NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF ARTS AND SOCIAL SCIENCES

COURSE CODE: CSS 112

COURSE TITLE: SOCIOLOGY OF LAW

COURSE GUIDE

CSS 112
SOCIOLOGY OF LAW

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Introduction

Welcome to CSS 107: Sociology of Law. This is one of the compulsory courses offered at the School of Arts and Social Sciences of National Open University of Nigeria (NOUN). This course is in one part. CSS 107 (Sociology of Law) is a 2 credit unit course.

Course Aims

The aim of the course is to expose you to the methods of how sociology influences law in the Nigerian society so that you will be able to identify correctly the sociological perspective of Legal reasoning and Law making in Nigeria. This will be achieved by:

Introducing you to the meaning of Law
Introducing you to the meaning of Sociology
Explain the background situation for Law making in our society.

Course Objectives

In order to achieve the aims listed above some general objectives as well as specific objectives have been set. The specific objectives are listed at the beginning of each unit. The general objectives will be achieved at the completion of the course. At the end of this course material you should be able to

Define Law and apply it in different situation
Define Sociology and understand the sociological perspective of Law
Explain the relationship between Law, Custom and Morality
Understand the problem of law enforcement against the background of Sociology

Course Materials

For this course, you will require the following materials

1. The Course Guide
2. Study Units which are twenty five (25) in all
3. Textbooks recommended at the end of the units and
4. Assignment file where all the units' assignments are kept.

Study Units

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

Each unit contains some exercises on the topic covered and you will be required to attempt the exercises. These will enable you to evaluate your progress as well as reinforce what you have learned so far. The exercises together with the Tutor Marked Assignments will help you in achieving the stated learning objectives of the individual units and the course.

Assignment File

Your assignment file consists of all the details of the assignments you are required to submit to your tutor for Marking.

Course Overview

Unit	Title of Work	Weeks Activity	Assessment (End of Unit)
Module 1	**Introduction to Sociology of Law**		
Unit 1	Defining Sociology	1	Assignment 1
Unit 2	What is Law?	1	Assignment 2
Unit 3	The Necessity of Law	1	Assignment 3
Unit 4	What is Sociology of Law?	1	Assignment 4
Module 2	**Concepts of Law**		
Unit 1	Consensus Theories of Law	1	Assignment 5
Unit 2	Conflict Theories of Law	1	Assignment 6
Unit 3	The Natural Law School of Jurisprudence	1	Assignment 7
Unit 4	Analytical/Positivist School of Jurisprudence	1	Assignment 8
Unit 5	The Historical School of Jurisprudence	1	Assignment 9
Unit 6	The Sociological School of Jurisprudence	1	Assignment 10
Module 3	**The Relation Of Law To Selected Concepts**		
Unit 1	The Relation of Law and Morality	1	Assignment 11
Unit 2	The Relation of Law to Custom	1	Assignment 12
Unit 3	The Relation of Law to Force	1	Assignment 13
Unit 4	The Relation of Law to Justice	1	Assignment 14
Unit 5	The Relation of Law to Freedom	1	Assignment 15

Unit 6	Law and the Rule of Law	1	Assignment 16
Module 4	**Module 4 Th**		
Unit 1	The Pre-Colonial Legal Order of Nigeria: Southern Nigeria (Prior to 1861)	1	Assignment 17
Unit 2	The Pre-Colonial Legal Order of Nigeria: Northern Nigeria	1	Assignment 18
Unit 3	The Colonial Legal Order of Nigeria: 1861 to September 1960	1	Assignment 19
Unit 4	The Post-Colonial Legal Order of Nigeria: 1960 to Date	1	Assignment 20
Unit 5	Issues in the Development of the Nigerian Legal System	1	Assignment 21
Module 5	**Law, Social Change and Emerging Legal Structure of Nigeria**		
Unit 1	The Impact of the Colonial Experience on Nigeria's Legal System	1	Assignment 22
Unit 2	Impact of Political Independence on Nigeria's Legal System	1	Assignment 23
Unit 3	The Influence of Modern Global Trends	1	Assignment 24
Unit 4	The Emergent Legal Structure: Problems and Prospects	1	Assignment 25
	Revision	1	
	Examination	1	
	Total	27	

Assessment

Your assessment for this course is in two parts. First, are the tutor marked assignments and second is a written examination. You will be required to apply the information and knowledge gained from this course in completing your assignments. You must submit your assignments to your tutor in line with submission deadlines as stated in the assignment file.

Tutor Marked Assignments

In this course, you will be required to study twenty five (25) units and complete the tutor marked assignment provided at the end of each units. The assignments attracts 20 marks each the best four of your assignments will constitute 30% of your final mark. At the end of the course, you will be required to write a final examination which counts for 70% of your final mark.

The assignments for each unit in this course are contained in your assignment file. You may wish to consider other related materials apart from your course materials to complete your assignments. When you complete each assignment send it together with the Tutor Marked Assignment (TMA) to your tutor. Ensure that each assignment reaches your tutor on or before the deadline stipulated in the assignment file. If for any reason you are unable to complete your assignment in time, contact your tutor before the due date to discuss the possibility of an extension.

Final Examination and Grading

The final examination for this course will be for a duration of two hours and count for 70% of your total mark. The examination will consist of questions, which reflect the information in your course material, exercises and tutor marked assignments. All aspects of the course will be examined. Use the time between the completion of the last unit, and examination date to revise the entire course. You may also find it useful to review your tutor marked assignments before the examination.

Course Marking Scheme

ASSESSMENT	**MARKS**
Assignments	Best of four assignment scores at 10% each – 30% of total course mark
Final Examination	70% of total course mark
Total	100% of Course Material

How to get the Most from This Course

In distance learning, the study units replace the university lecture. This is one of the great advantages of distance learning, you can read and work through specially designed study materials at your own pace, and at any time and place that suits you best. Think of it as reading the lecture instead of listening to the lecturer. In the same way a lecturer might give you some reading to do, the study units tells you when to read, and which are your text materials or sets of books. You are

provided exercises to do at appropriate points.

Each of the study units follows a common format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with the other units, and the course as a whole. Next to this is a set of learning objectives meant to guide your study. The following is a practical strategy for working through the course.

1. Read this Course Guide thoroughly, it is your first assignment

2. Organize a study. Design a 'course overview" to guide you and note the time you are expected to spend on each unit and how the assignment relate to the units. You need to gather all the information into one place, such as your diary or a wall calendar.

   Whatever method you choose to use, you should decide on and write down your won dates and schedule of work for each unit.

3. Once you have created your won study schedule, do everything to stay faithful to it. The major reason that students fail is that they get behind with their course work.

4. Turn to unit 1, and read the introduction and the objectives for the unit.

5. Assemble the study materials, you will need your text books and the unit your are studying at any point in time.

6. Work through the unit. As you work through it you will know what sources to consult for further information.

7. Review the objectives for each study unit to confirm that you have achieved them. If you are unsure of/about any objectives, review the study materials or consult your tutorial facilitator.

8. Keep to your schedule when the assignment is returned, pay particular attention to your tutorial facilitator's comment.

9. Review the objectives for each study unit to confirm that you have achieved them.

10. When you have submitted an assignment to your tutorial facilitators for marking do not wait for its return before starting on the next unit. After completing the last unit, review the course and prepare yourself for the final examination.

Tutors and Tutorials

There are 15 hours of tutorial provided in support of this course. You will be notified of the dates, time and location of these tutorials together with the name and phone numbers of your tutorial facilitators, as soon as you are allocated a tutorial group.

Your tutorial facilitator will mark and comment on your assignments, keep a close watch on your progress and on any difficulties you might encounter and provide assistance to you during the course.

Do not hesitate to contact your tutorial facilitator by telephone, e-mail or discussion board. The following might be circumstances in which you will find help necessary contact your tutorial facilitator if:

a. you do not understand any part of the study units or the assigned readings
b. you have difficulties within the exercise
c. you have a question or problem with an assignment, with your tutors comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutorial facilitator and ask questions. You can raise any problem encountered in the course of your study. To gain maximum benefits from course tutorials, prepare a question list before attending them.

Summary

This course guide has introduced you to every aspect of your course on Sociology of Law. We wish you every success in your study.

Sociology of Law is a one semester, 3 credit unit, 100 level course which consists of five modules, each module comprises four to six study units. In all, there are twenty-five (25) study units. The course provides social scientific insights into the origin, development and operations of law and the legal systems. Broken into five modules, the course manual gives adequate information on *Definition of Law, Conceptions of Law, The Relations of Law to Selected Concepts, The Nigerian Legal System,* and *Law, Social Change and the Emerging Legal Structure of Nigeria.*

There is no doubt that students will find this course manual quite useful. The *teach-yourself* approach to teaching and learning adopted in writing the manual will be of great benefits to the students. The Self-Assessment Exercises (SAE) and Tutor - Marked Assignment (TMAs) will adequately assist students to have a full understanding and perform successfully in the course.

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MODULE 1 INTRODUCTION TO SOCIOLOGY OF LAW

The precise moment of the emergence *of Sociology of Law* as a discipline is not certain, though generally put at the mid-twentieth century. You should note, however, that the application of the sociological perspective to law dates, at least, as far back as the Enlightenment period (18th century) of intellectual history when even "Sociology" as a discipline, was yet to emerge. The perspective is clearly discernible in Montesquie's 1748 classic, *De Vesprit des lois.* This trend was also very noticeable in the works of early sociologists such as Max Weber and Emile Durkheim.

In this module, which is made up of four units, *Sociology of Law* will be introduced to you. In the first unit, you will learn the meaning of "Sociology" as a prelimary step to learning the meaning of "Sociology of Law". The second unit addresses the meaning of the second component of the course title, namely the concept of law. Unit 3 is an outgrowth of unit 2 but is given a separate unit because of the volume of materials covered. By the time you get to unit 4, you will already have had the basic ingredients of the two disciplines that form the foundation of the course. Defining and understanding the nature and scope of the emergent discipline therefore becomes easy.

The four units that constitute this module are thematically linked. The goal of the module is to conceptualise the discipline *of Sociology of Law.* This goal is broken into specific unit objectives which you will come across shortly. By the end of the module you will understand the basic methods and concerns of the two parent disciplines. You will also understand why the relationship between the two have not always been cordial, but has nevertheless led to the emergence of this course. You will also know the central assumption *of Sociology of Law,* namely: that laws and legal systems are derivatives of the social structure -products as well as sources of its change.

Unit 1 Defining Sociology
Unit 2 Defining Law
Unit 3 The Necessity of Law
Unit 4 Defining Sociology of Law

UNIT 1 DEFINING SOCIOLOGY

CONTENTS

1.0 INTRODUCTION

You must have read the Course Guide. I also assume that you have read the introductory comments on module 1. This unit is the first among the four constituent units of the module. The idea behind this unit, is for you to be acquainted with the general outline of the parent discipline of which this course is a branch. This is necessary for you to be able to concretely comprehend what the Course is about.

If you are a student of "Criminology and Security Studies" at NOUN, you probably already have a basic or working knowledge of the discipline of sociology from the Course "Introduction to Sociology". Nevertheless it is important to start this Course by defining sociology in a concise manner tailored to meet your needs in understanding this Course. The introduction is indispensable for you, if you are merely offering the Course as an elective and have no background in sociology.

The unit guides you through not just the definition of Sociology, but also highlights its method and perspective, and the distinctive bearing that these have in understanding social phenomena.

2.0 OBJECTIVES

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

Understand the meaning of Sociology;
Apply the Sociological method/perspective in analysing social issues;
Distinguish Sociology from common sense and other Behavioural Sciences.

3.0 MAIN CONTENT

3.1 What is Sociology?

Probably from the sound of the word alone, you have an inkling or could hazard a guess about the meaning of Sociology. You probably see it as “something to do with socials”. I remember when I first gained admission into the University to read Sociology. I showed my semi-literate father the admission letter and his immediate retort was: “of all the Courses in the University why should you choose to go and learn about how to be social.”

Well, in linking the word to "social", if that is what you did, you are not totally wrong. The "social" however is not in the sense of being sociable or attending parties. It should be understood in the sense of "society".

The word “sociology” is a hybrid one coined by the acclaimed father of sociology, Auguste Comte, from two languages. The Latin Word “socius” which means “social” or “society”, and the Greek word “logus” which could mean study, science, or theory. Going by the etymological meaning therefore, Sociology is the "study of society". There is a problem, however, with such a short definition: though short, it is so broad that it hardly defines.

SELF ASSESSMENT EXERCISE 1

What do you understand by the statement that the "definition though short, is so broad that it hardly defines"?

GUIDELINES

> A definition should fix the bounds and limit of what is being defined in precise terms. Does the short definition of sociology do that?
>
> Since so many disciplines would fit the position of studies of society, it follows that the short definition does not distinguish sociology from other disciplines.

Virtually, every intellectual discipline is in a way a study of society. Even when we narrow the coverage down to the social or behavioural sciences, there are still a number of likely candidates that fit such a definition. Economics, Political Science, History, Anthropology and Psychology all study human behaviour and society. In search of an adequate definition for Sociology therefore, we must first distinguish the discipline from other behavioural sciences.

3.2 Sociology and other Behavioural Sciences

The various intellectual disciplines which study man and his work can be distinguished from one another based on a number of criteria. For example, we may ask whether they focus on only one aspect of social life (and if so which one) or whether they take multi-dimensional or wholistic approach. We may also want to know whether they emphasise the concrete and immediate or the abstract and generalised. Do they stress measurement and statistical manipulation or favour direct and qualitative methods?

Other yardsticks exist for demarcating the disciplines. For our purposes here however, it suffices to stress that there is one basic difference between Sociology and the other social science disciplines. While the others pick single dimensions of man in society to focus on, Sociology takes a wholistic approach. To be wholistic is to see the interrelatedness of the different dimensions of man. *Sociology of Law*, for example, singles out the legal dimension of society for study. But in doing so, it must relate what happens in the legal sphere to the other major spheres in society.

Economics focuses on man's activities in relation to production, distribution and consumption of goods. Political Science is concerned with the allocation of power. History seeks to establish the sequence in which events occurred. Psychology is the science of man's mental processes. Anthropology is concerned with studying all aspects of the life of primitive man. Sociology is interested in all aspects of society.

This omnibus interest in everything is something that sociology shares in common with common sense. As a result, sociology has left itself open to criticism largely based upon ignorance of its methods and objectives. For example, the discipline has been described as: a "Jack of all trades, master of none", a "painful elaboration of the obvious", and as a discipline which takes "what everyone knows and puts it into words that no one can understand" (see Horton & Hunt 1984).

It is therefore important that you learn at this stage the methods of sociology. This will enable you to distinguish sociological statements from common sensical proposition. It will help you to develop the sociological perspective.

3.3 The Sociological Method and Perspective

In carrying out investigations into social phenomena, sociologists proceed according to the general requirement of the scientific method. It is precisely this scientificity that makes sociological propositions totally

different from common sense. For our purposes, and in cognisance of the constraint of space, it is this aspect of sociological method that needs to be emphasised here.

The scientific method has been described as a set of general principles which guide scientists (consciously or unconsciously) in the search for new knowledge. It entails a systematic and purposive gathering of facts, deductive reasoning in translating theory to practice and induction in translating statistical result into theoretical inferences. There is no fixed order in which the scientist must proceed, but the steps are generally agreed to include the following:

Experiencing a problem
Defining the problem
Review of relevant works done on the subject
Formulating hypothesis
Collecting data
Classifying, interpreting and analysing data
Testing hypotheses/verification
Drawing conclusions/formulating theories

The sociologist, whether conducting a quantitative (survey) or qualitative research proceeds according to scientific principles. Furthermore, in analysing his findings and drawing conclusions, he is guided by theory. The sociological perspective is the distinctive way in which sociologists view society and social life. At the end of this unit, and by the end of the whole course, you will be able to appreciate the subtlety and complexity of the sociological perspective when directed upon the phenomenon of law. It is the special ability of sociologist to view the interconnectedness of various aspects of society. The ability to see the relationship between individual action and social structured is the insight that will enable you to see law as a product as well as source of social structure. Importantly, you will have confidence in your new found knowledge because it would have come from the application of rational scientific principles. This is what distinguishes sociology from history, creative writing, journalism, common sense, and others who deal with similar subject matter. The sociological imagination enables the sociologist to see beyond events of his immediate environment to global historical trends and to see the relationship between the two. It equips him with the "quality of mind to grasp the interplay of man and society, of biography and history, of self and world" (Mils 1959:4).

The possessor of the sociological imagination contends with three broad classes of issues. Firstly, he identifies the structures or parts that make up society and establishes their relations with one another. This is done with a view to determining how each of the

parts work towards enhancing continuity or change in societal features. Secondly, he tries to locate where the particular society he is interested in stands in human history. He asks himself what meaning that society has for the development of humanity as "whole". Furthermore, he tries to identify the essential features of the historical period and the ways in which it differs from other periods. The third set of concerns that he must contend with centres around the kinds of "human nature" that can be seen to predominate in the society at a particular period. He will then seek to know how these "natures" are formed, shaped, and liberated or repressed.

3.4 Sociology Defined

There are various definitions of sociology. Majority of them reflect the particular biases of the definer. The best way to approach the issue of definition is to ask, what is the basic problem to which the discipline addresses itself and how does it tackle the problem?

SELF ASSESSMENT EXERCISE 2

What are the basic problems to which sociology addresses itself and how does it tackle the problems?

GUIDELINES

Sections 3.2 & 3.3 of this unit have highlighted some of them, even if indirectly. Read those sections and try to outline the problems before proceeding.

Compare your answers with the basic concerns of sociology outlines in 3.4.

The basic concern of sociology is the issue of social order. It wants to explain the nature of social order and social disorder. It wants to know how social order comes about and persists. What are the dynamics of it? What brings about social disorganisation disorder? What is the relation between individual action and social structure? What meanings do individuals attach to their individual actions. In addressing these, sociology proceeds according to the principles of science. In other words, sociology shares with all other scientific disciplines the assumption that there is an order in nature which can be discovered, analysed and comprehended.

Based on these concerns, assumptions and methods, we can define sociology as a discipline which is concerned with "the *scientific*

study of human social *interactions* and the *products* of such interactions". The italicised words are the key elements and must feature in any good definition of the discipline. Why it is "scientific" has already been discussed in detail. Social order, which we describe as the basic concerns of sociology, is manifested in the form of interactions between people. The social institutions, (e.g family, religion, government,) which arise therefore constitute the products of interaction.

4.0 CONCLUSION

Now that you know the meaning of sociology, you are well on the way to understanding what *Sociology of Law* is about. It simply means that all those assumptions, concerns and methods of Sociology you have learned, are brought to bear on the phenomena of law. This is done with a view to unravelling law's content, operation and consequence for the social order. This is all that is required for purposes of introducing the *Sociology of Law.* Should you need to know more about Sociology, the Course "Introduction to Sociology" is available for you to take. It offers a more detail and elaborate explanation.

5.0 SUMMAY

From this unit, you have learned the meaning, method, assumption and concerns of sociology. Within the constraints of space, the basic aspects of those components have been highlighted in such a manner as would help your understanding of the course. Towards meeting the overall modular goal of introducing Sociology of Law, however, you will still need to read the next three units.

6.0 TUTOR-MARKED ASSIGNMENT

1. Distinguish sociology from other behavioural sciences and common sense.
2. Be as comprehensive as possible. Write a minimum of 5 and a maximum of 10 typewritten pages.

7.0 REFERENCES/FURHTER READINGS

Bloom, L. & Ottong, J. (1987). *Changing Africa: An Introduction to Sociology.* London: Macmillan Publishers.

Durkheim, E. (1938). *The Rules of Sociological Method.* Newyork: The Free Press. Cuff, B.C. & Payne, G.C.F (eds). (1981). *Perspectives in Sociology.* London: George Alien and Unwin Press.

Horton, P. & Hunt C. (1984). *Sociology*. Boston: Mcgraw Hill.

Inkeles, A. (1964). *What is Sociology*. New Jersey: Engelwood Cliff, Prentice Hall.

Mills, W.C. (1959). The *Sociological Imagination.* London: Oxford University Press.

Thompson, K. & Tunstall, J. (eds). (1971). *Sociological Perspectives.* England: Penguin Books in Association with the Open University Press, England.

UNIT 2 DEFINING LAW

CONTENTS

1.0 INTRODUCTION

In the first unit of this module you learned about the meaning, assumptions and methods of Sociology. You were told that it was a necessary preliminary step in the effort to introduce Sociology of Law to you. In continuation of the quest to gradually lead you to a full comprehension of what the course is about, this second unit explains the second component of the course title, namely Law.

The unit will however not just stop at defining law, it will also explain some of the more basic dimensions of the concept. These will include its sources, classifications and functions.

2.0 OBJECTIVES

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

Understand why it is difficult to have a single universally accepted definition of law;
Classify laws based on different criteria;
State the sources of law;
Describe some manifest and latent functions of law.

3.0 MAIN CONTENT

3.1 What is Law?

The question sounds simple enough. The phenomena denoted by the concept of law are however extraordinarily complex. The word is a common everyday word and everyone assumes he knows the meaning. This is understandable because in a broad sense, we find laws everywhere, i.e. so long as we interpret the concept to mean a rule of action. As such, there are laws governing all games or sports, there are scientific laws, natural law, and even the rules that regulate your relationship with the NOUN and how you do your assignments may all be regarded as laws.

SELF ASSESSMENT EXERCISE 1

What is law to you?

GUIDELINES

Try and answer this question as best as you can before reading further.

Think of all the rules that have governed the different aspects of your life whether at home, at work, - the play group, association and so on.

Which of those rules would you regard as laws? What is the basis of your saying that some of the rules are laws and others are mere values?

Attempt a formal definition of law. Then read further and see the extent to which your definition conforms with or deviate from the working definition given here.

This all encompassing use of the word has created problems for commentators on law who must constantly specify the particular sense in which they are using the term. For example, the second edition of the Webster's dictionary contains six entries for the word “law” and the first of these alone has 13 separate meanings. It is not surprising that as Bohannan (1962:73) notes, "more scholarship has probably gone into defining and explaining the concept of "law" than into any other concept still in central use in the social sciences."

For the purposes of this course, the term law is used not in a general, but in a restrictive sense. You are to understand it as law which emanates from the state. But even the laying down of such a parameter for determining what is law has its own problem. For example, do we now

say that primitive societies which had no "State" in the strict sense had no law? Such societies had no written laws and no formal or centralised authority to enforce their obligatory rules of human conduct, yet they as a matter of fact had laws.

The same problem will confront efforts to define laws in terms of "Commands of a sovereign". There are many rules which are not in form of commands given by an authority, directed to an individual. For example, laws relating to contract do not command any one to enter into a contract. In trying to resolve the problem, some have argued that law is what the judges say it is and that attention should therefore be on interpretations given by judges to law and not on what is enacted by the legislature.
A review of some definitions of law would be in order at this point.

John Austin (a Lawyer) defined law as a "rule laid down for the guidance of an intelligent being by an intelligent being having power over him." This definition conforms to the Imperative or Command Theory of Law. Lawyers tend to prefer such definitions. John Salmond also defines law as "the body of principles recognised and applied by the state in the administration of justice. There is much emphasis on an authoritative body giving out the commands. But as earlier noted, such a definition will exclude rules of conduct in decentralised primitive societies from the purview of law. This is not acceptable.

Accordingly, Fredrich Von Savigny maintains that law is not the creation of the legislator or any sovereign, but emanates from the popular consciousness of a nation (voikgeist) and exists for the purpose of regulating the action of individuals and the whole community.

SELF ASSESSMENT EXERCISE 2

Which of the different views of law agrees most with your own view of law?

GUIDELINES

Try and answer the question before reading further.

Compare the different views of law with the on you have yourself given in SAE I.

Which of them closely approximate your own?

With the benefit of knowing other views, do you still think the one that comes closest to yours is the best?

Go on to read 3.1 and see if it necessitates your reviewing your stand.

Many more definitions could be given. But they will lack in one respect or the other. Renowned scholars have appreciated this ever since. For example, the social philosopher, Immanuel Kant, had expressed disappointment at lawyers for still seeking a definition of their concept of law. Another scholar, this time a legal philosopher, Lord Hart declared that nothing convincing enough to be recognised as a definition could provide a satisfactory answer to the question of what law is. In 1964, Justice Julius Stone hit the nail on the head when he stated that: "Law is necessarily an abstract term, and the definer is free to choose a level of abstraction: but by the same token, in these as in other choices, the choice must be such as to make sense and be significant in terms of the experience and present interest of those who are addressed" (Stone 1964:177).

3.2 Law Defined

The problems of defining law as discussed above notwithstanding, it is necessary to provide a working definition for the concept. This is because the concept will come up many times in the course of your reading through the course. Which image then should it conjure whenever it comes up?

Towards a working definition of law, it is first necessary to state the major characteristics of law that is contemplated, whenever the concept is used in this Course. The characteristics are as follows:

Law is a complex whole of many phenomena.
These phenomena include the norms regulating behaviour and the machinery for their enforcement and administration.
The norms which constitute the law are social in character.

That is to say they regulate the behaviour of an individual in relation to other societal members.

The norms that constitute the law present an orderly picture of the society in which the norms operate.
The order guaranteed by the norms is a coercive order. In other words, the authority of law is reinforced by force, which the organised society can deploy to compel individual conformity or face various forms of deprivations, including life.
The authority which supports the law operates according to other established norms. It is not arbitrary or spontaneous.

Taking cognisance of those characteristics we may then provide a working definition for law, thus. “Law is a body of rules of social conduct which are recognised as obligatory by the people whose conduct it guides, and which visits specific sanctions administered by legitimate authority on violators”.

3.3 Sources of Law

The sources of law are the materials from which legal rules are made. Such materials include: custom, religious beliefs, morality, habits, mores and folkways, whether written or not, and so on. Sometimes the word "source" is not used in reference to material from which laws are formed alone, but also in reference to the manner in which laws are made. Hence legislation, codification, judicial precedents, and equity are also sources of law. When we come to the particular experience of Nigeria, the word "sources" shall still be extended further to denote entire system of laws from which Nigeria has borrowed. For example, the received English law will become a source of law.

SELF ASSESSMENT EXERCISE 3

Other than the sources listed, which other sources of law can you think of?

GUIDELINES

Remember that the word “source” is a loose one and can be used in many senses.

You are encouraged to keep the three major distinctions in its use in mind when thinking of other sources.

From which materials are laws made which has not been included here, how is law made that has not been included here, or how is law borrowed that has not been included?

Think of any other way in which law can be sourced. Remember you need not allow yourself be hampered by the strict definition of law as something made by the legislature.

For our purposes in this unit, the term will be used in reference to how laws are made. In this regard, there are Legislation, Custom/Judicial precedents, Equity, and a host of others that we may describe as subsidiary sources. Let us take them one after the other.

3.3.1 Legislation

This is the law that results from the activity of a law enacting body such as the legislature (or in Nigeria, the National and State Assembly). In other words when a group of people, usually representing the sovereign, sit down to consciously deliberate and enact laws, we say such a body is legislating.

For example, Nigerian legislation is made up of statutes and subsidiary legislation. The laws that the legislative arm of government enacts are called statutes. When however, laws are enacted in pursuance of powers granted by a statute, such laws are called subsidiary legislation. Nigerian statute that is laws made by centralised decision making bodies (whether the Parliament/Assembly or by Military councils during military regimes) include: Ordinances, Acts, Laws, Decrees and Edicts.

3.3.2 Custom and Judicial Precedents

Custom, combined with decisions of judges in decided cases of the past, constitute a source of law especially in common law countries (i.e. countries following the model of the English legal system). In such countries, judges are bound by decision already reached by courts in the past, when they are confronted with a new case with similar facts. In this way, custom and judicial precedent serve as sources of law. This source may also be referred to, simply, as case law.

3.3.3 Equity

Equity in a simple sense means fairness or justness. It developed as a source of law in England to mitigate the harshness of the common law (i.e. law based on English custom). It enables one to ask if justice has been done, even when the law has been followed to the letter. The English Lord Chancellor used to grant relief on behalf of litigants who believed they have suffered under the common law (i.e. Custom and Judicial Precedents) system of justice. Such intervention by the Lord Chancellor followed no established principle other than "grounds of conscience". Equity then developed to such an extent that if there was any conflict between a rule of equity and a rule of common law, the rule of equity was to prevail. In this way equity (consideration of fairness, justness, good conscience) came to become a source of law.

3.3.4 Subsidiary Sources

These include writings and commentaries by legal scholars. They are not much used in countries which operate then" legal system according to English law principles. But in countries of continental law like

Germany, France, Italy and so on, it is a respected source of law. Also, under Islamic law the unanimous agreement of legal scholars (i.e. *ijma)* is considered a major source of law, after the holy Koran and *Sunna.* The issue of sources of laws will be revisited again in module 4, when we shall be dealing with the Nigerian legal system.

3.4 Classifications of Law

The law may be divided based on a number of criteria. Some of such broad divisions include the distinctions between:

Criminal law and Civil law
Public law and Private law
Substantive law and Procedural law.

SELF ASSESSMENT EXERCISE 4

Which other classification of laws can you think of?

GUIDELINES

Think of the various components of the legal system (police, courts, prisons, customs, etc.) and imagine if they will be concerned with different sets of law?

Think of varieties of offences and imagine if there are no similarities/differences that may warrant comparing some together and separating others e.g. in terms of "whose ox is gored" (government, public or private), or how serious the offence, or whether it is against property, person or public order, etc.

Then read on and see if your classifications embrace those presented here.

3.4.1 Criminal Law and Civil Law

Criminal law refers to those aspects of law dealing with offences or crimes that are punishable by the state. Civil law on the other hand, refers to the law governing conduct which is not punishable by the state. Note however that the distinction between a crime (punishable by the state) and a civil wrong (where the individual wronged seeks redress) is not in the quality of the act. The aim of criminal law is to punish the offender, while the aim of civil law is to redress wrongs. This is done mainly through compensating the wronged party.

3.4.2 Substantive and Procedural Law

Substantive law refers to the bodies of law which define offences, and prescribe penalties for violations. It also defines rights and duties. Examples of the substantive criminal laws of Nigeria are the Criminal code and the Penal code.

Procedural laws prescribe procedures that must be followed in prosecuting offenders and other persons through the Justice System. For example they contain rules of arrests, bail, detention, trial proceedings, and so on. Examples of procedural laws in Nigeria are the Criminal Procedure Act (CPA) which is operative in the southern part of the country, and the Criminal Procedure Code (CPC) which operates in the north.

3.5 Functions of Law

Law performs very important functions for society. In fact it has been argued that it is law which makes the social order, and by implication society, possible. Some of the more obvious manifest functions of laws are as follows:

1. **Preservation of the existing lefeal system:** This the law does by laying down rules on how to come into power (e.g. on formation of political parties and election). It also contains such offences as Treason and Sedition as a way of protecting those in power.
2. **Maintenance of peace and order:** This is a prerequisite for man to realise his potentials in any society. The law is able to perform this function more effectively through its branch of Criminal Law.
3. **Provision of redress for harm done to an individual:** This is achieved mainly through the law of tort. Remedies may be given even when no relationship agreement exists except between the parties.
4. **Provision of redress for broken agreements:** This is mainly covered by the law of contract.
5. **Protection of basic freedom of the individuals:** In most modern societies, this requirement is taken care of the by the enshrinement of Fundamental Rights in the Constitution, which is the supreme law.
6. **Protection and reinforcement of family relationships:** The branches of law most useful in this regard, include Family Law, Law of Succession, Torts, etc.

These are the manifest and beneficial functions of law. A school of thought is however emerging to contend that these apparently benign

functions of law, actually mask an underlying partisan functions. That the law, first and foremost, exist to protect the powerful and to legitimise an unjust status quo. The debate is an enduring one. It will be taken up more appropriately in module 2, where we shall be discussing the various conceptions of law. The more germane question of whether law is in fact necessary in society will be discussed in the next unit (i.e. unit 3).

4.0 CONCLUSION

You now know the meaning of law, when used in a narrow or academic sense. You have also been exposed to the important and basic components of the concept. You should never lose sight of the purpose of the unit however. This course is a Sociology course, and not a Law course. The conceptualisation of law is hence undertaken only with a view to making you understand the "Sociology of Law".

Towards that end, the much that has been accomplished in the main content of this unit suffices.

5.0 SUMMARY

In this unit, you have learned that law, though a frequently taken for granted word, is a very difficult concept to define. You have also been given some of the basic characteristics of the concept, which any good definition of it must capture.

The unit has also discussed some of the basic dimensions of the concept which yeu should know, for you to claim to actually know the meaning of law. They include its sources, classifications and functions. In the next unit, more will still be said about law and the debate over whether it is something that human society can do without.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the meaning and sources of Law in not more than six typewritten pages.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 THE NECESSITY OF LAW

CONTENTS

1.0 INTRODUCTION

In the last unit, you learned the meaning, sources, classifications and functions of law. In the subsection on functions, you were presented with a list of some of the vital roles that law plays in society. Remember however, that the subsection ended on the note that a debate is currently on going, on whether law is as beneficial as those functions seem to suggest. Furthermore there is a growing opinion that there are many other candidates for the position being claimed for law in terms of order maintenance. It has been suggested that other social control mechanism such as custom, morality and other informal means can serve the purpose of law. This unit is devoted to examining the debate about the necessity of law in society more closely.

2.0 OBJECTIVES

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

State the argument for and against the existence of law in society/ Demonstrate that at the core of the argument, is the differing conceptions of human nature," 1 Understand that law, even if it is an evil, is a necessary evil.

3.0 MAIN CONTENT

3.1 Is Law Necessary in Society?

Put more clearly, the question is whether law enhances or impedes the attainment of the corporate goals of society. In answering the question two major positions have emerged: one arguing that law is a good thing and is in fact the thing that makes society possible. In other words that

there can be no society without law. The other camp maintains that law is a positively evil thing. Its existence distorts human nature and engenders all the societal ills. *As* such society can well do without it.

SELF ASSESSMENT EXERCISE 1

Can a society exist without law?

GUIDELINES

Attempt the question on your own before reading further.

Then think in terms of human nature. How good or bad is it? Use yourself as example: without the threat of law would you conduct your life differently?

Law has both its advantages and disadvantages but which are more? Do you know or can you conceive of any society which has no law? How will life in general, in such a society, be?

A deeper examination of the debate reveals that the underlying issue of contention which creates the divide in perception is a philosophical one. It centres essentially on the conception of human nature. Those who believe in the natural goodness of human nature do not see any need for law. They maintain that if man is left to his own devices, the innate goodness in him would emerge and there will be no need for any one to make him civil. The existence of law with its characteristic restraints and coercion are held to negatively impact on man's goodness. So it is law which actually creates rather than curb societal ills.

The opposing camp rests its argument on the premise that man is evil or bad by nature. If left to his devices without the restraint of law, anarchy and chaos would result. There will as a result be no social order or society.

Let us now look more closely at the arguments of both sides and what their exponents have to say.

3.2 The Case for the Existence of Law in Society

The underlying idea, around which this case is built, is that man is by nature evil and the law is needed to keep his evil inclination in check. As far back as the third century B.C., the "Legist" school of philosophy in China had made this argument. It concluded that only the restraint of penal law would bring good back to society. It was reacting to the decadence and chaos that then characterised the Chinese society.

At about the same time, the “Shastra writers” of India were making similar argument. According to this school, man by nature is greedy and grasping. If left to operate without law, life itself would become a sort of "devil's workshop" operating on the “logic of the fish”. The big fish will feed on the smaller ones. It is only the restraint of law that would avert such a devil's workshop.

There are a number of modern writers who share this view about the inherent evil nature of man and the need for law as a weapon to curb such passions. Foremost among them is Thomas Hobbes. To him society without law is a veritable recipe for disaster. His arguments are eloquently stated in his book *Leviathan* published in 1661. A passage in the work that aptly summarised his views read thus:

> In the nature of man we find three principal causes of quarrel. The first maketh man to invade for gain. The second for safety and the third for reputation. The first uses violence to make themselves masters of other men's person, wives, children and cattel. The second to defend them and the third for trifles such as a word, a smile, a different opinion and any other sign of undervalue. . . .
>
> Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war is of everyman against everyman.
>
> In such condition there is no place for industry because the fruit thereof is uncertain and consequently no culture of the earth, and which is worst of all, continual fear and danger of violent death and the life of man is solitary, poor, nasty, brutish and short.

Probably, the last sentence of the quotation is not new to you. It is a popular phrase and it summarises the argument of those in favour of law. Without law to control men, their evil passions would surge and society would be thrown into a life of constant war, and life would be nasty, brutish and short.

SELF ASSESSMENT EXERCISE 2

Do you agree that without law, life would be nasty, brutish and short?

GUIDELINES

You have now seen one side of the argument. Before going on to read about the other side, try and ruminate over the first position?

Is man really innately evil? If he is, is law the only means by which those evil tendencies can be kept in check? What about religion, morality and conscience? Can these not do the trick?

Compare your answers with the argument of the other camp in section 3.2

Other modern exponents of the view include David Hume, Niccolo Machiavelli and Jean Bodin. Jean Bodin described the original state of man as one of disorder, force and violence. Hume stressed that where there is no law, coercion and government, there can be no society. Machiavelli urged governments to do what is in the interest of the state and not consider the interest of individuals because men by nature are bad and unfaithful.

3.4 The Case against the Existence of Law in Society

The underlying assumption here is that man by nature is inherently good. The existence of law is held to suppress rather than bring out that innate goodness. Law then, only serves to impede the realisation of man's potentialities.

Plato, one of the seminal thinkers of early Greek philosophy, argued that what is needed in society is not law but education. Education will ensure that everyone knows his position in society and justice consists of everyone knowing and doing what is required of his position. He maintained for example that only philosophers (who are considered the most educated) should rule.

Adam Smith's popular theory of *laissez-faire* though specifically an economic theory, has the broader implication that any form of official restraint hampers society progress. The theory calls for government to hands off from the economy and allow free competition through the operation of invisible hands of market forces. Law is held to inhibit free competition and to distort the natural development of the economy and society.

Herbert Spencer, one of the founding fathers of Sociology, made more or less the same argument. The Russian anarchists, Bakunin and Kropotkin maintained that the best system of social organisation is anarchism. Other soviet legal philosophers like Stuchka and Pashukanis

took similar positions.
Many Marxists have also argued that law is not a precondition for society. Karl Marx himself believed that with the eventual coming into being of communism, law along with other coercive institutions of the state will wither away.

4.0 CONCLUSION

You have been presented with the two major contending positions about the necessity of law in society. Which of them will you consider to be more appropriate? The fact is, there is virtually no known human society that has existed without law. Persuasive as the argument of the camp who argue that law is not necessary is, it is difficult to buy. You should therefore study deeper into this Course, having it in mind that law is necessary for the existence and persistence of society. The objective of exposing you to the debate is, for now, to be regarded as largely academic.

5.0 SUMMARY

This unit is to be taken as a further elaboration of the concept of law discussed in Unit 2. The main objective is to expose you to the debate about the necessity of law to the society. You have now read both the argument for and the argument against. I expect that you are as convinced as I am, that the debate is largely academic and that the law is indeed very necessary for the continued existence of any society. If not, your position is still legitimate and you may hold on to it, provided you can defend it.

6.0 TUTOR-MARKED ASSIGNMENT

Critically assess the arguments for and against the necessity of law in society. Ensure that your argument touch on all the relevant aspects of the question. Write a maximum of six type-written pages.

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 DEFINING SOCIOLOGY OF LAW

CONTENTS

1.0 INTRODUCTION

In the first three units of the course, you learned the meaning of sociology, and the meaning of law. You were told that the two disciplines together form the foundation for this course. It is now time to learn the meaning of sociology of law. This, infact, has been the modular goal towards which those first three units were preparing you.

In the present unit, you will learn about the emergence of sociology of law and why it took so long to emerge, given its obvious usefulness. This usefulness will be underscored by citing some of the many illuminating statements on the issue, as pronounced by eminent sociologists and jurists.

Even more importantly, you will learn about the subject matters/concerns of the course. The overall aim of the unit is for you to grasp the full meaning of sociology of law.

2.0 OBJECTIVES

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

Explain the reason for the late emergence of sociology of law as a formal course of study
Understand the meaning of sociology of law
Describe the subject matter of the course;
Demonstrate that sociology of law is a branch of general sociology as well as an auxiliary of legal studies.

3.0 MAIN CONTENT

3.1 Emergence and Development of Sociology of Law

As an academic course of study, the emergence of Sociology of Law is generally put at the mid-twentieth century. Infact, some believe that it did not become institutionalised as a modern empirical science until 1962 when the research committee of sociology of law was established by the International Sociological Association.

Nevertheless, the concerns of the course are clearly discernible in the works of notable social scientists and jurists dating back to the 18th century. In fact, a distinctively sociological touch is clearly brought out in Montesquieu's 1748 *de I' esprit des lois,* in which he demonstrated the ways in which law and society may shape each other. That concern is also obvious in the works of early jurists such as Maine (1861: *Ancient Law),* Jhering (1866), and Holmes (1926: Collected Legal Papers). The concern is reflected in the works of early sociologists such as; Durkheim (1893: *Division of Labour),* Sumner G.W. (1906: *Folkways),* Weber (1922: *Law in Economy and Society).* And also in the works of early Anthropologists such as Malinowski (1926: *Crime and Custom in Savage Society).*

The pertinent question becomes, given this early interest in the social content of law, why did it take so long for the sociology of law to emerge as a course? The core of the answer lies in the attitude of those same early lawyers and sociologists. Each group tried to carve out the boundaries of its discipline and saw others trying to deal with same subject as outsiders and intruders.

The founding fathers of Sociology saw themselves as scientists in the mould of physical/natural scientists. The founding fathers (e.g. Auguste Comte, Emile Durkheim, Graham Sumner) believed in the unity of the scientific method. In pursuance of this, they saw the domain of sociologist as that of the *"Quidfacti"* or "social fact". They were positivists who maintained that sociology should deal only with "facts", the observable or the "is". Law to them belonged to the normative realm or the realm of the "ought". Though they were very interested in social order and social control, they did not consider "law" in the restricted sense, worthy of sociological investigation.

Lawyers on the other hand have always been very conservative. They confer an aura of sacredness on their subject. Anyone not trained as a lawyer is not "learned" and is not, welcomed to dabble into the subject matter of the “noble profession”. This mutually reinforcing attitudes continued to militate against the development of the discipline until both sides eventually realised what both disciplines stand to gain from working together.

To underscore this new awareness, many illuminating statements were made by eminent jurists and sociologists of late 19th and early 20th century. In fact, the major beneficiary of the coming together of the two parent disciplines is Law. It is in recognition of this, that majority of law faculties in the world today, require that sociology of law be offered as part of the course leading to the award of a degree in law.

Maurice Harriou, a French jurist, stated that "A little law leads away from sociology but much law leads back to it, and a little sociology leads away from the law, but much sociology leads back to it." In other words, it is ignorance on both sides that has hindered the emergence of the discipline.

Oliver W. Holmes (1920:21), a one time supreme court judge of the U.S.A. also notes that "the life of the law has not been logic. It has been experience of real social existence which the juridical process cannot overlook. Law embodies the study of a nation's development and cannot be dealt with as if it contains only the axioms and corollaries of the book of mathematics".

Jhering R.V. (1866), a German jurist also argued that "the lawyer had not merely to grasp the technical principle of his subject, but had to bring to it, a genuine understanding of the underlying sociological implication of the legal rule with which he operates and how these could be used to resolve and harmonise rather than provoke or exacerbate conflict".

More recently, a one time Nigerian supreme court judge, Karibi-Whyte had also noted that: "It is extremely important for a good understanding of law to understand its general background i.e. the whole sociological situation which gives rise to the prohibition of particular conduct or provide defense for such prohibition".

So the contemporary wisdom is that it is legitimate and rewarding for sociologist to be interested in law, and for lawyers to be interested in sociology. The hitherto antagonistic relationship has become one of partnership. But before delving into this new reality, let us look at the concerns of sociology of law.

SELF ASSESSMENT EXERCISE 1

What do lawyers and sociologists stand to gain from studying each other's disciplines?

GUIDELINES

Read again the illuminating statements of eminent personalities on the issue in 3.1.

Understand law and social order are part of the concerns of sociologists.

Lawyers become better lawyers when they understand the social contexts of law.

3.2 The Subject Matter of Sociology of Law

A very good analysis of subject matter of sociology of law is contained in Podgorecki's (1974) work, *Law and Society*. Much of what is presented here are taken from that book. You are encouraged to get a copy for your personal readings.

Having said that, let us quickly, add that the Course is a rapidly developing one and the subject matter as such, is not static. While podgorecki's (1974) work captures the essential subject-matter, the subject-matter remains dynamic. The major challenge for the Course, however, remains the attempt to integrate jurisprudence and social research.

Shortly and sharply put, the subject matter of sociology of Law is law and its social context. As a sub-discipline of the discipline of Sociology, its aim is to apply sociological insights to legal phenomena, particularly in thearticularly in their interrelatiic social conditions and the social structure. This is a logical implication of the informed assumption that law and all its instrumentalities influence and are influenced by the social structure.

The Sociology of Law is concerned with the nature of law, its sources and functions, its Nation to other social control mechanisms and the complex relationship between the legal system (i.e. law together with the apparatuses for making, enforcing and administering it) and the society. It studies the materials from which laws are made, the institutions which make the laws and the influences on such an exercise. It is also concerned with the institutions and processes of law enforcement, interpretation, adjudication and administration. Components of the legal system such as the legislature, the police, the justice departments, courts, prisons, social welfare agencies, and so on, are all examined with a view to sociologically unraveling and explaining their functions. Questions are posed and answered as to the nature of the organisation of such institutions, their underlying ideologies, their actual

operations, their latent and manifest functions, as well as their relationship with the social structure within which they operate.

At this point, you are advised take another look at the 13 course objectives earlier presented in the course guide to this course. Those objectives also reveal the concerns and subject-matter of the course in very clear terms.

3.3 Defining Sociology of Law

The foregoing discussion on the emergence of, and concerns of Sociology of Law should have by now given you a clear idea of what the course is all about. In its shortest and yet quite precise definition, the course may be viewed as the application of sociological methods to the study of law. More elaborate and fairly standard definitions of the course, however, exist. Let us briefly review a few of them.

SELF ASSESSMENT EXERCISE 2

Attempt a definition of sociology of law.

GUIDELINES

> A second reading of the content of this unit up to this point would be helpful.
>
> Look particularly at its concerns.
>
> You may then read on and compare your definition with those of others. In which respects are they different or similar?

Seizmck P. (1969) offers this definition: The sociology of law may be regarded as an attempt to marshall what we know about the natural elements of social life and to bring that knowledge to bear on a consciously sustained enterprise, governed by special objectives and ideas.

Aubert V. (1962) describes it as part of the general discipline of Sociology, which deals with the specific legal way of thinking.

Podgorecki's (1974) definition is more elaborate and includes the subject matter of the sub-discipline. According to him:

> The sociology of law has as its task, not only to register, formulate and verify the general inter-relations existing between the law and other social

> factors (law could then be regarded as an independent or dependent variable), but also to try and build a general theory to explain social process in which the law is involved and in this way link this discipline with the bulk of sociological knowledge.

Back home in Nigeria, Alemika (1994) defines sociology of law as

> the application of sociological theories, insights and methods to the problems of law in relation to society. This concern stems from the assumption made by legal sociologists that law and legal systems are derivatives of social structure. They are products of society as well as sources of its change.

A critical look at the foregoing definitions reveals that they are all saying virtually the same thing. Some have only gone farther than others in elaboration. At best then, there is a distinction without a difference. By the same token, you are free to adopt any of them that catches your fancy. Or better still coin your own definition. The major requirement is that your definition must include words to the effect that sociological or social scientific methods would be applied to law.

4.0 CONCLUSION

The first three units of this module have been preparing you for this unit 4. You should by now have a fairly definite idea of what sociology of law is about.

5.0 SUMMARY

You now know the reasons for the late emergence of this sub-discipline of sociology. You also know that it is not just a branch of general sociology, but it is also an auxiliary of legal studies. Many quotations have been given on the benefits of sociologically studying law, and the various definitions of the course prof erred by eminent scholars. The ultimate goal of the module, namely introducing Sociology of Law to you, has expectedly been realised.

6.0 TUTOR-MARKED ASSIGNMENT

Justify the need for a sociological study of law (in not more than six typewritten A4 pages).

7.0 REFERENCES/FURTHER READINGS

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MODULE 2 CONCEPTIONS OF LAW

The two dominant views of law in Sociology are the consensus/functionalist and the conflict perspectives. The former views law as an embodiment of communally agreed upon values. The latter, especially its Marxist variant, maintains that society is characterised by conflict between groups and that the law takes the side of the most powerful of the groups. The major propositions and proponents of each of the two views would be presented to you in this module.

In addition to such theoretical models of law in Sociology, there are also models of law in jurisprudence. The legal sociologist is interested in understanding what is known about the law on law's own ground. Hence, he looks at his data with the lens of jurisprudence in one eye and the lens of Social Science in the other. It is in this way that useful insights have been provided into the content and operation of law. This module will also introduce you to the major conceptions of law in jurisprudence, their postulations and their exponents.

On the whole, this module is made up of six units. The modular goal is to give you a deeper understanding of the meaning of law by highlighting the various ways in which jurists and sociologists conceive the concept. This goal is broken into specific unit objectives given at the beginning of each of the units.

Each of the six thematically linked units which constitute this module is devoted to explaining a particular view of the law. At the end of the module you would have learnt that not only are there different ways of conceiving the law, but that each of the perspectives has its own merit. Your view of the law thereby becomes more sophisticated, deeper and fuller.

The six ways of viewing the law presented in this module are by no means exhaustive. Neither are they mutually exclusive. They are however the most important and dominant ones. The student who is interested in knowing more (e.g. other versions of conflict theories such as Social Interactionisms, or Critical Theories, and other versions of jurisprudence such as Legal Realism or Teleological School) is encouraged to read the recommended materials at the end of each of the units.

Unit 1 Consensus Theories of Law
Unit 2 Conflict Theories of Law
Unit 3 Natural Law School of Jurisprudence
Unit 4 The Analytical/Positivists School of Jurisprudence
Unit 5 The Historical School of Jurisprudence

Unit 6 The Sociological School of Jurisprudence

UNIT 1 CONSENSUS THEORIES OF LAW

CONTENTS

1.0 INTRODUCTION

A theory is a general explanation of a phenomenon which is presented in such a way that the major outlines of the phenomenon and the links between them are highlighted. Using such a theory as a framework, it becomes easy to explain specific manifestations of that phenomenon as instances of the generalisation provided by the theory. Theories of law are therefore explanatory generalisations on features of law such as its nature, content, character, operation, purpose and so on.

In sociology, we reckon with two broad classes of theories and of law. These are the Consensus theories the Conflict theories. This unit will discuss Consensus theories while unit 2 will take up Conflict theories.

2.0 OBJECTIVES

At the end of this unit you should be able to:

State the basic assumptions of Consensus/Functionalist theories of law;
Name at least two proponents of Consensus theories of law;
Identify theories of law that proceed from the Consensus model of society;
Critique Consensus theories of law.

3.0 MAIN CONTENT

3.1 Basic Assumptions-and Propositions of Consensus Theories of Law

Consensus theories, as the name suggests proceed form a fundamental assumption that consensus exists in society. In other words, that societal members are agreed (in consensus) about what is in the interest and will further the well-being of society and what will not. They do not see any fundamental cleavages or divisions between groups in society.

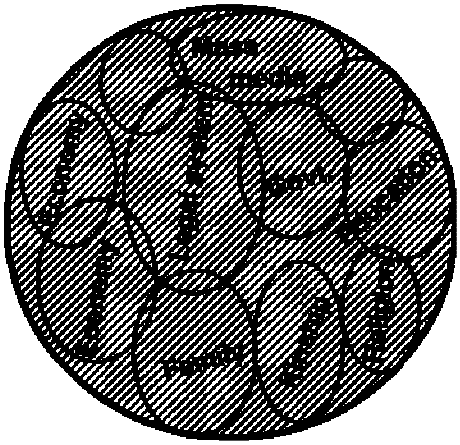
The theories hence, rest upon a consensus model of society. They also believe that society is made up of parts (or structures) and each of those parts or structures functions to maintain stability, equilibrium and general well-being for the whole society. This is why they are also called Structural Functionalists.

To Functionalists, society is a self-contained system made up of interconnected and interrelated parts. Such parts include social institutions like religion, family, government, economy and education. They also include smaller components such as the law and agencies of the legal system.

These parts or structures exist in a state of mutually reinforcing equilibrium. They all have functions to perform and such functions are interwoven and interconnected. If every part performs its proper functions, society would be stable, balanced and in a state of equilibrium. But if any part is not doing well society would experience instability, chaos, disorder and disequilibrium.

A state of instability is a transient or temporary state. This is because society will always tend towards stability. So when there is any instability generating developments, society has the in-built mechanism to generate certain vectors that would restore stability.

The scenario being described is best illustrated with the concept of a system. Anything that is a system presupposes that all its constituent parts are working towards the corporate interest of the whole. For example, a human being or any biological organism is a system. If any part of the human being, no matter how small, is "suffering", the whole human suffers. If the little finger is on fire the whole body feels the pain. Another example is the motor vehicle. Every part of it is important and if any part is not doing well the whole vehicle feels it. To the functionalists, society is a system. What is good for the whole society is good for the individuals of the society.



Society is a whole, made up of interconnected and mutually reinforcing parts.

The law is a major vector generated by society to ensure equilibrium. While crime and other social ills tend to create instability and disequilibrium, the law operates to restore stability and equilibrium or balance.

SELF ASSESSMENT EXERCISE 1

How does law restore stability to society?

GUIDELINES

> Think of situations of instability, crises or disorders that your society (national or local) has witnessed in recent time. Were the police called in? Were people arrested? Were people arraigned in courts? Were some given imprisonment terms? Did order return?
>
> There are ways in which law restores stability and in punishing erring ones, it is also deterring potential troublemakers in the society.

To the Functionalists, law is an embodiment of communally held, cherished values and sentiments. The values and interests that are enacted as law are those of the whole society and not any particular section of society. In terms of attributes, the law is fair, non-partisan, impartial and a neutral arbiter, or a disinterested third party. It exists to serve the interest of the corporate whole and this subsumes the interest of individuals. These lofty attributes are also held to characterise the agents of the law such as the police, prison and courts.

3.2 Proponents/Exponents of Consensus Theories of Law

Some of the notable exponents of this view of law include Thomas

Hobbes, for whom (as we noted in unit 3 of module 1) society cannot exist without law to ensure peace and order. Jeremy Bethamm's utilitarianism also fits the view. For him, the best society is one which ensure the greatest happiness for the greatest number of people, and it is only through law that this is done.

For our purposes here, it will suffice to highlight the contributions of two notable exponents of this perspective, namely, Emile Durkhein and Harry Bredemeier.

3.2.1 Emile Durkheim

Durkheim was very impressed by the imported role that law plays in streamlining human behaviour to conform to demands of society. He described it as the most precise and measurable symbol of social solidarity. Like all Functionalists, he took it for granted that the law serves the purposes of the whole society without any discrimination.

An important function that Durkheim attributed to law was that of social integration. Law is not just a mechanism of social integration, but in performing that function, it reproduces the major forms of social solidarity; namely, mechanical and organic solidarity. Where laws are repressive, as in primitive and homogeneous societies, the kind of solidarity produced is mechanical. Restitutive laws (which Durkheim held to characterise modern heterogeneous societies) on the other hand, reproduces organic solidarity.

3.2.2 Harry Bredemeier

Bredemeier's work was a reinterpretation of another work by Talcot Parson on the operation of the society system. Talcot had maintained that there are functional prerequisite which any social system or society must meet before it can operate successfully. These functional prerequisite are: (a) Adaptation (b) Goal attainment (c) Latency or pattern maintenance and (d) Integration.

A society according to Parson must be well-adapted to its environment in order to eke out a living from it. The institution of society which ensures a successful adaptation to the environment is the economy. The political institution sets goals and ensures that they are achieved. Cultural institutions provide motivation for members as well as avenues for tension management.

The distinctive contribution of Bredemeier is in identifying law as the major mechanism for bringing about integration, by ensuring control and coordination among the constituent elements of society.

Again we see that a benevolent and impartial but very important role is ascribed to law. This is the major distinctive feature of Consensus theories of law. The law is never seen as partisan, or as forged out of conflict. Rather it is seen as an embodiment of the corporate interest of the whole society.

SELF ASSESSMENT EXERCISE 2

Do you agree that law is impartial? Illustrate your answer.

GUIDELINES

Note that absolutes are rare in the social sciences. You therefore be very cautious in giving a "No" or "Yes" answer.

It is best to argue for both sides and then on the balance of superior argument you align with a side, even while noting that it need not always be so.

So law is sometimes partial, and sometimes impartial. Whichever side of the continuum that you incline more to will determine whether you are a Consensus or a Conflict theorist.

3.3 Critique of Consensus Theories of Law

The major shortcoming of Consensus theories of law lies in their assuming that there is a consensus in society. Society is made up of different groups with differing interests. Since such interests are not the same and may even be opposite, it is naive to portray the law as an embodiment of communal values. In a situation of conflicting interests, it is not possible for one law to serve all the interests. In Nigeria for example, one's identity, whether ethnic, religious, or gender may affect his views and feeling about a particular rule of law differently.

A second weakness of Consensus Theorists lies in their characterisation of law and the machinery for its enforcement and administration as benign and impartial. The experience in Nigeria contradicts this. The contents of the laws are not neutral, nor are the enforcers and administrators. Consistently, the rich fare relatively better than their less fortunate counterparts in the justice process. For example, it is easier for the rich to avoid arrests, meet the conditions for bail, pay fines and do many other things for which the relevant rules may apply uniformly to everyone, but which ability to fulfill the requirements is tied to money.

4.0 CONCLUSION

You now know one of the two major theoretical conceptions of law in sociology. The very kernel of this view of law is revealed in the name of the view i.e. Consensus theories. The Consensus model of society is dominant in sociology as a whole. All theories proceeding from that model make a fundamental statement that there are no fundamental conflicts in society. Hence, this view of law sees the value enshrined in law as the cherished values of the whole community. The moment you question that assumption, you are also questioning the pedestal upon which the consensual views of law stand.

5.0 SUMMARY

In this unit, you have learnt about a particular conception of law. As you read deeper into this module, you shall be exposed to more. Remember, the core of the argument of this school about law, is that it is an embodiment of communally agreed upon values.

6.0 TUTOR-MARKED ASSIGNMENT

Identify any Consensus Theory of law and analyse the extent of its conformity to the general assumptions of the Consensus model of society. Write a maximum length of six typewritten A4 pages.

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UNIT 2 CONFLICT THEORIES OF LAW

CONTENTS

1.0 INTRODUCTION

In unit 1 of this second module, you learnt about the Consensus view of law. You were told that Consensus theories take it for granted that members of society are all agreed about the values that are enacted as law and that every one views law as a good thing. In this unit, you will be presented with the other side of the argument. Conflict theorists are of the view that society is characterised by many conflicting interests. As such values are not the same for all people, the values enacted as law are the values of particular groups, not of the whole society. It follows therefore that law is not the beneficial thing (at least not to everybody) that Consensus theories portray it to be.

2.0 OBJECTIVES

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

State the basic assumptions of Conflict theories of law;
Name at least two exponents of the conflict perspective on law;
Identify explanations of law that proceed from the conflict model of society;
Criticise Conflict theories of law;
Compare Consensus and Conflict theories of law.

3.0 MAIN CONTENT

3.1 Basic Assumptions and Propositions of Conflict Theories of Law

Various kinds of theories are categorised under Conflict theories. So long as a theory recognises that there are different groups with interests that may conflict, it may/can be subsumed here. For our purposes however, it is the Marxist variant of Conflict theories that we are most concerned about.

Marxist theories proceed from the premise that the manner of ownership of the means of production, divides society into two major antagonistic classes. There is the class that owns the means of production. This class may be called the capitalist, bourgeois, ruling, propertied, parasitic, exploitative, upper or simply the dominant class. The second class do not own any means of production but its members have only their labour to offer for sale to the other class. This second class may be called the working, labour, exploited, proletariat, lower or simply the dominated class.

SELF ASSESSMENT EXERCISE 1

Using the Marxist typology, try and fit *50* people that you know into the two major classes.

GUIDELINES

> The classical Marxist position about classes is very simple and straightforward. Think of each of those fifty people in terms of whether they own means of production (i.e. capital, equipment, factories, land, etc.) or whether they do not. If they do not, how do they make a living? Are they salary workers? Are there some in the managerial/professional groups who are quite wealthy but do not own means of production? Do you in fact find it difficult to place some? Are some in the capitalist class poorer than some in the political class? These are some of the problems of the orthodox Marxist position.

The class that owns the means of material production (i.e. machines, land, factories, etc.) also owns the means of mental production (i.e. mass media, education, religion, etc.). The class also dominates the state apparatus. Hence, it is the ruling class. The major objectives of this class is to make profit and more profits. It makes the profit largely by exploiting the lower class. It pays members of the lower class wages which are less than what those workers put into the production process. The surplus goes into the pocket of the dominant class.

Law and the machinery of the justice system are geared towards ensuring that this unjust status quo is perpetuated.

The classic Marxist argument is that the economic infrastructure of society (made up of the means/factors of production) determines what happens at the ideological superstructure of society (made up of production relations and to which law belongs). In other words, the nature and character of law is determined by the economy base or substructure of society. Since in capitalist societies the economic base dictates unequal relationship, it follows that the law is shaped to meet the demands of such inequalities.

The two classes in a capitalist society have opposing interests. The capitalist class wants to preserve the exploitative relationship between the classes; the working class wants to end it. The classes have conflicting interests and values. Law comes in to mediate. But the law cannot at the same time embody opposite values. It ends up taking sides with one of the parties to the conflict, namely the capitalist or dominant class. In Marxist parlance, the law becomes, simply, an aspect of the superstructure twitching to the control of the economic infrastructure. This attribute of the law is reflected by all the other components of the legal system. That is to say, the police, courts, prison, and other jusdicial agencies are all partisan. They are on the side of the capitalist class and cannot be impartial, neutral or benevolent as Consensus theories portray them.

Marxists, however, note that it is not all the laws, or all the actions of its agents that are in favour of one side only. Some laws are beneficial to everyone (e.g. you cannot say the laws against murder, theft or rape favour only the upper class). This is, however, more coincidental than deliberate. In search of the specific order (of the capitalist) the general order (of everyone) may also be served. It is also noted that agents of the law such as the police are not just instruments of the ruling class, but sometimes exercise their own institutional or relative autonomy. This is why it is possible to sometimes arrest and punish erring members of the ruling class.

3.2 Proponents/Exponents of Conflict Theories of Law

There are a large number of theorists who share the assumption that society is characterised by conflict and that law cannot, as a result, embody the values of everyone. But as earlier noted, our interest is mainly on the Marxist variants of such arguments. Now, even among Marxists, there are slight differences among exponents on the nature and functions of law.

Radical Marxists such as Quinney, Taylor and Thompson see law simply as an instrument of the ruling class. The implication of viewing law and the legal system as instruments of one class is that law must always favour one class. For example, Thompson (1975) argues:

> The law is a part of a superstructure adapting itself to the necessities of an infrastructure of production forces and relations. As such, it is clearly an instrument of the defacto, ruling class. It both defines and defends the rulers' claim upon resources and power. It mediates class relations with a set of appropriate rules and sanctions all of which ultimately confirm and consolidate existing class power. Thus, the law may be seen instrumentally as mediating or reinforcing existing class relations and ideologically, as offering to those relations a legitimation.

Other not so radical Marxists are more cautious in declaring the law and components of the legal system to be mere instruments of the ruling class. They argue that while serving the interest of the ruling class, the law is not merely a tool or instrument to be wielded by the ruling class as it deems fit. Instances where members of the ruling class have run foul of the law and are punished are cited as examples. Hence, Louis Althusser, though a Marxist, maintains that the law and its agents have what he calls relative autonomy. In other words, they are not totally dependent on the whims and caprices of the ruling class.

Gramsci is another Marxist, who argued that the state or ruling class is not always trying to flex its muscles by using the law to its purposes. But rather that the law is part of the Ideological State Apparatuses, through which the ruling class attempts to forge legitimation for itself. This is done not by coercion but by persuading the lower class to see the benefit of law to all.

Soviet Marxists such as Lenin and Stalin actually believed that with the coming of the Socialist (Bolshevik) Revolution in 1917, law will die away. This is because, it will no longer be useful in a classless society where it is not needed to keep the oppressed suppressed. But in 1921 they realised the futility of expecting law to wither away. They then declared that law rather than dying in a socialist society, would actually be "raised to the highest level of development".

Other soviet Conflict theories such as Stuckka and Pashukams advocated for anarchism. Karl Renncr is a more contemporary exponent of the Marxist perspective of law.

3.3 Critique of Conflict Theories of Law

The basic argument of Conflict theories of law is that in terms of content, law is made up predominantly of the vested interest of the ruling class. In terms of its operation, it is tilted in favour of the ruling class and is a mechanism for preserving the status quo.

This argument is rooted in the orthodox Marxist position that the law is simply part of the ideological superstructure of society, twitching to the string-pulling of the economic base. This argument has been criticised for being too sweeping. There are laws in which partisanship cannot be detected.

SELF ASSESSMENT EXERCISE 2

Cite some laws which are partisan (i.e. partial) and some which are not. Justify your classification.

GUIDELINES

> It might be easier for you to cite laws which you will say do not favour any particular group. Marxists, however, have a point in saying that some laws are partisan. These are mostly laws relating to property. Some laws are not obvious in their partisan character but become so in the process of enforcement. The criticism that not all laws are partisan is however quite valid.

Secondly, laws such as traffic laws, pollution, even theft and rape cannot just be dismissed as reflecting vested interest of a particular class. They serve the interest of all.

Thirdly, in portraying agents of the law as merely serving the interest of a class, Marxists ignore the individual wills and the meaning that such agents attach to their actions. After all they cannot just be robots.

Marxists' belief that all capitalist societies will inevitably experience a socialist revolution, and that only such a revolution will bring law into harmony with objective reality, has also been criticised for being idealistic.

Marxists have also been criticised for the centrality given to class struggles while ignoring other sources of conflict such as race, ethnicity, religion, gender and so on.

4.0 CONCLUSION

You have now learnt about the second of the two major alternative ways of viewing law in sociology. Their differences stem basically from their views about the nature of the society order. While Consensus theories assume that there is a consensus among members of society on what is good for society, Conflict theories assume the existence of fundamental conflicts. These views about society affects their respective conceptions of law, its content, operation and purpose.

The conclusion regarding this specific unit is that so many theories can be subsumed under Conflict theories. Our emphasis here has been on Marxist variants of Conflict theories. Even then, it has been shown that the Marxist theories have subversions with different emphases.

5.0 SUMMARY

In this unit, you have been presented with the Conflict theoretical perspective on law, you have learnt that there are different versions of conflict theories. That the Marxist brand is the most dominant and most useful for our purposes in this course. The differences within the Marxist perspective have also been presented, as well as a general critique of Conflict theories. Having followed the format in which the Consensus theories were presented, it is expected that you will find it easier to compare the two alternative views of law.

6.0 TUTOR MARKED ASSIGNMENT

1. Compare the argument of the Consensus and Conflict perspectives of law. State which of the arguments is superior and why you consider it so. (Write between 7 and 10 typewritten A4 pages).

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UNIT 3 THE NATURAL LAW SCHOOL OF JURISPRUDENCE

CONTENTS

1.0 INTRODUCTION

In the first two units of module 2, you learnt the two major sociological perspectives on law. In the present unit and the remaining units of the module, you will be exposed to jurisprudential perspectives on law. Remember, the modular goal is to make you understand the major conceptions of law.

The Natural law view of law is about the oldest and most enduring of all. The major thrust of its argument is that there are two laws: natural law and man-made law. The former is the higher and superior law. The latter is inferior and should emulate the former. In this unit, the arguments about the two laws are explored with a view to enhancing your knowledge of the concept of law.

2.0 OBJECTIVES

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

State the major propositions of the Natural Law School of Jurisprudence;
Understand the various dimensions of natural law and how it has changed with history;
Analyse the Natural Law argument;
Demonstrate its relevance for modern day legal organisation.

3.0 MAIN CONTENTS

3.1 Assumptions and Propositions of the Natural Law School

The premise from which this School of Jurisprudence proceeds is that there are two major types of laws. These are natural laws and man-made laws. The Natural laws are held to be superior to laws made by man. The Natural laws are sometimes called “higher laws” or “divine laws”, while man-made laws are called “positive laws”.

The natural law belongs to a higher order. It is an ideal system which the man-made laws should try to reflect and imitate. Exactly what is this natural law and how do we know it? If positive laws are man-made, who makes the natural law? The answer to these questions are not the same, they have varied from time to time, and from place to place. Natural law has been equated with physical and propositions of the natural law school from which this school of jurisprudence proceeds. These are natural laws held to be superior to laws made by man. The Natural laws “higher laws” or “divine laws”, while man-made laws are laws of nature, with what is universal in human nature, with what is most beneficial or rational for man, with laws of God, with morality and so on. Whatever the meaning given to natural law, however, one basic thing remains the same. It is held to be a higher and superior law to man-made or positive laws.

The major postulation of natural law theorists, then, is that the good society is one in which man-made laws are harmonised with natural laws. The more the two converge in a society, the more that society is deemed to be properly organised. More would be said on the development and changing conceptions of natural law in the next section of this unit, where we would be discussing exponents of the school.

3.2 Development and Exposition of the Natural Law School of Jurisprudence

Rudiments of the natural law theory of law were discernible in the works of the early Greek philosophers. They made no distinction between the physical laws of nature and what they consider the laws of their gods. Both of these were held as standards for their man-made laws to emulate. Beginning with the Presocratic philosophers however, the conception of natural law acquired a more sophisticated touch. Nature came to be actually located in the natural rather than in the supernatural. It became "how things or peoples may normally be expected to behave or be." But the question became, what is natural for man? Is it natural to allow the strong to prevail over the weak, or is it more natural to protect the weak against the strong? The Presocratics

opted for the latter. Nature is instinct or base drives and natural laws are laws which curb those animal instincts, such as sex drives.

SELF ASSESSMENT EXERCISE 1

What is Natural for man?

GUIDELINES

The word "natural" is a loose one which is frequently used sometimes to stop further argument. It is natural for hare to be ferocious and for sheep to be docile. What exactly is “natural in man” and “natural for man”.

Think in terms of innate attributes.

Think also in terms of what is good for man and in this wise think of society. What is beneficial to society or to the greatest number of people.

Think also in terms of what is divine will or what the holy books (Bible & Quran) describe as such.

Then formulate your own view of what is contemplated when we talk of “natural” and “natural law” before you read further.

3.2.1 Aristotle

Aristotle developed this view further. To him what is natural is that which is common to all mankind. Man as a politico-social being has more or less the same purpose. Nature is the way man behaves by reason of his psychophysical make up. It is also an ideal expressing the conditionality for the full realisation of man's innate potentials. Natural law then, is the law which is common to mankind and enables man to fulfill his purpose as a social being.

3.2.2 Stoicism

The next development on the natural law theory came from the Romans, in particular, the philosophical schools of Stoicism. The Stoics also emphasised the universality of human nature and stressed that reason is the essential characteristics of humanity. Proceeding from this premise, the Stoics argued that there was a universal law of nature which can only be ascertained by reason. This universal law should be the criterion for judging the adequacy of man-made laws.

3.2.3 The Middle Ages

The period that followed the decline of the Roman Empire (say between 400 A.D to 1300 A.D) was a kind of setback for the development of the scientific spirit. It is called the "middle ages" or the "medieval era" and witnessed the increasing dominance of the two great religions of the world in intellectural fields. This trend was reflected in the natural law doctrine. Natural law was equated with “God –made” or “Divine law”.

In the Christian world, saint Augustine and Saint Aquinas maintained that divine laws were a higher superior law given by God. In the Muslim world, Al-Ghazzali also maintained that reasoning is inferior to knowledge that comes through faith in God. Man-made laws, no matter how well reasoned out are inferior to divine laws. The point to note is that natural at this period became divine law.

3.2.4 The Renaissance Period

The renaissance period followed the middle ages, and again the conception of natural law changed. This was as a result of a new resurgence of the scientific approach to issues. But this did not lead to a rejection of natural law. Rather, natural law was reformulated to mean the "highly rational" quality in human law. There was a belief that man is rational and that his reasoning abilities could be used to construct a rational system of natural law. In other words, laws that are rationally derived are natural laws.

The enlightenment period of intellectual history followed the renaissance. It witnessed a massive attack on the natural law theory. In the place of natural law which was thoroughly discredited, the positivist school of jurisprudence emerged. This school shall form the subject of the next unit of this module. It must however be stressed that the natural law doctrine never really died. Infact, it has began to make a comeback beginning with the 19th century when the Teleological school of jurisprudence emerged. We shall say more on this later.

The existence of countries whose legal systems are modelled after a higher law (e.g. Sharia legal system of some Islamic countries, and the common law in Christian /Jewish nations) is testimony to the continued relevance of the natural law theory.

3.3 Critique of the Natural Law School of Jurisprudence

The attack against the natural law doctrine have come mostly from acclaimed scientists. It is argued that the doctrine is too idealistic, moralistic and makes unverifiable propositions. The contents of the

"higher laws" called natural laws are largely unascertainable.

SELF ASSESSMENT EXERCISE 2

Do you agree that natural law is idealistic?

GUIDELINES

Something that is ideal is something that is not concrete or does not exist in the reality of everyday living?

Is it not possible to isolate some versions of the natural law theory such as those of stoickism and renaissance and indeed natural law with content?

What of when there are sacred scriptures (Quran and Bible) containing divine laws, are such laws still idealistic? If they are not, are there sources ascertainable or does the fact that God is not concrete makes such laws idealistic?

It is instructive that the natural law doctrine met its first sustained opposition during the enlightenment era of intellectual history. It was a period (i.e. 18th century) when there was great euphoria about the benefits of science. All intellectual disciplines were trying to imitate the natural sciences in the application of the scientific method. The pre-requisite for this is to study concrete observable phenomena. Unfortunately, the phenomena denoted by the concept of Natural law were not so easily available for empirical observation.

The notion of a higher law or divine law was held to be confusing morality. The basic questions about what constitute natural law and how we get to know it was held to be unanswered, notwithstanding attempts made in that direction.

4.0 CONCLUSION

In conclusion, we can say the natural law perspective has further advanced our knowledge of the meaning of law. Though the notion of a higher law is one that is difficult to concretely establish, it seems to have pervaded and continues to pervade many analysis about the purpose of law. That laws contain values is never in doubt. The problem is those values derived from a higher law? Are they derived from our notion of right and wrong? Or from reasoning about what is good for mankind? Positivists argue that the natural law school has not answered these questions. They are right in a way. But that is not to say that the natural law doctrine is useless. There are in fact fundamental values that all

humans subscribe to and hold to be above man-made laws. Some of such values are in modern times enshrined as fundamental rights in constitutions. E.g. the right to life, freedom of movement, right to private family life, and so on.

5.0 SUMMARY

In this unit, you have learnt the propositions of a major school of jurisprudence. The basic postulation of the school is that there are two laws in society. The higher of the laws is the natural law. The lower one is man-made law. The man-made law should reflect the natural law. You have been told that though the concept of natural law appear hazy and vague, it is nevertheless a reality. When societies hold certain laws to be more fundamental than others (e.g. fundamental rights contained in chapter 4 of the 1999 constitution of Nigeria) they are in essence conceding that a system of higher laws exists.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the relevance of the natural law approach for modern conceptions of law (write not more than 5 type-written pages).

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 THE ANALYTICAL/POSITIVIST SCHOOL OF JURISPRUDENCE

CONTENTS

1.0 INTRODUCTION

In the last unit, you learnt about the Natural law school of Jurisprudence. You were told of its assumptions, propositions and the criticism against it. The most severe criticism of the natural law school came from the advocates of legal positivism. These are people who call for the application of scientific methods to the study of law. To them, it is positive (or man-made) law that should be the legitimate concern of jurisprudence. Natural law is too vague and intangible to be susceptible to scientific investigation.

The positivist school was largely influenced by spirit of enlightenment. That spirit is also the spirit of science. It is the view that the scientific method should be uniformly applicable to all phenomena, whether physical or social. In this unit, the argument of the positivist school of jurisprudence are discussed with a view to further enhancing your knowledge of the concept of law.

2.0 OBJECTIVES

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

State the major postulations of the positivist school of jurisprudence; name the major exponents of the school;
Critically analyse the major tenets of the school;
Demonstrate the relevance of the school for modern conceptions

of law.

3.0 MAIN CONTENT

3.1 Assumptions and Propositions of the Positivist School of Jurisprudence

By the 19th century, science assumed such an enviable status in Europe that every other intellectual discipline felt compelled to be scientific, if only to fit into the pattern. Such a bandwagon effect was also noticeable in the study of law.

The positivist school of jurisprudence emerged essentially as a critique against the prevailing natural law approach. Positivists argued that the natural law approach was unscientific, and dominated by untested/ untestable philosophical speculations. They (i.e. positivists) advocated for a breakaway from the search for ultimate causes as typified by the natural law's idea of a higher or divine law.

The analytical/positivist school was out to achieve certain clear objectives. It wanted to bring clarity, logic, consistency, coherence and non-redundancy in the study of law. Its proponents maintained that these objectives could be achieved by collecting, comparing and synthesising authoritative legal materials. They emphasised that in going about such an exercise, care must be taken not to let the investigators' cognitive apparatus affect the process. In other words, objectivity is stressed. The investigator should also be concerned only with what the law is (i.e. the law as it is made by man) and not with what the law ought to be (as implied in the idea of a higher law or morality).

From this position, four clear postulations of the school can be stated:

(a) Laws are commands and given. In other words, only laws enacted by the sovereign or by bodies acting in his behalf are the real laws.
(b) The conceptual analysis of such laws is a legitimate field of study on its own, and should not be confused with social evaluation.
(c) Legal rules can be made and legal decisions reached on the basis of such rules, without any recourse to vague and nebulous notions of social justice, morality or a higher law.
(d) Law as they are must be kept separate from law as they ought to be.

These postulations reflect the basic concerns of positivist. The study of law to them must be very clear cut. It must be a study of the official reality of man-made or positive laws. To them, bringing in notions of

social justice, morality, natural law/justice and other so-called "higher values" would only confer an aura of sanctity on established law. It would consequently make reform very difficult. It would also make the scientific study of law virtually impossible. This is because the scientist would be forced to reckon with phenomena that are not available for empirical study.

3.2 Development and Exposition of the Positivist Doctrine of Law

Legal positivism is essentially a 19th century development though its roots can be dated back to the renaissance period (14-17th century) when there was an attempt to demarcate the physical laws of the universe from the normative laws of human conducts. Later, David Hume tried to make a distinction between “What is” and “What ought to be”. The ideas of the utilitarians about the influence of pain and pleasure on human behaviour was another contributory factor to the emergence of this school. But by and large, the major factor that is responsible for the emergence and development of the positivist school of jurisprudence was the critical spirit of science that was sweeping through the whole of Europe of the 19th century, as a result of enlightenment philosophy.

The founders of positivist jurisprudence believed that the universal principles of science could be applied to the study of law. Their major criticism of natural law which had hitherto been the prevalent view of law, was that by failing to separate law from religion/moral issues, it created muddled thinking.

SELF ASSESSMENT EXERCISE 1

Is it possible to separate law from moral?

GUIDELINES

This is exactly what the positivists set out to do and claimed to have done.

But no matter how scientific they wanted to be, morality would always form a part of law. Of course, it is possible to focus only on law that is man-made and as it is contained in the law books. But in making those laws, moral issues must have come in, regardless of whether they derived from a higher natural law or man's own notion of what is right.

3.2.1 Jeremy Bentham

Jeremy Bentham, though described as a utilitarian, is one of the founding fathers or proponents of legal positivism. He argued very strongly that law could only be properly understood if it is separated from moral/ religious issues. To him, what the law is, and what the law ought to be, are entirely different issues. In deciding the validity of a legal rule therefore, it is totally unnecessary and may be counter-productive to be concerned with issues of whether it is just or unjust, fair or unfair. This is because such questions are concerned with the moral worth of the legal rule and not its validity. Note however, that this view does not mean that Bentham consider law and morality to be unrelated.

For Bentham, a critical understanding of law will require that we carry investigation into eight areas. These are:

(a) The source of the law (i.e. who made it and from what).
(b) The subject of law i.e. the persons the law concern.
(c) The objectives of the law i.e. the acts or omissions to act.
(d) The extent of the law i.e. in space and time.
(e) The aspects of the law i.e. the directives and incitatives.
(f) The force of the law i.e. obedience eliciting factors.
(g) Remedia appendages i.e. subsidiary/procedural laws.
(h) Expression of the law i.e. its language and phraseologies.

We need not dwell much on these. <

3.2.2 John Austin

John Austin is the other major figure in the development of legal positivism. His major preoccupation , just like Bentham, was to raise the study of law to a scientific footing. In going about this, he dwelt on three major areas of concern. These are:

(a) The definition of law.
(b) The relationship between law and morals.
(c) The nature and scope of a valid legal study.

SELF ASSESSMENT EXERCISE 2

In many primitive societies, especially pre-colonial African societies, there were no identifiable sovereign. What is the implication of Austin's definition of law for such societies?

GUIDELINES

> Simply put, it meant they had no laws. But they had rules of conduct. Since such rules perform the same functions and add the force of law, it is wrong to deny them the name of law, just so as to meet the scientific requirement of Austin.

On definition, Austin sees law as a command of a sovereign. It is a rule laid down for the guidance of an intelligent being (a determinate human inferior) by an intelligent being (a determinate human superior) having power over him. The command or law is the expression of a will by the sovereign. The subjects must willy-nilly obey such a command or be visited by an evil or a sanction. So it is only man-made laws that Austin contends with. One implication of his definition, is that laws do not exist in societies without a sovereign.

Regarding the relationship between law and morality, Austin maintains that the two, while related, must be kept separate. He shares Bentham views on the validity of law. A legal rule in so far as it is properly made is valid, no matter how morally objectionable it may be. According to him, the tendency to confuse law with moral is "one most prolific source of jargon and perplexity". Again it must be stressed that distinguishing law from morality as positives do is not the same thing as declaring that law and morals are not related. The issue of validity must also not be confused with that of fairness or justness. To illustrate, Natural law theorist, may condemn apartheid laws of former South Africa as unjust and not conforming to natural or higher law. Positivist, will maintain that such laws, no matter how unjust or condemnable, are valid so long as they are man-made and properly enacted.

On the nature and scope of a valid legal study, Austin distinguished between the science of legislation and the science of jurisprudence. While the science of legislation is concerned with criticism and reform of the law, the science of Jurisprudence is concerned with the exposition and conceptual analysis of the law. The latter is what Austin considered the more proper focus of a valid legal study. He was convinced that there was sufficient commonalities in the conceptual framework of all legal systems to justify a general jurisprudence by which conclusions of general validity can be made.

The positivists concern with conceptual and analytical inquiries has done much for legal study. For example, it is mostly responsible for the technicality and precision of the language of the law, as we have it today. True to its scientific claims, it is most concerned with clarifying meaning of legal terms and concept. This very attribute has however been criticized. The criticisms as well as others are presented in the next

section of this unit.

3.3 Critique of the Analytical/Positivist School of Jurisprudence

While legal positivist have patted themselves on the back for bringing precision, coherence and conceptual clarity to legal terms, scholars of other persuasions have criticised them for introducing too much legal technicalities and jargons to law. It is argued that the positivist quest for technicality has made legal language difficult for legal practitioners to comprehend, much less the "unlearned" literates and other laymen. '

The school has also been criticised for its insistence that the only valid law is one issuing forth as a command of the sovereign. This, first of all, exclude the rules of conduct in societies without identifiable sovereigns from the purview of law. Secondly, it could lead to injustices and tyranny if the laws cannot be subjected to standards of morality or a higher law.

The legal positivist view of law is not only excluding morality in insisting that only sovereign commands are laws, but it also by the same token excludes other norms or rules of conduct which perform social control functions, and ensure the continuity of the legal order. It naively forgets that not all laws are in the nature of commands, e.g traffic laws, or laws of contract are not commands.

4.0 CONCLUSION

In conclusion, you have learned in this unit that the positivist school (also called the analytical school (or simply legal positivism) emerged as an outcome of the scientific euphoria that engulfed Europe of the 18th and 19th century. Its arguments were essentially an attack on the orthodox natural law approach which was deemed to be speculative and unscientific.

You have learnt that the major argument of the school was that law must be separated from morality. The kind of law that it considers to be valid law, is that enacted by men, at the instance of a sovereign. Your knowledge of law has been advanced further by a step.

5.0 SUMMARY

This unit presents the arguments and postulations of the positivist school of jurisprudence. In it, you learnt the context in which the school emerged, the criticism it leveled against the natural law school, and some of the criticism that has been leveled against the school itself.

Again, bear at the back of your mind that the unit is part of a package/module designed to expose you to the various theoretical ideas (Sociological and Jurisprudential) on law.

6.0 TUTOR-MARKED ASSIGNMENT

Compare the arguments of the natural law and positivist school of jurisprudence on the nature of a valid law (write not more than eight typewritten A4 pages).

7.0 REFERENCES/FURTHER READINGS

Friedman, W. (1967). *Legal Theory* (5th ed.) London: Stevens & Sons Ltd.

Lord Lloyd of Hampstead (1985). *Introduction to Jurisprudence* (5th ed.) London: Stevens & Sons Ltd. Lloyd, D. (1987). *The Idea of Law*. London: Penguin Books.

Sills D.L. (ed) (1968) *International Encyclopedia of the Social Science.* (LE. S.S.) Coheir-Macmillan publications, London. See the following entries: Jurisprudence 8: 335-38, Legal Positivism, Austin John, 1,471-473, Bentham, 2:55-58.

UNIT 5 THE HISTORICAL SCHOOL OF JURISPRUDENCE

CONTENTS

1.0 INTRODUCTION

This unit contains the third of the major schools of jurisprudence that will be discussed in Module 2. It is yet another step forward in your learning of the juristic conceptions of law. Remember that the last two units (i.e. units 3 & 4) contain the natural law and the Positivist approach respectively.

The historical school of jurisprudence emerged at about the same time with the positivist school in 19th century Europe. However, while the positivists emerged in Britain, the historical school emerged in Germany. More importantly, their ideas were diametrically opposed to each other. The very things that one emphasised were the things that the other de-emphasised. The positivist/analytical school was totally caught up in the scientific spirit of the moment. The historical school maintained that the phenomenon of law must not be subjected to the scientific criteria advocated by Positivists. Their arguments, especially when placed side-by-side with the positivist postulations, make interesting reading.

2.0 OBJECTIVES

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

State the major propositions of the historical school of Jurisprudence;

Mention some of the major exponents of the school and their contributions;
Critically examine the arguments of the school;
Demonstrate the relevance of the school for modern conceptualisations of the phenomena of law.

3.0 MAIN CONTENT

3.1 Assumptions and Propositions of the Historical School of Jurisprudence

The historical school of jurisprudence proceeds from the premise that law is not a creation of a sovereign or whoever his representatives might be. Rather, law is a gradually evolving thing which comes out from the realities and experiences of a particular people. This stand is totally opposed to the stand of the positivists who maintain that the only thing that qualifies as law is that which conies as a command from the sovereign.

To historical jurisprudence, the only valid law is one that result from a long historical process. Its validity lies in the fact that it is rooted in the popular consciousness of the people. The best example of such a law is customary law. It need not be enacted nor written. It is sufficient that the community has over time come to recognise the rules, and the people consider it an obligation on them to obey the rules.

SELF ASSESSMENT EXERCISE 1

How does the community over time come to recognise rules and members consider them binding on them?

GUIDELINES

Practices and habits after a while have a way of becoming binding rules.
Decisions in novel cases also tend to serve as precedents for similar cases in the future.
Unit 2 of module 3 of this course will explain more the relationship between law and custom.

So we see a fundamental difference in the positivist and historical conception of law. The Positivists glorify legislation and despise customs. For the historical school exponents, it is the exact opposite that is the case. They glorify custom and despise legislation. Legislation can only be taken seriously if it is just a formal enactment of customary rules of conduct. But the historical approach insists that such rules of

custom constitute the valid law, regardless of whether they are enacted in form of legislation or not.

3.2 Development and Exposition of the Historical School of Jurisprudence

As noted in the introductory sections of this unit, the historical school of jurisprudence emerged in the 19th century in Germany. Its major objective was to counter the arguments of the positivist school which was a contemporary.

3.2.1 Freidrich Savigny

The major figure in this quest and who is widely acclaimed as the founding father of the historical school is Freidrich Carl Von Savigny. For Savigny, law was not a deliberately created product of some artificially contrived legislator. Rather, it was a slow organic distillation of the spirit of a particular people among which it operated. Such spirit of the people is captured by the German word, "Volkgeist."

To the historical school, law is not just an abstract set of rules that a sovereign imposes on society. It is an integral part of society and is deeply rooted in the social order. It is shaped by society and embodies/reflect traditional value system. The notion is similar to the Marxist view of law described in unit 2 of this module. It is also similar to the argument of the sociological school of jurisprudence which we shall come to very shortly in unit 6. The historical school is however still different from them in being too backward looking. For the historical school law must always be a passive reflection of social values. The sociological schools see law playing a more active role in social engineering and is more forward looking.

3.2.2 Henry Maine

Another major exponent of the historical school of jurisprudence is Henry Maine. He is the most prominent figure of the English historical school (Savigny was from Germany). He stressed the continuity of historical development and argued that law is constantly being adapted to a changing society. He maintained that to understand the laws in earlier societies would require an understanding of the historical contexts of those societies. Maine, however, was not as contemptuous of legislation as Savigny. Even while maintaining that understanding history is a prerequisite to understanding past and present laws, he conceded that laws can be used to shape present history. Historicity must not be used as an excuse to tie present society to the follies of the past or impose traditional attitudes upon the needs of modern times.

SELF ASSESSMENT EXERCISE 2

How can historicity tie present society to the follies of the past?

GUIDELINES

Times do change, and such changes may be such that hitherto existing rules are no longer adequate or appropriate for regulating the new times. In such situations, customary rules, if they are not flexible may actually become a hindrance to change.

Read the second paragraph of 3.2.2 on critique of this school for further elaboration.

3.3 Critique of the Historical School of Jurisprudence

The historical school of jurisprudence has contributed valuable insights into the understanding of law. It has showed that law is an integral part of society rather than just an abstract set of rules. It has drawn attention to the dangers of relying exclusively on legislation as the only law, and has highlighted the pitfalls of following the technical mechanical conception of law by positivists. These contributions notwithstanding, the historical school also has its own share of shortcomings.

The backward looking character of the historical school is already discussed above. Such an attribute confers a sanctity on law, engenders an uncritical acceptance of the follies and foibles of the past and may hinder societal development, laws should be responsive enough to regulate behaviour in line with modern realities. Where a people keeps referring to the past in order to explain occurrences of the present and future, law cannot be dynamic. It will not bring about social change, but must always passively follow behind. Such a view is no longer attractive.

Secondly, cases of successful legal transplantations, where whole laws of one country are transported and made to operate in a totally different country, knocks much of the steam away from the historical school argument. Many colonial powers imposed their legislation on their colonies and many such colonies have continued to operate by such laws. Infact, some countries out of their own volition have borrowed from the laws of other countries and have achieved better results than their own laws. So if such a thing can happen if follows that laws need not necessarily come from the tradition, consciousness and experiences of a people. This point underscores the issue of changing times. A rapidly developing society may find that its own laws can no longer adequately cater for the new relationships. For example, a primitive

society used to travelling by donkeys which suddenly acquires vehicles will need to import traffic laws from societies already used to vehicles, instead of waiting to evolve its own laws on traffic.

Thirdly, the tendency of the historical school to maintain that customary rules constitute the valid law may be two sweeping. Not all customs should constitute laws. Some customs are too menial or trivial. For example, custom may dictate how to eat, drink, dress or greet. Would it be realistic to designate all such custom as laws? The obvious answer is no.

Even the notion of a common spirit or consciousness in society (denoted by the concept of Volkgeist) is problematic. Societies and groups, no matter how small, are made up of people who are not necessarily homogenous and may not have uniform/unanimous views on issues. In sociological parlance, they do not have a consensus of values. It becomes difficult then to say which custom have evolved from the spirit of the people/nation and which from the spirit of the dominant group.

4.0 CONCLUSION

You have now learnt about the emergence of the historical school of jurisprudence, as well as its postulations, exponents and critique. Their arguments are best appreciated when juxtaposed with those of the positivist schools. It is expected that your knowledge of the concept of law has been advanced further in this unit. Remember, however, that you are not studying law in this course. The rationale for devoting a whole module to explaining law is that by the time you start on the other modules, they will be easier for you to follow. Understanding law will also aid your understanding of the whole programme of “Criminology and security studies” for which "Sociology of law" is just one course.

5.0 SUMMARY

In a nutshell, this unit has further contributed to your knowledge of the concept of law, by focusing on the arguments of the historical school of jurisprudence, and the context of its emergence.

6.0 TUTTOR-MARKED ASSIGNMENT

Do you agree with the historical school that the real law is customary law and not legislation? Justify your answer in not more than five typewritten A4 pages.

7.0 REFERENCES/FURTHER READINGS

Friedman, W. (1967). *Legal Theory* (5th ed.). London: Stevens & sons Ltd.

Lord Lloyd of Hampestead (1985). Introduction to Jurisprudence, (5th ed.) London: Stevens & sons Ltd.

Loyd, D. (1987). *The Idea of Law*. London: Penguin Books.

Sills, D.L. (ed) 1968) International Encyclopedia of the Social Sciences. See the following entries: Freidrich Savigny 14:21, Maine Henry 9:530-533, Maitlen William 9:533-534, Jurisprudence 8:334-338.

UNIT 6 THE SOCIOLOGICAL SCHOOL OF JURISPRUDENCE

CONTENTS

1.0 INTRODUCTION

This unit is the last of the units of module 2. In line with the modular goal, the objective here is to expose you to yet another conception of law. Though one of the major views of law in Jurisprudence, the name of this school, sociological jurisprudence, suggests that it is closely related to the sociological perspective of law.

The thrust of the arguments of this school is that law, rather than being seen as mere body of rules, should also be seen as a useful tool for reordering society to suit the yearnings of a people. In this unit, the postulations as well as the exposition of the school are presented to you with a view to further enhance your knowledge of the meaning of law.

2.0 OBJECTIVES

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

State the major propositions of the sociological school of Jurisprudence;
Specify the major contributions of the major exponents of the school;
Critique the postulations of the school;
Demonstrate the relevance of the school for present day conceptualisations of law.

3.0 MAIN CONTENT

3.1 Assumptions and Propositions of the Sociological School of Jurisprudence

This school emerged in the late 19th century with the major purpose of integrating law and the social science. It criticised both the positivist school and historical school position on law. The positivist school for reducing legal inquiry to mere conceptual analysis and the historical school for being so backward looking.

The sociological school was particularly against legal positivism's pro-occupation with law as contained in books (statutes, case law, law texts) to the neglect of actual behaviour of law agents in relation to those rule. It described Legal Positivists concern with conceptual theorising (or second, order facts) as parochial and arid because it ignores the factual sub-stratum (first-order facts) on which those concept of law are forged.

Sociological jurists argued that it is really the complex mass of primary or first order facts (i.e. behaviour of legal officials) that give meaning and purpose to the law and which are consequently more important for study. The interplay of the two orders of facts (i.e. first order facts made up of law in actual operation) and second order, made up of law in the law books) is where inquiry should focus. The investigation of the interplay is the fundamental requirement for really understanding law in society.
Based on these arguments, the sociological school of Jurisprudence make the following propositions:

(a) Law is not unique. It is only one method of social control among others. For example, there are a number of informal control mechanisms such as socialisation, group pressure, and rules of conduct such as custom, morality etc. and so on which perform social control functions.

SELF ASSESSMENT EXERCISE 1

Name some of the informal control mechanisms which perform similar social control functions as law and how they do it.

GUIDELINES

Law and its apparatuses (police, courts, prisons) are formal methods of social control. There are also many informal control measures which play a supplementary role, e.g. as a child grows from infancy to adulthood, he is always under the constant supervision of family, friend, peer group, schools, churches/mosques, associations, work place, and so on, all of

which are trying in their own small ways to make him conform to the requirements of orderly and civilised living.

(b) Law is not a closed logical entity rather it should form the legitimate focus of investigation by any one, learned or not.
(c) The law in action is the living or true law, and more worthy of intellectual searchlight than the dead law contained in books which has hitherto been the major focus of Jurisprudence.
(d) Law is a relative phenomena. It may manifest in various forms in various societies and its origin varies.
(e) The abiding and more rewarding concern for scholars and for society should be with social justice rather than with mere jurisprudential exposition of concepts.

In outlook therefore, the sociological school of Jurisprudence is a functionalist school. Law should be studied with a view to comprehending how it can be used to improve society. The function of law is put *ab initio* as the harmonisation of diverse social interests in a manner that will ensure greater societal well-being with minimum friction.

3.2 Development and Exposition of the Sociological School

The sociological school of Jurisprudence emerged in the latter half of the 19th century. It grew rapidly thereafter. Notable among its exponents are Roscoe Pound and Eugen Erlich. These two and their contributions are discussed in the subsections below.

3.2.1 Roscoe Pound

Pound was an American, legal philosopher and a law teacher. He is the most dominant influence in the Grafting of the sociological school. He consistently emphasized the need to study law in its actual workings rather than how it exists in the law books.

To him, the whole legal process should be seen as a form of "social engineering". It is only first hand factual and scientific investigations that will yield the insights necessary to appreciate this. He maintained that much of the problem of the applicaiety arise out of ignorance of the workings of the law. Once true social scientific insights are provided into the way the law works, workable solutions would come up.

Pound explained that there are conflicting and competing interests in society. The legal process as the formalization of social control becomes the mechanism for scrutinising and comparing those interests with a view to adopting the most beneficial to all. In this regard, he stressed the

functions of the courts as the supreme agent of the law when it comes to effecting social control.

A major contribution of Pound lies in his insistence that though law is shaped by social structure, it (i.e. law) also has the capacity to develop the framework for its own development and shapes society in the process.

3.2.2 Eugen Erlich

Erlich was also very interested in the relationship of formal rules (or laws as they exist in books) to the actual social norms which govern the operation of the law in society. It is those social norms of law in action that he described as the "living" or true law.

In other words, behind the technical law in books that lawyers contend with, there is a living law. The lawyer must therefore go beyond the man made or positives law, to the normative inner workings of those laws.

Erlich's major contribution was the call for lawyers, judges, legislators and other personnel of the justice systems, to be in close touch with the inner workings of society which may not be immediately apparent in the language of the law but have all the same forged the law.

SELF ASSESSMENT EXERCISE 2

What do you understand by "inner working" of society that may have “forged the law”?

GUIDELINES

> A major essence of this course is to demonstrate that law is a creation of society which shapes and is shaped by society.
>
> The law does not speak on its own and it does not make itself. These are this issues that sociological juriprudence is trying to draw attention to. Any serious understanding of law must therefore include the social context of its emergence and operation.

3.3 Critique of the Sociological School of Jurisprudence

Sociological Jurisprudence has shed significant light on aspects of the law hitherto ignored or taken for granted by the other schools. Furthermore, it has demonstrated that those aspect (the law in action, the

living law) are actually more fundamental for an understanding of law and its role in society than mere conceptual analysis. The school is, however, not without its own weaknesses.

First the sociological school has been faulted on grounds of its functional analysis. It assumes that there is consensus on interest in society over what is good for it. Furthermore, it assumes that such interest can be known and all that will be required will be to tailor law to it. This is simplistic and naive, especially when considered in the light of the realities of modern society. In capitalist societies for example, where interests of employers and employees are polarised, how can law be made to reflect the antagonistic interests and chanelled to social engineering? Engineering to fit whose conception of society?

Secondly, and relatedly, the assumption that the law is natural and operates outside the control* of sectional interests is also largely unfounded. The group in control of law (if the point is conceded) are most likely to wield the law in a manner that further its interests. Perhaps, if exponents of sociological Jurisprudence had delved deeper into their "living law" or law behind the law, this partisan nature of the law would have been unravelled to them.

4.0 CONCLUSION

This unit is the concluding unit of module 2. Module 2 deals with the various conceptions of law. So far, two sociological perspectives and four juristic perspectives have been presented. Note that there are other schools of Jurisprudence such as the Realist school (or legal realism), the Teleological school and other less prominent ones. I have concentrated on the four most dominant ones and I am certain that they suffice for our purpose in this course.

The sociological School is the one that most adequately straddle the disciplines of law and sociology. In this unit you have learned that the school emerged in the late 19th century, that its major exponents are Roscue Pound and Eugen Erlich. You have also learned their contributions and the critique of the school. I expect that by now, you know virtually all that there is to knows about the basics of conceptualising law. You are nonetheless encouraged to read your recommended texts and study other dimensions of the phenomenon not presented here. You should bear in mind at all times that no particular way of viewing law is perfect or with out any shortcomings. Hence a critique is presented at the end of each school. It should be helpful for you to note that the views are not mutually exclusive. It is allowed to combine views for a fuller understanding of law.

5.0 SUMMARY

In this unit, you have been introduced to the fourth major school of Jurisprudence. Its propositions about law and the contribution of its exponents have been presented. You have learnt that no perspective is perfect or without weaknesses. That the views are not mutually exclusive. For a deeper and fuller understanding of the concept of law, feel free to draw upon compatible insights from the various schools and theoretical approaches. Remember that they emphasize different aspects and so may not be as different as they sound. For example, in answering the question of what law is, Natural law school emphasises a higher law, Positivists emphasise man-made law, Historical school emphasises customary law, Sociological school emphasises the law in action.

6.0 TUTOR MARKED ASSIGNMENT

Critically evaluate the propositions of the six approaches to law that you have studied in the module, and formulate your own view of law that is comprehensive and reflect your knowledge of the different approaches. Write a minimum of 15 and a maximum of 20 type- written A4 pages.

7.0 REFERENCES/FURTHER READINGS

Friedman, W. (1967). *Legal Theory,* (5th ed.) London: Stevens & Sons Ltd.

Lloyd, D. (1987). *The Idea of Law*. London: Penguin Books.

Lord Lloyd of Hampstead (1985). *Introduction to Jurisprudence*, (5th ed.) London: Stevens & Sons Ltd.

Sill, D. L. (1986). *International Encyclopedia of the Social Sciences.* See the following entries: Jurisprudence 8: 334-338, Roscoe Pound 12:395-398, Erlich Eugen 4:541, legal realism 9:440, 5:549 (under kilewelism & F. Jerome)

MODULE 3 THE RELATION OF LAW TO SELECTED CONCEPTS

So much has been said about law in modules 1 and 2. It is time to also discuss other modes of social control which are non-legal. These non-legal sources of control are found side by side with law in every society. Usually they supplement and reinforce law in its functions but they have their own separate identity and a times may function independently of, or to even undermine law.

This module is made up of six units. In each of the units, the relation of law to one non-legal source of social control or one concept that is intrincately tied to the idea of law is examined. These are done with a view to giving you a sociological understanding of conformity and social control in society.

The first unit examines the relationship between law and morality. It shows that law does not exist in a vacuum and that legal codes bear great similarity with moral codes. The areas of convergence and divergence between law and morality is highlighted and a conclusion is drawn. This approach is adopted in the next two units, namely on the relation of law to custom, and on the relation of law to force. Unit 4 focuses on the relation of law to justice. Usually the idea of justice is implied in the idea of law and the ultimate purpose of law is to bring justice to society. The unit reveals that the relationship may not be as easy as that. Infact that there may be legal injustice, where the letter of law is followed yet injustice results at the end.

In unit 5 the relation of law to freedom is examined. Again the two concepts are fairly intricately interwoven, yet there is always a kind of tension between them. This is because the idea of law which must necessarily imply some constraints/restraints on individual actions does not quite go with the idea of freedom or liberty to do what one wants. Yet it is law which guarantees freedom. The harmony and tensions in the two concepts are laid bare, in this unit.

Unit six explicates the concept of the rule of law. This is as a logical follow up to the discussions in unit *5* on law and freedom, and unit 4 on law and justice. The ultimate aspiration of all modern civilized society is that the law and not man should rule. The meaning of this statement and its consequences for the operation of the social order is explored in unit six.

The overall goal of the module is to demonstrate the relationship between law and major concepts associated with the idea of law to you. This gives you a more comprehensive idea about the nature of social

order. As usual, each unit contains statements on specific unit objectives. At the end of the module you should have achieved both the modular goal and unit objectives.

Unit 1 The Relation of Law to Morality
Unit 2 The Relation of Law to Custom
Unit 3 The Relation of Law to Force
Unit 4 The Relation of Law to Justice
Unit 5 The Relation of Law to Freedom
Unit 6 Law and the Rule of Law

UNIT 1 THE RELATION OF LAW TO MORALITY

CONTENTS

1.0 INTRODUCTION

Morality comes to mind easily in any discussion of non-legal sources of social control. This is because it is pervasive and quite often it openly competes with law. It is a yardstick by which many judge the validity of law and whether to obey it or not. If you may recollect our discussion under unit 3 of module 2 which talks about the natural law conception of law, you will recall that the natural law doctrine is about two laws: natural law and man-made law. The former is said to be a higher law, which the latter must emulate. Well, the whole notion of a natural or higher law has been linked to morality. In other words, morality is raised to the level of a superior law, which law must reflect or it will be deemed invalid.

In this unit, you will learn about the relationship between law and morality. What are their similarities, and what are their differences? Is the relationship mutually reinforcing or undermining? Can law and morality actually serve other than the same purposes?

2.0 OBJECTIVES

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

Distinguish law from morality;
Identify areas of commonality and divergence between law and morality;
Demonstrate when law and morals can reinforce or undermine each other.

3.0 MAIN CONTENT

3.1 Law and Morals

We have already expended much energy in conceptualising law in the first two modules of this course. You should draw upon the knowledge you gained therefrom in approaching this and the other units of module three. I will assume that you understand what law is, and will only attempt to define the particular concept that law is paired with in the respective units.

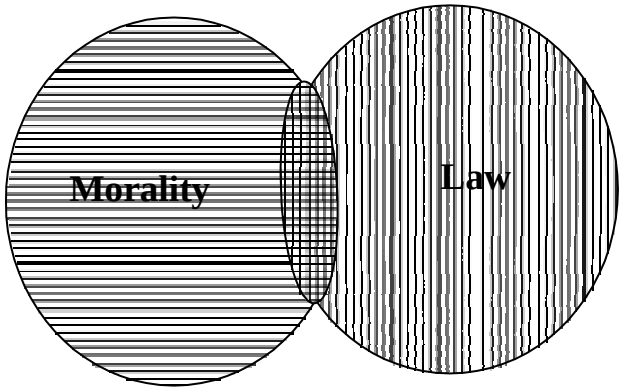
Morality has to do with notions of tightness or wrongness. What is described as right or wrong may vary from place to place and from time to time. The yardstick of determining whether a particular thing is right or wrong also varies. But every society definitely has principles of right and wrong behaviour. The way a person lives his whole life may be described as moral (e.g. upright, virtuous, with integrity) or immoral (e.g. dishonest, sexually loose, living in sin). The concept of morality is therefore a very wide one, associated with diverse things. For our purposes, it suffices to state that whenever we try to judge any action in terms of whether it is right or wrong we are in the domain of morality. It presupposes the existence of a higher value by which we judge actions and other values, including the law.

Law as a rule of conduct embodies values. Usually these are moral values, but they need not necessarily be so. In other words, most of the tune, what is morally right would also be legally right and what is morallywrong would be legally wrong. But the content and dictates of the two need not always coincide. Some things that are legal may be judged to be morally wrong, or some things that are illegal may be morally right. For example, the law may accept homosexuality between consenting adults, but such acts stand morally condemned.

It is important to note that the ideas of law and morality are at all times influenced by power. A powerful group may be able to have laws made in its interest which do not reflect popular morality. A powerful group

may also be able to influence the content and direction of morality.

The pertinent question becomes: what is the relationship between law and morals. The relationship is well illustrated by the idea of two intersecting circles.



The relationship between law and morality

The diagram shows that while law and moral have their distinct grounds, there are areas of commonality between. It should be stressed, however, that commonality does not mean identicality. This is because, even in the common ground, there exist certain differences. For example, law and moral condemn murder, rape, theft and so on. But their definitions of those acts vary. What may constitute rape in morals may not be so in law.

SELF ASSESSMENT EXERCISE 1

In what circumstances will law and morality both use the same name for a moral wrong/crime yet invest such with different meanings?

GUIDELINES

Law tends to be more precise in it definitions and her ingredient that must be present before particular crime is complete. Morality on the other hand tends to be more loose or generalised in its use of terms. For example, under morality, rape is committed whenever a man has sex with a woman without her consent. For law on the other hand, a boy below 12 years cannot commit rape even if he achieves erection, penetration and ejaculation because he is not yet of the age of legal responsibility. A husband or a lunatic may also not be able to commit rape in law even if all the other elements that will make the action a rape under morality exist.

3.2 Convergence of Law and Morals

An obvious similarity between law and moral is that both prescribe and proscribe conducts, and in doing this, there is great concurrence on which conduct to prescribe and proscribe. The preponderant majority of acts that morality will condemn are also condemned and made illegal by law. When moral and legal codes concide, there is greater certainty of obedience from citizens and of enforcement by legal officials. Law and moral will also tend to supplement and reinforce each other. Furthermore, it becomes a moral duty to obey the law.

Law and morality both impose standards of conduct necessary for social order. In doing so the rules that they lay down are expressed in similar language of obligations and duties, rights and wrongs. These similarities should not seduce us to start thinking that law necessarily connotes moral obligation or that moral obligations are always translated into law. The differences between the two spheres are clearly brought out in the next section.

3.3 Divergence of Law and Morals

A major difference between law and morals comes from their definitions of condemned acts. Morality does not attach the many qualifications that law will attach before one that is accused will be adjudged guilty. For example, S.314 of the criminal code of southern Nigeria States that "A person is not deemed to have killed another, if the death of that other person does not take place within a year and, a day of the cause of death". This provision is same under English law. Under morality, however, a person is guilty of murder or causing the death of another regardless of how long after his action before death results. Morality do not need to bother with legal technicalities, it is quick to judge.

Secondly, the law does not punish omission to act except where there, is a legal duty to act. For example in the Nigerian case of Akanni V.R. (1959) WRNLR 103, the court not held that some men who watched an old woman die in a burning house without doing anything to help, had not committed any offence legally, though their action was morally disgraceful. The position could be the same if somebody who could swim, watches a child drown when he could have saved the child at no risk to himself. So refusal to help is not illegal but - it is immoral. Interestingly, a man who refuses to give back a borrowed knife to its owner because he (borrower) honestly believes the owner will commit a crime with the knife is morally right but legally wrong.

A third area of divergence is the area of sexual immorality. There are so

many aspects of sexual relationship which morality frowns upon but to which the law will not attach legal sanctions. The law in many western countries now allows abortion, homosexuality and various forms of adulterous relationships. In those countries, these acts still stand morally condemned.

Sometimes the law may deliberately refrain from supporting the moral rule because the machinery of enforcing such may be cumbersome or may create more problems than it will solve. A good example of this is prostitution. This age old activity is typically between consenting parties and there is usually no complainant. To insist that the law must punish prostitution is to seek to enforce public notions of morality on individuals. Furthermore, since it is secretive and there is no aggrieved party, detection is very difficult. In Nigeria, prostitution is not a crime perse, but soliciting for it, or making a living from it (like pimps) constitute a crime.

SELF ASSESSMENT EXERCISE 2

Cite examples of some widely committed crimes in Nigeria which the law is against but yet seems to ignore and enforces only in exceptional instances and why.

GUIDELINES

> An obvious example is abortion. The law is only half-hearted in this regard and abortion is quite pervasive in Nigeria. The explanation is that abortion is largely seen as a amoral rather than a legal issue. It is recognised as wrong more and given effect in moral areas. For example, Catholics because of their religious beliefs do not practise even milder forms of contraception/family planning, talkless of abortion.
>
> Similar examples abound in intoxication (in the north), homosexuality, smoking in public and so on.

Finally, it may be noted that law and moral may sometimes diverge so much, that morality may require a disobedience of law! For example if a legislation is made to legalise drug taking, or stealing or some other vices, morality will require that such laws be disobeyed. Even in the military where the norm is "obey before complain", a subordinate is morally right when be disobeys an immoral order.

4.0 CONCLUSION

The major conclusion that can be drawn from the foregoing analysis is

that law and moral share much in common, but .they are by no means the same. The question one may then ask is, what is the nature of the relationship and which is the dominant partner? Law appears to be dominant to the extent that it is backed by the coercive apparatus of the state. But law is easier to enforce when it encodes moral values. Morality, to a large extent therefore, shapes the law. Infact when laws do not reflect morality it justifies disobedience. Sometimes however law that may at first not be in tune with morality, may go on to engender new notions of morality that suit the changing times. This has been the case with powerful lobby groups for changes in popular sentiments. For example, laws relating to protection of children and animals against cruelty have emerged largely through this way in Western countries. So new moral duties may be recognized by a powerful elite, the new ideas are pushed till they become law,, and when they become law, they in turn influence morality.

In conclusion therefore, we see that morality influences the content of law, but new laws may also influence morality. It is when there are wide cleavages between the two that problems arise. When, the differences are not deep, morality and law tend to supplement and reinforce each other.

5.0 SUMMARY

In this unit, you have learned that law and morality both impose standards of proper conduct in society. That in most cases they supplement and reinforce one another. Morality to a large extent determine the content of law. But laws can also serve to alter morality. It has been stressed, that even in areas where morality and law agree, the content of the concordance may not be identical. In the remaining units of this module, you will encounter other sources of social control that are related to law in a similar manner with morality.

6.0 TUTOR MARKED ASSIGNMENT

Identify and critically discuss the points of convergence and divergence of law and morality. Do not write more than six typewritten A4 pages.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 THE RELATION OF LAW TO CUSTOM

CONTENTS

1.0 INTRODUCTION

Custom is another major and obvious non-legal source of social control. It exists side by side with law in most societies of the world. Not only does it supplement law in the process of social control , it is infact a major source of law. This is especially so in common law countries (countries modelled after the English legal system where customs and judicial precedent is a major source of law, Nigeria inclusive. Socialist countries however frown upon the use of custom, understandably because it would reflect the values of a discredited era.

In this unit, the relationship between law and custom will be critically examine. You will learn about their similarities, their differences and the nature of the relationship between them.

2.0 OBJECTIVES

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

Analyse the relationship between law and custom;
Identify areas of commonalities and differences between the two concepts;
Predict the future relationship between law and custom given certain historical antecedent of any society.

3.0 MAIN CONTENT

3.1 Law and Custom

In definition, both law and custom are rules of conduct which members of society recognise and consider obligatory to observe. The differences

come, when we start specifying the nature of the rules, how they are made, how they are enforced, who enforces them, and so on.

Much has been said by way of explication of the concept of law. So we need only to expatiate on the concept of custom here. Usually, it is the habits or practices of a people, that have been observed over a period and which are seen to be useful for the corporate well being of the society that crystallizes into the custom of such a people. The habit and practices, in other words, become not just what ought to be done, but what must be done. They become obligatory and sanctions are attached for non-observance.

Custom may also come into being by deliberate innovations of those in authority. For example, when a novel situation is presented in a dispute, the way in which the relevant authorities settle the dispute becomes a precedent custom and the rule become applicable for subsequent similar situations that may arise. The major difference between law and custom is that custom is unwritten, and lack centralized state organs to enact, enforce or interpret it. Laws are written and have the whole legal machinery made up of legislatures, police, courts, prisons and others to give effect to it.

SELF ASSESSMENT EXERCISE 1

Cite some customary rules in your society which are not enforced by formal agents of law but which are nevertheless binding or considered obligatory by members.

GUIDELINES

> Those from rural areas will have more to cite her. Many of such rules still exist in modern day Nigeria. In some cases, sanctions are even administered by informal organs. There are many such rules in the area of pre or extra-marital sexual relation, misuse of communal or family property especially, land, and so on.

3.2 Convergence of Law and Custom

We have already noted that both law and custom are rules of conduct which members of society consider bound by. In early or primitive society, custom was also the law. Such societies had no developed legal system characterised by written laws and centralised administrative machinery that today constitute the hallmark of law.

As modern societies evolved, however, there was a recourse to legislation as the major source of law. It is instructive to note that the

major source of such legislation was custom. Legislation as we explained in module one, involves an assemblage of people constituted to enact laws. So the content of such laws were predominantly custom. Even where laws are mainly judge-made (i.e. case laws, judicial precedents) such judges rely on custom. Hence when following the Norman conquest of England, judges were asked to declare the law of England, they resorted to declaring the custom of England, as there were no written codes. The custom of England infact continues to exist today as the common law of England. Nigeria also has its customary laws and though the colonial experience undermined the status of such laws, custom continue to constitute a source of law in Nigeria. There is however a proviso: the custom must not be repugnant to natural justice, equity and good conscience.

Furthermore, in branches of law where not many statutes exist, e.g. in law of contracts and Torts, custom as given expression by judges, continue to be a source of law. There are terms implied by custom into contracts and judges will enforce them at least in common law countries (i.e. English-speaking countries).

Constitutional custom and convention also continue to play a very important role in the legal process For example, in Britain, such custom conventions as: The monarch must assent to a bill passed by parliament or the Prime minister must resign if defeated in the commons on a major issue, or that the leader of the majority party forms government, are considered so important that non-compliance cannot be contemplated. Yet they remain mere custom because they are not written as part of the laws of Britain.

It is noteworthy also that mercantile custom continues to play an important role in the development of the commercial law of common law countries.

Finally, it is also worthy of note that modern international law share much in common with custom. Both lack centralised organs of enforcement and administration. Just as custom had no state police to enforce its rules, International law lacks a standby international police to enforce its rules. But just as custom evolved from a primitive stage to modern law, it is envisaged that International law would also become modem. There are indications that this is already happening with International courts and united nation's multinational forces being instituted.

3.3 Divergence of Law and Custom

There are fundamental difference between primitive custom and

developed law. The similarities pointed out above notwithstanding. First is that custom lacks the substantive features of law. There are no written codes to define offences and stipulate penalties. No procedural rules or written penal philosophies and goals. In short, custom is simplistic and appear arbitrary because of the lack of articulation based on rational principles of the various components of the rules and the goals they are meant to achieve.

Secondly, while there is usually a centralised government /state in whose name laws are made, this is not the case with custom. Infact you may not even know when precisely customs are made, talkless of in whose name. Of course it is possible to invoke the name of the society as a whole (as anthropologis such as Malinowski and Radcliff - Brown has done in their studies of primitive societies). But society is a nebulous concept, and so is the spirit or consciousness of a nation evoked by Savigny in arguing that customary law is the real law.

Logically flowing from the absence of a centralised government is the fact that there are typically no centralised organs for creating, enforcing and administering custom. Such organs must necessarily be built around law in a developed legal system.

The lack of centralized organs of enforcement and administration of custom also translates into a lack of records. The operative custom therefore, largely depends on the accuracy, reliability and honesty of the memories of the custodians of custom and tradition. These include elders, chieftains, oraclists, priests, diviners, etc.

Again the lack of an enforcement/administrative organs as well as lack of records, meant that the enforcement as well as adjudication of custom was largely arbitrary and indiscriminate, especially in societies where self-help was a recognised means of seeking remedy. There are a number of writers who have contested this view of customary law enforcement and administration. But one need not go into that now. We shall revisit the issue when we get to module 4.

It has been argued that even when custom serves as a source of law, it does not then mean that custom is law. This is because custom is just one among the many sources of law. For example, morality and religious values contribute to law in their separate identities and should not be treated as if they are inseparable from custom.

SELF ASSESSMENT EXERCISE 2

Cite different laws that have separately been influenced by morality, religion, and custom.

GUIDELINES

> Admittedly, it is in reality difficult to isolate the three sources of law and say which has influenced a particular rule of law. Nevertheless, the student should be able to find good examples.

Finally, law as been described as having a certain autonomy of its own and reflecting the subtleties and sophistication of legal professionalism. Custom on the other hand is described the approach of the layman, shaped by exigencies of day to day transactions among people and lacking in sophistication.

4.0 CONCLUSION

In conclusion, it is obvious that while law and custom share much in common there are also many areas of differences between them. You now understand what those areas are. Note however that dissent is allowed in social science. You are free to disagree with any of the points enumerated above. The only proviso is, you must be able to reasonably justify your position. If the relationship between law and custom is to be scrutinised from the angle of which is more dominant, clearly law is. Custom is a source of law, but law can be used to change custom. For example, the custom of killing twins in Calabar was outlawed by the law. And so law need not always reflect custom.

5.0 SUMMARY

In this unit you have learned that custom is a non-legal way of performing the legal functions that law performs. In early primitive societies when law as we know it presently was yet to develop, custom was the law. When law eventually developed along with modern societies, custom served as its major source. There are however, at present clear differences between law and custom. Custom continues to exist side by side with law and performs supplementary roles to law. But law clearly remains the dominant partner. Where there are clear differences between law and custom of the native that will entail contrary requirements, law will most likely prevail. The point made in unit 1 of this module about how the elite influence the content of law is also relevant here. If the group in control of the state machinery perceive a particular custom to be wrong (e.g. in being obnoxious or not serving then- vested interest), it may legislate against that custom. The legislation would prevail because of the organised, coercive apparatus at the state disposal. On the whole however, law will reflect custom, prescribing what custom prescribes and proscribing whatever custom proscribes.

6.0 TUTOR MARKED ASSIGNMENT

Critically discuss the relation of law to custom, using Nigerian examples. Write a maximum of five type written A4 pages.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 THE RELATION OF LAW TO FORCE

CONTENTS

1.0 INTRODUCTION

Force is another concept which has close association with law. For any definition of law to be complete, it must contain an aspect about what happens to violators of the law. This is what is contemplated when we talk about force. It entails the whole machinery of the state, organised legitimately and entrusted with the authority of enforcing the law. This explains why many police organizations in the world are called Police "Forces", although in the spirit of growing humanitarian clamour, many are beginning to jettison the word force.

In this unit, you will learn the meaning of force and the various dimensions of it. You will learn that the force contemplated in this unit is one that is characterised by the twin elements of legitimacy and authority. You will also be exposed to debates concerning the desirability of linking law to force and whether force is in fact a necessary component of law. Do people obey law because they fear force or sanctions or is it because of moral or other commitments to the social order? Many other related thorny issue will also be addressed.

2.0 OBJECTIVES

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

Analyse the relationship between law and force;
Describe the different forms of "Force"
Understand that law must ultimately be backed by force, good counter-arguments notwithstanding.

3.0 MAIN CONTENT

3.1 Law and Force Defined

We have defined law several times in preceding units. It consists of a body of rules of conduct which members of society recognise and consider obligatory on then- part to observe. Now, the non-observance of such rules would entail the visitation of negative sanctions on violations. It is the same law that is invoked to punish erring members. The whole process of punishing offenders (i.e. Criminal law) or redressing wrongs and awarding remedies (civil law) is characterised by the foreboding presence of force (police, court, prison, military, etc.). This force is overwhelming and can easily subdue any resistance that the violator may want to put up against the operation of penal laws.

Ordinarily, we understand force to mean the power or ability to enforce one's will. It is the power to make people act in conformity with one's demands, regardless of those other people's wishes. The notion offeree implies that there is a resistance to be overcome.

In this regard, force may come in various forms, and it becomes important to distinguish the kind offeree contemplated here. The gun-totting armed-robber who stops a vehicle on the highway, asks passengers to disembark and to enter the bush while he makes away with their vehicle and valuables has exercised force.

The gun-wielding policeman who does more or less the same thing has also exercised force. But the forces exerted are different. The citizen knows that the armed -robber is not entitled to his obedience. The armed-robber has been able to make him comply purely by the threat of the gun or force alone. The citizen however believes that the policeman is entitled to his obedience. His uniform gives him a stamp of legitimacy. He however, has no authority to order passengers into the bush.

This is the major distinction that must be made here. The force that we associate with law is the force which is characterised by the twin elements of legitimacy and authority, it implies that there is a state with a legitimate or quasi-legitimate government in place. That the state has law enforcement and administration agencies. That there are laws governing the operation of the agencies. And in short, that the personell of the agencies wield legitimate authority. The citizens believe in and recognise the legitimacy of the agencies and so feel a sense of duty in complying with the orders of the agents and not out of fear of force alone.

SELF ASSESSMENT EXERCISE 1

Why would you obey/disobey a uniformed policeman who is not carrying any weapon, when he orders the vehicle in which you are travelling to stop and all passengers to disembark?

GUIDELINES

Suppose you are the driver of such a vehicle, will you stop? What if it is a armless civilian who orders you to stop? Will you stop?

The difference in your attitude should normally be informed by the uniform or designation of the person giving the orders in terms of whether he is a policeman or an ordinary civilian. The former bears the stamp of legitimate authority. Ordinarily, this is what should make you obey, not because of the material time he is carrying, a weapon which he may use if you disobey.

3.2 Convergence of Law and Force

In the practical sense, it is inconceivable that we can have law that is not supported by force. Take the element of force away and what you have left cannot be law. This however must not be interpreted to mean that law can rest on force alone. As earlier noted, the word force is used in this unit to mean legitimate authority, and legitimate authority presupposes that many cherished values (moral, religious, custom, etc), are distilled into law.

Of course, a few aberrant situations have come up in the past where for a few months societies were run on brute force (with no legitimacy) alone. This happen in some countries that were occupied by Nazi Germany during the second world war, where the occupiers lack no legitimacy whatsoever yet were able to rule through fear and brutai force for a while, it also happens in periods of military coups. These are however isolated cases and lasted for very short periods. But though they do not conform to the view that force must be legitimate authority, they underscore the point that force is a crucial component of law. In other words, the major compelling reason why people obey the law is the fear of sanctions for doing otherwise, though this is not always obvious.

3.3 Divergence of Law and Force

Interestingly, arguments have also been advanced to the effect that force need not be a component of law, or that it is even an anathema to law.

First, it has been argued that any force or violence is wrong in itself.

Therefore, any law which rests upon violence offends the principles of true morality. Force is a negation of law and recourse to violence is an extraneous element outside law, which is only brought in when law itself has broken down. As such, it is not a component of law. This second view is however convoluted and not very clear.

Another group of commentators claims that people obey the law not because they are constrained to do so by force, but because they consent or at least acquiesce in its operation. It is then maintained that it is such consent rather than any threat offeree which enables the legal system to function. The social contract idea (the idea that the state or government is a product of an agreement between the governor and the governed) underlies this view. It is instructive, however, that the legal fiction of a social contract has now been dropped in favour of the idea of universal suffrage and majority rule.

It has also been argued that the element of force is absent in international law. There is no regular international police force to enforce it, yet it is law.

In conclusion, therefore law is said to be conceivable without force. The idea of law need not be associated with force, and in modern societies, people obey laws not because they fear force, but because they believe in the law.

SELF ASSESSMENT EXERCISE 2

In your own view, what is the fundamental reason for obedience to law?

GUIDELINES

> Admittedly, a number of factors come into play in making one obey law: conformity with moral or customary value, belief in its legitimacy, the fear of punishment if one disobeys and so on.
>
> But which is dominant? Is it the fact that a stern policeman with weapons is not always hovering over you enough to say that force or fear is not an important element in obedience to law?
>
> Read the conclusion to the unit in S.4.0.

As a student, which of the two views of the relation of law to force do you consider most appropriate? My own views are contained in the concluding section below.

4.0 CONCLUSION

In this unit you have learned of the two opposite views regarding the relation of law to force. One view describes law and the legal system essentially in terms of legitimacy, authority and consensus and excludes the element of force. The other view is a coercionist view of law and puts force at the forefront of law perhaps to the neglect of authority and legitimacy. The reality, however, is that both views are not mutually incompatible and must be taken into account to get a comprehensive understanding of the relation of law to force and the dynamics of the social order.

True, the need for the actual use of force is becoming less and less in modern society. People are obeying law more, not because of the element of compulsion or force but seemingly because they believe in the law and perceive their obedience to be right. But this should not lead us to conclude that force is not needed. The knowledge of the existence of a formidable force (e.g. the police force, the armed forces etc.) to crush any resistance is enough to render resistance to law useless. So people seemingly obey without resistance, not because they really want,to obey but because disobeying is not worth it. At all levels of society, human law has depended for its ultimate efficacy on the degree to which it is backed by organised coercion. While there is much good in human nature, there is also much basic instincts and drives. Mere commitment to a civilized living is not enough to keep those aggressive drives in check. The force behind law does, to a large extent.

5.0 SUMMARY

In this unit, we have advanced a step further in conceptualising the relation of law to concepts associated with it. You have learned that there is disagreement in the literature over whether force is a necessary component of law. One group says it is another says it is not. My own opinion is that for law to be effective, (even international and customary laws which lack organised enforcement machinery). It must be backed by force. Do you agree? Again dissent is allowed, but you must show that you understand the issues on both side of the argument, and be able to argue the superiority of your own position.

6.0 TUTOR-MARKED ASSIGNMENT

The notion of legitimate authority is essential to the functioning of law in any community. Critically discuss.

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 THE RELATION OF LAW TO JUSTICE

CONTENTS

1.0 INTRODUCTION

To state that there is a relation between law and justice is to state the obvious. This is because the purpose of law ordinarily is to ensure justice. The word justice is however an omnibus or nebulous one and has been invoked in so many differing situation that its meaning is becoming obscure. Among the more prominent senses in which the word has been used are the following: natural justice, jungle justice, poetic justice, divine justice, substantial justice and legal justice.

In this unit, you will learn the relation of law to the more important of these forms of justice. You will also learn to distinguish one form of justice from another.

Furthermore, you will learn that though law or legality is generally associated with justice, there may also be legal injustice.

2.0 OBJECTIVES

At the end of this unit you should be able to:

Understand the relationship between law and justice;
Identify and explain at least two or more important forms of justice;
Demonstrate ways in which law may be used to achieve purposes other than justice.

3.0 MAIN CONTENT

3.1 Law and Justice Defined

Again we need not spend time defining law because materials in modules 1 and 2 which you must have studied, contains more than sufficient explanation. We noted however, that the general purpose of law, as bodies of rules seeking to control human behaviour, is to attain justice in society. In a general sense then, the peace, stability and continuity of the social order which law guarantees, is justice. This is the sense in which Plato understood the concept when he defined justice in terms of every one and everything acting according to his/its proper place in the order of things. When animals act according to their natures, building implements are used for building and not for fighting, doctors heal the sick, and philosophers rule, everything in conformity with its sphere, according to the best of their abilities, there will be Platonic justice.

Regardless of the sense in which the term justice is used, there is a similar thread that runs through. This is the idea that things have ended in a satisfactory or just way. When a thief caught red-handed, is lynched on Nigeria streets, it is jungle justice. Jungle in the sense that proper procedures have not been followed in meting out instance justice, but it is justice all the same because many believe the culprit deserve to die and they no longer have faith in the police and criminal justice system. Natural justice is an elusive concept, yet it is concrete enough to haves fundamental principles guiding its attainment and legal practitioners take it seriously. For example the two fundamental principles of natural justice are that:

(a) You must hear the other side in a dispute *(audi alteram patem),* and
(b) You must not be a judge in your own case *(Nemo judex in causa sud).* When people talk of Nemesis catching up with somebody or when Nigerians say "Na God catch am", they are all invoking some notions of divine justice in which every offender gets his just desert regardless of whether the human criminal justice apparatus is able to handle the culprit or not.

SELF ASSESSMENT EXERCISE 1

Is jungle justice a form of justice?

GUIDELINES

First, explain what you understand by the concept justice in such a way that it’s pillars are brought out. Then see the extent to which jungle justice conforms. In the final analysis, the answer

> may be neither here nor there. But it will be possible to describe a continuum on which you can then say the extent to which jungle justice approximates any particular end.

There are many forms of justice and they can be distinguished notwithstanding the common denominator of "just reward", whether negative or positive, underlying all of them. For our purposes in this unit, the concern shall be with three major forms of justice. Formal justice, substantial justice and legal justice. The relation of law to these forms of justice is examined in the following three sections of this unit.

3.2 Law and Formal Justice

Once people are categorised, and the people in each category are treated equally, formal justice is done. This concept of justice rests upon the cliche that "likes should be treated alike". It is not interested in the criteria by which classification or categorisation is done. It takes the basis of classification (whether just on unjust) for granted. The only concern is whether subsequent on classifications, rules and procedures are being applied such that equals (by virtue of class) are treated equally. Once this is so, then formal justice is being done.

To the extent that formal justice does not question the justness of rules of procedures themselves, but is only concerned with whether the rules are being adhered to, it falls short of an adequate conceptualisation of justice. The implication of the formal justice positions, is that even if the criteria for segregating people for selective application of law is mere skin colour (as happened in Apartheid South Africa and it is still happening in parts of the U.S. A) justice is being done, so long as the rules are adhered to. A more robust conceptualisation of justice should question the rules themselves and evaluate them according to higher standards.

Besides, applying sane law to equals may not actually amount to equality of treatment because human beings are rarely equals; notwithstanding the standards by which equality is adjudged. For example, there is in theory equality of access to criminal justice machinery, but not all can make equal use of it. If conditions of bail for similar offences are fixed at equal cost for every one, it is obvious that the more well-to-do will easily meet the conditions than the indigent.

3.3 Law and Substantial Justice

Substantial justice requires two other elements in addition to the requirement of formal justice. First is the need to decide if the rules are themselves just. In other words, the values by which rules are judged to

be just will have to be based on something other than justice. Such higher values usually, will be conditioned by our history, traditional, socio-economic environment/religious/ethical/moral values and universal practices of mankind the world over.

The second element is equity. This entails the need to be fair by making rule-application less rigid and more individualised. The rationale is to foresee and provide for peculiarities in the situations of individuals. The need is met by allowing a certain latitude for the exercise of discretion to the state justice officials. For example, if five individuals separately, commit the offence of theft, they would have committed it for different reasons desperation fostered by hunger, insanity and inability to understand nature of act, out of greed/for illicit gain, out of spite, calculated act of revenge, mistake thinking it actually belong to him (accused) on some person other than victim and so on.

The principle of equity which underlies substantial justice demands that factors motivating the crime, as well as the total situation of the individual be considered. As such the judge who has the power of discretion (and not under strict application of mandatory sentences, once offence is proved as required by formal justice) can award different penalties taking into cognisance the situation of the offender.

3.4 Law and Legal Justice

The concept of justice is a broad one which can be invoked whenever there is talk of rule application. It applies whenever there is a code of rules, whether legal or non legal. In this regard sports clubs, students' associations, tribal meetings, all of which have rules can talk of justice in reference to the application of those rules.

Legal justice is what we talk of when we carry the discussion on justice to the specific domain of law (as against just any rule). It means justice according to the law of the land. When a case is settled according to the dictates of the law, we say legal justice has been done.

The logical follow up to this is that we may also have legal injustice! So, can anything legally done amount at the same time to an injustice? The answer is yes.

There are three ways in which legal injustice may occur:

(a) When a case is decided in a sense that is contrary to what the law has laid down. E.g. if the law says any one who steals is to be awarded a medal, then somebody steals and he is punished or locked up, legal injustice has been done.

SELF ASSESSMENT EXERCISE 2

Think of a situation where law will be so obviously against morality/logic. In such a situation can you really think of non-compliance with the law, as injustice?

GUIDELINES

Such extreme cases are rare, but there have been instances when the letter of the law did not quite accord with the reality, e.g. the law under Buhari in 1984, prescribing death penalty for drug trafficking of the releasing more recent law against smoking in public. No matter how responsible those laws were, the fact is not enforcing them when they come before a court will amount to legal injustice.

(b) Whenever the law is not duly administered in the spirit of impartiality that it calls for, e.g. when a judge has a stake or vested interest in seeing a case go in a particular way, and allows such interest to influence his judgement.

(c) When the law is itself unjust, even when it is impartially administered, it still amounts to legal injustice. So here we see that legal justice and substantial justice seem to merge. The standard for judging the unjustness of a properly made law, whatever the value, is a substantial test of justice.

4.0 CONCLUSION

You have learned the relation of law to three major conception of justice. It should be pointed out to you, that when we talk of relation of law to justice, we most often mean substantial justice. Law, in addition to complying with the formal attributes of justice, need also to possess a just content. That is, its actual rules must by their provision aim at, and endeavour to conform to some criterion of rightness which reposes on values exterior to justice itself. Formal justice cannot handle and is not interested in handling issues of, upon which basis do we indicate preference for one set of values over others.

Two major ways by which modern legal system aspire to attain not merely formal, but also substantial justice are:

(a) By allowing discretion or flexibility in the administration of justice; and

(b) By incorporating certain higher values in their supreme laws (constitution). For example, most nations today have enshrined sections on fundamental rights in their constitutions. These rights

serve as yardsticks for assessing the just application of the other provisions of law. They (fundamental rights) prevail in the event of conflict with any other law.

5.0 SUMMARY

In this unit, you have learnt that there are different froms of justice and that law is closely associated with all of them. You have been told that, though the ordinary aim of law is to achieve justice, there are times when law either in content, or in its manner of administration has created injustice. Of the three major forms of justice examined, substantial justice comes out as the most important. You have been told in fact, that it is the kind of justice most in contemplation when we talk about the relation of law to justice. I expect that you have digested the content of this unit, bearing in mind that it is the fourth unit of module 3, which goal is to explain law in the context of its convergence and divergence from other social control sources, and related concepts.

6.0 TUTOR-MARKED ASSIGNMENT

Critically examine the three major forms of justice discussed in this unit and explain which of them more closely approximate your own idea of justice. Write a maximum of 6 typewritten pages.

7.0 REFERENCES/FURTHER READINGS

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See the following entries: Justice 8:34 1347.

UNIT 5 THE RELATION OF LAW TO FREEDOM

CONTENTS

1.0 INTRODUCTION

The issue of freedom (or liberty or rights) has of late assumed quite some significance. Governments have been raised or brought down on grounds of human rights profile alone. As Democracy gains ascendance over other forms of government (such as Theocracy, Aristocracy, Dictatorship/Autocracy and other forms of Totalitarianism/Despotism), so is the issue of guaranteeing certain freedoms to individuals.

In this unit, the relationship between law and freedom is examined with a view to demonstrating how law further or hinder liberty. Freedom does not quite fit the notion of a competing source of social control as morals or custom treated in the earlier units of this module. But the idea of freedom is nonetheless closely interwoven with the idea of law. Freedom just like justice is one of the aims that law seeks to achieve. This may sound contradictory because we associate law with imposition of restraints which is an antithesis of freedom. But as you read further into this unit, you will come to understand that law, though seemingly restricting freedom, is in reality expanding it. You will also learn how modern societies try to raise the values embodied in fundamental rights above every other value. This they do by enshrining them in the constitution and declaring them to be the provisions that must prevail in the event of conflict with any other law.

2.0 OBJECTIVES

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

Understand how law expands freedom even while seeming to restrict it;
Specify at least six fundamental rights and show their limitations;
Analyse the relation of law to freedom.

3.0 MAIN CONTENT

3.1 Law and Freedom Defined

Law, as I presume you now know very well, is a body of rules of conduct which tell people what they may do and particularly, what they must not do. Not only does it proscribe certain acts or omissions to act, but it stipulates and go on to enforce penalties for non compliance. In other words, law imposes restraints on human activities.

Freedom on the other hand, ordinarily means the ability to do what one wishes without restraint. It may therefore appear that it is a contradiction in terms to say that the idea of freedom is embodied in law. The contradiction, however, disappears when we understand freedom to mean, not the liberty to do whatever one wants, but the liberty to do whatever one wants within the limits imposed by law. This is legal freedom.

So does legal freedom constrict or expand freedom? It must be made clear that even with the restraint implied in the notion of legal freedom, it still serves to expand rather than restrict freedom. This fact is better appreciated when we view man, not as an individual living alone in an unrestrained state of nature, but as a social being living in community with other individuals. It logically follows that individuals, in exercising their freedoms must not be allowed to encroach on the exercise by others of their own freedom. If every one is allowed to do anything in the name of freedom, a situation of “might is right” will easily ensue and society may degenerate into the Hobbesian State of nature where everyone is at war with everyone.

In limiting the freedom of individuals, therefore, the law is in effect expanding the freedom of the whole. For example, the legal restriction on physical assault by its very intention of preventing indiscriminate assaults on one another, secures freedom for all. The English Law Lord, Lord Dennings put it quite well when he said that: “your right to swing your fist ends where my nose begins”.

3.2 Law and Fundamental Rights/Freedom

Some freedoms are considered more basic than others. Over the years a body of such freedoms has come to be recognised all over the world. They go by such names as Basic Rights or Fundamental Human Rights or just Human Rights.

Such freedoms are now being written into many national constitutions beginning with the American constitution of 1776. The courts are bound

to treat such right/freedoms as overriding. Any legislation or legal ruling that is inconsistent with them are deemed invalid to the extent of the inconsistency and very rigid/ difficult procedures are required for their amendment.

In recent times, similar attempts at guaranteeing basic freedoms have been made at International levels. The Universal Declaration of Human Rights of 1948, spear-headed by the United Nations Organisations, is a good example. It is supposed to be binding upon all the nation signatories.

Chapter 4, sections 33 to 46 of the 1999 Constitution of the Federal Republic of Nigeria contains provisions on Fundamental Rights. These provisions are fairly representative of the values expressed in the concept of legal freedom. Let us look at the provisions, section by section. You should pay particular attention to the qualification/limitations imposed by law on the enjoyment of each of the rights/freedoms/liberties.

SELF ASSESSMENT EXERCISE 1

Read sections 33 to 45 of the 1999 constitution of the Federal Republic of Nigeria and evaluate the extent to which the qualifications imposed, limit the enjoyment of each of the fundamental rights.

GUIDELINES

The qualification/limits of the rights could be seen by the use of those same words in the constitution or by the use of "provided" or just “proviso”.

Try and see what is left of the rights after the qualifications. It is usually not much. Yet it is usually enough to secure freedom, so long as there are responsible executive, legislative and judicial arms of government in place.

In reality however, the qualification are too extensive and while they protect the citizen against other citizens, they do not afford him much protection against the government.

(a) *Right to life (S.33 of 1999 Constitution of Nigeria):* Everyone has a right to life and this is perhaps the most basic of all rights. But the constitution allows for one to be deprived of his life in the following situations: (i) execution of the sentence of a court (ii) Reasonable force used on him in self defence, to effect a lawful arrest and to suppress a riot or mutiny.

(b) *Right to dignity of human person (s.34 of 1999 Constitution of Nigeria):* In pursuance of this; (i) no person is to be subjected to torture or inhuman treatment, (ii) held in slavery or servitude or forced to perform compulsory labour. But he could be made to do those things if required by court, or by the Armed Forces if he is a member, or in the event of an emergency/calamity threatening the well being of the community or compulsory national service prescribed by the National Assembly.

(c) *Right to personal liberty (s.35 of 1999 Constitution of Nigeria):* Every person is entitled to this except in the following situations: (i) execution of sentence of a court (ii) if below 18 years for the purpose of his education (iii) if insane for the purpose of his treatment. This right include right to remain silent (when arrested or detained) until after consultation with a legal practitioner, right to be informed in writing of reason for his detention, right to be brought before a court within a reasonable time and right to compensation and public apology if unlawfully arrested or detained.

(d) *Right to fair hearing (s.36 of 1999 Constitution or Nigeria):* This right embraces many of the due process and legality principles that underline the rule of law. We shall deal with it elaborately in the next unit. For now it should suffice to say it is the longest section on the human rights provisions of Nigeria. And as is usual, it contains quite a number of provisos.

The following basic freedoms are also guaranteed by the 1999 Constitution of the Federal Republic of Nigeria: Right to private and family life (s.37), Right to freedom of thought, conscience and religion (s.38), Right to freedom of expression and the press (s.39), Right to peaceful assembly and association (s.40), Right to freedom of movement (s.41), Right to freedom from discrimination (s.42), Right to acquire and own immovable property anywhere in Nigeria (s.43) and protection against compulsory acquisition of property (s.44).

Through these and similar provisions world wide, the law seeks to grant and protect freedoms of individuals. But it recognises that unfettered freedom can be counter-productive, so restrictions are imposed on individuals to guarantee freedom for all. To ensure legal equality, democracy becomes the preferred mode of governance and provisions such as universal franchise and recognition of equality before the law are put in place. Preservation of property is regarded as a fundamental purpose of law. But again this is eroded by nationalisation of industries and land, and the governments power of compulsory acquisition.

The right of association is guaranteed but so long as it does not conflict with the right of the state to preserve public order.

SELF ASSESSMENT EXERCISE 2

To what extent do you think the right to join association, including trade unions, for the purpose of fighting for one's right (s.40 of 1999 constitution) should be extended to para-military and military organisations?

GUIDELINES

The constitution, which is the supreme law actually does not exclude such organisations from forming association and trade unions. The Supreme Court has however in (Osawe v State) insisted that the right does not extent to them. If so, it would only create room for chaos and instability. Hence the recent police strike (February 2002) was widely condemned for being illegal, even when they claimed to be pursuing the rights granted them under S.40.

Freedom of speech and of the press is protected but provided it is not used to incite the public or publish defamatory stories, or obscene publications or propagate ideas aimed at generating intolerance against particular groups.

Religious practices which do not violate laws are allowed. A whole hog of smaller rights are protected as personal freedom also, provided they do not amount to encroachment on others' right or a violation of law. These include freedom to come and go as one pleases, to take up or reject any employment of choice, reside wherever is desired, and generally to lead what to him is the good life, subject to compliance with the laws of the land.

4.0 CONCLUSION

In conclusion, you should note that conflict may and in fact do arise between the various types of fundamental Rights and values which underlie them (conflict is not just in terms of the Rights and other provisions of law). Thus freedom of speech may conflict with the right of the citizen to be protected against intolerant propaganda. The right to independent religion may entail preaching discrimination against other religions. Above all, the security of the state may be involved as a value overriding all individual claims.

One way of resolving such conflicts, drawing upon the U.S experience, is to declare certain freedoms to be more fundamental than others, e.g.

Right to private life may supercede the freedom of the press. As such, in the event of publication of scandalous intimate details of something an individual has done in the privacy of his house, that individual may have a remedy in court on the ground of violation of his privacy, even if the story is true.

You should also note that it is one thing to lay down fundamental norms, but quite another to ensure that those concerned actually comply with them. Because of the shortcomings of national government in protecting individuals rights, attempts have been made at super-national levels to protect such rights. Prominent in this regard are the Universal Declaration of Rights adopted by the U.N. in 1944, and the institutionalisation of Customary International Law. The problem with such international efforts, however is that they lack power to do much in terms of restraints against sovereign power of states to deal with their citizens. For example, only states (not individuals) are recognised in the International Court, and an individual cannot therefore take complaints there against his state.

Besides, there are no machineries at such international platform to enforce ultimate compliance by the state, even if a citizen succeeds in bringing a complaint against it. Most of the International declaration on human rights are in effect, mere statements of principles, useful for influencing public opinion, but not likely to have any obitep when states flout their provisions.

5.0 SUMMARY

In this unit you have learned that the idea of freedom is embodied in the idea of law, though ordinarily the two concepts seem to signify opposite things. You have learned that law, in seeking to restrict the freedom of individuals is actually expanding the stock of freedom in the whole society. You have also been told that some freedoms are considered more fundamental than others. These fundamentality freedoms are also called Human or Basic Rights. Because they are fundamental, they are now entrenched in modern constitutions as values which the law holds supreme and will give precedence should any conflict arise between them and other laws. There are however so many qualifications/provisos to the enjoyment of these rights that one wonders if the law does not take away with one hand what it has given with the other. What ever the case, one thing is clear, for freedom to be guaranteed, it is ultimately the law that we must rely on. This point will be made even clearer in the next unit, which is on the Rule of Law.

6.0 TUTOR-MARKED ASSIGNMENT

Describe the ways by which law restricts freedom in order to expand freedom. Write a maximum of six typewritten pages. Be as clear and concise as possible and try to use local (Nigerian) illustrations.

7.0 REFERENCES/FURTHER READINGS

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UNIT 6 LAW AND THE RULE OF LAW

CONTENTS

1.0 INTRODUCTION

The concept of the Rule of Law should be a familiar one to you. It is very commonly used. In its simplest meaning, it means that things are done in society according to law rather than by the whims and caprices of man or arbitrarily. It was Aristotle who stated that he who bids the law rule may be deemed to bid God and reason above rule, but he who bids man rule adds an element of the beast. This unit roundoff our discussion on the relation of law to concepts that the law is normally associated with. The unit is largely a continuation of the last unit which discussed the relation of law to freedom. This is because for freedom to have any freedom, i.e. freedom to act within the limits of law, it is defined by law. Hence it is only when law reigns supreme that those freedoms can be enjoyed. In this unit you will learn the meaning of rule of law, the pillars on which the concept rests, the extent to which it can be found in practice, and its various formulations and criticisms.

2.0 OBJECTIVES

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

Understand the meaning of the rule of law;
Identify the components of rule of law;
Describe the extent to which Nigeria meets the requirements of rule of law;
Examine the relationship between laws and the rule of law.

3.0 MAIN CONTENT

3.1 The Rule of Law Defined

The first and perhaps most seminal definition of rule of law was propounded by A.V. Dicey in 1915. He reduced the concept to the presence of three elements in any society. First, there must be absolute supremacy or predominance of regular law over arbitrary power. In other words, every person or institution must be subject to the law. All actions must be based on the provisions of the law and any breach punished according to the law. The operation of the legal system and in particular the application of the law must be above the wishes or whims of everybody.

SELF ASSESSMENT EXERCISE 1

Is it possible and desirable to subject every person and institution to one and the same law?

GUIDELINES

> Try and recall or reread the discussion on substantial justice (unit 4 of the module).
>
> Are people equal? If not, is it describle to subject unequals to equal law? Wouldn't the impact of such a law be infact unequal?
>
> In a situation where law itself is made and enforced by people is it infact possible for it to be absolutely supreme?
> In approximating the question, make a distinction between "possibility" and "desirability".
>
> You may want to refresh you memory and get addition materials by reading unit 3 to 5 of this module again.

Secondly, there must be equality of every one before the law. In other words, the same law and standards apply to everyone irrespective, of their standing or status. Thirdly, the courts are the best custodians of peoples' right and should administer the laws.

Dicey's formulations have however been criticised and have as a result undergone some re-formulations. For example, it has been argued that if law must predominate at all times it means no discretionary power must be given to those who administer it. Policeman would not be able to arrest on mere reasonable suspicion and courts cannot give different sentences for same offence. Furthermore, it is unrealistic to talk of equality before the law, because people are not equal. What will happen to diplomatic immunity, or immunity granted to Presidents and

Governors while in office (see S.308 of the 1999 Constitution of Nigeria)?

As a result, the current understanding of the Rule of Law is as follows: that the concept is a dynamic one, but with the following attributes;

(a) It presupposes a system based on law and order. Note, law and order is not to be an excuse for suppressing dissent and oppressing opponents.
(b) It presupposes the existence of a democratic system of government i.e. the people should have a say in who governs them and be able to effect periodic changes of leadership through elections. They should also be able to disagree.

SELF ASSESSMENT EXERCISE 2

Do you consider the existence of democratic government a *sine qua non* for the proper operation of the rule of law?

GUIDELINES

Democracy provides a more conducive environment to the flourishing of rule of law than any other, system of government.

But procedural safeguards put in place to guarantee rule of law notwithstanding, it is ultimately the kind of people who operate the system that determines the extent to which rule of law will be given expression.

It should therefore not be surprising to concede that some military government may give room for operation of rule of law than under a corrupt democratic regime.

(c) There must be an independent agency where aggrieved citizens can seek remedy. This is usually the courts or tribunals. They should be insulated from unwholesome influences and be independent and impartial.
(d) There should be a development of Rule of Law as an International concept.

These are mostly refinements of Dicey's propositions and are meant to take care of the rigidity of Dicey. Some people also add separation of powers between the three major arms of government as a requirement.

The ultimate aim of all these provisions is to ensure that it is the law which rules and not man. The relationship between the ruler-ship of the

law and the kind of law that are in place to guarantee such ruler-ship is more closely examined in the next section.

3.2 The Relation of Law to the Rule of Law

Two clear principles or inter-related elements which emerge from our conceptualisation of the Rule of Law above, are the elements of legality and due process. Legality has to do with imposing restraint on application of criminal label or sanction against an alleged offender. Due process requires that the whole process of justice, from arrest to eventual sentence of an offender, must be conducted in such a way as to minimise the chances of convicting the innocent. The two elements are instruments to prevent the state from exercising arbitrary power on its citizens. They are meant to ensure the operation of rule of law in day-to-day activities of the state.

The Nigerian 1999 Constitution gives lucid expression to these concerns in section 36(1-12). In other words, that section has enshrined procedural saveguards as part of Fundamental rights in an attempt to ensure the due process of law are legality.

In summary, such provisions seek to ensure: the independsce of the judiciary, speedy and fair trial of accused persons, and adequate judicial control over power and methods used by the police to get confessions. There are also provisions of adequate safeguards regarding arrests and detention pending trial, and adequate legal aids for the indigent. The accused is entitled to refuse to make any self-incriminating statements. The lawyers on both sides (i.e. defence axil prosecuting) must be free and independent of any state pressure. No person shall be found guilty of an offence that is not written down before the date of its commission. A person is only answerable for his own wrong doing and is not to be punished simply because he is in some way connected with or related to the same group as the guilty person. He is presumed innocent until proven guilty, not to be tried twice for essentially the same offence and many other provisions.

As such the relation of law to the rule of law is fairly obvious and definite. There is a rule of law when law is properly made, fair in its content, and applies over and above individual whims and caprices regardless of whether such individuals in fact constitute the State.

3.3 Critique of the Rule of Law

A major critique of the rule of law is that it rests upon the "Social contract" theory of society which sees the State as a partnership between the ruled the rulers. As such it assumed that the state is an impartial and

benevolent organ that holds pluralistic interest in balance. But the notion of social contract has since been discarded. Once we see the state as a one sided or partisan party in a society with conflicting interests, it becomes glaring that the rule of law is a mere mask, masking exploitative and unequal relationship.

Second, the fact that legality and due process provisions are in place does not guarantee equality. This is because if the substantive laws themselves are unfair, then no amount of procedural safeguards can ensure equality and fairness.

The foregoing criticisms should not however be construed to mean that there is nothing hi the rule of law. Infact, one must concede that the law in every society guarantees some degree of regularity and fairness for all. Furthermore, it must also be agreed that law do infact curb the excesses of those in power. No government can be totally arbitrary. Even the despotic Abacha Military regime of Nigeria tried to maintain a semblance of following the law, notwithstanding the underground lawlessness he perpetrated that are now coming to light.

4.0 CONCLUSION

In conclusion, you should see the rule of law as an ideal type (i.e. a pure, perfect form not found in reality) to which all modern societies aspire to. But no country has been able to live up fully to its requirements. On a continuum of countries, you will find that the advance capitalist West has approximated the ideal more closely than third world or developing countries like Nigeria. In terms of regimes, civilian democracies have been nearer it than military and other autocratic regimes.

You should by now be able to construct yardsticks of measuring the attainment of rule of law, and seeing the extent to which various countries have performed on it.

5.0 SUMMARY

In this unit, you have learned about the concept of the rule of law. You now know that it has no single definition but it is generally agreed that it means the extent to which the law is allowed to direct the affair of society rather than the wishes of men. Remember the twin principles of legality and due process and what they entail. At the end, it was concluded that a complete rule of law is something that no society can claim to have achieved. But we can measure societies in terms of the extent to which they approximate the ideal.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by Rule of Law?
2. Compare the extent of its attainment under any military regime with any civilian regime of your choice in Nigeria. Write a maximum of eight typewritten page

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MODULE 4 THE NIGERIAN LEGAL SYSTEM

INTRODUCTION

The first three modules of this course have dealt with general issues that is of major concern in the sociology of law. In this module, specific focus will be brought to bear on the Nigerian situation. In discussing the Nigerian legal system, those general concerns would be given specific empirical content. At the same time, the issues of modern versus traditional or formal versus informal justice system would be addressed.

This module is made up of five units. The style adopted in writing the first four units which deal with historical periods in Nigeria's development is the same.
The units are broken into the following six parts:

(a) Overview
(b) Substantive law (i.e. law defining offences and rights)
(c) Procedural laws (i.e. laws defining how to proceed with an alleged offender)
(d) Penal laws (i.e. rules defining what to do with a convicted offender)
(e) Personnel of the justice system, and
(f) The outcome of the justice (especially criminal justice) process.

This uniform approach enables easier and better comparison of the nature and character of the legal systems during the pre-colonial, colonial and post colonial eras of Nigerian history. In the last unit, i.e. Unit 5, some thorny issues in the evolution of the legal system are briefly examined.

You should bear in mind that this excursion into the history and development of the Nigerian legal system is also an excursiory into the evolution of the modern from the traditional. For space and time constraints (Sociology of law is a one semester course), no separate module is created for a discussion on formal versus informal methods of justice. But such a topic is a very important part of sociology of law. Attempts have been made in this module to integrate the concern of such a topic here.

Therefore, the first two units where the pre-colonial legal system of Nigeria is discussed should also be seen as a discussion of informal or traditional systems of justice. As you will soon discover, the references given there conmin material on informal justice systems outside Nigeria. Units 3 and 4 which discuss the colonial and post-colonial legal systems respectively should also be seen as a discussion of formal legal systems.

Unit 3 is a good illustration of the attempt, even if a lumsy/authoritarian one, to transit from a predominantly informal to a predominantly formal system of justice.

The overall goal of the module is to familiarise you with the historical development of the Nigerian legal system while at the same time highlighting the important features of traditional and modern systems of justice to you. Specific objectives towards that goal are presented in each of the units.

Unit 1 The Pre-Colonial Legal Order of Nigeria: Southern Nigeria (Prior to 1861)
Unit 2 The Pre-Colonial Legal Order of Nigeria: Northern Nigeria
Unit 3 The Colonial Legal Order Nigeria: 1861 to September 1960
Unit 4 The Post-Colonial Legal Order of Nigeria: 1960 to Date
Unit 5 Issues in the Development of the Nigerian Legal System

UNIT 1 THE PRE-COLONIAL LEGAL ORDER OF NIGERIA: SOUTHERN NIGERIA (PRIOR TO 1861)

CONTENTS

1.0 INTRODUCTION

The effective colonialisation of Nigeria by Britain began with the cession of Lagos to Britain (in a Treaty of Cession) in 1861 by king Dosunmu of Lagos. The period before 1861 may therefore be regarded

as the pre-colonial period. During this period, the geo-political entity now known as Nigeria did not exist. What we had were relatively autonomous tribal societies, each with its own system of justice administration.

It is nonetheless possible to divide the pre-colonial territory into two major parts based on systems of justice administration. In the present day northern Nigeria, the Islamic system of justice, especially the Maliki School brand was dominant, the Fulani Jihadist having first conquered the area before the British came. In present day southern Nigeria, Justice administration was largely based upon the customary law system of the different tribes.

In this unit, the focus will be on system of justice administration in the southern part. The next unit will handle the Northern part. You should note that in discussing the justice system in pre-colonial southern Nigeria, we are in essence also discussing informal or traditional forms of justice.

2.0 OBJECTIVES

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

Describe the main features of the pre-colonial legal order in Southern Nigeria;
Demarcate the various types of laws (such as substantive, procedural, penal), and state their contents in pre-colonial southern Nigeria;
Specify the elements of informal justice and state the extent to which they still characterise justice administration in your society;
Understand that pre-colonial African societies had their own systems of justice, which had its own merits, notwithstanding what western ethnocentric writers would want us to believe.

3.0 MAIN CONTNET

3.1 Overview of the Pre-colonial Legal Order of Southern Nigeria

The pre-colonial era of Southern Nigeria is the period before 1861, when King Dosunmu gave out Lagos to Britain under the Treaty of Cession. Before that period, the territories that comprise the present southern Nigeria were relatively autonomous tribes. Each had its own customary way of administering justice. The concept of nation was not understood as such. But there were frequent wars. Whenever a particular

tribe or Kingdom wanted to expand, it could overrun its neighbouring town and annex it. In this way, there were powerful kingdoms such as Benin Kingdom and Oyo Empire. There were also a few coastal towns which had developed as a result of slave trade, and later produce trades.

In all the villages, towns, kingdoms, and empires, the applicable law prior to colonialism was unwritten customary law. These are the respective customary rules of the different peoples. There were no formal or centralised machineries for the enactment, enforcement or administration of such rules. They have simply evolved from the practices, habits, and previous decisions of respected arbitrators. Yet the rules were acknowledged and recognised as binding and obligatory. Negative sanctions were available for non-compliance, and enforcement range from self-help remedies to enforcement by recognized organs. Though the various divisions of law as well as purpose of law, are not explicitly recognised or articulated, they nevertheless existed as we shall soon see in subsequent sections.

In other words, these so-called 'primitive' societies that made up the precolonial Southern Nigeria had their own substantive laws, procedural laws, penal laws, and$_x$personnel for the creation of law as well as is enforcement and administration. In this unit, pre-colonial Southern Nigeria is treated as if it is was one entity. You must bear in mind, however, that each of the myriad's of societies that it was composed of formed political units with their own notions of justice. For example, while there were big, centralised political units like the Oyo empire, there were also decentralised, seemingly leaderless societies like the Tivs and Ibos. And there were thousands of small units which did not come under the influence of large tribes.

SELF ASSESSMENT EXERCISE 1

Name any twenty small pre-colonial tribes that were not under the political influence of any kingdom.

GUIDELINES

This is simple enough. The dominant tribes in pre-colonial times remain large dominant still, in the political configuration of Nigeria. There are however so many others refered to as minorities. In fact, Nigeria is said to have between 250 and 400 ethnic groups. Within these ethic groups are small societies which have always been autonomous and insulated from the dominance of large tribes. You will also be doing yourself some good if you can get any elementary history textbook on the history of Nigeria and its people.

3.2 Substantive Laws

The concept of substantive laws is used to denote those bodies of law which defines offences as well as the rights and duties of citizens. They prescribe and proscribe activities and stipulate penalties for non-compliance with or violation of the law. Under the heading of substantive law, we are concerned with issues such as: sources of law, general principles of liabilities under the law, classification of offences and offenders, the available defenses to criminal liability, age of criminal responsibility and so on. I am taking the trouble to explain the heading here, (and will do so for each of the other sub headings of this Unit) for a reason. It is important that you understand the explanation, because the sub-headings will re-occur in the next three units of this module. I will assume then that you already know what they mean.

In terms of sources of law in the pre-colonial southern Nigeria, it suffices to say it was predominantly from the custom of the people. A lot has already been said about custom in the section above on over-view. If you need to know still more, you are referred to module 3, unit 2 where the relationship between custom and law was discussed.

You must note however that custom itself reflect many other kinds of rules, beliefs, folkways, norms and values which over time crystallize into rules of conduct which the people believe they are bound to observe. It embraces social morality, ethics, religion and general beliefs of the people. It also subsumes decisions taken by relevant authorities in new cases, which later become some sort of judicial precedents for the future. So these other rules either separately, or in conjunction with custom, constituted the major sources of law in the pre-colonial southern Nigeria.

The criteria of classification of offences varied from community to community. But preponderantly, there were distinctions between whether an offence is against an individual, against the society or against God (or the gods.

They also had their own principles of liability. For example, unless a rule was violated, one cannot be punished. Accepted defences against criminal liability included age, insanity, mistake and self-defence. Somebody that is considered a child, insane, or who shot a person by mistake, honestly believing he was shooting an animal, or kills in self-defence was either totally exonerated or his level of liability reduced. These features characterised all modern systems. It is wrong to deny their existence under the pre-colonial legal systems or so-called “primitive” societies just because they did not exist in books but customs.

3.3 Procedural Laws

This refers to rules governing how the justice machinery is invoked against an accused person and the proceedings that follow thereafter up to the point at which he is set free, made to redress the wrong or punished for his crime. The major issues of concern here are: sources of such rules, principles of general liability under the rules, arrest procedure, detention, and the trial process.

In pre-colonial southern Nigeria, the sources of procedural laws were not distinct from the source of substantive law. They both us in custom. Again there is no formal articulation of principles of liability, but it has been criticised for not allowing for the operation of the principle of presumption of innocence. In other words, that the way accused people were treated was like they are adjudged guilty before trial and that it doesn't put burden of proof on the accuser or prosecutor. The terms used here are a bit legalistic and may not be easily comprehensible to you. But I assure you that they will become clearer when we get to units 3 and 4. For now, just note the criticism against customary law on the principle of liability. We shall critically examine the criticisms in unit 5 of this module i.e. “Issues in the History of Nigerian Legal System”.

In terms of arrest, every member of the society could single-handedly effect, or participate in the arrest of an accused person. In addition, some societies had institutions such as secret societies and age-grades who performed the functions of the police and vigilante organisations. Again there were no formal elaborate procedures on arrests. But it is conceivable that it couldn't have just been arbitrary. In some societies, the age and standing of the accused person in society determined who effected the arrest and the manner in which it was affected. Detention facilities rarely existed and in fact the whole idea of detention and imprisonment was not really part of the justice system.

The trial process itself, varied from community to community. But it was by and large open and participatory. That is, people were allowed to make contributions, especially those who knew the disputants litigants. In most societies trials are held under big trees or at village squares. The judges usually are respected elders of the community. But serious cases may go before a chief, king, diviners or secret societies.

SELF ASSESSMENT EXERCISE 2

Describe any non-legal way of detecting the perpertrators of crime that you know of, and evaluate its efficacy.

GUIDELINES

There are still in practice many informal methods of detection, even if most of them are described as unreliable.

In many villages and rural areas people still go to diviners, witch doctors, Imams and so on to seek for revelations on committers of offences.

Usually people to whom fingers are pointed are asked to confess or an evil will befall them. You may assess the efficacy by comparing the proportion of those identified who actually own up, the awe in which people still hold such informal threats, and so on.

The most talked about aspect of pre-colonial southern Nigeria Justice process, is the "Trial by ordeal" system. This entails making an accused person who denies an offence go through some ordeal, meant to bring out the truth. It is usually resorted to when there is a strong suspicion that the accused committed the crime. In some societies he may be made to swallow poison (e.g. liquid from the bark of the poisonous sasswood tree), or where it is a woman accused of killing her husband, she may be made to drink the water with which the husband 'corpse was washed (this still obtains in some parts of eastern Nigeria today). The accused may also be made to walk across a deep pit (with dangerous items inside) on a thin rope laid across it. In each case where the accused survives the ordeal, they were deemed innocent. If otherwise it is believed that, they were guilty.

This system of trial has been roundly criticised, especially by western writers. They hold that there is no way of actually knowing it's efficacy and that many innocent people may have died in the process. We shall revisit this argument in unit 5 of this module.

3.4 Penal Measures

This refers to the rules regulating the treatment of an offender after he has been found guilty, as well as the measures of execution and philosophies behind them. The issues of concern under the heading include the goal of the measures. The kinds of sentencing options available, and the rights of convicted offenders. On the whole, the philosophy underlying penal practices in pre-colonial southern Nigeria tended more towards reconciliation than the modern ideas of retribution and deterrence. It was more akin to the current trend towards reformation and rehabilitation. The idea that primitive laws were very harsh and repressive or that penalties were very severe is not borne out

by the experiences of southern Nigeria. Imprisonment was hardly an option. The closest that any society came to this most frequently awarded sentence for crime in modern societies, was the Yoruba's idea of detaining offenders for a short period that they used to make restitution. For example, the substantive penalty may be for him to farm for his victim for three months. For the three months he may be housed in a small hut in the King or Chief's compound, from where he goes to the farm. Even then this was reserved for the most recalcitrant of offenders.

The sentences of pre-colonial southern Nigeria preponderantly tended towards the non-custodial. Among the available options were restitution, reconciliation, flogging, compensation, self-help, banishment/exile, and death penalty. But again because of the sanctity of human life, death penalty was rarely carried out by the community, e.g. such a culprit may instead be taken to a wild or evil forest (may be bound) and left there to die or be devoured by wild animals. He may be bound hand and foot, put into a canoe with limited food and set adrift on a river with wishes of luck if he can untie himself and make a living somewhere else.

Where the offence is such as is classified as an offence against the gods, the gods were left to wreck their own vengeance and quite often it was believed that they do.

3.5 Personnel of the Justice System

This heading is straightforward. The issues of concern here relate to the humans or professionals who man the justice apparatus. For example, in modern societies, organisations like the police, courts, prisons and so on, with their professionals who carry out legal functions like enforcement, adjudication, and correction easily come to mind.

In many pre-colonial southern Nigeria societies, the functions of enforcement, adjudication and correction were not so rigidly separated, but in others the demarcation was quite noticeable. In general, the following categories of people played prominent roles in the justice process: secret societies and age grades were more important in performing the arrest function. But they were assisted by societal members. In a number of cases, the person wronged or his family or community is the one on whom the onus of enforcement falls upon.

At the trial process itself, diviners, oraclists, witch doctors, elders/elders council, and chiefs/chief council or king played the dominant role. But since trial was largely participatory, contributions came in freely from members who have gathered to witness it. Sometimes the dispute may be just between two individuals, but at the level of the trial, it may

translate to between families or even between villages/communities which the individuals come from.
In terms of enforcing the trial decisions, again it is age grades and secret societies that feature most. Sometimes however, the individual wronged, (or his family/village/community/tribe) is required to exert the revenge.

3.6 Philosophy and Outcome of the Justice Process

The overall philosophy which underlie justice in pre-colonial southern Nigeria, was that of conciliation and restoring equilibrium to society. The overriding concern was to reconcile the disputant in such a way that no one leaves downcast or puffed up. Both parties were told in clear terms where they went wrong.

The trial process is more like an informal gathering of caring and council members rather than stern-looking and impersonal officials that characterize the formal/modern system.

The repressive and punitive cast of primitive society frequently described by western writers was largely absent. The customary laws reflected the values, beliefs, yearnings and aspirations of the people. The procedural laws were simple and very effective. The trial process was informal, quick and very cheap. Penal measures were non-custodial, less punitive but more restitutive.

The outcome at the end of it all was that justice reflected the views of the people, there was commitment and belief in it, it was convenient and convincing, and was largely devoid of the rancour and acrimony that characterises present day Nigeria legal system.

SELF ASSESSMENT EXERCISE 3

From your knowledge of informal and formal adjudicatory processes, which one will you hold to be more satisfactory in terms of people's identification with it, and why do you think so?

GUIDELINES

Look at the total process itself and explain the extent to which it meets the needs of adjudication. Look at the setting whether rural or urban.

Relationship between litigants, other members of society and the extent of communities. Ultimately your answer may be tied to the kind of people making use of the system, whether the westernised urban elite, or the traditional rural dweller.

You should be able to draw an independent conclusion that will be based on “everything considered.”

4.0 CONCLUSION

In conclusion, we can say that, though lacking the sophisticated features of developed legal systems, societies of the pre-colonial southern Nigeria had their legal systems complete with the major components expected in any legal system.

In terms of the overall philosophy of the justice system, it looked like it was designed to, and did indeed, achieve a humane, flexible system which ensured equilibrium. This view may however be contested. Especially by western writers who see non-western legal system as essentially barbaric, repressive and characterised by rnany repugnant features. We shall join issues with such writers later in unit 5 of this module. For now however, you may align with any of the positions with your own justifications, or keep an open mind and wait till after the last unit of this module.

5.0 SUMMARY

In this unit you have learned that prior to the colonisation of Nigeria, the different autonomous tribes which now make up the federation of Nigeria, bad their own systems of justice administration. The system was an informal type and based largely on unwritten customary law in the south (in the next unit you will learn about what the north was like). You have also learned the mean it of the major divisions of law and have been told that the discussion in the next three units of this module will be according to the same divisions.

The major position that has been pushed in this unit, especially in its concluding parts, is that the pre-colonial justice system was humane and served the purpose of justice and society well. It was however noted that an opposite view exist and you need not be hasty in aligning with my position.

This unit is long, perhaps the longest in the whole course. But its length is justified on the ground of laying foundations for all the other units in this module.

6.0 TUTOR-MARKED ASSIGNMENT

Identify and critically discuss either any form of trial by ordeal, or any form of informal trial process that is still practised in your community

today. Write a maximum of five typewritten pages.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 THE PRE-COLONIAL LEGAL ORDER OF NIGERIA: NORTHERN NIGERIA

CONTENTS

1.0 INTRODUCTION

In Unit 1 of this module you were told that the pre-colonial Nigeria setting could be divided into two broad parts for the purposes of discussing justice administration. Unit 1 then dealt with one of the two parts, namely southern Nigeria.

This unit will focus on pre-colonial northern Nigeria. The approach/style would be just as in unit 1. You will however see that the fact that the Islamic Jihadist had conquered the north and established the Sharia system before the advent of British colonialist makes their experience different from that of southern Nigeria, and justifies their separate treatment.

2.0 OBJECTIVES

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

Describe the main features of the pre-colonial legal order of northern Nigeria;
Delineate the various types of laws and highlight their contents in pre-colonial northern Nigeria;
Understand the basic features of the Sharia legal system.

3.0 MAIN CONTENT

3.1 Overview of the Pre-colonial Legal Order of Northern Nigeria

The area now referred to as Northern Nigeria was also made up of autonomous tribes who lived and administered themselves in more or less the same way as Southern Nigeria. Until the early 19th century, when the Fulani Jihadist overran and conquered the territory. By the time the British Colonial adventure began in Nigeria in 1861, the northern part had been under the influence of the Islamic rule for close to a century.

The pre-colonial Northern Nigeria that we are concerned with therefore, is that of the era of the Islamic rulers. The north was then under a more advanced, centralised political organisation with Sokoto (where Othman Danfodio established himself) as the headquarters.

The overall leader of the Sokoto caliphate was assisted by Emirs in different prominent towns. Islam was not just the dominant religion thereafter, but all encompassing way of life which also dictated the nature and character of the legal system.

In other words, the north was operating the Sharia legal system. Of course, there were a few areas in the north (such as Tiv land and much of the present day Middle Belt and Christian dominated areas in the present north) which the Jihadist were unable or yet to penetrate. Those places operated in ways quite similar to southern Nigeria. Our discussion here shall focus essentially on the Islamic north.

3.2 Substantive Laws

The basic source of law in the Islamic North was the Holy Koran. The laws are deemed to have been given by God and so are divine. The laws of the Koran which are necessarily not too elaborate nor exhaustive are supplemented by some recognised subsidiary sources. In order of importance, these are the Sunnahi Hadith (i.e. sayings and deeds of Prophet Mohammed), Ijma (unanimous agreement of learned Islamic scholars), Qiyas (Analogical deductions), and Istihad (subsidiary sources) which included public interest, legal presumptions, custom and "Blocking the means". Offences are classified according to whether they are contained in the Holy Quran (Huddud offences), or require retaliatory measures (Qisas), or required discretionary handling (Taazir). We shall explain these classifications further in subsequent sections of this unit.

In terms of defenses against criminal liability, Age (infant/child), self-defense, mistake, and insanity were accepted. Intoxication rather than

being accepted as a defense was itself deemed to be a criminal offence and can only compound the problems of anyone citing it as a defense.

One thing worthy of note is that,- Islamic law, to the extent that it was largely contained in a book (Holy Quran), is a written law. The tendency to describe it as a customary law is therefore not quite correct, because customary laws are unwritten. Nevertheless, for our purposes here, and from the official view in Nigeria, all pre-colonial laws are deemed to be customary laws.

3.3 Procedural Laws

The pre-colonial Northern Nigerian laws on procedure were contained also in the Holy Quran and other sources. In other words there was no demarcation between sources of substantive laws and sources of procedural laws.

The type of offences allegedly committed has implication for procedure and standards of proof. For example, the standard of proof for Huddud (textually designated) offences are over high. Usually, for testimony of witnesses to be accepted, the witnesses must be sane, male, adult, usually reliable, and normally at least three in number giving the same account. The Huddud offences are seven and include: adultery/fornication, scandal, drunkenness, rebellion, highway robbery/brigandage, apostasy and theft.

Since the political organisation of the north was more developed, it had a machinery for justice administration. There were "local policemen" who effected arrests. Detention was more used than in the south, and there were judges. The trial process was quite simple but relatively more formal than in the south. The legal administrative machinery was manned by Islamic legal scholars mostly.

3.4 Penal Measures

The Shariah system of the pre-colonial Northern Nigeria, also gave expression to all the modern ideas about the goals of punishment. The available penalties revealed a concern with issues of retribution, deterrence, as well as reformation and rehabilitation.

Again penalties were tailored to conform to the basic classification of offences. For Huddud (textually designated) offences, the penalties are already contained in the Holy Quran or Sunna and the judge is not allowed any discretion in awarding the penalties. Once the standard of proof is met, and the conditions are also met, the judge must give whatever penalty is contained hi the holy books, e.g. for adultery, it is

stoning to death, for theft it is cutting of limbs, and for rebellion it is death.

For Qisas offences (i.e. murder or grievous bodily harm) the penalty is retaliation of the victim (or when victim is dead, the relevant relation), or the victim is allowed to opt for compensation. So even murder is compoundable under Islamic law. The relation of the deceased can ask for "blood money" rather than demanding that the culprit be also killed.

SELF ASSESSMENT EXERCISE 1

Which problems do you envisage in effecting retaliatory (Qisas) penalties?

GUIDELINES

Problems of who carried it out?

How to carry it out in exact measures such that it is not less or more than the initial injury.

If the injury is on the internal organs, say on liver, spleen, kidney, etc., due to blood, how is the blow to be administered back with such force that only the affected organ in the victim is also affected in the ' offender and in an exact way?

For Taazir offences, the judge is allowed to use his discretion in awarding penalties. The category embraces all offences which are neither Huddud nor Qisas offences. In cases where an offence is Huddud, but the conditionalities nor high standards of proof are not met, the judge may also treat such as Taazir and award discretionary penalties. Among the sentencing options available under Taazir are admonition, fines, seizure of property, threat, boycott, public disclaim, reprimand, exile (which today translate to imprisonment), imprisonment, flogging and death sentence.

3.5 Personnel of the Justice System

Predominantly, the personnel of the Sharia legal system are learned Islamic scholars. In fact, knowledge of Islamic principles and teachings is the basis for power wielding in any Islamic system. This is because the ultimate law on the organisation of an Islamic state is the Holy Koran. As such, power, whether legislative, executive or judicial is reserved for those who know what God wants.

The overall head of the Islamic state, i.e. the Caliph, is chosen not based

on election or heritage or any other consideration. The Caliph is supposed to be the most pious and knowledgeable. Same goes for legislative power (Ijma), judicial power (wielded by the kadis), or spiritual and intellectual powers (wielded by the Imams).

The more upright, pious and learned one is, the more he could be entrusted with power. In fact, for the Sharia legal system practitioners need not undergo any legal training. This is because every thing is contained in the Holy texts and being knowledgeable in it implies knowledge in all spheres of human endeavors.

3.6 Philosophy and Outcome of the Justice Process

Since the Islamic religion is a total way of life in which legal relations is embedded, it follows that Islamic legal system also serves religious functions. So long as people are committed to the religion, they are also committed to the legal system that it prescribes.

The implication is that people believe in the justice system. They identify with the outcome of the justice process because it accords with the will of Allah. So just as we concluded regarding the pre-colonial south, justice in the pre-colonial north was also quick, cheap and convincing.

The Quranic laws are seen as divine, higher and superior laws which man made law should imitate. It is inconceivable to adherents of the faith that a penalty proscribed by God should be judged by human reasoning and standards and found to be wanting. This was at the very core of the recent Sharia crises in Nigeria.

SELF ASSESSMENT EXERCISE 2

Highlight the remote and immediate causes of the recent (2000-2001) Sharia crises in parts of Nigeria.

GUIDELINES

The composition of the population in the affected state, especially the presence of a sizeable number of Christians.

The lack of adequate consultation and explanation of what it entails before trying to impose the Sharia system.

The fear (researchable or unreachable) of Christians that they would be forced to live in the Muslim way.

Political factors in those who wanted to use it to undermine the Obasanjo civilian regime etc.

Western writers and Christians described Shariah's punishments such as cutting of limbs for theft, stoning to death for adultery and flogging for drinking as barbaric and savage. This was precisely the way the British colonialist saw the laws of pre-colonial northern Nigeria. But the northern people (Muslims) themselves did not and still do not see it in that light.

It may be concluded, at least from the point of view of those affected, that the justice system of pre-colonial north ensure stability and equilibrium. The philosophy underlying it was a religious one. The outcome was peace, harmony and contentment, devoid of the rancour and wrangling that characterise present day Nigerian legal system.

4.0 CONCLUSION

The conclusion, just as with unit 1, is that pre-colonial northern Nigeria had its own system of justice administration which in sophistication is comparable to modern legal systems. In philosophy, it had a religious undertone which did not separate the legal sphere from other spheres. In outcome there was a belief in and commitment of the people, at least the muslim north to the legal system.

The British colonialist however saw the system as barbaric and characterized by many repugnant features. In other words it fell short of the British notion of justice. This issue would be taken up more fully in Unit 5 of this module. You may wish to read that unit before choosing which view to align with. On the other hand, if you have already made up your mind, I hope you can articulate and justify your position.

5.0 SUMMARY

You have learned in this unit that though the pre-colonial Northern Nigeria was not a single entity, the earlier conquest of large parts of it by the Fulani Jihadist put it on the path to achieving that. It had a more centralized political organisation with a vast territory under the political leadership of the Sokoto Caliphate. The territory was administered according to Islamic principles and the legal system was Shariah based. You have learned that the Islamic law is largely written though referred to as customary law. You have also been presented with the different aspects of law under the system and how religious considerations are paramount. You may want to read unit 3 of module 2, which was on “Natural law” to have a richer understanding.

You now know how pre-colonial Nigeria was legally administered prior to the advent of the British colonialists. The decision as to whether their methods were barbaric and repugnant to natural justice is largely yours to make. But the debate will be revisited later in unit *5* of this module.

If you had any problem in understanding the discussion under any of the major subdivisions, go back and read unit 1 of this module where each section contains elaborate statements on what is expected.

6.0 TUTOR-MARKED ASSIGNMENT

Compare justice administration in pre-colonial northern and southern Nigeria. Do not write more than 10 typewritten pages.

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UNIT 3 THE COLONIAL LEGAL ORDER OF NIGERIA: 1861 - SEPTEMBER 1960

CONTENTS

1.0 INTRODUCTION

In 1861, King Dosumu of Lagos, who could neither read nor write, signed a document called the *Treaty of Cession.* He had been assured that by signing the document, the imperial might of Britain would be brought to protect Lagos (his kingdom) from all enemies. By the simple act of signing however, he had ceded Lagos to the British and that singular act set into motion the effective colonialisation of the territory that is today known as Nigeria.

The colonial experience had profound effect on justice administration in Nigeria. It marked the inception of a formal/modern legal system in Nigeria. The legal changes that it brought remain the predominant features even of present day Nigeria.

In this unit, you will learn about the imposition or superimposition of the British legal system on the indigenous legal machinery. You will learn that though the two system existed side-by-side, the foreign system was the dominant partner and the local one was allowed to continue its existence only in so far as it did not conflict fundamentally with the foreign one.

2.0 OBJECTIVES

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

Describe the main features of the pre-colonial legal order of Nigeria;
Specify the important legal developments that occurred during the colonial period;
Understand that the British colonialists were more interested in instituting a legal system that suited their ways of life and then exploitative mission rather than the one that accord better with indigenous ways of life;
Understand the critical role that law and the legal system plays in creating and sustaining social change.

3.0 MAIN CONTENT

3.1 Overview of the Colonial Legal Order of Nigeria

The colonial period (i.e. 1861-1960) marked the period of the establishment of a formal legal system in Nigeria. Prior to 1861, British and other European nationals had engaged in trade along the coastal areas (such as Lagos, Benin, Bonny, Brass etc.) with indigenous people. In the course of such trades, dispute inevitably arose. Indigenous courts made attempts to settle them but always not to the satisfaction of the foreigners.

With the treaty of cession in 1861 Britain could play a more visible role in dispute settlement. It established consuls to regulate trade. The consuls in turn established consular courts, which were later followed by equity courts.

In 1863 a supreme court was established in Lagos, but it was supreme in name only. In powers it was not more than a magistrate court. The West African Court of Appeal (WACA) was later established in Sierra-Leone, as an appellate court for the whole of West Africa. The highest court of the land (i.e. similar to supreme court of today) was the Judicial Committee of the Privy council (JCPC) which was in London. These courts applied English law. Our local/native laws and custom were however allowed limited scope of operation so long as it was on civil matters and not repugnant to natural justice. -

On January 1, 1900 the protectorates (i.e. protected territories) of Northern and southern Nigeria were established. A supreme court was established in each of the protectorates. But again the courts were only supreme in name. They remained subordinated to WACA and JCPC. They were empowered to apply the common law of England, the doctrines of equity, and the statute of general application which were in force in England on the day of January, 1900.

The protectorates were amalgamated in 1914 into one political unit called Nigeria. Three types of courts were established: the supreme court (again supreme only in name), the Provincial courts and the native councils. The provincial courts were presided over by whites, mostly administrative officers (District and Resident Officers). The system was roundly criticised for being out of tune with the yearnings of the people. The officers were not lawyers, did not know the custom of the people, no legal representation in the courts, language barriers and so on. The native courts were presided over by chiefs and Alkalis, but were under the supervisory powers of the District Officers.

SELF ASSESSMENT EXERCISE 1

To what extent will you agree with the assertion that Nigeria is not and should never have been a nation and that the amalgamation of 1914 was a kind "forced marriage"?

GUIDELINES

Background to the amalgamation.

Were the people of the different protectorates consultated before the amalgamation?

Are the differences/diversities between the north and south so serious that they do not make for the existence of a single nation?

What contemporary problems of Nigeria are traceable to the amalgamation? If given a choice, would a the people really prefer separate nations?

Your objective viewpoints on which is preferable.

In 1933 there was a reform of the system, for the first time. High courts and magistrate courts were established. There were additional reforms in 1943. A separate law for juvenile was also established in that year along with juvenile courts.

In 1954, under the Lyttleton Constitution, Nigeria became a truly Federal nation with three regions: North, west, east and a Federal Capital Territory of Lagos. In that year also, WACA was abolished, and the Nigerian Federal Supreme Court became second in hierarchy after the J.C.P.C

The over view has focused mainlyon development in the judicial sector of the legal system. There were development in other areas too that are

not significant as far as transformation of the informal pre-colonial legal system to a formal colonial legal system is concerned. For example, a formal police force was established in 1930. Several prisons were built in different places. The attempt to train legal professionals to man the justice apparatus was not very successful. The first Nigerian professional lawyer was Christopher Sapara Williams who qualified around 1889. To meet the shortfall in personnel, the institution of local attorneys was created whereby policemen, court clerks, and others who have some practical experience in justice administration were allowed to practise as lawyers even without any legal education.

3.2 Substantive Laws

The major sources of law during the colonial period was the received (more appropriately, imposed) English law. This came in the form of statute of general application in England (i.e. legislation), common law of England (case law) and the English doctrine of Equity. The legislative houses set up by the different constitutions (i.e. Clifford Constitution in 1922, Richard's Constitution in 1946, Macpherson Constitution in 1951 and Lyttleton Constitution in 1954) also provided limited sources of law in form of local legislation (called ordinances). Nigeria customary law also served as a source of law particularly in civil matters so long as it could be shown that it was "not repugnant to natural justice, equity and good conscience or incompatible with any law for the time being in force". This is known as the repugnancy test.

In terms of principles of liability, it was the same as in England and other modern countries. For criminal law, no one was to be found guilty of a crime unless the offence is contained in a written law. Since customary law was not written, this provision had the effect of excluding customary law from the domain of criminal law.

Among different criteria of classification, offences were also classified according to whether indictable or non-indictable, or whether it constituted a simple offence, misdemeanor or felony.

The defenses to criminal liability were also as in England today. They include insanity, mistake, infancy, self-defence, provocation, etc. The defences remain the same in post-colonial Nigeria. We shall briefly explain what they entail in the next unit, i.e. Unit 4.

A significant difference between substantive criminal laws of colonial Nigeria from the pre-colonial Nigeria, is that the criminal laws of colonial Nigeria could be found in written form in books. For example, the substantive criminal law of colonial Nigeria was contained in one document: the criminal code. This code was borrowed from Queensland

in Australia, another colony of Britain and made to be applicable in Nigeria.

SELF ASSESSMENT EXERCISE 2

Read through the provisions of the criminal code presently in operation in southern Nigeria and identify those provisions which are clearly foreign and out of tune with the value of Nigerians.

GUIDELINES

There are many such provisions, especially in criminal laws relating to spouses, and in the commitment, or ingredients of the different crimes.

The criminal code is readily available in bookshop and libraries throughout the country.

3.3 Procedural Laws

The major sources of procedural laws in the colonial period were the Criminal Procedure Act (CPA) for criminal procedure. For civil procedure, they are found in the various High Court Civil procedures, and rulings of superior courts.

The major principle of liability was that everyone should be presumed innocent until proven guilty. Arrest procedures become formalised. The police was the chief law enforcement agent, though private citizens could also arrest, provided they hand over the arrested person to the police as soon as possible. Police stations were built with detention facilities for those accused who could not meet the requirement of bail.

The trial process also became formalised. It held in courts (not under trees, or chiefs' palaces) and proceeded according to explicit set of rules. Trial by ordeal or the swearing of oath by "fetish" symbols were abolished.

3.4 Penal Measures

In the colonial period, penal policies also became formalised. Penalties such as exile and banishment were abolished. Imprisonment became the major form of sentencing. In addition however, there were the options of fines, flogging and death penalty open to the judges. Though in theory, laying claim to modern ideals of correction and reformation, in practice the dominant idea was punitive.

3.5 Personnel of the Justice System

One immediate impact of the colonialisation of Nigeria, was that there was a change in the personnel administering justice.

The elders, chiefs, Kings, age grades, secret societies, diviners, and so on, who had hitherto been the dominant justice personnel lost out. They were replaced by British administrators and professionals with legal training, and by personnel of such agencies as the police and prisons.

In certain native courts, elders, chiefs, and other custodians of customs and traditions were still allowed to hold court. But their jurisdictions were limited to minor civil matters in which customary law was the guiding law.

3.6 Philosophy and Outcome of the Justice Process

In the colonial period of Nigerian history we are confronted with a situation where a legal system reflecting the values of an alien culture is superimposed on an indigenous legal framework. Since the values of the two cultures are different, it is only logical that the indigenous people experience strain and dissatisfaction with justice administration.

Many of them were reluctant to use the machinery of justice and still preferred their indigenous informal modes of dispute settlement. Those who used it were discouraged. When the alien system is invoked against neighbour, the whole neighbourhood may begin to treat the complainant as an object of scorn and ostracism regardless of whether they believed the accused was wrong.

The philosophy of impersonality, and adversarial principles that characterise the trial process did not accord with the values of the people. They were used to being arrested, tried and penalised by friends, elders and people whom they know and live with, based on a customary law which they believed in, in an informal setting. Being arrested, tried and penalised by impersonal, sterns looking strangers, according to an alien law in the strange setting of a court which may be more than a days journey away and characterise by innumerable delays in the name of adjournment was something they just could not identify with.

The overall outcome was that justice was expensive, slow, and not convincing. It tended also to generate rancour and acrimony among disputants even after the so-called settlement in court.

4.0 CONCLUSION

It may be concluded that the colonial period of Nigeria's history marked the emergence and development of its formal legal system. It was a period during which the developed legal system of Britain was imposed on Nigeria. The major rationale for the superimposition was to make the citizen governable and thereby facilitate the realisation of British colonial objectives. The superimposition has however come to stay. For as you shall soon find out in the next unit, the present day legal system of Nigeria reflects much more of the colonial legacy than the pre-colonial system. This is rather unfortunate, for the pre-colonial system do not only accord more with our values but also seems more functional for the attainment of societal goals of peace, stability and harmony.

5.0 SUMMARY

This unit has focused on the colonial legal order of Nigeria between 1861 and September 1960. You have learned that the colonial experience began with the cession of Lagos to the Colonial British empire in 1861. You have also learned that in fashioning the legal system to its taste, the colonial masters treated the indigenous legal system as inferior and of a subordinate status. Indigenous criminal law was abolished, and customary civil law was allowed only if it passes the repugnancy test. The conclusion is that the pre-colonial legal system was more responsive to the yearnings and aspiration of the people. This is however not to say that the British system is an unmitigated disaster. Infact there were many new relations of commerce that our local laws could not have handled but which the foreign laws could.

You are free to disagree with my conclusions, and to draw and justify your own.

Note: If you have any problem in understanding the subdivisions of the law under which the discussion has been done here, I suggest that you take a look again at unit 2 of module 1, and unit 1 of module 4 of this course.

6.0 TUTOR-MARKED ASSIGNMENT

“Critically discuss the emergence and development of the Nigerian legal system from 1861 to 1960”. Write a maximum of ten, typewritten pages. Make sure your essay is not just a reproduction of what you have learned in this unit. Clearly show the development of the different components of the legal system such as law, police, courts and prisons.

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 THE POST-COLONIAL LEGAL ORDER OF NIGERIA: 1960-TO-DATE

CONTENTS

1.0 INTRODUCTION

On October 1, 1960 Nigeria became an independent nation. This was expected to have profound effect on the legal system. But it did not. The interest of the indigenous leaders who stepped into position of the colonialist were not essentially different from those of the erstwhile colonial masters. So the legal system remained largely the same.

In this unit, you will learn that the nature and character of post-independence Nigerian legal system owes much more to the colonial experience. It reflects a predominantly Western value while the indigenous system continues to play a subordinate role. You will also learn about military incursion into politics and the effect that this has had on the legal system.

2.0 OBJECTIVES

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

Understand that Nigeria has a modern legal system fashioned along the lines of the English legal system;
Specify some of the more important changes in the legal system that occurred after independence;
Describe the important features of the current legal system;
Compare the post colonial with the pre-colonial legal system of Nigeria.

3.0 MAIN CONTENT

3.1 Overview of the Post-Colonial Legal System of Nigeria (1960-to-Date)

The 1960 independence constitution of Nigeria marked the beginning of self rule. But some vestiges of colonialism remained. For example, the Queen remained the ceremonial Head of Government, while the Judicial Committee of the Privy Council remained the highest court of the land.

The Republican Constitution of 1963, however, consolidated independence. The Queen ceased to be the head of state, the J.C.P. C (Judicial Committee of the Privy Council) was abolished and for the first time our supreme court became truly supreme. A fourth region, namely the mid-western region was added to the existing three, thus further entrenching federalism. The customary court system was reformed especially with regard to their control and supervision. Hence native courts were abolished in the north and replaced with area courts, and some grades of customary courts were abolished in the East and West.

On 15th January, 1966 the military struck in a coup d'etat. The constitution was suspended by virtue of the constitution (suspension and modification) Decree No 1 of 1966. The Federal Military Government (FMG) was empowered to make laws for the country. Laws made by the FMG were called Decrees while those made by State government were called edicts. Decree No.5 of 1966 (unification Decree) the country was transformed from a federal to a unitary government. All regions were abolished and provinces created in their place.

A counter coup followed in July 1966. The country was reverted from unitarianism back to federalism and the regions resurrected. To forestall civil war, the states (creation and transition) provision Decree 14 of 1967 was promulgated. Twelve states were created from the former four regions.

Military coups and military regimes have dominated the political landscape of post independent Nigeria. There was another Military coup on 29th July, 1975. Political power was handed to the civilians briefly between 1979 and 1983. By January 1st 1984 the military were back in power and remained there till May 29, 1999. This was when the 4th (but really more like 3[r"] republic came in. This fourth republic is still in place and the supreme guiding law is the 1999 constitution. This constitution has been roundly criticised and is currently undergoing a review. But it remains the current constitution.

SELF ASSESSMENT EXERCISE 1

Read the following sections of the 1999 constitution and attempt a critique of them: preamble to the constitution, S.$l_{(2)}$, S.7, S.10, S13-24, S.308, S.315.

GUIDELINES

The sections have been most criticised. The preamble states, "We the people of the Federal Republic of Nigeria... Do hereby make, enact as give to ourselves the following constitution". This is said to be a lie because the constitution was imprised by the military and not by the people, to the constitution is already lying about itself.

S. 1 (2) talks about who should govern Nigeria.

S.7 is about local government, whose tenure and state control over them has generated much controversy.

S. 10 prohibits any state religion. The effect of this on the states that have adopted Sharia is controversial.

S. 13-24 states all the good things that government should do for the people. The block of sections is titled "Fundamental Objectives and Directive Principles of State Policy", the problem is they are not justifiable. That is they are not binding on government and you cannot take any government to court for not enforcing them.

S.308 grants immunity to serving executives president and vice president, governor and deputy governors during their tenure of office. It has generated much controversy, because it means those people can commit virtually any crime and go scot free.

Most of the other laws of, the federation have remained intact whether under military or civilian regime. They can be found in the "Laws of the federation of Nigeria 1990".

3.2 Substantive Laws

The sources of law under post-colonial Nigeria are not very different from under the colonial Nigeria. Neither has there been any radical or drastic change in their content. The sources remain:

(a) legislation under which it may be noted that decrees and edicts

which are laws made by military regimes have come in. Besides, statutes of general application in England are no longer applicable in theory. But in practice most of them have been reenacted virtually verbatim by local legislation.

(b) received English law which include common law of England and Doctrines of equity as frequently found in case laws.

(c) case law and

(d) customary law. Again the customary laws must still pass the repugnancy test before it is accepted as a source of law.

Let it be mentioned in passing that as far as criminal law is concerned, Nigeria now operates two major codes. In Southern Nigeria the criminal code which was borrowed from Australia during the colonial era remains operative with minor modifications. In northern Nigeria, the operative criminal laws are contained in the penal code. Prior to independence, the north had agitated for a code that is more in tune with their predominant Islamic values. The penal code was borrowed from Sudan/India. So upon independence on October, 1 1960; the north started to operate the penal code.

In terms of principles of liability, classification of offences and defenses to criminal liability, the situation of post-colonial Nigeria is virtually the same as colonial Nigeria. There are however slight differences in classification of offences between the north and south. The age at which one can be held to be responsible for his criminal action remains seven years and above, throughout the federation. The following defences among others are accepted all over the country: insanity, mistake, self-defence, and provocation. By defences we mean that even if the person may have committed the criminal act, by virtue of those defenses he should not be punished at all or that his/her punishment should be reduced. An insane person does not know what he is doing. Same for a provoked (or in the south intoxicated) person. Somebody who does an act without intention but by mistake should also not be given full punishment, and so on.

3.3 Procedural Laws

The major laws on criminal procedures are to be found in different documents for the northern and southern Nigeria. For the north they are contained in the criminal procedure code (CPC). For the south, they are contained in the criminal procedure act (CPA). Laws on civil procedure are contained in various high court proceedings. In addition, the enabling act of relevant law enforcement and administration agencies also contain rules on procedure.

The general principles of liability, just like under the colonial era

include: presumption of innocence until proven guilty, protection against double jeopardy and observation of the many due process provisions contained in section 36 (fair hearing) of the 1999 constitution.

Rules guiding arrest include: the person being arrested must be informed of the reason for his arrest, he should not be arrested with more force than is reasonably necessary, he should be granted bail if he meets the requirement and where detained, he should not normally be detained for more than 24 hours before he is taken to court.

The court trial itself proceeds upon the adversarial principle. The judge sits and listens as prosecuting and defence attorneys argue it out. It is like a fight (adversary) which the judge observes and pronounce judgement upon. Each side calls witnesses which he examines and which are cross-examined by the other side. The jury system of trial is not practised in Nigeria. In high courts and higher courts, both sides are usually represented by lawyers. In fact for some cases, especially criminal cases, legal representation is a requirement.

3.4 Penal Measures

In theory, the post colonial penal policy is constructed around reforming the offender. In practice however, the routine use of imprisonment as sentencing option, and the deplorable and cruel conditions of our prisons shows that penal measures are more punishment oriented.

Other sentencing options recognised by the courts include: fine, flogging, and the death penalty. Death may be by hanging or by the firing squad. Probation exist in the books but is rarely used, and even then it is restricted to juveniles.

Custodial methods, especially imprisonment, remain the most common sentence. Most of the prisons are on the model of colonial type with high fences. There is only one open prison (Kakuri open prison at Kaduna) in Nigeria. There is also only one bostal institution (again at Kaduna) for Juvenile offender. Though there are a number of remand homes, the prisons are congested, and those awaiting trial are even more than the convicted inmates. Prison rooms are occupied by as many as four times the number of inmates they are meant for. Food is poor, medical facilities are lacking, and there is little or no opportunity for training and recreation.

3.5 Personnel of the Justice System

In line with the requirement of a modern/formal legal system, the

personnel of the Nigeria system are formalised. The Police is the agency charged with law enforcement. It makes arrests, and in lower courts, conduct most of the prosecutions. The law allows private citizens to make arrests especially when the crime is committed in their presence. But they are to hand over such an arrestee, as soon as possible to the Police. Note that even when vigilante groups perform law enforcement functions, they are only doing so as private citizens and have no legal power to torture, detain and do many of the other they do.

The trial process of the post colonial legal system is dominated by legal professionals or people with legal training. The judges, prosecutors, and lawyers are all supposed to be trained lawyers. A limited scope for participation is however also given to lay people (i.e. people not versed or learned in the law). For example in lower courts, lay people can act as judges. Customary courts in the south may be presided over by those knowledgeable in the customs of the people, while Area courts in the North may be presides over by alkalis whose only qualification is knowledge of Islam.

Government organisations such as the prison service, or welfare department are in charge of corrections. These are also trained personnel in the mould of para-military organisations like the Police. Other para-military organisations which also partake injustice administration include Immigration, Custom service and the National Drug Law Enforcement Agency.

3.6 Philosophy and Outcome of the Justice Process

In theory, the post-colonial legal system rests on humane, rational and goal oriented principles. The various components are inter-dependent and the handling of offenders appears quite civilised. In practice however, the operation of the legal system leaves much to be desired. Just as with the colonial system citizens still seem to experience a feeling of alienation with the legal system.

In nature, majority of Nigerians are still traditional and prefer informal modes of dispute settlement carried out by familiar faces. The whole system of police, court and prison systems still seem foreign and alien. The situation is further compound by a growing realisation that these modern agencies do not serve their expressed purposes.

SELF ASSESSMENT EXERCISE 2

Do you agree that modern law enforcement agencies are not serving their expressed purpose?

GUIDELINES

Clear identification of the agencies and the purposes each should serve.

To what extent have those purposes been served? Explication of the reason for your position on this.

Do you have facts and figures? Think over what the situation would be like if those agencies were not there at all. Think also what it would be like if certain things are alone to improve the performance of the agencies.

Many people now prefer to report then- complaints if it is minor to community elders and if it is serious to vigilante groups rather than to the Police. People go to sleep feeling more secure if they have employed their own guards or contributed to a Neighbourhood watch/vigilante fund, than relying on the Police.

For cases that go to trial stages, the technicality of the language, the impersonal setting, the stern looking judge with artificial white hah", the interminable delays and adjournments, have tended to frustrate litigants. Many complainants simply stop attending trials, feeling that their problems are being compounded.

There is also widespread disillusionment with the prison system for creating criminals rather than reforming them.

Above all, those processed by the system seem to leave it with feelings of dissatisfaction regardless of whether they have been processed as complainants, accused or even as mere witnesses. Feelings of mutual hostility and acrimony also tend to characterise subsequent relations between litigants/disputants rather than the reconciliation that was the major preoccupation of the pre-colonial system.

4.0 CONCLUSION

In conclusion, we can say that the post-colonial legal order of Nigeria is not essentially different from the colonial legal order. The indigenous people have however not totally left their traditional leanings to come to par with the foreign values that the legal system gives expression to. There seems to be a dual legal system in operation, not just in terms of the north and south creating different codes, but also in terms of the tension between the traditional/informal and the modern/formal. Which is the way forward? I reserve my answer to the concluding unit of this course where problems and prospects of the Nigerian legal system are discussed. In the meantime, you are free to formulate your own ideas

about a solution to the problem.

5.0 SUMMARY

In this unit, you have learned about the significant features of the post-colonial legal system of Nigeria. Just like the colonial system, it is fashioned after the English legal system. You have learned that though stuck with a modern system based on foreign values, the attitude of the citizens remain largely traditional. The outcome is a legal/justice machinery which many people are reluctant to use. This must not be interpreted to mean that the legal system has no use. On the contrary there are many things that the post-colonial system can handle which the pre-colonial system cannot even begin to contemplate (e.g. traffic laws, contract, transnational crime etc.). The point however is that more room can be given to certain elements of the pre-colonial system to play a part in the modern system, instead of the present subordinate position, that it has been consigned to.

6.0 TUTOR-MARKED ASSIGNMENT

In which significant respects would you consider the post-colonial Nigerian legal system to be superior to the pre-colonial legal system. Write a maximum often typewritten A4 pages.

7.0 REFERENCES/FURTHER READINGS

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UNIT 5 ISSUES IN THE DEVELOPMENT OF THE NIGERIAN LEGAL SYSTEM

CONTENTS

1.0 INTRODUCTION

In the course of the first four units of this module, some debatable issues recurred which for space constraints and to avoid repetition were not pursued. This unit will now take up some of those issues with a view to briefly but critically examining the contending views.

In this unit, you will be exposed to the contending views about some aspects of our traditional justice system vis-a-vis the modern legal system. You will learn more about the repugnancy doctrine, the principles of natural justice, and other debatable issues.

2.0 OBJECTIVES

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

Understand the tension between the traditional and modern aspects of Nigerian legal system;
Make informed contributions to the enduring debate on what the Nigeria legal system should emphasise/ de-emphasise
Link some of the problems of present day Nigeria legal system to its dual heritage.

3.0 MAIN CONTENT

3.1 Issues in Substantive Law

The major issue of concern here is the subordinate status given to customary rules as a source of law. First the criminal aspect of such laws was abolished in one swoop by the provision that only written laws will apply to criminal offences. For example, 8.36(12) of the 1999 constitution states that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law. S.3(2) of the penal code of Northern Nigeria also states: “After the commencement of this law, no person shall be liable to punishment under any native law or custom”. See also S.4 of the criminal code of southern Nigeria.

The import of all these is that customary law is applicable only in civil matters. But even within this limited scope, the operation of customary law is subject to its passing the repugnancy test. In other words, the judge can only apply it, when it is "not repugnant to natural justice, equity and good conscience or incompatible with any law at the time being in force". It must also be generally accepted. The problem is that the standard of repugnancy was (during colonial era) and is still being judged by foreign, or specifically, British values.

These two spheres of subordination of customary rules (it must be written to be applicable crime, and it must pass the repugnancy test to apply to civil matters) have been sources of some problems and debate. For example, it is argued that it will not take much to write and codify customary laws of the different areas of Nigeria if government is really interested. Besides, the Islamic law of northern Nigeria is already written. Why is it described as unwritten for the purposes of making it a customary law?

The repugnancy principle has also been roundly criticised as a vestige of colonialism. This has also caused problems in the north and the recent sharia crisis was part of the problems. The Islamic north claimed that if their religion prescribes cutting of limbs for theft, and they believe in it and want it like that, it is wrong to use foreign standards to describe Islamic criminal law as barbaric and repugnant to natural justice.

The question remains, why should the customary law of Nigeria be subordinated to the customary law of England in the operation of the Nigerian legal system? Is the issue merely one of patriotism/nationalism or do the advocate of a higher status for our customary laws really have point? Is it possible to give full expression to our many customary rules in a modern legal system?

SELF ASSESSMENT EXERCISE 1

Should the customary laws of Nigeria enjoy a higher status in the Nigeria legal system?

GUIDELINES

First try to ascertain the meaning of and the content of customary law.

Leaving the issue of nationalism/patriotism aside, try to determine if the content of the various customary rules are really adequate, civilised, and flexible enough to play a more conspicuous role in modern Nigerian society.

If some aspects of customary laws are actually repugnant, there are ways to excuse the repugnancy and at the same time raise the laws from their subordinate positions.

3.2 Issues in Procedural Laws

The issues here also revolve largely around the repugnancy principle. It has been argued that the operation of the pre-colonial justice system did not meet the requirements of a modern system and that it fell short of natural justice. For example, the process of trial whereby litigants swear by potent objects (instead of by the sacred books or Holy Bible/Holy Quran), or the trial itself which involve some form of ordeal.

A comparison of the pre-colonial and post-colonial trial process however, do not bear out such easy dismissal of the pre-colonial system.

If we look at the process of oath- taking it is quite obvious that even today, the swearing by potent objects (e.g. iron, hom or other fetish symbols) are more efficacious than the holy books. There are professional liars who can take the witness stand, swear by the holy books and go on to lie, yet nothing happens to them. Same for public officers who upon assuming office, swear by the holy books to serve the public interest but only end up looting the public treasury. The people seem to believe in the potency of pre-colonial oath objects than in the holy books.

The trial process itself which involved ordeals in the pre-colonial period was also considered more efficient and effective. It was cheap and it achieved results. It also met the requirements of the two fundamental principles of natural justice namely: audi alteram patem (Hear the other side) and nemo Judex hi causa sua (You cannot be a judge in your own

case). The trial was cheap, convincing and accorded with the beliefs and values of the people.

The modern trial process is very expensive, alien, entails many delays and the people do not believe in it. For example, the adversarial principle whereby the atmosphere of a fight is created is estranging. Even many of the due process provisions meant to guarantee fair trial do not accord with the values and norms of the people. E.g. in furtherance of the principle of Presumption of Innocence, an accused person can keep mute during the whole trial, because the onus is not on him to prove that he is innocent but on the prosecutor to prove that he is guilty. But under Nigerian values, somebody who is innocent is expected to shout and proclaim his innocence keeping mute is usually interpreted as a tacit acceptance of guilt.

The pertinent questions include: which of the trial processes is best suited for achieving the goals of the justice system? Is it not possible to combine the best bits of both systems? Should we retain the charade of holding the "holy" books by the right hand and asking people to swear in the name of God when we know that no one (especially the criminally minded) believes in any effect resulting from such swearing?

SELF ASSESSMENT EXERCISE 2

“Which of the two systems of trial (traditional and modern) do you consider more suitable for achieving the goals of the legal system”

GUIDELINES

Establish what you consider to be the goals of the legal system.
Highlight the features of the two systems of trial.
Which of them will facilitate achievement of the goals better?
Why do you think so?

3.3 Issues in Penal Policies/Measures

The pre-colonial penal practices were dominated by non-custodial measures. The colonialist brought the idea of imprisonment and it quickly became the most frequently used option of sentencing. The current global trend, however, is towards de-institutionalisation and non-custodial methods of correction. This accords more with the reformative/rehabilitative ideal of punishment. It is surprising that while the advanced world, including Britain, our erstwhile colonial master, is moving increasingly towards non-custodial (i.e. non-imprisonment or non-confinement) measures, Nigeria is increasingly becoming custodial.

In this regards, it has been argued that the pre-colonial policies were better. It is not easy to train people for conditions of free, responsible living in society, under conditions of captivity. The irony is while Britain is abandoning imprisonment and relying more on our traditional measures such as fines, restitution, reconciliation, Nigeria is abandoning those traditional measures in favour of imprisonment.

The effect is obvious. We have more criminals and more recidivists (i.e. repeat offenders). The prison serves as a training ground where they are dehumanised, and they learn more sophisticated skills from hardened and habitual criminals.

There is no need for problem questions here because the issue is very clear. If Nigeria is truly desirous of giving practical demonstration to its theoretical commitment to rehabilitation (and not imprisonment) of offenders, it should borrow from penal measures of its pre-colonial past and learn to rely less on imprisonment.

3.4 Issues in Personnel/Staffing of the Justice Machinery

The traditional/pre-colonial Nigerian mentality of having familiar people take legal decisions about other people still seems prevalent. There is widespread suspicion and distrust of criminal justice agents. Hence, many people now shun courts in preference for informal modes of adjudication. People only go to court when they are strangers or the situation is such that their relationship has deteriorated irretrievably.

Of late in Nigeria, informal modes of law enforcement have also gained ascendancy over the formal modes. Neighbourhood watches and vigilante groups are being set up in virtually all streets. Ethnic militia are also daily springing up not just to supplement but to complete with, and if possible displace regular law enforcement agencies. The incidences of jungle justices such as lynchings or using hired assassins to settle scores is also on the rise. All these developments suggest disillusionment with the modern/formal agencies of social control.

There is a lot that the Nigerian legal system can learn and borrow from the traditional system.

4.0 CONCLUSION

The conclusion to be drawn from the discussion so far is that, there is much good in the traditional system that has been discarded in favour of Nigerian present legal system. You must not get the impression that we are advocating for a full return to the traditional system. There certainly are some repugnant features of that system, and it will be quite

inadequate in meeting many modern needs that a legal system must respond to. Rather, the point is that much can be borrowed from the traditional system which reflects the traditional values still dominant in the minds of many Nigerians, to supplement the modern system.

A situation where the traditional system is treated as so inferior that only aspects of it that are compatible with the present legal system are allowed to survive, is counter productive. It ignores the indigenous values of the people, assumes that the modern system is perfect in all respects, and belittles our much orchestrated independent and sovereign status.

5.0 SUMMARY

In this unit, you have learned that the subordinate status accorded our traditional legal values in their coexistence with the modern legal system is a source of problems in the attainment of justice goals in Nigeria. It has been suggested that more expression should be given to traditional values especially in the trial process and in the execution of penal measures. Note however, that the view that has been pushed here is largely one side strong arguments also exist for the opposite view that traditional concern should actually be further de-emphasized if we want our legal system to meet our aspirations. You may therefore want to take a different position from the one adopted here. The social sciences unlike the physical and natural sciences, do allow disagreement. Your view must however be grounded on concrete, superior argument.

6.0 TUTOR-MARKED ASSIGNMENT

“The Myriads of legal problems presently bedeviling the Nigerian society can be best addressed by de-emphasising the traditional elements in our legal system.” Critically discuss. Write a maximum of ten typewritten pages.

7.0 REFERENCES/FURTHER READINGS

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MODULE 5 LAW, SOCIAL CHANGE AND EMERGING LEGAL STRUCTURE OF NIGERIA

The focus of this module is the dynamic relationship between law and social change in Nigeria and how this has impacted on the emergent legal structure of the nation. There is an enduring controversy in the social sciences on the relation of law to social change. One view sees the two phenomena as partners of equal status in the engendering of social progress. Another view maintains that social change is the leading partner while law just follows and reflect the changes. Yet another view posits that it is law which actually leads and drags along social changes.

In reality, each view has its own merits. Determining which comes first between law and social change becomes as difficult as determining which come first between the egg and the chicken. The debate is however, now largely academic for it is now widely recognised that any of the two could come first depending on the situation and circumstance. But what is incontrovertible is that they tend to consolidate and reinforce each other. A change in one without a corresponding change in the other creates tension and may in effect mean no change at all.

This contemporary wisdom is aptly demonstrated by the Nigerian experience from colonialism to date. The history of the Nigeria legal system has been one of an intricate and closely linked relationship between law and social change. While it is difficult to say whether it is social change that led to the treaty of cession of 1861, or whether it is the treaty that led to the social change, it is very easy to see that since 1861, law and social change have walked hand-in-hand.

This module is made up of four units. The first unit focuses on the impact of colonialism in structuring the Nigeria legal system. It reveals a great reliance on law by the colonialist, in trying to create a social structure that is conducive to the realisation of their aims, manifest or ulterior.

In the second unit, the impact of Nigerians political independence both as a significant social change, and as an opportunity for using the law to create compatible social changes in other spheres is examined.
Unit 3 takes a look at some global trends and the effect they have had on the Nigerian legal system.

In unit 4, which is the final unit of the module (as well as the whole course), the significant features of the emergent legal system of Nigeria is highlighted. Thereafter its problems are examined, and the unit concludes naturally, on the prospects of the legal system.

UNIT 1 THE IMPACT OF THE COLONIAL EXPERIENCE ON NIGERIA'S LEGAL SYSTEM

CONTENTS

1.0 INTRODUCTION

Much has already been said on the history of the Nigeria legal system in the last module. The purpose here is not to repeat the colonial history, but to select those aspects of it, which had significant impact on the then legal system and have endured in one way or the other to influence the present structure and character of the Nigerian legal system.

In this unit, you will learn that the colonial master relied overwhelmingly on the legal system to fashioned out the kind of society they wanted out of Nigeria. The Nigerian colonial experience was about the coming together of two different kinds of people with alien cultures. Infact the natives themselves (i.e. apart from the white colonialists) were not living together as a people and had no sense of nationhood. To weld the diverse peoples and culture into a political entity, the law was used, not just as a legal framework to reflect the far reaching changes, but more importantly as a tool to forge further changes that will consolidate and give meaning to the new dispensation.

2.0 OBJECTIVES

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

Understand how law can be used to bring about social change, and how social change can bring about change in law;
Explain the importance of law in the creation of a colonial state;
Describe some of the fundamental changes in the legal system and social relations of people during colonialism.

3.0 MAIN CONTENT

3.1 Law and Social Change in Colonial Nigeria

Prior to 1861 there was no Nigeria, talkless of a legal system to talk of. There were just relatively autonomous tribal societies in the society, while the Fulanis through the Sokoto caliphate were extending their control all over the north. British and other European nationals were of course engaging in some produce trade along the coastal areas with some natives (slave trade having been abolished).

The signing of the treaty of cession by king Dosunmu and four of his chiefs was a legal act whose effect was to cede Lagos to Britain and thereby effectively making it a colony. The subsequent creation of the Southern and Northern Protectorates and their amalgamation into Nigeria in 1914 were all legal acts whose effects are profound. In other words, those events illustrate in clear terms the ways by which law can effect social change, or at least give recognition to social change.

The capability of law to do such things, however, depend on the context and general socio-political milieu of law. In pre-colonial societies, law (or customary rules) were a by product of the life experience of the people. As such, they could not really create social change. For law to be at the forefront of social change, a formal legal machinery is needed. This is precisely what the colonialist did. The treaty of cession marked the beginning of a formal legal system in Nigeria. When the impact of colonialism on Nigeria's legal structure is being discussed, it is important to bear in mind that it was colonialism itself which brought about the institutionalisation of a formal legal system in Nigeria.

The development had far reaching implications on the indigenous framework of justice administration. Formal agencies, like the police arose to enforce law instead of the hitherto prevalent methods of self-help remedies, age-grades and secret societies. The elders, family heads, priests, chiefs and others who handled dispute gave way to courts and trained lawyers. Prisons were constructed, laws were written.

To make all these things possible, including the application of English laws, and imposition of English legal system, it is again on the law that the colonialist relied. By simple proclamations, courts, laws, and whole

protectorates were created.

New relations of commerce, hitherto unknown to customary law also emerged. New laws were needed to regulate such relations and again English laws were relied upon. The economy was monetized and trade by barter and, later exchange by cowries had to give way.

SELF ASSESSMENT EXERCISE 2

Cite some examples of the new relations of commerce that came up and the kind of laws that would be needed to regulate them.

GUIDELINES

> Think in terms of a primitive society that was far behind even the present day rural societies that you know of. There were no factories/industries to manufacture anything on a large scale, except people for family holdings dealing with particular crafts. No currency par se (except say for cowries in some area). No vehicles, and no written laws.

So while such societies may have criminal law because there was crime, and land laws because many civil conflicts were about land, there were unlikely to be company law and constitutional law. If laws of contrast were available they would be very rudimentary. The notions of agency, partnership, limited liability companies, hire purchase, sale of goods law and so on would be foreign and could only have come in with the new relations of commerce. It is not surprising that even today; Nigeria laws in those areas remain mere verbatim reenactments of English laws.

The colonial government, also by law/proclamation changed the ownership structure of land overnight. It took all the land of the colony and vested it in the crown. For example, the Land and Native Rights Proclamation of 1910 stated:

> All native land and all rights over same are hereby declared to be under the control and subject to the disposition of the government and shall be held and administered for the use and common benefit of the natives.

It is instructive to note that this 1910 proclamation formed the foundation of the 1916 Land and Native Ordinance, as well as the Land Tenure Law of 1962, and the Land use Act of 1978 currently in force. They all have the effect, by mere pronouncement of law, of divesting citizens of ownership of land, and vesting ownership of same on

government. We shall discuss the Land Use Act as an instance of trying to create social change and social justice through law, in the next unit.

The many ordinances (colonial legislation) promulgated during the colonial period had the effect of instituting new legal machineries or modifying existing ones. The overall effect was the establishment of a formal machinery of justice. This development had significant effects in changing the behavioural patterns of the people too. They were forced to make use of the formal machinery not necessarily by coercion. For example, when the chief, palaces and native courts could no longer exercise jurisdiction in criminal cases, those involved in criminal cases found they have to make use of the formal courts. In civil matters involving foreigners and locals, they were also forced to make use of formal courts. Their transactions with foreigners were regulated by foreign rather than customary laws. Even the currency used were foreign currencies.

Another major way in which the colonial legal system forged new patterns of behaviour among the natives was the way it largely replicated practices in the imperial country in the colonies. In short, the legal system was fashioned in such a way as to facilitate the realisation of British exploitative aims. No matter how vehemently they insist that theirs was a civilising mission, the facts on the ground showed that Britain benefited a lot from its colonies. Mineral resources were savagely exploited, the rail system was constructed in such a way as to carry produce from the interior to the coast for export, education was lopsided and designed to create "white man in black man's skins". Everything was geared towards creating a docile, obedient indigenous citizenry that is conducive to British drive to derive maximum economic benefit from the colonies.

As Oloruntimehin puts it:

> The colonial authorities, realizing the importance of the legal system as an instrument of social change, had used their powerful position as rulers to establish and operate a legal system which would function for the achievement of effective government which was considered a necessity for the derivation of maximum economic interests (1984:212).

As much as we may castigate the colonial legal system for its lopsidedness and its being used to achieve ulterior motives, there is something that cannot be taken away form it. It brought about some major changes in the political, social and other landscape of the nation. In fact it marked the establishment of formal social control (distinct

from the hitherto largely informal system of socialization, and group pressure) in Nigeria. In the next section we shall briefly look at the ways in which formal control was established in Nigeria.

SELF ASSESSMENT EXERCISE 2

What do you understand by statement that "colonialism marked the establishment of formal social control in Nigeria'; ?

GUIDELINES

What was social control like before colonialism? It was largely informal and left in the hands of families, and associations. No formal court, police, prisions, etc. Infact some soecities did not even have government at least not in the sense of a centralised political authority.

With colonialism the situation changed. Courts were established, prisons were built, police formed and government institutionalised.

3.2 Establishment of Formal Social Control in Nigeria

The British efforts in this direction are more obvious in the history of the establishment of the court system and the powers granted to the various courts. The first courts, namely the consular courts, equity courts, and Lagos Supreme Court, were established mainly to provide a peaceful atmosphere for the commercial activities along the coastal areas, between natives and European nationals.

Then as the colonial adventure proceeded into the interior, you find British companies such as the Royal Niger Company being granted powers to administer territories. Later on, the territory of the Royal Niger Company (RNC), which later became the oil rivers protectorate and still later southern protectorate had its own supreme court, while the northern protectorate also has its supreme courts. (As earlier explained in module 4, these supreme courts were supreme in name only, and no Nigerian court actually became supreme until 1963). Both protectorates were created in 1900 and their respective supreme courts were empowered to apply common law and equity as well as statutes of general application in force in England on the first day of January, 1900.

In 1914, the two protectorates were amalgamated into the colony and protectorate of Nigeria. Their laws and legal systems were harmonised, their respective chief justices were abolished, a single chief justice and single attorney general were appointed. The Supreme Court ordinance

of 1943 further strengthened the legal system. That same year the children and young person ordinance was adopted.

In terms of law enforcement, the modern police force did not emerge until 1930. Before then, some ad hoc arrangements were made by the respective protectorates. Since the colonial government was always attempting to ruthlessly suppress dissent, the police force had a paramilitary stance. They were made up predominantly of ex-slaves, ex-soldiers, and sometimes ex-convicts. They were usually staffed by non-locals and this made it easy to unleash them in a cruel fashion on the natives. Infact, they were used several times in military expeditions. In 1930, the Nigeria Police Force was formed largely from the remnants of the West African Frontier Force (WAFF) as well as the Hausa constabulary Dogorai in the north. It was an exclusively male force, and females were not recruited until 1955.

4.0 CONCLUSION

It may be concluded from the foregoing discussion that the experience of colonialism has had a tremendous impact on Nigeria's legal structure. It marked the establishment of a formal social control machinery, and was characterised by many ambitious attempts to use the legal system to bring social changes that are in tune with the vision of the colonial masters.

5.0 SUMMARY

In this unit, you have learned that the colonialist relied very much on the legal system in achieving then-colonial mission in Nigeria. The creation of the protectorates and the entity called Nigeria were accomplished through legal proclamations. Thereafter the law was still relied upon to bring about changes that suited the new dispensation. Of course, where the changes were clearly discordant with local beliefs, the coercive instrument such as the paramilitary police forces were brought into ruthlessly suppress dissent and restore order.

6.0 TUTOR-MARKED ASSIGNMENT

Examine the view that colonialism marked the establishment of a formal legal system in Nigeria.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 THE IMPACT OF POLITICAL INDEPENDENCE ON NIGERIA'S LEGAL SYSTEM

CONTENTS

1.0 INTRODUCTION

In continuation of the modular goal of examining the relationship between law and social change, this unit situates the discussion within the context of post-colonial Nigeria. The attainment of independence for any country is a significant event which is expected to have profound impact on the legal system. Since a legal system is largely shaped by those in power, and since Nigeria independence meant a change in power from white colonial masters to indigenous power wielders, this power change is expectedly reflected in the role that the law is made to perform.

In this unit, you will learn that the changes brought about by independence were not as profound as would have been expected. First, because the new indigenous master had interests that were not radically different from the erstwhile colonial masters. And second, because the independence was more a political independence with little or no economic independence. Nevertheless there were some significant changes.

2.0 OBJECTIVES

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

Explain why Nigeria's legal system continues to bear deep imprint of the colonial legal system notwithstanding its independence;
Describe some of the important changes that have been witnessed in the attempt to use law to create social change and social

justice;
Understand why the law has been used more radically under military than under civilian regimes in Nigeria.

3.0 MAIN CONTENT.

3.1 Law and Social Change in Post-Colonial Nigeria

On 1st October 1960, Nigeria gained independence from Britain. That event itself was a legal act, for Nigeria did not have to engage in any bloody war to get independence. It was handed to her, so to say “on a platter of gold”, by signature, reminiscent of the 1861 Treaty of Cession. Many have since described that independence as mere political independence which left the country economically tied to the apron string of Britain. It has been described as a flag and file independence and some writers will not use the word "post-colonial but would prefer to say “new-colonial” Nigeria.

SELF ASSESSMENT EXERCISE 1

Why is Nigeria said to have gotten her independence on a “platter of gold” and why is the independence described as mere “flag and file?”

GUIDELINES

Platter of gold becuase she did not have to fight or wage a war/bloody revolution to get independence. Compare this with many other African countries which wage long drawn out wars to get independence.

“Flag and file” in the sense that there is a Nigerian flag to testify to her independence and sovereignty and there is a file containing documents by which it was granted political independence.

What the sceptics are saying is that so long as the country has been unable to achieve independence and foreign countries still dictate policies to her, the country cannot be said to be really independent.

Whatever the case might be, the fact remains that as from October 1960, Nigerians became the rulers of Nigeria. Largely because the indigenous leaders who stepped into positions vacated by the colonialist share identical interests (capitalists) with the colonial masters, the structure of colonial legal system has remain largely intact. The changes that the legal system has been used to effect have also not been as drastic as

would have been expected. All the same, there is no gainsaying that some changes have been attempted and a number of them successfully accomplished.

The discussion that follows will be under two headings: civilian administration and military administration. The military has been bolder in using the legal system to bring about desired changes. But there have been changes under both administrations. This is both in terms of altering the legal system to respond to social changes and also in terms of using the legal system to create desired social changes.

3.2 Law and Social Change under Civilian Administration

In the 42 years (i.e. 1960 — 2002) of Nigeria's chequered post independence political history, the civilians have ruled her for only 14 years (1960 — 1966, 1979, 1983, 1999 to date i.e. 2002).

In those 14 years the civilian have tried within pressing constraints (of having a vested interest as capitalist interest in the perpetuation of the colonial legacy, manning an economically dependent nation, and limitations of the requirements of rule of law), to make the legal system respond to and reflect the socio-political environment, and to use it to create desired social changes.

The fact of the independence itself, and the attendant shift in leadership from colonial to indigenous masters is a very significant social change. But this changes which as earlier noted was also a legal change, had to be made meaningful only by law. The law was needed to consolidate, reinforce it and reproduce it across the whole spectra of social, economic and political institutions throughout the land.

In terms of changes in the legal system itself, we note that the Nigerian Independence Act of 1960 abolished the colonial laws Validity Act of 1865 as far as Nigeria was concerned. By the fact of independence, no Act of the British parliament passed after independence could extend to or be deemed to be applicable in Nigeria any more. Furthermore, the British Crown lost power to legislate for Nigeria. The Nigerian parliament became empowered to repeal or amend all the Acts of the British Parliament that had hitherto extended to Nigeria. Many British laws were in fact repealed or amended, though in reality those some laws were simply reenacted (most times verbatim) as local legislation.

It is noteworthy however, that the British Queen remained the Head of State, while the Judicial Committee of the Privy Council in London remained the highest court of the land. The 1963 Republican Constitution of Nigeria corrected both anomalies and for the first time,

the Nigerian Supreme Court became truly supreme i.e. the highest court of the land. A fourth region, the mid-west region was also created.

The legal education Act of 1962 ensured that practitioners of law in Nigeria do not just regurgitate British ideas by introducing a local content in legal education.

Various laws were also enacted to establish various corporations such as Electricity, Railways, Ports, Defense, Airways, Shipping, Insurance, Petroleum, and Security Printing and Minting. It was in the spirit of National development and since individuals who could shoulder the cost of these giant concerns were not available, the government took it upon itself.

On the whole however, the development of the legal system and the conscious use of the law to effect changes have been more pronounced under military regimes.

3.3 Law and Social Change under Military Administration

The military have ruled Nigeria more (ruling for 28 out of the 42 years of independence) than civilian administrations. Perhaps because they are not hampered by provisions of legality, they have been bolder in using the legal system to effect changes.

Infact, the very take-over of power by military men is illegal and it is not surprising that one of the first causality after any successful coup is the Constitution which is suspended.

The first military regime in Nigeria came via a coup d'etat in January 1966. It was easy for the head of the military junta (Aguiyi Ironsi) to wake up one day and turn Nigeria from a federation into a unitary state. In other words, the regions were abolished, and the federal structure of Nigeria was reverted to unitary structure in which regions were replaced by provinces. This was through a decree (remember decrees are laws made by the Federal Military Government while laws of State Military Governments are called edicts). When a counter-coup came six months later, it was again easy by decree for the new head of state (Gowon) to revert the country back to a federal structure. Furthermore, as part of the effort of the new government to forestall war, it was again easy to use a decree to create 12 States out of the existing four regions. The point is that it is easy for military regimes to use law to bring changes. For example, no civilian regime has been cash to create a single state because of the rigorous requirements of the constitution. Yet virtually all the military regimes created states with some of the states creation exercises under the military being based on something as trivial as

satisfying a wife's whim. But the existence of those states are realities which civilian regimes dare not tamper with. (Today Nigeria has 36 States thanks to the military -12 by Gowon, increased to 19 by Murtala/Obasanjo, raised to 21 then 30 by Babangida and increased to 36 plus FCT by Abacha).

There are other areas in which the military has used the legal system to effect changes. The one that most readily comes to mind among them is the "Nigerian Enterprises Promotion Decree of 1972" which was later amended in 1977. The promulgation of this decree was necessitated by the desire to reduce the stranglehold of foreigners on Nigeria's economy and create room for indigenous people to own parts of the larger business organisations. Under the decree, certain small businesses were reserved exclusively for Nigerians. Larger business organisations were opened to foreigners provided the paid-up share capital is more than N400, 000 or the turn-over of the enterprise is more than Nl, 000,000 and the equity participation of Nigerian citizens or association in the business is not less than 40% . The amendment in 1977 transferred more shareholdings to Nigerians by raising equity participation of Nigerians to 60%.

Yet another effort by the military to utilise the legal system to promote the economic development of Nigeria is its intervention in wages payable to workers and in the conditions of then- employment. This is done through fixing by law a national minimum wage. Any wage below is illegal. This has been difficult to enforce but the spirit behind it is commendable.

The military has attempted to use the law to control trade disputes and curb strike. Various trade dispute decrees have been enacted and at a time when the federal military government thought strikes by teachers and medical doctors were getting out of hand in the 1990s, it enacted a decree that sought to put both professions under essential services and therefore not allowed to go on strike. This however failed as the unions have continued to go on strike and the decrees have never been successfully invoked.

The land use decree (called Land Use Act under civilian regimes) of 1978 was another bold legislation meant to bring social justice in the use of land. It was felt that land was constituting a recurring source of dispute, especially in southern Nigeria, (in the north such a law already existed) due to the inadequacy of customary system of land ownership. This decree then vested the ownership of all land in the country in the government. As a result, overnight, everybody in Nigeria became a tenant. This law has achieved some measure of success but it is also a subject of severe criticism.

Other military laws with similar intention of creating new relations overnight and thereby enthroning social justice and social change include: Decrees on Rent Control, Price Control Decree, Income Tax Management Decree, Insurance Decree of 1976, Failed Bank Decree. The establishment of various forms of Tribunals to try specific offences is also an innovation, most often used by military administrations to circumvent the slow, tedious process of the regular machinery of law.

The military has also, quite apart from using law to effect changes, instituted some development of the legal system which have proved helpful to the legal system whether under civilian or the military. For example, the reform of the Native Court system which saw their (i.e. Native Courts) abolition and replacement by Area Courts in the north, and customary courts in the south, was done by the military in the late 1960s. Furthermore, the establishment of an Appeal Court as the second highest court of the land was also done in 1976 by the military. So the military has been decisive in fashioning out the hierarchy of the Nigerian judicial system.

SELF ASSESSMENT EXERCISE 2

Why has there been more changes in both the legal system and societal structure under the military than other civilian regimes?

GUIDELINES

Civilians must proceed according to the law and this is, a slow process. Besides, at every step of the way there may be judicial obstacles mainly in the form of injunctions and declaring the government's *action ultra* vires or unconstitutional.

The military on the other hand do not have to contend with many of such obstacles. The constitution is suspended, many other clauses are put in place to stop the courts from enquiring in to the military government's acting, and the civil populace is generally more point.

4.0 CONCLUSION

The attainment of independence was a significant social change in Nigeria, which was reflected in the legal system. But the legal system did not just reflect it, it (i.e. legal system) was instrumental in making the change meaningful and entrenched in other areas of Nigeria's national life. The Post Colonial legal system therefore, is characterised by various efforts at using the legal system to bring about and consolidate social change. Aside from these, and few legal developments such as abolishing of J.C.P.C, as highest court, and the

establishment of an Appeal Court, the legal system largely maintained its colonial framework. Even when laws of the erstwhile colonial masters were purportedly repealed, they were only reenacted and given a local appellation.

The conclusion then is that the colonial impact on Nigeria's legal system has remained more enduring than the pre-colonial impact, (when no formal legal system existed) and has eclipsed whatever changes the independence could have brought. The reason for this is obvious. It has to do with the capitalist character of the indigenous elite and the inability to have achieved economic independence along with political independence.

5.0 SUMMARY

In this unit, you have learned that Nigeria's political independence of 1960 was a significant change in her history. You have also learned that in bringing social, economic and other relations in harmony with the development, the legal system played a prominent role. The drastic changes expected were however not very forthcoming because of the acculturation of the indigenous elites in British values and the continued economic dependence of the new nation. It has been argued here also that it was easier for the military to utilise the legal system to bring about desired social change, though they were not always successful in doing so.

6.0 TUTOR-MARKED ASSIGNMENT

Describe which social changes are desirable in Nigeria of today that will ensure greater social justice, and how the legal system can be utilised to effect the social changes.

7.0 REFERENCES/FURHTER READINGS

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UNIT 3 THE INFLUENCE OF MODERN GLOBAL TRENDS

CONTENTS

1.0 INTRODUCTION

The worldis increasingly becoming a global village and the international community has a way of influencing social changes in member nations. Especially, beginning with the period after the second world war, when the United Nations Organisation (U.N.O) was formed, it has been increasingly realised that mankind is interconnected in so many ways that the apparent isolated activity of one nation may have effects on other nations. The need to protect the ecosystem and the rising incidence of cross-border or transnational crimes have further underscored the interconnectedness. As a result, deliberate effort has been made in different spheres to harmonise certain laws of different nations, in such a way that global aspirations are met. Some of such efforts are explicit and nations are persuaded and occasionally even coerced to toe the line. Sometimes nations on then" own decide to join the band-wagon, not because any effort is made to include it, but because of its own desire to join in civilisation or partake in a moden trend.

In this unit you will learn about some of the more important changes (both in law and in society) that global trends have brought about in Nigeria.

2.0 OBJECTIVES

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

Describe some of the international standards that have been set

up, against which individual nations are supposed to gauge their own performance;

Specify and explain some important changes that Nigeria has made through the use of law in order to bring certain practices in Nigeria to international standards;

Understand ways in which global trends can influence internal policies of nations even in the absence of visible efforts to do so.

3.2 The Influence of Modern Global Trends on Nigerian Legal System

The global influences on Nigeria's legal system are discussed under four headings, here under.

3.3 Global Influences on Nigeria's Human Rights Policies

The sudden demise of General Sanni Abacha and his military regime in 1998, and the revelations of the regime's human rights violations in the aftermath, did thrust human rights issues to the fore of national discussion in Nigeria. "Human Rights" suddenly became a household word in Nigeria. But human rights issues had been on the international agenda of political discourse long before then, and Nigeria is infact a signatory to many international conventions on human rights.

The internationalisation of Human Rights, formally began with the adoption of the Bill on Universal Declaration of Human Rights by the U.N. General Assembly on 10th December 1948, without a single dissenting vote. The Declaration was conceived to serve as "the common standard of achievement for all peoples and all nations" but has today become an instrument of almost a legally binding status. The U.N. was to go on later to approve two covenants as part of the international Bill of Rights. These are the: International Convenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESIR). Both came into force in 1976 but were acceded to by Nigeria in 1993.

The point in a nutshell, is that the international community through the U.N.O declared that human beings have some basic rights which nations must endeavour to promote and protect. Tabiu and Ladan (1998:6) put it this way:

> For the first time, states were bound before the International community to promote their individual citizens' rights. For the first time, they granted an international body authority to monitor their promises to observe those rights. For the first time also, the victims of

human rights violations had a means of recourse outside the jurisdiction of the authorities who oppressed them.

It is in compliance with such international standards that many countries (Nigeria inclusive) now include fundamental rights provisions in their constitutions. The 1963,1979 and current 1999 constitutions of Nigeria contain such provisions (in case you have a problem following this discussion, I suggest you refresh your memories of human rights by reading unit 5 of module 3 of the course again).

SELF ASSESSMENT EXERCISE 1

Comments on Human Rights practices in Nigeria.

GUIDELINES

Explain what you understand by Human Rights.

Note that it is a wide concept and though community-used in relation to political oppression, it is also applicable in the ordinary legal sphere. E.g. some actions may be legal and yet violative of human rights. The tendency for instance, to keep people undergoing trial on remand in prison for a long time, after which they might eventually be found innocent is violative of their human rights, some for convicted criminals who may be detained under inhuman conditions.

Take a look at other organs of the state, police, immigration, courts, NDLEA, etc. and relate there activities to human rights.

Other human right treaties which guide human right practices in different nations (and most of which Nigeria has assented to) include:

The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Nigeria/1988).
The Convention on the Prevention and Punishment of the Crime of Genocide.
The Convention Relating to the Status of Refugees.
The International Convention on the Elimination of all Forms of Racial Discrimination (Nigeria/1967).
The Convention on the Elimination of all Forms of Discrimination against Women (Nigeria/1985).
The Convention on the Rights of the Child (Nigeria/1991).

Furthermore, there are other international human rights instruments which are not in form of treaties but in form of resolutions. They are as

such not binding on member states, but nevertheless set standards which such states are expected to observe. They include the following:

The UN Standard Minimum Rules for the Treatment of Prisoners.
The UN body of Principles for the Protection of All Persons under any form of Detention or Imprisonment.
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Most of these concerns have been translated into relevant laws in Nigeria.

3.3 Global Influence on Nigeria's Gender Policies

The influence of global trends is also quite noticeable in policies and laws relating to gender opportunities and treatment in Nigeria. Again, the U.N.O has been most instrumental in exerting those influences. The changes that have resulted include: opening up traditional male-professions to women, enfranchisement of women, equal pay for equal work, regardless of gender, elimination of discriminatory tax laws and discriminatory inheritance laws, and in some instances the practice of Affirmative Action (or reverse discrimination) by which women are favoured over their male counterparts for access to desired resources and positions.

As noted under our discussion on Human Rights, one of the International Conventions that Nigeria has ratified is the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In the spirit of such commitments, Section 42 of the current 1999 constitution of Nigeria gives legal backing to non-discrimination. In other words, it is part of the fundamental rights of Nigerians that one is not discriminated against on the basis of sex. Since the constitution is the supreme law of the land, all other laws, policies and practices relating to the treatment of women must be fair and non-discriminatory. Otherwise, they will constitute illegality and be actionable in a court of law.

Stiff penalties also exist for trafficking in women or for those who tend to use women in any degrading way. Many local branches of international NGO's (Non-Governmental Organisations) fighting for the rights of women presently exist and are encouraged. A bill seeking to ban female circumcision (or Female Genital Mutilation) in Nigeria, had been passed by the National Assembly.

In a nutshell, changes are being brought about in the laws and social practices relating to women in Nigeria as a result of the current global interest in Gender and Feminism. This is notwithstanding that local sentiments, especially among men, are yet to catch up with such global trends.

SELF ASSESSMENT EXERCISE 2

Comment on Gender policies/practices in Nigeria.

GUIDELINES

Make a distinct between what the law says and what obtains in actual practice.

Are the provisions of the law adequate? Is the government halfhearted measures to conform to international standards?

Are the laws succeeding in bringing about a change of attitude?

3.4 Other Areas of Global Influence

The influence of global trends has also been very noticeable in Nigerian laws relating to labour, the treatment of the environment, the trading in rare animals, and so on.

In the arena of labour, the International Labour Organisation (ILO) has set many standards for the treatment of labour and labour unions which many countries have had to follow and uphold. For example, convention 158, Article 2 of the ILO provides that the employment of a worker shall not be terminated without a valid reason. Articles 5 & 6 of the same convention go on to list matters which cannot constitute valid reasons. They include: union membership, participating in proceedings against employer and so on.

To protect the environment from the devastating effect of chloro-fluorocarbons (CFC) which are alleged to be corroding the ozone layer, the government recently (2001) announced a ban on importation of used refrigerators and air-conditioners. Such used products, it was revealed, have not been made environment-friendly. The governments action was part of the global effort to prevent the depletion of the ozone layer. The problem that results from such depletion (i.e. green house effect) is a global one and not just for the culprit countries. Hence the global effort. The same spirit informs the prevention of various forms of pollution, the fight against nuclear proliferation-ration and other international concerns such as drug trafficking, women trafficking and other transnational

crimes.

4.0 CONCLUSION

The conclusion is that there are a number of ways in which global concerns affect the laws and lives of the people of any nation. The more the present trend towards globalisation intensifies, the more the influence of international concerns would become obvious. This course is not strictly a law course and so an elaborate discussion of the particular changes in law is not called for. It suffices however to note that global influences on legal systems, and the fact that international organizations like the U.N.O, are beginning to force nations to comply with international standards in certain things, seems to be eroding the concept of sovereignty of nations. It may ultimately require a reformulation of the concept.

5.0 SUMMARY

In this unit, you have learned that global events and trends do have a tendency to influence both legislation and social changes in a country. In Nigeria such trends have influenced legislation on human rights, gender, labour, environment and so on. You have also learned that not all the international influences come in the form of binding laws which signatory nations must observe. Sometimes standards are just set and it is only expected that nations use those standards to gauge their performance.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss ways in which global events and trends have influenced legislation and social change in the past 20 years in Nigeria. Write a maximum of six typewritten pages with appropriate illustrations and references.

7.0 REFERENCES/FURTHER READINGS

Sesay, A & Odebiyi A. (eds) (1998). *Nigerian Women in Society and Development.* Ibadan: Dokun Publishing House.

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UNIT 4 THE EMERGENT LEGAL STRUCTURE: PROBLEMS AND PROSPECTS

CONTENTS

1.0 INTRODUCTION

This is the last unit, not just of module 5 but of the whole course. This unit will wrap up the discussions in the last two modules of the course. This two modules have been concerned with the situation of the law and the legal system in Nigeria. Having discussed various aspects of the legal system, it is pertinent to ask, what then are the major features of the emergent legal system of Nigeria? What are its problems? What are the prospects for resolving the problems and putting a viable responsive legal system in place? This unit addresses those issues/questions.

2.0 OBJECTIVES

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

Describe the major characteristics of the emergent Nigeria legal system;
Identify and explain the major problems of the legal system;
Proffer solutions to the problems of Nigerian legal system.

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3.0 MAIN CONTENT

3.1 The Emerging Legal Structure of Nigeria

From the discussion in Module 4 and the first two units of this module, it should be apparent that the emergent Nigerian legal system is largely a colonial legacy. It bears the bold imprint of Britain in virtually every aspect and has been described by Oloruntimehin (1984: 221) as a "miniature English legal system". Forty two years of independence (i.e. 1960-2002) has not been able to change that, though some token, half-hearted attempts have occasionally been made to Nigerians the system.

In the systems of law that are operational and their comparative hierarchical statuses, there has been little or no change since the colonial era. In the arena of criminal law, the criminal code borrowed from Australia during the colonial period is still the criminal code of southern Nigeria. In the north, the Penal Code borrowed from Sudan remains operational. Since customary law do not apply in the area of crime, it follows that virtually the whole of Nigerian criminal law is imported.

In areas of civil law where statute law is available, those statutes usually amount to a verbatim reenactment of English statutes, notwithstanding that they now bear different names and are contained in the "Laws of the Federation of Nigeria 1990". Examples include the Sales of Goods Act, Bills of Exchange Act, Company and Allied Matters Act and so on. Infact other than that the English parliament can no longer legislate for us, there has been very little change since colonialism. Our customary laws remain in operation for crimes. For civil matters, they are given a subordinate status and must pass the repugnancy test to be applicable.

Note: If the discussion here sound a little too condensed for you to follow, you are advised to go back and read module 4, especially unit 3.

Regarding law enforcement, the emergent legal structure relies on such formal agencies such as immigration, customs, drug Law Enforcement Agency and particularly, the police. But Informal modes of enforcement, especially through vigilante groups, have been growing of late.

In terms of interpretation of laws, dispute adjudication and general administration of justice, the emergent legal system relies heavily on the courts. In the rural areas however, and to a limited extent in the urban, areas, informal modes of arbitration, such as elders council, workers union, family headship and village heads court continue to operate.

Regarding correction of offenders, imprisonment remains the most frequently pronounced sentence by the courts. There are other options such as fines, canning and death penalty which are less often used. There is no area in which Nigeria has remained more stagnant and unwilling to move from the colonial practices than in correction. There is so much faith in imprisonment. Modern modes of de-institutionalised sentencing and offender treatment such as suspended sentences, probation, parole, hostel scheme, conjugal visits and community based rehabilitation are virtually non-existent in Nigeria.

In the spheres of enforcement, adjudication and correction, it is the British Colonial Policy that is still dominant in the emergent Nigerian legal structure. In the next section of this unit, we still look at the specific problems posed by the dominance of alien features on Nigeria's legal system.

3.2 Problems of the Emerging Legal Structure

For easier comprehension, the discussion is streamlined under four major sub-headings, viz problems relating to the law, law enforcement, adjudication and corrections.

3.2.1 Problems Relating to the Nature of the Laws

As noted in 3.1 above, the laws that are in operation in Nigeria are largely foreign laws. This poses some problems. First, those laws may not actually reflect the values and yearnings of Nigerians. The tendency is that feelings of alienation, estrangement and lack of confidence may be experienced by those whom the laws affect. If the criminal codes in the country are both foreign and customary laws cannot apply to criminal matters, 42 years after independence, does it mean Nigerians share the British views about the repugnancy of customary law? And as if that is not enough, customary law may only apply in civil matters (i.e. relating to marriage, family, land tenure, inheritance, succession to land) if it is not repugnant to the principles of natural justice.

Furthermore, the language of the law in Nigeria tend to be too technical. In a country where up to 70% of the population are illiterate, the operative laws are so phrased that even the literate but not learned (i.e. not lawyers) cannot understand the technicality. Yet ignorance of the law is not accepted as a defence in court. This is a double bind for natives. First the values enshrined in laws are foreign, and second the language is also foreign and incomprehensible.

In the northern part of the country, some states are presently going out of their ways to enact Sharia codes which they claim are more in tune

with values and ways of their people.

3.2.2 Problems Relating to Law Enforcement

It is generally agreed in Nigeria that the law enforcement machinery has not been effective. The reasons given for this include inadequate quantity and quality of personnel, poor funding and equipping, poor training, poor staff remuneration, and importantly for our purposes here, lack of identification/cooperation by the members of the public with the enforcement machinery.

The modern police was established in Nigeria in 1930. The major purpose for its establishment by the colonial government was to use it ruthlessly to suppress dissent from the indigenous people. It was more military oriented, and the establishment went out of its way to deliberately recruit ex-slaves, ex-convicts, ex-military men and people of non-local origin, who will be hard and cruel on dissenters. The colonial policeman saw government and people as two antagonistic sides and saw himself on the government side. This generated mutual hostility and distrust between citizens and the police. It has been argued that the situation has not changed much since then.

This point has been strongly underscored in recent times by the increasing reluctance of people to utilise the formal mode of law enforcement. In many Nigeria cities today, many people prefer to report offenders to vigilante groups or ethnic militia, to lynch them, or to seek personal revenge by hiring paid thugs or assassins to carry out justice accordingly to their specifications.

3.2.3 Problems Relating to Adjudication/Justice Administration

The setting and proceedings of trial under the emergent legal system is another source of problems. It is too formal, too rigid and adversarial. The air of confrontation created, the sternness of the judges countenance and his fake grey hair, the fact that it is not participatory in nature (i.e. people from the floor not contributing), the delays, the adjournment, the length, the expenses, and the technicality and sophistication of language, the alien values that the law gives expression to and the fact that a single man (in most cases) deliver the judgement at the end of the day, are all features of the emergent legal structure which differ considerably from what the people would really identify with. It is true that from the period of colonialism to date is over a century, and that a new generation of westernised Nigerians with different values should have since been forged. The reality however is that the psyche and mentality of Nigerians have not changed to any significant extent. And in fact, in the

rural areas (which constitute the majority of Nigerians) cases are still being disposed and justice being dispensed according to informal principles more reminiscent of pre-colonial times than the modern legal system.

The consequence is that there is a widespread reluctance to utilise the formal adjudicatory machinery.

3.2.4 Problems Relating to Corrections

As noted in 3.1 above, sentencing and correctional administration has remained most conservative and stagnant since colonial times. The non-custodial measures of pre-colonial Africa were displaced and replaced by custodial or institutional ones, usually prisons, by the colonial masters. The situation has remained ever so in Nigeria.

The irony however is that the rest of the civilised world, Britain inclusive, are increasingly moving towards the non-custodial forms.

The excessive reliance on imprisonment by the emergent legal structure of Nigeria implies that correction has a punitive cast. The cruel and deplorable conditions of the prison further suggest a retributive/deterrent justification for punishment. Prisoners are hardly reformed but more probably they come out even more hardened than before imprisonment. There are many cases of repeaters i.e. people who go into prison, serve their terms, come out, commit another crime, go in, and then come out only to commit another crime, and so on.

So not only does imprisonment not accord with traditional Nigerian values, it actually has a negative effect on the character of those imprisoned. Many are so dehumanised while in prison (a bell tells them when to wake up, when to sleep and when to eat. They are called by numbers rather than by name, they are not allowed independent action, etc.). So when they come out, they find it difficult to cope with civilised society. So they want to go back, some come out to meet a wife who has since remarried, children who are ashamed to be associated with ex-convict employers who do not want ex-convicts as employees and a community that do everything to shun them. Before long, they drift back to bad companies of similarly stigmatised individuals, and it is not long before they resume their career in crime.

SELF ASSESSMENT EXERCISE 1

Why do ex-convicts tend to resume the criminal careers?

GUIDELINES

Factors that led them to the first crime may still be there to push them back.

The prisons rarely reform but rather tend to mould inmates into hardened criminals.

When they come out society rejects them: no family, no friends, no job, the identity of being an ex-convict makes everything so> difficult.

Only like-minded and like-situated individuals accept them. They mutually reinforce one another's negative values.

It is a further indictment of justice administration in Nigeria, that 2/3 of all inmates in Nigerian prisons are awaiting trial. Yet Nigeria subscribes to the principle of "presumption of innocence until proven guilty".

3.3 Prospects of the Emerging Legal Structure of Nigeria

By prospect, we mean the probable future chances or expectation of success from the Nigerian legal system. It makes for easier comprehension to deduce these expectations from the potentials or capability of overcoming the major problems enumerated above. So, we might well be talking of solutions. It is then only proper to discuss the prospects of the emerging legal structure under the same headings as the problems were discussed.

3.3.1 Prospects of the Laws

First of all, there is a need to give more scope of operation to customary laws. If all it takes to make a law applicable in the criminal arena is for it to be written, nothing stops the codification of Nigerian customary laws of crime. After all, the common law of England is in reality a compilation of English unwritten customary law.

Secondly, the subordinate status of customary law in civil matters has to be addressed. Again, a codification (i.e. collecting the laws together in a written, compact form) of all the relevant customary laws, in the process of which repugnant ones would be expunged, will take care of this.

Thirdly, the legislations currently in force contain preponderant English laws. It is not enough to simply talk of repealing or amending certain laws only to reenact them with a local name. There is a need to undertake periodic reviews and reform of our laws, to bring them up to

date and in tune with the legitimate yearnings and aspirations of the people. Towards this end, the law reform commission needs to be strengthened. As it is presently constituted, it can hardly perform the role of meaningful reform of our laws.

If these suggestions are implemented, there is great prospect of our laws rising to meet the challenges of not just our traditional needs, but of modern times.

3.3.2 Prospects of Law Enforcement

The efforts of the present administration (Obasanjo) towards doubling the size of the police force in three years (2001-2003) at an annual incremental rate of 40,000 is quite commendable. The efforts of the administration to also better- equip all the paramilitary services, pay them better, train them better and to rid them of bad eggs, is also welcome.

However, there is still much more to be done if the confidence of the people in the services are to be restored. First, the training curriculum of the personnel has to undergo a fundamental change. It should de-emphasise riot and military drills while emphasising a service orientation. The decision to drop the word "force" from the name of Nigeria Police Force (in 2001) shows that the government is also thinking in this direction. But mere dropping of name is not enough to change the militaristic stance of the force, which was forged at its inception during colonialism and has persisted ever since.

A totally new orientation is required from the Police Force if it is to enjoy the cooperation of the people. It is ironic and tragic that the which is the most visible form of the state and which exist to fight illegality is generally regarded as the most corrupt organisation in Nigeria today. The men of the force use every opportunity to extort bribe from the people and some have been caught participating in armed robbery. The incessant delays at police stations, the routine detentions, the use of torture for interrogation, the slipping through police hands of dangerous criminals, its general lackadaisical attitude to justice, all constitute reasons why people are increasingly resorting to informal justice system.

In restructuring the force, efforts should be made to incorporate aspects of the traditional modes of enforcement. For example, it may be worthwhile to post policemen to serve in their own towns of origin. It may even be desirable for states to have their own police forces (instead of the one federal force that is allowed, courtesy of Section 214 of the 1999 constitution). These innovations will have their advantages as well

as their drawbacks, but on the whole may be worthwhile when considered against the background of the general disenchantment with law enforcement in Nigeria. To underscore the extent to which the Nigeria Police has deviated from what it should stand for, it recently embarked on an unprecedented strike in some states of the federation between January and February 2002.

SELF ASSESSMENT EXERCISE 2

Can the February 2002 strike action by men of the Nigerian Police Force be justified on any ground?

GUIDELINES

Identify the different grounds: legal, moral, necessity/desperation, etc.

The strike was illegal because men of paramilitary organisation are not allowed to go on strike.

But could it be justified on the ground that they were pushed to the wall? What were their demands anyway? How legitimate was the strike,

How considerate were the police of members of the public that they left at the mercy of criminals for the period of the strike?

3.3.3 Prospects of Adjudication and Justice Administration

A lot has already been said inwHG above on the negative features of justice administration of the emergent legal structure. It follows that addressing those negative aspects would be a sure way of enhancing the satisfaction of the people with the system and the attendant general attainment of criminal justice goals. The trial process, for example, need to be made less adversarial. It has to become more responsive to the yearnings of the people by making the language of law and trial less technical. Decisions should be reached more promptly. More courts have to be established to reduce the costs incurred by litigants and even witnesses in travelling long distances to make court appearances. If the process cannot be made more open and participatory, then at least the process of reaching a decision should not be left to a single man.

The Nigerian judge, by being required to pass judgement as well as sentence is made to be many things at once: a judge, a psychiatrist, a psychologist, a criminologist, a sociologist and so on. This is because after resolving the questions of guilt (which may be a legal decision), the

judge will also decide whether the sentence should be imprisonment and for how long, or whether it should be any of the other options. And in doing this he is supposed to consider the needs of the offender (reformation, medical, deterrent or punitive) as well as the needs of the criminal justice system. It is suggested here that the sentencing decision should be left to a committee made up of all the other relevant professionals in the medical field, as well as the behavioural sciences.

The scope of sentencing options available should also be broadened. The routine use of imprisonment is infact proving counter-productive. It is suggested that such measures as suspended sentence, probation and parole be introduced. Besides, serious consideration should also be given to diversion programmes (e.g. diverting offenders from the criminal justice system to juvenile homes, foster homes, half-way homes, hospitals, and so on). At present, such diversions exist in theory only for juveniles, and even they are hardly used in practice.

3.3.4 Prospects of Corrections

The major problems with correction administration in our emergent legal structure is, as noted in 4sfe3-above, its punitive cast and its routine use of imprisonment as a measure of correction. The way out is to move towards the use of non-custodial measures which incidentally was a characteristic of the pre-colonial/traditional system of justice in Nigeria.

SELF ASSESSMENT EXERCISE 3

Name and explain some indigenous non-custodial measures of correction that you know of.

GUIDELINES

> "Non-custodial" as the term suggests, mean that corrective measures should not include custody, especially not imprisonment.
>
> The pre-colonial justice system relied on such measures for correction. They include fines, exile, restitution, flogging and so on.
>
> Another look at Unit 1 of Module 4 may be helpful. So will reading further into this unit.

If judges make more use of fines, probation, suspended sentences and other non-custodial sentences, and if our prisons become more humane,

less congested and deplorable, there is great prospects for a more meaningful and result-oriented penal policy in Nigeria.

4.0 CONCLUSION

The conclusion that can be drawn from the foregoing discussion is that the emergent legal structure of Nigeria is characterised predominantly by foreign/alien features. The foreign content of the law is raised above local values and the other components of the legal system have all been formalise to bear a distinctly English stamp. These have created some problems in the operation of the legal system. The legal system, however, has some prospects of meeting the yearnings and aspirations of Nigerians, since the problems are capable of being addressed.

5.0 SUMMARY

In this unit, you have learned about the significant feature of the emergent legal structure of Nigeria. You have been told that the legal system we have in place currently is dominated by foreign features whether in the law, law enforcement, law administration or corrections. The problem posed as a result has also been highlighted. It was concluded that the system still has great potentials for meeting the yearnings and aspirations of the majority of Nigerians once those problems are addressed.

6.0 TUTOR-MARKED ASSIGNMENT

Critically discuss the problems and prospects of the Nigerian legal system. This is a wide question though it looks straightforward. You will be expected to demonstrate an awareness of the features of the current legal system and how they have evolved into their present form. You are encouraged to go beyond the materials in this unit, and cite original examples to illustrate your points.

7.0 REFERENCES/FURTHER READINGS

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