

## Chapter 63



# Law and Justice

*Olúyémisí Bámgbòṣé*

### Introduction

Legal scholars, texts, and philosophers have given different definitions to the term law. The definitions are given from the perspective or context of the society, the individual, authority, or courts. In 1905, Melville Bigelow in the *Columbia Law Review* stated that a scientific school of legal thought should begin with a sound working definition of the term law<sup>1</sup>

In Bigelow's article, he gave the 1700 definition of the term law by Blackstone: "law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and forbidding what is wrong."<sup>2</sup> Bigelow went further to criticize the definition by Blackstone as theological, unsound details, and conveys a wholly erroneous idea; it "must be set aside"<sup>3</sup> This describes what the law should be and what it should not be. He defined municipal law as the existence of binding relations, direct and collateral; of rights and duties between men or between the state and men; or legislative grants of authority under which such relations may be created each in virtue of freedom to do whatever is reasonable.<sup>5</sup>

1 Melville M. Bigelow, "Definition of Law," *Columbia Law Review* 5 (1905): 1-19, accessed October 8, 2015, <http://www.jstor.org/stable/1109712>.

2 Ibid. 1.

3 Ibid. 2, 4, 7, and quote on 9.

4 Ibid. 10-18.

5 Ibid., 18

## Culture And Customs Of The Yorùbá

In a letter to the editor of the *American Anthropologist* titled "Concerning Roscoe Pound's Definition of Law," Adamson Hoebel quoted A. R. Radcliffe Brown's definition of law as "[s]ocial control through the systematic application of the force of politically organized society."<sup>6</sup> The source of Brown's definition was Roscoe Pound.<sup>7</sup> John Austin in *Austin's Jurisprudence* says "law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."<sup>8</sup>

In contemporary times, there are attempts to define the term law in legal texts. Bryan Garner in *A Dictionary of Basic Legal Terms* says that "law is a regime that order human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force in such a society."<sup>9</sup> *Black's Law Dictionary* defines law "as a body of rules of action or conduct prescribed by controlling authority and having binding legal force."<sup>10</sup> Generally, law is a system of rules that are enforced through social instructions to govern behavior. It is, therefore, official rules and regulations. Law governs a society and it controls the behavior of members of that society.

The purpose of law is to maintain social order by holding and attaining justice in the society. It regulates the actions of the members by teaching and informing them how to behave properly. Bastiat says the purpose of law is to prevent injustice from reigning in a given society.<sup>11</sup> Summarizing the purpose of law, it serves many purposes, such as establishing standards or providing guidelines that citizens must follow. Laws maintain order, providing order consistent with societal guidelines, resolving disputes through formal means, like the court system, and informal means, like Alternative Dispute Resolution. Laws protect people's liberties and rights from violation or intrusion from persons, organizations, and governments.

On the characteristics of law, Bigelow gave a description of what law should and should not be.<sup>12</sup> It is important to state that laws can be written or unwritten. A summary of the characteristics of law are as follows: Law is a system of rules; it is recognized by a group of persons, community or government; it regulates and governs the actions of its members; and it is enforceable by the group of persons, community

6 E. Adamson Hoebel, "Concerning Roscoe Pound's Definition of Law," *American Anthropologist New Series* 64 (1962): 836.

7 A. R. Radcliffe-Brown, "Law Primitive," *Encyclopaedia of the Social Sciences* (New York: Macmillan, 1933) 10:202 cited in Hoebel, "Concerning Roscoe Pound's Definition of Law," 836.

8 Austin's Theory of Law accessed on April 10 2016, <http://www.mbhaa.com/microsoft%20word%20>.

9 Bryan A. Garner, ed., *A Dictionary of Basic Legal Terms* (naps.: West Group, 1992), 120.

10 "Purpose of Law," *Family Guardian*, accessed on October 10, 2015, <http://famguardian.org/subjects/lawandgovt/articles/purposeoflaw.htm>.

11 Frederick Bastiat, *The Law* (1850; reprint, New York: Foundation for Economic Education, 1968), 29, cited in K. W. McGee "Duty to Whom?" in *The Ethics of Tax Evasion: Perspectives in Theory and Practice*, edited by R. W. McGee (New York: Springer Science at Business Media, 2012) 41.

12 Bigelow, "Definition of Law," 10-18.



or government. Law has different classifications of law. Basically, law can be broadly classified into public law, private law, and international law.

Public law regulates the relationship the individual and the state, while private law governs relationship between one individual and another with the state. International law regulates relationships states. The sources of law in Nigeria include the Common Law of England, doctrines of equity, and statutes of general application in force in England as of January 1, 1900. English statutes received as part of the law in Nigeria by local legislation. Other sources include local legislation, federal and state laws, Nigerian case law, and customary law. Customary law as a source of law in Nigeria will be the main focus in the discussion in this chapter.

The concept "justice" is an abstract idea of right and wrong. It means fairness and equality. The concept has been defined in different ways by philosophers and legal jurists. Merriam Webster dictionary defines justice as the process or the result of using laws to fairly judge and punish crimes and criminals.<sup>13</sup> Bhandari, in his book *Plato's Concept of Justice: An Analysis*, says that justice is a fundamental principle of a well-ordered society.<sup>14</sup> He went on to say it is the bond that holds society together.<sup>15</sup> Afifeh Hamed in his article "The Concept of Justice in Greek Philosophy (Plato and Aristotle)" said that the concept justice according to Plato and Aristotle meant goodness as well as willingness to obey laws.<sup>16</sup> John Rawls in *A Theory of Justice* describes the concept in terms of fairness.<sup>17</sup>

There is a link between law and justice. Rawls expressed that in whatever context the concept is considered, justice is a cardinal pillar in any legal system.<sup>18</sup> He further stated that it is first virtue of any social institution.<sup>19</sup> Rawls showed the link between the two concepts when Sionaidh Douglas-Scott quoted him as saying that laws and institutions, no matter how efficient and well arranged, must be reformed or abolished if they are unjust.<sup>20</sup> In essence, the two concepts are interwoven and cannot be separated. A law must, therefore be just to all, and all should be able to find justice through the law. A judge in Edo State Customary Court of Appeals said in the paper

13 Merriam Webster Dictionary, accessed on October 10, 2015, <http://www.merriam-webster.com/dictionary/justice>.

14 D. R. Bhandari, "Plato's Concept of Justice: An Analysis," paper presented at the Twentieth World Congress of Philosophy, Boston, Massachusetts. August 10-15, 1998, accessed October 10, 2015, <https://www.bu.edu/wcp/papers/Anci/AnciBhan.htm>.

15 D. R. Bhandari, *History of European Political Philosophy* (Bangalore, Bappco: The Bangalore Press, 1963), 5-54.

16 Afifeh Hamed, "The Concept of Justice in Greek Philosophy (Plato and Aristotle)," *Mediterranean Journal of Social Sciences* 5 (2014): 1162.

17 John Rawls, *A Theory of Justice*. (Cambridge, MA: Harvard University Press, 1971), 3.

18 Ibid., 3.

19 Ibid., 3.

20 Sionaidh Douglas-Scott, "Justice, Injustice, and the Rule of Law in the European Union," in *Europe's Justice Deficit? Beyond Good Governance*, edited by G. de Búrca, D. Kochenov, and A. Williams pages 1-16 (Oxford: Hart Publishing, 2014), accessed on October 10, 2015, <http://ssrn.com/abstract=2457266>.



“The Relevance of the Customary Court of Appeal in the Dispensation of Justice” that dispensation of justice is the primary aim of establishing a court of law.<sup>21</sup>

## Customary Law of the Yorùbá

The Yorùbá are one of the three main ethnic groups in Nigeria, a country in West Africa that had been colonized by the British. Over 500 minor ethnic groups are found in Nigeria, and they are spread over three main geographical units. The Yorùbá are predominantly in the Western part of Nigeria made up of Lagos, Òyó, Ògùn, Onḍó, Òṣun, Èkítì, and sparsely in some parts of Kogi and Kwara States. Before colonization, all the various ethnic groups existed as independent groups with their own body of rules governing them. With the arrival of the colonial legal system and amalgamation of Nigeria in 1914, Nigeria became a country with three regions made up of the Western, the Northern, and the Eastern regions. In 1963, the regions were divided into twelve states with the structure of the ethnic groups still distinct. Presently, there are thirty-six states that make up Nigeria, with the three dominant ethnic groups still prominent. Nnoli Okwudibu writes that Nigeria is a country that has a feature of ethnic pluralism.<sup>22</sup> Prior to the introduction of colonial legal system in Nigeria, Oluyemisi Bamgbose stated that the country was not void of law and legal institutions.<sup>23</sup> Badaki also claims that there existed notions, norms, rules, agencies, and institution of law in the geo-cultural groups.

The Yorùbá had their indigenous or customary laws and institutions. Customary law is the indigenous law of the Yorùbá. A great majority of people in the indigenous communities conducted their affairs in accordance with their customary laws or issues relating to marriage custody, divorce and inheritance. Okany in *The Role of Customary Courts in Nigeria* defines customary law of a community as a body of customs and traditions which regulate the various kinds of relationships between members of the community.<sup>24</sup> The learned jurist and scholar Justice Teslim Elias defines customary law as a body of rules that are recognized as obligatory by its members.<sup>25</sup> Mukoro considers customary law from the long period it has attained the force of law in a particular area. He said it is “the rule in a particular area that has attained the force

21 Edo State Customary Court of Appeal, “The Relevance of the Customary Court of Appeal in the Dispensation of Justice,” accessed on October 10, 2015, <http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/THE%20RELEVANCE%20OF%20THE%20CUSTOMARY%20COURT%20OF%20APPEAL%20IN%20THE%20DISPENSATION%20OF%20JUSTICE.pdf>.

22 Nnoli Okwudibu, *Ethnic Politics in Nigeria* (Enugu: Fourth Dimension Publishers 1979).

23 Oluyemisi Bamgbose, “Dispute Settlement under the Yoruba Culture: Lessons for the Criminal Justice System,” in *The Yoruba in Transition. History, Values, and Modernity*, edited by Toyin Falola and Ann Genova (Durham North Carolina: Carolina Academic Press, 2006), page 125 -26

24 Martin C. Okany, “The Role of Customary Courts in Nigeria” (Enugu: Fourth Dimension Publishers, 1984), 39.

25 Teslim O. Elias. *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956), 55.



of law due to prolonged usage.”<sup>26</sup> Allen, making reference to the Gold Coast Colony Native Administration Ordinance, wrote that it is a rule or body of rules that obtains and is fortified by established native usage and which is appropriate and applicable to any particular cause, action, suit, matter, or dispute and includes also any native customary law recorded as such.<sup>27</sup>

Eminent Nigerian jurists have also defined customary law. Andrews Obaseki JSC, in the case of *Oyèwùnmí v. Ògúnṣẹ̀san*, defined customary law as “The organic or living law of the indigenous people of Nigeria regulating their lives and transaction.”<sup>28</sup> A similar definition was given in the case of *Owónyìn v. Òmọ̀tòshó*.<sup>29</sup> The acceptability and binding nature of customary law on the people in a particular area highlighted in the two cases above were also noted by Badaki in his book *Development of Customary Law*.<sup>30</sup> Customary law has been defined in legislation. The Evidence Act 1990 which has been repealed by the Evidence Act 2011 provides that customary law is a rule which in a particular district has long usage obtained by force of law.

Customary law has certain distinctive features. Andrew Edward Wilson Park, the author of *The Sources of Nigerian Law*, says that customary law must be an existing native law and custom and not of by gone days.<sup>31</sup> In addition, Park said customary law must be in existence and it must enjoy the assent of a particular community.<sup>32</sup> Mukoro in *Customary Law and Traditional Rulership in Nigeria* buys into Park’s definition above.<sup>33</sup> The observance of customary law must be “binding obligation capable of being enforced,” according to Mukoro.<sup>34</sup> Because it changes from one society to another and from a custom to another one, customary law is elastic and unwritten. Allot eloquently sums up the unwritten nature of customary law in the following words:

Customary law is unwritten. There is no written memory of the edicts and judges. They exist only in the minds 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 refreshing of old precedents all of which depend on written texts, which

26 A. Mukoro, “The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect,” *International NGO Journal* 4 (2009): 167-172.

27 Carleton Kemp Allen, *Law in the Making* (London: Oxford University Press, 1927)

28 1990, 3 Nigerian Weekly Law Reports, Part 13, 207.

29 1961, All Nigeria Law Report, 309.

30 A. D. Badaiki, *Development of Customary Law* (Lagos: Ticken Publishers, 1997), accessed on October 11, 2015, <http://www.academicjournals.org/INGOJ>.

31 Andrew E. Wilson Park, *The Sources of Nigerian Law* (London: Sweet and Maxwell, 1963).

32 Ibid.

33 A. Mukoro, “Customary Law and Traditional Rulership in Nigeria,” in *Local Government and Culture in Nigeria*, edited by I. O. Aransi (Chapel Hill, NC: Chapel Hill Press, 2004), cited in A. Mukoro, “The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect,” *International NGO Journal* 4 (2009): 5

34 Ibid.



## Culture And Customs Of The Yorùbá

the justice may scrutinize at leisure.<sup>35</sup>

Acceptability by the people governed by customary law shows the validity. The fact was buttressed in the case of *Eshugbayi Eleko v. Government of Nigeria*.<sup>36</sup> Jégédé in his book *Principles of Equity*, emphasizes this fact by pointing out that the reaction of the community to the law would reveal its acceptability or otherwise.<sup>37</sup> Asiedu-Akrof further buttresses this fact.<sup>38</sup>

Flexibility and adaptability are characteristics of customary law that have been noted in the Nigerian *locus classicus* case of *Lewis v. Bânkólé*<sup>39</sup> where the erudite judge Osborne C. remarked that "one of the most striking features of West African native law and custom is its flexibility." Allot also recognized its fluid nature.<sup>40</sup> Obaseki itemized some characteristics in clear terms.<sup>41</sup> Customary law is organic in that it is not static. It is regulatory in that it controls lives and transaction of the community subject to it. It is a mirror of the culture of the people. It imports justice to all the lives of those subject to it.<sup>42</sup> From another angle, Nwabueze posit that customary law is geographically and tribally sensitive.<sup>43</sup> Citing the Edo State case of *Egharevha v. Orunonghae* and quoting the learned judge of the court of Appeal, Ibiyeye JCA said "there is need for more cogent and convincing evidence that the custom of *Igiogbe* has extra-territorial application outside Benin Kingdom."<sup>44</sup> *Igiogbe* is a Benin mid-western Nigeria custom that entitles the elder son of the deceased to inherit all the land and building where the deceased lived until death. Another important feature of customary law is that it is supported by enforceable sanction for breach of the accepted rules.

It is apt to briefly discuss an issue related to customary law that has generated a lot of controversy among legal scholars and jurists: the classification of Islamic law as customary law. This classification was said to have been done during the colonial regime.<sup>45</sup> J. N. D. Anderson in his book *Islamic Law in Africa* supported

- 
- 35 Anthony Allot, "Essays in African Law," (London: Butterworth Publishers, 1970), cited in A. Mukoro, "The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect," *International NGO Journal* 4 (2009): 167-172.
- 36 1932 Appeal Cases (AC) 622.
- 37 M. I. Jegede, *Principles of Equity* (Ibadan: Ethiope Publishing Corporation, 1981).
- 38 Dereck Asiedu-Akrof, "Judicial Recognition and Adoption of Customary Law in Nigeria," *The American Journal of Comparative Law* 37 (1989): 571-593, accessed on September 28, 2015, <http://www.jstor.org/stable/840092>.
- 39 1908, 1 Nigerian Law Report 81, pp. 100-101.
- 40 A. N. Allot, "The Judicial Ascertainment of Customary Law in British Africa," *The Modern Law Review* 20 (1957): 244.
- 41 *Oyewunmi v. Ogunesan* 1990 3NWL 13, 182 at 204.
- 42 *Ibid.*, 207.
- 43 R. N. Nwabueze, "The Dynamics and Genius of Nigeria's Indigenous Legal Order," *Indigenous Law Journal* 1 (Spring, 2002): 153-199.
- 44 2001, 11 NWLR, pt. 724, pp. 318-337.
- 45 Andrew E Wilson Park, *A New Source of Nigerian Law* (London: Sweet and Maxwell, 1965), 65.



this classification.<sup>46</sup> The High Court Act provides that "native law and customs includes moslem law."<sup>47</sup> Justice Karibi-Whyte commenting on this classification said "admittedly native law and custom has been statutorily defined to include moslem law."<sup>48</sup> However, he added that there are distinguishing features that nevertheless remain."<sup>49</sup> The classification of Islamic law as customary law was adopted in *Sulia & Ayòplá & Anor v. Muritala Fóláwiyó*.<sup>50</sup> However, the Supreme Court in the Nigerian case of *Alkamawa v. Bello* made a pronouncement that Islamic law is not the same as customary law.<sup>51</sup> Akintúndé Èmíolá suggests that the error in the classification may have been based on the fact that some states in Nigeria, the Islamic law regulates the day to day affairs of the people, as customary does in many parts in the traditional societies in Southern Nigeria.<sup>52</sup>

Oba has criticized the classification, which he said is an arbitrary statutory classification that has no real basis in fact or law but which has remained largely till now.<sup>53</sup> Jamil Abun-Nasir described the classification as "a legal travesty and religious affront."<sup>54</sup> Justice Níkè Tóbi described it as an ignorant assumption or conclusion."<sup>55</sup> The learned justice Karibi-Whyte on this issue stated that "equation of mohammedan law with customary law is demonstrably wrong and clearly misleading."<sup>56</sup> Many other jurists and legal scholars have joined in this debate.<sup>57</sup>

Some distinguishing characteristics brought forth to contest the two law concepts are as follows: Based on origins, it is said that Islamic law is divine while customary law is derived from the assent of the community, citing the case of *Owónyìn v.*

46 J. N. D. Anderson, *Islamic Law in Africa* (London: Cass, 1978), 223.

47 Section 2 of the High Court Act of the Federal Capital Territory, Abuja; and Section 2 High Court Laws of Northern Nigeria 1963.

48 A. G. Karibi-Whyte, *The History and Sources of Nigeria Criminal Law* (Ibadan: Spectrum Law Publishing, 1993), 125.

49 Ibid.

50 1942 8 W.A.C.A 39 at 41-2.

51 1998, 6 Supreme Court of Nigeria Judgments, 127

52 Akintunde Emiola, *Principles of African Customary Law* (Ogbomoso: Emiola Publishers Ltd., 1997), 7.

53 A. A. Oba, "Islamic Law as Customary Law: The Changing Perspective in Nigeria," *The International and Comparative Law Quarterly* 51 (2002): 818.

54 Jamil Abun-Nasr, "The Recognition of Islamic Law: Its Justification and Consequences," in *Society and National Identity in Africa*, edited by Jamil Abun-Nasr, Ulrich Spellenberg, and Ulrike Wanitzek (Hamburg: Helmut Buske Verlag, 1990), 34.

55 Niki Tobi, *Sources of Nigerian Law* (Lagos: MIJ Professional Publishers Limited. 1996), 151.

56 A. G. Karibi-Whyte, *The History and Sources of Nigerian Land Law* (Ibadan: Spectrum Books Limited, 1993), 125.

57 Justice T. A. Aguda, "Toward a Nigerian Common Law," in *Fundamentals of Nigerian Law*, edited by M.A. Ajomo (Lagos: Nigeria Institute of Advanced Legal Studies, 1989), 260; and Isaac Oluwole Agbede, "Legal Pluralism: The Symbiosis of Imported Customary and Religious Law, Problems, and Prospects," in *Fundamentals of Nigerian Law*, edited by M. A. Ajomo (Lagos: Nigerian Institute of Advanced Legal Studies, 1989), 235.



## Culture And Customs Of The Yorùbá

*Omọ̀tòshọ*.<sup>58</sup> Islamic law shapes the community in which it is based and not vice versa as in customary law.<sup>59</sup> In *Lewis v. Bánkólé*, it was decided that flexibility is a basic characteristic of customary law. This is not the case with Islamic law, which is a written injunction.<sup>60</sup> The applicability of the two laws is pointed out as a distinguishing factor. Òbíládé points to the fact that customary law applies to particular tribes and communities and is unique to them, though some other tribes may share similar laws.<sup>61</sup> On the other hand, Islamic law, according to Oba, is a universal law that transcends tribes, languages, and race.<sup>62</sup> This was aptly brought out in the case of *Sàkà Sàláù v. Adéribígbé*.<sup>63</sup> Finally, and more fundamental, is the fact that Islamic law is written, and the sources ascertained in writing. However, another striking characteristic of customary law is that it is unwritten and dynamic in nature.

In the judicial system of the Yorùbá culture, one of the erroneous beliefs and myths about the African States generally, which Olúyémisí Bámgbosé noted in *Dispute Settlement under Yorùbá Culture: Lessons for the Criminal Justice System*, is the lack of a proper and coordinated judicial system prior to the colonial legal system.<sup>64</sup> The truth is that prior to the colonial legal system, which is the dominant system in Nigeria now, the country precisely known as Nigeria was not void of law and legal institutions.<sup>65</sup> Badaiki asserted that "there existed notions, norms, rules, agencies and institutions" of law in the geo-cultural groups in the different communities.<sup>66</sup> It is, therefore, a misconception that there was no court system among the Yorùbá prior to the colonial legal system. Lloyd confirmed the existence of a court in the indigenous communities citing the process of the *oba* (king) and council of chiefs sitting in a judicial capacity.<sup>67</sup> Other persons apart from the Oba, who is considered as the political head, are involved in the administration of justice in the pre-colonial period among the Yorùbá people. They include family heads, village/clans heads, age grades, traditional spiritual leaders like the Ògbóni, the Òṣo Mèsì, and the Agẹmọ in different parts of Yorùbá land. The system of administration of justice among the Yorùbá is hierarchically structured with the family head at the base of the structure and the *oba* at the apex. The customary laws of the different communities are used in the administration of justice. Though the laws were unwritten, they were well and widely known by the people it governed, and knowledge of these laws was effectively disseminated through various indigenous methods like folktales and town meetings. They were also passed down by

58 1961, 1 ANLR 304.

59 A. A. Oba, "Law as an Instrument of Social Change," paper presented at the annual luncheon of the NAMLASS held Ilorin, Nigeria, February 17, 2001, 24.

60 1908, 1 NLR 87 at 100.

61 A. O. Obilade, *Nigerian Legal System* (Ibadan: Spectrum Books, 1998), Chapter 6.

62 Oba. "Islamic Law as Customary Law," 832.

63 1963, Western Nigeria Law Report, 80.

64 Bamgbosé, "Dispute Settlement under the Yoruba Culture."

65 Ibid., 126.

66 Badaiki, *Development of Customary Law*.

67 F. C. Lloyd, *Yoruba Land Law* (London: Oxford University Press, 1962).