. For purpose of this rule:

- The judge should admit an extrinsic evidence

- The judge should not call witnesses to testify as to speeches made at the floor of the National Assembly or State Assembly when the Bill was being debated or being passed into law.

- Intention of the lawmaking body must be gathered from the words it has used in the Statute itself.

- Statute must be considered as a whole ex antecedentibus et *consequentibus (i.e. by what has gone before and by what comes* after).

- This implication of this course is that certain words which may appear clear and unambiguous on the surface may turn out to attract different meaning.

- The judge must always keep in mind the general purpose of the Statute (also called the ratio legis)

- Judicial attitude should be res magis valeat quam pereat (i.e. rather let the thing be valid than perish). For example where a statutory expression in issue is susceptible to two interpretations –

- one leading to sensible results and make the Act valid while the second leads to absurdity or failure of the Statute through uncertainty, the Court should lean in favour of a construction and interpretation that would make the provision valid. It is construed "ut res magis" – it may have effect than be destroyed": Rayfield *v. Hands 1966*

- The Judge should not have regard to social or parliamentary history of the particular statute in question: Vacher v. London *Society of Compositors (1913)*

- The Judge must not take into consideration his personal knowledge of the import of the Statute. This is a departure from what obtained. In former times when judges were members of the Royal Council, legislators or draftsmen of legislations and construed statutes by their personal knowledge.

Judges may refer to the legal history of the statute. Speeches and debate at the floor of the National or State Assembly pertain to Parliamentary history and are not permissible aid. Legal history of a statute provides an external aid corresponding to the surrounding circumstances which may be prayed in and when construing written instruments": Viscountess *Rhonda's Case (1920)*

Note the distinction between the parliamentary history and the Legal history of a Statute.

The Golden Rule is a more cautious adaptation of the functional approach. It allows the Court to apply the ordinary meaning of the statutory words or expression as used in the Statute, unless doing so would result in absurdity, in which case, the Literal sense would be

modified. In R. v. Princewell (1963), the accused was charged with bigamy, a criminal offence committed by

> "any person who, having a husband or a wife, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife".

The offence is complete when a person who has married "marries" again while both spouses are living. The Court found as a fact that the accused first had a statutory marriage and later contracted a second marriage under the customary law. It was argued on his behalf that the word "marries" in the Criminal Code was intended to mean valid marriage as defined under the Code and did not extend to customary marriages. The Court applying the golden rule, held that "marries" was not to be interpreted as contracting a valid marriage but going through any form of marriage.

In the case of Prince of Hanover v. Att-Gen. (1955), a German Kaiser claimed British citizenship under a Statute, which conferred British nationality on the descendants of Princess Sophia. The trial Judge considered that strict application of literal rule would lead to the absurdity of conferring a British nationality on a German. He thereupon limited the provision to descendants of Princess Sophia in the lifetime of Queen Anne. However, the Court of Appeal adopting a functional approach reversed the decision on appeal.

Council of the University of Ibadan v. Adamolekun (1967)

In this case, the Court was faced with two seemingly contradictory statutory expressions in the Constitution (Suspension and Modification) Decree No. 1, 1966. Its s. 3(4) provided that where an Edict was inconsistent with a decree, it shall be void to the extent of its inconsistency. By S. 6, No court of law in Nigeria shall enquire into the validity of any decree or edict.

Application of the literal rule has the effect that even if an Edict were void for inconsistency, the Court was lame and could not declare it so. To avoid the ambiguity, the Court applied the golden rule and held that the edict in question was void to the extent of its inconsistency.

Also see the case of Awolowo & Ors v. Federal Minister of Internal *Affairs (1962). In this case, Plaintiffs are members of the Action Group,* the official opposition party in Nigeria in 1962 Chief Awolowo was the leader. The Defendant was a member of the Northern Peoples Congress, the political party in power and the Minister of Internal Affairs of the Federation, with responsibility for Immigration. In November 1962,

Chief Awolowo and 24 others were charged with treasonable felony. Under the Nigerian Constitution, “every person who is charged with a criminal offence shall be allowed to defend himself in person or by legal representative of his own choice”. The Plaintiff appointed Mr. E.F.N Gratiaen, QC who was a Britain resident in UK. On his arrival at the Ikeja Airport, Mr. Gratiaen was refused entry into Nigeria by an Immigration Officer, in spite of the fact that all papers were in order. The Immigration officer acted on the direction of the first defendant as the Minister of internal Affairs.

Plaintiffs took out this action alleging that the refusal to admit Mr. Gratiaen into Nigeria was not only malicious but also deprived them of their right to be defended by a counsel of their choice.

The Defendants pleaded S. 13 of the Immigration Act which provided as follows:

> “Notwithstanding anything in this ordinance contained, the Governor-General may, in his absolute discretion, prohibit the entry into Nigeria of any person, not being a native of Nigeria”.

Held: Constitutional and statutory provisions are not inconsisted and the term “Counsel of Choice” must be subject to certain limitations that he is not under a disability of any kind and can enter the country as of right.

4.0 CONCLUSION

In addition to the literal rule which you studied in the last unit you have in this unit learnt more canons – mischief and golden rules of interpretation and construction of statutes. The court must give ‘force and life’ to legislative intentions but must the court also legislate? Take a stand: - orthodox or activist (no neutral ground), and justify your choice.

5.0 SUMMARY

You have studied the earliest rules of interpretation: literal, mischief and golden rules. You have seen the case where they derive their source and authority. You have also seen their applications in recent times and under local conditions.

6.0 TUTOR MARKED ASSIGNMENT

What do you know of either of the following:

1. Mischief Rule
2. Golden Rule

7.0 REFERENCES/FURTHER READINGS

Thorton, G.: Legislative Drafting 1978

Bennion, A.: Statute Law 1990

Plus Allen:

UNIT 4 OTHER RULES OF CONSTRUCTION AND INTERPRETATION OF THE STATUTES

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1.0 INTRODUCTION

So far, we have had an over-view of the necessity for interpretation and judicial attitude towards it. In the previous lecture, we dealt in some details with such important canons of interpretation as the literal mischief, and the golden rules and their applications.

There are other rules of construction and interpretation recognized in the Nigerian Legal System; and in this lesson, we shall deal with more of them.

2.0 OBJECTIVES

It is hoped that at the end, you will be able to enumerate the principles of interpretations and construction, explain their application and be able to support your explanation with decided cases.

Let us, discuss additional rules of interpretation and construction of statutes.

3.0 MAIN CONTENT

3.1 Ejusdem Generis Rule

Words standing alone are without meaning. The context in which they occur must be taken into account. Under this rule, where general or omnibus words (causus amisus) follow particular words of the same class, the general words must be construed to be similar in meaning to the particular words, which they accompany.

3.2 Illustration

A statute defines "premises" as meaning "a building of any description occupied or used by persons for living or sleeping or other lawful *purpose." In this clause, 'living', 'sleeping' are particular words: but* "other lawful purpose" is general (causus amisus). The question likely to come before the Court which may call for construction and interpretation is: whether or not a building used as a Night Club or the like retain the character of "premises" and so answer that description.

Would such phrase as: "… chairs, tables, and desks or any other thing …" include or exclude:

(a) table fan (b) wrist watch (c) a stool

Does an importer of pyrogalic acid contravene the law banning an importation of "guns, ammunition, rifles, explosives, and any other *goods".*

The guiding rule is that general words used together with particular words are not wider in scope than the particular words.

In Attorney General v. Brown (1920), the statute before the court contained a prohibition against importation of guns, and ammunition, rifles, explosives and any other goods. Pursuant to this proscription, an order-in-council was passed prohibiting the importation of pyrogalic acid and when the Order-in-Council was challenged it was held ultra *vires and void. The omnibus statutory expression "any other good"* specified particular goods, which do not belong to the class of pyrogalic acid.

Another example is the Betting Act 1853 (UK) prohibiting the keeping of a "house, office, room or other places for betting. In Powell v. *Kempton Park Racecourse Co. (1899), the Court held that Tattersall's* Ring on the racecourse did not fall within the statute. The House of Lords said that "any other place" meant a place similar to "a house", "office" or "room".

3.2.1 Reason for Growing Importance Of Ejusdem Generis Rule

Ejusdem Generis Rule is growing in importance. The Court is being called more frequently to apply it. This trend may be explained in terms of:

(a) New words or class of words continually creeping into modern dictionary and usage.
(b) Development in education, economy, and technology vis-à-vis the dynamism of the society.

In every case, judicial practice has been to limit the general or omnibus words and expressions, and impose a construction in which the omnibus words are not wider in scope than the particular words. The operation of this rule in any particular situation may be excluded by the statute in clear and unambiguous terms. The clear intention of the lawmaking body is the over-riding consideration.

SELF ASSESSMENT EXERCISE 1

Describe Ejusdem Generis rule of Statutory Construction and *Interpretation*
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3.3 Noscitur A Sociis Rule

This rule is similar to Ejusdem Generis rule. The rule is that the meaning of doubtful words must be ascertained by reference to the meaning of words associated with it. Noscitur a sociis means “one is known to ones companies”.

Examine the clause permitting one to “carry on the business of mechanical engineers and general contractors”. What is the scope of “general contractors’ in relation to mechanical engineers or vice versa?

In the important case of Ashbury Railway Carriage Co. v. Riche (1875). The object of that company included the following:

(i) “To make and sell or lend on hire railway carriages and wagons and all kinds of railway plant, fittings, machinery and rolling stock”.
(ii) To carry on the business of mechanical engineers and general contractors”.

(iii) "To purchase, lease, work and sell mines, minerals, land and buildings".
(iv) To purchase, and sell, as merchants, timber, coal, metals, or other materials and to buy and sell any such materials on commission as agents".

The company contracted to finance the construction of a railway in Belgium and there was evidence before the Court that the contract had been ratified by all the members of the company. The question before the Court was the competence and power of the company to make the contract and it was held that the real description of the contract entered into by the company is an engagement to supply the contractors for the construction of a foreign railway with the funds necessary to enable them to execute their contract. This is clearly not within any of the objects described in the Memorandum of Association and the contract therefore was ultra vires and void.

The power "to carry on the business of mechanical engineers and general contractors" or hire railway carriages and wagons would not extend to constructing or financing the construction of a railway. The term "general contractors" must not be wider in scope than that which went immediately before it. Applying the noscitur a sociis rule, "general contractors" in the particular context must be construed by reference to "mechanical engineers" which precedes it.

SELF ASSESSMENT EXERCISE 2

What do you understand by the rule: Noscitur A Sociis
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3.4 Lex Non Cogit Ad Impossibilia Rule

This rule permits the court to construe a statute in a manner that does not command doing what is impossible.

The Court, for example, will not construe a law in such a way as to command a marriage to a dead person or between persons of the same sex or command the execution of every red haired female.

3.4.1 Use of Aids

The Court, in construing and interpreting statute, may be assisted by use of aids in the construction and interpretation of statutes. The purpose is to discover the intention of the lawmaking body and the courts do this

by reading and considering the actual words contained in the particular statute which calls for interpretation. These aids are as follows:

3.4.2 Internal Aid

The Court is at liberty, in appropriate cases, to refer to certain things that are contained in the statute; namely:

(i) Title of Statute:

The court may refer to both the long and short titles. This is a development and departure from earlier practice which did not permit of such reference. The aid applies where particular statutory word is ambiguous.

(ii) Preamble:

The court may refer to the preamble of a statute being interpreted and in situations where the words in issue are of doubtful meaning. We saw in the case of Prince of Hanover v. AG (1957) that the clear and unambiguous words used in the body of the statute did over-ride every other consideration. Preamble therefore must give way to clear statutory words.

(iii) Heading of Sections of the Statutes:

The heading of a section may lead to an inference of what that section is up to. It is regarded as part of the statute and may be referred to in constructing and interpreting statute

(iv) Marginal/Side Notes:

These are not regarded as part of public statutes, and should not, generally, be called in aid in the construction and interpretation of statute. Often, side or marginal notes are inserted in the statute by the legal draftsman.

However, there may be occasions where the Statute itself has made reference to the marginal or side notes. This may be found in local or private statutes and in such cases, the Court may refer to them as aids in construing and interpreting statutes.

(v) Punctuations:

The court may pay particular attention to punctuation marks in construing and interpreting the meaning of statutory words and expressions.

(vi) Interpretation Clauses:

Some statutes contain a section where it defines words as used in the particular Statute. The section is inserted by the draftsmen. But the Courts may or may not refer to them.

(vii) Schedules:

Schedules can be found in several statutes. The body of the Statute may contain express reference to the Schedule; so as to form part of the Act. In such cases, the courts refer to them. However, schedules, which contain clauses that are merely illustrative or examples, are the handiwork of draftsmen and are irrelevant.

(vii) Object and Scope of the Statute:

Heydon's Case (1584), which established the Mischief Rule must be referred to for completeness. The case permitted the Court, to refer in the course of construction and interpretation of Statute to:

(i) the law as it stood before the State
(ii) the mischief which the previous did not provide for
(iii) the remedy
(iv) the true reason for the remedy

Exception:

Any reference to internal aid is excluded where

(i) the context provides otherwise.
(ii) the meaning of the statutory expression is clear and unambiguous.

3.4.3 External Aid

External aids refer to the materials that are outside the statute, which the courts may consult in the course of construing and interpreting the statute. External Aids to which reference may be made include:

(i) Dictionaries
(ii) Text-books
(iii) Reports of certain commissions
(iv) Legal history of the statute (as in mischief rule)

3.4.4 Interpretation Act or Law

There is a statute called Interpretation Act. The statutory definitions in this statute apply to all statutes in the federation. For example, the statute enacts that 'Or' or 'Other' wherever they occur in statutes are to be construed disjunctively unless, there is a contrary intention.

Penal provisions prescribe, often, the maximum punishment. Some laws – very few – provide both minimum and maximum: e.g. Robbery and Fire Arms Act.

4.0 CONCLUSION

In continuation of our discourse about the rules of statutory interpretation we talked about ejusdem generic rule, noscitur a sociis rule and lex non-cogit ad impossibilia rule. The use of aid – external and internal also received due attention in the course of the unit. You have been guided by illustrations to enrich your understanding. Stop a while, reflect on what you have learnt about interpreting and constructing statutory provisions.

5.0 SUMMARY

You have studied additional five rules of construction and interpretation of Statutes.

6.0 TUTOR MARKED ASSIGNMENT

1. What do you know of the Ejusdem Generis Rule
2. What aids to Interpretation may be used by the Courts when called upon to construe a Statute.
   May Courts consider:

(a) speeches made in the National or State Assembly
(b) marginal notes
(c) the Preamble to the Statute
(c) text books and monographs

7.0 REFERENCES/FURTHER READINGS

Thorton, G.: Legislative Drafting 1978

Bennion, A.: Statute Law 1990

UNIT 5 OTHER RULES OF CONSTRUCTION AND INTERPRETATION OF THE STATUTES AND PROVISONS OF THE CONSTITUTION

CONTENTS

1.0 Introduction
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3.0 Main Content
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  3.1.1 Mistake of Law
  3.2 Retrospective Legislation
  3.3 Eventualities Unforeseen
4.0 Conclusion
5.0 Summary
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1.0 INTRODUCTION

This is the concluding part of our lecture on Construction and Interpretation of Statutes. Our focus are on the principles of interpretation which previous lectures on the subject have not touched. Very importantly, we shall examine what the judicial attitude is likely to be when faced with novel cases.

2.0 OBJECTIVES

At the end of the lecture, you should be able:

- To demonstrate a sound understanding of the various canons of construction and interpretation of statute
- To discuss each of these rules and make adequate references to appropriate authorities.
- Cope with a novel situation either from a conservative or activist stance.

3.0 MAIN CONTENT

3.1 Miscellaneous Rules

Few may be mentioned briefly:

3.1 Mistake of Law

(a) Where words are missing or employed wrongly in a Statute, the Courts enjoy the power to supply the missing word or correct the error but they are often reluctant to do so. The Court may only resort to this rule where there is clearly a mistake of law on the part of the lawmaking body.

(b) The power of Court to correct a mistake of law by the legislature is limited to statutes in which the mistake of law is patent. Where the mistake is latent the power is lame, and any attempted reconstruction would amount to naked usurpation of legislative powers and functions.

Nature of Mistake

A patent mistake is one that is apparent on the face of the statute. On the other hand, a mistake is latent where ambiguity does not appear until further facts become known.

The Case of Lyde v. Bandard (1828) provides a useful illustration. In that case, the Court was faced with a Statute which provides that no action lay on a representation that a person:

> "may obtain credit, goods, or money upon unless the representation was in writing".

The Court corrected the error, by providing the missing word so as to read:

> "may obtain credit, goods, or money upon credit unless the representation was in writing"

Can you spot out the corrections, if any?
Read the clauses again – first without correction and then with the correction.

SELF ASSESSMENT EXERCISE 1

What is a mistake of law?
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3.2 Retrospective Statutes

(a) The Court leans strongly against a retroactive legislation. There is a presumption in favour of prospectivity. Retrospective effect of Statute will arise only where a statute expressly so enacts or by necessary implication.

Thus, a Statute containing a provision, which removes a limitation of N1,000 in respect of claims against a company under liquidation; would not apply to claims which had already accrued against the company.

Conversely, when a statute has been passed, barring certain action after expiration of six months; the effect would be both retrospective and prospective in matters inchoate. The reason is that the subject matter is procedural merely.

The presumption against retrospectivity may be displaced where
(i) the statute by clear expression or by necessary implication provides otherwise.
(ii) the statute merely introduces new rules of procedure, since there are no vested rights in procedure.

Where a later statute provides the word or clause that is missing in an earlier statute, the newer statute will relate back to the older statute and take effect from the time, when the earlier statute was passed. This is common in "declaratory Statutes".

Suppose a Statute places a product under a duty, but omits to prescribe the rate. A later statute stipulating the rate would be interpreted as operating retroactively.

(b) A Will speaks immediately before the Testator's death. The effect of any intervening legislation therefore is to alter the will.

SELF ASSESSMENT EXERCISE 2

Do Acts of the National Assembly have retrospective effect? Give examples.

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3.3 Eventualities Unforeseen

Professor Allen states:
"It is one thing, however to gather the intention of a statute from a consistent course of legislation, and quite another to apply it in circumstances concerning which an Act is silent".
It is hardly practicable that the lawmaking body legislates in a way that covers every eventualities – foreseen or unforeseen. When faced with matters which were unforeseen by the legislators at the time of passing the Statute into law, how does the Court apply the canons of interpretation and construction of statutes?

An unforeseen eventuality may arise where a statute is silent about a certain right or some claim, which subsequently evolves and has become subject of litigation before the Court.

In early law, when there were limited forms of action and the law did not provide any remedy, there was no right of action, no matter the injury or damage suffered. Novelty presented singular difficulty in the face of inelasticity of forms of action.

In Ashbury v. White (1703), the defence of novelty was argued strongly and was accepted by some of the judges, but it was equally strongly denounced by Holt CJ whose opinion carried the day in the House of Lords. Holt CJ had said:
"If the plaintiff has a right, he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal".

But it is not every "interest" that is recognized and the recognition or refusal to recognize a new right is always a policy decision. See Weller *v. Foot & Mouth Disease Research Institute (1966)*

In Haseldine v. Daw (1914) Scott LJ said:
"The Common law has throughout its long history developed as an organic growth, at first slowly under hampering restrictions of legal forms of process, more quickly in Lord Mansfield's time and in the last 100 years at an ever-increasing rate of progress as new cases, arising under new conditions of society of applied science and of public opinion, have presented themselves for solution.

Be that as it may problems still arise are where the interest in dispute is either wholly novel or not widely recognized. An example is action for nervous shock arising from a willful act calculated to cause harm based upon the interest in personal safety: Wilkinson v. Downton (1897), and

Javier v. Sweeney (1919). Today where there is right, there must be a remedy.

Statutes are written in words regulating the rights and obligations of parties and creating at times, wholly new heads of liability. As legislators cannot anticipate all possibilities they are unable to pass laws to cover all situations. Courts feel reluctant to state new principles of liability but in practice, they do rationalize, and in the process extend a number of analogous instances in which a claim has been sustained.

Whether a Court would see or decline to see an analogy is dictated by policy consideration. It may be instructive to consider some of such in statutes:

Sales of Goods Act 1893:

Contract of sale of twenty naira and upwards: Section 4 of Sales of Goods Act 1893 provides that
"a contract for the sale of any goods of the value of twenty naira or upwards shall not be enforceable by action unless some note or memorandum in writing of the contract be made and signed by the party to be charged of sale". The Act is silent concerning dissolution of such contracts of sale. The question that arises then is:
Should it also or should it not be evidenced by Note or Memorandum in writing to be signed by the party to be charged or his agent on his behalf?

Married Women's Property Act 1882

Under this Act, a married woman can dispose of her real property without joining her husband in the conveyance, as was earlier the practice. The Act was silent on the question whether a married woman Trustee can convey a freehold trust property without joining her husband (not a trustee) in the conveyance. It is probably an omission that the Statute did not also dispense with the joining her husband. This issue came before the Court in Re Harkness and Allsopp's Contract *(1896) and the Court declined to supply the omission and held that in* the particular circumstance, the husband should be joined conveyance, as was the earlier practice. The Parliament subsequently effected the necessary correction by passing the Married Property Act 1907 enabling a Married Woman Trustee to convey real property without the husband being joined as a party to the conveyance.

(c) Expressio unius est exclusio alterius
(i) The general rule is: Where a matter is totally not provided for in a statute, "not provided for it must remain"

For purpose of construction and interpretation of Statutes, express mention of certain things means the exclusion of all other things not mentioned (expressio unius, est exclusio alterius). For example Act for "Bicycle and moter cycle" excludes motor cars: Re Cyclist Touring Club 1907)

(ii) Where Statute does not make a specific provision but only a general one, the question that arises whether or not the Court should expand the general provision. This arises when inventions occur which were unheard of at the time the legislators passed the statute. In Re Radio Communication in Canada (1932), the Judicial Committee of the Privy Council held that Broadcasting was included in the description "telegraphic".

The Court cannot, without doing injustice, ignore the development or invention altogether merely because the statute did not mention them and could not have mentioned them since broadcasting had not been known when the particular Statute was enacted.
What is paramount to the Court is the general spirit of the statute - the implied will of the legislators.

However, the Court is not to resort to fiction or arbitrariness. It is incompetent therefore to imagine what the legislature would have provided - whether it would have provided this and that had particular invention been foreseen at the time of passing the statute into law.

SELF ASSESSMENT EXERCISE 3

Consider Causus omissi on the part of the legislature?
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3.4 Interpretation of the Provisions of the Constitution

The Constitution is the fundamental and organic law of a nation or state, establishing the conception, character and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise. (Black's Law Dictionary 7th Ed.) It is the grundnorm of the people and contains all the laws from which the institutions of state derive their creation, legitimacy and very being. It is also the unifying force in the nation, apportioning rights and imposing obligations on the people who are subject to its operation. It is a very important composite document, the interpretation or construction of which is subject to recognized cannons of interpretation designed or

crafted to enhance and sustain the esteem in which Constitutions are held the world over. (Dapianlong & 5 ors v. Dariye & Anor (2007)).

The courts cannot amend the Constitution. They cannot change the words either. Idigbe JSC put the interpretative function of the courts this way:

It is the duty of this court, which has the ultimate responsibility of declaring and interpreting provisions of the constitution always to bear in mind that the constitution itself is a mechanism under which all laws are to be made by legislature and not merely an Act which declares what the law is. Accordingly, where the question whether the Constitution has used an expression in the wider or in the narrower sense, the court should always lean, where the justice of the case so demands, to the broader interpretation unless there is something in the context or in the rest of the constitution to indicate that the narrower interpretation will best carry out its object and purpose. (Nafiu Rabiu v. Kano State (1980))

The primary function of the judge therefore, is to declare the law, not to decide what it should be. The business of law making is, exclusively a matter of the National Assembly or State Assembly in Nigerian context. Though the populace look forward to the judiciary for dispensation of justice, the judge is always conscious of his limitation in the discharge of his judicial duties. He carefully and firmly sets out to administer justice according to law, the law which is established for us by the National or State Assembly. It therefore follows that where the words of the Statute or the Constitution are unambiguous but clear in their ordinary and grammatical meanings, a judge has a binding duty to interprete the words of Constitutional provisions accordingly – giving them their simple, natural and ordinary meaning without introducing extraneous matters. See Dapianlong & 5 ors v. Dariye & Anor 2007 and Chief Gani Fawehimi v. IGP & ors (2002)

Where words and expressions in the constitutional provisions have been legally or judicially defined or determined, their ordinary meaning will definitely give way to their legally or judicially defined meanings. This is in conformity with the principle of judicial precedent or stare decisis.

Mere technical rules of interpretation are to some extent inadmissible in a way so as to defeat the principle of government enshrined in the constitution.

Provisions of the Constitution are not to be construed or interpreted in isolation but interpreted in a just and holistic manner, taking into

consideration other provisions. But the judge must not stray away in search of what prima facie gives His Lordship a most reliable meaning (African Newspapers v. FRN (1985)), Salami v. Chairman LEDB *(1989)) and Ogbonna v A. G Imo State (1993)).*

Aderemi JSC also confirmed that the duty of the judge is to expound what the law is, and should loyally follow the doctrine of stare decisis. It is not his duty to consider what social and political problems do, today require. That is to confuse the task of the judge with the task of a legislator. More often than not, the law as passed by the legislators, has produced a result which does not accord with the requirements of today. Let that defective law be put right, not by the court but by legislations. One must not expect the judex, in addition to all his other problems to decide what the law ought to be. The judex is better employed if he puts himself to the much simpler task of deciding what the law is (Dapianlong & 5 ors v. Dariye & Anor (2007))

Obaseki JSC, summarized the twelve commandments for interpreting and construing the Constitution as follows:

> "In the interpretation and construction of our Constitution, bear the following principles of interpretation in mind:
>
> (1) Effect should be given to every word.
> (2) A construction nullifying a specific clause will not be given to the Constitution unless absolutely required by the context.
> (3) A Constitutional power cannot be used by way of condition to attain unconstitutional result
> (4) The language of the Constitution where clear and unambiguous must be given its plain evident meaning.
> (5) The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entirety; a particular provision cannot be dissevered from the rest of the Constitution.
> (6) While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller – import to it meaning.
> (7) A constitutional provision should not be construed so as to defeat its evident purpose.

(8) Under the Constitution conferring specific powers, a particular power must be granted or it cannot be exercised.
(9) Delegation by the National Assembly of its essential legislative function is precluded by the Constitution
(10) Words are the common signs that mankind make use of to decide their intention one to another and when the words of a man express his meaning plainly and distinctly and perfectly, there is no occasion to have recourse to any other means of interpretation.
(11) The principle upon which the Constitution was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions.
(12) Words of the Constitution are therefore not to be read with stultifying narrowness.

(see AG (BOS) v. AG (FED). (1981))

Courts, it must be emphasized, cannot amend the Constitution. They cannot change the words. They must accept the words, and so far as they introduce change, it can come only through their interpretation of the meaning of the words which change with the passage of time and age.

4.0 CONCLUSION

Congratulations, you have come to the concluding unit on construction and interpretation of statutes and on this course. Note that mistake of law is not to degenerate into judicial legislation and that presumption of prospectivity of legislation can only be displaced by clear statutory provision. Judicial attitude when faced with a novelty appears unsettled but you are sufficiently guided to take your stand and justify it. Once again congratulation.

5.0 SUMMARY

We have come to the end of the lectures on Construction and Interpretation of Statutes. In the absence of jury system, the judge determines the question of facts and applies the law to the facts as found by him. His primary function is to interpret or construe the law, gives effect to the will of the lawmaking body, and do justice.

Where cases are novel in principle, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but when the case is only new in the instance, and the only question is upon the application of a principle already recognized in the law to such new case, it will be just as competent to Courts justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago.

6.0 TUTOR MARKED ASSIGNMENT

1. What rule of Interpretation do you know?
2. To what extent do the modern rules governing the Interpretation of Statutes allow judges to "make law" if at all.

7.0 REFERENCES/FURTHER READINGS

Thorton, G.: Legislative Drafting 1978

Bennion, A.: Statute Law 1990