DINNER OF CARCASSES: AN ANALYSIS OF THE NATURE OF NIGERIAN LAWS

Written by ***Mojisola Eseyin**** *&* ***Edoho Godwin*****

**Associate Professor*

***Post Graduate Student, University Of Uyo, Nigeria*

Abstract

The expectation of any progressive legal system is to find expression in continuity and contemporary development. When in a legal system laws reflect the past and not the present such a legal system is not dynamic. Laws reflects the status of any legal system. Nigerian laws still relish the old and outdated laws of the colonial masters that crept into the legal system via the statutes of general application. Some indigenous enactments merely reiterate the English system and do not reflect the spirit of the people. This practice is a rejection of the Savignian's doctrine of Volksgeist. It follows therefore that legal development in Nigeria may be feeding on dead laws and carcasses. This work critically analyses Nigerian law unfolding the obsolete nature and making suggestions for reform.

Introduction

In an attempt to define the term law, several jurists and scholars have been classified into schools of thoughts.[1] Individually, their attempts at defining law has been variously criticized.[2] However, the schools of thought have been eulogized for their contributions to the unraveling of the idea of law.[3] In other words, although individually, these schools have failed to achieve their objectives but collectively they have been able to expatiate on the nature and idea of law. A critical perusal of each legal system, including the Nigerian Legal System, will identify the trappings of each of these schools of thoughts. Thus positivism is more visible in the criminal laws,[4] while realism is embedded in judicial precedent[5] or case laws. Historical jurisprudence gives impetus to customary laws.[6] There are several sources of Nigerian Law. According to

[1] M. Eseyin, "Legal Cartography: The Result of an Attempt to Formulate and Appropriate Legal Theory for Nigeria" (2015) 41 *Journal of Law, Policy and Globalization*, 170.
[2] See: R.W. M. Dias, *Jurisprudence* (3rd Edn. Butterworths, London 1970), 381-544.
[3] Ibid
[4] J. M. Elegido, *Jurisprudence* (Spectrum Books Limited, Ibadan 2010), 56
[5] Eseyin (n.)
[6] P.Onyango, "African Customary Law: An Introduction" (2013) <www, academia.edu/10451696/AFRICAN_CUSTOMARY_LAW_SYSTEM> accessed 10 December, 2016.

Obilade, the sources of Nigerian Law include: Nigerian legislations;[7] English law which consists of the received English law comprising the Common law, the Doctrines of equity and the Statutes of general application in force in England on January 1, 1900; customary law and Judiciary precedents[8]

Each of these sources of Nigerian law represents the postulation of each of the schools of thought. However most of these sources of Nigerian law have been influenced by English law. In fact, it will not be an over-statement to say that what is regarded as Nigerian law, with particular reference to Nigerian legislations, is actually an imposition or transplantation of the laws of other countries.[9] It was the stern opposition of the proposed imposition of the codes of Napoleon in Germany that led to the full-blown emergence of Historical Jurisprudence led by Friedrich Carl von Savigny. It was Savigny's postulation that law should not be an imposition but develop organically from the spirit of the people.[10] The spirit of the people he called "the *Volksgeist*".

In contradistinction to the ideas and principles of the historical school of thought Nigerian law is majorly made up of legislations imported, received or borrowed from other countries.[11] Particularly, most of these laws were received from England. They continue to apply in Nigeria even when they have since been repealed or amended by the country from where they were borrowed from. Thus, we continue to dine with dead laws even in the face of our ever changing society.

The aim of this work is to critically analysis Nigerian laws, especially the obsolete legislations which continue to be applicable in Nigeria even when they have lost touch with the contemporary realities and have since been discarded completely through the process of repeal or copiously amended by its country of origin. The theoretical framework to be adopted in this research is the historical analysis of law. Recommendations will be made to the effect

[7] Nigerian legislations as used here include the Nigerian Constitution. Some authors identify the separate source of Nigerian. Law. See: J. O. Asein, *Introduction to Nigerian Legal System* (2nd Edn. Ababa Press Limited, Lagos 2005), 24.

[8] A. O. Obilade, *The Nigerian Legal System* (Spectrum Law Publishing, Ibadan 1993), 55-56

[9] Asein (n.7)

[10] M. D Dubber, "New Historical as Critical Analysis of Law" (2015) http://ssrn.com/abstract = 2584119 accessed on December 2016.

[11] W.A. Adebayo, "The Common Man and the Cross of the Law in Nigeria: The Parody and Crisis of life" (2015) 3 (1) *The International Journal of Humanities and Social Sciences*, 309. www.theijhss.com accessed on 10 December 2016.

that various Law Reform Commission and the Legislature at the Federal and State levels in Nigeria should undertake a massive upgrade and review of all our laws to bring them in line with contemporary realities.

2 Historical School of Thought

Historical Jurisprudence began as a reaction to the postulation of the Natural Law theorists. It is noted that Historical Jurisprudence and Positivism were the two principal reactions to the Natural Law Theory.[12] Herder and Hegel laid the foundation for the Historical school in Germany.[13]

Friedrich Carl Von Savigny gave impetus to the Historical school.[14] He rejected Natural Law and was also not in support of positivism. To him a legal system was part of the culture of a people. Law was not the result of an arbitrary act of a legislator but developed as a response to the impersonal powers to be located in the people's national spirit. He called this people's spirit, "the *Volksgeist*". He used his *Volksgeist* theory to oppose the proposed imposition of the Code of Napoleon in Germany.[15]

It is noted that the central theme of historical jurisprudence is that law is not to be regarded as an arbitrary grouping of regulations laid down by some authority. Rather, those regulations are to be seen as the expression of the conviction of the people, in the same manner as language, customs and practices.[16] Emphatically, to drive home his points, Savigny noted that, "law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality".[17]

It was part of Savigny's writing that law passes through three developmental stages.[18] The first stages is the stage of unwritten customs. In the second stage, the customs are reduced

[12] M. D. A Freeman, *Lloyd's Introduction to Jurisprudence* (8th Edn. Sweet and Maxwell, London, 2008), 1077.
[13] *Ibid*
[14] Dubber (n.10), 9; H. Harata, "An Interim Report on Savigny's Methodology and his Founding of a Modern Historical Jurisprudence " (2013) 8 (9)
[15] Freeman (n.12), 1079.
[16] Eseyin (n.1), 175
[17] Freeman (n.12), 1080
[18] Elegido (n.4), 82.

into written forms. At the final stage is when the law is enacted into legislation. In this later stage, Freeman observes, the law will lose touch with the *Volksgeist* or spirit of the people and will become but "the property of a clique of experts".[19]

The Historical school, just like the other schools of thought, has been variously criticized. The whole idea of the *Volksgeist* has been criticized for there is a near impossibility to identify the *Volksgeist* in a country with multi-ethnic coloration like Nigeria. According to Doherty[20] "many countries have groups or different races and different culture, different religions or totally different political persuasion. Differing spirit exists even in countries with strongly totalitarian governments such as Poland." She concluded that even though Savigny allowed for inner circles of groups and localities within a country, his theory cannot accommodate these many countries where a choice of spirits exists.

Another criticism of Savigny's theory is his failure to take into account the successful transplantations of laws from one place to another. According to Dias,[21] legal transplantations happened contemporaneously with era of Savign's legal theory and books. Particularly, there is evidence that at that time, German Civil Code was adopted in Japan, Swiss Code in Turkey and the French laws (especially English, French and Portuguese) have been transplanted to African and Asian countries.

It is also worth noting that the historical school has been greatly criticized for its devaluation of influence of legislation.[22] Similarly, it minimizes the influence which individuals have exercised upon legal development. Examples of such individuals include the classical jurists of Rome, Littleton, Coke[23] and Lord Denning.

Despite the attacks on Historical school, the contribution of the school is an eye-opener to the fact that imposition of alien norms will be counter-productive as it would not guarantee the cherished social order of the society. Applying the postulation of the historical school to

[19] Freeman (n.12), 1080.
[20] M. Doherty, *Jurisprudence: The Philosophy of Law* (Old Bailey Press, London 1997), 240.
[21] Dias (n. 2), 431.
[22] Ibid, 432,. Elegido (n. 11), 309.
[23] Dias (n.2), 430

censorial jurisprudence in Nigeria will enhance the efficacy of law as an instrument of social engineering.[24]

3. The Nature of Nigerian Law

There are several sources of Nigerian Law or Nigerian legal system. They are: the constitution, legislation, received English law, customary law and judicial precedents.[25] Nigeria was colonized by the British, thus most of its laws are made up of laws received from England and other Commonwealth countries.

The Nigerian Constitution is regarded as the supreme law of the land. This is more pronounced in sections 1 and 3 thus:

> This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
>
> If any other law is in consistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

The Nigerian courts have severally upheld the supremacy of the Constitution over all other laws in Nigeria.[26] Nigerian legislations consist of enactments made by the National Assembly, to wit, the Senate and the Federal House of Representatives for Federal laws and at the states' level; the State Houses of Assembly. Legislations form the most important source of Nigerian law and consist of Statutes and subsidiary legislations.[27]

Customary law is another source of Nigerian law and includes Islamic law.[28] However, customary law is not automatically applicable in Nigerian courts. Its existence must be proved

[24] Adebayo (n.11), 309.
[25] Eseyin (n. 1), 175
[26] See: *Eleso v. Government of Ogun State* (1990) 2 NWLR (Pt. 133) 420; *Ifegwu v. Federal Republic of Nigeria* (2001) 13 NWLR (PT. 729) 103; *Anka v. Lokoja* (2001) 4 NWLR (Pt. 702) 178.
[27] I. J. Udofia, *Foundations of Nigerian Legal System* (Esquire Publishers, Uyo 2006), 50.
[28] Eseyin (n. 1), argues that Islamic law constitute a distinct source of Nigerian Law.

by calling of witnesses[29] or reliance on Books and Manuscripts.[30] The only exception here is where the said custom has been judicially noticed by the courts.[31] Received English Laws consist of Common law, doctrines of Equity and statutes of general application. Due to the scope of this work, particular focus will be on the Statutes of general application. Statutes of general application that were in force in England on the 1st day of January, 1900 were the third category of received English laws. The courts are entrusted with the responsibility of ascertaining and applying those statutes that meet the laid down criteria for application under the general provision.[32] It must be shown to have applied to the whole of the United Kingdom and was in force as at January 1, 1900. An Act of the British parliament that had been repealed in England before that date is inapplicable. Also, on the authority of the case of *Young v. Abina*,[33] such statute would still apply in Nigeria even if it was repealed or amended in England after that date. Thus archaic and obsolete legislations continue to apply in the Nigerian legal system. In the instant case, the Land Transfer Act of 1897 which was repealed in England in 1925 was held to be applicable in Nigeria.[34] It is disheartening to realize that the laws we feed on in the Nigerian legal system are non-existent where we attached them from. The colonial masters dumped heaps of legal carcasses on the Nigerian legal system. It is impossible for such a system to grow and extend in all its ramifications. Decay and retardation will be ready partners in such a system.

Judicial precedents or case laws also constitute the source of Nigerian law. Under this, past decisions of superior courts are cited and relied upon in similar circumstances. Nigerian Supreme Court has held unto this principle with conspicuous jealousy.[35]

The Nigerian legal system has acquired a dual structure comprising of customary and English law. It is also based on the well-recognized doctrine of *stare decisis* (judicial

[29] *The Queen: Expiate Chief Lewis Ekpanga v. Ozogaba II* (1962) I All NLR 268; *Oyediran v. Alebiosu II* (1992) 7 SCNJ 187 at 193-194.

[30] Section 70 of the Evidence Act, 2011 states thus, "In deciding questions of customary law and custom, the opinions of traditional rulers, chiefs or other person having special knowledge of the customary law and custom and any book or manuscript recognized as legal authority by people indigenous to the locality in which such law or custom applies, are admissible". See also: *Adedibu v. Adewoyin* (1951) 13 WACA 191; *Adeseye v. Taiwo* (1956) 1FSC 84

[31] See: Sections 16 (1), 17 and 18 (1) of the Evidence Act, 2011; *Angu v. Attah* (1960) 15 WACA 20.

[32] The Received English Law does not apply in the States of the old Western Region by virtue of the Law of England (Application) Law of 1959.

[33] (1940) 6 WACA 180

[34] *Ibid*

[35] See: *Dalhatu v. Turaki* (2003) 110 LRCN 1572

precedents) and admits to hierarchical arrangement of laws. It also adopts the adversarial or accusatorial system of administration of law by the courts.[36]

4. The Legal Dinner with Carcasses in Nigeria, an Analysis

It has been noted in this work that historical school was a reaction to positivism as well as natural law school. The proponents of the former emphatically states that law should not be an imposition but should emanate from the common consciousness of the people. The aspect of historical theory of law that is relevant to our analysis here is extracted from the work of Savigny, particularly, the stern opposition of Savigny to the proposed importation of the Napoleon Code from France into Germany. At that time, the Romanic laws had already been well grounded in Germany. He advocated for a law that was developed from the customs and practices of the people, just like language and custom.

Nigeria at a time was applying majorly English laws, albeit the colonial administration also had a legislative house, which was more or less made up of the English people. In 1900 these laws, especially the statutes of general application were officially received as part of the Nigerian law. Even the transplanted laws were localized to suit the local circumstances, mostly by the replacement of Naira with Pounds and Buckingham Palace with Aso Rock.[37] According to Lord Denning,

> It is a recognition that the Common Law cannot be applied in a foreign land without considerable qualification. Just as an English oak, so with the English Common Law. You cannot transplant it to the African continent and expect it to retain the tough character, which it has in England. It will flourish indeed but it needs careful tending.[38]

[36] See: Asein (n. 7), 3-8; *Eholor v. Osayande* (1992) 6 NWLR 524 at 541-542.
[37] Eseyin, (n. 1), 175
[38] *Nyali Limited. V. Attorney- General* (1955) 1 All ER 646 at 652-653.

Similarly, in the case of *Caribbean Trading and Fidelity Corporation v. Nigerian National Petroleum Corporation*[39] the Nigeria Supreme Court held thus:

> Quite apart from the fact that borrowing from other systems has always been and continues to be a common form of legal change and development and those legal systems… Nigeria does not cease to be Nigerian because it has chosen a particular mode for ensuring the procedural completeness of its legal system, just as Nigeria does not cease to be Nigeria by choosing the English Language… our legal system draws much of its strength from being part of a Common Law system having its roots in the past while remaining organic.

In Nigeria, the legislature has not imbibed the admonitions of Lord Denning quoted above. Merely replacing key words in our legislations does not make such legislations to suit our particular circumstances. The gravity of this assertion is well noted when one considers the jumbo pay package for Nigerian legislators and also the fact that Nigeria operates a bi-cameral legislature at the Federal level. Information and communication Technology and computer have been fully on ground for almost a decade before our legislators saw the need to amend the Evidence Act to admit electronically generated evidence.[40]

It should also be noted that the height of our application of dead or archaic laws is more evident in the Sales of Goods Acts, 1893; Hire Purchase Act, criminal laws and family law. The Sales of Goods Act continuously makes reference to England, Scotland and Pounds.[41] Besides, Section 4 of the Sale of Goods Acts 1893 has been repealed in England, it still applys in Nigeria except in Lagos and States of the former Western Nigeria which legal regimes have promulgated home bred laws in that regard.[42] England has a new and more contemporary

[39] (2002) 34 WRN 11
[40] Section 84 of the Evidence Act 2011.
[41] See: sections 4, 11, 59, 62 of the Sale of Goods Act 1893.
[42] See: U. Udok, *The Law of Sale of Goods in Nigeria* (Kan Educational Books, Uyo 2004 175)

legislation on Sale of Goods which was developed in tandem with the new technological and legal development and has dropped the 1893 Act like a bad habit. Unfortunately, the old, obsolete, condemned and unwanted law is still the extant law in Nigeria.

Our laws are like carcasses when they ignore societal development. The law is meant to change with the changes in the standard and cost of living. Fiscal considerations and dimensions should be reflected in the law. The Hire Purchase Act punishes the vendor with a fine of twenty naira only where he fails to provide adequate information about the purchase transaction[43]and that remains the same till date. This legislation was made in the same year when the West African Currency Board notes and coins were withdrawn and replaced with the Nigerian version. Twenty naira meant so much then but is today almost inconsequential Also, our criminal laws (Criminal Code and Penal Code) are filled with sanctions which are not commensurate with the gravity of offences committed.[44] It is worth noting that section 370 of our Criminal Code creating the offence of Bigamy was not enacted to suit the Nigeria situation. Hence it has become very irrelevant. Women will hardly press charges against their husbands under this provision. Suffice it to say that, that provision died on arrival and has since been stinking in our legal system. It did not conform to our customs and traditions wherein a man is permitted to marry more than one wife. The Criminal Code was imported from Queensland in Australia while the Penal Code was modelled after the Sudanese Criminal Code.[45]

Conclusion

Historical jurisprudence posits that law should not be an imposition but should be a growth arising from the *Volksgeist* or spirit of the people. The most pronounced protagonist of this school was Savigny who opposed the proposed imposition of French Napoleon Codes in Germany. Although Nigerian customary law fits the description of the Historical school, it is an uncontroverted fact that most of the laws in Nigeria are borrowed imported or received from other jurisdictions. This is contrary to the postulation of the Historical school. It should however be noted that, generally, these laws operate successfully in the Nigerian legal system without protest.

[43] See: Section 6 (4) of the Hire Purchase Act, 1959.
[44] Section 490 0f the Criminal Code
[45] C. O. Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria* (2nd Edn. Spectrum Book Limited, Ibadan 2005), 4-10.

It should however be noted that most of these laws are archaic, obsolete, anachronistic and have lost touch with the contemporary realities. Also, most of these laws have long been declared dead in their countries of origin but still apply with equal force in Nigeria. Most of them have been repealed or amended in the legal system of their origin, but Nigeria still feed on these carcasses. Moreover, many of our legislations revolve on one point and are devoid of the dynamism expected of progressive societies. Some also exist as extant laws but are dead to the spirit of the people. They answer the name, law, but remain dead to the people because they do not reflect the spirit of the people.

There is therefore the need to embark on a massive repeal and amendment of most of our legislations by our legislature. Thus this work call on the various Law Reform Commissions to liaise with the National and States Houses of Assembly to ensure that our laws are updated and upgraded to suit our particular circumstances. Alternatively, this work recommends that the cut-off date for the statutes of general application be removed so that the statutes will apply in Nigeria in their current status as in their country of origin.