

The Place of Customary International Law in the Nigerian Legal System – A Jurisprudential Perspective

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Abstract

Every society has a framework of laws and principles upon which it develops. The international society thus posits various rules upon which the sovereign states and other subjects of international law may develop in pursuit of the actualization of their interests. A similar situation obtains in Nigeria where her legal system prescribes various laws towards regulating social relations within her jurisdiction. As a sovereign state, Nigeria remains subject to international law with the incidental international responsibility for any breach of same. Though her legal system allows for the enforcement of international treaties in her municipal courts subject to certain qualifications, the law appears to be silent on the status of customary international law. This paper argues that customary international law forms part of the Nigerian legal system and should be applied where appropriate towards the maintenance of peaceful co-existence between all interests represented in the Nigerian society.

Keywords:

Individual, Law, Jurisdiction, Custom, State.

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Introduction

The move from individuality to communality in the history of human evolution cum civilization lends credence to the proposition that friction and tension are necessarily incidental to social interaction and existence. Indeed, it is undoubtedly true that human existence is founded on and sustained by the conceptualization of law, as a natural, physical and social phenomenon. This is based on the fact that law, as an instrument of social engineering, plays the primary role of striking a balance between the multifarious competing interests represented in the society.

Thus, on the municipal level, law maintains an important balance between the interests and rights of the individuals *inter se*, and that of the individual *vis-à-vis* the state. Indeed, the position in Nigeria is aptly stated by section 1(1) of the Constitution,² to the effect that its provisions is the supreme law and is binding on all persons and authorities (including Nigeria itself as a State).³ Similarly, in the

international plane, law also maintains the necessary balance between the interests cum rights of the various subjects of international law. Indeed, the purposes of international law include: resolution of problems of a regional or global scope, regulation of areas outside the control of any one nation and adoption of common rules for multinational activities. International law also aims to maintain peaceful international relations and resolve international tensions peacefully when they develop, to prevent needless suffering during wars, and to improve the human condition during peacetime.⁴

However, the concept of sovereignty entitles the State to determine what laws should obtain within her jurisdiction, without prejudice to her international responsibility with reference to breaches of international law. Nigeria is no exception such that section 12 of her

any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void” - *Kalu v Odili* [1992]5 NWLR (pt 240) 130; *Phoenix Motors Ltd v NPFMB* [1993]1 NWLR (pt 272) 718; *Speaker, Kogi State House of Assembly & 4 Ors v Hon. David Adegbe* [2010]10 NWLR (pt 1201) 45; *Cadbury Nig. Plc v Federal Board of Inland Revenue* [2010]2 NWLR (pt 1179) 561; *A.G -Ondo State v A.G - Federation* [2002]9 NWLR (pt 702) 222; *Hope Democratic Party v Mr. Peter Obi & 5 Ors* [2011]18 NWLR (pt 1278) 80; *Ekulo Farms Ltd v Union bank of Nigeria Plc* [2006] All FWLR (pt 319) 895; *Fasakin Foods (Nig.) Ltd v Shosanya* [2006] All FWLR (pt 320) 1059.

⁴ E.A. Oji, “Application of Customary International Law in Nigerian Courts”, *NIALS Law and Development Journal* (2011) 1(1), p 151.

² 1999 Constitution of the Federal Republic of Nigeria (as amended), hereinafter referred to as the 1999 CFRN (as amended).

³ *African Continental Bank Plc v Losada (Nig.) Ltd* [1995]7 NWLR (pt 405) 26; *Lakanmi v Attorney-General of Western State* (1971)1 UILR 210, (1974) ECSR 713; *Ereku v Military Governor, Midwestern State* (1974)10 SC 59; *Onyiuke v Eastern States Interim Assets and Liabilities Agency* (1974)10 SC 77. This position is given more impetus by section 1(3) of the 1999 CFRN (as amended) which provides that “if

Constitution provides that “*no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly*”.

The implication of the above is that international law is recognized by the Nigerian legal system provided it is codified in a treaty to which Nigeria is a party and has been domesticated by an Act of the National Assembly.⁵ No mention is made of customary international law and it appears that it is inapplicable in so far as Nigerian jurisprudence is concerned. This paper makes a critical analysis of the concept of customary international law, its relationship with municipal law and the Nigerian legal system. It pontificates that customary international law is recognized by the present state of the Nigerian legal system and makes a case for its application in Nigeria. It enjoins the judiciary (both the Bar and the Bench) to adopt same where applicable in the determination and

resolution of disputes; just as it calls upon the legislature and the executive to take cognizance of same in the making and implementation of laws and policies for the sustainable development of the Nigerian society.

Sources of International Law

Any discourse on the sources of international law should rightly start from the provisions of article 38(1) of the 1945 Statute of the International Court of Justice (ICJ) which provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international customs, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁵ *General Sani Abacha v Gani Fawahinmi* [2000] FWLR (pt 4) 533 at 585-586, [1996]9 NWLR (pt 475) 710; *Comptroller of Nigerian Prisons v Adekanye* [1999]10 NWLR (pt 623) 400; *Ubani v. Director, State Security Service* [1999] 11 NWLR (pt 625) 129; Also see the High Court decisions in *Mohammed Garuba & Ors v Attorney-General of Lagos State & Ors* (unreported judgment of the Lagos State High Court in Suit No. LD/559M/90), *Bamidele Opeyemi & Ors v Professor Grace Alele-Williams* (unreported judgment of the Bendel State High Court in Suit No. B/6M/89) and *Gani Fawehinmi v The President* (Unreported, Suit No. M/349/92), all cited in J.A. Dada, “Human Rights under the Nigerian Constitution: Issues and Problems”, *International Journal of Humanities and Social Science* [Special Issue - June 2012]2 (12), pp. 33 – 43.

This provision is widely recognized as the most authoritative and complete statement as to the sources of international law.⁶

International conventions, otherwise called treaties, are written agreements between two or more sovereign states. International organizations may also be given the capacity to make treaties, either with sovereign states or other international organizations.⁷ Although treaties are basically agreements between the parties thereto, the binding effect conferred on them by the various enforcement machineries in the international sphere imbues same with a status akin to legislation at municipal law. Treaties may incorporate rules of custom or develop new law. Treaty law thus is created by the express will of states. The present system of international law remains largely consensual and centered on the sovereign state. It is within the discretion of each state to participate in the negotiation of, or to sign or ratify, any international treaty. Likewise, each member state of an international organization such as the United Nations is free to ratify any Convention adopted by that organization.⁸

Customary international law on its part is unwritten and derives from the actual practices of nations over time. To be accepted as law, the custom must be long-standing, widespread and practiced in a uniform and consistent way among nations. Some customary international law has been codified in recent years.⁹ For example, the Vienna Convention on the Law of Treaties codified the customary law principle of *pacta sunt servanda* which is to the effect that treaties between sovereign states are binding on the parties thereto and must be followed in good faith.¹⁰ However, it must be stated that treaties are not superior to customary law so that the former does not necessarily override the later and may co-exist with it.¹¹

The phrase ‘general principles of law recognized by civilized nations’ is taken to connote principles so general as to apply within all systems of law that have achieved a comparable state of development.¹² According to Professor Shaw, situations do arise where there is no treaty, custom or judicial authority

⁶ I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, Oxford University Press, 2003, p. 5; M.O. Hudson, *The Permanent Court of International Justice: A Treatise*, New York, Macmillan, 1934, p. 601. According to Professor Shaw, “*In international law, it is a dynamic source of law in the light of the nature of the international system and its lack of centralized organs*” – M.N. Shaw, *International Law*, 6th edn, New Delhi, Cambridge University Press, 2008, p. 70.

⁷ E.A. Oji, *op cit*, p. 152.

⁸ *Ibid.* It has been said that “the treaty making process is a rational and orderly one, permitting participation in

the creation of law by all states on the basis of equality” – Henkin *et al*, *International Law: Cases and Materials*, St. Paul-Minnesota, West Publishing Co., 1980, p. 73.

⁹ E.A. Oji, *op cit*, p. 154.

¹⁰ 1969 Vienna Convention on the Law of Treaties, article 26; *Gabcikovo-Nagymaros Project Case (Hungary v Slovakia)*, ICJ Reports, 1997, p. 7; *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)*, ICJ Reports, 1996, p. 102; *Nicaragua v USA (Military and Paramilitary Activities in and against Nicaragua) Case*, ICJ Reports, 1986, p. 392.

¹¹ *Ibid.*

¹² Henkin *et al*, *op cit*, p. 75.

to cover a particular point in international law. It is for such a reason that the general principles of law recognized by civilized nations came to be recognized as a source of international law so as to close such gap which is otherwise known as *non liquet*.¹³ Some of the general principles of law that has been applied by the courts include:

- i. the principle of *res judicata*;¹⁴
- ii. the principle that any breach of obligation incurs liability to make reparation;¹⁵
- iii. the general principle of subrogation;¹⁶
- iv. the principle of lifting the veil;¹⁷
- v. the principle of circumstantial evidence;¹⁸
- vi. the general doctrines of equity.¹⁹

Judicial decisions rendered by international courts are important elements in identifying and confirming international legal rules.²⁰ The most important international courts are the

International Court of Justice, which mainly handles legal disputes between nations, and the International Criminal Court, which prosecutes individuals for genocide, war crimes and other serious crimes of international concern.²¹ It must however be stated that although several regional courts have been established,²² the principle of *stare decisis* does not apply to international judicial tribunals though their decisions are often cited and utilized in subsequent decisions.²³

The opinions of highly qualified publicists as reflected in their writings also constitute a veritable source of international law. Starting from Gentili and Hugo Grotius, writers have contributed immensely to the development of international law.²⁴ Indeed, the works of such renowned writers constitute a means of ascertaining rules of customary international law. Such writings remain a way of arranging and putting into focus the structure and form of international law and of elucidating the nature, history and practice of the rules of

¹³ M.N. Shaw, *op cit*, p. 98; H. Thirlway, "The Law and Procedure of the International Court of Justice", *BYIL* (1988), p. 76; P. Weil, "The Court Cannot Conclude Definitely...? *Non Liquet* Revisited", *Columbia Journal of Transitional Law* (1997)36, p. 109; E.A. Oji, *op cit*, p. 154 – 155.

¹⁴ *Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)* Case ICJ Reports, 2007, p. 113.

¹⁵ *The Chorzow Factory Case* (1928) PCIJ Series A No. 17 p. 29.

¹⁶ *Mavrommatis Palestine Concessions Case* (1924) PCIJ Series A No. 2 p. 28.

¹⁷ *The Barcelona Traction Case* ICJ Reports, 1970, p. 6 at 39.

¹⁸ *Corfu Channel Case (U.K v Albania)* ICJ Reports, 1949, p. 4.

¹⁹ *Diversions of Water from River Meuse (Netherlands v Belgium)* Case (1937) PCIJ Series A/B No. 70 p. 73.

²⁰ 1945 Statute of the International Court of Justice, article 38(1)(d).

²¹ E.A. Oji, *op cit*.

²² Examples include the European Court of Human Rights (ECHR), Inter-American Court of Human Rights; African Court of Human and Peoples' Rights (ACHPR), etc.

²³ The position is aptly stated in article 59 of the 1945 Statute of the International Court of Justice to the effect that decisions of the court have no binding force except as between the parties and in respect of the case under consideration. However, the common practice is for the courts to follow earlier decisions unless the circumstances of the particular case under consideration suggest the contrary – *Cameroun v Nigeria (Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria) (Preliminary Objections)* ICJ Reports, 1998, p. 275.

²⁴ M.N. Shaw, *op cit*, p. 112.

international law. They play a useful role in stimulating thought about the values and aims of international law, as well as pointing out the defects that exist within the system, while making suggestions for the future.²⁵

Resolutions and decisions of the United Nations and other international organizations now also have a great impact on the views and practices of sovereign states, sometimes leading to rapid formation of customary international law.²⁶ The activities of some of these organizations result in draft conventions that may be adopted as treaty by the United Nations General Assembly.²⁷ Indeed, the United Nations Security Council, and some international organizations such as the European Union, have been conferred with power to enact directly binding measures.²⁸

The Nature of Customary

International Law

Albeit at risk of prolixity, it must be stated that article 38(1) of the ICJ Statute²⁹ establishes the place of international customs as a source of international law.³⁰ The existence of

customary rules of international law can be deduced from the practice and behavior of states.³¹ However, in the process of such logical deduction, a distinction has consistently been drawn between custom strictly so-called and usage. Usage represents an international habit of action without legal obligations, whereas custom represents those usages which have obtained the force of law.

It is instructive to note that the very nature of customary international law crystallizes as a necessarily incidental precipitate of the distinction above stated and may be summarily discussed under the following heads, *viz*: actual behavior of states (i.e. usage) including the elements of duration, generality, uniformity and consistency in such practice, and the psychological or subjective belief that such behavior cum usage is 'law'.

Actual Behaviour of States

Actual behavior of states means such usage as appears from the practice of states, which practice may take several forms such as treaties, decisions of international and municipal courts, municipal legislation, diplomatic correspondence, opinions of national legal advisers, practice of international and national institutions, policy statements, official manuals on legal questions (e.g. manual of military law), as well as

²⁵ *Ibid*, p. 113.

²⁶ E.A. Oji, *op cit*, pp. 155 – 156.

²⁷ For example, the International Law Commission – 1947 Statute of the International Law Commission, article 1(1).

²⁸ E.A. Oji, *op cit*.

²⁹ 1945 Statute of the International Court of Justice.

³⁰ I. Brownlie, *op cit*; M.O. Hudson, *op cit*. According to Professor Shaw, "In international law, it is a dynamic source of law in the light of the nature of the international system and its lack of centralized organs" – M.N. Shaw, *op cit*, p. 70.

³¹ *Ibid*, p. 73.

executive decisions and practices.³² According to Professor Shaw, “it is understandable why this first requirement..., since customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do”.³³

Although custom develops from recurrent acts of state practice, no particular duration is required in international law such that a lot will depend on the circumstances of the case and the nature of the usage in question.³⁴ Duration is thus not the most important component of state practice, though the practice must have gone over a period during which it becomes obvious that it is general in nature.³⁵

The element of generality of practice means that a large number of states must have adopted the practice. This does not mean universality in the sense that all states must adopt the practice. The position is more lucidly espoused by Professor Shaw as follows:

³² *Arrest Warrant Case (Congo v Belgium)*, ICJ Reports, 2002, p. 3 at 23 – 24; *Interhandel Case (Switzerland v United States of America)*, ICJ Reports, 1959, p. 27; *Reparation Case*, ICJ Reports, 1949, p. 174; *Yearbook of the ILC*, 1950, vol. II, pp. 368 – 372; J.L. Brierly, *The Law of Nations*, 6th edn, Oxford, Oxford University Press, 1963, p. 60.

³³ M.N. Shaw, *op cit*, 74.

³⁴ *Ibid*, p. 76.

³⁵ A.A. D’Amato, *Concept of Custom in International Law*, Ithaca, Cornell University Press, 1971, pp. 56 – 58; M. Akehurst, “Custom as a Source of International Law”, *BYIL* (1974-1975) 47(1), pp. 15 – 16; But see the contrary opinion to the effect that immemorial usage is required – *European Commission of the Danube Case* (1927) PCIJ Series B No. 14 p. 105 *per Judge Negulesco*.

The reason why a particular state acts in a certain way are varied but are closely allied to how it perceives its interests. This in turn depends upon the power and role of the state and its international standing. Accordingly, custom should to some extent mirror the perceptions of the majority of states, since it is based upon usages which are practiced by nations as they express their power and their hopes and fears. But it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.³⁶

³⁶ M.N. Shaw, *op cit*, p. 79. Also see the *North Sea Continental Shelf Cases*, ICJ Reports, 1969, p. 3 at 42 – 43.

The rule relating to uniformity and consistency of practice was laid down in the *Asylum Case*³⁷ where the International Court of Justice declared that a customary rule must be “in accordance with a constant and uniform usage practiced by the states in question”.³⁸ The need for uniformity and consistency of practice does not require complete uniformity, but there should be substantial uniformity. In the *Anglo-Norwegian Fisheries Case*³⁹ the court refused to accept the existence of a ten-mile rule for bays because there was no uniform practice in this respect.

b. The Psychological or Subjective Element

This element, otherwise referred to in legal terminology as *opinio juris necessitatis*, was first formulated by the French writer Francois Geny as an attempt to differentiate legal custom from mere social usage. It relates to the belief by a state that behaved in a certain way that it was under a legal obligation to act that way.⁴⁰ Thus, the *opinio juris*, or belief that a state activity is obligatory, is the factor which turns a usage into a custom and renders it part of the rules of international law. Put

differently, states will behave in a certain way because they are convinced that it is binding upon them to do so. Pontificating the need for this element in the emergence of a customary rule of international law, the International Court of Justice, in the *North Sea Continental Shelf Cases*, held *inter alia*:

The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the act is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.⁴¹

It must however, be noted that although a customary rule may arise notwithstanding the opposition of one or a few states provided the necessary generality is reached, the rule so created will not bind such persistent objectors unless they are rules of a very fundamental nature postulating by their nature universality of application (e.g. rules connoting obligations *erga omnes*) or those partaking of the nature

³⁷ *Asylum Case (Colombia v Peru)*, ICJ Reports, 1950, p. 266.

³⁸ *Ibid*, p. 276 – 277.

³⁹ ICJ Reports, 1951, p. 116 at 131; *Nicaragua v United States Case*, *supra*; *Right of Passage through Indian Territory Case*, ICJ Reports, 1960, p. 40; D.P. O’Connell, *International Law*, London, Stevens, 1970, pp. 15 – 16; D. Carreau, *Droit Internationale*, Paris, Pedone, 1994, p. 230.

⁴⁰ M.N. Shaw, *op cit*, p. 75.

⁴¹ *Supra*, at p. 44; *Nicaragua v United States Case*, *supra*; *Lotus Case (France v Turkey)* (1927) PCIJ Series A No. 10 p. 18.

of *jus cogens*.⁴² Such protests, when reinforced by acquiescence from other states, may create a recognized exception to the rule. The same cannot however, be said to apply to subsequent protests by a state after the full formation of a customary rule. Although the possibility of a state escaping from being bound by an already established custom through subsequent protests has been noted to exist,⁴³ the preponderance of opinion is that such states are bound by the rule and may at best work towards the evolution of a new rule to displace the existing one.⁴⁴ Note also that although generality of practice is required for the formation of customary law, it is possible for a local or regional custom among a group of states or two states only to emerge.⁴⁵

Basis of Obligation of Customary International Law

The basis of obligation of international custom is to be found within the various theories on the basis of obligation of international law as a complete system of law.

⁴² *Anglo-Norwegian Fisheries Case*, ICJ Reports, 1951, p. 139; *Asylum Case (Colombia v Peru)*, *supra*.

⁴³ The decision in the *Anglo-Norwegian Fisheries Case*, *supra* appears to suggest that when a state acts contrary to an established custom and other states prefer not to react to same in such a manner that suggest acquiescence, then that state may be considered as not being bound by the original rule. See G.I. Tunkin, *Theory of International Law*, Cambridge, Harvard University Press, 1974, p. 129.

⁴⁴ M. Virally, "Sources of International Law" in M. Sorensen (ed), *Manual of Public International Law*, London, Macmillan, 1968, pp. 137 – 138.

⁴⁵ *Right of Passage Case through Indian Territory Case*, *supra*.

The reason for the jurisprudential rationalization of the binding effect of international law is the apparent inconsistency between the existence of that system of law and the concept of state sovereignty. According to Brierly, "...if sovereignty means absolute power and if states are sovereign in that sense, they cannot at the same time be subject to law."⁴⁶ The question then is as to whether the sovereignty of states is reconcilable with international law or better put, as to the basis on which sovereign states feel bound by and do largely obey rules of international law.

The basis of obligation in state law differs radically from the basis of obligation in international law, which difference derives essentially from the difference in the nature of both systems of law. Municipal law is an expression or emanation of the will of the people as personified in the state⁴⁷ and

⁴⁶ J.L. Brierly, *The Law of Nations*, 6th edn, New York, Oxford University Press, 1963, p. 16.

⁴⁷ Thus, in the national legal order, the common will of the citizens finds its melting pot in the juristic entity of the state endowed with an institutional apparatus which lends cohesion to the society and authority cum force to its laws. This position obtains even in a military dictatorship or a totalitarian state in that upon the effective super-imposition of the will of the ruling class on the people, both wills melt into the 'state will' as epitomized by the legitimacy accorded the government. This does not necessarily mean that there is no possibility of the disintegration of 'state will'. Such disintegration will either result in the crystallization of a changed will for the same state (i.e. a change in government and its institutions, which may extend to the laws applicable in the state) or it may result in the disintegration of that state and the emergence of smaller states each possessing its own will.

consists of rules recognized and enforced by the sovereign state. Municipal law is therefore, essentially a law of subordination emanating from the will of a sovereign state (with legislative, executive and judicial powers) and addressed to subjects who are bound to obey, usually under the pain of sanction.⁴⁸ Conversely, there is the absence of a sovereign law-making authority in international law, absence of a sovereign executive authority enforcing international law and absence of a supreme tribunal with compulsory and unlimited jurisdiction. Thus, the international system is one of co-ordination in the sense that the community of states who are all sovereign, constitute at the same time the subjects of international law who are bound by the laws.⁴⁹

There are two major schools of thought on the basis of obligation in international law, *viz*: voluntarism (sometimes called positivism or consensualism) and objectivism (of which *jusnaturalism* is a variant).

Voluntarism proceeds from the fundamental assumption that rules of law are products of the human 'will', they exist for this will and also by this will. This school of thought has

been theoretically rationalized from different perspectives. According to Jellinek, since no state, in its attribute of sovereignty, is subject to any other state, it is the sovereign manifestation of state will that creates law. The state does this through the faculty of self-determination whereby the state creates law for itself in both internal and external affairs, and the faculty of self limitation whereby the state subjects itself, when it thinks same expedient to its private law, to recognize the personality of foreign states and bind her own will by entering into the international system. Thus, the continued obedience of states to international law is an expression of their sovereign will.⁵⁰ Triepel, on his own, opines that the 'will' that can impose on and bind sovereign states must be a 'superior will'. Since the will of no single state imposes, it has to be the common will of states. This 'common will' comes into existence through the '*vereignbarung*' which designates 'a union of wills' in which the wills of the participating states seek the same common objective in union in contradistinction to a 'contract' where the contracting wills pursue different objectives. The '*vereignbarung*' may be expressly realized as is the case in treaties, or it may be tacitly realized as in customary

⁴⁸ This aligns with the Austinian command theory of law to the effect that law is a species of command by a sovereign (a determinate political superior) to his subjects (political inferiors) who are under a duty to obey with the pain of sanction for any violation – J.S. Austin, *The Province of Jurisprudence Determined*, H.L.A. Hart (ed), London, Weidenfeld & Nicolson, 1954, p. 14.

⁴⁹ C. Rousseau, *Le Droit International Public*, Paris, Sirey, 1970, p. 27.

⁵⁰ G. Jellinek, *Die Rechtliche Natur der Staatenverträge: Ein Beitrag Zur Juristischen Construction des Völkerrechts*, Wien, A. Holder, 1880, p. 10.

international law.⁵¹ Cavaglieri rejects the view that international law rests on an external command and instead maintains that international law is merely a system of promises between co-ordinated and juridically equal subjects. He ascribes the juridical basis of the binding common will of states to the principle of *pacta sunt servanda*.⁵² Anzilotti supports this view and maintains that the principle is an absolute postulate of the international legal system imposing on, and independently of, the will of states. Thus, it is an *a priori* assumption of the international system which itself cannot be proved juridically.⁵³

Conversely, the objectivist doctrine situates the origin of the binding force of international law outside the human 'will' and places it either in a fundamental norm from where all rules emanate (such as the normativist theory of the Vienna school of thought led by Kelsen and Verdross) or in social necessities (as in the theories of Duguit and Scelle). Kelsen explains the binding force of international law on the basis of the law of normativity in which he ascribes to the principle of *pacta sunt servanda* the role of a fundamental norm which confers validity on all subordinate norms in the international legal system. In this

hierarchically ordered system, each norm derives validity from a higher norm culminating in a legal pyramid. This is similar to the national legal order where the constitution, imparts validity on other statutes which in turn validates by-laws and delegated legislations culminating in the individualization of the norm by the execution of an act by an official of the system. According to him:

We have to start from the lowest norm within international law, that is, from the decision of an international court. If we ask why the norm created by the decision is valid, the answer is furnished by the international treaty in accordance with which the court was instituted. If again we ask why this treaty is valid, we are led back to the general norm which obligates the states to behave in conformity with the treaties they have concluded, a norm commonly expressed by the phrase *pacta sunt servanda*. This is a norm of general international law, and general international law is created by custom constituted by the act of states. The basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact,

⁵¹ H. Triepel and R. Brunet, *Droit International et Droit Interne*, Paris, A. Pedone, 1920, p. 15.

⁵² A. Cavaglieri, *Lezione di Diritto Internazionale: Parte Generale*, Napoli, Gennato Maio, 1925, p. 44.

⁵³ D. Anzilotti, *Corso di Diritto Internazionale*, Paris, Sirey, 1929, p. 46.

and might be formulated as follows: ‘the states ought to behave as they have customarily behaved’.⁵⁴

Professor Brierly reminds us that there need not be any mystery about the source of the obligation to obey international law and declares that a mere juridical explanation cannot suffice to solve the problem of the obligation to obey the law. The answer must be sought outside the law. For him, the obligation to obey international law has a moral foundation as dictated by human rationality and social necessity. Thus, he declares that:

The ultimate explanation of the binding force of all law is that man, whether he is a single individual, or whether he is associated with other men in a state, is constrained in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.⁵⁵

For sociological jurists, the centre of gravity of law lies in the society itself. Social necessities provide not only the origin but also the basis and the validating criterion of law. Thus, Professor Leon Duguit is recounted as having opined that all laws, including international law, are products of social

solidarity. The transformation of a social norm into a juridical norm (otherwise called objective law) occurs when the bulk of the members of the society accept as legitimate its regular enforcement by those in power. Adopting this logic, Scelle declares that the respect for social solidarity is not only the basis of law but is also a biological necessity since no one can compromise it without harming societal life and his own life.⁵⁶

There is some merit in all these theories; their weakness lies in their claim to universality which taints their credibility. Indeed, it is submitted that the true basis of obligation of international law, more especially custom, is to be sought in a hybrid of all these theories and may be stated thus: ‘the consent or will of the states to be bound by their common acts as necessitated by such moral and social considerations as are prevalent in the society at the relevant era’.

Relationship between International Law and Municipal Law

There are two major conceptions of the relationship between international law and municipal law which conceptions logically derive from and reflect the position adopted by theorists with relation to the basis of obligation in international law. Thus, while the voluntarist theory which ascribes the basis

⁵⁴ H. Kelsen, *General Theory of Law and State*, Cambridge, Harvard University Press, 1945, pp. 369 – 370.

⁵⁵ J.L. Brierly, *op cit*, pp. 54 - 56.

⁵⁶ G. Scelle, *Manuel de Droit International Public*, Paris, Domat-Montchrestein, 1948, p. 6.

of obligation to the consent of states leads to ‘dualism’, the objectivist theory which situates the basis of obligation of law outside the human or state will favour ‘monism’.⁵⁷

Dualists’ doctrines postulate that municipal law and international law constitute two distinct and separate categories of legal systems. Thus, the validity of municipal law is not conditioned by international law, such that within a state, the rules of international law cannot be applied as such, but only after being transformed or received into that legal system.⁵⁸

The monists on the other hand, maintain that international law and municipal law must be regarded as manifestations of a single conception of law. The main reasons for this assertion is that both laws are addressed ultimately to the conduct of the same subjects (i.e. the individual) and some of the fundamental notions of international law cannot be comprehended without the assumption of a superior legal order from which the various systems of municipal law are, in a sense, derived by way of delegation.⁵⁹

International practice does not endorse any of the competing theories of Monism or Dualism unreservedly.⁶⁰ As regards the question of primacy of international law, international jurisprudence leans in favour of monism with primacy of international law. It is, in the words of Hersch Lauterpacht, “a critical and realistic monism, fully alive to the realities of international life.” He gives his reasons for this cautious view:

Just as international law is at present an imperfect law in a stage of transition to true law; so its monistic structure is not absolute and thorough going. It is a monism qualified by dualistic exceptions and contradictions. This statement may appear paradoxical seeing that in pure juridical logic there is no transition between monism and dualism. But the very imperfection of international law implies that, if we are to give a true picture of its present position, we cannot treat it as a logical system. It is therefore necessary to admit that, so far as positive law is concerned, monism, while providing a working instrument of scientific knowledge for international law as a whole and while providing an adequate and the only possible basis for its development to true law, often breaks

⁵⁷ A third theory, nihilism, preaches absolute supremacy of municipal law over international law. This theory appeared under the favourable conditions created by German militarism and was called to serve its predatory interests. See E.A. Oji, *op cit*, p. 156.

⁵⁸ E.A. Oji, *op cit*; H. Triepel, *Volkerrecht und Landesrecht*, Berlin, Leipzig, C.L. Hirschfeld, 1899, p. 7; K. Strupp, “Les Regles Generales du Droit International de la Paix”, *HR* (1934)47, p. 43; M.N. Shaw, *op cit*, p. 131.

⁵⁹ E.A. Oji, *op cit*; H. Kelsen, *op cit*, p. 363 – 380; M.N. Shaw, *op cit*, p. 132.

⁶⁰ E.A. Oji, *op cit*.

down and yields to the reality of a dualistic nature.⁶¹

Dr. Oji opines that Lauterpacht's view accords with contemporary reality. Citing the decision in the *Alabama Claims Arbitration*,⁶² she pontificates that monism will ensure the survival of international law since the logic of dualism would not only be a subversion, but also a negation, of international law. In line with Dr. Oji's position, it is settled law that a state cannot plead the provisions of its own law or deficiencies in that law in answer to a claim against it for breach of an obligation under international law.⁶³ The principle of primacy of international law over municipal law was reaffirmed by the ICJ in its Advisory opinion in the *United Nations Headquarters Agreement Case*.⁶⁴ This principle of primacy of international law over municipal law before international tribunals applies to all aspects of a state's municipal law, to its constitutional provisions, its ordinary legislation, the executive acts of its officials and to the decisions of its courts.⁶⁵ Today, international

human rights courts often declare national laws incompatible with international rules and may award compensation to those whose rights have been violated.⁶⁶

Application of International Law in Municipal Courts

It must be stated that in exercise of sovereignty, it is within the exclusive jurisdiction of a state to determine what laws should operate within its legal system. Thus, although a state bears an obligation to act in conformity with international law and will bear responsibility for breaches of it in the international sphere, conflict between a state's municipal law and its international obligations does not affect the effectiveness of that municipal law within the territory of that state.⁶⁷ Perhaps, this explains why Potter, P. in

(1929); *Chattin's Claim*, 4 RIAA 282 (1927); *Exchange of Greek and Turkish Populations Case*, PCIJ Reports, Series B, No. 10, p. 20; *Finnish Ships Arbitration (Finland v UK)*, 3 RIAA 1479 (1934).

⁶⁶ For instance, in its operation, the European Court of Human Rights may hold a state law invalid if it is against the Community law. See the case of *Christine Goodwin v UK* (2002) ECHR 588; E.A. Oji, *op cit*.

⁶⁷ The obligation to obey international law and the concomitant responsibility attendant to breach of same usually compels the state to take cognizance of their international obligations in the course of municipal exercise of executive, legislative and judicial powers of government. Again, the development of international law, especially international custom also takes the municipal behavior of states into cognizance. In view of the above, Professor Shaw argues that "there is indeed a clear trend towards the increasing penetration of international legal rules within domestic systems coupled with the exercise of an ever-wider jurisdiction with regard to matters having an international dimension by domestic courts. This has

⁶¹ H. Lauterpacht, *International Law, Collected Papers*, Vol. 1, Cambridge, Cambridge University Press, 1970, p. 214.

⁶² (1872) Moore Arbitration, p. 653.

⁶³ Also see the *Free Zones Case* PCIJ Reports, Series A/B, No. 46, p. 47; the *Graeco-Bulgarian Communities Case* (1930) PCIJ Reports, Series B, No. 17, p. 32 and the *Polish nationals in Danzig Case* (1932) PCIJ Reports, Series A/B, No. 44, p. 24.

⁶⁴ ICJ Advisory Opinion of 28th April 1988.

⁶⁵ *Massey Claim Case*, 4 RIAA 155 (1927); *Chorzow Factory Case*, *supra*; *Peter Pazmany University Case*, PCIJ Decision of 15th December 1933; *Youman's Case (United States v Mexico)*, 4 RIAA 110 (1926); *Caire's Claim (France v Mexico)*, 5 RIAA 516

the case of *Wilkinson v Kissinger*⁶⁸ refused to be bound by the decision of the European Court of Human Rights (ECtHR) in *Christine Goodwin v UK*.⁶⁹ It is therefore not surprising that there is no consistent or general behaviour by states as regards the application of international law within their municipal legal system such that the practice varies from state to state.

The U.S. Constitution designates ratified treaties, along with the Constitution itself and federal statutes, the supreme law of the land⁷⁰ and empowers Congress “to define and punish ... offences against the Law of Nations.”⁷¹ Customary international law is automatically incorporated into the U.S. legal system as federal common or unwritten law.⁷² The U.S. state and federal courts presume that U.S. law conforms to international law; such an attitude has been urged consistently by the Supreme Court of the United States.⁷³

The practice in the United Kingdom allows for the applicability of international law⁷⁴ on the basis of the doctrine of transformation⁷⁵

and the doctrine of incorporation. The doctrine of transformation maintains that before any principle of international law can be applied in English courts, it has to be transformed or specifically adopted into English law by the use of appropriate constitutional machinery, i.e. by an Act of parliament, authoritative judicial decision or established usage.⁷⁶ Conversely, the doctrine of incorporation holds that rules of international law are automatically part of English law and are applicable in British courts provided they are not inconsistent with Acts of parliament or prior authoritative judicial decisions.⁷⁷ The modern practice in UK shows a preference for the incorporation doctrine.⁷⁸

led to a ...greater preparedness by domestic tribunals to analyze the actions of their governments in the light of international law” – M.N. Shaw, *op cit*, p. 138.

⁶⁸ (2006) EWHC 2022 (*Fam*), (2006) H.R.L.R. 36.

⁶⁹ *Supra*.

⁷⁰ Article VI.

⁷¹ Article I, Section 8.

⁷² *The Paquette Habana* (1900) US 677 20 Sup. Ct. Rep. 290.

⁷³ *Filartiga v Pena-Irala* (1980) 630 F. 2d 879.

⁷⁴ See Upjohn J. in *Re Claim by Herbert Wragg & Co. Ltd* (1956) Ch 323 at 334; and Lord Cross in *Oppenheimer v Cattermole* (1976) AC 249 at 277.

⁷⁵ Otherwise called the specific-adoption theory.

⁷⁶ *R v Keyn* (1876)2 ExD 63; *Mortensen v Peters* (1906)8 F (J) 93; M.N. Shaw, *op cit*, p. 139.

⁷⁷ While expounding this theory, Blackstone opined that “the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be part of the law of the land”. See M.N. Shaw, *op cit*, p. 140; *West Rand Gold Mining Co. v R* (1905)2 KB 391; *Chung Chi Cheung v R* (1939) AC 160; *Buvot v Barbuitt* (1737) Cases t. Talbot 281; *Triquet v Bath* (1764)3 Burr 1478.

⁷⁸ *Ibid*; *Trendtex Trading Corp. v Central Bank of Nigeria* (1977)2 WLR 356; *Thai-Europe Tapioca Services Ltd v Government of Pakistan* (1975)3 All ER 961; *Maclaine Watson v Department of Trade and Industry* (1988)3 WLR 1033 where Nourse, LJ emphasized that the *Trendtex Case* had resolved the rivalry between the incorporation and transformation doctrines in favour of the former. Also see the dictum of Lord Slynn in *Ex Parte Pinochet (No. 1)* (2000)1 AC 61 at 77. However, the qualifications to this rule must be noted. Firstly, treaties ratified by UK except those relating to the conduct of war and concession of territory, and also offences under international law do not automatically become incorporated into English law until specifically adopted by an Act of parliament – *Maclaine Watson’s Case, supra*; *the Parlement Belge* (1879)4 PD 129. Secondly, an Act of

Considering the above, it may be asserted that while in some countries a treaty or customary international law is given constitutional status superior to national legislation,⁷⁹ in other countries treaties do not become effective in national law until they are enacted by Parliament. This latter attitude is adopted in most English speaking countries of Africa. Most of such countries require an Act of Parliament to incorporate international law into municipal law before it can be enforceable.⁸⁰ Most of the Constitutions in their provision on the applicability of international law within the courts of the state refer to treaty law. Nothing is said on the status of international customary law before

parliament or authoritative judicial decision prevails over any rule of international law to the contrary – *Mortensen v Peters*, *supra*. However, note the English law presumption that parliament does not intend to act in breach of international law such that an Act of parliament should be interpreted in a manner as would avoid conflict with international law – *Garland v British Rail Engineering Ltd* (1983)2 AC 751; *Ex Parte Brind* (1991)1 AC 696. Thirdly, on issues relating to the status of a foreign state or government, or the existence of a state of war, a certificate signed by the Foreign Secretary is conclusive of the issue and overrides any position adopted on the issue by international law – *The Annette* (1919) P 105; *City of Berne v The Bank of England* (1804)9 Ves. Jun. 347. Fourthly, by virtue of the act of state doctrine under English law, an alien injured abroad by an act authorized or ratified by the Crown has no remedy in English courts, despite any rule of international law to the contrary – *Buttes Gas & Oil Co. v Hammer (No. 3)* (1982) AC 888; *Buck v Attorney General* (1965)1 Ch 745; *Helen Liu v Republic of China*, 29 ILM, 1990, p. 192.

⁷⁹ See the Basic Law of the Federal Republic of Germany, Article 25; Dutch Constitution, Article 65; 1947 Italian Constitution, Article 10.

⁸⁰ See section 1999 CFRN (as amended), section 12; Constitution of South Africa, Article 242; Namibia requires that the parliament does not object to the international law for it to be effective.

these courts. Only one African Constitution,⁸¹ that of South Africa, in 1994 and 1996 explicitly refers to customary law. According to section 231, “the rules of customary international law binding upon the Republic shall ... form part of the law of the Republic”. The implication of the above situation is lucidly captured by Dr. Oji in the following words:

In consequence, it would appear that international customary law only becomes incorporated on the basis of the acceptance of states to act in accordance with the general rules of international law. What is the implication of such a situation? When it is noted that treaties which have the positive consent of states in signature and ratification are mostly subjected to parliamentary re-enactment and or acceptance, it only leaves to imagination what may be the attitude of some of the states whose Constitution is silent on the status of international customary law. Especially, realizing how international customary law is established, it may give room to defaulting states to argue against its positive nature.⁸²

⁸¹ M.T. Ladan, *Materials and Cases on Public International Law*, Zaria, Ahmadu Bello University Press Ltd, 2007, p. 6.

⁸² E.A. Oji, *op cit*, pp. 161 – 162.

Though section 12 of the Nigerian Constitution provides only for the applicability of treaties ratified by the country thus suggesting the municipal non-enforceability of international customs,⁸³ an analysis of the Nigerian legal system reveals the position of customary international law in Nigeria.

Nature of the Nigerian Legal System

The Nigerian legal system has a chequered history.⁸⁴ From the pre-colonization era when all the different ethnic groups that comprise the country each had its own set of rules and practices governing life in their respective societies and also various institutional frameworks for the administration and enforcement of these rules, the incursion of colonization introduced a radical change in the nature of the Nigerian legal system. It brought about the introduction of English law (both in its received and extended form) and also the establishment of English-styled courts in Nigeria. The post-independence era produced the legal system as we have it today

with the Constitution providing for the making of the various laws and the establishment of the various institutions regulating affairs in the country. The sources of Nigerian law currently include the Constitution, Nigerian legislation, Nigerian case-law, customary law, English law and international law.

The Nigerian Constitution is the fundamental law of the land and specifies a bundle of rights and duties, as well as rules that may be enforced under the law.⁸⁵ One remarkable feature of all Nigerian constitutions is that they have all been written. Unlike the position in Britain where parliament is supreme,⁸⁶ the Nigerian Constitution is superior to all other laws of the land and regulates the judicial, executive and legislative organs of government as well as the rights of the citizens.⁸⁷ Thus, it is the basic norm; the ultimate premise of the legal system.⁸⁸

Nigerian legislation consists of all Acts, Laws, and subsidiary legislations in force in Nigeria. All enactments made by the National Assembly are designated as 'Acts' while those

⁸³ This absurd and totally unwelcome proposition appears to be reinforced by the '*expressio unius est exclusio alterius*' maxim of statutory interpretation (which literally means that the express mention of a thing excludes all others) – *Peoples Democratic Party v INEC* (2001)1 WRN 1; *Richardson v Lead Smelting Co.* (1762)3 Burr 1341.

⁸⁴ An elaborate discussion on the history of the Nigerian legal system may be found in C.J.S. Azoro, "The Place of Morality in the Nigerian Legal System: A Jurisprudential Approach", an unpublished LL.B Project submitted to the Faculty of Law, Nnamdi Azikiwe University, Awka, pp. 37 – 42.

⁸⁵ For example, Chapter IV which provides for fundamental rights and freedoms.

⁸⁶ *Lee v Bude & Torrington Railway* (1871) LR 6 CP 576; *R v Jordan* (1967) Crim LR 483; *Chenny v Conn* (1968)1 WLR 242.

⁸⁷ 1999 CFRN, section 1(1) & (3); *INEC v Musa* (2003)10 WRN 1; *Attorney General of Abia State v Attorney General of the Federation* (2002)17 WRN 1, [2002]6 NWLR (pt 763) 264; *Attorney General of Ondo State v Attorney General of the Federation* (2002)27 WRN 1, [2002]9 NWLR (pt 772) 222.

⁸⁸ D Lloyds, *The Idea of Law*, London, Penguin Books, 1979, p. 194.

made by the Houses of Assembly of the various states are designated as 'Laws'.⁸⁹

Though the traditional role of the courts is *jus dicere* and not *jus dare*,⁹⁰ the Nigerian judges still make law, albeit in a different sense from the legislature.⁹¹ For instance, where there is no law previously governing the situation before the court, the judge may create some principles of law for the situation.⁹² Furthermore, the judges have to apply the law to ever-changing combinations of circumstances to which the law has never been previously applied. Where a court declares a rule for purposes of deciding a case,

such rule becomes a precedent for deciding future cases with similar facts. Judicial precedents is therefore one of the sources of Nigerian law.⁹³

Customary law in Nigeria is traditionally classified into ethnic/non-muslim law and sharia law. The ethnic/non-muslim law consists of the various indigenous laws applicable to the different ethnic groups in Nigeria. Islamic law applies to adherents of that religion and was introduced into Nigeria as an aftermath of the successful process of Islamization and the *jihads* in Northern Nigeria. It is based on the Holy Koran and the teachings of the Prophet Mohammed as interpreted by the rightly guided Caliphs. In some areas, Islamic law has completely supplanted the pre-existing customary laws, while in others, there has been a relative fusion of the two systems. The teachings of the Maliki school of thought is predominantly applied in Nigeria.⁹⁴ Section 14 of the Evidence Act makes provisions for the application of customary law in Nigeria.⁹⁵

English law (in its received and extended forms) are also part of Nigerian law as an incidence of colonialism. The extended

⁸⁹ When federalism was introduced in Nigeria in 1954, all enactments made by the central legislature prior to 1st October 1954 retained the name 'Ordinances' while those of the regional legislatures were designated 'Laws'. On attainment of independence in 1960, the laws made by the federal legislature were renamed 'Acts' while those of the Regions continued to be 'Laws'. Upon military intervention in Nigerian political life, enactments made by the Federal Military Government became known as 'Decrees' while laws made by the State Military Governors or Administrators were known as 'Edicts'. With the return of democratic government, the 'Decrees' were renamed 'Acts' while the 'Edicts' were renamed 'Laws'.

⁹⁰ i.e. to state and declare the law, not to give law. See the 1999 CFRN (as amended), section 6; *Attorney General of Ondo State v Attorney General of the Federation*, *supra*; *Lakanmi v Attorney General of Western Nigeria*, *supra*; *Attorney General of Abia State v Attorney General of the Federation* (2006) NSCQR 161; *Attorney General of Ogun State v Attorney General of the Federation* (1982)1-2 SC 13; *Attorney General of Lagos State v Attorney General of the Federation* (2004)20 NSCQR 29; P.A.O. Oluyede, *Constitutional Law in Nigeria*, Ibadan, Evans Bros Publishers Ltd, 1992, pp. 75 – 78.

⁹¹ *Ogunlowo v Ogundare* [1993]7 NWLR (pt 307) 610; C.K. Allen, *Law in the Making*, 7th edn, Oxford, Clarendon Press, 1964, p. 16.

⁹² *Bello v Attorney General of Oyo State* (1986)12 SC 1; *Obi v INEC* [2007]11 NWLR (pt 1046) 565; *Amaechi v INEC* [2007]18 NWLR (pt 1065) 2, (2007)7-10 SC 172.

⁹³ J.O. Asein, *Introduction to Nigerian Legal System*, 2nd edn, Lagos, Ababa Press Ltd, 2005, pp. 73 – 97; O.N. Ogbu, *Modern Nigerian Legal System*, 2nd edn, Enugu, CIDJAP Press.

⁹⁴ J.O. Asein, *op cit*, p. 118.

⁹⁵ Evidence Act, 2011; *Agbai v Okogbue* [1991]7 NWLR (pt 204) 391; *Oyewunmi v Ogunesan* [1990]3 NWLR (pt 137) 137; *Ojisua v Aiyebilehin* [2003]11 NWLR (pt 723) 44.

English law refers to those English statutes made by the Crown and her agents, which were made to apply directly to Nigeria.⁹⁶ Received English law refers to the principles of common law, doctrines of equity and statutes of general application in force as at 1st January 1900 which were incorporated into Nigerian law by local legislations.⁹⁷

International law is one of the sources of Nigerian law. Albeit at risk of prolixity, it must be emphasized that the Nigerian Constitution provides for the domestic

application of any treaty ratified by Nigeria provided it has been transformed into Nigerian law by an Act of the National Assembly.⁹⁸ As will be seen shortly, international customs also form part of Nigerian law.

Customary International Law and the Nigerian Legal System

It is quite unfortunate that the position of customary international law in Nigeria is as clear as mud.⁹⁹ Section 12 of the Nigerian Constitution provides only for the applicability of treaties ratified by the country thus suggesting the municipal non-enforceability of international customs. This absurd and totally unwelcome proposition appears to be reinforced by the ‘*expressio unius est exclusio alterius*’ maxim of statutory interpretation (which literally means that the express mention of a thing excludes all others).¹⁰⁰

Though section 19(d) of the Nigerian Constitution provides that the foreign policy objectives of the country shall be the respect for international law and treaty obligations as well as the seeking of settlement of international dispute by negotiation, mediation, conciliation, arbitration and adjudication, this section is not enough to

⁹⁶ The Foreign Jurisdiction Acts (UK), 1843-1913 and the Colonial Laws Validity Act (UK), 1865 gave this power to the Crown. Since independence, all Nigerian Constitutions have preserved these laws. See 1960 Nigerian Constitution (Order-in-Council), section 3(1); 1963 CFRN; 1979 CFRN, section 274 and the 1999 CFRN (as amended), section 315. Also see the case of *Ibidapo v Lufthansa Airlines* [1997]4 NWLR (pt 498) 124 where the Supreme Court held that from 1960 till date, all the English laws, multilateral and bilateral agreements concluded and extended to Nigeria, unless expressly repealed or declared invalid by a court of law or tribunal established by law, remained in force subject to the provisions of the prevailing Nigerian Constitution.

⁹⁷ Interpretation Act, Cap 123, *Laws of the Federation of Nigeria*, 2004, section 32; High Court Law (Eastern Nigeria), Cap 60, *Laws of Eastern Nigeria*, 1963, section 3; Law of England (Application) Law (Western Nigeria), Cap 60, *Laws of Western Nigeria*, 1959, sections 28 and 29; High Court Law (Northern Nigeria), Cap 49, *Laws of Northern Nigeria*, 1963, section 35. Note that with the successive creation of states from the different regions, the new states adopt the laws of the parent region, sometimes with minor amendments. The received English law reception clauses of the relevant enactments in almost all the states are similar. Note also that the reference date of 1st January 1900 has been held to apply only to statutes of general application so as to allow for the application of the principles of common law and doctrines of equity in their dynamic nature and as perceived by the English courts from time to time. See the case of *Nigerian Tobacco Co. Ltd v Agunanne* (1995) LPELR-SC.31/1989, [1995]5 NWLR (pt 397) 541. Also see J.O. Asein, *op cit*, p. 107.

⁹⁸ *General Sani Abacha v Gani Fawahinmi, supra*.

⁹⁹ This is unlike the position in Ghana as seen in the preceding chapter of this work.

¹⁰⁰ *Peoples Democratic Party v INEC* (2001)1 WRN 1; *Richardson v Lead Smelting Co.* (1762)3 Burr 1341.

warrant the application of customary international law in Nigeria. This assertion is predicated on the fact that the section is dedicated to the foreign policy objectives which Nigeria as a state pursues and nothing more. Besides, section 6(c) of the Constitution makes, not only the provisions of section 19, but also the provisions of the entire Cap. II of the Nigerian Constitution non-justiceable.

The obvious lacuna in the Constitution is capable of keeping one in the dark as regards the applicability or otherwise of customary international law. There is a dearth of Nigerian judicial authorities on the issue. In the case of *Ibidapo v Lufthansa Airlines*,¹⁰¹ the Supreme Court failed to advert its mind to this issue while pronouncing on the position of international law in Nigeria and only focused on bilateral and multilateral agreements. The only Nigerian case that dealt with customary international law is the case of *African Continental Bank v Eagles Super Pack Ltd.*¹⁰² In that case, the issue for determination was whether the Uniform Customs and Practice (UCP) for documentary credit is applicable in Nigeria. The UCP was made by the International Chambers of Commerce with headquarters in Paris with a view of having a universal standardization of letters of credit in banking and commercial transactions. At the trial court, it was held, *per* Ononuju J. that the

UCP is not applicable in Nigeria. However, at the Court of Appeal, it was held that the UCP constitutes customary international law and can be judicially noticed and applied in Nigeria. Indeed, the Supreme Court, in *Akinsanya v United Bank for Africa*,¹⁰³ applied the provisions of the UCP although it was neither argued nor decided that it amounts to an international custom and whether same is applicable in Nigeria by virtue of that.

From the decision of the Court of Appeal in *African Continental Bank v Eagles Super Pack Ltd.*, and the attitude of the apex court in *Akinsanya v United Bank for Africa*, it may be argued that Nigerian courts can judicially notice an international custom under the provisions of the Evidence Act.¹⁰⁴ However, the validity of such an argument is doubtful considering the fact that section 258 of Evidence Act¹⁰⁵ defines custom to mean ‘a rule which in a particular district has from long usage obtained the force of law’. The word ‘district’ has been defined to mean ‘area of a country or town especially one that has a particular feature’.¹⁰⁶ Juxtaposing these two definitions, it can be seen that for a custom to be susceptible to the invocation of the

¹⁰¹ *Supra*.

¹⁰² [1995] 2 NWLR (pt 379) 590

¹⁰³ [1986] 4 NWLR (pt 35) 273

¹⁰⁴ Evidence Act 2011, s.17 (formerly Evidence Act, Cap E14, *Laws of the Federation of Nigeria*, 2004, section 14, which provides for judicial notice of custom).

¹⁰⁵ *Ibid*. This section is *ipsisima verba* with section 2 of the repealed Act.

¹⁰⁶ A.S. Hornby, *Oxford Advanced Learners' Dictionary of Current English*, 7th edn, Oxford, Oxford University Press, 2006) p.426.

principle of judicial notice under the Nigerian Evidence Act, such a custom must be that of a locality in Nigeria. The draftsman never intended any custom outside Nigeria, such that the attitude of the courts as depicted in the cases above remain of doubtful validity.

From the above, it becomes clear that the fate of customary international law as regards its applicability in Nigeria remains marred by uncertainties. Dr. Oji seriously criticizes the current position and argues for the application of international customs in Nigeria.¹⁰⁷ After a critical analysis of the nature of Nigerian customary law and an analogous exposition on the similarities between the two systems of law, she makes a case for the application of international customs in Nigeria, just on the same terms as Nigerian customary law. According to her:

...if ethnic customary law can form part of the body of Nigerian laws, so also can international customary law. It may only require that such international customary law be established before the Nigerian court; and that it passes the repugnancy test; incompatibility test and the public policy test.¹⁰⁸

She pontificates that the requirement of passing the repugnancy test will not constitute any problem, as before any norm of

international practice can translate into international customary law, it would have passed a stiffer test, that is, acceptability by a large number of the international community. Any practice that acquires such a generality of acceptance would certainly not be repugnant to natural justice, equity and good conscience. The requirement itself is such that is accepted by most civilized nations.¹⁰⁹

She envisages a problem as regards the compatibility test since several of the new international norms seek to change the *status quo*. To solve this, she falls back on the purpose of that requirement for the validity of ethnic customary law which is to make sure that there is consistency in the existence and application of law in the country and to abolish customary laws that conflict with the provisions of the Constitution and other laws made by the Nigerian legislature. She suggests that just as with ethnic customary law, for international customary law to be enforceable within the states, it should not be incompatible with any law for the time being in force. Her reason for arguing to sustain this position is that if it is not so, the position of the law, at some times may be unascertainable, especially

¹⁰⁷ E.A. Oji, *op cit*, pp. 163 – 167.

¹⁰⁸ *Ibid*, pp. 164 – 165.

¹⁰⁹ The ICJ has increasingly referred to “equity” in its judgments. For example, in the *Guld of Maine* case, (ICJ Report (1984) 246 at 305, it stated that the concepts of acquiescence and estoppel in international law follow from the fundamental principles of good faith and equity. It also referred to considerations of equity in the *Barcelona Traction* case. See the case of where the ICJ applied the principle of equity.

during the window periods of the emergence of international customary law. Again, it will also be possible for international customary law to define the rights and liabilities of citizens without any input by them through their elected representatives.¹¹⁰

As regards the public policy test, she argues that it is the public policy of Nigeria, and not that of the international community that will be relevant. This condition will take care of the customs and peculiar traditions of the country. For instance, the international policy may accept a norm that is totally alien and not in conformity with the belief of a people. For instance, the body of international human rights is growing rapidly, to protect certain minority groupings that some African culture may bluntly refuse to accord recognition. Thus, an international custom seeking to protect the rights of transsexuals may not be readily accepted in Africa, as not reflecting the immediate human rights challenges of the people. Treaty obligations consider this aspect of a people, thus the need for consent and provision for reservations in some cases.¹¹¹

From the above, it is clear that Dr. Oji does not suggest that section 17 of the Evidence Act expressly or impliedly provides for the domestic application of international customs in Nigeria. Rather, her position is that Nigerian courts can proactively invoke their

judicial powers towards applying international customs on the same basis as local customs considering the analogy between both systems of laws. Laudable as the logic in the above position may seem, it is our humble submission that it raises several issues of jurisprudential relevance which cast serious doubts as to its practicability.

First is the jurisprudential question of the basis upon which to found the domestic obligation to obey and apply international customs in Nigeria. As we have earlier submitted, the basis of the obligation to obey international law is the consent or will of the states to be bound by their 'common acts' as necessitated by such moral and social considerations as are prevalent in the society at the relevant era. What then will be the basis for the domestic application of international customs in Nigeria? This raises the vital issue of the public policy test by Dr. Oji. From her standpoint, the relevant 'will' is no longer the 'common will' of the various sovereign states from which the custom evolved. Rather, that 'will' is now made subject to the 'will' of the Nigerian people as deducible from the public policy of Nigeria. Since *opinio juris* is a vital element for international custom, it follows that unless Oji's 'public policy' is arrived at, international custom is inapplicable in Nigeria. It must be emphasized that 'public policy' is an ever-evolving concept and is not contained in a single document. It is not even the policy

¹¹⁰ E.A. Oji, *op cit*, pp. 165 – 166.

¹¹¹ *Ibid*, pp. 166 – 167.

of the Judge who is to apply the international custom. It is the view of the generality of the Nigerian people on any particular issue that constitutes her public policy on an issue. The plurality cum heterogeneity of the Nigerian socio-ethnic polity and the resultant differences in opinion on most issues will mean a difficulty in ascertaining the 'common will' of Nigerians on most subject matters of international custom and will invariably, affect its applicability.

The second is the issue of the apparent inconsistency between the logic of her position and Nigerian sovereignty. It is trite that in exercise of sovereignty, states reserve the authority to determine the laws that should operate in their legal system and for countries like Nigeria operating a written Constitution, same constitutes the *alpha* and *omega* of its legal system. This means that any law that is not expressly or impliedly allowed by the Nigerian Constitution, it forbids. This is the essence of the dictum of Niki Tobi, JCA (as he then was) in *Phoenix Motors Ltd v NPFMB*¹¹² where he observed that "the Constitution is the highest law of the land. All other laws bow or kowtow before it. No law which is inconsistent with it can survive. That law must die and for the good of the society..." Dr. Oji did not, and clearly could not have been able to expressly or impliedly trace her logic to the Nigerian Constitution or any law deriving

validity thereunder. Thus, she appears to posit that contrary to the principle of separation of powers under the Nigerian Constitution and in disregard of Nigeria's sovereignty, our Judges can make law by directly importing rules of customary international law without any constitutional backing. To that extent, we submit that the validity of her views remains in doubt.

Thirdly, she appears to have reduced international law to the same status as indigenous customary law. This is quite opposite the dictum of the Supreme Court in *Gen. Sanni Abacha v Gani Fawehinmi*¹¹³ to the effect that rules of international law in their domestic application, will prevail over any local rule of law to the contrary, subject to the provisions of the Constitution on their applicability.

Lastly, she appears to suggest that whatever is not repugnant to the international community will also pass the repugnancy test under Nigerian law since any practice that acquires such a generality of acceptance would certainly not be repugnant to natural justice, equity and good conscience. Thus, her requirement is met once such custom is accepted by most civilized nations. However, the fact that the general practice acceptable in most civilized countries allow same sex

¹¹² *Supra*.

¹¹³ *Supra*.

marriage and transsexualism,¹¹⁴ a practice considered repugnant under both Nigerian customary and statutory law casts serious doubts on the validity of her assertion.¹¹⁵ The repugnancy test under section 17 of the Evidence Act is the Nigerian standard and not that of the international community.

The various pitfalls in Dr. Oji's view necessitate a reflection on the nature of the Nigerian legal system so as to deduce a better rationale for the domestic application of international custom in Nigeria. It is trite that "customary international law is part of the common law of England."¹¹⁶ Also, it is trite that the common law is made part of the Nigerian legal system by section 32 of the Interpretation Act. The Interpretation Act is an Act of the National Assembly, validly made in exercise of the legislative powers conferred on that body by section 4 of the Constitution.¹¹⁷ A logical juxtaposition of the above position clearly reveals that customary international

law is part of Nigerian law, applicable by our courts to the same extent as the common law. It is therefore our contention that just as is the position in England following the theory of incorporation, customary international law is also part of Nigerian law provided it is not inconsistent with the Constitution or any local enactment, or any authoritative decision of our courts. The relationship between it and customary law is to be determined on the principles of internal conflict of law.¹¹⁸

It is our submission that this view takes care of the various pitfalls that inundate Dr. Oji's position. Firstly, the basis of obligation will still remain the 'common will' of Nigeria as a state as reflected in her Constitution. This preserves the sovereignty of Nigeria and ensures the supremacy of her Constitution, since the application derives from the legislative powers provided for by the Constitution. It also avoids the problems associated with the repugnancy and public policy tests since the two tests are not relevant considerations for the application of common law in Nigeria.

Conclusion

Considering the role of international law in the maintenance of world peace and the

¹¹⁴ *Christine Goodwin v UK* (2002) ECHR 588; *Niemietz v Germany* (1992) 16 EHRR 97; *Baerhr v Lewin* (1993) US 825 P 2d 44; *Re Kevin (validity of marriage of transsexual)* (2001) FamCA 1074; *MT v JT* (1976)355 A. 2d. 20k.

¹¹⁵ Penal Code, Cap P3, *Laws of the Federation of Nigeria*, 2004, sections 284 and 405; *Okonkwo v Okagbue* [1994]9 NWLR (pt 368) 301; *Mogaji v Nigerian Army* [2008]8 NWLR (pt 1089) 338. Also, see the Same Sex Marriage (Prohibition) Act, 2013.

¹¹⁶ *Per* Lord Millet in *Ex Parte Pinochet (No. 3)*, *supra*. Also see *Lord Advocate's Reference No. 1 of 2000* (2001) SLT 507 at 512; *R v Jones* (2006) UKHL 16; *Commercial and Estates Co. Of Egypt v Board of Trade* (1925)1 KB 271.

¹¹⁷ *Attorney General of the Federation v Guardian Newspapers Ltd* (1999)9 NWLR (pt 618) 196; *Attorney General of Abia State v Attorney General of the Federation* [2002]6 NWLR (pt 763) 300 SC.

¹¹⁸ *Labinjoh v Abake* (1924)5 NLR 33; *Okolie v Ibo* (1958) NRNLR 89; *Griffin v Talabi* (1948)12 WACA 371; *Nelsen v Nelsen* (1951)13 WACA 248; *Salau v Aderibigbe* (1963) WNLR 80; *Koney v Union Trading Co. (1934)2 WACA 188*; *Osuro v Anjorin* (1946)18 NLR 45.

realization of the common ideals of mankind, the importance of its application even in the municipal level cannot be over-emphasized. In the international level, this has led to the increased adoption of treaties and the proliferation of international institutions aimed at boosting greater participation in the development and enforcement of international law. However, the fact that a state may refuse to ratify a treaty and for those that apply the transformation doctrine, refuse to domesticate an already-ratified treaty poses a great threat to the realization of the ideals intended by the founding fathers of international law. Nigeria is a typical example, as the provisions of section 12 of her Constitution has denied domestic potency to the numerous treaties she has ratified, amongst which is the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

The nature of customary international law enables it to escape these impediments to the application of treaties above stated, since all states are bound by same, subject to few exceptions. It does so by committing them to uphold certain principles that comprise the “laws of nations” or “the customs of nations”, an indication of social contract obligations on the international level. It most times imposes *erga omnes* obligations on the states to enforce its principles.¹¹⁹ Apart from the fact of its

enforceability against the state at the international level, all that is required for the domestic application of international customs is the appropriate constitutional machinery. In the Nigerian context, this is provided for by section 4 of the Constitution and section 32 of the Interpretation Act.

In view of the foregoing, a call is therefore made on the various institutions and agencies exercising governmental power in Nigeria to become alive to the potency and applicability of this branch of international law within the Nigerian legal system. The judiciary, as the last hope of the common man, is hereby also urged to apply the principles of common law wherever necessary to meet the justice of the numerous cases that are litigated before them, especially in those areas of Nigerian law that are yet undeveloped. It therefore behooves Nigeria, as a sign of credible commitment to her international obligations, to strive to apply international customary law towards fulfilling her pledge to the international community.

¹¹⁹ These norms are also referred to as ‘*jus cogens*’. See E.A. Oji, *op cit*, pp. 168 – 169.

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