



UNIVERSITY OF IBADAN JOURNAL OF

PRIVATE AND BUSINESS LAW

U.I.J.P.L.

VOL. 9 2015-2016

RIGHT TO ABORTION AND RIGHT TO LIFE: BALANCING THE COMPETING INTERESTS OF THE PREGNANT WOMAN AND THE UNBORN CHILD(FOETUS) MARCUS AYODEJI, ARAROMI	1
THE APPLICATION OF REDUNDANCY IN NIGERIA: A COMPARATIVE INTERCOURSE WITH SOME SELECT JURISDICTIONS S.O. DAUDU	37
CHARITY LAW IN NIGERIA - NEED FOR A NEW PARADIGM JOHN OLUWOLE A. AKINTAYO & AFOLASADE A. ADEWUMI	65
THE LEGAL CONSEQUENCES OF PAPER AND ELECTRONIC DOCUMENT NECESSARY FOR THE CONTRACT OF CARRIAGE OF GOODS BY SEA GABRIEL E.B. INYANG & NKASI I. OFEM	85
A DECADE OF PENSION REFORM ACT 2004: NEED TO REFORM THE REFORMER OLANIYAN, K. O.	107
DEMOCRATICALLY ELECTED LOCAL GOVERNMENT COUNCILS VERSUS CARETAKER COMMITTEES IN NIGERIA: A CASE FOR LOCAL GOVERNMENT AUTONOMY O. I. ADEJUMO	137
X-RAYING ARBITRAL PROCEDURES AND PRACTICE UNDER THE OGBA CUSTOMARY LAW G. O. AKOLOKWU (MRS)	169
THE PRINCIPLE OF VOLUNTARINESS AND EQUALITY UNDER NIGERIA LABOUR LAW: MYTH OR REALITY? DAVID TARH-AKONG EYONGNDI & MARY-ANN O. AJAYI	189
THE LEGAL RULES GOVERNING THE PROPER INTERPRETATION AND APPLICATION OF THE WORD "TRADE" IN INCOME TAX LEGISLATION D A OBADINA & S O ELETU	223
Thoughts on Dismissed Staff in Nigeria: An Assessment of the Pension Reform Act 2014 Bright Bazuaye	257
The conceptual Framework for Salvage, General Average and Marine Insurance Alaka Oladipupo	277
Restorative Justice and its Reflections in The Administration of Justice Under Nigerian Customary law Akinbola Bukola Ruth	303
Change of Position as a Palliative Tool to The Boundlessness of The Defence of Esoppel Under The Law of Restitution Titilola Hameed	329
Legal Education in Nigeria and Borderless Legal Practice: What Hope for the Nigerian Trained Lawyer? Emmanuel Oluwafemi Olowononi & Oluwasegun Isaac Aderibigbe	351

ISSN 1595-2495

All rights Reserved

2015-2016

All correspondence should be directed to:

The Editor-in-Chief

University of Ibadan

Journal of Private and Business Law

UNIVERSITY OF IBADAN LIBRARY

**RESTORATIVE JUSTICE AND ITS REFLECTIONS IN
THE ADMINISTRATION OF JUSTICE UNDER
NIGERIAN CUSTOMARY LAW**

Akinbola Bukola Ruth

Abstract

The quest for justice is a basic human attribute from time immemorial. British colonization and its adversarial system of justice, met the administration of customary law which served the purpose of justice in Nigeria from time immemorial, characterized by community participation, flexibility, absence of rigid procedure and technicalities, speedy dispensation of justice and absence of courts in the English fashion, but efficient and trusted by the people it bound. Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior through stakeholder-driven cooperative processes that bring all willing stakeholders to meet to resolve their differences. This article argued that restorative justice is not new to Nigeria as it reflects attributes of the Nigerian customary law. There are common attributes shared by both systems, including participation of the offender, offended and the community, non-adversary resolution of conflict, focus on repair and restoration of peace rather than punishment, technicalities recognition of the victim of crime rather than the state as a principal party. It recommended better dispensation of justice in Nigeria through leveraging on the common attributes shared by the administration of customary law and restorative justice.

Key words: *Administration of justice, customary law, restorative justice, and semblances of Restorative justice and reflections*

Introduction

This article aims basically to examine the administration of customary law in Nigeria and highlight semblances of restorative justice in it. The article will concern itself with elements of restorative justice and the similarities in the philosophies behind the administration of justice under the Nigerian customary law and restorative justice. It proposes that customary law has a high potential to contribute to speedy dispute resolution with minimum or no damage to harmonious relationships, and it shares this and some other qualities with restorative justice. The relatively minimal cost in terms of time and other resources, the participatory attribute, accountability of offender to the victim as well as the society, individual and collective responsibility for crimes committed, the key role played by the victim and the society, acceptance of responsibility and commitment to and taking responsibility to repair the damage caused by the offence committed as much as possible, are all attributes of restorative justice, which can also be identified in the administration of justice under customary law in Nigeria. Such elements of customary law make it a desirable, potent and preferred option for speedy trials, reducing animosity, as against the adversarial system of dispute resolution currently much used in Nigeria, under the adversarial system. The adversarial system of justice administration is associated with the English legal system operated in Nigeria. It has foreign attributes which do not have their roots in the customs of the Nigerian people. Its operation connotes some problems, which Nwocha has identified to include prolonged delay in adjudication of disputes, high cost of litigation, corruption and the bitterness and rancour that follow court judgments¹. Others are that a majority of Nigerians feel alienated from the foreign laws (strange legal system), and in most cases would rather resort to their more familiar customary

¹ Nwocha, M. E. (2016). Customary Law, Social Development and Administration of Justice in Nigeria, *Beijing Law Review*, 7, 430-442.

laws to settle their disputes and determine regular issues such as marriage and inheritance rights².

Restorative justice on the other hand, has been found to share similar values with the customary law of Nigeria. This article proposes that the intent of customary law and the mode of its administration portray elements of restorative justice much more than those of retributive justice and that attributes of restorative justice are more reflected in the way customary law operates in Nigeria than in the adversarial system of justice. Restorative justice is therefore, not an entirely new concept or practice to customary law.

The article is in seven parts, comprising the introduction; secondly, conceptual clarifications; thirdly, historical outlines of the origin of administration of customary law in Nigeria; fourth part is the application of customary law, under the administration of justice under customary law in Nigeria. The fifth part is an overview of restorative justice while the sixth part highlights the semblances of restorative justice in Nigerian customary law as compared to retributive justice under the adversarial justice system; and lastly, the conclusion. Under conceptual analysis, the meaning and sources of customary law are examined, including their relationship with the English common law. In terms of the administration of customary law, there are certain criteria or requirements that must be met for a customary law to be valid and enforceable and these are examined in the fourth part. The comparative expose of similarities between customary law and restorative justice as against retributive justice, make up the fifth part of the article, is an overview of restorative justice while the sixth part is an examination of the reflections of restorative justice elements in customary law justice administration.

The conclusion summarizes the important issues dealt with in the paper and proposes that there could be more benefits if recourse to restorative justice and customary law is made in Nigeria, to ease the

² Nwocha, M. E. (2016). *Ibid.*

slow dispensation of justice and minimize the disaffection and animosities often associated with the outcomes of the adversarial system of adjudication in Nigeria.

CONCEPT CLARIFICATION

Restorative Justice

According to Batley, restorative justice is about addressing the hurts and the needs of both victims and offenders in such a way that both parties, as well as the communities which they belong to, are healed.³ The scholar observed that there are several definitions of restorative justice⁴, but there are three principles that are common to them and these are:

- a) Crime is seen as something that causes injuries to victims, offenders and communities. It is in the spirit of *Ubuntu* that the criminal justice process should seek the healing of breaches, the redressing of imbalances and the restoration of broken relationships.
- b) Not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible.
- c) In promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.⁵

³ Mike Batley, Restorative Justice in the South African Context, in *Beyond Retribution – Prospects for Restorative Justice in South Africa*, (pp. 21-32) p.21.

⁴ It is important to note that Batley wrote from a South African perspective at a time when rate of crimes was very high and the apartheid regime had just ended in that country, with its notorious racial discrimination.

⁵ Mike Batley, *ibid.*

Restorative justice was described as a “new movement in the field of victimology and criminology”, that concedes that crime causes injury to people and communities, stating that justice is to repair those injuries while the parties are to legitimately participate in that process of the repair.⁶ When a party is not able, or does not want to participate in such a meeting, other approaches can be taken to achieve the restorative outcome of repairing the harm.

John Braithwaite defined it by stating that restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior, and is best accomplished through cooperative processes that allow all willing stakeholders to meet, noting that other approaches are available when that is impossible⁷.

Some questions have been found to be useful for determining whether any initiative is restorative. They are:

- i. Does it address harms and causes?
- ii. Is it victim oriented?
- iii. Are offenders encouraged to take responsibility?
- iv. Are all three stakeholder groups involved?
- v. Is there an opportunity for dialogue and participatory decision-making?
- vi. Is it respectful to all parties?⁸

Customary Law

Customary law has been defined severally. Generally, it is a system of law that emanates from the custom of a people or community, binds them and grows with the consciousness of the particular society over time and with usage. Internationally, in the context of traditional

⁶ Centre for Justice & Reconciliation at Prison Fellowship International May 2005, Restorative Justice Briefing Paper – 3.

⁷ John Braithwaite (1999). Restorative Justice: Assessing Optimistic and Pessimistic Account Vol. 25, The University of Chicago Press. pp. 127.

⁸ Batley, op.cit., p.23.

international law doctrine, customary law can be described as “usages generally accepted as expressing principles of law”.⁹

Eminent scholars have defined customary law and a few of such definitions will be highlighted. In the view of Elias, it is “a body of customs accepted by members of a community as binding upon them”¹⁰, while Obilade in his book described it thus: “Customary Law consists of customs accepted by members of a community as binding among them”¹¹. According to the renowned scholar and eminent jurist, Niki Tobi, customary law is “The Customs, rules and traditions which govern the relationship of members of a community”¹².

Statutorily, Customary Law has been defined by defining custom, as “a rule which in a particular district has from long usage obtained the force of law”¹³. Similarly, the Black’s Law Dictionary defines custom as a practice that by its common adoption and long, unvarying habit has come to have the force of law and it defines customary law as law consisting of customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws¹⁴.

In case law, customary law has been variously defined, but only a few of such definitions will be highlighted here. In *Aku v Aneku*¹⁵, it was defined as:

The unrecorded tradition and history of the people, practiced from the dim past and which has grown with the growth of the people, to stability and eventually becomes an

⁹ Permanent Court of International Justice, The Case of the S.S. “Lotus”, Judgement of 7 September 1927, PCIJ Series A – No. 10, at 18.

¹⁰ Prof. Teslim O. Elias CJN. 1956. *The Nature of African Law*.

¹¹ Obilade, A. O. 1979. *The Nigerian Legal System*, p.83.

¹² Niki Tobi, 2003. *Sources of Nigerian Law*, p. 104.

¹³ Section 2(1), Evidence Act, Cap E.14, Laws of the Federation of Nigeria, 2004.

¹⁴ Garner, B. A. Ed. (2009). *Black’s Law Dictionary* (9th.ed.). Minnesota: West Publishing Co. p. 443.

¹⁵ *Aku v Aneku*, (1991) 8 NWLR Pt. 209, p. 280.

*intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unwavering habit has become compulsory and has acquired the force of law with respect to the place or the subject matter to which it relates.*¹⁶

In *Oyewumi v Ogunesan*, it is defined as "... the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions."¹⁷ In *Owoyin v Omotosho*, Bairamian FJ, defined customary law in the Supreme Court as "A mirror of accepted usage, among a given people"¹⁸

It is notable that customary law has been recognized in the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN).¹⁹ The CFRN provides for customary law, including customary arbitration, as "an existing law" which is in force immediately before and after the coming into force of the CFRN. Nevertheless, customary law just like any other source of law, system of law or law is subject to such necessary modification as will bring it into conformity with the Nigerian Constitution.

The CFRN further authenticates customary law in Nigeria, by providing for it in the Customary Court of Appeal and by empowering States to establish a customary court system. *Ese Malemi* has rightly submitted that the inclusion of such provisions in the CFRN shows that neither statutes nor the Supreme Court, intend to destroy, reduce to the background in the Nigerian Legal System, nor erode or abolish the customary law by their provisions²⁰.

¹⁶ Per *Ndoma-Egba JCA Aku v Aneku*, (1991) 8 NWLR Pt. 209, p. 280 at 292 CA.

¹⁷ *Oyewumi v Ogunesan* (1990). 3 NWLR Pt. 137 p. 182, at 207, SC.

¹⁸ *Owoyin v Omotosho*, (1961) 1 ANLR, 304.

¹⁹ Section 315(3)-(4) (b) and (c), CFRN, 1999, as amended.

²⁰ *Ese Malemi*, 2008. Introduction to Nigerian Legal System,

Reflection

Reflection in this article refers to replication, image of a thing, the likeness of something, the reproduction or echo of something. The word reflection here describes the relationship between restorative justice and the administration of justice in customary law in Nigeria, by which images of attribute of administration of justice in restorative justice, are like what happens in customary law as a person's image would reflect to him/her while standing before a mirror.

Historical outlines of the origin of administration of customary law in Nigeria

Nigeria as a geographical entity has a lot of historic empires and cultures compared to other countries in Africa, and its history is traceable to as early as 11,000 BC when a number of ancient African communities inhabited the area that now makes Nigeria. The greatest and the well-known empire that ruled the region before the British arrived was the Benin Empire whose ruler was known as Oba of Benin. Other tribes such as the Nri Kingdom also settled in the country, especially in the Eastern side. History has it that the Songhai Empire settled in some of the country's territory.²¹ In 1901, Nigeria was made a British protectorate and was colonized until 1960, when the country gained independence.²² Nigeria is a federal state in West Africa, sharing borders with Cameroon and Chad to the East, Benin to the west, and Niger to the north. It also has a coast in the south that lies on the Gulf of Guinea in the Atlantic Ocean. It is made up of 36 states and the Federal Capital Territory Abuja, where the capital city is situated.²³ Prior to the arrival of the British colonial masters and their system of administration of justice, each native community had its own system of justice administration, by

²¹ spainexchange Country Guide, A short History of Nigeria. Retrieved from <https://www.studycountry.com/guide/NG-history.htm>

²² By the 11th century, Islam had arrived in Nigeria via the Hausa States. In 1851, the British forces seized Lagos, which was later annexed officially in 1861.

²³ Spainexchange, *opcit.*

which society was governed in the form of well-organized customary rules and regulations that guided social interactions and relationships as well as protecting the society and dispensing justice.²⁴ Such customary rules were received, well recognized and respected by the populace bound by it.²⁵

Similarly, Niki Tobi has observed that historically, the natives of the area presently known as Nigeria²⁶, before the arrival of the British around 1861, had set down system for the administration of justice in their different societies, which system was not as sophisticated as the British system, but it was designed to ensure stability of society and maintenance of the social equilibrium.²⁷ The learned Jurist rightly noted that most important objective of customary law was to promote communal welfare by reconciling the divergent interests of the different peoples.²⁸

Two major types of societies were identified for the purpose of administration of justice under customary law, namely the chiefly and

²⁴ Obeagu C.C., 2008. *The Rudiments of Legal Method in Nigeria*, Enugu, Celex printers & publishers, p.379

²⁵ Obeagu, *ibid.*

²⁶ See generally, Elias, T. O., *The Nigerian Legal System*, 2nd ed. (1963); *The Nature of African Law*, Manchester University Press (1962); *British Colonial Law: A Comparative Study*, Stevens and Sons (1962); Nwabueze, B. O., *The Machinery of Justice in Nigeria*, Butterworths (1963); Adewoye, O. *The Judicial System in Southern Nigeria*, Sweet and Maxwell (1979); Folarin, A.; *The Laws and Customs of Egbaland*, E.N.A. Printing Press (1939); Kenning, J. *Customary Laws and Customary Courts in Yorubaland*, Institute of Social and Economic Research (1963); Ibeziaku, S.M., *The Nigerian Customary Law*, Etudo Ltd. (1964); Okojie, C.G. *Ishana Native Laws and Customs*, John Okwesa and Co. (1960); Ogwurike, C., *Concept of Law in English Speaking Africa* Nok Publishers (1979); Gowers, W.F., *Notes on Muhammedan Law in Northern Nigeria Zungeru* (1919); Ruxtan, F.H., *Maliki Law*, Luzacand Company (1916).

²⁷ Niki Tobi (JSC), 1996. *Sources of Nigerian Law*, Lagos, MIJ Professional Publishers Limited, p.1.

²⁸ Niki Tobi, *ibid.*

the chiefless societies²⁹. The separation had an impact on the method and style of administering justice in each of the different societies. The chiefly societies were mostly found in Hausa and Fulani communities in the Northern Provinces, the Yorubaland and Benin in the Southern Provinces, while example of a chiefless society was the Igbos, also in the Southern Provinces.

In the chiefly societies, administration of justice was more formal, rigid and stable, having some semblance of the English style of administration of justice, in contrast to the chiefless societies. In the chiefly societies institutions were kingly,³⁰ and adopted a clearly set down hegemony in the administration of justice. For instance, there was the Emir at the helm of affairs in the chiefly societies in the Northern Provinces while the Oba performed similar duty in the Yorubaland and Benin, each one serving as a fountain of justice and an embodiment of the collective will of the people in their domain and the Emir or Oba was assisted by other institutions and persons.³¹ In the Northern Provinces, there was the *Waziri* or *Vizier*, the Alkali or Chief Justice and the *Maaji* or Treasurer While in the Yorubaland and Benin in the south, the apex of the administration of traditional justice in traditional society was and is still the Oba, assisted by a council of paramount chiefs which is responsible directly to him.³²

Broadly, there were two major classifications or types of customary system of administration of justice, namely the chiefly and the chiefless societies. In the chiefly societies in the south, there were established institutions for the purpose of administration of justice and they were ordered in a monarchical structure. Usually, these were similar to their equivalents in the North and predominantly male-

²⁹ Niki Tobi, *ibid*.

³⁰ The expression is used in the loosesenses of the word as distinct from the traditional British concept

³¹ Niki Tobi, 1996. Sources of Nigerian Law, op.cit.

³² Niki Tobi, *ibid*.

controlled, according to Niki Tobi.³³ The role played by some pseudo metaphysical groups in the south in the administration of justice, is notable.³⁴ For instance, Dike commented on the old Calabar that the Egbo order was the supreme political power there and it exercised not only executive or legislative functions but was the highest court of appeal there, while its President became the head of the community³⁵. Also, Johnson while writing on the Yorubaland in the South West stated that amid the Egbas and Ijebus, the Ogbonis are the chief executives and they had the power of life and death as well as power to enact and to repeal laws.³⁶

In chiefless societies on the other hand, administration of justice was more democratic and different. Niki Tobi described its institutions as more republican in terms of structure and function, citing the Igboland as an example. In Igboland, there was the council of elders, which was charged with the responsibility of administering justice in accordance with the customs and culture of the people.³⁷ Professor Ewelukwa, an Igbo scholar, posits that: "In Igboland, there was a hierarchy by which adult male family members, controlled by the elders or titled men heard cases first and from their decisions, appeal went to

³³ Niki Tobi, *ibid*.

³⁴ Secret societies like the Ogboni in Yorubaland, the Egbo or Ekpo of the old Calabar Province were also involved in the administration of justice, as in some places, they assisted the Oba and his traditional rulers; but in other places, they had their own fraternity in the administration of justice. These institutions exerted strong influence due to the very strong belief of the people as well as the tremendous influence they had in the enforcement of law and order.

³⁵ Dike, K. O., *Trade and Politics in the Niger Delta 1830 – 1885*, p. 33.

³⁶ Johnson, S. *History of the Yorubas*, Routledge (1921), p. 78.

³⁷ The council of elders was the fountain of justice, although it was assisted by officials in the enforcement of law and order. Customarily, disputes were first dealt with by adult male members of the family or village as the case may be and there were also instances when women were involved in the resolution of disputes. See generally, Jones, G. I., *Report of the Position, Status and Influence of Chiefs and Natural rulers in the Eastern Region of Nigeria*, Government Printers, Enugu (1956), pp 5-23 in Niki Tobi, p.3.

an association of all male members of the village involved and then to the association of all the male members of a forum, although disputes were usually left for the elders to resolve, save for special cases".³⁸

One notable general practice that is also common to both the chiefly and chiefless societies in the administration of Justice in Nigeria under customary law, is that administration of justice in traditional society was not conducted in courts "with all its paraphernalia of a formally designed building, punctuated with an aura of legalism and juristic style".³⁹ There were however, basic and to a large extent temporary arrangements in specific places, particularly the family house, market meeting shed, or other places, depending on the size of the community that constitute the litigants and its suitability for purpose. What mattered most is that the traditional courts aimed at ensuring justice in litigation, which is the most important thing for the business of those courts.⁴⁰

Generally therefore, there were no rigid rules of practice and procedure as the case is with the English styled administration of justice. It is also worthy of note that the practice of lawyers advocating on behalf of litigants is completely strange to customary law system of justice. It was sometimes the case that an elderly or well respected member of the community mediated or pleaded on behalf of a person to resolve a dispute, like in a debt dispute or a family problem, but the practice of charging for such intervention is strange to customary law system of resolution of conflicts.

Application of Customary Law in Nigeria

For the purpose of applying customary law, there are some characteristic criteria that are often used as determinants of what a

³⁸ See Okonkwo, C. O. (ed). *Introduction to Nigerian Law*, Sweet and Maxwell (1980), pp. 56 - 57

³⁹ NikiTobi, op.cit.

⁴⁰ Niki Tobi, ibid, p.

valid customary law is. Some of the characteristic features of customary law are:

a) That it must be in existence

Customary law must be in existence at the material or relevant time, making its existence, the reason for reliance on it. Karibi-Whyte, JSC recognized this quality of customary law in *Kimdey and Others v Military Governor of Gongola State and others*⁴¹. The Learned Justiced said: "It is one of the characteristics of customary law that it must be in existence at the material time"⁴². Justice Karibi-Whyte was affirming an earlier recognition of existence as a character of customary law as earlier stated by Speed, Ag. C.J. in the renowned land case between *Lewis v Bankole*⁴³, where Speed said that for the native law and custom to be enforceable, it must be "*existing natural and custom, and not that of bygone days.*"⁴⁴

b) It must be a custom and at the same time a law

Not all customs are laws and not all laws are necessarily customs. Some customs may be widely practiced in a society, but may not be enforceable or have the coercive power of a law. It is possible in the context of Nigeria, for a custom to change to a customary law recognized by the state in the process of codification, but before a custom becomes law, it must satisfy the provisions of the Evidence Act.⁴⁵

c) Customary law must be an acceptable practice

Acceptability by the local community where customary law operates is noteworthy. The definitions of customary law by Bairamian, F.J. in *Owoyin v Omotosho*⁴⁶ and the later affirmation by Karibi-Whyte JSC

⁴¹ *Kimdey and others v Military Governor of Gongola State and others* (1988) 2 NWLR (Pt.77) 445.

⁴² *Kimdey, Ibid* at p. 461.

⁴³ (1908) 1 NLR P. 81.

⁴⁴ Niki Tobi, *Sources of Nigerian Law*, p. 105.

⁴⁵ Section 14, Evidence Act.

⁴⁶ *Owoyin v Omotosho* (1961) 1 All NLR 304.

in Kimdey's case, where the word usage was used, clearly show that usage is a basic element of customary law. Usage may be used as a synonym of the word customary it has even been posited that without repeated usage, there cannot be customary law. By implication therefore, customary law is borne out of repeated usage of a practice until it gains the force of law. The effectiveness of a customary law is measured by the usage of it.

d) Customary law must be Flexible

Customary law has the ability to emerge and adapt to changing society. In *Alfa and others v Arepo*⁴⁷ the flexibility of customary law was stated by Duffus J. thus: "customary law is not however static law and in my view, the law can and does change with the times and the rapid development of social and economic conditions."⁴⁸ This position was stated in *Lewis v Bankole* and affirmed later in the cases of *Kimdey* and others where Karibi-Whyte reiterated that "*one of the characteristics of native law and custom and which provides for this resilience is its flexibility and capacity for adaptation. It modifies itself to accord with changing social conditions*"⁴⁹. An illustration of the changing ability of customary law to adapt to changing societal demands is the status of land transaction. Land held under customary law was inalienable because it was viewed as a most valuable property which must be preserved for posterity in traditional Nigerian society and sometimes, land is even deified⁵⁰.

e) Universal application

It is notable that there is no universally accepted definition of customary law and the word universally applied for describing the application of customary law only refers to its application within the scope of its influence where it is accepted as customary law. To be recognized as a customary law therefore, a custom must be

⁴⁷ *Alfa and others v Arepo* (1963) WNLR 95.

⁴⁸ *Alfa and others v Arepo* (1963) WNLR 95.

⁴⁹ Karibi-Whyte, in *Kimdey's case* op.cit.

⁵⁰ Niki Tobi, op.cit., p.109.

generally applicable among the people as a binding custom and not just to a segment of the society.⁵¹

For customary law to be applied, there are a number of tests it has to pass, usually referred to as the validity test. The tests are broadly categorized into three, including: i) Repugnancy test which comprises of the requirements that a customary law must not be repugnant to natural justice, equity and good conscience; ii) the incompatibility test, which demands that for a customary law to be applied, it must not be incompatible with any law for the time being in force; and iii) the Public policy test, which connotes that a customary law to be applied, must not be contrary to a public policy.⁵²

f) Unwritten Nature

Customary law is largely unwritten and it is passed down from one generation to another through oral rendition. According to Elias, CJN in *Zaidan v Mohosen*, "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"⁵³.

It is notable that customary law in Nigeria is duly recognized by the constitution of the Federal Republic of Nigeria 1999 (as amended) as part of the "existing law" which is in force immediately before and after the coming into force of the constitution.⁵⁴ It provides for the establishment of a Customary Court system by states and a Customary Court of Appeal at the Federal level. However, any customary law which is unconstitutional, repugnant

F

⁵¹ Ese Malemi, 2009. *The Nigerian Legal System, Text and Cases*, Lagos, Princeton Publishing Co., p. 59.

⁵² See generally, the proviso to section 14(3) of the Evidence Act, Laws of the Federation (LFN) 2004. See also section 26 of the High Court of Lagos Law, 2003 and others.

⁵³ *Zaidan v Mohosen* (1973) II SC 1 at 2.

⁵⁴ Section 315(3) – (4) (b) and (c).

to natural justice, equity and good conscience or incompatible with the existing law or contrary to public policy, will be null and void and will not be applied by the courts.

There are also statutory acknowledgements of customary law by statutes that provide for its application subject to its passing the validity tests. Some of such laws are the Supreme Court Act⁵⁵, Evidence Act and Evidence Laws of States and others.⁵⁶

Overview of Restorative Justice

Restorative justice programs provide platforms that enable the victim, the offender and the affected members of the community to be directly involved in responding to the crime. It makes such stakeholders principal part of the criminal justice process, with governmental and legal professionals serving as facilitators of a system that aims at offender accountability, reparation to the victim and full participation by the victim, offender and community.⁵⁷ The restorative process of involving all parties (often in face to face meetings), have been described as a powerful way of addressing not only the material and physical injuries caused by crime, but the social, psychological and relational injuries as well.⁵⁸

From the perspective of its emphasis, restorative justice has been described as an approach to justice that focuses on the needs of

⁵⁵ Formerly the Supreme Court Ordinance o. 4, 1876, s.19; No. 6, 1900, s.13; No.6, 1914 s.20, and No.23, of 1943 s.17.

⁵⁶ The High Court Laws of each state and that of the Federal Capital Territory; for instance, section 26 of the High Court Law of Lagos state, 2003, which provides: The High Court shall observe and enforce the observance customary law, which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or indirectly with any law for the time being in force.

⁵⁷ Centre for Justice & Reconciliation at Prison Fellowship International May 2005, Restorative Justice Briefing Paper – 3.

⁵⁸ Centre for Justice & Reconciliation at Prison Fellowship International May 2005, Restorative Justice Briefing Paper – 3.

victims and offenders, instead of the need to satisfy the rules of law or the need of the community to give out punishments.⁵⁹ It concerns itself with ensuring that victims are given an active role in a dispute and offenders are encouraged to take responsibility for their actions, "to repair the harm they've done by apologizing, returning stolen money, or (for example) doing community service".⁶⁰

Restorative justice is based on a theory of justice that views commission of crime and wrong-doing, as acted against the individual or community rather than authorities. The state is not a principal or fundamental actor in the resolution of conflict and does not need to play a central role in the process, as the offender, the victim and the community are the principal actors. This implies that in terms of costs, it may be said to be cheaper since the Police, the Prison system, the Court and services of Barristers are by implication, removed from the process. More importantly, the animosity that go with formal litigation in the adversarial system, is also minimized or eliminated by the forgiveness brought about through the face to face encounter of the litigants.

Braithwaite perceived that it can lead to transformation of people, relationships and communities⁶¹, identifying three basic principles of restorative justice which have been summarized firstly that crime causes harm and justice should focus on repairing such harm; secondly that the people most affected by the crime should be able to participate in its resolution; and thirdly, that the responsibility of the government is to maintain order, while that of the community is to build peace.⁶² He further recognized four components of restorative justice that can be referred to as its pillars and they are: a. inclusion of

⁵⁹ YWCA Madison Racial Justice Resource Guide, Restorative versus Retributive Justice, https://www.kintera.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative.vs.retributive_justice.pdf Page 6 of 17

⁶⁰ YWCA, Madison, *ibid*.

⁶¹ *Ibid*.

⁶² John Braithwaite (1999). *Op.cit*.

all parties; b. encountering the other side; making amends for the harm; and d. reintegration of the parties into their communities.⁶³

The offender is made accountable for the wrongful act done by them. In addressing offender accountability the approaches can include restitution, community service and other reparative sentences. In addressing victim and offender reintegration they can include material, emotional and spiritual support and assistance.⁶⁴

In terms of the strengths of restorative justice in the context of South Africa, two significant value additions to the practice and procedure of criminal justice were identified. The first is that restorative justice can provide a practical, coherent and sound response to the moral challenge presented by crime and the focus given by "the Moral Regeneration Movement". It affords practical ways of applying and cultivating the Five R's (reality, responsibility, repentance, reconciliation, and restitution), and in the process, gives effect to moral regeneration while taking advantage of the spiritual and indigenous roots on which it is based. Secondly, it is a form of justice that offers an applied way for families and communities to get involved in responding to crime and to heal its effects. In this sense, it enriches democracy and provides an avenue for the expression of participatory democracy.⁶⁵

Similarly, Pain and Peper et.al. found that there are particular advantages of restorative justice in the context of environmental offences. For instance, whereas under the retributive justice system, the communities who rely on, or interact with the environment would often not be recognized. The interest or stake of the communities or persons in the environment was usually subsumed in the broader goals of the State. Also, a community conference offers the opportunity for the offender to directly apologise to victims, understand how his or her

⁶³ John Braithwaite, *Ibid.*

⁶⁴ Centre for Justice & Reconciliation at Prison Fellowship International May 2005, *Restorative Justice Briefing Paper* – 3.

⁶⁵ Batley, p. 23.

actions have affected the lives and livelihoods of the victims, and commit to targeted actions to amend harm.

Further, conference additionally facilitates the education of the offender (and where the offender is a company, company employees) about the impact of environmental crime on the environment and on associated communities. Ideally, it enforces the importance of compliance with environmental laws, and reduces the likelihood of recidivism (repetition).

The value of an apology in bringing healing to the offended is also an advantage of restorative justice. While apology is an integral part of the restorative justice process, there is considerable value in the act of an offender offering an apology. In addition to an acceptance of wrongdoing (taking responsibility), an apology is a way for an offender showing respect and empathy for victims. This ensures that the offended does not feel resentment against the offender and if the apology is by a corporate body, such body may still be able to operate in that community, haven learnt its lesson through the earlier occurrence.⁶⁶

Expectedly however, as attractive as restorative justice appears, there are a number of criticisms and concerns against it, which Batley referred to as charges, including:

- a. restorative justice does not fit the thinking of legal practitioners;
- b. restorative justice is a soft option that ignores the need for punishment;
- c. restorative justice leads to net widening in that more offenders get drawn into the system than would otherwise be the case;
- d. restorative justice has generally not been creative and sophisticated enough in its applications to address the issues it claims to;
- e. many individual victims are not prepared to participate in restorative justice processes but are prepared to settle for

⁶⁶ Pain, Peper, et.al. op.cit. 2016, p.5-6.

- compensation directly – victims want retribution, not restoration;
- f. the level of anger in South African communities at present is so high that people are not ready for restorative justice processes – they want quick fixes;
 - g. restorative justice is not appropriate for dealing with more serious cases such as rape, murder and domestic violence;
 - h. Restorative justice overlooks and minimizes the seriousness of crime.⁶⁷

Comparing restorative justice with retributive justice, YWCA Madison Racial Justice Resource Guide⁶⁸ lists their points of divergence or difference as follow:

Retributive Justice

- i. Misbehavior/offenses are committed against authorities and are violations of rules of law or policies.
- ii. Offender is accountable to authorities for the misbehavior or offense.
- iii. Accountability is equated with suffering. (If offenders are made to suffer enough (i.e. expulsion or suspension) they have been held accountable.)
- iv. Victims are not the primary focus of the process.
- v. Offenders are defined by the misbehavior/offense. Victim is defined by material and psychological loss.
- vi. Misbehavior/offenses are the result of individual choice with individual responsibility.

⁶⁷ Batley, p. 24.

⁶⁸ YWCA Madison Racial Justice Resource Guide Page 6 of 17

Restorative Justice

- i. Misbehavior/offenses are defined as acts against victims and the community, which violate people and community trust.
- ii. Offender is accountable to the victim and the community.
- iii. Accountability is defined as taking responsibility for behaviors and repairing the harm resulting from those behaviors. (Success is measured by how much reparation was achieved).
- iv. Victims and community are directly involved and play a key role in response to misbehavior/offenses.
- v. Offenders are defined by their capacity to take responsibility for their actions and change behavior. Victims are defined by losses and capacity to participate in the process for recovering losses and healing.
- vi. Misbehavior/offenses have both individual and social dimensions and are the result of individual choice and the conditions that lead to the behavior.⁶⁹

Administration of justice under customary law in Nigeria and reflections of restorative justice

Restorative justice concepts are indeed not new to many African countries⁷⁰, including Nigeria, even though formal 'restorative justice programmers' were first introduced in countries such as Australia and New Zealand. It is a normal way of dealing with victims, offenders and the communities and not just a new imported and foreign concept.⁷¹ Just as South African native communities in administering justice would

⁶⁹ YWCA Madison Racial Justice Resource Guide Page 6 of 17. Available at https://www.kintera.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative.vs.retributive_justice.pdf

⁷⁰ Justice Nicola Pain, Justice Rachel Pepper¹, Millicent McCreath, John Zorzetto 2, Restorative Justice for Environmental Crime: An Antipodean Experience, International Union for Conservation of Nature Academy of Environmental Law Colloquium 2016, Oslo Norway 22 June 2016

⁷¹ Ibid

conventionally regard it as needful to apply dialogue, a device that emboldens the offender to take responsibility for the actions that constitute the offence and the possible results or effects include an apology, restitution and reparation, and restoring relationships between offender and victim, so it was in the Nigerian customary law setting as well.

It is notable that under customary law, where a community is involved, meetings are held publicly so as to provide everyone with a sense of ownership in the process, which is still evident in the way traditional courts function and the principles they uphold. This is in tangent with the participatory nature of restorative justice.

Offenders in most cases are not separated from their support system of family and close relatives, and those closest to offenders hold them responsible. In other words, concepts that have now been labeled restorative justice have been in use in South African communities for some time. African traditional justice has informed the development of restorative justice, and South African traditional leaders have endorsed the concept⁷². The similarities of South African traditional justice system with restorative justice as identified by Pain, Pepper et.al, are reminiscent of the administration of justice in Nigeria under the customary law, and particularly in the chiefless societies.

In highlighting some of the semblances of restorative justice in Nigerian customary law as compared to retributive justice under the adversarial justice system, the procedure for resolving disputes, the parties and stakeholders, the mode of enforcing judgments, the role of the family in the resolution of a dispute or making right a wrong done and the accountability of a family for the actions of its member, are some of the criteria for comparing.

In terms of trial procedure, in customary law it has been described as versatile and informal and there was no legal representation as such. Charges, countercharges and allegations were

⁷² Justice Nicola Pain, Justice Rachel Pepper et.al., *ibid*.

heard by the court. Witnesses were called, examined, cross examined and re-examined in some detail⁷³, not necessarily using those names for the procedure. Restorative justice in like manner, does not follow rigid laid down order of proceedings but it achieves giving each party the right to be heard without rigid procedure.

Also, restorative justice programs as earlier pointed out, provide platforms that enable the victim, the offender and the affected members of the community to be directly involved in responding to the crime and makes such stakeholders principal part of the criminal justice process, with governmental and legal professionals serving as facilitators, just as the traditional elders or leaders facilitate the dispute resolution meetings in the context of customary law trials. However, it has been pointed out that to discover guilt, there were also physical confrontations by resorting to the supernatural, ancestors and ordeals of various types in the detection of crimes and criminals, particularly where there was any doubt as to guilt. These local devices as crime detection mechanisms were resolutely believed with the effect that a guilty person was detested for being involved in them during the trial process. There was the strong belief that the supernatural, ancestors and the ordeals were in the best traditional position to castigate or punish an offender who could, under normal circumstances, escape the ordinary probing and astuteness of the trial judges.⁷⁴

Penwill wrote in respect of the Kamba that 'these ordeals are mostly used in what English law could classify as criminal cases - often theft or murder when the culprit is unknown.'⁷⁵ In terms of frequency of use, it has been observed that there was regular and constant resort to ordeals.

⁷³ Niki Tobi, 1996. Sources of Nigerian Law, p. 4.

⁷⁴ Niki Tobi, 1996. Sources of Law in Nigeria, p. 4.

⁷⁵ Penwill, D.J., *Kamba Customary Law*, Macmillian (1951), p. 67, in Niki Tobi, *Sources of Nigerian Law*, p. 4.

According to Talbot, ordeal 'was assuredly one of the greatest safeguards of justice'.⁷⁶ Accordingly, the basis for the detection of crimes and criminals in traditional society was mostly metaphysical and religious, and more like pagan worship than Christianity.

Similar to the British styled courts, judgment was delivered after the parties must have stated their cases. Most often, peacemaking was the major concern of the judge, most importantly in civil matters, where there was no element of criminality, an attribute which was not only unique but also very advantageous. Natson is correct when he said that 'the whole idea was to assuage injured feelings, to restore peace, to reach a compromise acceptable to both disputants'⁷⁷. The approach was different in criminal cases. The aim was to punish the deviant and the criminal. Punishment was severe, though reflecting the nature of the offence committed and example can include hanging a person who committed murder.

As accountability is important in restorative justice system, customary law trials in Nigeria likewise emphasizes accountability. The importance and scope of accountability in customary law trials appears to be more than what obtains in restorative justice, as it has been observed that the collectivist nature of accountability is a basic and important feature of the administration of justice in the traditional society.⁷⁸ The family as a unit, in most cases, accepted collective responsibility for the offence or wrong doing of the member.⁷⁹ Efforts were made to ensure that the culprit did not run away from the wrath

⁷⁶ Talbot, P. A., *The Peoples of Southern Nigeria*, III, Oxford University Press (1926) p. 620.

⁷⁷ Natson, J.N., "The Supreme Court and the Customary Judicial Process in the Gold Coast", *The International and Comparative Law Quarterly*, II, Part 1, p. 48. See also Green, M.M., *Igbo Pillage Affairs*, 2nd ed. (1964), p. 113, where she recorded that two women disputants had to take palm wine and oil beans 'so that they might eat together and thus make peace'.

⁷⁸ Niki Tobi, 1996. Sources of Nigerian Law, p.5.

⁷⁹ Niki Tobi, *Ibid*.

of justice. For instance, a murderer who tried to escape from justice would either be brought for trial by the members of the family or asked to commit instant suicide to avoid the family being exposed to public contempt, while in some other cases, the offending family paid compensation to the members of the aggrieved or bereaved family as the case may be.⁸⁰ Similar procedure was adopted in civil cases where members of the family were called upon to pay fines or damages, where the party was not in a financial position to do so. It was a traditional belief that a debt never dies. Accordingly, where the debtor died, the members of the family had the duty to satisfy the debt.⁸¹

Conclusion and recommendation

It is noted that the methods adopted in the customary social order in terms of the administration of justice before the British colonialism, clearly shows that the traditional legal system was participatory and communal, as opposed to the English legal system which was individualistic. Justice in the traditional system was quick and prompt and was regarded as a reality and not a nonconcrete concept. It was associated with just and fair standards and Justice aimed to uphold communal *esprit de corps*, (social coherence). To achieve justice, legal technicalities were not given undue emphasis as justice was the most important goal of the process rather than the method.

Since customary law shares several attributes and benefits with restorative justice, Nigeria should leverage on the common attributes of restorative justice and utilize customary law much more than is presently done. Greater use of customary law will ease the slow dispensation of justice, minimize the disaffection and animosities often associated with the outcomes of the adversarial system of adjudication, yield speedier outcomes and much more, it will yield more societal coherence and minimize animosity resulting from going through the adversarial system for resolving offences in Nigeria.

⁸⁰ Niki Tobi, *ibid.*

⁸¹ See NAI, CSO 1/19, XXX. Egerton to Crewe, 6 June, 1910, enclosure entitled "The Laws and Customs of the Yoruba Community.