

Sources of law Available to a Judge

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ABSTRACT

The basis of this research is that law cannot reside exclusively in legal rules. Jurists, therefore, in the search for justice would have to resort to a reconciliation of all other sources of law including the judge's personal technique or conception of justice. The judge should always be inspired by a common ideal which is to arrive at a solution which best conforms to the general sense of justice. Such other sources that are at all times available to a judge.

Keywords: Law, Judge, Jurist and Justice.

The Principles of Equity

Equity is an important source of law. It is a body of rules evolved in the 15th and 16th centuries and was applied by the courts of the Chancellor in order to complement or to correct any law that had become insufficient, defective, or where judgment has to be given according to common sense or fairness [1,2]. The common law was not functioning properly. Its procedures for arriving at judgment were faulty and naturally the judgment the courts were rendering were grossly inequitable. An appeal was made to the conscience of the king, as sovereign justice to intervene so that his subjects will obtain justice which the common law could not give [3]. The king saw it as a moral duty to intervene and which he did through the court of the Chancellor. The Chancellor intervened in equity which was based on conscience. The result was the development of equitable rules which were occasionally invoked to ensure that the system of law which the courts apply now was perfected in the interest of morality. In his intervention, the Chancellor did not modify or change the law as formulated by the common law courts. His respect for the law was shown in the maxim that "Equity follows the law". However, in following the law considerations of morality were not forgotten and it was in the name of morality that the Chancellor intervened without clashing with the law. Doctrines like 'Specific performance' enjoining execution in contract, 'discovery order' enjoining a party to produce document in his possession required for a resolution of a matter, 'undue influence' as moral imperative was directed

against persons who may unconsciously take advantage of their positions as parent, guardian or master to obtain some under advantage [4]. These and many more equitable doctrines were developed to ameliorate the harshness of the law. However, in 1873-1875, the common law and doctrine of equity fused by the Judicature Act. From this date English courts were able to apply or order the equitable remedies and at the same time apply the rule of common law, thus avoiding the old procedural duality [5].

The whole essence of equitable intervention is for the avoidance of wholly unreasonable and unjust law. In other words, the justness and reasonableness must be a condition precedent to its validity. The technical rules of equity, developed by the court of the chancery were formally received into Nigeria's legal system through various statutory enactments which were the outcome of many English judicial decisions. In other words, technical rules of equity a force in Nigeria have necessary foundation in English case law [6].

The English legal system was introduced in Nigeria for reason of convenience and politics. According to Elias, it became necessary "by reason of the presence therein of a number of English people to whom it is as much necessary to preserve their accustomed notice of right and justice as it is that certain indigenous ideas, legal as well as customary, should be vouchsafed to the local inhabitants. Again, the local people had adopted the English law which sometimes runs counter to traditional

legal ideas. It became necessary to have a new legal situation that can facilitate transaction between the two systems. In 1863; a local ordinance was enacted known as Ordinance No. 3 of 183; Section 1 of the ordinance all laws and statutes which became in force in England on January 1, 1863. In 1876, the supreme Court Ordinance No .4 formally introduced English courts in law and doctrines of Equity and the statute of General Application in force in England in July 24, 1874. By section 18 of the ordinance law and equity were to be administered concurrently so as avoid a multiplicity of legal proceeding. Apart from technical rules of English equity introduced into the Nigerian system which include the doctrine of specific performance, part performance, elections, laches. there is also a long series of local enactments which introduced broad principles of equity into the Nigeria system, particularly in the ascertainment and application of Nigeria's customary law [7]. These broad principles of equity are known as the repugnancy doctrine which was

...the equitable is just, but not legally just but a correction of legal justice...when the law speaks universally, then, a case arises on it which is not covered by the universal statement (rule) where the Legislators fails us and has erred by over-simplicity to Correct the omission to say what the legislator himself Would have put into his law if he had known (of this Variety of issues). Hence, the equitable is just and better than one kind of justice (i.e, legal justice) not better Than the error that arises from the absoluteness of the Statement (rule). And this is the nature of the equitable, (It is) a correction of law where it is defective owing to Its universality...by reducing universal justice into a Just particularity.

The plank of this thesis is that Nigerian judges ought to administer law with due respect to natural justice, equity and good conscience and that the administration of law by Nigeria court cannot be exclusively based on legal rules. Lawyers and judges who hold tenaciously to the positivist theory of law should note that procedural due processes ranging from the principles of natural justice- *audi alterem partem*, (meaning; lets hear the other side) and *nemo judex in causa sua* (meaning you cannot be a judge in your own cause) to the issue of notice, opportunity to

introduced to facilitate the retention of indigenous laws which is to administered side by side with the received English laws. With the introduction of the repugnancy doctrine, Nigerian courts we under a duty to enforce customary laws as long as it is not repugnant to natural justice, equity and good conscience and were also empowered to apply the rules of natural justice, equity and good conscience where common law, doctrines of equity and locals laws are not applicable. The implication of the introduction of the repugnancy doctrine is that courts in the process of asserting and applying an alleged customary law should recognize and apply equity in its broad sense, that is, giving humane and liberal interpretation to the alleged rules of customary law [8,9].

It is necessary to note that the idea that what is fair and just in the circumstance should dominate the administration of law permeated the writing of Aristotle. He made an important distinction between the spirit of saw and the letter of the law. According to Aristotle;

confront adverse witnesses, the impartiality of tribunal, the representation by counsel, legal aids, payment of compensation etc, are all founded in natural equity. Equity is therefore one source of law and where the law is inadequate to produce a just solution to a legal problem before a judge, the principles of equity is always available to lest the creative ability of such a judge to decide the case on general principles of fairness, reasonableness, common sense and natural justice [10,11].

Customs

Custom is the earliest fountain of law. It is the earliest form of law which had arisen from the established practices of every community. It is, therefore, a source of law and in interpreting or applying the law, judges are as a matter of fact expected to be guided by the custom of the people. The positivist law theorist or jurist may not, however, recognize the role of custom in the judicial process due to a tendency to identify all laws exclusively with the will of the sovereign. Custom is not only a source of law it can also be useful in finding just solution to certain legal problems especially where the alleged custom is reasonable [11]. The supreme

*I declared that I make the above demised and bequest
When I am quity sane and well. It is my will that the
native law and custom of Benin shall not aplly to alter
Or modify this will.*

The testator did not bequest anything on the plaintiff, his eldest son, who by native law and custom should not only succeed him but should inherit the late Chief's "Igiogbe" in Benin custom comprise of the house or house where a deceased hereditary chief lived or used as seat as Benin chief. In other words, the Igiogbe or such house or houses cannot be taken away from the eldest son who succeeds his father to the titles or office. This matter was instituted in the High Court in Benin but was finally decided in the Supreme Court of Nigeria After a protracted legal tussle, the Supreme Court held that Chief Lawal-Osula was wrong to have devised the Igiogbe to persons other than his eldest surviving son and that any devise of his Igiogbe to any person will be void. The Supreme Court Further held that Chief Lawal-Osula was at liberty to bequeath and devise his real and personal estates to any one of his choice excluding the Igiogbe which customarily belongs to the eldest surviving son especially when such one has performed the burial rites of his father in accordance with the native law and custom [12]. The Supreme Court further held that the Benin customary law of inheritance cannot be said to be repugnant to equity,

court of Nigeria demonstrated the above assertion in one of its rare activist and liberal decisions in the case of Lawal Osula.¹⁶ In this case, Chief Usman M. Lawal-Osula died on 2nd December 1972 and left a will. He devised to the 1st defendant Mrs Lydia Modupe Lawal-Osula, his wife, whom he married under the English marriage ordinance. The Chief had prior to his marriage to Modupe married under Benin native law where he where he had three children. The late Chief in his will devised several things in his estate including the houses where he lived to Lydia Modupe, the first defendant. The late chief's will read as follows:

good conscience and indeed natural justice. The court noted that the inheritance under English law as relevant to succession to seat and estate of hereditary person like the Duke of Earl-is not different from Benin customary law and that this custom is designed to keep Family tradition and maintain orderly continuity.

Simply stated, the Supreme Court held that the will made by late Chief Osulu was valid except as it affects the Igiogbe which is a violation of the customary law and the history of Benin people. What is remarkable about the decision of the Supreme Court is that it had decided the matter exclusively from the angle of legal rule, the court would have held that once the formal requirement of making a will was satisfied by Chief Osula his will was valid and the question of Igiogbe would have been declared contrary to natural justice, equity and good conscience. The implication of this rare decision of the Supreme Court is that the custom of a people once it is reasonable is a source of law and if justice of a matter would be achieved from recourse to custom, tradition and history judge are expected their application in order to do substantial justice [3].

Judicial Decision

Judicial decision is a source of law, "A Judicial Decision" in the words of Suttner is "at once a decision on the law, a punishment or a resolution of a particular dispute, and an affirmation of certain values."¹⁷ A judge's decision can be categorized into two; *a ratio decidendi*, and *orbita dicta*. A *ratio decidendi*, are those pronouncements of law which appear to the judges to be necessary for his decision. An *orbita dictum* on the other hand is the opinion of a judge in the process of delivering judgment. While *a ratio decidendi* constitute a precedent which is binding on other inferior courts, *orbita dicta* may have only a persuasive effect [6].

Generally speaking; judges always maintain that they do not make law and that they are under a strict duty to apply the law as it is even where it would inflict injustice. In other words, the judge is a slot machine, He simply finds in existing and relevant law that exists and applies it in a mechanical manner the case in hand. This view of the judicial role of judges is built on an exudation of positivism. That judges make law is a fact. However, the scope of their law making may be limited. Although the law or legal rule made by judges may not be strong as that made by the legislature; the fact remains that judges make law and they do that behind the screen of "interpretation" of legislation [7].

In other words, judges decide cases within the context of operation of rules, it is apparent that multiple considerations come into play in the mind of a judge before he arrives at what may be called a good reason for his decision. Such reasons may be social, political, moral, ideological, religious and otherwise. It is to be noted that "all the principles, precepts, and maxims of statutory interpretation are judges made." judges may therefore, not acknowledge openly and brazenly that they make law in order not to be accused of interfering or usurping the powers of another organ of government. What they do is to play down the element of conscious choice in their decision and to expose their reasoning in the form of logical deductions from well established rules. There is,

therefore, a distinction between what the courts say and what they, in fact do [8].

However, as earlier stated, as far as positivist theory of law is concerned, the task of a judge is to administer and not create law. The Latin phrase *stare decisis* prescribes how judges ought to interpret the law. It means that the present case is to be decided in accordance with the decision reached in the past in a similar case. In other words, legal reasoning is precedential. The implication of this is that a judge is not at liberty to use the court to inflict his own moral view of the world on others. He is expected to set aside his moral inclinations and adjudicate issues in a manner consistent with previous judicial reasoning. The fear has always been that if justice outside the law is allowed, the rendering of justice could now become the "uncontrolled passion, prejudice, and instinct of the person administering justice and, therefore, running the risk of being whimsical and unpredictable." To avoid this situation, judges are now expected to give decision in accordance with general rules, untouched, or affected by the subjective reason of the judge [7].

This research holds that a law-suit or legal problem is not synonymous with a mathematical problem. This thesis therefore advocates a concept of justice that is not founded on justice according to law but on law according to justice. It consists on a judicial process in which judges are not reduced to a sterile role and made an automaton and which place judges where they can keep the law alive in motion and make it progressive for the purpose of arriving at the end of justice without any inhibition by technicalities and formalities; judges who will always find every conceivable but acceptable ways of avoiding narrowness that would unleash injustice.

Although precedential reasoning is not entirely condemnable but its application at the expense of justice is. This research regards him a good judge who knows how to decide cases according to circumstances; who can evolve new and effective principles to deal with challenges and problems that changes

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bring about in the society. A good judicial decision is one that is conformity with the good of man. It is not just one that manifests only from the efficient administration of law but one that embodied human values according to prevailing social consciousness. In this lies the difference; the differences between a liberal, progressive, purposive and activist judge, and a restrictive, passive and conservative judge. The basis of law in common law countries has been the judge-made rule and such judges had come from the first category of judges as asserted above. Again, it is the decision of the activist, liberal and progressive judge in the Supreme Court of the United States that had formed the basis of the study of America constitutional law and not the bare constitutional texts of the U.S [10].

The Supreme Court of the United States through liberal interpretation of the U.S. constitution and its laws was able to effect changes that touched positively the lives of the American poor, the marginalized, minorities and blacks. Literal and narrow interpretation of the constitution was discarded by the United States Supreme Court and the court adjusted itself to social engineering by adopting the liberal and broader interpretational approach that meets with the spirit of her constitution. The result was rapid constitutional changes especially on the issue of race and race relations. The blacks moved

Democracy and Legal Justice

Nigeria is said to be democratic state. Democracy presupposes that the citizens in a democratic state enjoy certain fundamental rights. The existence of such rights is intended to maintain human dignity. Such rights can be founded in Chapter Four of the constitution of the Federal Republic of Nigeria, 1999. The rights include freedom of movement, freedom of association, the right to fair trial and freedom of the person. Other measures designed to maintain human dignity are concepts like the rule of law, a concept which denotes supremacy of law, equality of all before the law [5].

This regards to due process also means that no person shall be deprived of life, liberty or property except in accordance

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from "none equal" status with whites as found by the Supreme Court in Plessy v Ferguson to "equal but separate" status from the white. Today, the blacks are not only equal but also joined as declared by the court in Brown v Board of Education.²² Barack Obama, a black is today the president of the United States of America. The Supreme Court of America was an instrument of consummate reform which gave shape as well as from to America's national ideas and ideals. It was in recognition of this that Holmes had asserted that the rules which the courts will follow, the prophesies of what the courts will do in fact, and nothing more pretentious are what he means by law [1].

President Roosevelt with Holmes assertion when he described judges as the chief law makers in the United States. According to him, judges are the final authority and that "every time they interpret contract, property, vested right, due process of law, liberty, they necessarily enact into law parts of a social philosophy and as such interpretation is fundamental, they give direction to lawmaking. The position taken by this research is that the courts or judges in Nigeria should through its interpretative functions advance the course of democracy and champion the enthronement of justice, equity and good governance by the avoidance of excessive legalism at the expense of moral and natural justice [4].

with the provision of the law. Protection of human dignity forms the core of human rights. The liberal theory of John Locke had as much influence on the constitution of the United States as much as it had over the constitution of Nigeria. According to Locke, individual citizens have the rights against the state which in fact was the reason for the formation of a political society - the state. The state according to Locke was created as a trust for the protection of their natural right to "life, liberty and property" [3].

For Locke, therefore, individuals are ends; the state is the means and when the state is unable to protect the rights of the individual citizen, the individual should not only resist the state but

should also dissolve it. To have this freedom in the constitution is one thing; the consummation of the right is another thing. This is because a democratic government can violate or suppress these rights. Several governments in Nigeria in the past had engaged in the violation of rights and all the revolutions in Nigeria or military coups have ostensibly been based on the notion of abuse of power by the incumbent government. In all cases of abuse of power by the government, the courts were ready allies, interpreting the law as given irrespective of the immorality and injustice generated by such laws as long as the written law did not introduce morality as an element for determining the validity of the exercise of the powers. The consequences was serious and predictable as what ensued was flagrant violation of human rights and eventual collapse of governments. Nigeria had fought a thirty months old war and had recorded three failures in democratic experiment. As Nigeria again embark on another democratic experiment, it had to be stressed that morality which is the foundation of the essential elements of any enduring and sustainable human civilization should be elevated to a philosophical ideology to be imbibed by individuals and institutions in Nigeria including all the organs of government; the legislature, the executive and the judiciary [8].

The researcher is in agreement with C.S. Nwodo in his assertion that immorality is at the heart of the growth and development of any human civilization and Nigeria cannot be an exemption. According to him, Nigeria or any other group to grow politically, socially, and economically must be committed to sound moral principles.²⁵ This will mean that democracy may not succeed in Nigeria if it is not built on moral foundation. It will further mean that courts in Nigeria must appreciate the moral foundation of democracy and would therefore include moral and

ethical considerations in its commitment to justice without which Nigeria's democratic ambition may be after all a mirage.

In a democracy, the law is linked to the principles of justice and has a moral basis. That there could be justice outside justice according to law would sound superstitious to a totalitarian state like the USSR before Perestroika and Glasnot of Gorbachev. In that era of Russian history, law itself was regarded as an instrument in the service of those in power - The dictatorship. The structure of law was in the Austinian side strictly imperative and judges in the Soviet courts were expected to interpret laws as envisaged by the dictatorship of the ruling class. Judges apply the laws as envisaged by the dictatorship of the ruling class. Judges apply the law and do not create any and cannot either out of equity or for any other reason deviate from enacted legislation. According to Lenin, one of the founders of USSR, "the court is an organ of state power. The liberals sometimes forget this. For a Marxist, it is a sin to do so [8].

Lenin's thesis has summarized what this research has been labouring to explain. In a democratic liberal dispensation, law is linked to an absolute value. In dictatorship, this is not the case. The principle of legality does not even bind the ruling class, the Supreme Soviet, who were placed above the law. The law was at their disposal but cannot dictate their conduct.²⁷ Nigerian Judges, should therefore, distinguish the role of judges in a totalitarian state where extreme positivist theory of law and legalism should inevitably and predictably hold sway from a democratic liberal state where the activities of government including the judiciary is expected uphold democratic principles that originates from a moral foundation based on human dignity that by nature belongs to man [10].

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