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AN EXAMINATION OF THE ROLES OF ANTHROPOLOGISTS AND HISTORIANS IN ASCERTAINING NIGERIAN CUSTOMARY LAW

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Abstract

Customary law has continued to be relevant to the lives of the natives, particularly in matters of marriage, land holding, chieftaincy, inheritance and succession. Due to the plural and unwritten nature of African customary law, precision and clarity are lacking in the law. There is the need to ascertain the applicable rules of customary law with a view to knowing the exact contents of the law and assist in judicial administration. The aim of this effort is to examine the roles of anthropologists and historians in identifying the customary laws which the natives observe in their daily affairs as their applicable Nigerian customary laws. The objective of the study is to elucidate the importance of having anthropological and historical involvement in ascertaining the applicable native laws and customs of the Nigerian people and to identify the rules of customary law that will deserve to be ascertained. The study adopted doctrinal methodology and placed reliance on primary sources of official documents, statutes and decided cases. Similarly, the study placed reliance on secondary sources like textbooks and internet materials. The finding of the study was that social anthropologists and historians should be involved more in the ascertainment exercise of the Nigerian customary

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laws. The study concluded that an effective identification of the applicable customary laws will be achieved if anthropologists, historians and other specialists relevant in the ascertainment exercise are appropriately involved. The study recommended that extant customary law rules which have the assent of the natives will deserve to identified and ascertained for the future generations of Nigerians.

Key Words: Roles, Anthropologists, Historians, Custom and Law.

1.1 INTRODUCTION

Generally speaking, customary law binds indigenes and non-indigenes who live in a particular native community;[396] and the rules continue to guide indigenes when they reside outside their community.[397] With the arrival of the British colonialists into Nigeria and the consequent introduction of English law,[398] the British colonialists believed that so many of the African traditional societies lacked effective central administration and were into some barbaric traditional practices, like group responsibility in criminal trials, belief in witchcraft, trial by ordeal, and so many others, which were considered unjust, inequitable and mundane.[399] Hence, the colonial administration considered those practices to be unsustainable under their administration and standards or tests were created by the British colonial masters for the application of rules of customary law in the native communities.

Therefore, for a rule of customary law to be applicable, it needed to pass the statutory tests, because customary law was considered inferior to the English laws which exclusively governed issues of public law, like criminal law and procedure, constitutional and administrative matters, tort and contract.[400] The machinery for judicial administration in African traditional communities were also relegated to mere informal institutions for settling very trivial and inconsequential conflicts and they were not truly treated as courts; while customary law became confined to only limited

[396] F. Adaramola, *Jurisprudence* (LexisNexis Butterworths, Durban, 2008), 93.
[397] ibid.
[398] The first of such legislations was Ordinance No.3 of 1863.
[399] S. Alieke, The Outlaw of Barbaric Cultural Practices in Nigeria https://www.tekedia.com> accessed 10 January 2024.
[400] A. A. Oba, 'The Future of Customary Law in Africa' in *The Future of African Customary Law* (Cambridge University Press, United Kingdom, 2011), 62.

civil matters relating to land holding, family disputes and chieftaincy issues.[401] With time, customary law became inconsequential and adulterated with the application of British standards into the application of traditional African customary law.[402]

The different standards or tests provided by the British colonialists for the application of customary laws were retained in several legislations after independence in many African states and therefore, the application of customary law is still subjected to repugnancy,[403] incompatibility,[404] public policy[405] and constitutional tests.[406] Similarly, during colonial rule, the personnel of most of the courts were either British or British trained and were charged with the responsibility of applying customary law with its inherent characteristics of flexibility and uncertainty due to its unwritten nature.[407]

The unwritten characteristic of customary law has made it difficult to identify the applicable customary rules and since customary law is not a matter solely for the lawyers, anthropologists/sociologists and historians have also devised different approaches to identify the applicable customary law in the various constituent communities for judicial application.

1.2 CUSTOMARY LAW

Terms like 'local custom', 'native law', 'native law and custom' and 'native custom' have been interchangeably used to denote customary law.[408] Like many other legal terms, customary law has no universally acceptable definition.[409] The efforts to define

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[401] ibid.
[402] See *Giwao bin Kilimo v Kisunda bin Ifuti* (1938) 1 LTR (R) 403; S Abraham, ;The Colonial the Unity Legal Service and the Administration of Justice in the Colonial Dependencies' (1948) (30) *Journal of Comprehensive Legislation*, 8.
[403] See *Ashogbon v Oduntan* (1935) 12 NLR 7.
[404] See Section 26 (1) of the High Court Law of Lagos State Cap. 52, 1973; Section 20 (1) High Court Law of Eastern Nigeria Cap. 61, 1963.
[405] See Section 18 (3) of the Evidence Act Cap. E14, 2011; Paragraph 2 of the Preamble of the 1999 Constitution of the Federal Republic of Nigeria, as amended; See also the Abolition of Child Marriage Law of Niger State of Nigeria, 1991.
[406] See Sections 1 (1), (3) and 315 of the 1999 Constitution of the Federal Republic of Nigeria, as amended.
[407] O. Akanki, 'Proof of Customary Law in Nigerian Courts' (1970) 4 *Nigerian L.J.*, 20.
[408] A. D. Badaiki, *Development of Customary Law* (Tiken Publishers, Lagos, Nigeria, 1997), 10.
[409] M. Abdo and G. Abegaz, Defining Customary Law and Legal System www.abyssinialaw.com accessed 10 January 2024.

customary law is long standing,[410] and several attempts have been made to define the term. It is however important to distinguish customary law from social rules and habits of behaviour of the people.[411]

According to Onyango, customary law is human law which are found in traditional social and psychological fabrics of the human society.[412] Bennett defines customary law as the law of small scale communities which regulates the lives of people living in the community where it operates and exclusive of people who live outside the community where the law is applicable.[413] On his part, Badaiki[414] defines the customary law of a given society as the aggregate of traditions and customs regulating different kinds of relationships between members of the given society. He says customary law is very exhaustive, makes provision for every aspect of the people's life and the language of human interaction.[415] In the African context, Law is not merely a legal concept, it also has sociological, physiological and anthropological nature.[416]

The Customary Court of Appeal Law of Plateau State of Nigeria defines customary law as, *'the rule of conduct which governs legal relationships as established by custom and usage and not forming part of the common law of England nor formally enacted by the Plateau State House of Assembly but includes any declaration of modification of customary law but does not include Islamic personal law'*.[417] The Evidence Act of Nigeria also attempts a definition of custom as, *'a rule which, in a particular district, has, from long usage, obtained the force of law'*.[418] Similarly, the Supreme Court of Nigeria, per Obaseki JSC (as he then was), in the case of *Bilewu Oyewumi v Amos Owoade Ogunsesan* said that, *'Customary Law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people…'*[419]

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[410] P. Onyango, *African Customary Law: An Introduction* (Law Africa Publishing (U) Kampala, Uganda 2013), 26.
[411] H. L. A. Hart, *The Concept of Law* 2nd edn (Oxford University Press, United Kingdom 1961), 12.
[412] P. Onyango (ibid), 19.
[413] T. W. Benneth, *A Source Book of African Customary Law for Southern Africa* (Juta and Co. Limited, Johannesburg, 1975).
[414] A. D. Badaiki, *Development of Customary Law* (Tiken Publishers, Lagos, 1997), 10.
[415] ibid 12.
[416] A. T. Oyewo, *African Customary Law in Comparative Milieu and Related Topics* (Jator Publishing Co., Ibadan, Nigeria 2003), 2.
[417] S. 2 Customary Court of Appeal Law of Plateau State, 1979.
[418] S. 258 Evidence Act Cap. E.14, 2011.
[419] (1990) 3 NWLR (Pt. 137) 182 at 207.

1.2.1 FEATURES OF CUSTOMARY LAW

One of the striking features of customary law is that it varies from community to community and with cultures, and even within an ethnic group, customary law might vary within the various dialects that make up the ethnic group. Another feature of customary law is its' flexible or elastic.[420] Because of this characteristic of the law, it is easily amenable to changes and it can adapt to pressing societal needs and circumstances to reflect the changing social and economic conditions of the society where it operates.[421] Another important characteristic of custom is that, it must be accepted by the community it governs[422], as it is the consent of the community that gives a custom its validity, regardless of how barbarous or mild it might look because the communities are usually emotionally attached to its obedience.[423] Finally, the law has the characteristic of being unwritten; presently, 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 people[424]. Time and developmental changes have made many customary transactions to now be reduced into writing and writing is now recognised in customary transactions.[425]

1.2.2 Validity of Customary Law in Nigerian Courts

Repugnancy test, incompatibility test, public policy test and constitutional test have been applied over time to determine the applicability of a rule of customary law in a customary society.

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

[421] *Alfa v Arepo* (1963) WNLR 95; See also *Dawodu v Danmole* (1962) 1 WLR 1053; *Amodu Tijani Secretary, Southern Nigeria* (1921) AC 399 at 404.; *Alade v Aborishade* (1960) 5 FSC 167; *Chukweke v Nwakwo* (1962) 2 WLR (Pt.5) 195; See also the observation of Osborne C.J. in *Lewis v Bankole* (1908) 1 NLR 81 at 100-101.

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

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

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

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

1.2.2.1 The Repugnancy Test

The origin of this test cannot be said with precision,[426] and some legal scholars have opined that the origin of the rule is traceable to the Roman canonical law which was prevalent in most of the medieval European States[427] and has been a veritable tool in the administration of justice the world over.[428] The courts have not been able to state with precision the meaning of the clause[429] and the courts have always laboured to say the actual and true meaning of the clause.[430] The repugnancy clause has been put to aid by various courts of the land to assert the non-enforceability of a rule of customary law which is considered contrary to natural justice, equity and good conscience.

Accordingly, universal principle that no man should be condemned unheard, expressed in the Latin maxim *Audi Alteram Partem*[431] and the maxim that no man can be a judge in his own cause, expressed in the Latin maxim *Nemo Judex In Causa Sua* have been put to aid in the application of customary law.[432] Going by the gamut of cases earlier decided in Nigeria, customary laws that were considered repulsive to civility have been adjudged inapplicable. In the case of *Eshugbayi Eleko v Officer, Administering the Government of Nigeria*,[433] Lord Atkin held the view that a rule of custom which is considered barbarous must be rejected on the ground of being contrary to the test.[434]

1.2.2.2 The Incompatibility Test

The second test to be passed by a rule of customary law sought to be enforced is the incompatibility test and the test is provided for in so many laws in Nigeria, couched in different manners. It has been observed that the test simply aims to subject customary

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[426] M..I. Jegede, *Principles of Equity* (M.I.J. Professional Publishers, Lagos, 2007), 7.
[427] ibid; M. E. Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon', (2015) 15 (2) in *African Studies Quarterly Journal*, 87.
[428] T. O. Dada, *General Principles of Law* (Manuere-Joe Production Ent., Lagos, 1998), 65.
[429] A. O. Obilade, *The Nigeria Legal System* (Spectrum Books Limited, Ibadan, 2011), 100.
[430] T. O. Dada, *General Principles of Law* (Manuere-Joe Production Ent., Lagos, 1998), 64.
[431] See the case of *R. v Chancellor of University of Cambridge* (1723)1 Str. 557, 567 where Fortesque J. said: 'even God himself did not pass sentence upon Adam before he was called upon to make his own defence. 'Adam' (says God) 'where art thou? Has thou not eaten of the tree whereof I commanded that thou should not eat?
[432] See *Thomas v Oba Ademola II* (1945) 18 NLR 12 at 23; *Sandy v Hotogua* (1952) 14 WACA 18; *Modibbo v Adamawa Native Authority* (1956) NRNLR 101; *Guri v Hadejia Native Authority* (1959) 4 FSC 44; *Ugoala v State of Lagos* (2021) All FWLR (Pt. 1091) 1853.
[433] (1931) AC 662, 673.
[434] See *Edet v Essien* (1932) 11 NLR 47; *Abassi Okon Ekpan v Chief Henshaw* and Okoho Ekeng Ita (1930) 10 NLR 65; *Solomon v Gbobo* (1974) 2 RSLR 30; *Meribe v Egwu* (1979) 3 SC 23.

law to provisions that are contained in municipal laws.[435] Many statutes provide that a rule of custom to be enforced on the people must overtly or covertly not be seen to be incompatible with any law for the time being in force.[436] The incompatibility test will be applied where there is a local legislation which is ordinarily made to govern a given subject matter to the exclusion of customary law.[437] Similarly, some other enactments have provided that a customary law to be enforced must not be considered to be incompatible with any law that is in writing.[438]

By the incompatibility test, a rule of customary law gives way to any legislation which is in force if the customary law rule is incompatible with the said law. In other words, customary law rule to be enforced must not be incompatible with a law that is passed by the National Assembly, State House of Assembly or a Local Government Council.

1.2.2.3 The Public Policy Test

The term 'public policy' has no precise definition and Agbede defines it as the idea of judicial legislation or interpretation by courts which are hinged on current needs of a community.[439] According to Malemi,[440] public policy means public welfare, public good, and public interest, national interest, welfare of the people or the interest of the society. It further means the security and welfare of the individual and the nation as an entity. Therefore, anything that is injurious to the people and the state, is against the policy of the government. In the Nigerian case of *Okonkwo v Okagbue*,[441] an alleged custom which made a woman to nominally marry a dead man in order to bear children for him in his name was declared to be contrary to public policy and it was further held that any custom that offends morality will be against public policy. Morality may be understood in terms of the moral values and ideals that are prevalent in a society which aims to preserve its interests. By this test, the court will refuse to enforce or recognise a custom on the basis that it has a mischievous tendency and will be injurious to the

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[435] M. E. Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon' (2015) 15 *African Studies Quarterly*, 85.
[436] See S.26(1) High Court Law of Lagos State (Cap.52), 1973; S.20(1) High Court Law of Eastern Nigeria (Cap. 61), 1963.
[437] Validity and Tests of Customary Law: A Detailed Explanation https://bscholarly/validity-test-customary-law/ accessed 10 January 2024.
[438] See S.13 (1) High Court Law of Mid-western Nigeria (No.9) of 1964.
[439] I. O. Agbede, *Legal Pluralism* (Shaneso C.I. Ltd., Ibadan, 1991), 74.
[440] E. Malemi, *The Nigeria Legal Method* (Princeton Publishing Co., Lagos, 2012) 180.
[441] (1994) 9 NWLR (Pt. 368) 301.

interest of the state or community where it is to be enforced. So many cases have been decided in the light of some policy decisions of the government.[442]

The public policy of a nation or community is dynamic and not static; it changes with the exigencies of time and needs. It is therefore no surprise when Lord Denning said the public policy is 'an unruly horse' which no one can predict.[443] Eso JSC has opined that it will be dangerous for a court to solely base it judgment on public policy as it would 'give room for uncertainty in law'.[444] It is therefore important that to prevent the public policy test from becoming an 'unruly horse' that no one knows where it could take one when one gets astride,[445] there is the need to exercise great caution in the application of the test.

1.2.2.4 The Constitutional Test

As a consequence of Nigerian constitutionalism and constitutional government, the 1999 Constitution of the Federal Republic of Nigeria, as amended, is the basic law and the Nigerian *grundnorm*. According to Kelsen in his Pure Theory of Law,[446]the original norm which is the highest in hierarchy of the available norms will be called the *grundnorm*. The original *grundnorm* is the basic or final norm (*fons et origo),* which Salmond[447] said is fundamental and deserves to be termed the legal source.

The Nigerian Constitution of 1999, as amended provides for its own supremacy when it says the constitution is the ultimate law and its provisions shall be obligatory on every authorities and persons in the nation.[448] The constitution under the same section also provides that in case any other law is not consistent with what the constitution provides for, that other law shall be void to the extent of its inconsistency with the constitution and the provisions of the constitution shall prevail.[449]

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[442] See *Re Adadevoh* (1951) 13 WACA 304; *Cole v Akinyele* (1960) 5 FSC 84; *Helen Odogie v Iyere Aika* (1985) Nigerian Bulletin of Contemporary Law, 51; *Nze kwu v Nzekwu* (1989 (2 NWLR (Pt. 104) 373.

[443] *Enderby Town Football Club v Football Association* (1971) ch.591.

[444] *Sonnar (Nig.) Ltd. & Anor v Partenreedri M.S. Nordutind & Anor.* (1987) 11 S.C. 121, 143-144.

[445] See the dictum of Burrough J. in *Richardson v Mellish* (1824) 2 Bing. 229 at 252. See recent examples in law of contract- *Gray v Barr* (1971) 2 Q.B.554, in law of probate- Re Giles (deceased) (1971) 3 WLR 640.

[446] H. Kelsen, *The Pure Theory of Law* (Berkley, 1967), 200.

[447] J. Salmond, *Jurisprudence* (Steven and Haynes, London, 1913), 47-50.

[448] Section 1(1).

[449] Section 1(3).

These provisions of the constitution are indicative of the superior status of the constitution in the ranking of laws.[450] On the strength of afore referred provisions of the constitution, all other laws operating in Nigeria, be it legislation, case law, customary law, received English law must be in strict compliance with the provisions of the constitution. Any other law that is directly or indirectly contrary to the provisions of the constitution will be ineffectual, while the constitution will prevail.[451]

It has been observed[452] that the commonest area of conflict between customary law and the constitution are in matters of the fundamental human rights of the citizens.[453] Some basic human rights like the right to life;[454] right to dignity of human person;[455] right to personal liberty;[456] right to fair hearing;[457] right to private and family life;[458] right to freedom of thought; conscience and religion;[459] right to freedom of expression and the press;[460] right to peaceful assembly and association;[461] right to freedom of movement;[462] right to freedom from discrimination;[463] right to acquire and own immovable property anywhere in Nigeria[464] are all provided for in the Nigerian constitution. Any cultural or customary practice that would prevent a citizen from enjoying of any of these constitutionally provided rights would be declared invalid and unenforceable in any Nigerian court.

1.4 COURTS OF CUSTOMARY LAW JURISDICTION

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

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[450] J. O. Akande, *Introduction to the Nigerian Constitution* (Sweet and Maxwell Limited, London, 1982), 2

[451] *A.G. Abia v A.G. Federation* (2003)13 NSCQR 373; (2003) FWLR (Pt.152) 131.

[452] 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) 37 (2006), 100.

[453] Chapter IV, Sections 33-46 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[454] Ibid Section 33.

[455] Ibid Section 34.

[456] Ibid Section 35.

[457] Ibid Section 36.

[458] Ibid Section 37.

[459] Ibid Section 38.

[460] Ibid Section 39.

[461] Ibid Section 40.

[462] Ibid Section 41.

[463] Ibid Section 42.

[464] Ibid Section 43.

Court of Nigeria,[465] the Court of Appeal,[466] the Federal High Court,[467] the National Industrial Court,[468] the High Court of the Federal Capital Territory, Abuja,[469] a High Court of a State,[470] the Sharia Court of Appeal of the Federal Capital Territory, Abuja,[471] a Sharia Court of Appeal of a State,[472] the Customary Court of Appeal of the Federal Capital Territory, Abuja,[473] a Customary Court of Appeal of a State,[474] such other courts has may be authorised by law to exercise jurisdiction or matters with respect to which the National Assembly may make laws,[475] 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.[476]

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. 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 which are also called courts of limited jurisdiction, are not courts of record and they exercise jurisdiction strictly based on the statutes that created them. 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.[477] In the northern states of Nigeria, there are Area Courts Law for the respective area courts established in the States.[478] The provisions of the Law in the northern states are similar in contents.

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

[465] Ibid Section 6 (5) (a).
[466] Ibid Section 6 (5) (b).
[467] Ibid Section 6 (5) (c).
[468] Ibid Section 6 (5) (cc).
[469] Ibid Section 6 (5) (d).
[470] Ibid Section 6 (5) (e).
[471] Ibid Section 6 (5) (f).
[472] Ibid Section 6 (5) (g).
[473] Ibid Section 6 (5) (h).
[474] Ibid Section 6 (5) (i).
[475] Ibid Section 6 (5) (j).
[476] Ibid Section 6 (5) (k).
[477] See Section 32 of Customary Courts Law of Lagos State, 2011.
[478] For example in Kwara State there is the Area Courts Law Cap. A9, (Laws of Kwara State of Nigeria) Law, 2006.

Territory[479] to the Court of Appeal established by the Constitution.[480] The Court of Appeal sits on such matters in its appellate jurisdiction and the President is enjoined in his power of appointing the Justices of the Court of Appeal,[481] 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.[482] Appeals of matters, including issues of customary law go from the Court of Appeal to the Supreme Court, established by the Constitution.[483] 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.

1.5 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.

1.5.1 Anthropological Method of Ascertaining Nigerian Customary Law

Anthropologists and sociologists adopt hallmark holistic approach to identifying what qualifies as applicable custom of the people.[484] 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 of peoples' culture.[485] 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.[486] To qualify as an applicable custom, it is required that such a custom or culture must be of cherished value shared among the members of the given community. How

[479] See Section 265 and 267 of 1999 Constitution of the Federal Republic of Nigeria, as amended.
[480] ibid Section 237.
[481] ibid Section 238.
[482] ibid Section 237(2).
[483] ibid Sections 230 and 233.
[484] R. E. Lenkeit, *Introducing Cultural Anthropology* (McGraw-Hill Companies Inc., 2001), 36.
[485] L. A. Ayinla, 'African Philosophy of Law: A Critique' (2002) 6 *A Journal of International and Comparative Law*, 162.
[486] ibid 37.

much of the culture to be shared by the people to who it governs has agitated so much debate. If such a custom is shared by the largest number of the people it governs, then it will be taken as an applicable custom or culture.[487] Therefore, the custom must be a core norm of inherited value regulating the social activities of the people.

In the quest to identify the applicable customary laws, anthropologists view customs as cumulative, dynamic, adaptive and diverse in nature.[488] 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,[489] and that customs constantly change internally through innovations and inventory activities which combine to create new things.[490] Similarly, external influences through a process of diffusion or the borrowing of items and ideas from other culture also have significant influence on the applicable customary laws of any group of people,[491] this is so because no nation is an island of its own.

Going by the application of rules of customs, anthropologists differentiate between what is referred to as an 'ideal culture' and a 'real culture'. An ideal culture refers to the values, beliefs, and norms people desire to achieve or should do as a manner of life style, such as respecting elders and being honest, whereas real culture are the vales, beliefs, and norms that a society actually follows.[492] 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.[493] In other words, the method helps to recover or reconstruct lost culture which are extinct.[494]

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.[495] To know the applicable customs of the people in any given area despite its unwritten nature, reference will be

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[487] Ibid 33.
[488] Ibid 32.
[489] ibid.
[490] ibid 33.
[491] ibid.
[492] Ideal vs. Real Cultures | Definitions & Examples https://study.com>academy>lesson accessed 20 January 2024.
[493] Ayinla (fn. 96), 255.
[494] O. A. Ogunbameru, An Introduction to Sociology 4th edn (Timsole Publications, Ile-Ife, 2022), 274.
[495] ibid.

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.[496] In addition, many cultural anthropologists consider participant observation as an all embracing technique because it offers the researcher with lived experience and better insight into the Nigerian customary law. Also key informant interview which entails the process of eliciting information from carefully selected informants about Nigerian customary law or relevant subject matter can be carried out. Further, in-depth interview is also used in anthropology for obtaining a deep insight on a subject matter.

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.[497] For a long time in the past, Anthropology and Ethnology[498] were enlisted in the service of colonisation and domination, by presenting Africa as a primitive and backward continent.[499] 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 diffusionism[500] 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.[501]

'Eurocentricism',[502] 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

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[496] ibid.
[497] ibid 256.
[498] This is the scientific study and comparison of human races. See A.S Hornby, *Oxford Advanced Learner's Dictionary of Current English* 8th edn. (Oxford University Press, United Kingdom, 2010), 500.
[499] J. Ki-Zerbo, *General History of Africa: Methodology and African Prehistory* (Heinemann Educational Book (Nig.) Limited, Ibadan, 1990), 5.
[500] 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.
[501] See J. M. Blaut, *The Coloniser's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, London, 1993).
[502] 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.

'developing'.[503] 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 institutions as the *sine qua non* of what is acceptable and right.[504] This has in no small measure informed and culminated in denigrating African realities.[505] 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.[506]

1.5.2 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.[507] In fact, there is the European myth that Africans did not have history before their contact with Europe,[508] and that whatever history Africans have, can be considered part of European history in Africa.[509] A notorious variant of this European position of African law has been expressed by Trevor-Roper when he said: *'Perhaps, in the future, there will be some African history to teach. But at present there is none: there is only the history of Europeans in Africa. The rest is darkness…and darkness is not a subject of history…'*[510] In unraveling 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.[511] In the investigation of African people and their culture, people and their culture, historian put to aid three main sources, these are

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[503] 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

[504] 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.

[505] ibid.

[506] O. A. Ogunbameru (fn. 99).

[507] Ibid 1.

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

[509] ibid 56.

[510] H. Trevor-Roper, *Rise of Christian Europe* (Thames and Hudson, London, 1964), 9.

[511] ibid.

written documents, archaeology and oral tradition,[512] and backed up their studies with the use of linguistic and anthropology. [513] The historical approach assist to put to bare the linkage of the

extant legal provisions with the past.[514] Historians put to use materials like letters, diaries, photography and sometimes, speeches as examples of primary sources.[515] 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[516]. 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 Sahel[517]. In the recent times, discoveries of manuscripts were made in Morocco, Istanbul and Turkey, bearing out materials on African customs[518].

Another source for the historical investigation of the African people's culture is archaeology, which is conceived to furnish materials that cannot speak for themselves[519] and which source is considered utterly objective and absolute about the language of finds dug up from the earth.[520] 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. Many African countries have not been able to take benefit of this method of unraveling the people cultures in view of its capital intensive nature and there is therefore the need for intra-African programme to identify the most important sites.[521]

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 records[522]. Here,

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[512] Ibid 2.
[513] Ibid.
[514] R. K. Pathak, 'Historical Approach to Legal Research' (2019) in *Legal Research and Methodology Perspectives, Process and Practice* (Satyam Law International, India).
[515] Lesson 4 How Historians Study the Past www.kyrene.org>lib>Domain accesses 20 January 2024.
[516] J. M. Blaut, *The Coloniser's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, London, 1993), 2.
[517] ibid 3.
[518] ibid.
[519] ibid 3.
[520] ibid.

[522] ibid.

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 fulfill a social role, just like archives which sometimes conceal a good many falsehoods beneath their objective appearance.[523] Similarly, oral 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.[524]

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.[525] 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.

1.6 Conclusion

Even though the indirect rule system of colonial administration allowed the continuous application of customary laws of the various traditional communities, the rules were to be applicable subject to them passing the various legislative tests provided by the colonial masters for their application. Several years after Nigeria's independence, the rules for the application of customary law are still retained in several extant law in the country. This study discussed the various tests for application and the impacts the tests have had on the application of customary law in Nigeria.

The study further appreciates that, since rules of customary law are essentially not in writing, the various approaches adopted by sociologists/anthropologists, historians and the legal practitioners to identify the laws are also discussed. Similarly, the study discussed the courts that apply rules of customary law and the practice and procedure in the courts. The study found that the unwritten nature of the law has always been a challenge in proving rules of customary law, coupled with requirement of the Evidence Law in Nigeria which provides that rules of customary law will be proved as a matter of fact. The study recommends that there is the need for certainty of the rules of customary law and this can be achieved by documenting the laws. By documenting the applicable customary laws will assist in solving the problem associated with the

[523] ibid.
[524] ibid.
[525] ibid.

proving of the law in court rooms. This will assist in no small measure in taking full advantage of the unifying characteristic of Nigerian customary law, which can be a hallmark feature of the law that can be borrowed by the jurisprudence of the so called advanced countries.