Statutory Redundancy of the Provisions of Evidence Act 2011 on Proof of Customs in Nigeria

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Abstract

This article sets out to unravel the redundant provisions of the Evidence Act 2011 vis-à-vis the proof of customs with particular attention to the provision dealing with the court to which Evidence Act 2011 applies. This study is motivated by the fact that proof of customs and customary laws has always been a difficult one. The methodology adopted in this work is a combination of doctrinal methodology and analytical methodology. The work examines the devastating impact of the provisions of the Evidence Act 2011 that exclude the customary court from the courts to which the Act is applicable. It is shown that the inapplicability of the Evidence Act 2011 to customary courts has rendered the sections dealing with the proof of customs redundant. The work thus demonstrates vividly the urgent need to redraft section 256(1) of the Evidence Act in order to make the Evidence Act 2011 applicable to customary courts.

1. Introduction

Law is the regime that orders human activities and relations through systematic application of the force of politically organized society through social pressure, backed by force in such a society; the legal system.[1]

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1 B. A. Garner, *Black's Law Dictionary*, (9th edn.,) (USA: Thomson West, 2009), p. 962.

It is an obligatory rule of conduct.[2] Ladan posits thus: [3]

> To start with, one has to ask, what is law…? The rival theories on the concept of law illustrate the fact that there is no definite answer to the question what is law? But law, however defined, exists always to ensure legal order and the due administration of justice in an organized society. This is the general purpose of law.

Command simply connotes an order given to a person or an animal.[4] Customary law[5] is law consisting of customs that are accepted as legal requirements of obligatory rules of conduct; practices and beliefs that are so vital and intrinsic part of a social and economic system that they are treated as if they were laws.[6] Customs are norms or rules about the ways in which people must behave if social institutions are to perform their tasks and society is to endure. The central principle of customary law is the reciprocity of benefit conferred; the sanctions which ensures compliance with the rules of customary law lies in a tacit threat that if a man does not make his contribution, others may withhold theirs.[7] A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to

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2 S. Bone, *Osborn's Concise Law Dictionary*, (9th edn., London: Sweet and Maxwell, 2001), p. 226.

3 M. T. Ladan, *Introduction to Jurisprudence*, (Lagos: Malthouse Press Limited, 2006), p. 17.

4 A. S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*, (6th edn., Oxford: Oxford University Press, 2001), p. 222.

5 Also termed Consuetudinary law.

6 Garner, *op. cit.*, above Footnote 1, p. 443.

7 M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, (7th edn., London: Sweet & Maxwell, 2001) p. 945.

any legislation though it may derogate from common law.[8] According to Akaniro:

> The customary law of any community is a body of customs and traditions which regulate the various kinds of relationships between members of that particular community in their traditional settlements. Thus customary law in Nigeria is a body of law derived from the custom of the people as practiced from time immemorial till the present time.[9]

Customary law is also defined as the customs accepted by members of a community as binding among them.[10] In *Owoniyi v Omotosho,*[11] Baramian FJ, described customary law as 'a mirror of accepted usage among a given people'. Obaseki JSC in *Oyewunmi v Oguesan*[12] defines customary law as: "The organic or living law of the indigenous people of Nigeria regulating their lives and transactions". Section 258(1) of the Evidence Act 2011 defines custom as: "A rule which in a particular district, has from long usage obtained the force of law".

Customary law is 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 laws.[13] It consists of customs accepted by members of a

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8 Bone, *op. cit.*, above Footnote 2, p. 121.

9 E. G. Akaniro, *A Study Guide to the General Principles of Nigerian Law*, (Ikeja: Elcoon Press Ltd., 1997), p. 27.

10 A. Sanni, *Introduction to Nigerian Legal Method*, (Ibadan: Spectrum Books Ltd., 2006), p. 8.

11 (1961) All NLR 304.

12 [1990] 3 NWLR (Pt. 137) 365.

13 Garner, above Footnote 1, p. 413.

community as binding among them.[14] The customary law is a body of customs and traditions which regulate the various kinds of relationships between members of that particular community in their traditional settlements.[15] In the case of *Oladimeji v Ogunleye*[16] the Nigerian Court of Appeal noted that customary law is the organic law 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.[17] Custom is a mirror of the culture of the people. It goes further to import justice to the lives of all those subject to it.

With the introduction of the received English law in Nigeria the enforcement of customary law became absolutely distorted and indeed completely obstructed. The court, instead of the traditional rulers, hijacked the power to enforce the customary law and thus started dismantling the superstructure upon which customary law stood. At the end of the culture invasion, the court established so many rules that a prior existing customary law and indeed any other customary law must satisfy before they will be enforced. This is referred to as the validity test.[18] Thus according to Park:[19]

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14 A. O. Obilade, *The Nigerian Legal System*, (Ibadan: Spectrum Law Publishing, 1979), p. 83.

15 Akaniro, above note 9, p. 27.

16 [2012] 37 WRN 50.

17 *Ibid.*, p. 78 lines 35 – 45.

18 There are three such tests namely: The customary law is not repugnant to natural justice equity and good conscience; the customary law is not incompatible either directly or by necessary implication with any law for the time being in force and that the customary law is not contrary to public policy.

19 A. E. W. Park, *The Sources of Nigerian Law*, (London: Sweet & Maxwell,1963).

> Certain customary rules and institutions have been abolished by statute. It does not automatically follow, however, that those which have not been abolished remain in force. For all rules of customary law are subject to certain general tests of validity before they can be enforced.[20]

Towing the same line of thought, Obilade[21] pointed out that: "Rules of customary law are subject to tests of validity prescribed by statute. An applicable rule of customary law is not to be enforced by the courts unless it passes the tests".[22] The central principle of customary law is the reciprocity of benefit conferred; the sanctions which ensures compliance with the rules of customary law lies in a tacit threat that if a man does not make his contribution, others may withhold theirs.[23] An enforceable customary law is one that is not repugnant to natural justice, equity and good conscience; it is not against public policy and is not incompatible, either directly or by necessary implication with any written law for the time being in force.[24]

In *Ogiefo v Isesele I*[25] it was held that native laws and customs are organically dynamic. Regrettably, ever since the emergence of the sociological ideas of Roscoe Pound,[26] with

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20 *Ibid.*, p. 68.

21 Obilade, *op. cit.*, above Footnote 14.

22 *Ibid.*, p. 100.

23 Freeman, *op. cit.*, above Footnote 7, p. 945.

24 See the The Customary Court Law, Cap. 32 *Laws of Enugu State* 2004 as amended in 2011, s. 15(1) (a). See also Akaniro, *op. cit.*, above Footnote 9, p. 28 and A. E. W. Park, *The Sources of Nigerian Law*, (London: Sweet & Maxwell, 1963), pp. 69-80.

25 [2014] 20 WRN 55.

26 Roscoe Pound is a professor of law at the Harvard Law School. He is also the founder of the American Sociological School of Jurisprudence. Pound conceived of the end of law not primarily in terms of a maximum of self-assertion, but principally in terms of

particular regard to the modern concept of law in a developing society, the most unreasonable and highly misplaced criticism about African Law is that it is merely custom and not law. However, concerted efforts have so far been made to sweep away the cobwebs, the myths, prejudices and philosophical doubts of those who have all along denied that there was any such thing as African Law, customary or native law. Allot[27] insisted that African Law (customary law) is reasoned. It is not arbitrary, savage or non-existent. The difference between African Law and Western Law is one of degree, not of kind.

Customary law generally emerges from the traditional usage and practice of a people in a given community, which, by common adoption and consent on their part, and by long and unvarying habit, has acquired to some extent, element of compulsion, and force of law, with reference to the community. And because of element of compulsion, which it has acquired over time by consistent community usage, it attracts sanction of different kinds and is enforceable. Putting it in a more simplistic form, the custom, rules, traditions, ethics, and culture which govern the relationships of members of a community are generally agreed as customary law of the people. In explaining customary law, it is important to point out what customary law is not. 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 which is enforceable and binding within Nigeria between parties subject to its sway.

Thus custom means a rule which, in a particular district, has, from long usage, obtained the force of law.[28] There are

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maximum satisfaction of wants. See J. M. Elegido, *Jurisprudence*, (Ibadan: Spectrum Books Limited, 2000), pp. 94 – 95.

27 A. Allot, "Fundamentals of Nigerian Law", *Law Quarterly Review*, pp. 106 – 110.

28 Evidence Act 2011, s. 258 (1).

numerous usages in every community but not all these usages are eligible to be tagged customary law. It is only those usages that by virtue of long usage have acquired the potency of law that is accepted as customary law. Thus customary law is not an enactment. Unfortunately, the Act is mute on what is the period of time that will be termed long usage. This is where the issue of proof of customary law becomes problematic. The problem is however mitigated when the matter has been adjudicated upon by the court in which case the matter will be judicially noticed. The old position on this matter is that a custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.[29] Commenting on this old position of law, Ilegbune noted that: "A custom can qualify for judicial notice only if it has been so often proved, pronounced upon and acted upon by a court of superior or co-ordinate jurisdiction in the same areas to such an extent that it can be said that it has acquired notoriety".[30]

In *Motoh v Motoh*[31] the Court of Appeal held that customary law has to be proved by calling witnesses who have such personal knowledge of the particular custom and it is only when such custom becomes notorious as a result of frequent proof in courts that judicial notice of it is taken without further

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29 Repealed Evidence Act, section 14(2). The provision of section 14(2) was discussed in *Oladimeji v Ogunleye* [2012] 37 WRN 50 and *Osadebe v Osadebe* [2012] 42 WRN 158.

30 T. O. Ilegbune, *Law of Evidence and Procedure in Nigeria*, (Enugu: Chenglo Ltd., 2010), p. 149.

31 [2011] 42 WRN 124 at 171.

proof.[32] A learned scholar affirmed that a single decision of the Supreme Court on the existence of a custom had binding effect on courts of inferior jurisdiction.[33] The existence of a custom may also be established by the evidence of a lone witness. However, the Supreme Court in *Eyo v Onuoha*[34] held that though customary law may be established by the evidence of a lone witness, it is unsafe to rely on such evidence and desirable that there should be evidence of more than one witness.

The corollary consequence of the foregoing elucidations of the position of law on the proof of the existence of customary law is that there is a nagging problem of how to establish customary law in the Nigerian courts. The Evidence Act 2011 in solving this problem of how to establish customary law created another problem. This problem can only be vividly grasped after the expatiations that follow hereunder.

2. **Courts with Jurisdiction on Customary Law**

Court is a governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice.[35] For the court to effectively administer justice, the court must have jurisdiction over the subject matter of the case before it. Jurisdiction is the authority or legal weapon which a court must possess to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its

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32 See the cases of *Dung Jata v Pam Dung* [1993] 3 NWLR (Pt. 283) 558, *Lavinda v Afiko* 6 WACA 108 at 109, *Chiga v Umaru* [1986] 3 NWLR (Pt. 29) 460 at 466, *Giwa v Erinmilokun* [1961] 1 SCNLR 337, and *Osolu v Osolu* [1998] 1 NWLR (Pt. 535) 532.

33 Ilegbune, *op. cit.*, above Footnote 30, p. 149.

34 [2011] 39 WRN 1 at 21.

35 Garner, *op. cit.*, above Footnote 1, p. 405.

decision.[36] The issue of jurisdiction is a threshold one which the Supreme Court in *Elugbe v Omokhafe*[37] has held must not be treated lightly.[38] In *Wambai v Donatus*[39] it was held that jurisdiction is a threshold issue which must be resolved first before any consideration. Where a court lacks jurisdiction to hear a matter, the entire proceedings no matter how well conducted would amount to a nullity.[40]

In *Gwede v INEC,*[41] the Supreme Court entrenched that no matter how well proceedings were conducted by a court, the proceedings would come to naught and remain a nullity if same were embarked upon without jurisdiction. This explains the principle of law which allows issue of jurisdiction to be raised orally and even for the first time at the Supreme Court.[42] Where the jurisdiction of a court is in limbo, the adjudication must be put on hold pending the determination thereof. It is elementary to state that the importance of jurisdiction cannot be underrated for

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36 See *Abacha v Federal Republic of Nigeria* [2014] 11 WRN 1 at 52 and *Enyadike v Omehia & Ors.* [2010] 11 NWLR (Pt. 1204) 92 at 112.

37 [2010] 32 WRN 149.

38 *Solomon v Federal Republic of Nigeria* [2014] 2 WRN 150; *Emeka v Okadigbo* [2014] 1 WRN 79; *Okeke v Securities and Securities Exchange Commission* [2013] All FWLR (Pt. 677) 731; *Labiyi v Anretiola* [1992] 2 NWLR (Pt. 258) 139; *Madukolu v Nkemdilim* [2001] 46 WRN 1 and *Ofia v Ejem* [2006] 36 WRN 113.

39 [2015] 2 WRN 51.

40 *Ibid.*, p. 88. See also *Amobi v Nzegwu* [2014] 3 WRN 1.

41 [2015] 9 WRN 1.

42 *Ibid.*, p. 97. See the cases of *Salisu v Mobolaji* [2014] 7 WRN 55, *Petrojessica Enterprises Ltd. v Leventis Technical Co. Ltd.* [1992] 5 NWLR (Pt. 244) 675; *Katto v CBN* [1991] 9 NWLR (Pt. 214) 126; *Oloriode v Oyebi* [1984] 1 SCNLR 390 and *Ezomo v Oyakhire* [1985] 1 NWLR (Pt. 2) 195.

the purpose of litigation.[43] Thus where a jurisdictional issue is raised, it must be considered first. This is because jurisdiction is a radical and crucial question of competence.[44]

Jurisdiction of a court is usually discovered by perusing the provisions of the law establishing such court. In customary law issues, the court that has jurisdiction is the Customary Court. In Nigeria, a customary court, though subject to the provisions of the 1999 Constitution as amended, administers the customary law prevailing in the area of jurisdiction of the court or binding on the parties to a dispute, so far as that customary law is not repugnant to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with any written law for the time being in force.[45] Where a party is dissatisfied with the decision of a customary court, the party appeals to the Customary Court of Appeal if in a state where Customary Court of Appeal exists.[46] This is because it is at the discretion of a state to determine whether it needs the Customary Court of Appeal.[47] Section 280(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that: "There shall be for any State that requires it a Customary Court of Appeal for that State". A Customary Court of Appeal exercises appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.[48] Thus

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43 *Iragbiji v Oyewinle* [2013] 43 WRN 1; *Opara v Amadi* [2013] 39 WRN 1, *ACN v INEC* [2013] 13 NWLR (Pt. 1370) 161 and *Abiec v Kanu* [2013] 13 NWLR (Pt. 1370) 69.

44 See *IGP v Andrew* [2014] 12 WRN 130.

45 See for instance the Customary Court Law of Enugu State Cap. 32, 2004 as amended in 2011, s. 15(1)(a).

46 In a State where Customary Court of Appeal does not exist, appeal lies to the Magistrate Court or sometimes State High Court.

47 This is also the position with respect to Sharia Court of Appeal.

48 The Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 282(1).

Constitutionally the Customary Court of Appeal and by extension the Customary Courts, where they exist, have the exclusive jurisdiction to hear and determine the existence of a customary law and apply it *mutatis mutandis* to a case relating to questions of customary law. In *Osadebe v Motanya*[49] the Court of Appeal elucidated that a question of customary law is a dispute or issue about what is the applicable rule of customary law in a given set of circumstances or how to apply the said rule of customary law or the content of the applicable rule of customary law or the legal consequences under customary law of undisputed facts.[50] The Supreme Court in *Pam v Gwom*[51] held that a decision is in respect of a question of customary law when the controversy involves a determination of what the relevant customary law is and the application of the customary law so ascertained to the question in controversy. Where the parties are in agreement as to what the applicable customary law is and the Customary Court of Appeal does not need to resolve any dispute as to what the applicable customary law is, no decision as to any question of customary law arises. However, when notwithstanding the agreement of the parties as to the applicable customary law, there is dispute as to the extent and manner in which such applicable customary law determines and regulates the rights, obligations or relationship of the parties having regards to the facts established in the case, a resolution of such dispute can be regarded as a decision in respect to a question of customary law. Where the decision of the Customary Court of Appeal turns purely on facts or question of procedure, such decision is not with respect to a question of customary law, notwithstanding that the applicable law is customary law.

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49 [2014] 23 WRN 162.

50 *Ibid.*, p.187.

51 [2000] 2 NWLR (Pt. 644) 322.

The implication of the foregoing is that customary law must be established before the customary courts. This is imperative because customary law is a matter of fact and must be proved by cogent and convincing pieces of evidence except where the court has taken judicial notice of the existence of the said custom.[52]

3. Judicial Notice

Judicial notice means the acceptance by a court of the truth of a fact without proof, on ground that such a fact is within the court's own knowledge.[53] In *Global Soap & Detergent Ind. Ltd. v National Agency for Food & Drug Administration and Control*[54] judicial notice is defined to refer to facts which a Judge is called upon to receive and act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer. It also refers to such facts which a court mandatorily takes as proved by the operation of law.[55] The lower court can take judicial notice of the proceedings of other courts.[56]

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52 See the cases of *Folami & Ors. v Cole & Ors.* [1990] 2 NWLR (Pt. 133) 445 and *Agbai v Okagbue* [2004] 40 WRN 1.

53 Ilegbune, *op. cit.*, above Footnote 30, p. 143.

54 [2011] 50 WRN 108 at 137.

55 See the cases of *Amaechi v INEC* [2008] 10 WRN 164, *Omodiora v FCSC* [2008] 44 WRN 53 and *Idris v ANPP* [2008] 8 NWLR (Pt. 1088) 1 at 155.

56 In *Adegbuyi v APC* [2014] 6 WRN 44 at 58 the Court of Appeal held that the court is entitled to take judicial notice of its own proceedings and records and that the court can also take judicial notice of the contents of such proceedings and records. Such according to Kayode Eso JSC(as he then was) in *Osafile v Odi (No. 1)* [1990] 3 NWLR (Pt. 137) 130 at 170 accords with both common sense and justice for were it otherwise, there would be no end to what has to be proved.

The significance of judicial notice is that facts of which judicial notice can be taken need no further proof. Such facts are said to be within the knowledge of the court and the parties need no further evidence to establish it. Proof of a matter which judicial notice can be taken of is not necessary.[57] Oshisanya explained that matters admitted under judicial notice are accepted without being formally introduced by a witness or other rule of evidence, and even if one party wishes to lead evidence to the contrary.[58]

This position of law is statutorily sustained by virtue of section 122(1) of the Evidence Act 2011 which provides that: "No fact of which the court shall take judicial notice under this section needs to be proved". Section 122(2)(l) of the Evidence Act 2011 stipulates that: "The court shall take judicial notice of all general customs, rules and principles which have been held to have the force of law in any court established by or under the Constitution and all customs which have been duly certified to and recorded in any such court". This provision is in tandem with section 17 of the Evidence Act 2011 which dictates that a custom shall be judicially noticed once it has been adjudicated upon once by a superior court of record. Where a customary law or custom cannot be judicially noticed it must be established through credible evidence.

4. How to Establish the Existence of a Customary Law

The customary court (indeed any other adjudicatory body) in Nigeria must grant all the parties to a matter before it fair hearing. Fair hearing connotes the impression given to an ordinary reasonable person watching the proceedings. If he goes

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57 See *Adeyemo v State* [2011] 52 WRN 168 at 180; See also *Onyekwe v State* [1973] 5 SC 1.

58 L. O. Oshisanya, *An Almanac of Contemporary Judicial Restatements with Commentaries*, (Ibadan: Spectrum Books Ltd., 2010), p. 733.

with the impression that a person has not been treated fairly then there is a breach of fair hearing.[59] In *Alhaji Rasheed Gbede & Ors. v Alhaji Rasheed Ramoni & Ors.*[60] the Court of Appeal noted that the test of fair hearing is that from the observation of any person present in court justice must appear to have been done. The parties must be afforded equal opportunity to present their respective cases without let or hindrance. The court must be impartial without any degree of bias against any of the parties.[61] In *Amale v Sokoto Local Government*[62] it was held that the issue of fair hearing is personal to the party concerned and requires no prompting by an extraneous body.[63] In *Nigerian Navy & Ors. v Labinjo*[64] the Supreme Court insisted that a hearing is taken to be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing or not given opportunity to be heard, the hearing cannot qualify as fair hearing. Without fair hearing the principles of natural justice are jettisoned and without the principles of natural justice the concept of the rule of law cannot be established and grow in society.[65] The rule of fair hearing is not a technical doctrine.[66] It is one of substance. The question is not whether injustice has been done because of lack of fair hearing. It is whether a party

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59 See *Rear Admiral Francise Echie Agbiti v The Nigerian Navy* [2011] 13 WRN 1 at 35.

60 [2011] 11 WRN 126 at 138.

61 See the cases of *Alsthom v Saraki* [2005] 10 WRN 75 and *Ndukauba v Kolomo* [2005] 12 WRN 32.

62 [2014] 10 WRN 32.

63 *Ibid.*, p. 52.

64 [2015] 14 WRN 1.

65 *Ibid.*, p. 28. See also *Mbanefo v Molokwu* [2014] 15 WRN 35. 70 – 71.

66 See the case of *Arc. Akin Olusola T/A Arseph Associates & Ors. v Trusthouse Properties Ltd.* [2011] 3 WRN 109 at 138.

entitled to be heard before deciding had in fact been given the opportunity of being heard.

An allegation of denial of fair hearing goes to the root of the entire adjudication. It must therefore be considered and resolved before going into the merits of the decision appealed against. The consequence of denial of right to fair hearing is the nullification of the entire proceeding no matter how well conducted.[67] In the Nigerian legal system, fair hearing is not only a common law right but a constitutional right. This is by virtue of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended, the purport of which is that in the determination of his civil rights and obligations, a person is entitled to a fair hearing within a reasonable time by a court or other tribunal established by a law. In *Aniagu v Ugwu*[68] the Court of Appeal stated the basic criteria and attributes of fair hearing to include:

a. That the court shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case.
b. That the court or tribunal shall give equal treatment, opportunity and consideration to all concerned.
c. That the proceeding shall be held in public and all concerned shall have access to and be informed of such place of public hearing, and
d. That having regard to all the circumstances in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done[69].

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67 See *Saliu v Egeibon* [1994] 6 NWLR (Pt. 348) 23 at 44.

68 [2011] 15 WRN 140 at 156-157.

69 See *Tyonex (Nig.) Ltd. v Pfizer Ltd.* [2011] 10 WRN 157 at 169.

There is no hard and fast rule as to how to establish the existence of a customary law. However, customary law is easier to prove where there exists a written declaration on the existence of a particular custom. The written declaration must be registered for it to be recognized. The purpose of a registered declaration is to embody in a legally binding written statement, the customary law of a particular area, setting out clearly and precisely the acceptable custom of the people with respect to a particular issue.[70] The Court of Appeal in *Shittu v Olawumi*[71] held that:

> Once a declaration has been duly and validly made, and registered in relation to any native law and custom or customary law…that declaration becomes the native law and custom or customary law to the exclusion of all other laws and practices thereon. Thus any custom, tradition or usage that is alleged to exist but is not found in the registered declaration may generally be presumed to have been disregarded or excluded from such custom, tradition or usage.[72]

Consequently, where there is a clear registered declaration the proof of customary law becomes less cumbersome. Also in *Ogboriefon v Ogboriefon*[73] the Court of Appeal held that: "As is the case with all customary law, it has to be proved in the first instance by calling of witnesses (or a witness) acquainted with the native customs until the particular customs, have, by frequent

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70 This usually has to do with the procedural stages for the ascendance to the status of a traditional ruler.

71 [2012] 21 WRN 123.

72 *Ibid.*, p. 162. See also *Daramola v Attorney General of Ondo State* [2000] 7 NWLR (Pt. 665) 440; and the Supreme Court decision in *Adeosun v Governor Ekiti State* [2012] 24 WRN 1 at 21.

73 [2011] 23 WRN 159 at 182.

proof in courts, becomes notorious that the courts take judicial notice of them".[74]

This position was further re-affirmed in *Motoh v Motoh*[75] when the Court of Appeal held that: "Customary law has to be proved by calling witnesses who have such personal knowledge of the particular custom and it is only when such custom becomes notorious as a result of frequent proof in courts that judicial notice of it is taken without further proof".[76] It must be accentuated that the success of a party's case does not depend on the number of witnesses he calls. However, in the area of customary law and traditional evidence, it is desirable that a person other than that person asserting the existence of such customary law and tradition should also testify in support of its existence, as it is unsafe to accept the statement of the only person asserting the existence of a custom as conclusive.[77]

5. The Provisions of the Evidence Act 2011

Evidence Act is the main source of law of evidence in Nigeria. It governs evidential procedure. The law of evidence prevents judgment based on prejudice or illogical conclusions. It is indeed an aid to the administration of justice.[78] It prescribes how facts

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74 See also the cases of *Olubodun v Lawal* [2008] 76 SCNJ 269 at 267 and *Usiobaifo v Usiobaifo* [2005] 1 SCNJ 227 at 237 – 238.

75 [2011] 42 WRN 124.

76 *Ibid.*, p. 171. See also the cases of *Dung Jata v Pam Dung* [1993] 3 NWLR (Pt. 283) 558; *Adeogun v Ekunrin* [2004] 2 NWLR (Pt. 826) 52, *Chiga v Umaru* [1986] 3 NWLR (Pt. 29) 460, *Giwa v Erinmilokun* [1961] 1 SCNLR 337, *Folami & Ors. v Cole & Ors.* [1990] 2 NWLR (Pt. 133) 445 and *Osolu v Osolu* [1998] 1 NWLR (Pt. 535) 532.

77 See the cases of *Okene v Orianwo* [1998] 9 NWLR (Pt. 566) 408, *Bello v Governor of Kogi State* [1997] 9 NWLR (Pt. 521) 496 and *Ekpenga v Ozogula II* [1962] 1 SCNLR 423.

78 S. T. Hon, *Law of Evidence in Nigeria*, (Portharcourt: Pearl Publishers, 2013), p. 4.

should be established. On custom, section 16(1) of the Evidence Act 2011 stipulates that: "A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence". The burden of proving a custom lies upon the person alleging its existence.[79] A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record.[80] The implication of this position of law is that once a party refers the court to a judgment recognizing the existence of a particular customary law that customary law will be automatically clad with judicial notice. This has gone a long way to eliminate the intellectual conjectures and prognostications on the likely number of times a court must pronounce on a custom for the custom to be judicially noticed.

Where a custom cannot be established as one judicially noticed, it must be proved as a fact.[81] Where the existence or the nature of a custom applicable to a given case is in issue, there may be given in evidence the opinions of persons who would be likely to know of its existence[82] as to the existence of the

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79 Evidence Act 2011, s. 16(2).

80 *Ibid.*, s. 17. This provision has settled the controversy generated by virtue of the Repealed Evidence Act, s. 14(2) which stipulates that: "A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration". This controversy generated by these provisions arose from its lack of specificity with regards to the number of times a superior court must have acted upon it before it can assume the toga of judicially noticed custom.

81 Evidence Act 2011, s. 18(1).

82 *Ibid.*, s. 18(2).

customary law.[83] Section 18(3) of the Evidence Act 2011 still entrenched the validity test by providing that: "In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience". It is pertinent to point out that every fact is deemed to be relevant which tends to show how in particular instances a matter alleged to be custom was understood and acted upon by persons then interested.[84]

A perusal of the foregoing provisions of the Evidence Act 2011 indicates that the Act has vividly simplified the procedures for according judicial notice to customs and also established the procedure for proving the existence or otherwise of a custom. The Customary Courts and Customary Courts of Appeal expectantly should have heaved sigh of relief that there is now on ground clear statutory provisions on how to prove customary law. But it is not yet to be!

6. The Slamming of the Guillotine

As earlier stated, one would have thought that the Evidence Act has given a clear roadmap to the courts that have jurisdiction to handle customary law issues on how best to go about their obligations, but it is not so. Section 256(1)(d) of the Evidence Act 2011 provides *inter alia* that this Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply to judicial proceeding in any civil cause or matter in or before any Customary Court of Appeal.[85] Before now legal practitioners

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83 This will be in accordance with *ibid.*, s. 73.

84 *Ibid.*, s. 19.

85 This by extension applies also to Customary Courts in States where they exist.

rarely appear in the customary courts.[86] This is probably because it is believed that customary rules of evidence should apply.[87] But this customary rule of evidence has not in any way helped the court in determining how customary law should be established.

Interestingly, the customary court laws have given customary courts good leeway to circumvent the actualization of any palpable means of proving customary law. In Enugu State for instance, section 20 of the Customary Court Law of Enugu State 2004 as amended in 2011 provides that:

> No proceedings in a customary court and no summons, warrant, order, decree or other process issued or made by the court shall be declared void or otherwise varied upon appeal, solely by reason of any defect in procedure or want of form; but every court or authority exercising appellate jurisdiction by virtue of this Law or any other law, shall decide all matters brought to it on appeal from a Customary Court as substantial justice of the case may require.

The courts are usually quick to remind whoever cares to listen that its mandate is doing of substantial justice. What indeed is substantial justice? It has been very difficult to define the term justice. Justice has been viewed from various perspectives under the Nigerian Law. Succinctly put, justice is the fair and proper administration of law.[88] Justice also connotes the upholding of

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86 This is irrespective of the constitutionally recognized right to legal representation by legal practitioners.

87 See E. G. Akaniro, *Study Manual on Law of Evidence and Procedure I*, (Ikeja: Elcoon Press Ltd., 1997), p. 13 and Ilegbune, *op. cit.*, above Footnote 30, p. 8.

88 Garner, above Footnote 1, p. 881.

rights and the punishment of wrongs by the law.[89] Justice is much more than a game of hide and seek. It is an attempt to discover the truth, our human imperfections notwithstanding.[90]

The Supreme Court of Nigeria in the case of *Josiah v State*[91] accentuated that:

> …Justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even a two way-traffic. It is really a three way traffic: Justice for the appellant accused of a heinous crime of murder, justice for the victim, the murdered man, the deceased whose blood is crying to heaven for vengeance and finally justice for the society at large.

But the Court armed with the law must like a knight in shining armour ride to the rescue to ensure that justice is done.[92] The lawyers are the architect and masons who work in the temple of justice. The lawyer owes a duty to society by his activities in and out of court to ensure that justice is not sacrificed on the altar of guilt. If he clings to legal technicalities and the courts allow him to find in them an escape route, society will feel that its security and protection are jeopardized.[93] This position has received judicial endorsement in the case of *Aderounmu v INEC*[94] when the Court of Appeal held that: "By sheer recourse to unwarranted technicalities, the course of justice should not be allowed to be defeated".[95] In the case of *Nwagu v Chima*[96] the Court of Appeal

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89 Bone, above Footnote 2, p. 222.

90 See the case of *Salawu Ajide v Kadiri Kelani* [1985] NWLR 248 at 269.

91 [1985] 1 NWLR 125 at 140.

92 See *Adedipe v Frameinendur* [2012] 24 WRN 120 at 174.

93 Ladan, above Footnote 4, p. 11.

94 [2012] 9 WRN 81.

95 *Ibid.*, p. 97. See also the case of *Sylvester Ogbomor v The State* [1985] 1 NWLR (Pt. 2) 223, *State v Salihu Mohammed Gwonto &*

restated that: "The prime duty of any court is to do substantial justice and it would not allow that to be clogged with unwanted technicalities".[97]

Consequently, justice must not be rushed and should not be excessively delayed. In *APGA v Ameke*[98] the Court held *per* Lokulo-Sodipe (JCA) that it is truism that justice delayed is justice denied. In the same vein, hurried justice is justice buried. Neither is good for the dispensation of justice.[99] Thus the courts saddled with the responsibility of applying customary law should clearly state in its rules the procedure for establishing customary law before it vis-à-vis civil matters. The State Houses of Assembly may also by orders allow the application of Evidence Act 2011 in civil matters at the Customary Courts or Customary Courts of Appeal.

In criminal cases, the Court is expected to rely on Evidence Act 2011. This is because the inapplicability of the Evidence Act 2011 is as far as civil causes or matters are concerned. It is applicable to the Customary Courts and Customary Courts of Appeal in the exercise of their respective jurisdictions in criminal cases. In such cases, sections 134 to 140 of the Evidence Act 2011 will apply and help the Customary Courts and the Customary Courts of Appeal to do justice to the accused person. This is even more stringent considering that section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 as amended firmly pronounced the presumption of innocence of an accused person.

Ors. [1983]1 SCNJ 142, *Bature v State* [1994] 1 NWLR (Pt. 320) 267, *State v Salawu* [2011] 6-7 SC (Pt. IV) 14 at 184.

96 [2012] 3 WRN 89.

97 *Ibid.*, p. 104. See also the cases of *Abubakar v Yar'adua* [2009] 5 WRN 1 at 122, *Usman v Umaru* (2001) FWLR (Pt. 70) 1544).

98 [2012] 7 WRN 91.

99 *Ibid.*, p. 114.

The primary duty of the court, as explained in *Nnachi v Onuorah,*[100] is to do justice in cases that come before them in accordance with the rules of the court provided to guide the procedure for the attainment of such justice which is to be justice according to the law applied to the peculiarities of a given case. Aniagolu JSC (as he then was) in the case of *Bakare v Apena*[101] had beautifully and succinctly stated that position when he held that:

> A judge will not adopt a method of adjudication alien to procedural rules of justice, upon a plea that he is actuated by the noblest of intention and an impassionate zeal, for justice, which propels him into bizarre methods of arriving at justice, holding as it were, as a justifying Machiavellian principle, that the end justifies the means. The court as the last resort will indeed do justice by the procedure laid down by law and the Constitution. The moment a court ceases to do justice in accordance with the law and procedure laid down for it, it ceases to be a regular court to become a kangaroo court.

In *Owners v Insurance*[102] the Supreme Court restated the law that the parties who approach the court by the invocation of their statutory jurisdiction are bound by and to comply with the rules of court provided for by the statutes. The Rules are extremely germane and relevant where there are clear provisions on how to attain the realm of justice. Where there is no such clear provision, the parties and the court are left to grapple with unascertainable procedure. This is the case in the proof of customary law after 2011.

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100 [2011] 22 WRN 77 at 89.

101 [1986] 4 NWLR (Pt. 33) 1.

102 [2008] 5 SCNJ 109.

7. Conclusion

The recent developments in most customary courts are that the court is now manned in most states by legal practitioners[103] and legal practitioners now appear in customary courts.[104] Thus one cannot fathom why the clear rules of evidence law as enunciated in the Evidence Act 2011 particularly as it affects the proof of the existence of custom cannot be applicable to customary courts. What is worse, the Evidence Act 2011 is also not applicable to the Customary Court of Appeal; a court that is constitutionally established. This indeed is unacceptable and smacks of impolitic drafting.

Therefore, it is herein advocated that section 256 of the Evidence Act 2011 should be amended to include Customary Court of Appeal[105] among the courts to which Evidence Act 2011 applies.[106] If this amendment is not done, the provisions of sections 16 to 19 of the Evidence Act 2011 will become redundant and inapplicable in the actual circumstance they are most needed. A stitch in time saves nine!

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103 See Ebonyi State Customary Law, Cap. 47, 2009, s. 4.

104 See for instance the Enugu State Customary Law 2004 as amended in 2011, s. 26(1).

105 And also Sharia Court of Appeal.

106 It is also necessary to include the Customary Courts bearing in mind the recent developments in the said courts. It can also be rationalized that experience has shown that practitioners grapple with the problem of applicable evidential rules at the customary court level. Thus it becomes necessary to make Evidence Act 2011 handy to them since the much touted Customary Rules of Evidence is nowhere to be ascertained.