

The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect

Akpomuvire Mukoro

*Department of Local Government Studies, Obafemi Awolowo University,
Ile-Ife, Osun State, Nigeria
E-mail: cammukoro@yahoo.co.uk*

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ABSTRACT An evolutionary examination of democratic governance in Nigeria throws up a lot of gap, which metaphorically are in need of surgical operations. Not only are the existing statute almost a near departure from what obtains in practice, politicians and technocrats carry on as if all the grey areas that have constituted a cog in the operation of a just, equitable, accountable and democratic system, are immutable to change. While customary law is recognized as the organic living law of the people at the grassroots level, the local government legislature do not have anything to do with this important lifeblood of the society. It is the state government; that is very distant from the people that exercise the oversight functions over customary laws. Even in areas where local government and their legislature are bequeathed with oversight functions, the state governments still wields the big stick. Where then is the autonomy which each unit of government is supposed to exercise under a democratic system of government? This paper concludes with the fact that the legislature at the local government level should be strengthened, so that their by-laws would become enforceable. In the same light, it is being advocated that there should be a harmonization of customary law with other laws in the states, so that these laws would be seen to be working at the two different levels of government.

INTRODUCTION

The 1999 Constitution of Nigeria recognizes the existence of three units of administration and governance at the federal, state and local government levels. The federal constitution specifically recognize “The system of local government by democratically elected local government councils” This Constitution (1999) provides for the existence of a legislative council that operates through the use of by-laws.

In the present democratic dispensation under which the federal system of government is operated in Nigeria, the existence of local government is the exclusive preserve of state governments. And just as there is the Federal Judicial Service Commission with an oversight functions over the chief justice of Nigeria and the Supreme Court, the Court of Appeal, the High Courts and the Attorney General of the federation, the state governments also exercises oversight functions over the state courts and customary courts. Interestingly, the customary courts exist in every local government, but their control depends on powers of the state governments. The local government legislature have very little or no impact on the operations of the customary courts. Even though, it is accepted that customary laws derive from the customs, traditions mores, religions and

the organic institutions of the people, local government legislature do not have the powers to legislate sanctions, actions, and procedures into the conducts of customary laws.

This is where this paper draws its interest. It charts a course for a synergy where the legislative councils of local governments would find an alliance with the workings of the customary courts since the operative foundations and directions of customary laws springs from the customs and traditions of the people at the local government level.

DEFINITION OF TERMS

Two terms need proper clarification here to place the usage of terms in this paper in their proper perspective. These terms are customary law and local government legislature.

Customary Law

Hon Justice Narebor (1993) gave a definition of customary law to be:

... a rule of conduct which is customarily recognized, adhered to and applied by the inhabitants of a particular community in their relationship with one another within or outside the particular community and which has obtained

the force of law, in that non-compliance with the rule or custom in question attracts adjudication and possible sanction.

The definition above bears close resemblance to that given by Allen (1939) while analyzing the Gold Coast Colony Native Administration Ordinance 1927. Said he,

Native customary law means a rule or a body of rules regulating rights and imposing correlative duties, being a rule or a body of rules which obtains and is fortified by established native usage and which is appropriate and applicable to any particular cause, action, suit, matter, disputes, and includes also any native customary law recorded as such ...

When the two definitions given above are seriously considered, it will be detected that customary law consists of customs accepted by people in a community as binding among themselves. Customary law according to Mukoro (2004) while speaking about the Evidence Act of Nigeria Section 2, sub-section 1 of 1990 said that customary law is the rule in a particular area that has attained the force of law due to prolonged usage. Both Elias (1977) and Badaiki (1997) see customary law as a body of customs, accepted by members of a community as binding upon them. Badaiki's position summarizes the position adopted by this paper. Said he, "Customary law is rooted in the history, tradition and culture of the people that sometimes it is interchangeably used with custom".

Local Government Legislature

This is the official rule making body of a political system. According to Robertson (2002), there is no theoretical reason why the legislative functions should be carried out by such a body, unless a prior commitment has been made to democracy as the source of legitimate rule making. In addition, even in non-democratic societies, the position of the legislature still exists as the official law making organ of a government, and in this respect; the local government.

The legislature has become a standing body recognized by society and by the laws of the land as sharing with the executive or ruler the functions of policy and rule making for the good of the citizenry. People in the legislature act as representatives of the people. They get into the chamber of law and policy making through elections, appointments and or through inheritance.

In Nigeria, the local government legislature has existed in different guises. First, as an indigenous governance council under a paramount ruler before colonialism, which then metamorphosed into native authority system which became known as indirect rule? Even after independence in 1960, the traditional councils were still very much prominent (Dudley 1981). In 1976, the National Reform carried out for the local government recognized the work carried out by the legislature as being under a traditional council. The pattern only slightly changed as from 1992 when election was now conducted into the local government councils – just like the States and National Assemblies. This much was confirmed by Mbah (2009).

THE OPERATION OF CUSTOMARY LAW AND LOCAL GOVERNMENT LEGISLATURE IN NIGERIA

A. Customary Law

Customary law is rooted in the history, tradition and culture of the people. It is the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static; it is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people.

It is the evidence Act of the Laws of the federation of 1990 that has given the greatest teeth to the existence of customary law in Nigeria. Section 2(1) of the Evidence Act considers customary law as "a rule which, in a particular district has from long usage obtained the force of law".

Furthermore, customary law should be in existence at a relevant point in time and enjoy assent of a particular community whose members accept it as law. To qualify as customary law, it must, according to Park (1963) be "existing native law and custom and not that of bygone days". The observance must be a binding obligation capable of being enforced.

Another way through which customary law operates in Nigeria is that it is elastic because it changes from society to society and from custom to custom. In this light, it is usually unwritten. This point was corroborated by Allot (1970) when he said:

First, the law is unwritten. There is no written memory of the edicts and judges, they exist only

in the mind of those who administer and those who are subject to the customary law. There is no pondering over legal principles, no juristic analysis, no criticism or refurbishing of old precedents all of which depend on written texts which the justice may scrutinize at leisure.

The cosmopolitan nature that many traditional societies are now assuming in Nigeria, has made many customary laws to be put in writing. In many of the court rooms, judgments are now recorded. But that does not mean that the sources of these laws are not the recollection of elders and others whose traditional roles enables them to have special knowledge of the customs and traditions of the people. The purpose for the recording now serves as a reference point particularly in environments where cultures have blended into one another.

The way things are presently, customary laws can be ascertained before the courts in two ways: by proof and by judicial notice. Section 14(1) of the Evidence Act (1990), provides that:

A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall die upon the person alleging its existence.

A breakdown of this connotes that if a custom is not judicially noticed, the party asserting that it exists has to prove its existence by evidence. The evidence act does not automatically apply to all judicial proceedings in or before courts and this raises the issue whether proof of customary law in customary courts is required by law.

Judicial notice is the second method of ascertaining customary law. According to the evidence act of 1990:

A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

The expression the "same area" suggests that judicial notice cannot be taken in one culture group and apply it to another culture group. In a nutshell, it can be argued based on the present circumstances that customary law satisfies the attributes of law. This is because, it is a norm of obligations

made by a legal authority, for which there is enforcement by organized agencies for the purpose of serving certain functions as social control, disputes settlement and so on (Badaiki 1997).

1. The Validity of Application of Customary Law

All rules of customary law are subject to certain general tests of validity before they can be enforced. There are three such tests. The first is that the customary law is not repugnant to natural justice, equity and good conscience. The second is that it is not incompatible either directly or by implication with any law for the time being in force. The third is that it must not be contrary to public policy.

(a) The Repugnancy Test: The repugnancy test of the evidence Act of the laws of Nigeria states that a court should not enforce as law a custom which is repugnant to natural justice, equity and good conscience. Therefore, no customary law should obstruct the rules of natural justice like the right to be heard, liberty and freedom of association.

(b) Incompatibility with Local Enactments: Although it has been established that both statutory enactments and customary laws are sources of law in Nigeria, the "incompatibility test" has undoubtedly ranked local enactments above customary law. This means that customary law which is not compatible with any existing enactment ought not be enforced by the courts. The argument is that existing customary laws must not be incompatible with any written law (Obilade 1991).

(c) Public Policy Test: This means that a custom shall not be enforced if it is contrary to public policy. The idea of public policy here implies the principle of judicial legislation or interpretation founded on the current needs of the community. Anything that offends morality is contrary to public policy. That is moral values and ideas which are prevalent in a society as a way of preserving its interest. Where a transaction is contrary to the policy of the laws or public policy, the law refuses to enforce or recognize it on the ground that it has a mischievous tendency so as to be injurious to the interests of the state or the community. This law is predicated on the interest, be it welfare, safety or advancement of the society at large.

2. The Making and Application of Customary Laws

Although various communities exist within the boundaries of particular local governments, such local councils do not have authority to make laws that are customary in nature for the communities. The local governments only make by-laws for the smooth operation of the local councils. These by-laws are not binding on the customary courts.

In contrast, the various state governments within which local governments exist make laws for the courts that operate at the local government level. The question to ask therefore is why cannot the local government legislature make laws for the customary courts that exist within their territory, since the state legislatures are doing same for laws that has to be applied within the jurisdiction of the state.

Another major hindrance to the application of customary laws at the local government level is that customary law mostly deals with matters of land, debts, torts, family, succession and matrimonial matters. The problem of conflict between different systems of customary law now features because of the disappearance of rigid geographical divisions between tribes and the corresponding growth of mobility among the population. Consequently, it is now established that many communities have sizeable number of non indigenes living within them. This is where the functions of the local government legislature should cover cases of land disputes, family matters, debts, torts and matrimonial matters for the customary courts to adjudicate on.

Another point that has to be made here concerns the codification of laws in Nigeria. A critical appraisal of the customary law reveals that it is riddled with internal conflicts. This to a very large extent compounds the problems of judges whose unenviable duty it is to reconcile the seemingly irreconcilable conflicts. Added to this is the flexibility and uncertainty which characterize customary law. The repugnancy doctrine and proof of customary law in courts have not helped matters either. The vexed question therefore is: should Nigeria's customary law remain in this state of uncertainty? Or should it be codified. This issue of codification will give credence to the works of the local government legislature. The legislature is on ground and closest to the people at the community level. They are therefore in the best

position to take over customary law matters for the courts.

3. Merits and Demerits of Customary Laws in Nigeria

Merits

- (a) Customary laws are flexible and easy to amend to suit the situation at hand.
- (b) People's cultures and traditions are given recognition.
- (c) It gives assurance to the unlettered and illiterate as he sees his culture being used to adjudicate cases.
- (d) Customary laws keep our traditional rulers and knowledgeable people in cultural matters very busy. This gives them recognition and role to play in the society.

Demerits

- (a) Customary laws are not written and cannot be defended in competent law courts.
- (b) Some customary laws are barbaric in nature which may not be fair when implemented in new environments or urban centre.
- (c) They are mostly not democratic since they originate from mainly autocratic tendencies.
- (d) Always too sectional in outlook and therefore can not convey universal applicability.
- (B) The Operation of the Local Government Legislature.

In Nigerian federal system of government, the local government legislature is provided for in the constitution. Members of the legislature are called councilors and they are democratically elected for specific period of terms. As elected representatives of the people, they are empowered to make by-laws. By-laws which also mean local government laws are that body of law or enactment made by the local government to govern the conduct of the people living within the local government area. The 1999 Constitution of the Federal Republic of Nigeria together with other statute books like the 1976 local government reform and the Handbook on Local Government Administration, prescribes very specific areas within which local governments can make by-laws. Local governments in Nigeria can only make by-laws over the control of motor parks, marriages, divorce and custody of children, liquor license, control of drumming, bicycle

license, markets, slaughter slabs, control of live-stock's, registration of marriages, prevention of road obstruction etc.

What has to be pointed out with the Nigeria by-law system is that it is sterile, because they lack enforcing agencies or enforcement authorities. For laws to be effective, they must have the powers of arrest, detention, prosecution etc. To say the least, these requirements are lacking in Nigeria local government by-laws. The absence of this enforceable instrument of authority has really whittled down the powers of the local government legislature. To say the least, local government does not and can not control the customary laws and courts that exist within their territory of operation. By-laws made by the council only become enforceable only through the voluntary volition of citizens and through the support given by state enforcement agencies like the police.

In practice, whatever the local government legislature does must not run contrary to state government legislation and where it conflicts with the state-laws, that of the state take precedence.

1. Functions of the Legislature in Local Government

- (a) Making of by-laws for the good and governance of the local government.
- (b) Deliberating on matters of state and national importance as it affects the Local government.
- (c) Overseeing the activities of the executive arm of government.
- (d) Confirming the appointment of political appointees made by the executive.
- (e) Approving funds for the activities of government i.e. budgets.
- (f) Exercising investigative powers over the activities of government that is acting as the watchdog over citizens rights.

2. Merits and Demerits of By-Laws in Nigeria

Merits

- (a) By-laws take care of every citizen in that local government irrespective of the background and nationality.
- (b) By-laws are documented and could be referred to when the need arises.
- (c) They are not subject to easy change or amendment for the sake of it.

- (d) By-laws are superior to customary laws because of government backing and the procedural nature of its making.
- (e) It is law made by democratically elected representatives that takes the interests of the generality of the people into consideration.
- (f) By-laws are rigid and written which makes them very difficult for easy manipulation.
- (g) It exhibits a better foundation that is based on international standards rather than for its being titled towards ethnic affinity and culture.

Demerits

- (a) By-laws are not easily amended because of the procedure involved.
- (b) The process for making by-laws is cumbersome and time consuming.
- (c) It has little or no respect for the maker(s).
- (d) The judiciary has to come in when the need for interpretation arises.

THE RELATIONSHIP BETWEEN CUSTOMARY LAW AND LOCAL GOVERNMENT BY-LAWS

Some prominent scholars in the fields of local government law and customary law in Nigeria have tried to build a relationship between the two institutions at the local government level. The positions of (Yakubu 1999; Asein 200; Eregha and Agbro 2005) align with each other. They are summarized below:

- (a) Local government laws (By-laws) are written while the customary laws are not codified. Their mode of enforcement is also different.
- (b) Customary laws vary from one community to the other, depending on the prevailing tradition and customs.
- (c) While customary laws are very flexible, those of by-laws are rigid and therefore can not easily be changed.
- (d) While by-laws are static and constant, customary laws are dynamic and fluid.
- (e) Customary laws are somewhat inferior to by-laws since they can be set aside by courts of higher jurisdiction.
- (f) While by-laws originate from the people and it is civil in nature, customary laws are based on customs and tradition and therefore may not have universal acceptability like by-laws.
- (g) While customary laws are subject to change

over time due to many variables, local government laws are difficult to change because of the procedures involved.

- (h) While by-laws are documented, customary laws are not documented and they are linked to autocratic tendencies.
- (i) Customary laws can rise and fall with its political leaders or originators. While by-laws do not rise and fall with political leadership. By-laws are made through procedures and by constituted authority.
- (j) The study of modern law will not be complete without a discussion of customary law. In the same vein, most of the traditional rulers who are custodians of the people's history had a lot of in-road into the affairs of local government authorities during the periods of pre and during colonialism.

THE PROSPECT AND WAY FORWARD FOR CUSTOMARY LAW AND LOCAL GOVERNMENT LEGISLATURE

In the drive to reconstruct a workable future for customary law and local government legislature in Nigeria, it is here asserted that most of the customary laws in Nigeria have become outdated, obnoxious and irrelevant, especially considering the plural nature of the Nigeria society (Nwabueze 1982). To give customary law a facelift, the challenges of asking for autonomy for the local governments according to Oyovbaire (1982) has to be faced. As a dynamic modern society, the conflict between customary laws and the co-existence of customary law with other laws has to be settled. This is where the powers of the legislature at the local government level has to be strengthened. It is here advocated that the legislature at the local government should be able to legislate on laws that would be respected and enforced by the state in the various communities in a local government within a state. Even the powers of enforcement of its laws should be given the local government. And if possible a working relationship should be established between the organs of the state and that of the local government so that the new and desired powers for local government legislature would be seen to be working. (See, Egwummuo 2007 and Eso 200).

A new wave should be established for the codification, integration and unification of customary laws in Nigeria (Elias 1969; Azinge 1991). This should be done by bringing the

legislature at the local governments to work with the legislature at the state level in conjunction with the state judiciary so as to be able to harmonize their laws and for the laws to be seen to be working at the two different levels of government. The cases of countries like Tanzania, Ghana, Ethiopia, Ivory Coast and Malagasy (Badaiki 1997) are easily cited as examples in Africa. Maybe, the method on how they went about it should be studied and adopted in the Nigerian state.

At the local government level, there is the clear absence of legal department which is a major problem in local government legislation. Most councilors are not learned and hence are not properly grounded in the act of law making. To bring a human face into the local government law, a legal department should be created to oversee this area, just as it is at the state level with the Ministry of Justice. Also, it is here advocated that proper training should be given to councilors or should have been acquired before the job of legislation is embarked upon. Government should design very potent seminar/workshop or training programmes for councilors and make sure they attend. Comprehensive provisions of customary law, legislation and lawyers trained in the annals of the law like statutory interpretation is urgently required for running the local governments in Nigeria.

The enforcement of by-laws has often proven to be problematic as not only do they lack the powers of enforcement, where they exist, they are carried out haphazardly. Another problem is that people often considers the closeness that they share at the Local Government level which often affects the law itself and its enforcement. Understanding the act of governance will remove all those inordinate considerations. In this respect, only the socio-economic, legal and development considerations will underlie the making and enforcement of legislation at the local government level.

CONCLUSION

The relationship that should exist between customary law and local government legislature is very fundamental and critical for the survival of Nigeria's democracy. For one, it decentralizes governance and creates room for the observance of the rule of law, thus giving rise to an egalitarian society. The legislature plays a central role in the

survival of the presidential system of government. This is because, not only is it an arm of government, it lays the foundation and builds the structure which leads to the achievement of the good life for the executive and the judicial arm of government. Both customary law and local government by-laws are products of the people's customs, beliefs, principles and tradition. They logically therefore have to work together as one entity to ensure that there is unity of purpose in the existence of local government. But the present state of customary law shows that it is not yet fully developed. It is necessary according to Badaiki (1997) to undertake a "scientific and systematic study of the customary laws of the various culture groups in the country". Such a gigantic task should involve not only the local, state and federal government through the various Ministries of Justice and Judicial Departments (Olaoba 2006) but also the Universities and Nigerian Law School using a consortium of experts in law, History, Sociology, Anthropology, Religion and Customs. The culture groups as well as their community elders must be involved and carried along in the project.

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