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TRANSPLANTS AND MONGRELS AND THE LAW: THE NIGERIAN EXPERIMENT

By A. A. O. OKUNNIGA

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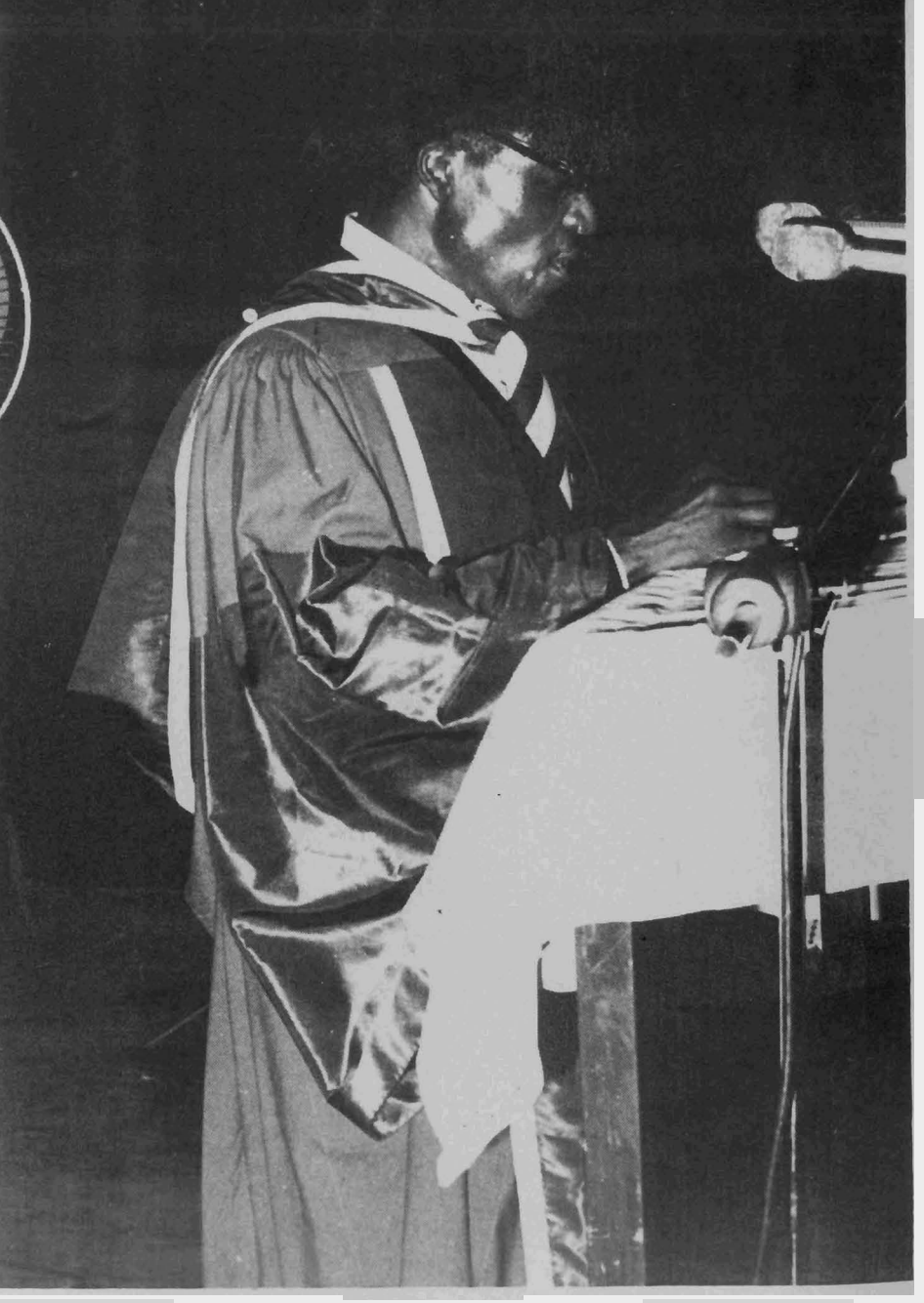

Professor A. A. O. OKUNNIGA

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An Inaugural Lecture delivered at the University of Ife on 17th May, 1983.

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INTRODUCTION

Transplants and Mongrels and Law ? What have they in common? Abstract with vegetable and animal connection -- a basis for a very large variety of definitions of law in a brain-trusting contest ? To embark upon this type of definition of law or any type of definitions of law would be time-wasting in a one-hour inaugural lecture of this type that we have on our hands tonight. Time-wasting because there are as many definitions of law as there are men who care to define law; as the Maxim goes: *Quot homines tot sententiae.* Nobody, including the lawyer, has offered, nobody, including the lawyer is offering, nobody, including the lawyer, will ever be able to offer a definition of law to end all definitions. This is not advocating pessimism. It is because the nature of law makes it very pliable when it comes to the problem of definitions. Like the six blind men of Hindostani when they went to "see" the elephant, every definition may be able to say something about some aspects of law but not one of the definitions is able to say everything about law. The philosopher, William James put the difficult problem of relativity in matters like this generally in these words:

> Hands off; neither the whole of truth nor the whole of good is revealed to any observer; although each observer gains a partial superiority of insight from the peculiar position in which he stands. Even prisons and sick-rooms have their special revelations. It is enough to ask of each of us that he should be faithful to his own opportunities and make most of his own blessings, without presuming to regulate the rest of the vast field.[1]

Bengamin Cardozo[1b] opines that "we must know what the law is, or at any rate what we mean by it, before we can know how it develops." Earlier on in his book, *The Growth of the Law*, he said, "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." This is true, but Cardozo does not mean that we must be able to define law before we can know how it develops. Knowledge of the law can be proven in other ways, most especially by observing it at work; and especially when its workings lead to the achievement of justice or the securing of greater happiness for the individual citizen; for, to quote Lord Denning of contemporary common law fame,

> It is no use having just laws if they are administered unfairly by bad judges or corrupt lawyers. A country can put up with laws that are harsh or unjust so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness.[1d]

On the other hand, law will not be necessary in St. Paul's ideally organised political society since the citizens will be righteous, for it is St. Paul's view that.

> . . . . the law is not made for a righteous man but fod the lawless and disobedient, for the ungodly and for sinners, for unholy and profane, for murderers of fathers and murderers of mothers, for manslaughters, for whoremongers, for them that defile themselves with mankind, for men-stealers, for liars, for perjured persons, and if there be any other thing is contrary to sound doctrine.[1e]

It is interesting to observe that St. Paul here anticipated the darling doctrine of the Marxists which dreams of an Utopia where the society will be so egalitarian that there will be no need for law as it will wither away and be replaced with the "administration of things". The Marxist States are yet

to concretize in full this ideal. Paul wrote the epistle quoted above nearly two thousand years ago and the sinless and non-law State has not been found anywhere in this sublunary abode of arrogant but ignorant and fragile mortals.

It does not seem that anybody is so perfect as not to be touched by the law one way or the other. It does not seem that any citizen can easily brush off the force of the law. Whichever way one looks at the matter, it seems that "Leave me alone – let me do what I do", is a warning that no responsible citizen can address safely to the law. Not only will the mind its own business, but your business, their business, our business, his business, mine business, as well. And the law will do this whether or not it has been voluntarily invited by the citizen. The law affects us in such a variety of ways that we cannot afford to be indifferent to what it does, how it does it and by what or whom it does it. Frederick Rodell of Yale Law School fame puts it lucidly even though sarcastically in the following words, and I quote *in extenso:*

> It is the lawyers who run our civilization for us – our governments, our business, our private lives. Most legislators are lawyers; they make our laws. Most presidents, governors, councillors, along with their advices and brain-trusters are lawyers; they administer our laws. All the judges are lawyers; they interpret and enforce our laws. There is not separation of powers where the lawyers are concerned. There is only a concentration of all government powers in the lawyers. As the school boy puts it, ouds is a "government of lawyers, not of men.[1f]

As to what actually the lawyers make the law do, or what they do through the law, the erudite professor continues:

> It is not the businessmen, no matter how big, who run our economic world. Again, if it is the lawyers: the lawyer who 'advise' and direct everytime a company is formed, everytime a bond or a snare of stock is issued, almost everytime material is to be be bought or good to be sold. . . . And in our private lives, we cannot buy a house or rent an apartment, we cannot get married or try to get divorced, we cannot die and leave property to our children without calling on the lawyers to guide us.[1g]

Fred Rodell writes about the law and the legal order of the United State of America. What he is saying applies *mutatis mutandis* to the Nigerian legal order. Afterall, Nigeria and the United States of America received the doctrines of the common law from the same source.

Yes, the law does all those things enumerated by Rodell and a lot more. As said earlier, a citizen who treats the law lightly does so at his own peril. The maxim *ignorantia juris quod quisque scire tenetur non excusat*[3] is as true and as forceful today as it was when LORD COKE made the statement some four hundred years ago. If you twist the tail of a life lion, believing it was that of a giant toy lion, who is to blame for the consequences? It may interest the non-lawyer that the law performs under a multiplicity of *aliases:* orders, regulations, by-laws, ordinances, edicts, decrees, statutes, codes, judicial precedents, Acts, customary laws, equity and so on and so forth. It may also be of interest to the non-lawyer that while all the above *aliases* come under the general rubric "law" the origin of one may be very different from that of the other: one may derive from customary law and the other from statute law or common law.

With these prefactory observations, I will now move into the topic for this lecture: "Transplants and Mongrels and the Law: The Nigerian Experiment."

WHAT ARE TRANSPLANTS AND MONGRELS FOR THE PURPOSES OF THIS LECTURE ?

One great disadvantage of the law researcher and writer is that he is not free, like his colleagues in the sciences, to christen his discoveries, e.g. some plant scientist discovered the pawpaw and named it *carica papaya.* The science world accepted this and the name remains for ever so to say. Another scientist discovered the Yoruba *Iyere* and christened it *piper nigrum* and the name became a scientific name of that plant. The lawyer, on the other hand, as a general rule, has to employ the ordinary words of the language to describe his findings. It would surprise the non-lawyer to hear that there are not as many technical words in the language of the law as there are, say, in Chemistry or Botany.

The words "transplant" and "Mongrels" as used in this lecture, then, are not technical words (or legal words)[4] and they are used here only by way of analogy. Analogy, is so frequent in law that it could be said that it is a tool in the "mouth" or the pen of the lawyer. Both words are taken from the biological sciences. The *legal* transplant then is a statute, or a doctrine, or principle or rule of law taken from one legal order to another legal order e.g. the common law of England was statutorily planted in Nigeria at the beginning of the colonial era, the 'reception date' being 1st January 1900. This is the general patern in the third-world countries that came under the Suzerainty of Britain. The common law in the United States of America on the other hand cannot properly be regarded as a *transplant* as the American colonies in fact brought with them the law of their homeland in Britain. The law of the American colonies was really like British law on board a British Ship on British waters. The typical 'transplant' moves from home to a foreign land.

The Mongrel, on the other hand, is a law or statute or any legal principle or rule derived from more than one origin e.g. it may be partly foreign and partly local. It may also derive from two or more local laws.

A law can also be a *transplant* and a *mongrel* at the time. Our current Constitution affords a good example of this. The frame-work is that of the United States of America while the fleshing-up is Nigerian.

THE CORPUS JURIS NIGERIANA, ITS CONTENT OF TRANSPLANTS AND MONGRELS

As at now the Corpus juris Nigeriana comprises the following: First the *indigenous* laws of the people called *native law and custom, native law native customary law* or *customary law.* This also includes technically the Islamic law of Northern Nigeria which now comprises the following States: Bauchi, Benue, Borno, Gongola, Kano, Kaduna, Kwara, Niger, Plateau and Sokoto.

The various High Court Laws in the Federal Republic of Nigeria made provisions for the enforcement of customary law subject to comformity with "natural justice, equity and good conscience not imcompatible either directly or by necessary implication with any laws for the time being in force."[5] There is not one body of customary laws but various customary laws are to be found as one moves from one ethnic group to another; while there may be variations within sub-ethnic groups. Thus, while one may validly speak of a body of Yoruba or Igbo customary laws, a closer look will show that there may be variations in some aspects of the customary law of the Ondo Yoruba and that of the Egba Yoruba; or between the Onitsha Customary law and Owerri Customary law.

Secondly, there are local statutes made by Nigerian legislative bodies. This will include such of the various legislation of the colonial period as are still in force, enactment of the military regime as are still in force, enactments of the Federal and Regional or State legislations since the attainment of national Independence. The most outstanding of the post-independence legislation is the 1979 Constitution which succeded the 1963 Constitution of the Republic of Nigeria.

Thirdly, we have certain English Statutes which were in force in England before the first day of January, 1900, and which are called Statutes of general application. These English Statutes continue to apply in Nigerian generally even if they have been rescinded in their home of origin. Several of these Statutes are, to say the least, too outmoded to continue to stay in our statute books. How useful now is the Statute of Frauds of 1677 (passed during the reign of Charles II)? How suitable to our present needs are the Statute of Uses of Henry VIII: the Married Women's Property Act of 1882, the Real Property Act of 1845, the Interpretation Act of 1889, Victoria's Trustee Act of 1893, the Settled Lnads Acts of 1882, Edward VI's Charities Act of 1547, George III's Sunday Observance Act, 1780, or William IV's and Victoria's Wills Act, 1857, to name just a few of the long list of such obsolete or obsolescent foreign statutes making an already cumberous system of law more cumbersome'. It may be correct as BRETT, F.J. observed in *Lawal* v. *Youman*[6] that as at 1961 when Lawal v. Youman was decided, "in all, only between thirty and forty English Acts have been held or assumed to be in force." This is but cold comfort. One useless or confusing law is more than enough not to talk of forty!

Unlike the other parts of the Federal Republic of Nigeria where English Statutes of general application still remain in force, the former Western Region of Nigeria passed in 1959, the Law of England (Application) Law Cap. 60, Section 4 of which provides:

"Subject to the provisions of this Law no Imperial Act hitherto in force within the Region shall have any force or effect herein."

By Section 2 of the Law "Imperial Act" means any statutes passed by the Parliament of England, the Parliament of the United Kingdom of Great Britain and Ireland or the Parliament of the United Kingdom of Great Britain and Northern Ireland. The date of commencement was 1st July 1959.

These statutory provisions make not only *Statutes of general application* but also all British imperial statutes inapplicable in the Region from the commencement date. These provisions are now part of the Law of the states later replicated from the former Western Region and the Western State. namely, Bendel, Lagos, Ogun, Ondo and Oyo States.

Similar in origin to the Statutes of general application are certain English Statutes incorporated into Nigeiran law by reference. The method of incorporation is by a provision in the Nigerian Statute concerned that the Nigerian Court/s shall apply the current English law on the subject. An example is the English Matrimonial Causes Act, 1950, incoporated by Section 4 of the Regional Courts (Federal Jurisdiction) Act, 1961.

In yet a fifth group are the common law in the strick sense and the doctrines of *English* or *technical* equity. The principles of the common law are supposed to have existed from time immemorial, and all that the judges have to do is to declare the common law principles. This declaratory theory has definitely fallen out of favour in modern times as examples of judge-made law are many. As Sir Carleton Allen pertinently observes, "many of those things that we now take for common law were developed by His Majesty's judges."[7] The doctrines of English equity or *technical*

equity on the other hand, are not supposed to have existed from time immemorial like common law. On the contrary, they were invented by the Chancellor,[8] but like the common law became crystallised and rigid. To quote Harold Porter:

> It [equity] has become in this last century a severely technical part of the legal system that differs from the Common Law primarily in the attitude of the courts towards its problems. It has little to do with "natural justice", nor is it "justice according to law', but it is 'justice according to [English] Equity.[9]

Common law and technical equity were practised in different courts until the Judicature Acts 1873/75 made it possilble for both to be administered concurrently in any of the Divisions of the Supreme Court of Judicature established under the Acts.

The *corpus juris Nigeriana,* then, comprises laws from the above-named five sources. By the descriptions given to *transplants* and *mongrels* earlier, it is clear that the bulk of our law in this country as at now are either transplants or mongrels. Of the five sources described above, only two are national and indigenous; namely, our indigenous law, alias native law, alias native law and custom, alias customary law and, of course, our local statutes. The others: statutes of general application, English Statutes deliberately incorporated by reference into our law and the doctrines of English or technical equity are each either transplants or mongrels or both. They are all foreigners even though it can be said in their favour that long usage has so acclimatized them as to make them deserve the title "native-foreigners". Our rain has beaten them much over the years, our sun has scorched them so much as to have made them shed much of their foreign clothes and habits. For example, in *Oyekan* v. *Adele*[10] the Judicial Committee of the Privy Council disregarded the words of limitation in

the conveyance of the Iga Idunganran which was made by the British Crown in 1870 "to King Docemo and his heirs" and held that the conveyance did not vest the fee simple in King Docemo privately, but in his representative capacity as the family head. The Board pontificated, "*The words, "His heirs executors administrators and assigns forever' are to be rejected as meaningless and inapplicable in their African setting*" [11] In English setting the words could have vested a fee simple absolute in King Docemo in his private capacity. Examples of such nomogymastics abound in legal history.

HOW DO THE TRANSPLANTS AND MONGRELS RELATE TO THE HOME LAW OR CUSTOMARY LAW?

It would appear that right from the onset the British colonial masters had intended a type of legal dualism within the Nigerian legal system viz, the English law and the indigenous or customary laws of the people. LORD HALLEY put the British attitude in these words:

> There thus prevails in practice a system of legal dualism, and it is not only easy to foresee clearly the course which the two elements of laws, European and African, will ultimately take.[12]

LORD WRIGHT is even more forthcoming: In the celebrated case of *Laoye* v. *Oyetunde*[13] he observed:

> The policy of the British Government in this and other respects is to use for the purpose of the country the Native Laws and Customs in so far as possible and in as far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The courts which have been established by the British Government have the duty of enforcing these native laws and customs, so far as they are not barbarous, *as part of the law of the land.*[14]

It is quite common place to talk of legal dualism with

reference to our indigenous or customary law *vis a vis* the received foreign law. It should, however, be borne in mind that when one has in mind the *Nigerian corpus juris,* what we have is not a duad but a triad, not a pair but a trio viz. the received foreign law, our indigenous or customary law and our own statute law. I shall however keep to the orthodox theory of legal dualism as between the received foreign law and Nigerian customary law. I shall now probe further into this relation between the foreign and the indigenous sources of our laws.

In the first place, the dualism is not like the type that exists between English common law and English equity in which equity is a law paramount abrogating *pro tanto* any inconsistent rule of common law. As between our customary law and common law each has more or less been satisfied so far, to plough its own furrow; content, so it seems to keep its own appointed limit. English or technical equity, on the other hand, do occasionally, as will be seen later, pay salutary visits to customary law.

Secondly, the dualism, does not appear to be directed towards bringing about eventually a beneficial osmosis or osmotic solution. There is yet a third type of dualism, and it would seem that the trend has generally leaned towards a symbiotic existence, each helping the other, as much as possible, and wherever necessary to achieve what justice demands. As we shall see later in this lecture, the courts now will not hesitate in appropriate cases to resort to remedies provided by technical equity in customary law cases. *Awo* v. *Cookey Gam*[15] type of cases are very illustrative. However, it si seriously doubted whether this relationship can be kept healthy and on an even keel for long as it seems that the customary law of the people is being relegated to the background in the scheme of things. It does not receive much attention in a similar manner as the received foreign law. If the present apathy to custo-

mary law continues the relation between the two sources of our law will change from a beneficial symbiotic one to a painful sapprophytic one in which the age-long and revered customary law of the people will die while the foreign law feeds on its carcase.

THE TOOLS AND MODUS OPERANDI OF THE TRANSPLANTS AND MONGRELS' INVASION OF CUSTOMARY LAW

As every Nigerian lawyer knows, all courts in the country, whether High or customary are by statutes enjoined "to observe and enforce the observance" of customary law or native law and custom of the people in so far as such rules of customary law do not conflict with the rules of "natural justice, equity and good conscience nor with any written law in force.' As every Nigerian lawyer also knows, the phrase "natural justice, equity and good conscience" has been interpreted to mean "what is fair", "what is just" "what is of 'good report", "what is equitable"; in short, what equity in the broad sense, as different from technical equity of the old Court of Chancery, would approve. What, in other words, Sir Carleton Kemp Allen would call "the average instinct of justice in the common man". Contemporary writers often refer to this doctrine as the *doctrine of repugnancy*. As I have observed elsewhere,

> Equity within the contest of the repugnancy doctrine was ostensibly meant to be used as hyssop to wash away the 'sins' of customary law, and thereafter leave it pure, unsullied, unmodified, for the regulation of the lives of millions of Nigerians who come under its jurisdiction.[16]

In the earlier statutes providing for the application of customary law in the Supreme Court, the phraseology of the enabling sections was merely permissive; "nothing in

this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance"[17] Contemporary enactments employ a more mandatory phrase, such as "the High Court shall observe and enforce the observance of every customary law."[18]

The doctrine of repugnancy thus described above is the main tool in the hands of the judges to abrogate any rule of customary law that outrages "natural sense of justice." Strictly speaking, the doctrine of repugnancy did not cover cases of anachronistic left-overs, conservative plodders-on of customary law. These might be stupid or obsolescent but they are not 'barbarous'. So the courts had no say, or they thought they had no say, by way to reform in customary law. Thus one hears LORD ATKIN say in the case of *Eshugbayi Eleko v. The Government of Nigeria.*[19]

> The Court cannot itself transfer a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to 'natural justice equity and good conscience.

The point in issue was whether the ancient Yoruba custom which required an unpopular Oba to commit suicide would properly in modern times be replaced with banishment. Similarly in the East African case of *Kajubi v. Kabali*[20] GRAY, C.J. following *Eshugbayi Eleko v. The Government of Nigeria*, warns that

> The native community may assent to some modification of an original custom, but the modification must be made with the assent of the native community. It cannot be made by an individual or a number of individuals. Least of all can it be mad by a court of law.

The same cautious or, rather, over-cautious judicial approach to anything that may smack of attempt to reform or modify customary law was shown by the court in the well-known case of *Awo V. Cookey Gam*[21]. Here Webber, J. found clearly that the plaintiffs had acquiesced

in several acts of ownership by the defendants for many years. All the same, the learned judge said

> We do not decide this point in accordance with any provision of English law as to the limitation of actions, but simply on the grounds of equity, on the ground that the court will not allow a party to call in aid principle of native law, and least of all principles, which, as in this case, were developed in and are applicable to a state of society vastly different from that now existing, merely for the purpose of bolstering up a stale claim.[22]

Obviously, "Equity" in the passage qouted above means equity in the general sense, equity in the sense of "what is just and fair". Though the learned judge found *acquiescence* in the plaintiffs, he would not base his judgement on this doctrine of technical equity nor on principles derived from English law which includes technical equity "which", to quote him again, "were developed in and are applicable to a state of society vastly different from that now existing" (in Nigeria). The early timorous approach of the courts in these cases might be a reaction to the caveat sounded by the Full Court against the temerity of SPEED Ag. C.J. in the celebrated case of *Lewis v. Bankole*[22], decided barely nine years after the official reception date of English law in Nigeria. Sitting as trial judge in this case which concerned the law on members' share in family property among Lagos Yorubas, the learned judge made a mockery of the expression "natural justice and good conscience", the principle on which the courts have been enjoined by statutes to administer customary law. He dismissed the case on the ground that the plaintiff's claim was against the technical doctrine of acquiescence. He said, *inter alia:*

> I am not sure that I know what the terms "natural justice and good conscience" mean. They are high sounding phrases . . . it would not be easy to offer a strict and accurate definition of the terms. But with regards to equity, the case is

> different. The rules of equity are, or ought to be perfectly known to this Court, and if a native law or custom is found to be repugnant to the fundamental rules of equity, it is absolutely the duty of the Court to ignore it. . . . . and should not be countenanced by this Court on the ground that it is in accordance with native law or custom, however harmless, nay, however admirable the native law or cutom may be.[23]

Fortunately for the future of judicial development of customary law, the rather conservative and narrow approach of SPEED, Ag. C. J. was roundly disapproved by the Full Court when the case went on appeal. It cannot be denied of course that even today, there are still text-writers who share SPEED's view. A contemporary writer has opined:

> "It is therefore clear that the courts should in all cases come to general conclusion about the rule, [customary law in question] and if they find that it is not generally invalid it is their duty to apply it whatever the result may be."[24]

In the view of this school the judge must not apply the pruning knife of general equity to remove dead wood in customary law with a view to encouraging healthier growth of useful branches and buds. The ameliorating influence of general equity, according to this school, does not and should not apply when it comes to customary law.

To say the least, this approach is very restrictive and highly negative. Fortunately, this has not been the general view of our judges, whether in the colonial era or since national independence. OSBORNE, C.J. rightly observed in the case of *Lewis v. Bankole*[25] that our customary law is not only flexible but also has in some circumstances been modified and even departed from as expendiency might demand. There are, then, what could be described as the negative or restrictive aspect of the doctrine of repugnancy, and the positive of creative aspect of the doctrine.

In the former, the Court are enjoined to abrogate barbarous rules of customary laws, but in latter, the Courts can, where justice and equity demand, make necessary modification to an existing rule of customary law or doctrine to apply it in a given case, as the Courts observed in *Lewis v. Bankole*[26] or in *Mariyama v. Sadiku Ejo.*[27] There is no doubt at all that the doctrine or repugnancy has been applied restrictively and negatively to abolish the more barbarous rules of customary law e.g. slavery under any mask in which it had paraded itself e.g. that the claim of the owner of a former "domestic"[28] to administer the estate of the deceased domestic to the exclusion of the relations of the domestic is repugnant to natural justice, equity and good conscience:[29] that an alleged rule of customary law that a man by reason only of having paid the dowry in respect of a girl betrothed but not married to him could claim the children of the girl by another man was repugnant;[30] that the *Akinkwa*[31] practice among the Akan people of Ghana by which a man could "dash" himself to a stool and thereby entitled the holder of the stool to administer the estate of the *Akinkwa* as against his next of kin was repugnant.

Examples of judicial use of the doctrine of repugnancy to abolish barbarous rules of customary law are not hard to come by. It is, however, in the positive or creative use of the doctrine that the role of the courts in the development of Nigerian customary law can be more fully appreciated. And in this job of recreating and modifying customary law, the courts have prayed in aid where practicable the rules and doctrines of technical equity like laches, acquiescence, relief against forfeture, injunction and even declaratory judgements (which form no part of the doctrines of technical equity). As we have seen earlier, the Courts were originally rather hesitant to apply the doctrines of technical, equity to customary law, perhaps in pursu-

ance of the policy of legal dualism. But with the lead given by the Full Court in *Lewis v. Bankole*[32] in 1908 the more adventurous judges soon began to throw the net of technical equity far afield. It is, however, in the area of property law that equity, both in the broad sense and in the sense of technical equity has made much inroad and impact. To take a few examples: the strict rule of customary law relating to forteiture has been modified on equitable grounds in many cases e.g. on the grounds that in would be inequitable to eject a whole tenant community for an offence against customary tenancy committed by a few[33], or when on the ground of long occupation the Court feels that to allow forfeiture would cause hardship.[34] Relief against forfeiture will also be granted where a tenant in possession reasonably, though erroneously, believes himself to be a joint owner as so does acts challenging the title of the true owner. The was the situation in *Ogbakumanwu & ors of Iwollo Oye v. Chiabolo & ors of Agbogbo Awha.*[35]

In the area of family property in particular, equitable relief against forfeiture is an important tool for the courts to protect the interest of family members, who under strict customary law would incure forfeiture for insulting the head of the family or for "making juju" against him.[36]

The equitable doctrines of *laches* and acquiescence are unknown to customary law; so are prescription and limitation. While recognizing this, the Courts do now invoke *laches* and acquiescence to protect holdings under customary law. Also, such other remedies in equity like injunctions and the non-equitable declaratory judgements now figure frequently in customary law. Basing their support on equity in the broad sense, or what the courts prefer to call their inherent jurisdiction in equity, they have been able to evolve substantive principles and doctrines for the better administration of customary of customary law. For

example, as against the old rule of customary law that the family house could by no means be sold, the courts have decided as early as the case of Lewis v. Bankole,[37] that, if, in the circumstances of the case, a sale of family property is more equitable, then the courts will order a sale, or, if partition is better, the court will partition the property among those entitled thereto. Under the canopy of equity in the broad sense, the courts have invented rules as to who and who in the family can affect a sale or other outright alienation of family property. They have also ensured that a member of the family can bring action to set aside a sale of family property about which he was not consulted if he is a "principal member." They have tried to lay down some legal guidelines for determining the head of the family and his duties *vis* a *vis* other members of the family. They have worked out some agreed formulae for the distribution of family property or any profit accruing therefrom. They have, generally speaking, given some form and shape to customary law and there is now as ascertainable body of principles specifically meant for customary law which one might refer to as judicial customary law.

But experience the world over has shown that judicial legislation is not by any means the best method for law reform. And judicial modesty often prevents even the most arrogant of a notoriously humble group of men and women from confessing that judges do make laws. In the first place, there is the judicial reluctance to do so. The orthodox judge in common law legal orders still believes like or thinks like old LORD COKE that his duty is *jus dicere* not *jus dare*. Secondly, judicial legislation is necessarily *post facto*. They have to wait for the opportunity, unlike the legislator who may make laws that will take effect in the future. No wonder JEREMY BENTHAM compares judicial law-making with dog-training, for according to Bentham,

when you want to cure your dog of a bad habit, you wait until he does the undesirable act and then beat him. Thirdly, the effectiveness of judicial legislation depends very much, in legal orders of common law tradition, on effective doctrine of *stare decisis* which, as lawyers know, is that single doctrine of judicial precedent which advocates the acceptance of a previous decision *simply because* and for no other reason than that it has been given in a previous case decided by a superior court with which the bound court shares an heirarchical link. But the many loopholes in the doctrine militate against efficiency. To name a few of these e.g. distinguishing cases both on point of law and point of fact, the often-forgotten *caveat* that *stare decisis* is concerned only with "finding" of law and not finding of fact; the lack of regular and efficient law reporting in this country as at now, and with the creation of more states this problem would be more complex. Another important factor militating against stare decision depending on the rudicial method of reform in regard to customary law is the fact of the awkward rule-made by the judges – that they are not supposed to know customary law which must be regarded as matter of fact and so to be proved as facts are approved. It is true that the courts can seek the opinion of assessors or experts in order to ascertain what is the rule of customary law on a given set of facts. It is also true that a judge can take judicial notice of a rule of customary law that has been proved several times before the courts, though the number of times that the rule must be proved for the purpose of judicial notice is not stated in any of the statutes enjoining the courts to enforce the observance of customary law. However a situation where the courts of the country – I mean all courts of the country except customary courts – are supposed to be ignorant of any branch of the law they administer is very

awkward, to say the least. A situation in which the basic law of a country is relegated to the status of facts or foreign law and regarded as a non-indicible arcanum by its own judges, its own "sons of the soil", is most humiliating and call for very urgent attention.

It is clear that the reform of our indigenous law cannot depend on the judges even though their yeoman service in blazing the trail of customary law development and reform must be acknowledged and appreciated.

CUSTOMARY LAW RELEGATED TO THE BACK-GROUND

From what have been seen so far an ugly picture of the basic law, the home law, the host law receiving all the foreign transplants and mongrels has been relegated to the background and treated with disdain and neglect. The plea is not made that our indigenous law be preserved and developed simply because it is customary and belongs to us. If it is useless, if it is counterproductive, if all it does or capable of doing is to serve as a curio in the national gallery, then, let us not hesitate to park it somewhere in some remote and dark corner of the archives. It is too late in the day to yearn like Von Savigny for a King Custom who must reign alone and undisturbed by intruders such as legislation or transplanted foreign laws. Nigeria is not an example of the isolated, hermatically sealed society implied in the Savignian cult of the Volkgeist and its concomitant, the Volkrecht. All these granted however, it is ocularly demonstrable that the vast majority of the teeming population of this country – perhaps not less than 90% thereof – do regulate their lives by the indigenous law of the land. The vast majority acquire and alienate property in accordance with the principles of the indigenous law. Most of the people regulate their family lives according to customary law.

Succession to property and even titles in the majority of cases follows customary law. Even when most of the people buy and sell, they are more indigenous-law conscious. Many of the people of this country would regard the English doctrine of *consideration* as very stupid and would prefer the *quid pro quo* doctrine. Even our own slant of the various religions imported to us from overseas is not without strong flavour of our customary law. For example, a marriage celebration in the Church or court or according to Islamic rites is nothing in reality but a veneer or gloss on an elaborate sub-structure of custom and customary law. The so-called christian burials are partly customary and partly the rites of the particular brand of christianity inspite of the ostentatious religion capping. So, the indigenous law is still a strong force to reckon with in our legal order. Any attempt therefore, whether by design or otherwise, to relegate the indigenous law to the background is very counter-productive and cannot survive for long. Some eighty years ago, SPEED, Ag. C.J.[38] prophesised that the institution of family property was on its way out. One would wish that the learned judicial prophet were living today. He probably would have been able to have second thoughts before making the next prophesy about customary law institutions.

INSTALLING TRANSPLANTISM IN CRIMINAL LAW

So far, we have concentrated on the civil aspect of our indigenous law and the attitude of the imported foreign law to what the indigenous law does and how it does it. We seem to have ignored the criminal aspect. This, to some extent, is deliberate. On the other hand, it seems preferable to bring in the criminal aspect just about this stage in the lecture.

It is common knowledge that under our law, nobody

can be charged with a criminal offence not known to our criminal codes. An immediate effect of this is that our law does not recognize now any offence under customary law. All criminal offences must be so recognized under the relevant statutes. But we know that our criminal law is common-law oriented. The fully-baked customary law adherents – and these are many as we have seen – are rather sceptical about the sufficiency and efficacy of this foreign-oriented criminal justice. Customary justice – it has been said – is ambulatory justice. One would add that it also cannot admit of unnecessary delays. It moves fast. Nemesis, in the eye of customary law has wings and moves fast. "Justice delayed is justice denied" is a common saying. It has a clear ring of customary law.

In the common law-oriented system, justice, in customary law eyes, move over-cautiously and too slowly. Reaction to this unsatisfactory slow motion of this transplanted common law approach to the administration of criminal justice is demonstrated daily and at an alarming rate. As a colleague of mine, Professor D.A. Ijalaye, of the Department of International Law of this University has succintly put it "You only have to shout 'Ole o', 'Ole o', 'Ole o', and in the twinkling of an eye you'd have a human being roasting or bleeding to death before your eyes".

'Jungle justice"! our English or American sysnthesized Nigerian would shout. It may be "jungle justice" or "palm justice" or "savannah justice" or what you will, *but* it is not disrespect for the law of the land. It is, on the contrary a call to the institutionalised organs charged by the law of the land and duly delegated by the people to administer criminal justice, to examine or re-examine their *modus operandi*. It is a practical reminder to them that, in the words or James Coolidge Carter, law is "not a command or body of commands, but consist of rules springing from

the social standard of justice, or from the habits and customs from which that standard has itself been derived .... that a statute which conflicts with customs or habits cannot be enforced and is really a nullity."[39] So, when the general public feels against official inertia this way, there is as a symbolic, not orally-articulated slogan. "The Courts can wait." The codes can wait. The police can wait. But justice cannot wait.

Lynching, at least among the Yoruba people of Nigeria, is no part of customary law. It has now, unfortunately, beocme an illegal substitute for normal legal method of administering justice. The traditional Yoruba code of conduct has a better and more humane method of dealing with their social defiants, even an Oba who misbehaved. In traditional Yoruba society, an Oba whose offence attracted capital punishment would be sent the "calabash", symbolising that the people wanted his head in the calabash. In other words, he was being politely asked to commit suicide. Yoruba customary law would not have sanctioned the way Charles I was publicly beheaded in 1649.

As for the ordinary social miscreants, thieves, robbers, pick-pockets and so on, some Yoruba sub-ethnic groups had a method of warning the misfit that the society was aware and disapproved of his conduct e.g. by blocking his door-way at night with refuse.

The point being made here is not for our society to return to the ancient practices but the point out that there was/is something in them that we could have easily and profitably retained. Instead we have set up the transplants to the utter neglect of our historical past. This is not only unpatriotic and stupid, but dangerous. That is behaving like a people with no past or, at the best, behaving as if our past has nothing to do with our present. It is against the verdict of history. It is contrary to the common experience of men A. N. ALLOTT, has a useful lesson for us all here.

I quote him:

> In Africa, where all change is accelerated, the law is no exception; but it is important to see the present spurt to activity in its historical setting. From pre-colonial through colonial to post colonial times the law has been in a state of movement. Despite the varying super-structure the underlying substructure has preserved a remarkable continuity; this substructure consists of the daily habits, hopes and wishes of the ordinary undifferentiated, unsophisticated mass of African people. Even in the excitment of freedom and the new-found power of Africa's rulers to start again, the people's habits and wishes will re-assert themselves. If the new legal systems wander too far away from these habits and wishes them they will not work . . . . . if the new laws fail to do what the people want of them, then the people will do it themselves and in their own way. . . . .[40]

Then it might be too late. The force and avalanche of the descent on the rappist of justice might be of such nature as to make it impossible for primitive justice to measure its blows.

A SUMMARY OF THE PRESENT SITUATION..

In the term of the growth of the various sources of Nigerian law so far considered, the present situation may be summarized as follows·

(1) The imported English statutes of general application as well as English Statutes incorporated by references have established and acclimatised themselves in the country generally. It must be recalled that under the provisions of the law of England (Application) Law, Cap 60 of the 1959 edition of the *Laws* of the former Western Region of Nigeria, English Statutes of general application have ceased to apply in the Region and in all the States subsequently replicated from the Region. Notwithstanding the Law of

England (Application) Law, however, the 1959 edition of the Laws of the Western Region of Nigeria contain several provisions based largely on current English Statutes of general application as the following table gives a few of examples:

Western Region of Nig. Law	*English Acts*
1. Trustee Law, Cap 125	Trustee Act 1925
2. Public Trustee Law	Public Trustee Act 1906
3. Property & Conv. Law Cap. 100	Law of Property Act 1925) Settled Land Act 1925)
4. Limitation Law Cap. 64	Limitation Act 1939
5. Prescription Law Cap. 95	Prescription Act 1832
6. Infants Law Cap. 49	Infants Acts, 1855 – 1925
7. Married Women Property Cap. 76 C.49	Married Women Property Acts 1882, 1893, 1907, 1925, 1935.
8. Partnership Law Cap. 86	Partnership Act, 1890.

(2) The principles of the common law and the doctrines of English Equity (or technical equity) have also firmly established themselves. The role played by technical equity via the doctrine of repugnancy has been noted earlier.

(3) Nigeria's own local enactments whether by the Federal or State Legislatives need not take much time here. They fit into their proper place, always subject to the provisions of the current Constitution of the country.

(4) Our Indigenous Laws, or Customary Laws. There is no doubt whatsoever that this is the basic law of the land. There is no doubt that its position in our jurisprudence is assured by the Constitution of the land as well as other enactments of the land. There is no doubt, also, that the vast majority of the people believe in it and regulate their lives by its principles. Notwithstanding all this, it is clear

that as of now, this basic law of the people is the unfortunate, the least cared for by way of deliberate legislation intended to promote or enhance development. Apart from the statutory provisions enjoining the courts to observe and enforce the observance of customary law and the occasional bits of judicial pronouncements on it, customary law *vis a vis* the other sources of our law, stands naked, neglected and alone – a *filius nullius* in the Nigerian *corpus juris*. The pioneering efforts of writers like A.K. Ajisafe,[41] Ward-Price,[42] T. O. Elias,[43] G. B. A. Coker,[44] Obi,[45] and a few others on the subject must be acknowledged and appreciated. But these, like all pioneering efforts, especially in academics, have their several limitations. Notwithstanding this, and the contributions of the courts, as already discussed, our customary law cries up to the high heavens for more attention and care.

SUGGESTIONS AND CONCLUSION

One is aware of the debate as to whether or not customary law should be codified. This is, at the moment, irrelevant as no comprehensive collection has been made of the rules of customary law of any Nigerian ethnic group let alone the whole Federation.

One is also aware that there is at the moment a Law Commission for the Federation, and that here and there in the States there are Law Commissions. Again, these Commissions are not of particular relevance to the need of customary law as at now. As one would naturally expect, the preoccupation of these Commissions are with the existing laws of the country. Theirs is to find out about any needed reform in the existing law of the country or the State, and advice the appropriate authority about such need. Theirs is not to set out deliberately to "dig out", as it were, rules of customary law not yet declared as law

either judicially by the High Courts, or by the appropriate legislative body.

As constradistinguished from the Law Commissions, what will be said here is predicated upon the belief that there is still lying in the bosom of the village and community elders and the *native courts or customary courts*, rules and practices of customary law not yet declared as law in the usual manner, and that there is a crying need for a full-fledged, deliberate and inter-disciplinary research into the customary laws of the country with a view to unearthing such hiding or undeclared rules of customary laws. Even if such research does not unearth any hitherto-undeclared-by-the-courts rules of customary law, there would be the satisfaction that nothing now remains to be discovered. In any case, the research would afford a unique opportunity for a comparative study of our customary laws. This would in turn facilitate any subsequent compilation, restatement or codification of our customary law.

That such a research should be interdisciplinary does not need to be emphasized. Custom and customary law are very much interwoven with history, the social sciences, linguistics, anthropology and other similar disciplines. If error must be minimized, as much relevant expertise as possible should be on the research group. As the late Professor Montrose opines, the principal cause of error in this type of research is "the failure to penetrate sufficiently deeply into the institution which is being considered and to be content with a superficial view". He adds significantly:

> We need to use a microscope in our analysis in order to distinguish between actions which may have an external resemblance: we need to see the institution from within as it seen by those whose practices create the institution.[46]

Research into the customary laws of the hundred of ethnic and sub-ethnic groups comprising this great country

is by no means a minor experiment. It requires many men and women not only learned in their various disciplines but also devoted and zealous. It will be time-demanding and painstaking. It will demand much money — or what to the typical academic looks like "much money". Here, in particular, I speak from experience, having for the past twenty years or more been involved in researches on customary law, sometimes alone and sometimes in the company of other interested colleagues. The main group programme christened "Customary Law Research Project, University of Ife" was meant to cover the whole country. It was a ten-year programme. It had to be retired into the limbo of such unfulfilled academic researches for lack of funds, waiting for the dawning of another economically bouyant era. The various disappointments notwithstanding, my belief in the usefulness of such research in unshaken *even now*.

Not only must there be a sufficient number from each relevant discipline, the research in my view is better carried out on a zonal basis. I would suggest each State to be a zone for this purpose. Herein comes the need for co-operation between the Universities inter-se, and between the Universities on the one hand and the States on the other, since it will not be practical for any single University to be able to provide all the manpower and money required. Each State should be able to fund the research carried out in its territory. The Federal Government should be able to fund the cost of general co-ordination and printing.

Further, "mini" but useful researches could be carried out by the law students in the Universities. Instead of asking them to do projects on some aspects of common law or statutory law, they could be asked to base their projects on some topics on the customary law of their local government areas. This collective "wisdom" of the

students may help the main research.

The doctrine of judicial ignorance of customary law until several proofs make them take judicial notice of a given rule of customary law, is ridiculous, ludicrous and absurd. In all contemporary legal systems, a judge is presumed to know the law. Even in ancient Roman law with its strict formulary system, the *judex* (judge), who need not be a lawyer, was presumed to know the law. British colonial judges who were from alien cultures and language could be excused for their ignorance whether true or feigned. A Nigerian judge has no excuse. If he does not know, he must learn. An interpreter of the law belongs to the small fraternity of the learned. A learned person must be humble before the sciences. A mark of that humility is the willingness to learn always. A High Court judge inn this country need an incubating period of at least ten years at the bar. He ought, during that period, to have picked up the customary laws of two or more major ethnic groups. He should be able to pick more quickly thereafter. In any case, why cannot the judiciary organise from time to time symposia, seminars, workships, on customary law for its members and make attendance compulsory ? Are judges in Nigeria too old to learn ? Even if learning in this way is against the ethnics and practices of the honorable members of the Nigerian Bench, let us all ponder on these words of Lord Denning:

> "If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on, and that will be bad for both."[47]

With this, nothing now remains to be said as far as this lecture is concerned but to thank you all for coming and for listening patiently.

Thank you.

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1. Talks to Teachers on Psychology and to Students on Some of Life's Ideal. P. 246.

1b. The Growth of the Law pp. 22-28.

1d. Road to Justice p. 7

1e. I Tim. 1:8 - 10.

1f. *Woe unto you lawyers*, Pageant Press, Inc., New York Pp. 7-8.

1g. *ibid* p. 8

3. Source? a maxm source not necessary. Any Law Dictionary will show them.

4. There are no *legal* words as such but in law as in other disciplines there are some technical words e.g. charitable gifts, consideration.

5. The original provisions were made in S.17 Supreme Court Ordinance 1914, later re-enacted in the various High Court Law. See for example the High Court of Lagos Act Cap. 80 Sect. 27
High Court Law. W. Nigeria, Cap. 411 s. 12
High Court Law. Eastern Nigeria No. 27 of 1955, s. 22:
High Court Law N. Nigeria No. 8 of1955, 1955, s. 34.

6. [1961] WNLR. 199.

7. Law in the Making *5th ed. (Oxford Clarendon Press, 1951) p. 118.*

8. See *Re. Hallet's Estate* 13 Ch.D 696, 710 *Re. Diplock,* [1948] Ch. 465.

9. *Historical Introduction to English Law* Sweet & Maxwell (London 1948) p. 69.

10. [1957] 2 All E. R. 785.

11. ibid., at p. 790

12. *An African Survey* (O.U.P. 1956 ed.) P. 641.

13. [1944] A.C. 170.

14. ibid., at p. 172; emphasis supplied.

15. 2 NLR 100.

16. A. A. O. Okunniga, *Equity in Nigerian Law* (unpubd) p. 81

17. See *Supreme Court Ordinance* Cap. 211.

18. High Court of Western Nigeria Law *Cap. 44, S. 12(1).*

19. [1931] A.C. 662 at 673.

20. (1934) II E.A.C.A. 34.

21. 2 N.L.R. 100.

22. ibid 101.

23. INLR 81.

24. See A.E.W. Park, *Sources of Nigerian Law* p. 73 of Keny and Richardson *The Native and Customary Courts of Nigeria* p. 237.

25. ibid. 83 – 84.

26. 1 NLR 81, 100 – 101

27. 1 NLR 81.

28. [1961] N.R.N.L.R. 81.

29. A domestic was the descendant of a former slave.

30. *V.F. Martins v. Johnson & anor* 12. N.L.R. 46 of *In re Offiong Okon Ata; Abassi Okon Ekpan v. Henshaw Ita* 10 NLR 65.

31. *Edet v. Essien* 11 NLR 47.

32. Re *Kweku Damptey*, also *sub-nom Kodie v. Affraim* 1 WACA 12.

33. 1 N.L.R. 81.

34. *Chief Uwani v. Akom & ors 8* N.L.R. 19
35. *Ilori v. Osho* Supt. Ct. Suit 276/1940 (unreptd)
36. 19 N.L.R. 220.
37. See e.g. *Chief Ashogbon* v. *Oduntan 15* N.L.R. 7, *J.L. Manuel* v. *Chief C. Bobmanuel* 7 N.L.R. 101.
38. *Lewis v. Bankole* 1 N.L.R. 81, at 83 where he said "The institution of communal ownership has been dead for many years and the institution of family ownership is a dying institution."
39. Passage from Hall: *Readings in Jurisprudence* p. 121.
40. "The Changing Law in a Changing Africa." *Sociologius* 1961 New Series P. 115, 130–131.
41. *The Laws and Customs of the Yoruba People*
42. *Land Tenure in the Southern Provinces*
43. See e.g. his *Groundwork of Nigerian Law: Nigeria Land Law and Custom*
44. See his *Family Property among the Yorubas* (Sweet & Maxwell: London 19
45. *Ibo Law of Property* (Butterworths) London..
46. *Precedent in English Law and Other Essays* ed. H.G. Hanbury (Shannon Press Ireland 1968) p. 79.
47. *Packer v. Packer* [1954] p. 15, 22 cited on the cover of his book. *The Discipline of Law*. London (Butterworths) 1979.