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The Jurisprudence of the Right to Cultural Identity in Nigeria

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ABSTRACT

Most writers, international and local, have criticized the Nigerian Government for not embracing the true tenets of human right. This is not surprising since Nigeria in exercise of her sovereignty develops cold feet in domesticating most of the internationally recognized rights; rather she remains only a mere signatory to them. The effect is that no such right which is not provided for by the constitution will be enforceable in Nigeria. One of the most fundamental is the right to cultural identity considering the over 700 languages and 1000 inter-cum-ethnic tribes some of which are gradually fading away and going into extinction. This study seeks to jurisprudentially examine the nature of theright to cultural identity vis-à-vis the Nigerian legal system. The paper also studies the relevant agitations of the ethnic groups, and enquires into the *limits of the said right to cultural identity. It finally suggests the way forward.*

Keywords:

Human Rights; Nigeria; Cultural identity; Culture; Nigerian Constitution;

1. Introduction

The people of Nigeria once lived in their utter traditional ways.Each tribe was autonomous and identifiable in its own way. In this dispensation,the system of life of the people was structural and organized into a non-compartmentalised whole. Law, culture, economy, religion and politics coalesced and existed amidst various nationalities. There was harmony even in the face of what some have referred to as barbarism. There was order even in disorder. Omeje observes that, before the advent of colonialism in Nigeria, traces of European and Arabian subjects have been in Nigerian soil.[1]

With the conquest of Lagos in 1861 and the amalgamation of the Southern and Northern protectorates, came the birth of one of the sources of Nigerian law – the received English law, which was the folder for common law, statutes of general application and the doctrines of equity.[2] Thisbundle of laws operated as supreme over the

[1] Omeje, P.U, 'Evolution of Nigeria as a Political Unit' in C Mgbada (ed), *Nigerian Peoples & Culture* (Abakaliki: General Studies Division EBSU, 2005) p.60.

[2] Olowu D, and Lasebikan, F, 'Sources of Law in Nigeria' in A Sanni (ed), *Introduction to Nigerian Legal Method* (2nd edn Ile-Ife: Obafemi Awolowo University Press, 2006) p.246.

Confederalism, Okonkwo; Emmanuel Ifean

customary laws of the various communities, which later laws were subjected to colonially, though sometimes favourably, contrived validity tests. Following the Fulani *Jihad* and conquest of Hausa in 1804, the Hausa were Islamized, and the Islamic law which sprang from Arab, became the legal regime of most northerners. Islam seemed to be fused into the custom of the northerners and Christianity into the traditions of the southerners. Custom, religion and politics seemedfused and therefore confused. Due to multiplicity of tribal and linguistic enclaves, legal pluralism set in.

The domino effect is that the spirit of the different peoples*(Volksgeist)*as encapsulated in their various cultures is sought to be eroded. Certain tribal identities have gone into oblivion. Some cultural traits are gradually going into extinction. The cultural identity of the various folks that make up Nigeria is gradually withering away, giving room for the dominance of alien laws, alien traditions, alien philosophy which do not spring from the acknowledgement of the natural trait or consciousness or culture or history of the people, but rather an alien path which is super-imposed on the people in the name of national integration.

The main thrust of this study is to examine the nature and the extent of the right to cultural identity in the light of constitutional provisions for national unity. The basic assumption is hinged on the thesis of historical jurisprudence that emphasizes the inevitability of the influence of one's custom in one's activities.

2. Explication of Fundamental Terms

Human Rights: A general acceptable definition of human right has continued to elude jurists, scholars and commentators alike. It is a concept that can best be described rather than defined. Perhaps this is because of the metaphysical nature of the concept, especially as it concerns the inalienable (fundamental) rights. No wonder Julian states, 'it is no longer possible for us, as it was for our ancestors in the age of reason to conceive of human rights as existing in the abstract merely waiting to be deduced from first principles by the human intellect'.[3] This term that has often been traced to the Stoics (Zeno) is likened to natural law and nay, natural right. The Black's Law Dictionary *in tandem* with the Universal Declaration of Human Rights, describes it as 'the freedoms, immunities and benefits that, according to modern values (especially at international level), all human beings should be able to claim as a matter of right in the society in which they live.[4] However, these definitions seem rather too vague as they encapsulate 'rights' in the holistic sense of the word. Since not all rights are fundamental and justiciable in Nigeria, we must therefore restrain ourselves to the fundamental human rights as enshrined, described and listed in the constitution.[5]Oputa, JSC would say 'not

[3] RR Calude, 'The Classical Model of Human Rights Development', in JC Strouse and RP Claude (eds), *Empirical Comparative Human Rights Research: some preliminary tests for development hypothesis* (Baltimore: The Johns Hopkins University Press, 1976) p.51.

[4] Garner, *op cit,* p.809.

[5] Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011) Section 15(2) (hereinafter called CFRN 1999), section 33 to 44, 46.

every civil or legal right is fundamental. Fundamental human rights derive from the premise of inalienability of right of man's-life, liberty and pursuit of happiness…as enshrined in such constitution.'[6] For the purpose of this study therefore, we shall constrain ourselves to the fundamental human rights enumerated in Chapter 4 of the 1999 CFRN and the consequence of the domesticated African Charter of Human and Peoples Right.

Culture: Ndianefo agrees with Opata that the concept of culture has undergone a long evolution and has, therefore, acquired an elasticity of meaning such that everything under the sun can be subsumed under the umbrage of culture; hence we have mass culture, elite culture, scientific culture, techno-culture, yam culture, dance culture, etc.[7]Ndianefo warns that the variety of meaning which culture has acquired should not deter us from probing further for roots original meaning. Infact, he traced the origin of the word to Latin, meaning 'cultivation of the soil'. But in its metaphorical sense, it means 'cultivation of the mind'. It was during the 18th and 19ththat the word extrapolated to include 'beliefs, ideas, attitudes, artifacts, and so on'. No wonder Wireduobserves that culture is a complete phenomenon including everything that is connected with a people's way of life.[8]In this paper, culture means not only the cultivation of the mind, but also the beliefs, ideas, and attitudes of the various Nigerian peoples.

Religion:

The term 'religion' has proven problematic to define. This might be because it is two faced. That is, metaphysical and social. While the first limb deals with the divine, the second connotes man's way of life as it affects him and other beings around him. Okwueze notes that it is 'a regulated pattern of life of a people in which experiences, beliefs, and knowledge are reflected in man's conception of himself and…others…the physical as well as the metaphysical world.'[9] One thing is certain in most pluralistic states, different beliefs and experiences on the subject of the divine and the physical abound. Maduobserves that 'during the thousands of years of mankind history, man's search for God has led down too many path ways. The result has been the enormous diversity of religious expressions found worldwide'.[10] But in Nigeria currently, it seems impossible to distinguish culture from religion or religion from culture. The three main religions recognized are Christianity, Islam and Traditional Religion.

[6] Kuti v A.G federation & ors [1985] 2 NWLR (pt 6) p.211.

[7] Ndianefoo, I.J, 'The Role of Philosophy in Nurturing and Sustaining National Culture' in N Okediadi et al (eds), *Themes In Nigerian Peoples and Cultures* (Awka: School of General Studies Unizik, 2009) pp. 137-138.

[8] K. Wiredu, *Philosophy and an African Culture* (Cambridge: Cambridge University Press, 1980), p.6.

[9] MI Okwueze (ed), *Religion and Societal Development: Contemporary Nigerian Perspectives* (Lagos: Merit International Publications, 2004) pp.1-2.

[10] JE Madu, *The Paradox of the 'One' and the 'Many' in religion* (Nkpor: Globe Communications, 2003) p.43.

3. Constitutionalism and National Unity

With the independence in 1960, the successive Nigerian constitutions tried to integrate these different nationalities and worldviews into a unity. The provisions of section 15 (1) to (4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)are *apropos*:

(1) The motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress.

(2) Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.

(3) For the purpose of promoting national integration, it shall be the duty of the State to:

(a) provide adequate facilities for and encourage free mobility of people, goods and services throughout the Federation.

(b) secure full residence rights for every citizen in all parts of the Federation.

(c) encourage inter-marriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties; and

(d) promote or encourage the formation of associations that cut across ethnic, linguistic, religious and or other sectional barriers.

(4) The State shall foster a feeling of belonging and of involvement among the various people of the Federation, to the end that loyalty to the nation shall override sectional loyalties.

More still, section 14(1) categorically states that Nigeria shall be guided by the principles of 'democracy' and social justice. Subsection 3 thereof states that 'The composition of the Government of the

Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.' National integration was encouraged and discrimination on grounds of religion, prohibited.[11]

There is no gainsaying that the Constitution is the supreme law of the land.[12]The problem however is thatsince independence, the successive constitutions had been hatched by Military fiats rather than via the recommendations of popular democratically elected constituent assemblies.[13] Again, certain customary and religious laws are in conflict with some provisions of the constitution.An instance of this is the recent sharia regime which operates in the greater part of northern Nigeria today.Islam understands itself as a religion which specifies the way of life and holds its tenets as supreme over every other law. Succinctly put, the Sharia Penal Code laws, the Sharia Courts laws, *et al*, look up to the Quran and Traditions of Prophet Mohammad (*sunna*) as constituting the *grundnorm*. This is because the Quran is believed to be the direct words of Allah (God).[14] Yet another alarming factor fueling constitutional crises in Nigeria is the dark shadow of politicization. Thus, religion, culture, and law have become chess puns at the hands of politicians. The effect has been a ghostly chase of a better Nigeria sometimes and wrongly throughinadequate means. A study of the nature of cultural identity may be relevant.

4.Jurisprudence of the Right to Cultural Identity

In Nigeria Jurisprudence, not all rights are fundamental. Indeed rights are only fundamental when they are so enshrined by the Constitution in Chapter 4. In Chapter 4, no such right as to cultural identity was provided. It has been argued that the stipulations of chapter 2 are not rights but mere fundamental objectives and directive principles of state policy. Hence, they are non-justiciable by virtue of section 6 (6) (c),of the 1999 Constitution (as amended): "The judicial powers vested in accordance with the foregoing provisions of this section" -

> shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any

[11] Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011) Section 15(2) (hereinafter called CFRN 1999)

[12] Ibid., section 1 (3).

[13] Nwabueze, B.O, *The Presidential Constitution of Nigeria* (London: Churst & Coy, 1982) p.2.

[14] Ahmed, K, *Islam: basic principles and characteristics* (Leicester: The Islamic Foundation, 1974) p.9.

> authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;

This argument was further extended to the fact that these rights are mere International Covenant of Economic, Social and Cultural (ICESCR) recognized rights which are not binding on Nigeria by virtue of section 12 (1) of the said constitution:

> No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.[15]

Hence, any such law purporting to enforce it shall necessarily meet its waterloo with respect to the supremacy and inconsistency clauses of the Constitution as provided in section 1.

Unfortunately, these arguments fall short of a holistic interpretation of the law.First, it is long settled by the court in the cases of *Archbishop Okogie v Attorney General of Lagos*[16] and *Attorney General, Federation v Attorney General, Abia State*[17] to the effect that matters under Chapter 2 of the Constitution become enforceable when they are tied with fundamental right matters under Chapter 4. Following this premise, section 33 of the Constitution, protects the right to lifewhich right is not tied only to the termination of a person's breath. No! The Court has held severally that on Constitutional matters and Human Rights, a broad and liberal meaning must be given.[18] God forbid that we should wait till the point of death before our right to life will be so interpreted and enforced. The right to life is necessarily the right to economic life, housing, and in *extenso,* the right to be cultural identified within the African sociological context.

Luckily, the African Charter on Human and Peoples Rights 1981has been domesticated as part of Nigerian municipal law by an Act of the National Assembly.[19] Hence the Charter is enforceable without reservation[20].Any agreement that will militate against the enforcement of such domesticated treaty on the ground that the rights mentioned in the Charter falls under Chapter 2 of the Constitution and hence

[15] See also the decision of the court in *Abacha v Fawehinmi* (2000) 6 NWLR (pt. 660) p.228 at p.589 where the court held that International Treaties will continue to be persuasive unless and until they are domesticated in our law, in which case they come within section 12 and are enforced alongside with Chapter 4 of the Constitution.

[16] (1981) 2 NCLR 337.
[17] .(2001) 11 NWLR (pt.725) 689
[18] *Marwa & Anor v Nyako & Ors* (2011) 8 SCM, 64; *Uzoukwu v Ezeonu* (1991) 6 NWLR (pt. 200) p.708.
[19] African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Chapter A9, Laws of the Federal Republic of Nigeria 2004.
[20] *Ogugu v The State* (1994) 9 NWLR (pt.336).

invoking the effect of the ouster of jurisdiction clause in section 6 (6) (c),is jettisoned by the express provision of the said paragraph (c) which reads '*Except as otherwise provided by this constitution…'* which exception is already found in section 12which created the aperture for domestication.

More poignantly, Articles 15, 16 and 17 of the African Charterprovide for rights which include health, environment and development, *cultural identity,* et al. The Preamble of the domesticated law stipulates that the Universal Declaration of Human Rights 1948 including its protocols are part of the African Charter.No wonder the Charter omitted the use of the word 'Human' but rather used 'Fundamental Rights'. The effect is to incorporate all other rights mentioned in the Declaration without more, as Fundamental Rights enforceable in the African Charter, nay, in Chapter 4 of the Constitution. Surprisingly, the Evidence Act, 2011 in section 122, provides for the recognition of these laws (judicial notice). It is therefore settled that the afore-mentioned rights are not only recognized by Nigerian law, but they are also enforceable rights. EsoJSC (as he then was) affirmed this in *AlhajiDahiruSaude vAlhajiHalliruAbdullahi*[21]when he said that fundamental rights have always existed even before orderliness prescribed rules for the manner they are to be sought. They belong to the citizens.

The people's way of life cannot be endangered therefore, by the law of the land. FollowingHolfield's analysis, it should not be a mere privilege, but a right. For is it the law that gives the people their right or are these rights inbuilt and inalienable? Would not such law amount to a breach of the social contract?The effect of the domestication of the African Charter as pertaining to the Right to cultural identity is that it now falls as part of the constitutional rights and can only be limited or curtailed by the constitution itself. Now, the right to cultural identity is not among those limited by the constitution in section 45. The African Charter itself provides no such restriction expressly. Yet this right now enjoys a constitutional flavor. Cultural Identity (*Volksgeist*) therefore no longer should sit under the restricted emblem of customary law, but is now an issue of constitutional law. Thus, while customary law kowtows to the *validity tests,* the *Volksgeist*is subject only to the constitution. A dual recognition is thus formed. Under customary law, the *Volksgeist* is recognized but must not be incompatible with any other written law. Under constitutional law, the *Volksgeist* can only be limited when the constitution allows it by any other express provision or power allowed in the constitution and not just by any law. Unfortunately, most legal practitioners, philosophers, traditionalists, sociologists, anthropologists and historians are yet to realize this. And whether the Nigerian courts will be ready to give this irrefutable law its full effect is highly dubitable. But this is the position and its philosophical conclusion.

Be that as it may, culture and religions seem to be interwoven in many a Nigerian

[21](1987) S.C 197

nationality. Section 38 (1) of the Constitution providesthat every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief… to manifest and propagate his religion or belief in worship, teaching, practice and observance.Right to religious freedom bars any forceful religious instruction against the religion of another or where the person is a minor, against the approved religion of his parent or guardian.In *Okogie v A.G Lagos State*[22]it was held that every person is entitled to propagate his religion personally or through the church as a community.This religio-cultural relatedness is a source of limitation on the absolute enjoyment of right to cultural identity. Yet, right to religious freedom is by no means absolute. Any law that is reasonably justifiable in a democratic society can derogate from the exercise of religious right in the interest of defence, morality, health, and public order. More so, considering the apron ties of the theme of culture and religion, one may ask if the constitution has not by implication given way for the propagation of one's culture.

Again, section 42 of the Constitution frowns at any discrimination of a person on grounds of the person's *community, ethnicity, place of birth or origin*, circumstance of birth, sex, religion, political opinion or disability.[23]In these words lies the logical nexus of the people's culture. Simply put, people from one community cannot be discriminated against because of their race nor should they discriminate against others because they feel their race is superior. A community cannot go on killing others in order to show superiority. Infact, it is cowardice to kill fellow citizens where your grievance should be with the government.

5.Nigeria Problems and Respect for Cultural Identity: the Way Forward

Preservation and respect for people's cultural identity can be a panacea to many ills bugging Nigeria today!A holistic look at the Nigeria's problem will reveal that it is beyond corruption, poverty, leadership, religious intolerance, political god-fatherism, etc. It is the very structure in which Nigeria sits! Therefore the best system of law and government that can support the participation theory and retain the cultural identity of the people, while bringing development, is one which allows for the dominance of power in each community to make suitable laws that would reflect their cultural identity while making provisions only for certain areas of international interest with other communities to be governed by a confederate. The individual communities must be largely independent. The constitution which shall bind them on only areas of common and accepted interest must contain no more but that delegated to it. Each State law must be holistic, far more than what we presently have. With the state being autonomous, local governments or chancellors can be more empowered and each ethnic or inter-tribal group will have a person from its cultural area. Government becomes closer and

[22] [2003] 10 NWLR (pt 828) p.288 CA.
[23] *Nzekwu v Nzekwu* [1989] 2 NWLR (pt 104) p.373 SC; *Mojekwu v Mojekwu* [1997] 7 NWLR (pt 512) p.282 CA.

accountable than ever. The people can knock on their local government chairperson's or chancellor's door when necessary. Democracy in its original state will be restored. Patriotism as against terrorism will naturally flow. Healthy competition will ensue. Indeed the only system of government and legal system which suits this conciliation is a confederal system of government.This is a type of government which consolidates authority from other autonomous bodies. In the context of different indigenous tribes, it is a semi-permanent political and military alliance consisting of multiple nations (tribes) which maintained their 'separate leadership'.[24] The confederate government only handles those matters member states have assigned to it.[25] Its advantages include the fact that it keeps power and sovereignty at the local levels. It allows for retainment of separate identities and culture. It also makes for sincere co-operation on matters of common concern.

The Iroquois enclave, former USA, former Commonwealth of Soviet Union, Germany, etc, were countries that once practisedconfederacy. The only two strong arguments against confederacy are that it leads to a weak central government and that it allows for disunity. Yet these reasons are not strong enough. Aindepth examination of these arguments would reveal their inadequacy.

Firstly, it is not true that it breeds disunity; rather it is because tribes have realized their differences and understood the importance of unity that they decided to confederate. The confederate is not needed to govern the states or make laws for them. Thus each state will have its law and religion if it so wishes. The disadvantage here is that citizens living in other states may have to go back to their indigenous place and start afresh, yet it is better Nigeria starts afresh rather than continue in the ridiculous attempt to catch the wind. This way, the problem of legal pluralism, political conflict, intolerance, etc. will be a thing of the past.

The problem is in the structure! If we go back to the source and get our structure right, then gradually other mayhems will be greatly curtailed if not expelled. The confederate is not needed to govern the states or make laws for them. Thus each state or better still, geo-political zone (since they share high similarities) will have its laws and religion if it so wishes. In such laws, a state may make room for the foreigners. Each state becomes independent and only subject to those matters it allows for the confederate.

The only question that remains to be answered therefore is – what matter can be successfully delegated? There is no known custom that rejects the importance of defence, trade, and neutral meetings with the world. Truly speaking, these are the basic reasons why states subscribe to international organizations. In any matter that would be

[24] Wikipedia, 'Confederation' <http://en.m.wikipedia.org/wiki_confederation> Accessed on 14 March 2013.

[25] DSUSD, 'Advantages of Confederalism' www.dsusd.k12.ca.us/users/scottsh/Govt Advantagesdisadvantages%20federal.htm accessed on 14 March 2013.

contrary to the spirit of a community, such community could instruct the confederate that they have no interest in such matter. The confederates therefore, are the agents of the state. There is therefore needfor necessary review of Nigerian legal system to bring it at par with the spirit of its distinct and respective nationalities.

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