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An Examination Of The Co-Existence Of Statutory And Customary Criminal Law In Nigeria

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Abstract

Customary law has existed in so many societies over the ages. In Africa in general and in Nigeria in particular, customary law was the predominant legal framework that regulated the affairs of Nigerians in pre-colonial time. However, since the advent of colonial rule, in Nigeria, statutory criminal law appears to have taken preeminent position in terms of the legal framework that regulates the law of crimes in Nigeria. Really do researchers, academics, and policy makers explain the imbalance of the regulation of crimes in Nigeria by statutory law on the one hand and the customary law on the other. This paper will try to explain, rationalize, contextualize and demonstrate the theoretical understanding about the co-existence of the statutory and customary criminal law in Nigeria. The methodology for this research is predominantly doctrinal; it will draw insights from theoretical underpinnings of legal pluralism and post colonialism.

Keywords: Criminal law, Statutory law, Customary law, Criminology, Nigeria.

1. Introduction

The main purpose of this paper is to examine the treatment of customary criminal law by State law and the Nigerian Constitution in colonial and post-colonial Nigeria. The paper will examine the pre-colonial existence and applicability of customary criminal law in Nigeria. It will demonstrate that in pre-colonial times, customary criminal law was the predominant mode of criminal justice administration in Nigeria at family, village and community levels. It will also aim to highlight the manner in which the colonial authorities accommodated customary criminal law, leaving its administration to native courts whilst at the same time

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introducing the dominant statutory criminal law. It will be demonstrated that the colonial accommodation of customary criminal law was discontinued after political independence as it was rejected by the 1958 Constitutional Conference and that eventually, the abolition of customary criminal law was crystallised by the 1963 Republican Constitution and this abolition is retained by the Nigerian Constitution 1999.

Theories of legal pluralism will be used to contextualise and rationalise the colonial co-existence of customary criminal law and statutory criminal law in the context of Griffith's legal pluralism in the 'weak' sense. It will be argued that legal pluralism in the weak sense is a triumph of the ideology of legal centralism, an ideology that has resulted in the complete constitutional extermination of customary criminal law, despite the fact that customary criminal law is still operational in the daily lives of Nigerians at family, village and community levels.

It will be recommended that if Nigeria must conform to the ethos of deep legal pluralism, then a constitutional amendment to section 36 (12) of the Nigerian Constitution is necessary in order to accommodate customary criminal law so as to make it applicable and enforceable before courts of law in Nigeria. To achieve the above research objective, following this introductory section 1, section 2 will examine the meaning and nature of customary law in general. In section 3, the co-existence of customary criminal law and statutory criminal law in colonial and post-colonial Nigeria will be examined, while section 4 will provide a theoretical contextualisation of the treatment of customary criminal law in colonial and post-colonial Nigeria. Thereafter, section 5 shall conclude with suggestions for constitutional reforms in Nigeria.

2. Meaning and Nature of Customary Law

In the context of this paper, customary law refers to the unwritten customary rules which are considered as binding upon members of various African communities in pre-colonial, colonial and post-colonial times³ which Elias argued 'forms part and parcel of law in general'.⁴ Robert Smith demonstrated that although there is some diversity in customary law

³ See R Smith, 'Peace and Palaver: International Relations in Pre-colonial West Africa' (1973) 14 *Journal of African History* 599 at 600. See also, M Chanock, 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 3 *International Journal of Law, Policy and the Family*; 72 and GR Woodman, 'African Legal Systems', in JD Wright (ed), *International Encyclopaedia of the Social & Behavioral Sciences* (2nd ed. Elsevier, 2015) 272-275.

⁴ TO Elias, *The Nature of African Customary Law* (Manchester University Press, (1972) at v.

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across the African continent, such differences do not outweigh the similarities.⁵ Anthony Allott,⁶ identified and examined the common features of African customary laws to include: the unwritten and customary nature of the law;⁷ some similarities in judicial processes,⁸ which could be indigenous courts presided over by chiefs or in the arbitral tribunal in the villages,⁹ households, families and even clans;¹⁰ the significance of the supernatural;¹¹ forms of government founded upon consent of the community as well as the function and role of the community in the application, interpretation and enforcement of the law.¹²

Elias, appears to agree with the above characterisation of customary law as he also argued that across Africa there had emerged rules of customary law that were similar.¹³ Similarly, Smith reported that such customary laws were widespread in Africa and they were noticed by European visitors to Africa prior to colonialism.¹⁴ Customary law evolved with the various pre-colonial African societies. This implies that indigenous African customary laws were by no means static or uniform across pre-colonial African societies, as Sally Falk Moore observed amongst the pre-colonial Chagga peoples of Kilimanjaro, Tanzania.¹⁵

Indeed, pre-colonial customary laws and societies in Africa existed harmoniously with each other, such that a study of the history of African customary law in any African society is akin

⁵ R Smith, (n 1) above at 600. See also, AN Allott, 'Towards the Unification of Laws in Africa' (1965) 14 *International & Comparative Law Quarterly* 366 at 368.

⁶ AN Allott, *Essays in African Law* (Butterworth, 1960) at 66-70.

⁷ *Ibid.*, at 62 and 66.

⁸ *Ibid.*, at 68.

⁹ *Ibid.*

¹⁰ *Ibid.*, at 68 and 70.

¹¹ *Ibid.*, at 69.

¹² *Ibid.*, at 68-70.

¹³ TO Elias, 'African Law' in A Larson and CW Jenks, *Sovereignty within the Law* (Oceania, 1965) at 210-222. See also, M Gluckman, *Ideas and Procedures in African Customary Law* (Oxford University Press, 1969); AN Allott, *Essays in African Law: With Special Reference to the Law of Ghana* (Butterworth, 1960); AL Epstein, *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, vol 1 (Manchester University Press, 1954); S Roberts, 'Introduction: Some Notes on "African Customary law"' (1984) 28 *Journal of African Law* 1; C White, 'African Customary Law: the Problem of Concept and Definition' (1965) 9 *Journal of African Law* 86; and LA Obiora, 'Reconsidering African Customary Law' (1993) 17 *Legal Studies Forum* 217.

¹⁴ R Smith, (n 1) above at 600.

¹⁵ SF Moore, *Social Facts and Fabrications "Customary" Law on Kilimanjaro, 1880-1980* (Cambridge University Press, 1986) at 38.

to a study of the history of such societies.¹⁶ Omoniyi Adewoye observed, in relation to Southern Nigeria, that customary law in this area was ‘...latent in the breasts of the community’s ruling elite or of the court of remembrance, and was given expression only when...called for...’¹⁷ However, it remained as much ‘a functional element’ or ‘a means of practical action as law in literate society.’¹⁸ In line with the above argument, it has been argued that customary law ‘... provided a bond between the different States and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.’¹⁹

One of the main objectives of customary law, as in the case of Southern Nigeria, was for ‘peace-keeping and the maintenance of the social equilibrium.’²⁰ The reconciliation of parties to a particular dispute was also one of the overall objectives of indigenous African legal processes.²¹ In contrast to the nature of the French inquisitorial and the British adversarial judicial systems, the overarching goal of law in pre-colonial African societies was ‘...to assuage injured feelings, to restore peace, to reach a compromise acceptable to both disputants.’²² Part of the areas governed by customary law in pre-colonial, colonial and to some extent in post-colonial times is in the area of crimes, in terms of providing for punitive measures for crimes committed within the community through the administration of local chiefs, tribunals and deities.

Studies in the 1980s and 1990s illustrated how law had been used to manipulate and determine power relations between people and groups in various societies.²³ Research also reveals that although customary law was not static, through a combined effect of official colonial interference with the evolution of customary law and the role of indigenous African

¹⁶ AI Asiwaju, ‘Law in African Borderland: The Lived Experience of the Yoruba Astride the Nigerian-Dahomey Border’ in RL Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann Educational Books, 1991) 224-238 at 226.

¹⁷ O Adewoye, *The Judicial System in Southern Nigeria 1854-1954: Law and Justice in a Dependency* (Longman, 1977) at 3.

¹⁸ *Ibid.*

¹⁹ R Smith, (n 1) above at 600-601.

²⁰ *Ibid.*

²¹ *Ibid.*

²² O Adewoye, (n 15) above at 4.

²³ See SE Merry, ‘Anthropology, Law and Transnational Processes’ (1992) *Annual Review of Anthropology* 357 at 360 and JF Collier, *Marriage and Inequality in Classless Societies* (Stanford University Press, 1993).

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elites in the manipulation of power relations, official customary law has emerged which is different from the customary law practiced by ordinary African peoples.²⁴ Scholars have argued for a symbiotic relationship between State law, customary law and other forms of law.²⁵ Legal scholars have also revealed the gap between the 'living'²⁶ customary law and 'official'²⁷ or 'sociologists' customary law.²⁸

The literature has also identified several factors that have introduced changes into customary laws like the State, interactions with other groups, official recognition by State institutions and globalisation.²⁹ Indeed, a study has also revealed how State law tends to exclude peoples from utilising their indigenous accountability systems thereby negating their citizenship rights.³⁰ Studies have shown how official State institutions tend to accommodate customary law and the influence of other factors on customary law.³¹

3. Customary Criminal Law and Statutory Criminal Law in Pre-Colonial, Colonial and Post-Colonial Nigeria

²⁴ See RL Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann Educational Books, 1991); SE Merry, (n 111) above at 364; and SF Moore, *Social Facts and Fabrications" Customary" Law on Kilimanjaro, 1880-1980* (Cambridge University Press, 1986).

²⁵ See A Allott and GR Woodman, *People's Law and State Law: The Bellagio Papers* (Walter de Gruyter, 1985); Bds Santos, 'Law: A Map of Misreading-Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law & Society* 279; J Griffiths, (n 69) above; G Woodman, 'How State Courts Create Customary Law in Ghana and Nigeria' in Morse BW and G Woodman (eds), *Indigenous Laws and The State* (Foris Publications, 1988); and J Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 21 *The Journal of Legal Pluralism and Unofficial Law* 149.

²⁶ E Ehrlich, *Fundamental Principles of the Sociology of Law* (Russell & Russell Inc, 1962).

²⁷ SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (Summer 1973) *Law and Society Review* 719.

²⁸ GR Woodman, 'Judicial Development of Customary Law: The Case of Marriage Law in Ghana and Nigeria' (1977) 14 *University of Ghana Law Journal* 115.

²⁹ See GR Woodman, 'Customary Land Laws within Legal Pluralism over the Generations', 4 *SADC Law Journal* 2014/15, 189-208; GR Woodman, 'Ghana: How Does State Law Accommodate Religious, Cultural, Linguistic and Ethnic Diversity?', in M Foblets, J Gaudreault-Desbiens and A Dundes Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World*, (Bruylant, Éditions Yvon Blais, 2010) 255-280; and GR Woodman, 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated From the Field of Land Law' in H Mostert and T Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta & Co Ltd, 2012) 35-58.

³⁰ A Claassens, 'Contested Power and Apartheid Tribal Boundaries: The Implications of "Living Customary Law" for Indigenous Accountability Mechanisms, in H Mostert and T Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta & Co Ltd, 2012) 174-209.

³¹ See AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *The Modern Law Review* 244; AN Allott, 'Towards the Unification of Laws in Africa' (1965) 14 *International & Comparative Law Quarterly* 366; AN Allott, 'What is to be Done with African Customary Law?' (1984) 28 *Journal of African Law* 56; and TO Elias, *The Impact of English Law on Nigerian Customary Law* (Ministry of Information, 1958).

Criminal law in general is the corpus of laws that regulate crimes by proscribing conducts that are perceived to be detrimental, threatening or endangering to persons, property, safety and moral well-being of the society.³² Customary criminal law is therefore the unwritten rules that are considered binding on members of a community which regulates crimes, by proscribing conducts that are perceived to be detrimental, threatening or endangering to persons, property, safety and moral well-being of the members of a community.³³

In pre-colonial Nigeria, customary criminal law was the pre-dominant mode of criminal justice administration through local chiefs, tribunals and deities. Historically, the origin of statutory criminal law in Nigeria dates back to the emergence of colonial rule by the British in Nigeria. Thus, Nigerian statutory criminal originally derived from the English common law rules.³⁴ Prior to the emergence of colonial rule, the various local communities in southern and northern Nigeria had their various ways of regulating crimes through the pre-existing indigenous customary law institutions based mainly on the family, village and groups of communities.³⁵ In some areas of the North of Nigeria, Islamic law co-existed with customary rules of crime. It must be noted however, that a detailed discussion of the co-existence of Islamic law of crimes and statutory criminal law in Nigeria is beyond the scope of this paper.

The advent of colonial rule in Nigeria was not initially completely hostile to customary criminal law. Thus, in the colony of Lagos for example, the English rules of common law in relation to crime were introduced alongside other rules in 1863, although customary criminal law continued to apply in other parts of Nigeria outside of Lagos.³⁶ By 1904, the colonial government introduced statutory criminal law in Northern Nigeria through the proclamation of a Criminal Code. This proclamation of a Criminal code for Northern Nigeria was extended to the whole of Nigeria by 1916 after the amalgamation of the Northern and Southern Protectorates in 1914.³⁷

Colonial legislations continued to accommodate customary criminal law in colonial Nigeria as native courts and tribunals were allowed to apply and enforce it³⁸ until 1958. In 1958, the

³² CO Okonkwo and Naish, *Criminal Law in Nigeria* (Spectrum, 2003).

³³ L Sebba, 'The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies' (1999) 3 *Crime, History & Society* 71.

³⁴ CO Okonkwo and Naish (n30 above) at 3.

³⁵ *Ibid.*

³⁶ N Otu, 'Colonialism and the Criminal Justice System in Nigeria' (1999) 23 (2) *International Journal of Comparative and Applied Criminal Justice*, 293.

³⁷ *Ibid.*

³⁸ See the cases of *Gubba v Gwnadu Native Authority* [1947] 12 WACA 141 and *Maizabo v Sokoto Native Authority* [1957] NRNLR 133.

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status of customary criminal law in Nigeria took a dramatic dimension as the Constitutional Conference took the decision to abolish customary criminal law in Nigeria.³⁹ Indeed, following this decision at the Constitutional Conference, the 1963 Republican Constitution under its section 22 (10) provided that: ‘No person shall be convicted of a criminal offence unless that offence is defined and penalty therefor is prescribed in a written law.’ Effectively, as customary criminal law is mainly unwritten this meant that customary criminal law was thereby abolished.

In contemporary Nigeria, the primary source of criminal law is legislative enactments which comprise of several statutory enactments across the country, (Including federal, State and bye-laws). The two main criminal statutes in Nigeria are the Criminal Code (applicable in Southern States of Nigeria) and the Penal Code (applicable in the Northern States of Nigeria). Customary criminal law in contemporary Nigeria and its status within the Nigerian legal system is exemplified by the provision of section 36 (12) of the Constitution of the Federal Republic of Nigeria which states that:

Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

The implication of the above constitutional provision is that unless a particular rule of customary criminal law has been codified as a written law, it cannot be enforced by any court of law in Nigeria. By implication the large body of customary criminal law which is mostly unwritten is terminated by the above provision of the Nigerian constitution. In the remainder of this paper, the theoretical lens of legal pluralism will be used to explain and contextualise the treatment of customary criminal law by State law in colonial and post-colonial Nigeria.

4. The Co-Existence of Statutory and Customary Criminal Law: A Legal Pluralism Perspective

It is the argument in this paper that the debates about legal pluralism helps in contextualising and explaining the simultaneous co-existence of statutory criminal law and customary criminal law, and the eventual constitutional termination of customary criminal law in

³⁹ AO Alubo, *Modern Nigerian Criminal Law* (University of Jos Press, 2014).

colonial and post-colonial Nigeria. In a seminal essay published in 1986, Griffiths introduces his version of legal pluralism as 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs'.⁴⁰ Griffiths distinguishes between the 'social science' view of legal pluralism as an empirical state of affairs in society (the coexistence within a social group of legal orders that do not belong to a single "system") and what he calls a 'juristic' view of legal pluralism as a particular problem of dual legal systems created when European countries established colonies like Nigeria and superimposed their legal systems on the pre-existing legal systems.⁴¹ He then argues that a conception of legal pluralism which is based on how a State deals with a situation of normative heterogeneity is on the wrong footing, at best, he maintains that this is a contribution to the theory of 'legal centralism'.⁴²

Griffiths' version of the social-scientific theory of legal pluralism 'refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, over-lapping "semi-autonomous" social fields...'⁴³ This perspective of legal pluralism is one where law, legal doctrines and legal institutions are not all encapsulated under one paradigm of law, but have their sources and grounds in all the various social fields of a given community. Thus conceived, law becomes a product and reflection of the complex and diverse patterns of societal norms. Griffiths criticises what he terms 'the ideology of legal centralism' as opposed to hard legal pluralism by arguing that the 'ideology of legal centralism' is to be distinguished from real legal pluralism as legal centralism is all about uniform law for the State where State law's exclusive dominance over other forms of law which also should be administered by a single chain of State institutions.⁴⁴

This was the kind of situation developed in Nigeria under British colonial administration wherein the colonial government arrogated to themselves the power to accommodate customary criminal whilst simultaneously introducing statutory criminal law in colonial Nigeria. Haven criticised the 'ideology of legal centralism', Griffiths then makes a connection between it and soft legal pluralism. As he argues:

⁴⁰ J Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1 at 2.

⁴¹ *Ibid*, at 5 and 8.

⁴² *Ibid*, at 12.

⁴³ *Ibid*, at 38.

⁴⁴ *Ibid*, at 3.

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In this ('weak') sense a legal system is 'pluralistic' when the sovereign (implicitly) commands (or the grundnorm validates, and so on) different bodies of law for different groups in the population ... While such pluralism is not limited to the colonial and post-colonial situation, that is certainly where it is best known.⁴⁵

It is argued that the above situation of legal pluralism in the 'weak sense' identified by Griffiths was the exact situation in Nigeria under British colonial rule, in the context of how and to what extent the colonial authorities were willing to accommodate customary criminal law. By subjecting customary criminal law to the repugnancy test as well as to State law for its validity - a situation of Griffith's 'weak sense' of legal pluralism was therefore created in colonial Nigeria. Likewise, Gordon Woodman argues that such situations where State law assumes a validating role over other forms of law such as customary law is a situation of State law pluralism, as he puts it:

State law pluralism arises from the policy embedded in many state laws in Africa... of recognizing and incorporating into the state legal system parts of the bodies of customary law existing within that state's claimed field of jurisdiction. This is sometimes regarded as the primary type of legal pluralism.⁴⁶

Clearly, the legal situation in colonial Nigeria wherein customary criminal law is subjected to the validation of State law as represented by the various repugnancy clauses, is a situation of weak or State law pluralism and a triumph of the 'ideology of legal centralism'. Griffiths maintains that the origin of legal pluralism in this weak sense originated in 1772,⁴⁷ and he quotes Hooker to support this view:

[A] regulation for the new judicial system established in the territories administered by the East India Company provided that in suits relating to

⁴⁵ Ibid, at 5.

⁴⁶ Woodman GR, 'Legal Pluralism and the Search for Justice' (1996) 40 *Journal of African Law* 152 at 158.

⁴⁷ Griffiths J (1986) above at 6.

inheritance, marriage, caste.... The laws of the Koran...and those of the Shaster with respect to the Gentoos shall invariably be adhered to.⁴⁸

As the experience of Nigeria under British colonial rule illustrates, this system was exported to other parts of the world in Africa and Asia during the era of European imperialist expansionism through colonisation.⁴⁹ Griffiths rightly maintains that:

Legal pluralism in this sense has been a fixture of the colonial experience. Furthermore, it has generally persisted beyond the moment of formal “independence”, proving one of the most enduring legacies of European expansion and characterizing at the present day the larger part of all of the world’s national legal systems.⁵⁰

With the unification of indigenous customary criminal laws and State laws as a strategy of State-building as well as social and economic development in both colonial and post-colonial Nigeria, legal pluralism in the weak sense appears to have taken strongholds in Nigeria.⁵¹ This weak sense of legal pluralism have negative implications for the status of customary criminal law in the Nigerian legal system in the sense that in colonial times customary criminal law was given an inferior status compared to State law, while customary criminal law has been brutally terminated in post-colonial Nigeria.

Indeed, the colonial unification of laws in Nigeria continued gradually until political independence. In 1922, the legal and legislative culture in Nigeria assumed a new dimension. The Nigerian Constitution of 1922⁵² became the basis of law and governance in Nigeria for the next twenty-five years. Consequently, the country adopted ‘a unified legal system for the first time in its history.’⁵³ This Constitution established a Legislative Council with law-

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ For attempts at unification and codification of customary law in Kenya and Tanzania see Twining W, 'The Restatement of African Customary Law: A Comment' (1963) 1 *The Journal of Modern African Studies* 221.

⁵² The Sir Clifford Constitution.

⁵³ Elias TO, *Groundwork of Nigerian Law* (Routledge & Kegan Paul, 1954) at 165.

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making powers for Lagos and the Provinces in Southern Nigeria.⁵⁴ By 1946, a new Constitution⁵⁵ was introduced which made it possible for a larger Legislative Assembly to make Ordinances having force of law throughout Nigeria. The three Regional Administrations⁵⁶ which the Constitution created had no legislative powers and their functions were merely advisory to the Central Government.⁵⁷

The 1951 Constitution⁵⁸ retained the division of Nigeria into three Regions and additionally established a House of Assembly for each of those regions with legislative powers to make laws in the Regions.⁵⁹ By virtue of the *Adaptation Laws Order* of 1951⁶⁰ made pursuant to the 1951 Constitution there were several consequential changes to the Nigerian legal system one of which was the enactment of the *Interpretation Ordinance* which defined law to mean:

... an enactment of a Regional Legislature and it includes any order, regulation, rule of court or proclamation made under the authority of a Law; and the expression 'the law', when used, means the law under the authority of which the particular enactment has been made.⁶¹

Although Regional laws had no force of law outside the Regions, the Courts (except for Native Courts) were the concern of the central Government and the laws to be administered by them only had regional applications, thereby adding another layer to the already developing legal pluralism in a colonial Nigeria. In a somewhat prophetic note, Elias predicted the problem of legal pluralism arising from such arrangements in the following terms:

Accordingly, cases of local conflicts of laws as between the three Regions will soon begin to trouble the courts to an extent not perhaps paralleled in any

⁵⁴ See <http://www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html>. Accessed 20 May, 2016.

⁵⁵ The Arthur Richard Constitution.

⁵⁶ Northern, Western and Eastern Regions of Nigeria.

⁵⁷ Elias TO (1954) above at 165-166.

⁵⁸ Sir John Macpherson's Constitution.

⁵⁹ Elias TO (1954) above at 166.

⁶⁰ No. 47.

⁶¹ S. 3.

other federal system of government; for, already, the divergent local customary laws have been giving a good deal of worry of their own. Many Nigerians will before long come to find that their lives will henceforth have to be regulated, at one time or another, by three sets of laws: (a) Ordinances of the Central Government, (b) Laws of the Regional Governments and (c) Local customary law of the Province or District.⁶²

The 1954 Constitution⁶³ did not change the legal, legislative and judicial arrangements in any significant way, but did take Lagos out of any Regional control (making it the Federal Capital of Nigeria), the only notable development in that Constitution for the purpose of this paper was the granting of autonomy to the Southern Cameroons which was hitherto part of a larger Nigeria and Northern Cameroons.⁶⁴

The 1954 Constitution remained in force until the political independence of Nigeria in 1960.⁶⁵ John Ademola Yakubu correctly sums up the treatment of customary law during the colonial era in Nigeria by arguing that the situation was such that customary law became dependent on colonial State law for its validity and in 'its regulated state, its operation became dependent on the satisfaction of the rules of common law, equity and good conscience.'⁶⁶ Likewise, Elias maintained that during colonial rule, indigenous African laws and customs were applied only to the extent that they were 'not repugnant to the principles of natural justice, equity and good conscience, and if they are not inconsistent with any valid

⁶² Elias TO (1954) above at 167-168.

⁶³ The 1954 Littleton Constitution

⁶⁴ See <http://www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html>. Accessed 20/05/2016.

⁶⁵ Yakubu JA, 'Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria' (2005) 30 (4) Africa Development 201 at 206

⁶⁶ Ibid, at 201

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local enactment.⁶⁷ Consequently, Robert and Mann concluded that colonial administration changed African laws and institutions significantly.⁶⁸ Indeed, as they put it:

Research on law in colonial Africa thus illuminates a formative period in African legal history, one that is all the more important because it lays the foundation of modern African systems. Any understanding of the role of law in contemporary Africa must rest on an appreciation of the legal rules and institutions, processes and meanings created under colonialism.⁶⁹

On the eve of political independence, the implications of the colonial encounter with Britain, on the legal system of Nigeria was obvious. The legal rules and institutions of law in Nigeria had changed and evolved significantly in comparison to pre-colonial Nigeria. Legal pluralism became an inevitable phenomenon of the Nigerian legal system.⁷⁰ To put the inter-play and inter-connections between various normative or legal orders in a historical context, Tamanaha undertakes an overview of the history of the idea of State-building from Medieval Europe through to the 20th century.⁷¹ In so doing, he demonstrates that the traditional idea of viewing law as mainly the monopoly of the State is evidence of the triumph of State-building efforts and the ideology behind such, a project that has its origins in the late medieval Europe.⁷² It appears then that the success of State-building efforts in Medieval Western Europe which accounted for the gradual monopolisation of law by the emerging States leading to the

⁶⁷ Elias TO, *The Impact of English Law on Nigerian Customary Law* (Ministry of Information 1958) at 7-8. See also Ocran M, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' (2006) 39 *Akron L Rev* 465; Nwabara S, 'The "Received" Nigerian Law and the Challenge of Legal Independence' (1979) 14 *Journal of Asian and African Studies* 99 and Roberts S, 'Introduction: Some Notes on "African Customary law"' (1984) 28 *Journal of African Law* 1.

⁶⁸ Roberts RL and Mann K, 'Law in Colonial Africa' in Roberts RL and Mann K (eds), *Law in Colonial Africa* (Heinemann Educational Books, 1991) 3-58 at 5.

⁶⁹ Ibid. See also Moore SF, 'From Giving and Lending to Selling: Property Transactions Reflecting Historical Changes on Kilimanjaro' in Roberts R and Mann K (eds), *Law in Colonial Africa* (NH: Heinemann 1991) at 108-127. For a general analysis of the colonial African State see Young C, *The African Colonial State in Comparative Perspective* (Yale University Press 1994).

⁷⁰ See, Ige B, *Constitutions and the Problem of Nigeria*, vol 13 (Nigerian Institute of Advanced Legal Studies 1995).

⁷¹ Tamanaha BZ, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney L Rev* at 379-389.

⁷² Ibid, at 379.

contemporary dominant view that the State has monopoly of law has its origins in the State-building efforts of Medieval Western Europe.⁷³

The above legal tradition was then imported into Nigeria through British colonial administration of Nigeria between 1863 and 1960. In line with this argument, Tamanaha argues that the ‘Consolidation of law in the hands of the state was an essential aspect of the state-building process ... The various heterogeneous forms of law described earlier were gradually absorbed or eliminated.’⁷⁴ Indeed, theories of legal pluralism ‘requires that law be seen pluralistically: not just as the unified, systematized law of the nation state, but as produced and interpreted in many competing sites and processes in and beyond the state and often relying on conflicting, unclear or controversial authority claims.’⁷⁵

The colonial consolidation of law at the hands of the Nigerian State implied that other forms of non-State law in Nigeria were subordinated to State law and in most cases customary laws lost their pre-colonial legal status.⁷⁶ Indeed, the above legal developments in colonial Nigeria illustrates that the colonial Nigerian State monopolised law as legal pluralism was being introduced into Nigeria.⁷⁷ Through a system of ‘indirect rule’, British colonial authorities managed the affairs of the Nigerian colonies through pre-existing indigenous political and legal institutions.⁷⁸ In the process, colonial laws were gradually introduced into Nigeria and they co-existed and still co-exist with the indigenous customary law system even after political independence.⁷⁹

⁷³ Ibid.

⁷⁴ *Ibid.*, at 380.

⁷⁵ Cotterell R, *Law, Culture and Society - Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) at 29. See also, von Benda-Beckmann F and von Benda-Beckmann K, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 38 *The Journal of Legal Pluralism and Unofficial Law* 1.

⁷⁶ Tamanaha BZ, (2008) above at 380.

⁷⁷ *Ibid.*

⁷⁸ See Crowder M, 'Indirect rule—French and British style' (1964) 34 *Africa* 197 and Crowder M, *West Africa under Colonial Rule* (Hutchinson 1968) at 217-233.

⁷⁹ See Woodman GR, 'Customary Law in Common Law Systems' (2001) 32 *IDS Bulletin* 28; Woodman GR, 'Some Realism About Customary Law-The West African Experience' in Woodman GR and Obilade AO (eds), *African Law and Legal Theory* (Dartmouth 1995); Woodman G, 'Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria' in Allot A and Woodman G (eds), *People's Law and State Law: the Bellagio Papers* (1985); Daannaa HS, 'The Acephalous Society and the Indirect Rule System in Africa: British Colonial Administrative Policy in Retrospect' (1994) 26 *The Journal of Legal Pluralism and Unofficial Law* 61; and Sheleff LS, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (Routledge 2013).

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The above post-colonial legal developments in Nigeria demonstrates that the colonial heritage of legal pluralism in the weak sense continued as customary law continues to be applied only on the terms and conditions upon which State law is willing to accommodate it. Similarly, the idea of legal unification and monopolisation of law by the Nigerian State has been consolidated post-colonially. Griffith's view that unification of laws is driven by the idea that it is 'a condition of progress toward modern nationhood (as well as of economic and social 'development'),⁸⁰ is validated by the post-colonial legal developments in Nigeria.

Like Griffiths, Allott observes that in the context of Africa and in the post-colonial period most if not all African States tried to establish their authority and maintain national unity by ensuring that the inherited colonial legal system reflects the quest for national unity.⁸¹ Consequently, post-colonial African States embarked on a process of unification of laws with the objective of giving expression to such unity 'in legal terms'.⁸² However, Santos cautions against the idea of centralisation and unification of laws as he argues that:

It is necessary to use prudence to safeguard the basic unity of the polity, without however, destroying the capacity for traditional popular creativity, at a local and regional level, without which it will not be possible to create a true national identity towards a more just society.⁸³

Indeed, Santos' admonition that an excessive focus on unity at the expense of pluralism may be counter-productive in Nigeria as people whose culture and tradition are jeopardised by such excessive quest for unity and centralisation may end up with resentments and grievances against the State. Hard legal pluralism requires the recognition that law is not a unified phenomenon or based on a single system of laws. In line with this, Griffiths argues that real legal pluralism (deep or strong legal pluralism) must have a different objective of

⁸⁰ For a comprehensive analysis of the pros and cons of unification of laws in the African context see Allott AN, 'Towards the Unification of Laws in Africa' (1965) 14 *International and Comparative Law Quarterly* 366. See also Himsworth C, 'The Botswana Customary Law Act, 1969' (1972) 16 *Journal of African Law* 4, for the post-colonial situation in Botswana and Holleman JF, 'Trouble-Cases and Trouble-less Cases in the Study of Customary Law and Legal Reform' (1973) 7 *Law Soc Rev* 585. And for an article criticising attempts at codification of customary as inconsistent with African values see Bennett TW and Vermeulen T, 'Codification of Customary Law' (1980) 24 *Journal of African Law* 206.

⁸¹ Allott AN, 'Towards the Unification of Laws in Africa' (1965) 14 *International and Comparative Law Quarterly* 366 at 389.

⁸² *Ibid.*

⁸³ Santos BdS, 'From Customary Law to Popular Justice' (1984) 28 *Journal of African Law* 90 at 98.

demonstrating that law is not ‘unified’, ‘single’ or based on a hierarchy determined by the State, as opposed to weak or soft legal pluralism.⁸⁴

Haven distinguished between legal pluralism in the strong and weak sense, Griffiths goes on to cite with approval the ideas of Pospisil,⁸⁵ Smith,⁸⁶ Ehrlich⁸⁷ and Moore⁸⁸ and whilst he appears to align more towards Moore’s idea of the ‘semi-autonomous social field’ he concludes that all of them⁸⁹ ‘have no difficulty in recognizing legal pluralism in the strong, empirical sense as a feature of the social groups with which they are concerned.’⁹⁰

It is argued that strong or deep legal pluralism is the best way to account for the effective protection and preservation of customary criminal law, not just in Nigeria but also across the African continent. This is in line with Santos’ arguments in favour of expanding the concept of legal pluralism to cover all forms of social orderings.⁹¹ In some of his studies in Portugal⁹², Brazil⁹³ and in the Cape Verde Islands⁹⁴, de Sosa Santos demonstrates the existence of ‘three forms of legal spaces and their correspondent forms of law: local, national and world-legality.’⁹⁵ He maintains that ‘local law is large scale reality; nation-state law is medium-

⁸⁴ Ibid.

⁸⁵ See Pospisil L, *Anthropology of Law: A Comparative Theory* (Harper & Row 1971).

⁸⁶ See Smith MG, *Corporations and Society* (Transaction Publishers 1974).

⁸⁷ See Ehrlich E, *Fundamental Principles of the Sociology of Law* (Russell & Russell. Inc 1962, first published 1936).

⁸⁸ See Moore SF, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (Summer 1973) *Law and Society Review* 719. Reprinted in Moore SF, *Law as Process: An Anthropological Approach* (London et al: Routledge and Kegan Paul, 1978). See also Malinowski B, *Malinowski Collected Works: Crime and Custom in Savage Society*, vol 3 (Routledge 2002).

⁸⁹ Griffiths J (1986) above at 15-37. Pospisil’s idea of ‘Legal Levels’, Smith’s idea of ‘Corporations’, Ehrlich’s idea of the ‘Living Law’ and Moore’s concept of the ‘Semi-autonomous Social Field’.

⁹⁰ Ibid, at 14-15.

⁹¹ See Santos BdS, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press 2002).

⁹² Santos BdS, *Law and Revolution in Portugal: The Experiences of Popular Justice After the 25th April, 1974* (1976).

⁹³ Santos BdS, ‘Law, State and Urban Struggles in Recife, Brazil’ (1992) 1 *Social & Legal Studies* 235.

⁹⁴ Santos BdS, ‘A Justiça Popular em Cabo Verde’ (1984) *Estudo Sociológico*, Centro de Estudos Sociais, Faculdade de Economia da Universidade de Coimbra.

⁹⁵ Santos BdSB, ‘Law: A Map of Misreading-Toward a Postmodern Conception of Law’ (1987) 14 *JL & Soc’y* 279 at 287.

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scale reality; while world law (international and transnational) is small-scale reality.⁹⁶ Whereas local law is the most realistic in view of its proximity to its objects, international (world) law is the least realistic and national law has a mid-level reality.⁹⁷

In using the metaphor of the 'symbolic cartography of law'⁹⁸ Santos submits that the 'struggle against the monopolies of interpretation must be conducted in such way as to lead to proliferation of political and legal interpretive communities.'⁹⁹ His arguments are that a post-modern conception of law ought to be pluralistic, considering 'interlegality' by uncovering other latent and suppressed forms of legality.¹⁰⁰

In the above theoretical way, the debates on legal pluralism helps in rationalising and contextualising the gradual monopolisation of law by the colonial Nigerian State and the continuation of such monopoly of law by the post-colonial Nigerian State. In the process of such monopolisation of law, the indigenous customary criminal laws and legal institutions in Nigeria have been sub-merged into the State legal system by relegating customary criminal law and indigenous legal institutions to an inferior status in comparison to State law and its legal institutions. Indeed, section 36 (12) of the Nigerian Constitution effectively abolishes customary criminal law thereby creating a situation of Griffiths' legal pluralism in the 'weak sense'¹⁰¹ and Woodman's 'state law pluralism'.¹⁰² Indeed, it appears that customary criminal law has been completely exterminated in Nigeria even though it is applied informally at family, village and community levels in total disregard of the provision of the Nigerian Constitution. This demonstrates that despite official and constitutional termination of customary criminal law, it is still operational in daily lives of many Nigerian at family, village and community levels. Therefore, the 'living' customary criminal law is still here with us and appears to have survived official onslaughts on it, in line with Woodman's findings in relation to the 'sociologists' customary law. It is argued that Nigeria needs to amend section

⁹⁶ Ibid, at 287.

⁹⁷ Ibid.

⁹⁸ Santos BdSB, 'Law: A Map of Misreading-Toward a Postmodern Conception of Law' (1987) 14 JL & Soc'y 279 at 297.

⁹⁹ Santos BdS, *The Post-Modern Transition: Law and Politics* (Oficina Do CES 1989) at 33.

¹⁰⁰ Santos, BdS (1987) above at 299.

¹⁰¹ Griffiths J, (1986) above.

¹⁰² Woodman, G (1996) above.

36 (12) of the Nigeria Constitution in order to accommodate customary criminal law which is largely unwritten, by making it enforceable before courts of law in Nigeria.

5. Conclusion

This paper has examined the pre-colonial existence and applicability of customary criminal law in Nigeria. It has demonstrated that in pre-colonial times, customary criminal law was the predominant mode of criminal justice administration in Nigeria at family, village and community levels. It has also illustrated the manner in which the colonial authorities accommodated customary criminal law, leaving its administration to native courts whilst at the same time introducing the dominant statutory criminal law. It was also demonstrated that the colonial accommodation of customary criminal law was discontinued after political independence as it was rejected by the 1958 Constitutional Conference and the abolition of customary criminal law was crystallised by the 1963 Republican Constitution.

Theories of legal pluralism have then been used to contextualise and rationalise the colonial co-existence of customary criminal law and statutory criminal law in the context of Griffith's legal pluralism in the 'weak' sense. It was argued that legal pluralism in the weak sense is a triumph of the ideology of legal centralism, an ideology that has resulted in the complete constitutional extermination of customary criminal law, despite the fact that customary criminal law is still operational in the daily lives of Nigerians at family, village and community levels. It has been suggested that if Nigeria must conform to the ethos of deep legal pluralism, then a constitutional amendment to section 36 (12) of the Nigerian Constitution is necessary in order to accommodate customary criminal law so as to make it applicable and enforceable before courts of law in Nigeria.