SANCTITY OF CHIEFTAINCY DECLARATION ON NATIVE CUSTOM: THE ATTITUDE OF THE NIGERIAN COURTS*

Abstract

Leadership is indispensible in all human societies. And leadership in native communities finds expression in the underlying philosophy of native customs firmly anchored on the people's ontology. The ontological hierarchy has God at the apex, yet assigns Leadership roles at various strata in order of primogeniture. Thus, there are parents, family heads, community heads, culminating in the incidence of chieftaincy stools. Ascension to chieftaincy stools is governed by native customs which are largely unwritten. However, the exigency of modernity, the flexibility of these customs and the dynamism of societal living have influenced the tendency to commit native customs into writing. Thus, native customs relating to chieftaincy matters are often encapsulated in written documents commonly referred to as 'chieftaincy declarations', or 'chieftaincy constitutions', or 'chieftaincy instruments' without any particular style or form. Whatever the nomenclature, such instruments regulate the selection, election and deposition of chiefs. Ordinarily, it is the law that oral evidence will not be admissible to contradict, alter, add to, or vary the content of a written document. In the light of the foregoing, can chieftaincy declarations be said to be sacrosanct and so circumscribed as to be inadmissible of further oral evidence in proof thereof? What has been the attitude of the courts in grappling with this seemingly vexed question? The paper posits that the vacillation of the courts including reliance on 'curse' theory in preference to a registered written declaration and a government Gazette can be addressed by a thorough review of the existing Chieftaincy (Appointment and Deposition) Laws in force in Nigeria. This will save the Chieftaincy Institution from needless disputes, atrophy and insignificance.

Keywords: Chieftaincy Declaration, Sanctity, Native Custom, Attitude of Nigerian Courts

1. Introduction

The incidence of chieftaincy at native law and custom is not anchored on mere fiction. This is because the underlying philosophy of native law and custom is appreciated within the context of native people's ontology. Ontology is the philosophical comprehension of the nature of beings, their existence, basic classifications and interaction. It deals with the fundamental questions about beings and their categorization and relationship within a hierarchy, including their sub-divisions depicting their similarities or otherwise as well as their interactive relations. The whole essence of life for the natives is anchored on their ontology. Basically, the natives conceive 'being' as being synonymous with 'force'. In the natives' conception, force is not an accidental reality. It is more than a necessary attribute of being. It is indeed, the nature of being. Thus, force is being and being is force. Native ontology envisages a hierarchical ordering of beings according to their primogeniture with God at the apex, following in the hierarchy is man, the living as well as the departed. Animals, plants and minerals also find placements in the hierarchical order.[1] The foregoing succinctly captures and conveys the native ideas of leadership and chieftaincy. Thus, the native Chief assumes leadership by individual and or families or communities in order of primogeniture or as local peculiarities may dictate. The life of the chief or even the ordinary native is not limited to his own person, but necessarily extends to all that is fathered by his 'vital influence' and thus, ontologically subject to him – posterity, land possessions, beasts and all other goods. The chief as it were, becomes a symbol of native social solidarity. And so, whatever touches or affects any person(s) who depend on him, or his material possession, will be considered an injury to the integrity of his being, the intensity of his life, his vital rank and by implication, his vital force. This scenario also plays out in the interpersonal relations of persons within the ontological hierarchy. This appears to be the case when a government withholds recognition from a person(s) duly 'elected' or 'selected' in the capacity of a chief. The non-recognition is not just attached to the individual but necessarily extends to members of the native community to which the individual who was to be recognized as chief belongs. This is because natives who are subject to his vital influence in the ontological hierarchy are adversely affected and their life, their being, their vital force and vital rank are similarly distorted. That is the life wire, the inter-twine and vitality in the organic living and ontological conception of the native African.

2. Nature and Characteristics of Native Custom

'Custom' is understood to mean the established or commonly acceptable usage of a people in a given society.[2] Its acceptance is regarded as binding among the people.[3] Such custom is taken as obligatory.[4] Every society from

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[1]. Plecide Temples, *Bantu Philosophy* (Paris: Presence Africaine, 1969) 51 – 52.

[2]. O.N. Ogbu, *Modern Nigerian Legal System*, (3rd edn, Enugu: SNAAP Press Ltd, 2013) 92.

[3]. A.O. Obilade, *The Nigerian Legal System*, (London: Sweet and Maxwell, 1979) 83.

[4]. *Ibid*, 84.

primordial to modern times has a set of customs which regulates its affairs generally from one generation to another. These customs constitute the customary law of the people. The customary law is thus a body of existing rules regulating rights and imposing correlative duties which are fortified by established usage, appropriately applicable to any given cause, matter, dispute, issue or question.[5] The customary law is thus, the organic or living law of the people, regulating their lives and transactions.[6] These customs are transmitted by oral tradition from generation to generation. It seems that one of the most fundamental characteristics of native custom is that it must be in existence at the material time as a binding custom whenever its use is called into question. Thus, if a custom is not in existence at a material time, then it cannot have the obligatory force of law. It must therefore, not be ancient custom of 'bygone days'.[7] Such existing custom must of necessity be recognized and accepted by members of the community where it is sought to be relied upon. In the classical elucidation of Bairaman FJ, it is 'a mirror of accepted usage'.[8] Accordingly, a custom must have the assent, recognition and acceptance of the native people to which it applies. Lord Atkin aptly captures and conveys this point in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*[9] as follows: '… It is the assent of a native community that gives a custom its validity and therefore … it must be shown to be recognized by the native community whose conduct it is supposed to regulate'. Native custom is not static. One of its essential characteristics is its flexibility. It is organic and thus, reflects societal dynamism in accordance with changing times. In so doing however, it does not entirely lose its essence. In the words of Osborne CJ in *Lewis v Bankole*[10]*:* 'One of the most striking features of West African native custom … is its flexibility. It appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character'. Lord Atkin alluded to this position in the *Eshugbayi* case[11] when his lordship observed: 'Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influence of civilization become milder without losing their essential character as customs … .' Citing with approval the holding of Osborn CJ in *Lewis v Bankole supra,* Karibi-Whyte JSC further explained this element of native custom as follows: 'One of the characteristics of native law and which provides for its resilience is its flexibility and capacity for adaptation. It modifies itself to accord with changing conditions'[12].

Another attribute of native custom is that it is to a large extent unwritten. Native custom is essentially transmitted by oral tradition of recollections of elders, traditional role players and custodians from one generation to another. Native custom is thus, not an invention by conscious human commitment as appears to be the case with modern legislative practices and procedures. Elias CJN reiterated this point in *Zaiden v Mohssen*[13] as follows: 'Customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria, but is enforceable and binding within Nigeria as between the parties subject to its sway'. This unwritten attribute of native custom may have influenced the erroneous impression that transactions evidenced in writing were beyond the purview of customary law. It is now the law that such written documents evidencing transactions do not *per se* exclude the customary law.[14]

Lack of uniformity of native customs applicable to all the people all the time over a particular subject matter is another feature of customary law. Thus, the multiplicity and diversity of people imply *ipso facto* the multiplicity and diversity of their customs and cultures. These multiplicity and diversity of customs sometimes find manifestations even within different towns that make up an ethnic group or even within sub-divisions of such towns and clans.[15] This seemingly daunting attribute of native custom notwithstanding, it has continued to be a veritable means of regulating the affairs of native people *inter se.*

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[5]. See for instance, section 2, Customary Court Law, Cap 32, Revised Laws of Enugu State, 2004 (As Amended in 2011).
[6]. Obaseki JSC in *Oyewunmi v Ogunesan* (1990) 3 NWLR (pt. 137) 182, 207.
[7]. Speed Ag. CJ in *Lewis v Bankole* (1908) 1 NLR 81, 83; Karibi –Whyte JSC in *Kimdey v Military Governor of Gongola State & Ors* (1988) 2 NWLR (Pt.77) 445, 461.
[8]. *Owonyin v Omotosho* (1961) 1 All NLR 304, 309.
[9]. (1931) AC 622; 673.
[10]. Supra, (n.7), 1 NLR 81, 100 – 101.
[11]. Supra, (n.9), 673.
[12]. *Kimdey v Military Governor of Gongola State & Ors* Supra (n.6), 461. See also kingdom CJ in *Balogun v Oshodi* (1929) 10 NLR 36, 57 and Weber J in the same case at 53 of the same law report; Obaseki JSC in *Oyewunmi v Ogunesan* supra (n.6), 267. These cases are in no wise exhaustive on this point.
[13]. ((1973) 11 SC 1, 2. See also A. Allot, *Essays in African Law* (London: Butterworths, 1970) 61-62; *Alfa v Arepo* (1963) WNLR 95 on the unwritten character of Customary Law.
[14]. *Rotibi v Savage* (1944) 17 NLR 77.
[15] . A.O. Obilade, (n.3), 83.

3. Chieftaincy Declaration and Native Custom

Native chieftaincy affairs are regulated and governed by native customs of the people. Accordingly, selection, election and deposition of Chiefs have from the earliest times been conducted in accordance with native law and custom. These customs have been in the main, largely oral as transmitted across succeeding generations. However, with the passage of time and the encroachment of modernity into native communal living, some communities began to commit their native customs with respect to chieftaincy matters to print in the form of documents commonly called 'Chieftaincy Declaration' or 'Chieftaincy Constitution', or 'Chieftaincy Instrument'. This became a form of codification of native law and custom without any particular specification as to style and content. In any event, the purport of the chieftaincy declaration preponderates over the vagaries of nomenclature. The general rule of law is that once there is a written documents in regard to a particular transaction, oral evidence will not be admissible to contradict, alter, add to, or vary the content of the said written document. This is the purport of sub-section (1) of section 128 of the Evidence Act, 2011. This stance appears to have been adopted by the Supreme Court in a long line of cases.[16] There are however, circumstances under which the parties may depart from the general rule. These circumstances are captured in the proviso to sub-section (1) of section 128 of the Evidence Act. Thus, oral evidence may be admissible to prove fraud, intimidation, illegality, want of due execution, wrongful date, want or failure of consideration, mistake of fact or law, want of capacity of a contracting party and the like. Similarly, the existence of any separate oral agreement as to any matter on which a document is silent and the parties did not intend the document to be complete and final on the transaction may also be proved by oral evidence. The existence of any separate oral agreement as a condition precedent to attaching any obligation under the transaction; or of any distinct subsequent oral agreement to rescind or modify any contract or document under the transaction can also be proved by oral evidence. Similarly, any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description, unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.[17]

In the light of the foregoing, are chieftaincy declarations so circumscribed as to be inadmissible of oral evidence and native customs to supplement or contradict the purport of such declarations? Can it be said that such declarations are sacrosanct and constitute a bar to interference by the courts? These concerns and the attitude of the courts in grappling with these challenges will be examined hereunder.

4. The Attitude of the Courts to Chieftaincy Declarations on Native Custom

Paragraphs (b) and (e) of sub-section (1) of section 128 of the Evidence Act appear to be the most approximate basis to interrogate the attitude of the courts in construing the purport of written chieftaincy declarations or similar written documents on native custom. Unfortunately, the courts appear to have embarked on vacillation in interpreting chieftaincy declarations. However, the courts have also impliedly applied the purport of the foregoing provisions of the Evidence Act without expressly mentioning or referring to them in their consideration of actions bordering on Chieftaincy declarations. The cases of *Alhaji Bukoye & Ors v Bosere & Ors,*[18] *AG Kwara State & Anor v Alhaji Saka Adeyemo & Ors*[19]*;* and *Alhaji Mohammadu Esuwoye v Alhaji Jimoh Bosere & Ors*.[20] provide ready paradigms for a discourse of chieftaincy disputes and chieftaincy declarations. Unfortunately, the opportunity appears lost in the alter of narrow technicalities. The basic facts of these cases are fairly similar and indeed, arise out of issues of the criteria for ascending the stool of the *Olofa of Offa* in Kwara State. The last occupant of the *Olofa of Offa* stool, Oba Mustapha Olawore Olanipekun died in March, 2010 after over 40-year reign thereby rendering the stool vacant. It seems that there are two ruling houses in Offa – the Olugbense male ruling house and the Anilelerin female ruling house. The late Oba Mustapha was of the Anilelerin female ascendency ruling lineage. The kingmakers of Offa called for nominations from the Olugbense and the Anilelerin ruling houses to fill the vacancy. The appellant in E*suwoye v Bosere supra*[21], Alhaji Mohammadu Esuwoye emerged as the candidate of Anilelerin ruling house while the second respondent in the case, Alhaji (Prince) Abdulrouf Keji was the candidate of the Olugbense ruling house. Esuwoye emerged as the winner of the contest and was presented to the 9th respondent, the Governor of Kwara State for appointment as the new *Olofa of Offa*. He was so appointed, given a staff of office and crowned the *Olofa of Offa*. Following the coronation, the 1st – 3rd respondents instituted Suit No. KWS/OF/15/2010 in the Kwara State High Court, holden at Offa, for themselves

16. U*BN Ltd v SAX (Nig.) Ltd* (1994) 8 NWLR (pt. 361) 150; *Ugwuegede v Asadu & Ors*., (2018) 5 JSCNLR 134, 154 – 155; *Nnubia v AG Rivers State* (1999) 3 NWLR (pt. 593) 82; *B.O.N. Ltd v Akintoye* (1999) 12 NWLR (pt. 631) 392; *Agbakoba v INEC* (2008) 78 NWLR (pt. 1119) 489, 539.
17. Section 128(1)(a) – (e) of the Evidence Act 2011, hereinafter, 'the Evidence Act'.
18. (2016) LPELR – 40852 (SC).
19. (2016) LPELR Sc 650A/2013 (Consolidated) in the Supreme Court of Nigeria.
20. (2016) NGSC 8.
21. *Ibid*

and on behalf of Olugbense ruling house against Esuwoye, four Kingmakers as well as the Attorney General and the Governor of Kwara State respectively.

The claims and counter-claims which originated at the Kwara State High Court and the decisions therefrom threw up a multiplicity of appeals. Thus, a better understanding of the case and the subsequent appeals will be predicated on an understanding of the claims and counter – claims particularly as they relate to the subject under review. The claims are as follows:

(a) A declaration that ascension of the stool of *Olofa of Offa* is *rotational* between Olugbense (male) ruling house and Anilelerin (female) ruling house of Offa.

(b) A declaration that Anileferin ruling house having produced the late Oba Mustapha Olawore Olanipekun Ariwojoye II, who ruled for over 40 years, it is now the turn of Olugbense ruling house in law and/or equity to produce the *Olofa of Offa* on the basis of rotation.

(c) A declaration that Anilelerin ruling house is precluded from producing the candidate to fill the vacancy created by the death of Oba Mustapha Olawore Olanipekun Ariwojoye II from Anilelerin ruling house.

(d) A declaration that in view of the established chieftaincy custom of Offa from 1969, ascension to the vacancy stool of *Olofa of Offa* is rotational between the two ruling houses of Offa *viz* Olugbense ruling house and Anilelerin ruling house.

(e) A declaration that by virtue of the decision of Kwara State Government published in Kwara State Press Release No. 275 of 9th July, 1969 (pursuant to the report of the Sawyer Commission of Enquiry into Offa Chieftaincy Stool) ascension to the stool of *Olofa of Offa* is rotational between the Olugbense ruling house and the Anilelerin ruling house.

(f) A declaration that by virtue of the Chieftaincy declarations contained in the Kwara State of Nigeria Gazette No. 11 Vol. 4 of 12th March, 1970 and Legal Notices 3 and 4 of 1969 herein, in respect of the process of selection of a candidate for the stool of *Olofa of Offa* by Anilelerin ruling house and Olugbense ruling house respectively, ascension to the stool of *Olofa of Offa* is by rotation and not by competition, between the two ruling houses.

And on the strength of the foregoing, the claimants urged the court to decline the recognition and installation of Esuwoye, the Anilelerin ruling house candidate as the *Olofa of Offa* and to compel the Governor of Kwara State to recognize Alhaji Keji of the Olugbense ruling house as the *Olofa of Offa* instead. The 1st to 5th defendants including Esuwoye (the 2nd defendant) counter – claimed. They asserted that the Olugbense ruling house had been disinherited and had indeed, gone into extinction consequent upon the curse and decision of Oba Olugbense their progenitor to allow only the female lineage of Anilelerin to occupy the *Olofa* stool. Consequently, since the demise of Oba Olugbense, it is the female lineage of Anilelerin that have been occupying the *Olofa* stool apparently positioning the said family as the main and only ruling house in Offa. The counter claimants thus, sought:

(a) A declaration that no rotational policy exists in Offa between the ruling houses in Offa on the appointment of *Olofa of Offa* whenever the Stool becomes vacant.

(b) A declaration that the only ruling house that exists in Offa for the purpose of appointing an *Olofa of Offa* is the Anilelerin ruling house.

(c) A declaration that the Kwara State Government Gazette No. 11, Vol. 4 of 12th March, 1970 and any other Notices as it recognizes Olugbense as a ruling house in Offa is null and void as it is contrary to history, custom and tradition of Offa on Offa Chieftaincy.

The counter-claimants also prayed for an order of perpetual injunction to restrain the Governor of Kwara State from recognizing the Olugbense ruling house as having a right to ascension of the stool of *Olofa of Offa.*

The learned trial judge with whom the apex court agreed found that the exhibits tendered and the oral evidence adduced at trial do not support the claim that there was rotation in the ascension to the *Olofa* stool. The apex court however, preferred to rely on Exhibit DFC2, the Sawyer Commission of Enquiry report. The said report found and relied on the 'curse' theory said to have been placed on the male descendants of Oba Olugbense by the Oba himself, disinheriting them and denying their ascension to the *Olofa* Stool. This was said to be because of their crass neglect from saving him (the Oba) from an inferno. The old Oba was said to have been rescued by his

daughter's son from the Anilelerin family. Thenceforth, the Anilelerin family became the sole ruling house of Offa and the status of Olugbense family as a ruling house became defunct. Consequently, the apex court declared the Kwara State Government Gazette, Exhibit 'J' as null and void to the extent that it recognized the existence of two ruling houses in Offa and their right to ascension to the *Olofa of Offa* stool on rotation basis as being contrary to native law and custom of Offa. The Supreme Court also granted a perpetual injunction restraining both the Governor and the Attorney General of Kwara State from treating or recognizing the Olugbense family as a ruling house for the purpose of ascension to the *Olofa* stool. In other words, from the decision of the apex court in these cases, chieftaincy declaration is not sacrosanct afterall. The courts could inquire into their conformity with the native customs of the people whose chieftaincy stool is called into question.

Apparently akin to the foregoing position, the Supreme Court in *Oba Adebanjo Mafimisebi & Ors v Prince Macaulay Ehuwa & Ors*[22], Mustapher JSC relying on the holding of Onu JSC in *Ajakaiye v Idehai*[23] took the view that there is no doubt that the court cannot promulgate a chieftaincy declaration. However, the authorities appear to support the view that the courts have the competence to see whether a chieftaincy declaration (such as Exhibit 'A' in the instant case) is really in conformity with prevailing customary law and accordingly declare it invalid if it is not.[24] Notwithstanding the foregoing, Onnoghen JSC (as he then was) in the *Oba Adebanjo Mafimisebi case supra*[25] took the review that the law is now settled to the effect that where a declaration in respect of a recognized chieftaincy is validly made and registered, the matter therein stated shall be deemed to be the customary law regulating the selection of a person to be the holder of the recognized chieftaincy to the exclusion of any other customary usage or rule. The registered declaration is therefore a declaration of the tradition, customary law and usages pertaining to the selection and appointment to a particular chieftaincy stool which necessarily dispenses with the need of proof by oral evidence of such tradition, custom and usages each time the need arises to determine the matter. The views of Justice Onnoghen suggest that a registered chieftaincy declaration was sacrosanct and is deemed to be the customary law regulating the chieftaincy in question. This, accordingly to the learned Justice, dispenses with the need of further proof by oral evidence. This, with all due respect, appears to be a palpable departure from the pre-existing position of the apex court. Justice Onnoghen further clarifies the foregoing by stating the duty of the court with regard to a registered declaration. That duty is to apply the provisions of a Chieftaincy declaration to the facts of the case as established by evidence particularly as the court has no power to assume the function of making or amendment of customary law governing the selection and appointment of traditional chiefs. However, according to his lordship, it is the business of the court to make a finding of what the customary law is and apply the law for the purpose of the claims for declaration.[26]

The critical question then is, if as Justice Onnoghen held, a registered chieftaincy declaration is deemed to be the prevailing customary law and need no other proof by oral evidence, how then could His Lordship also hold that the court has a duty to find out what the customary law is? If there is no need of oral evidence in proof of customary law in the face of a 'sacrosanct' registered Chieftaincy declaration seemingly encapsulating same, how else can the court find out? Could it be said in the circumstance that the court will possibly transform into a soothsayer to be able to find out the true and prevailing customary law in the absence of oral evidence? This position, seems with all due respect, to be an avoidable vacillation in acrobatic fashion.

The foregoing notwithstanding, the court still held that a Chieftaincy declaration once made under a subsisting Chiefs Law, remains the customary law in force in the area which it covers and continues to have effect until it is amended, and the amended declaration is registered.[27]

The Supreme Court further qualifies the purport of a Chieftaincy declaration with respect to fair hearing. In *Adigun v AG Oyo State*[28] the apex court held that the making of a chieftaincy declaration is purely an administrative act and not a function exercisable by the court. Where however, there is a registered chieftaincy declaration in relation to a particular chieftaincy, the production of the declaration would suffice. But where in the process of the making of the said declaration those who ought to be heard were not so heard, or made in breach of the right to fair hearing the court can interfere, as the administrative body is bound to observe the rules of fair hearing[29]. *In Aiyegbaju v*

[22]. (2007) 29 SCNLR 410, 434.
[23]. (1994) 8 NWLR (pt. 364) 504, 532 – 533.
[24]. *Egumwense v Amaghizenwen* (1993) 8 NWLR (pt.315) 1, 4.
[25]. (n.22) 456. See also *Oladele v Aromolaran II* (1996) 6 NWLR (pt. 453) 180.
[26]. *Ibid*, 457. See also *Ikiwe v Edijero* (2001) 18 NWLR (pt. 745) 446, 478 – 479; *Adigun v AG Oyo State* (1987) 1 NWLR (pt.53) 678; *Afolabi v Governor of Oyo State* (1985) 2 NWLR (pt.9) 734, 738.
[27]. *Afolabi v Governor of Oyo State supra, (n.26).*
[28]. (1987) 1 NWLR (pt. 53) 678.
[29]. Onnoghen JSC in *Oba Adebanjo Mafimisebi case supra, (n.22),* 457 – 458.

Adesina[30] the Supreme Court also held that the court can set aside a registered declaration. The competence of the court to set aside or declare a registered chieftaincy instruments null and void is settled and beyond doubt. This, according to the apex court is irrespective of whether the said declaration enjoys the status of a subsidiary legislation or statutory instrument. This is particularly reinforced by the vires of the court to declare invalid an Act of the National Assembly, let alone, a mere statutory instrument. Onnoghen JSC clarified the apparent misconception that once a registered declaration is made, it cannot be set aside or declared invalid, holding that it can, where for instance, it offends any constitutional or statutory provision[31]. In *Fasuade v Babalola*[32] the Supreme Court per Uwaifo JSC stated the Law as follows:

> ...Where a declaration has been validly made in respect of a recognized Chieftaincy and registered, it represents the applicable Customary Law regulating the selection and appointment of a candidate to a vacant Chieftaincy; and the provisions of such a registered declaration should prevail until amended. See Ogundare v Ogunlowo (1997) 6 NWLR (pt. 509) 360. The registered declaration is the admissible and subsisting declaration. See Adigun v AG Oyo State (supra); Oladele v Aromularan II (supra); its existence from the relevant Chiefs Law has statutory force. See Ayoade v Mil. Gov, Ogun State (1993) 8 NWLR (pt. 309) III.

In the *Oba Adebanjo Mafinisebi case*[33], it was found per Onnoghen JSC that Exhibit A, the Chieftaincy declaration was not exhaustive of the Customary Law of the people of Ugbo with respect to the ascension of the *Olugbo of Ugbo* Stool. The said Exhibit A neither advocates the rotational succession nor the hereditary succession as the true reflection of the Customary Law. It was thus, convenient for the apex court to declare it null and void.

It appears that the courts have largely relied on inherent powers than express statutory powers in ascertaining the sacrosanctity of Chieftaincy declarations in relation to native custom. Thus, the express provisions of the Evidence Act in sub-section (1) of section 128 and particularly paragraphs (b) and (e) thereto have never been relied upon by the courts to justify their stance. In *Oladele v Aromularan II supra* the Supreme Court clearly held that a Chieftaincy declaration is a declaration of the tradition, customary law and usage in relation to the selection and appointment to a particular chieftaincy stool and necessarily dispenses with the need of proof by oral evidence of such tradition, customary law and usage each time such determination comes into question[34]. It is trite that the court has no power to assume the function of making or amending the customary law governing the selection and appointment of traditional Chiefs, yet it has powers to ascertain what the customary law is, and to apply same for the purpose of a claim for (Chieftaincy) declaration. This is the purport of such cases as *Ikiwe v Edijero supra and Adigun v AG Oyo State supra.* In the latter case, the apex court introduced the element of fair hearing, holding that a breach thereof in the making of a Chieftaincy declaration would activate the court to interfere with the Chieftaincy instrument. It follows from the dictum of Uwaifo JSC in *Fascade v Babalola supra*[35] that as long as a chieftaincy declaration is validly made and registered, it remains sacrosanct unless and until it is subsequently amended and the amended version also duly registered. 'Validity' in the making of such declaration will obviously include observance of the rules of fair hearing and due compliance with requisite laws such as the Chiefs and Traditional Rulers Laws as well as the Constitution of the Federal Republic of Nigeria 1999 as amended.

It is worthy of note that the tussle over the *Olofa of Offa* stool is amazingly interesting. Perhaps the most outstanding development in the *Olofa of Offa* chieftaincy cases[36] is the startling reliance on a mere 'curse' theory as the basis for swaying the apex court to depart from the purport of a written chieftaincy declaration and the Kwara State Government Gazette issued in that respect. What after all is a curse? A curse could be defined as a solemn utterance intended to invoke a supernatural power to inflict harm or punishment on someone or something.[37] It could also be ascribed to any expression embodying with it the assertion that some form of adversity or misfortune will befall or attach to some other entity. Such entity could include one or more persons, a place, or an object. In particular, 'curse' may refer to such a wish or pronouncement made effective by a supernatural or spiritual power, such as a god or gods, a spirit, or a natural force, or else as a kind of spell by magic or witchcraft. In the latter sense, a curse can also be called a hex or a jinx. In many belief systems, the curse itself or rituals associated therewith are considered to have some causative force in the result.[38]

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30. (1992) 2 NWLR (pt. 590) 163.
31. *Oba Adebanjo Mafimisebi* case supra, (n.22) *458.*
32. (2003) 11 NWLR (pt. 830) 25.
33. *Supra, (n.21),* 460 – 461.
34. See also *Afolabi v Governor of Oyo State supra, (n.26).*
35. (n.32).
36. *Alhaji Bukoye & Ors v Bosere & Ors supra,* (n.18); *AG Kwara State & Ors v Alhaji Saka. Adeyemo & Ors supra,* (n.19); and *Alhaji Mohammadu Esuwoye v Alhaji Jimoh Bosere & Ors supra,* (n.20).
37. <hittps//www.google.com/search> accessed on 29/04/2019.
38 .< http//en.m.wikipedia.org/wiki> accessed on 29/04/2019.

It seems that the study of forms of curses comprise a significant proportion of the study of folklore. And no less is the deliberate attempt to levy curses often associated as part of the practice of magic.[39] Magic, witchcraft, curses and the like, have no place in our jurisprudence. They, like fetish *juju* oaths constitute part of the moribond or dying culture in Nigeria in the light of constitutional imperatives.[40] By way of analogy, proof of curses, like magic, witchcraft, fetish oaths and the like, lack legal exactitude and are at best an exercise in fetish superstition, myths, mystery and spirituality. The graphically illuminating dictum of Kutigi JSC (as he then was) in *Marcus Nwoke & Ors v Ahiwe Okere & Ors*[41] is quite apposite. According to his Lordship:

> Both sides in the contested suit called as their witnesses natural and real human beings to say what they knew … . All the witnesses were available for cross – examination and re-examination on their testimonies. This was as it should have been under the law. The *juju* method as cheap and quick as it might appear to have been, had its own disadvantages. For example, you cannot put a *juju* in the witness box for any purpose. Its activities, method and procedure would appear to belong to the realm of the unknown eventhough the effects may be real in the end. The worst of all is that a *juju* 'judgment' or 'decision' is not subject to an appeal like the one we are all witnessing now in this suit. So that unless and until the *juju* descends to the level on which we can all understand its workings, it will be difficult to enforce its 'decision' in a law court. We have come a long way from the oracle.

The views expressed by Kutigi JSC aptly apply *mutatis mutandis* to proof of 'curses'. The supposed effects of a curse cannot be established under acceptable legal processes and procedure. It is in this wise, with all due respect, that the decision of the Supreme Court on this score in the *Olofa* case is though final, yet fallible.

It seems that the conclusion of the whole matter is encapsulated in the audacious thunderbolt of the Supreme Court which came *vide* the case of *Aiyegbaji v Adesina supra*.[42] *T*he apex court therein held that the court can set aside a Chieftaincy declaration since it has the *vires* to declare an Act of the National Assembly invalid, notwithstanding the apparent masquerading of a Chieftaincy declaration as a subsidiary legislation or statutory instrument. And so, despite the vacillation and acrobatics, a Chieftaincy declaration is not sacrosanct.

5. The Way Forward

Perhaps, the starting point of the way forward is to amend the Chiefs (Appointment and Deposition) Laws in such a way as to subject any Chieftaincy declaration to an 'approval referendum' before it is accepted by the government for registration. This will guarantee the input of all members of a community who are subject to the said declaration in the selection and appointment of anybody to their vacant Chieftaincy stool. This will obviate the necessity of subjecting the said Chieftaincy declaration to a further fair hearing test after due registration. It will also make them so circumscribed as to be inadmissible of further oral evidence to prove some other aspects of native custom on chieftaincy matters supposedly excluded. This approach in our view, will accord with the dictum of Uwaifo JSC in *Fasuade v Babalola supra*[43]. It will also guarantee a more consistent approach to construction of Chieftaincy declarations by the courts. It is also important to note that the courts ought to be more circumspect in interpreting and giving effect to written Chieftaincy declarations. In this wise, the courts must resist the pressure to supplant the role of the people or their king makers in the choice of successors to their chieftaincy stools under the regime of their native customs. This is particularly because of the ontological ripple effects it could visit on the community in question. Thus, the courts must not make a practice of declaring who should or should not be the 'rightful' or 'anointed' successor to a chieftaincy stool. The courts should at best make a finding anchored on ordering a new election or selection in accordance with established native custom as encapsulated in 'validly made and duly registered' chieftaincy declaration. By so doing, the court would have satisfied the requirements of both the law and native custom.

The existing Chieftaincy (Appointment and Deposition) Laws in Nigeria appear to reflect in the main, a colonial orientation of an 'omnipotent' and 'omniscient' imperial Governor as an infallible 'Mr. know All'. For instance, sub-section (3) of section 3 of the Chiefs (Appointment and Deposition) Law[44] provides as follows: 'In the case of any dispute, the Governor after due inquiry and consultation with persons concerned in the selection *shall have*

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[39]. *Ibid.*
[40]. See C.U. Agbo, 'Validity of Oath Taking at Customary Law Arbitration: The Constitutional Question, *UNIZIK Law Journal*, Vol. 7, No. 1, 2010, 284.
[41]. (1994) 5 NWLR (pt. 343) 159, 173. See also Ndoma – Egba JCA in *Iwuchukwu v Anyanwu* (1993) 8 NWLR (pt. 311) 307, 323.
[42]. (n.30).
[43]. (n.22).
[44]. Cap 9, Laws of Kwara State 2006.

the final say as to whether the appointment of any Chief has been made in accordance with Customary Law and Practice'.

The foregoing provision flows directly from the 'open ended' discretion conferred on the colonial Governor by the Chiefs (Appointment and Deposition) Law of Northern Nigeria[45]. There is urgent need to amend these laws to reflect modern realities. There is scarcely any doubt that recognition of Chiefs is a veritable source of political manoeuvres and patronage and *a fortiori*, the greatest weapon employed to intimidate respectable persons into submission. Although such provisions were probably intended to discourage or curtail a spate of litigations on Chieftaincy disputes, however, they could also be invoked to the detriment of particular individuals and ultimately prejudice the development of the Chieftaincy institution for the greatest good of the greatest number of persons in the community[46]. Besides, the governor as a human being is fallible and could be susceptible to preferences in clear manifestation of bias.

6. Conclusion

There is no doubt that Chieftaincy institution in native communities forms part of their humanity reinforced by their underlying philosophical ontology. There is therefore the need to consolidate the utility and development of that institution for the good of native people viewed from their prism. The apex court as the guardian of our jurisprudence can ensure certainty of the status of written Chieftaincy declarations over the vagaries of expediency and wild theories. This will save the Chieftaincy institution from needless disputes, degeneration and insignificant.

[45]. Cap 20, Laws of Northern Nigeria 1963. See also The Recognition of Chiefs Law, Cap 112, Laws of Eastern Nigeria 1963, s.3.

[46]. See A.G. Karibi-Whyte, 'The Incidence of An Established Aristocracy: Chieftaincy Institution Among the Kalabari' in T.O. Elias *et al* (ed), *African Indigenous Laws*, (Enugu: Government Printer, 1975) 83 - 84.