NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

COURSE GUIDE

LAW 100
INTRODUCTION TO LAW

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Published by
National Open University of Nigeria

Printed 2009

ISBN: 978-058-115-4

CONTENTS **PAGE**

The Challenge of Inclusion ……. 1
Women and the Law …… 3
Children and the Courts …….. 4
Multiculturalism and the Legal Tradition ……..…….. 6
Access to Justice: Making Legal Rights Effective ……..…..… 9
Bargaining in the Shadow of the Law ……..…..… 10
Pathways to Justice ……..……. 11
Obstacles to the Enforcement of Rights ……..……..… 12
Improving Access to Justice ……..…..… 15
Contingency Fees ……..…… 17
Legal Aid ……..……..… 18
Legal Services for the Disadvantaged …… 21
Access to Justice and the Problem of Centripetal Law …….. 26
Conclusion: The Future of Tradition ……..…. 28
Textbooks and References ……..….. **30**

The Challenge of Inclusion

The last quarter of the 20th century has proved to be a period of considerable change in Nigeria law. It has seen Nigeria achieve formal autonomy and legal independence. This has coincided with the Supreme Court's active reshaping of Nigeria law in a manner which has led to an increasing gulf between the law of Federal Republic Nigeria and that of other Commonwealth jurisdiction, including England. Adoption by Nigeria of the Republican path, in 1963 makes the severances of links with the British Monarchy and necessitates substantial revisions to the Federal Constitution. All these changes are deeply significant for the future of Nigeria law. A tradition received from Britain, and modified for Nigeria conditions from the earliest days of white settlement, has now evolved in such a way that it is possible to speak of a tradition of law in Nigeria which s distinct from the legal traditions of other common law countries.

Yet how "Nigeria" is the tradition? It is not Nigeria merely by virtue of the fact that the law has been shaped in a distinctive manner by judges

and the legislation of Nigerian legislatures both State and Federal. Nor is it Nigeria merely because it differs from English law, or the laws of other common law jurisdictions. Distinctiveness may be important to the formation of national identity, but distinctiveness from other legal systems is not sufficient to ensure that a country's legal system is "owned" by its people. For the tradition of law in Nigeria to be Nigerian, it needs to be a tradition which people accept as a valuable aspect of Nigeria life, and which reflects the composition, character and aspirations of the population. Furthermore, lawyers and the court system must be relevant to the general population as a last resort in the resolution of disputes, and not merely to corporations and organs of government. Despite all the changes in Nigeria law over the last quarter of a country, Nigerian law remains largely monocultural, and although women have been able to practice law for most of the century, the public face of the legal system-its judiciary and senior advocates-is predominantly a male face.

The challenge of inclusion is a challenge for the legal system to be more accommodating of the needs of the Nigeria population, and, in its public fact, to be, more representative of the diversity of that population. Perhaps the greatest challenge of all is that the legal system should be more accessible to private individuals, for the costs of justice are so high that they represent a major barrier to the legal system for a large proportion of the population. Increasing access to the court system is important, not merely so that all disputes which require a third party adjudicator can be resolved in accordance with the law, but so that the principle of the rule of law can be sustained.

Accommodation Diversity – A Legal System for All

For the tradition of law in Nigeria to reflect the composition and character of its population, its laws need to be drafted in a way which takes account of the diversity of that population, and the legal system needs to provide adequate protection for the rights of all. Many of these rights are the subject of international conventions to which is a signatory such as the *International Covenant on Civil and Political Rights,* the *Convention on the Elimination of All Forms of Racial Discrimination,* the *Convention on the Elimination of All Forms of Discrimination Against Women,* and the *Convention on the Rights of the Child.* Treaties do not become part of Nigeria law merely because Nigeria is a signatory to them. In any event, many treaties and conventions are drafted with such a degree of generality and deliberate ambiguity that they could not usefully be adopted into Nigeria law as a source of specific rights and obligations. Furthermore, many specific provisions of conventions are not intended to be the source of individual rights but rather impose obligations upon governments to improve the welfare of the population through executive action and administrative measures. Nonetheless,

numerous laws, both State and Federal, prohibit discrimination, and conferring other legal rights which are consistent with the rights conferred under international law.

To a great extent, these international conventions on human rights reflect the values of the western legal tradition. The very language of human rights owes its origins to the western legal tradition, and in particular, the enlightenment precepts of the French and American Revolutions. The notion that the legal system should be the means by which social change is effected is also a peculiarly western idea, tracing its origins historically to the central role which law has had in all social ordering. International law, with its use of moral and political pressure as a means of enforcing otherwise unenforceable obligations, is also dependent upon the notion of respect for law which is part of the western legal inheritance. Thus, although international conventions on human rights are of quite recent origin, and laws prohibiting discrimination have only been enacted in the last few years, these developments find their origin and impetus within the western legal tradition, rather than by departure from it.

Nonetheless, the tradition of law in Nigeria, as in other western countries, has needed, and still needs, to undergo a transformation and renewal in order to become more relevant to the diverse population which the legal system serves and the range of demands upon that system. It should not be surprising that a legal tradition which developed in a time when the population was relatively homogenous, both ethnically and culturally, and in which men of Anglo-Celtic descent dominated and controlled public life, should, at times unwittingly, be insensitive to the needs of Aboriginal peoples, children, the disabled, ethnic minorities and women. The challenge of inclusion is a challenge to make the legal system more accessible, and the laws fairer to, a number of groups in society, so that it meets the needs of the diverse range of people who come into contact with the system.

Women and the Law

Customary laws have provided a framework for the exclusion of women from public life. Women were executed from the professions and from other forms of employment. The social structure, placed women's role in the home, and subordinated their position to that of fathers and husbands. Women did not have an autonomous legal status, rather their position was subsumed within the family unit and their interests identified with the interests of the family. Through the course of this century, this position has gradually changed. Women have been allowed near autonomy as individuals. The barriers to employment have been

removed, and laws have been put in place to try to reinforce the principle of equal opportunity.

Coinciding with these changes, enormous changes have occurred in social structures in this century; now participate in the workforce. Whereas once, women were subsumed within the family unit, there has been a loosening of the ties which bind people together in marriage simultaneously with a marked increase in the legal regulation of the employment relationship. The changes in social structures have in turn produced new dilemmas for the law makers in determining the extent to which employers should be required to accommodate family commitments as a cost of employing staff, the way in which property should be allocated on marriage breakdown, and many other social issues associated with the change social structures.

At a time when society is in such a stage of transition, and when so many aspects of male-female relationships are being renegotiated, an important aspect of the challenge of inclusion is the need to engage in a continual examination of our laws and policies to ensure that a fair balance is being struck between the rights of men and women in different areas of social life. Another aspect of the challenge is to ensure that laws which are apparently neutral on their face do not have a discriminatory impact in practice, and do not contain implicitly masculine assumptions.

Changing laws is, however, only one dimension of the challenge. More difficult is changing attitudes. The structures of business and the professions do not readily accommodate the needs of women as the primary caretakers of children and other family members. Consequently, women continue to pay a disproportionate share of the costs of caring. Attitudes also need to be changed among lawyers and judges in order to eradicate example of discrimination and gender insensitivity in the practice of the law. The process of cross-examination in relation to complaints of domestic violence or sexual assault can be particularly alienating, as some defence lawyers seek to discredit the testimony of women by any means possible. They are aided and abetted in this by the adversarial system, which is predicated on the basis that each side should be able to present its case in whatever way it sees fit without much interference or control from the Bench. While judges have the power to disallow unfair questioning and to prohibit the harassment of witnesses, they are often reluctant to interfere with the manner in which the defence presents its case. This latitude given to defence lawyers in criminal trials is not infrequently at the expense of female witnesses.

Children and the Courts

The legal system has also had to adapt to the needs of children to a much greater extent than hitherto. The awareness in recent years of the extent of child sexual assault, and the public concern about the issue, has led to a considerable increase in the numbers of prosecutions for sexual offences against children, questions have been raised whether or not there should be a reduction in the age at which children might be called to give evidence. In turn, this has led to greater attention being paid to the needs of children as witnesses. The laws of evidence concerning situations when children are deemed incompetent to give evidence, require a reviour particularly the provisions which require that their evidence be corroborated in order to be accepted.

Court is nonetheless a frightening experience for many children. It is an environment which I quite alien from the world of home and school which children are sued to, and they often have misconceptions about the process, for example, that the judge will punish them if they lie in court. Many child witnesses are particularly afraid of seeing the perpetrator in the courtroom, and for this, and other reasons, steps have been taken in most Nigeria jurisdictions to make the process of giving evidence an easier one for children. In other jurisdictions, there in no option of using closed circuit television for child witnesses. Children give evidence from another room, which is connected to the courtroom by closed circuit. The child can see and hear the lawyers who conduct examination and cross-examination, while the lawyers, judge and jury are able to observe and listen to the child on the television monitor. Some jurisdictions also allow the child's evidence-in-chief to be given by means of a pre-recorded videotape. However, the child must normally be available for live cross-examination. These means so not, at present retain Nigeria but deserve some urgent consideration.

The use of technology is only one aspect of the challenge of including children in the court process. It is not only the courtroom, which is strange for children, but also the language used by the lawyers. Prosecutors and judges who are not used to dealing with children, and defence lawyers endeavouring to cast a reasonable doubt upon the accuracy of the child's testimony, may confuse a child witness by using language which is inappropriate to the child's age and linguistic capabilities.

The use of abstract rather than concrete language, sentences with multiple clauses, multifaceted questions, and questions with double-negatives can all serve to confuse children, while a focus upon peripheral rather than central details of their story may give a false impression of unreliability. Judges and magistrates who have an understanding of child development and the needs of child witnesses can intervene to ensure that children are able to understand the question

asked and to prevent then from being subjected to unfair cross-examination. However, a lack of awareness of the problems children have in giving evidence, together with an unwillingness to interfere significantly in the presentation of the defence case, combine to make the experience of giving evidence unnecessarily upsetting and difficult for many children.

Different issues arise in relation to children who are defendants in criminal trials. Almost all children accused of breaking the law are dealt with in special Juvenile Courts. These are generally much more informal that adult courts and sentencing practices have an explicit orientation towards rehabilitation, with custodial sentences being a last resort only used for repeat offenders convinced of serious crimes. The use of police cautioning is also an integral part of the response to juvenile crime.

In the past, the welfare orientation of juvenile courts has been a source of injustice for some children. The use of vague "status offences" such as being in moral danger or being beyond the control of parents has been a means whereby adolescents have been placed in state care "for their own good", but against their will, as a means of controlling their behaviour. Furthermore, the informal nature of court proceedings has justified failures to observe due process. Under modern juvenile court principles, due process is meant to be observed, while courts are required in sentencing to show a proportionality between the offence and the sentence. Nonetheless, may problems remain. Juvenile defendants are amongst the many groups in society who suffer from the pressure to reduce the public costs of justice.

Multiculturalism and the Legal Tradition

The challenge of inclusion is also the challenge of adapting the legal system to the demands of a multicultural society. The Nigerian government's official policy on multiculturalism. One of the government's law by this translates into systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain.

Multiculturalism means different things to different people. In terms of the legal system, the claim to respect for the rights of minorities may take five different forms. First, an acceptance of cultural diversity means that the freedom of particular groups to enjoy their culture or religion should not be restricted unless this is necessary to protect the human rights of other. The rights of minorities to be able to practice their religion and maintain their culture are protected by various conventions in international law. For example, Art 27 of the *International Covenant on Civil and Political Rights* provides that in States which have ethnic,

religious or linguistic minorities, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language. This is subject to the qualification, contained in Art 18(3), that State are entitled to impose such limitations on the exercise of people's freedom to manifest their religion or beliefs as are necessary in the interests of public safety, order, health or morals, or for the protection of the fundamental rights and freedoms of others. In the western legal and political tradition, the right of minorities and assemble. Laws which single or religious practices which are particular to them violate the principle of equality before the law. Nonetheless, laws which are neutral on their face and apparently of universal application may in practice have a discriminatory impact upon particular groups by inhibiting the enjoyment of their culture or exercise of their religion.

The second dimension of multiculturalism which is expressed in international conventions and covenants is that governments should act to prevent discrimination based upon religion or ethnicity. Article 26 of the *International Covenant on Civil and Political Rights* prohibits discrimination on the grounds of race and national origin, as does the *Convention on the Elimination of All Forms of Racial Discrimination.* These international obligations are given effect in domestic law by legislation such as the *Racial Discrimination Act 1975* (Cth). State anti-discrimination laws are also consistent with the aims of the international conventions.

The third dimension is that the legal system should be accessible to people irrespective of their cultural background and first language. If people from a non-English speaking background are to be able to understand court cases in which they are involved, this means that they will need interpreter services both in court and in the earlier stages of the legal process, such as interview with police and legal representatives. The right to give evidence through and interpreter is enshrined in the law constitution of the Federal Republic of Nigeria and professional interpreters are used at public expense. Defendants who do not understand what is being said in the trail should also be provided with an interpreter. It is perhaps necessary that the expansion interpreter services in other branches of the legal system.

A fourth possible dimension of multiculturalism in relation to the law is that government officials and courts should take account of particular cultural factors in the application of the general laws of the land to individuals. Thus, in child custody and access cases involving children of ethnicity, account might be taken of such factors as the importance for the child's cultural development and sense of identity of maintaining