

JURISPRUDENTIAL EXAMINATION OF THE CHALLENGES IN ASCERTAINING NIGERIAN CUSTOMARY LAW

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Abstract

Customary law has always been relevant to the lives of the Nigerians, particularly in matters of marriage, land holding, chieftaincy, inheritance and succession. Nigerian customary law is diverse and essentially unwritten in nature. The substance of the law are in the memory of the people who the law applies to. This makes precision and clarity which are associated with various codes in Western jurisprudence are lacking in African customary law and this has always been a challenge in judicial administration as the contents of the law are proved like a matter of facts. The aim of this research is to examine the judicial implication of having the substance of the law in loose form. The objective of the study was to examine the implication of the unwritten nature of customary law in judicial functioning of the courts. The study adopted doctrinal methodology of research and placed reliance on primary and secondary information. The primary sources include official documents. Similarly, secondary sources like textbooks, journals and internet materials were put to use. The findings of the study were that there is no uniform standard in the judicial application of Nigerian customary law because of the fluid nature of the law and the study concluded that there is the need to document the applicable laws to allow certainty in the law to assist the courts in their judicial functioning. The study recommended that efforts should be spared by the various levels of government in Nigeria to accomplish this project as this will help in the judicial application of Nigerian customary laws.

Keywords: Adjudication, Customary Law, Documentation, Judicial, Jurisprudence.

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Introduction

Nigeria, like many other African nations, is a heterogeneous society with a multiplicity of ethnic groups.¹ The multiplicity of ethnic groups translates to the multiplicity of customary law.² Savigny claims that custom is superior to legislation and for legislation to be worthwhile, it must be in consonance with the people's custom.³ Many African countries, just like many so called advanced nations of the world are homes to people with diverse religions, customs and traditions.⁴ The applicable African customary laws are in loose and unwritten making it difficult to identify the applicable customary laws.

A look at the applicable rules of customary law, *consuetudo juris*, of the various communities in Nigeria clearly shows that there are some customary law rules which are unifying within the ambit of the tribal structure. However, these rules operate in their loose forms. For instance, under the customary law, the legal estate in family land resides in the family, but the head of the family may have life usufruct or use for life of the family land, especially for farming purposes.⁵ Accordingly, if customary law continues to be in its loose and unwritten form, it will have the problem of being subjected to the nuances of a judge who has judicial responsibility to interpret a particular custom in any matter before him.⁶ There is therefore

¹ A.A Oba, 'The Administration of Customary Law in a Post-Colonial Nigerian State' in *The Possibility of African Legal Theory (The Cambrian Law Review)* vol. 37 (2006), 95; M. Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011), Cornell Law Faculty Publications Paper 187 <http://scholarship.law.cornell.edu/facpub/187> accessed 08 March 2024.

² N. Iguh, 'Conflicts of Laws in Nigeria' in *Fundamentals of the Nigerian Legal Systems* (Faculty of Law, Nnamdi Azikiwe University Nigeria, Bekaam Printers PVT Ltd., Royapuram, India, 2011), 91-110; R.A. Ige, 'Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in A Global Village' (2015) *Journal of Law, Policy and Globalisation* vol. 34, 59-66; J.O. Olubor, *Customary Laws, Practice and Procedure in the Area/Customary Courts, And The Customary Court of Appeal* <http://www.nigerianlawguru.com> accessed 08 March 2024.

³ F. Daramola, *Jurisprudence* 4th ed. (LexisNexis Butterworth, Durban, 2008), 298.

⁴ Expatrio, German Culture <https://www.expatrio.com/living-germany/german-culture#:~:text=Ger> accessed 08 March 2024.

⁵ *Alao & Anor. v Ajani & Anor.* (1989) 1 TWLR 104; *Olohunkun v Teniola* (1991) 5 NWLR (Pt. 192) 501.

⁶ K Llewellyn, 'Some Realism About Realism' (1931) Vol.44 Harv. LR 1222; Enabulele A and Bazuaye B, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Courts' (2019) in *Journal of African Law*, vol. 63 Issue 1, 79-104; World International Property Organisation, Customary

the danger of substituting a judge's opinion or background with what customary law is.⁷ To the American Realists, law is derivable from prevailing social interests and public policy. Accordingly, in interpreting the law, judges consider not only abstract rules, but also social interests and public policy when deciding a case.⁸ The substance of the law are in the memory of the people who the law applies to and time has its strong impact in fading the memories of man and losing a good quality of supposed applicable laws.

Definition of Nigerian Customary Law

Terms like local custom, native law, native law and custom and native custom have been interchangeably used to denote customary law.⁹ Like many other legal terms, customary law has no universally acceptable definition.¹⁰ Legal scholars, jurists, sociologists and anthropologists have attempted giving definitions to the term. According to Ajomo, customary law is the system of law that is indigenous to the various African communities in contradiction to the received European laws.¹¹ Elias defines customary law as an aggregate of customs accepted by members of a community as binding and applicable on them.¹² Similarly, Tarkaa defines customary law as the values of a given community which has become a

Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues <https://www.wipo.int> accessed 08 March 2024.

⁷ A.L. Goodhart, 'Some American Interpretation of Law' in *Modern Theories of Law* (Oxford University Press, London, 1933); W. Baude and S. E. Sachs, 'The Law of Interpretation' (2017) vol. 130 (4), 1455-1492; Greenberg M, 'Natural Law Colloquium Legal Interpretation and Natural Law' (2020) vol. 89 (1) *Fordham Law Review*, 109-144; Greenberg M, *Principles of Legal Interpretation* <https://plato.standard.edu/entries/legal-interpretation/> accessed 08 March 2024.

⁸ Legal Realism http://www.law.cornell.edu/wex/legal_realism accessed 08 March 2024.

⁹ A.D. Badaiki, *Development of Customary Law* (Tiken Publishers, Lagos, Nigeria, 1997), 10.

¹⁰ M. Abdo and G. Abegaz, *Defining Customary Law and Legal System* www.abysiniaw.com accessed 08 March 2024.

¹¹ M.A. Ajomo, 'Comparative Analysis of Customary Laws in Africa' in Osinbajo (ed.) *Integration of the African Continent Through Laws* (Published for the Federal Ministry of Justice, Nigeria by F. Foakes Publishers, Lagos, 1990), 9.

¹² T.O. Elias, *The Nature of African Customary Law* (Manchester University Press, United Kingdom).

pattern of behaviour of people living within a particular area.¹³ In the African context, Law is not merely a legal concept, it is also sociological and anthropological in nature, and accordingly, Glickman¹⁴, a sociologist, defines customary law as the legal principles followed in the various customary courts in dealing with disputes which proceed to litigation. In Nigeria, so legislations have attempted to define the term ‘customary law’; for example, the Customary Courts Law of the defunct Eastern Region of Nigeria¹⁵ defines customary law as a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.¹⁶ The Evidence Act of Nigeria also defines a custom a rule which, in a particular district, has, from long usage, obtained the force of law’.¹⁷

Similarly, the Supreme Court of Nigeria, per Obaseki JSC (as he then was), in the case of *Bilewu Oyewunmi v Amos Owoade Ogunesan* defines customary law as the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. That it is organic because it is not static and it is regulatory in that it controls the lives and transactions of the community subject to it.¹⁸

Sources of Nigerian Customary Law

Customary law has its origin of derivation in some basic sources. The sources of the law are diverse and linked with the history, social organisation, linguistics and the aggregate of the ways of life of the people who the law applies to. These sources of the law include: (i) Custom; (ii) Taboo; (iii) Command; (iv) Legislation and (v) Precedent. These identified sources of the law are set out below:

¹³ M. K. Tarkaa, Codification: A Treatise for the Creation of a Nigerian Common Customary Law, <http://itarka.wordpress.com/2015/06/05/codification-a-treatise-for-the-creation-of-a-nigerian-common-customary-law/> accessed 17 March 2024.

¹⁴ M.J.A. Glickman, ‘Principles of Tswana Customary Law: A Sociology Perspective’ in Comaroff J. and Roberts S. (eds) *Rules and Process: The Cultural Logic of Dispute Settlement in an African Context* (University of Chicago Press, 1981), 82-87.

¹⁵ Customary Courts Law (Cap. 32) Laws of Eastern Nigeria, 1963.

¹⁶ Ibid Section 2.

¹⁷ Section 258 Evidence Act, Cap. E.14 LFN 2011.

¹⁸ (1990) 3 NWLR (Pt.137) 182 @ 207.

(i) **Custom**

Customary law is basically made up of the diverse traditional customs of the natives. In Africa, law is an integral part of the peoples' culture.¹⁹ Customs have been described as the practices, values, usages, etc. of a particular ethnic grouping which have been of application for a very long time.²⁰ Because of its long application, custom will usually have the force of law and the people it binds subject themselves to its obedience.²¹

For any custom to be recognised as law and be enforceable, it must be certain, continuously observed by the people whom it applies to, binding on the people, not contrary to any rule of common law, reasonable, not conflicting with any other known custom and must have been practiced openly.²² Like a fact, customary law will be proved by positive evidence of the existence of the custom and it is only when it has acquired so much notoriety that a court of law will now take judicial notice of the custom in question²³.

(ii) **Taboo**

Taboo is another primary source of Nigerian customary law. Taboos are those conducts that are considered forbidden or sacred in the day to day affairs of a customary society. In the conduct of their daily affairs, natives do away from conducts that are prohibited in the community to prevent evil consequence to the individual who indulges in such activities. It is believed that indulging in an act of taboo, will be followed by a negative occurrence, like mental disorder, sudden death, etc.

¹⁹ L.A. Ayinla, 'African Philosophy of Law: A Critique' in *A Journal of International and Comparative Law* (2002) vol. 6, 147.

²⁰ *Ibid* 205.

²¹ A.T. Oyewo, *African Customary Law in Comparative Milieu and Related Topics* (Jator Publishing Co. Ibadan, 2003), 84. In England, a custom must be of reign of King Richard I of England. The year 1189 was the first year of the reign of Richard I. The reason for not enforcing a modern custom is that if such a standard is not applied, so many of the novel customs and practices would become law.

²² *Ibid* 84.

²³ See Section 16 Evidence Act Cap. E.14 LFN 2011.

(iii) Command

Austin²⁴ views law as the command of a political superior to a political inferior. In the chiefly communities, as had among the Yoruba of south western part of Nigeria, the king was considered supreme and he was viewed as the vicegerent of the gods on earth; accordingly, his directives and orders are commands to be followed in the native community. In republican communities as had in Igbo land and parts of the middle belt of Nigeria, there were no recognised heads as such had in Yoruba land.²⁵ The clans and villages had councils of elders mostly constituted by adult male members of the community who administered by giving commands in the clans and the villages.

(iv) Legislation

This is another important source of law in the customary societies. Unlike legislations in the common law systems that are mostly in writing, customary legislations are in the memory of the natives who know the legislations (laws) that guide them. Customary legislations are altered or abrogated from time to time to meet the needs of time. Elias²⁶ identified five types of customary legislations in African law. These are legislation by chief decree, legislation by chief in executive council, judicial legislation, institutional legislation and legislation in public assembly.

(v) Precedent

The doctrine of precedent (*stare decisis*)²⁷ as had under the common law system has a place of pride in African traditional law. Goodhart²⁸ has rightly observed that the doctrine of precedent, which is a hallmark of the English common law system, is applicable to every legal system even though with some variations in its application. The idea of being guided by

²⁴ J. Austin, *The Province of Jurisprudence Determined* (John Edward Taylor, London, 1882), 183.

²⁵ J.O. Asien, *Introduction to Nigerian Legal System* (Ababa Press, Limited, Lagos, 2005), 151.

²⁶ T.O. Elias, *The Nature of African Customary Law* (Manchester University Press, United Kingdom, 1956), 187-211.

²⁷ For meaning and import of the doctrine of *stare decisis*, see *N.I.W.A v S.P.D.C.N. Ltd.* (2020) 16 NWLR (Pt. 1749) 160; *Musa v Umar* (2020) 11 NWLR (Pt. 1735) 213; *Adams v A.G. Lagos State* (2020) 17 NWLR (Pt. 1753) 281; *State v Zakari* (2020) 8NWLR (Pt. 1727) 484.

²⁸ A.L. Goodhart, 'Precedent in England & Continental Law' (1934) L.Q.R. 41.

decisions in earlier cases has been a constituent part of Nigerian customary law jurisprudence.²⁹

Characteristics of Nigerian Customary Law

Over the years, certain characteristic features have been identified with rules of customary laws generally. One of the striking features of customary law is that it varies from community to community and with cultures. Even within an ethnic group, customary law might vary within the various dialects that make up the ethnic group. For example, in matters of marriage in Yoruba land, the payment of dowry is a *sine qua non* to conducting a valid marriage, but what would be paid as dowry usually differ from one community to another. It has also been observed that the principal feature of customary law is its flexibility or elasticity.³⁰ Because of this peculiar nature of the law, it is easily amenable to changes and it can adapt to pressing societal needs and circumstances. The rules of custom usually change from time to time to reflect the changing social and economic conditions of the society where the law operates³¹. This striking characteristic of customary law has long been observed by Osborne CJ in the case of *Lewis v Bankole*.³²

Another important characteristic of custom is that, it must be accepted by the community it governs³³, as it is the consent of the community that gives a custom its validity, regardless of how barbarous or mild it might look. This remains the position of the law because the communities are usually emotionally attached to its obedience.³⁴ This nature of customary law was rightly pointed out by Lord Atkin in the famous case of *Eshugbayi Eleko v Government of Nigeria*.³⁵

²⁹ J.O. Asein, *Introduction to Nigerian Legal System* (2nd ed.) (Ababa Press Limited. Lagos, 2005), 74.

³⁰ R.M. Unger, *Law in Modern Society* (The Free Press, New York, United States of America, 1976), 49

³¹ *Alfa v Arepo* (1963) WNLR 95.

³² (1908) 1 NLR 81, 100-101.

³³ *Kimdey & Ors. v Military Governor of Gongola State* (1988) NSCC 827.

³⁴ Iyaniwura W, 'Perspectives of African Customary System of Justice in Ekiti State', in Akin Ibidapo-Obe and T.F. Yerima, (eds.), *International Law, Human Rights and Development Essays in Honour of Professor Akindele Babatunde Oyebo* (Ado-Ekiti: Faculty of Law, University of Ado-Ekiti, 2004), 361.

³⁵ (1928) AC 459; (1931) AC 662 @ 673; See also *Yaktor v Governor of Plateau State* (1997) 4 NWLR (Pt. 498) 216.

It has further been observed that the rule to be enforced must be a current native law and custom and not customary practices that of by gone days.³⁶ Describing this characteristic of the law, Bairamian F.J., in the case of *Owoniyi v Omotosho*,³⁷ said native law and custom is ‘a mirror of accepted usage’. Another characteristic of customary law is that it is unwritten. This characteristic of customary law was categorically pointed out by Allott in his book.³⁸ A substantial part of customary law is unwritten and its source is essentially the recollection of elders and others whose traditional roles enable them to have special knowledge of the customs and tradition of their people³⁹. Time and developmental changes have made many customary transactions to now be reduced into writing and writing is now recognised in customary transactions⁴⁰.

Is Islamic Law Part of Nigerian Customary Law?

In Nigeria, the British colonialists included Islamic law in the definition of customary law and this caused large scale confusion.⁴¹ There has been tense argument as to whether Islamic law is part of customary law or whether Islamic law stands on its own independent of customary law. Islamic law has its source in the religion of Islam and the guiding rules of Shariah (Islamic law) as provided for by Allah (SWT) for every mankind.⁴² The Shariah is a detailed corpus of law which governs all aspects of personal and national lives of Muslims and their communities, the *Ummah*. The first primary source of Islamic law is the Holy Quran, while the second primary source of Islamic law is the *Sunnah* or *hadith* of the Prophet Muhammed (SAW). The other sources of Islamic law include *Ijma*, *Qiyas*, *Istihsan*, *Al-masalih al-mursalah*, *Urf* and *Adah*. The question as to whether Islamic law is an integral part of customary law has gathered recurrent decimal in African jurisprudence.

³⁶ Per Speed Ag. CJ in *Lewis v Bankole* (1909) NLR 100 @ 83; *Edokguolor v Idehon* (1966) WNLR 11.

³⁷ (1961) 1 All NLR 304 @ 309; (1961) 2 SCNLR 57. See also *Agu v Ikewibe* (1991) 3 NWLR (Pt.180), 385.

³⁸ A.N. Allott, *Essays in African Law* (Butterworth Publishers, United Kingdom, 1970) 61-62.

³⁹ A.D. Badaiki, *Development of Customary Law* (Tiken Publishers, Lagos, 1997), 15.

⁴⁰ *Bakare v Arepo* (1963) WNLR 95 and *Cole v Folami* 1 FSC 6, 68.

⁴¹ A.A. Oba, ‘The Administration of Customary Law in a Post-Colonial Nigerian State’ in *The Possibility of African Legal Theory*, *The Cambrian Law Review* vol. 37 (2006), 111.

⁴² Suratul-Al-Imran verse 85.

Oba⁴³ opines that Islamic law is radically different from customary law, and this is in consonance with several legislations in many northern states of Nigeria. Several legislations have been passed in many states in the northern part of the Federal Republic of Nigeria⁴⁴ repealing laws which classified Islamic law as a constituent part of customary law. Similarly, going by several provisions of successive constitutions in the Federal Republic of Nigeria,⁴⁵ we can say there is a distinction between Islamic law and customary law. Unlike ethnic customary law which is not uniform, varies from culture to culture and from community to community and usually of a restricted geographical application, Islamic law on the other hand is uniform and of universal application. Also, the substantial corpus of ethnic customary law is not written and the local customs which constitute the law only exist in the minds of those who are subject to the law.⁴⁶

Courts of Customary Law Jurisdiction in Nigeria

Courts in Nigeria may be broadly classified into superior courts and inferior courts. The superior courts in the Nigerian State are courts that are listed in the Constitution of the Federal Republic of Nigeria, 1999, as amended. The Courts include the Supreme Court of Nigeria,⁴⁷ the Court of Appeal,⁴⁸ the Federal High Court,⁴⁹ the National Industrial Court,⁵⁰ the High Court of the Federal Capital Territory, Abuja,⁵¹ a High Court of a State,⁵² the Sharia Court of Appeal of the Federal Capital Territory, Abuja,⁵³ a Sharia Court of Appeal of a State,⁵⁴ the Customary Court of Appeal of the Federal Capital

⁴³ A.A. Oba, 'Islamic Law of Customary Law. The Changing Perspective in Nigeria' in *International Comparative Law Quarterly*, vol.5, 2002, 817-850.

⁴⁴ See Section 29(2)(a) and (b) of Shariah Courts Law of Kano State, 2000.

⁴⁵ See Sections 240-244 and Sections 245-249 of the 1979 Constitution of the Federal Republic of Nigeria and Sections 260-264, Sections 265-269, Sections 275-279 and Sections 280-284 of the 1999 Constitution of the Federal Republic of Nigeria, as amended.

⁴⁶ A.N Allott, *Essays in African Law* (Butterworth Publishers, United Kingdom, 1970), 61.

⁴⁷ Section 6 (5) (a)

⁴⁸ Section 6 (5) (b)

⁴⁹ Section 6 (5) (c)

⁵⁰ Section 6 (5) (cc)

⁵¹ Section 6 (5) (d)

⁵² Section 6 (5) (e)

⁵³ Section 6 (5) (f)

⁵⁴ Section 6 (5) (g)

Territory, Abuja,⁵⁵ a Customary Court of Appeal of a State,⁵⁶ such other courts has may be authorised by law to exercise jurisdiction or matters with respect to which the National Assembly may make laws,⁵⁷ and such other courts has may be authorised by law to exercise jurisdiction at first instance or on appeal on matter with respect to which a House of Assembly may make laws.⁵⁸ The superior courts, as the name indicates, have wider powers than the inferior courts and they are also referred to as courts of unlimited jurisdiction. They are basically courts of record, and a court of record is defined as a court that is required to keep a record of its proceedings. The court's records are presumed accurate and cannot be collaterally impeached. Also it is a court that may fine and imprison people for contempt.⁵⁹ The inferior courts on the other hand are courts of fewer jurisdictions. Inferior courts include the magistrate court, district court, area court, customary court, juvenile court, coroner court and so on. Generally speaking, inferior courts are not courts of record and they exercise jurisdiction strictly based on the statutes that created them. They are also called courts of limited jurisdiction and they accordingly have jurisdiction over only certain types of cases, or cases in which the amount in issue is limited.⁶⁰

In Nigeria, the court system has been integrated into a single hierarchy of courts which deal with matters of modern law as well as customary law. Under the Nigerian legal system, customary courts satisfy the criteria of court of record and accordingly, a customary court keeps record of its proceedings and has power to punish for contempt and can impose fine. For example, the Customary Courts Law of Lagos State, 2011 provides that the decision of the court shall be reduced to writing on the day that proceedings are concluded.⁶¹

In the northern states of Nigeria, there are Area Courts Law for the respective area courts established in the States.⁶² The provisions of the Law

⁵⁵ Section 6 (5) (h)

⁵⁶ Section 6 (5) (i)

⁵⁷ Section 6 (5) (j)

⁵⁸ Section 6 (5) (k)

⁵⁹ B.A. Garner, *Black's Law Dictionary* 10th ed., (Thomas Reuters, United States of America, 2014), 407.

⁶⁰ *Ibid* 431.

⁶¹ Section 32.

⁶² For example in Kwara State there is the Area Courts Law Cap. A9, (Laws of Kwara State of Nigeria) Law, 2006.

in the northern states are similar in contents. The statute provides for the constitution of Area Courts and also makes provisions for the administration of justice in the various Area Courts. The Area Courts Law of Kwara State,⁶³ in its interpretation section defines an 'Area Court' to include an Upper Area Court. In Kwara State there are three grades of Area Court, namely the Upper Area Court, Area Court Grade I and Area Court Grade II and the powers of an Area Court shall not, subject to the provision of the law, exceed those prescribed in the First Schedule in respect of each such grade.⁶⁴ The Area Courts in northern states of Nigeria have extensive powers in civil law causes and matters. The law provides that the court shall in its civil jurisdiction administer the prevalent customary law in the area where the court is sitting or binding between the parties accept by the parties, the content of any law that is in writing and which the court may be permitted to enforce or any rule or order had under the Local Government Law or under any legislation repealed or superseded by that Law, and the provisions of all rules, order, and by-laws made by a Local Authority under any other law, and in force in the area of the jurisdiction of the court.⁶⁵ The Area Courts in the northern states of Nigeria apply rules of customary law prevalent in their areas of jurisdiction. There are similar provisions in the Customary Court Laws of the various states in southern Nigeria, making a customary court to apply rules of custom applicable in its areas of jurisdiction.⁶⁶ An appeal from a decision of an area court in a northern state on an aspect of customary law will go to the High Court of a state, established by the Constitution⁶⁷. However, an appeal from a decision of a customary court in a southern state will go to the Customary Court of Appeal, which is also established by the Constitution.⁶⁸ It should be stated that in the hierarchy of courts in Nigeria, both the High Court and the Customary Court of Appeal are courts of coordinate jurisdiction. It is clearly stated in the constitution that a Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil matters in matters of customary law and

⁶³ Ibid Section 2.

⁶⁴ Ibid Section 17 (1).

⁶⁵ Ibid Section 20.

⁶⁶ See Section 12 of the Customary Courts Law of Enugu State, 2004.

⁶⁷ Section 270 (1) of the Constitution of the Federal Republic of Nigeria, 1999, as amended.

⁶⁸ Ibid Section 280 (1), S. 282(1).

shall exercise such jurisdiction as may be prescribed by the House of Assembly of a State and for which the court is created.⁶⁹

The jurisdiction of the customary court in land matters is however subject to the provisions of the Land Use Act, 1978. Appeals on customary law matters go from the High Court of a State in northern states, Customary Court of Appeal of southern states and of the Federal Capital Territory⁷⁰ to the Court of Appeal established by the Constitution.⁷¹ The Court of Appeal sits on such matters in its appellate jurisdiction. The President is enjoined in his power of appointing the Justices of the Court of Appeal,⁷² to ensure that not less than three of the Justices are learned in Islamic personal law, and not less than three are learned in customary law.⁷³ Appeals of matters, including issues of customary law go from the Court of Appeal to the Supreme Court, established by the Constitution.⁷⁴ Similarly, in the appointment of the Justices of the Supreme Court, a reasonable number of them are expected to be learned in customary law since they sit on appeal in customary law matters coming from the Court of Appeal.

Methods of Ascertaining Customary Law

Customary law has always been a subject of interest to anthropologists/sociologists, historians and lawyers and different ways and means are adopted by scholars in these fields of human endeavour to establish the applicable rules of customary law in any given community.

Anthropological Method of Ascertaining Nigerian Customary Law

Anthropologists and sociologists adopt hallmark holistic approach to identifying what qualifies as applicable custom of the people.⁷⁵ Anthropologists are considered to be in vantage position to understand African law in view of their training as scientists of human societies and instructions, thereby adequately equipped for the proper and accurate study

⁶⁹ Ibid Section 282 (1) and (2).

⁷⁰ Ibid Sections 265 and 267.

⁷¹ Ibid Section 237.

⁷² Ibid Section 238.

⁷³ Ibid Section 237(2).

⁷⁴ Ibid Sections 230 and 233.

⁷⁵ R. E. Lenkeit, *Introducing Cultural Anthropology* (McGraw-Hill Companies Inc., 2001), 36.

of peoples' culture.⁷⁶ To achieve this, cultural anthropologists study the various dimensions of culture through description and analysis of the living cultures, sub-cultures and micro-cultures of the people and which extend to describing and analysing the language that is spoken by the people, their family system and kinship, gender setting, political and economic lives of the people, law system, religion, art, etc.⁷⁷ In the quest to identify the applicable customary laws, anthropologists view customs as cumulative, dynamic, adaptive and diverse in nature.⁷⁸ Since custom of the people are stored by the language spoken by the people, the culture of the people are built up in the peoples' languages. Anthropologists believe that peoples' customs evolve and change with the developmental activities in the community,⁷⁹ and that customs constantly change internally through innovations and inventory activities which combine to create new things.⁸⁰ Similarly, external influences through a process of diffusion or the borrowing of items and ideas from other cultures also have significant influence on the applicable customary laws of any group of people,⁸¹ this is so because no nation is an island of its own.

The anthropologists have adopted different methods of knowing the applicable customs of the people. Firstly, the anthropologist may study the archaeological record that has been compiled by archaeologists over time and make a painstaking study of the human cultural development of a group of people which will assist in no small measure to pin-point the pattern and trends of cultural change of the people over a given time.⁸² In other words, the method helps to recover or reconstruct lost culture which are extinct.⁸³ Secondly, the collection of life histories or historical records of events that have taken place among the people will also be studied and it will assist in no small way to unravel changes that might have taken place over time.⁸⁴ To know the applicable customs of the people in any given area despite its

⁷⁶ L. A. Ayinla, 'African Philosophy of Law: A Critique' (2002) 6 *A Journal of International and Comparative Law*, 162.

⁷⁷ Ibid 37.

⁷⁸ Ibid 32.

⁷⁹ Ibid.

⁸⁰ Ibid 33.

⁸¹ Ibid.

⁸² Ayinla (n. 76), 255.

⁸³ O. A. Ogunbameru, *An Introduction to Sociology* 4th edn (Timsole Publications, Ile-Ife, 2022), 274.

⁸⁴ Ibid.

unwritten nature, reference will be made to the life histories of the elders of the given customary grouping and the narrations of the elderly will no doubt be a veritable means of knowing the applicable cultures in the absence of written documents or archeological evidence to proof same.⁸⁵ Finally, when ethnographic studies of a particular culture are usually repeated after a number of years, the changes that have happened over the years will need to be documented and this will assist the anthropologist to be able to say the applicable customs of the people.⁸⁶ For a long time in the past, Anthropology and Ethnology⁸⁷ were enlisted in the service of colonisation and domination, by presenting Africa as a primitive and backward continent.⁸⁸ More so, the earliest ‘scholars’ or writers in these disciplines were missionaries, explorers and colonialists who either lacked expertise or consciously pointed ethnocentric narratives about Africa and her people. Darwinian evolutionism and diffusionism⁸⁹ with its theory that all the fine and beautiful things in Africa came from other parts of the world were strongly relied on by the colonialists and this informed their strength hold in the colonial empires.⁹⁰

‘Eurocentricism’,⁹¹ which is said to be produced when western standards are used to judge the legal, economic, religious, familial and socio-political institutions of the third world which make that part of the world to be defined as ‘underdeveloped’ or ‘developing’.⁹² It has been observed that the major aim of Eurocentricism is to project American and western interests, concerns, neuroses, predilections, prejudices, social categories and social

⁸⁵ Ibid.

⁸⁶ Ibid 256.

⁸⁷ This is the study of the characteristics of different peoples and the differences and relationships between them. See Oxford...

⁸⁸ J. Ki-Zerbo, *General History of Africa: Methodology and African Prehistory* (Heinemann Educational Book (Nig.) Limited, Ibadan, 1990), 5.

⁸⁹ See R. L. Lyman, M. J. O’Brien, ‘The Direct Historical Approach, Analogical Reasoning, and Theory in American Archaeology’ (2001) 8 (4) *Journal of Archaeology Method and Theory*, 303-342.

⁹⁰ See J. M. Blaut, *The Coloniser’s Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, London, 1993).

⁹¹ That is focusing on European culture or history to the exclusion of a wide view of the worlds; implicitly viewing European culture as pre-eminent.

⁹² C. T. Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ in C. Mohanty et al. (eds.) *Third World Women and the Politics of Feminism* (Indiana University Press, Bloomington, 1994), 71.

institutions as the *sine qua non* of what is acceptable and right.⁹³ This has in no small measure informed and culminated in denigrating African realities,⁹⁴ With the attainment of political independence, Africans scholars have shown determined interest to find out about their societies themselves and all the earlier prejudices are now being discarded by the African anthropologists to pave way for scientific discourse of the African people and their customs. Apparently, all these anthropological methods have their weaknesses, however, they have in many ways in the quest to understand the human nature, human society and human part.⁹⁵

Historical Method of Ascertaining Nigerian Customary Law

The people of Africa have always had history, and for a long a time, little was known about African history and the little that was known was misunderstood and considerably distorted through ignorance or self-interest of the European colonialists and settlers.⁹⁶ In fact, there is the European myth that Africans did not have history before their contact with Europe,⁹⁷ and that whatever history Africans have, can be considered part of European history in Africa.⁹⁸ In unravelling the history and culture of the people of Africa, historians adopt various methods to ensure historical truth is re-established and the well-tested methodology adopted for that purpose were not fundamentally different from that used anywhere else.⁹⁹ In the investigation of African people and their culture, people and their culture, historian put to aid three main sources, these are written documents, archaeology and oral tradition,¹⁰⁰ and backed up their studies with the use of linguistic and anthropology.¹⁰¹ The historical approach assist to put to bare the linkage of the extant legal provisions with the past.¹⁰² Historians put to

⁹³ I. William, H. Ghost, Positivism and African Cultural Heritage: Africa's Challenges to Jurisprudence <https://www.coursehero.com/file/59668662/Idowu-1-1pdf/> accessed 20 January 2024.

⁹⁴ Ibid.

⁹⁵ O. A. Ogunbameru (n. 83).

⁹⁶ Ibid 1.

⁹⁷ W. Idowu, African Philosophy of Law: Transcending the Boundaries Between Myth and Reality <https://www.brunel.ac.uk>> accessed 20 January 2024.

⁹⁸ Ibid 56.

⁹⁹ Ibid.

¹⁰⁰ Ibid 2.

¹⁰¹ Ibid.

¹⁰² R. K. Pathak, 'Historical Approach to Legal Research' (2019) in *Legal Research and Methodology Perspectives, Process and Practice* (Satyam Law International, India)

use materials like letters, diaries, photography and sometimes, speeches as examples of primary sources.¹⁰³ Similarly, artefacts such as tools are also considered primary sources in their studies. There are some written sources of African people culture, which are unevenly distributed in time and space.¹⁰⁴ The United Nations Educational, Scientific and Cultural Organisation (UNESCO) established the Ahmed Baba Centre at Timbuktu, Mali to collect relevant documents on African people and their culture, a substantial volume of which may be still be found in various libraries in North Africa, Europe, the Middle East and Armenia, and even in the homes of leading African writers and scholars in the Sahel¹⁰⁵. In the recent times, discoveries of manuscripts were made in Morocco, Istanbul and Turkey, bearing out materials on African customs¹⁰⁶.

Another source for the historical investigation of the African people's culture is archaeology, which is conceived to furnish materials that cannot speak for themselves¹⁰⁷ and which source is considered utterly objective and absolute about the language of finds dug up from the earth.¹⁰⁸ Historians will give interpretation to the information provided by these silent witnesses and clues to civilisation, whether they are foodstuffs, tools or artefacts, or objects made of glass, iron or pottery. Oral tradition is another important source of investigating the people's cultures. Oral tradition has been defined as a living museum of the whole stock of socio-cultural output shared up by peoples who were purported to have no written records¹⁰⁹. Here, reliance is placed on aged people who are the custodians of the people's history and culture and where oral narration is made, efforts would be directed to ensure that the materials contained in the oral tradition are well sorted and sifted to ensure it reflects the true culture and values of the people. Oral tradition of traditional facts has been criticised for being suspect because it is functional to fulfil a social role, just like archives which sometimes conceal a good many falsehoods beneath their objective appearance.¹¹⁰ Similarly, oral

¹⁰³ Lesson 4 How Historians Study the Past www.kyrene.org/lib/Domain accesses 20 January 2024.

¹⁰⁴ J. M. Blaut, *The Coloniser's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, London, 1993), 2.

¹⁰⁵ Ibid 3

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 3.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

narration of cultural values is sometimes devoid of chronological references and it loses its significance if it is reduced into writing and taken out of the audience that gave it life.¹¹¹

Notwithstanding these short-comings, oral tradition is of great historical value in the life of the natives as it reflects the customs and standards that are current in a society and it goes a long way to offer incidental description of facts and objects, which conjure up the social and physical setting in the life of any society.¹¹² In determining what constitutes the culture of a group of people, the historian will look at what is consistently done by the people over a period of time and in that, it will be taken, lay the culture of the people.

Challenges in Ascertaining Customary Law

Customary law in Nigeria is prone to so many challenges and this has made the project of ascertainment of customary law a very difficult task to accomplish. One of the basic challenges of the task is unwritten nature of the law which makes it difficult to know with precision the laws that are binding on the people. A law that is documented will be precise and known to everybody who it applies to. To get over this challenge, there is the immediate need to document all applicable laws to erase the challenges that accompany the proof of customary law in courts. Similarly, very few Nigerian law scholars take interest in Nigerian customary law and legal system, not to talk of fundamental processes like the ascertainment of the law. Many Nigeria law scholars criticise customary law principles and the few available written materials on customary law without proffering meaningful materials in the alternative¹¹³. There is general passivity in research based on African ideas and there is large scale preference for foreign legal systems which is part of the neo-colonial process.¹¹⁴ With this kind of a negative attitude to customary law, very little can be accomplished in the ascertainment project. African scholars should show interest in their legal tradition to buoy African development and standard of life. Customary

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ P. Onyango, *African Customary Law: An Introduction* (Law Africa Publishing (U) Limited, Kampala, Uganda 2013), 22.

¹¹⁴ Ibid 4.

law can be a means toward that end.¹¹⁵ Similarly, legal policies in many African nations are usually in line with the adoption and application of western legal concepts, systems and practices to the detriment of African values and systems. Ascertaining African customary laws and other laudable projects are therefore not considered important by this class of policy makers.

Another major challenge of the task of ascertaining the law is the identified feature of fusion of customary law principles with moral issues¹¹⁶. The fusion of customary law principles with moral principles has made customary law to be considered primitive social rules¹¹⁷. To a great extent, this goes against the modern understanding of what qualifies as law and rights that would deserve to be ascertained in a document. The unwritten nature of the law is principally responsible for this and it is hoped that with the documentation of the applicable rules of customary law, this challenge would be ameliorated. Another challenge to the ascertainment of customary law is the lack of data on the precise number of applicable customary laws in Nigeria. Different writers and scholars of Nigerian legal system give estimates of the number of ethnic groups and dialects of the Nigerian people.¹¹⁸ At this point of the country's development, scholars in Nigerian law should be able to categorically state with precision the number of ethnic groups and the applicable customary laws in Nigeria. If there is no precise information as to the number of applicable customary laws, then the ascertainment project would be faced with a fundamental challenge. Similarly, the diversity of Nigerian languages make it difficult to know the exact semantic meaning of legal notions in certain norms. This remains the situations in many African countries¹¹⁹. Having a deep understanding of the semantic meaning of legal notions in the applicable customary law therefore remains a serious challenge towards the ascertainment project. Happenings in mono-linguistic nations such as Rwanda, Burundi and also Tanzania have

¹¹⁵ Ibid 4-5.

¹¹⁶ R.S. Bhalla, *Concepts of Jurisprudence* (Nairobi University Press, Kenya, 1990), 4.

¹¹⁷ E.S. Hartland, *Primitive Law* (Methuen, London, 1924).

¹¹⁸ Location of Nigerian Ethnic Groups <https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/teaching-and-learning-in-the-digital-age-/through-lens-of-history-biafra-nigeria-thewest-and-the-world/the-republic-of-biafra/location-of-nigerian-ethnic-groups> accessed 22 March 2024.

¹¹⁹ P. Onyango, *African Customary Law: An Introduction* (Law Africa Publishing (U) Limited, Kampala, Uganda, 2013), 37.

no doubt proved that language cannot be a hindrance to universal concepts such as justice since they can express their social rules in one language¹²⁰. Another fundamental challenge to the ascertainment of Nigerian customary law is the lack of adequate investment in research based on Nigerian customary laws and values. Governments at different levels, organisations and wealthy individuals should contribute meaning resources in studies relating to Nigerian customary laws. This will on the long run assist the project aimed to ascertain the applicable customary laws of the Nigerian people.

Conclusion and Recommendation

The loose and fluid nature of the law has made it difficult for the judges to know with precision those laws the natives still consider applicable to their social, political and economic lives. If the present nonchalant attitude to the development of customary law continues, states such as United Kingdom and United States on the side of common law and France and Belgium on the side of civil law system will continue to dominate the world legal system in the absence of Africans translating their legal traditions into formidable and influential legal system through ascertainment.¹²¹ Values such as peace, reconciliation, unity, solidarity, human rights, equality, fraternity and liberty are integral parts of African law¹²² and the world stands to gain from such values when decisions are to be made in international bodies like the United Nations. This paper recommends:

- i. There is the urgent need to identify the applicable customary laws of the people of Nigeria.
- ii. The governments at various levels of the Nigerian state and other stakeholders in customary law have a role to play in identifying these applicable customary law rules for proper documentation.
- iii. Those customary law rules which cut across various divides of the Nigerian communities will deserve to be documented.

¹²⁰ Ibid.

¹²¹ Ibid 111-112.

¹²² Ibid 113.