



Non-State Law in Nigeria

A “Treasure Trove” or “Pandora’s Box”?

Lambert H.B. Asemota^{*}, Vienna

Abstract: Nigeria operates a tripartite legal system comprising customary law, Sharia law and the English common law regime. While the former two non-state legal systems predated the coming of the British to that region of Africa, English common law tradition was introduced with colonisation. Consequently, the Nigerian legal system has become submersed with legal pluralism which tends to put critical legal thinkers in two minds. This paper revisits the theories and practices of the established three-tier system within the context of the topical challenges that trickle down from attempting to reconcile the reliance by certain ethnic groups on the concept of self-determination (under the guise of freedom of religion and culture) and the opposing provisions of the Nigerian constitution and international treaties and conventions.

Keywords: Customary law, Sharia law, self-determination, Boko haram, Nigeria, Terrorism, Niger Delta Militant.

Part A

Introduction

In the heat of the decolonisation of parts of Africa and immediately prior to the granting of independence to the country now known as Nigeria, it was settled that the pre-existing non-state rules (native law and customs) be applied only as personal law. They were to be applied in family matters, such as marriage, inheritance, etc. However, one thing led to another and Sharia law has since been extended to criminal law jurisdiction just as customary law has also transformed into something else. These activities have in one way or another stirred up political hornets’ nest as the application of such non-state rules has since become so widespread that it has degenerated into agitation for self-determination and secessionist ideology by way of armed insurgence and terrorism in parts of the country.

This paper is divided into three parts. While in this introductory section, which also serves as part A, the salient points regarding the inception of legal pluralism and its necessity in the Nigerian geopolitical setting are highlighted, under part B the author attempts to address the core of the

* Lambert H.B. Asemota, LL.B., LL.M. (London), Dr.iur. (Vienna), Specialist in Refugee Care: ORS Service GmbH; formerly Director and Legal Adviser: African and Ethnic Minority Advocacy Centre, Vienna, Austria; author of the book, “Troubles That Ooze Out Of Legal Pluralism: The Human Rights Viewpoint (2015)”. I would like to thank Daniela Bereiter and others for their brilliant editorial assistance, and the independent reviewer whose critical analysis helped in shaping this article.

contentious issues by breaking them into I. Meaning and advent of customary law; II. Proof (and application) of customary law; III. Effect of customary law in Nigeria; IV. Limitation prescribed by law and V. Principles of self-determination.

Under I., the author traces the theories and practices of customary law through to its inclusion in the Nigerian legal system. Under II., he takes a fervent look at the circumstances under which customary law is applied. These include the criteria for determining whether or not a particular custom is applicable in a given case and the category of people to whom it applies. Under III., the author reminisces the reintroduction of customary law (including Sharia) within the context of the topical challenges that arise from attempting to reconcile the reliance by certain ethnic groups on the concepts of freedom of religion and culture under international law (within the auspices of self-determination) and the opposing provisions of the Nigerian constitution and ratified international treaties. Particular attention is also drawn to the political turbulence that marred the first six-year self (independent) rule which brought about military take-over that lasted over thirty years, before democracy was re-established. He touches on the subject of the run-up to the election dates, during which various promises were made by desperate in-coming politicians, one of which was that they would re-establish Sharia and customary laws. He emphasizes how, consequent upon the realisation of that dream, the insatiable nature of humankind took its toll on the natives and narrates at length how this played out in their quest for more autonomous pathways which culminated in the demand for fiscal federalism, self-determination and even pursuit of secessionist ideology. He concludes by elaborating how the natives vigorously pursued these elemental concepts via unholy alliance in the form of insurgency, which has invariably transformed into gun-wielding movements, such as Boko Haram (Islamic fundamentalist group), Movement for the Emancipation of Niger Delta (MEND), Niger Delta Avengers, etc. Under IV., the author argues that while anyone who feels marginalised has the right to seek redress, it must be done within the confines of the law. And in the absence of domestic instruments in that regard, he highlights a number of international treaties binding on Nigeria and which guarantee certain rights, as well as the limit to which such instruments can be invoked. The author draws his arguments to a close under V. by tracing the principle of self-determination under international law: the variations of this principle; the category of people to whom they apply; under what circumstances they could be invoked; and the limits of their application.

Part C. sees the author draw on the articulation of some known publicists on the subject to rebuff the protagonists' position. He concludes by asking whether, considering the resultant agitation for self-determination, secessionist ideology and acts of terrorism, it is appropriate to say that that reintroduction amounts to a discovery of a treasure trove or the opening of Pandora's box. In other words, is it advantageous or disadvantageous to the much-desired development of the nation?

Before the arrival of British colonialists and others like them, the area that is today known as Nigeria comprised a number of clans, settlements, kingdoms, empires, etc., and each had its own idiosyncratic traditions and customs, albeit by different nomenclatures. Although the various customs and traditions were orally handed down from generation to generation, through them, the indigenous peoples were able to effectively organise and regulate their societies. For reasons of standardisation however, the designation "customary law", in the form of non-state law, was adopted later as a mere change in nomenclature, but the character and merit of it have remained

the same to this day. Even though there were no established institutions to ensure compliance with the various customs, oral history and legends have it that the then peoples felt bound by them, as the sanctions for violation adequately served their purposes.

When the British colonialists in pursuit of their economic expansionist ideology arrived in the area, one of the major challenges that confronted them was the variety of pre-existing ethnic groups and languages. Quite clearly, the enormous number of ethnic groups more or less correlated with the countless traditions, customs and the semblance of religions in the area. Even within an ethnic group, there were local variations of tradition and custom. And because each ethnic community was largely independent of the other, the uncompromising nature of their various oral rules of customs and traditions often resulted in conflicts. What fell within the confines of the oral rules in a particular community could be prohibited in another.¹

For those in specialised fields other than law, history, sociology and anthropology and perhaps journalism (albeit minimally), the phrase “legal pluralism” may seem like a mere abstract notion that could be allowed to putrefy in the void of anachronism.² Nevertheless, in this article, the author revisits this tripartite system like an archaeological discovery dug up for reasons of its indomitable character and contemporary effects on the Nigerian political landscape.³ And these reasons are best elucidated within the context of the array of non-state norms hitherto referred to as traditions and customs, which needed to be surmounted in some of the areas comprising evidently heterogeneous peoples since they were forcefully merged by the British to carve out a number of countries; one of which is known today as Nigeria. Because of the multiplicity of these pre-existing local independent customs, it became a major challenge to choose certain rules of some customs in preference to others. Therefore, for exigency purposes, it was decided that the English common law regime (which later became the substantive state law) be applied alongside these said local customs with their attendant complexity, thereby establishing a pluralistic state in the form of legal pluralism.

In respect of the problem of applying native law in disputes between natives and non-natives of a particular community, Chigozie Nwagbara⁴ writes that to ascertain who was a native or non-native for the purpose of administering justice was cumbersome. She emphasises that because there were records of injustices in the native courts as a result, the colonial administrators decided on bringing them (the native courts) within the ambit of statutes so as to ensure immense control. This approach could well be argued to have given credence to the onset of the culture of Western ethnocentrism and rein of hegemonic control in most parts of Africa. And in the same vein, to complement all of these, the introduction of English as the official language of communication also became somewhat obligatory.

1 See generally Burabari Adule Nkor, *The Validity of Customary Law as a Source of Nigerian Law*, NIGERIAN LAW CLASS, July 26, 2014, <https://nigerianlawclass.wordpress.com/2014/07/26/the-validity-of-customary-law-as-a-source-of-nigerian-law-by-burabari-adule-nkor/> (last visited Mar. 27, 2017).

2 See LAMBERT H.B. ASEMOTA, TROUBLES THAT OOOZE OUT OF LEGAL PLURALISM: THE HUMAN RIGHTS VIEWPOINT, 25 (2015).

3 See *id.*

4 Chigozie Nwagbara, *The Nature, Types and Jurisdiction of Customary Courts in The Nigeria Legal System*, 25 JOURNAL OF LAW, POLICY AND GLOBALIZATION 1 (2014), <http://www.iiste.org/Journals/index.php/JLPG/article/view/13175/13354> (last visited Mar. 27, 2017).

Part B

I. Introduction Meaning and advent of customary law

There is indeed much controversy as to what amounts to customary law. However, it should be emphasised that the phrase "customary law" was later understood as what used to be the customs of the indigenous peoples of (perhaps) the whole of Africa. It is also variously referred to as tradition, custom or culture. However, it seems that one is the variant of the other, as they tend to dovetail into each other. Anthropologist Sally Engle Merry writes that culture "(...) *seems to be the equivalent of traditions, customs and religion.*"⁵ Similarly, according to another definition, tradition is "(...) *a belief, custom or way of doing something that has existed for a long time among a particular group of people.*"⁶ Whilst the existence of these customs cannot be contested, their sources cannot be easily traced. And as there are quite a number of them, so are there a number of sources. Nevertheless, oral history traces them back to pre-historic times. Therefore, they are known to have been handed down from one generation to another. Lon L. Fuller observed in 1968 about custom however that "*though we may be able to describe in general the class of persons among whom a custom has come to prevail as a standard of conduct, it has no definite author; there is no person or defined human agency we can praise or blame for its being good or bad.*"⁷ As a result of its complexity, particularly as this article pertains to the Nigerian legal system, perhaps the most expedient definition has been prescribed by the Nigerian Supreme Court in the case of *Zaidan v. Mohsen*: "(...) *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 as between the parties subject to its sway.*"⁸

In this connection, it is important to note that there is a great difference between Sharia and customary law. And with regard to that differentiation, let me emphasise therefore, that, although Sharia law is a written law, which is distinct, by normative nuances, from customary law,⁹ in this article, the author craves the indulgence of the readers for the loose conception of customary law in a way that subsumes Sharia law under it. Even though the dichotomy between them may be divulged later in this article, he has decided to begin by adopting the old methodology of constricting both into customary law for reasons of exigency. In that context, Kolajo, former Chief Customary Court President, observes that "(...) *only by virtue of some specific provisions in a law such as section 2 of the High Court Law Cap. 49 Laws of Northern Nigeria, 1963 which provides that native law and custom includes Moslem law that Moslem law is regarded as native law and custom. It is in truth and reality not customary law.*"¹⁰

How those customs of old came to be categorised as customary law is a matter for general debate and therefore outside the scope of this paper. However, one account given by *Legal Research*

5 Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, 26 POLAR 55, 61 (2003).

6 OXFORD ADVANCED LEARNER'S DICTIONARY (7th ed. 2005).

7 LON L. FULLER, ANATOMY OF THE LAW 71 (1968).

8 *Zaidan v. Mohssen*, [1973] 11 S.C. 1 (Nigeria) available at <http://www.lawpavilionpersonal.com/lawreportssummary.jsp?suite=olabisi@9thfloor&pk=SC.52/1973&apk=11911> (last visited Mar. 27, 2017).

9 Hence, section 2, Plateau State Customary Court of Appeal Law [1979] with a slight deviation, provides that it is a "(...) *rule of conduct which governs legal relationships as established by custom and usage and not forming part of the common law of England...but does not include Islamic personal law.*"

10 A.A. KOLAJO, CUSTOMARY LAW IN NIGERIA THROUGH THE CASES, 2 (2000).

*Guide*¹¹ has it that the application of customary law is as a result of the principle of legal centrism, according to which all law is believed to emanate from the state. In that respect, rites developed and practised by non-state actors, vis-à-vis customary and/or religious law were given the status of law as far as they derive their authority from the state.

Although the practice of this form of legal pluralism dates back to about 1772 in British India,¹² it was later imported into parts of Africa by the Europeans through the process of colonisation.¹³ And because there existed multiplicity of ethnic or linguistic groups, as earlier mentioned, the administration of such areas was highly cumbersome. Therefore, it became imperative to constrict the natives into groups, irrespective of the lack of homogeneity and without giving due consideration to historical, ethnic or linguistic backgrounds of each. This approach echoed in the utterances of the political leadership of both the Northern and Southern Regions, as well as the British representative's. For example, Adisa Adeleye writes that in 1952 the then Prime Minister, Alhaji Abubakar Tafawa Balewa, who happened to be from the North, was alleged to have made some inciting statements against the amalgamation of northern and southern protectorates in order to create the country, Nigeria. One of such statements was that the Nigerians, who were migrating from the Southern Region to the North for jobs and business opportunities were "intruders", and that they were not welcomed in the Northern Region.¹⁴ In the South, Chief Obafemi Awolowo, the then Premier of Western Region, was also quoted as saying that the "*Amalgamation of the Northern and Southern Protectorate was a mistake of 1914.*"¹⁵ And at a Convocation Lecture at Adekunle Ajasin University in November 2014 Iyorchia Ayu quoted Sir Hugh Clifford, the then Governor-General, as having described Nigeria as "*A collection of independent native states, separated from one another by great distances, by differences of history, and traditions, and by ethnological, racial, tribal, political, social and religious barriers.*"¹⁶ These somewhat arbitrarily formed groups were administered using laws and institutions in operation in the newly created British territories. Obviously, they did not completely abolish the native customs of the dominant groups within each territory. They were however greatly reduced as application of each was allowed in so far as the state enacted laws permitted. This brought about the idea of specifying which customary law and in what manner could be applied.

Even though customary law is applied in many countries around the world, particularly in Africa, the scope of this paper is restricted mainly to the Nigerian legal system. And in that connection, it is useful to state that customary law is predominantly practised in the South, whereas Sharia, being the legal jurisprudence based on Islamic religion, is mainly applied in the North where the majority are Muslims. According to Brendan Koerner,¹⁷ the religion arrived in the Northern Re-

11 *Legal Research Guide: Customary Law in Africa*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/africa-customary-law.php> (last visited Mar. 27, 2017).

12 M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* 61 (1975), LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/africa-customary-law.php> (last visited Mar. 27, 2017).

13 See *Legal Research Guide*, *supra* note 12.

14 See generally Adisa Adeleye, *AMALGAMATION OF 1914: Was It A Mistake?* VANGUARD NEWSPAPER (May 18, 2012, 12:00 AM), <http://www.vanguardngr.com/2012/05/amalgamation-of-1914-was-it-a-mistake/> (last visited Mar. 27, 2017).

15 Crawford Young, *Impossible Necessity of Nigeria: the Struggle for Nationhood*, 75 FOREIGN AFFAIRS 139 (1996).

16 Iyorchia Ayu, *The Break-up of Nigeria: Myths, Realities and Implications*, DAILY TRUST NEWSPAPER (Nov. 9, 2014, 4:00 AM), <http://www.dailytrust.com.ng/sunday/index.php/investigation/18693-the-break-up-of-nigeria-myths-realities-and-implications> (last visited Mar. 27, 2017).

17 Brendan Koerner, *How Did Sharia Get to Nigeria*, SLATE.COM (Aug. 22, 2003, 4:48 PM), http://www.slate.com/articles/news_and_politics/explainer/2003/08/how_did_sharia_get_to_nigeria.html (last visited Mar. 27, 2017).

gion at around 11th century, via traders from North Africa.¹⁸ While Islam remained the religion of court and commerce for centuries, the ordinary citizens, particularly those in the rural areas, continued to practise polytheistic or animistic faiths with elements of Islam blended in.¹⁹ This was one of the reasons Sharia was originally categorised as native custom (and later, customary law) when the British merged the Northern Region with the Southern Region. However, when the Penal Code Law²⁰ was promulgated in 1959, it abrogated the criminal jurisdiction of the Native Courts which previously had wide margin of power to adjudicate (using Sharia) on both penal and civil (personal) matters. It remained so until Nigeria finally returned to democracy in 1999. The hitherto personal scope of application of Sharia law was again extended to criminal law on in October 1999, following the election of Ahmed Sani as Governor of Zamfara state, who, in his electioneering campaign promised to re-establish Sharia law as a matter of right.²¹

II. Proof (and application) of customary law

Regarding the legal endorsement of customary law application in Nigeria, the colony of Lagos was the starting point. The Supreme Court Ordinance No. 4 of 1876 seems to be the first significant regulatory statute that made a far-reaching attempt to proffer guidelines as to when and how a given custom was to be considered for application. This is what is now referred to as the "Repugnancy Test". It stipulates: *"Nothing in this Ordinance shall deprive (...) any person of the benefit of any law or custom existing in the said Colony and Territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the colonial Legislature existing at the commencement of the Ordinance, or which may afterwards come into operation."*²² And therefore, when Nigeria was created in 1914 after the "amalgamation" of the northern and southern protectorates, the British government (through its principal representative, Fredrick Lugard, who was appointed as the first Governor-General), made it part of its foreign policy initiative to retain the customs prevalent in any such area. Hence, Lugard relates in his book the importance of ensuring that the traditions of native peoples were given serious consideration in governance. He believed that such strategy would help in no small measure in promoting the indigenous peoples' welfare and happiness.²³

Evidence Act LFN 1990²⁴ also provides that any such custom relied upon must meet the Repugnancy Test as initiated by the Supreme Court Ordinance. This is to ensure that the particular custom is suitable for application, and not barbarous, unfair or overtly discriminatory. It is however important to mention here that the legal pendulums in this regard have, in several cases, swung either way,²⁵ so that it now appears to be only a subject for academic debate.

18 *Id.*

19 *Id.*

20 Penal Code Law (1959) 18 (Northern Region) (Nigeria).

21 See GUNNAR J. WEIMANN, ISLAMIC CRIMINAL LAW IN NORTHERN NIGERIA: POLITICS, RELIGION, JUDICIAL PRACTICE, 129 (2010).

22 The Supreme Court Ordinance No. 4 of 1876.

23 See FREDERICK LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA (1926), available at <http://www.fafich.ufmg.br/luarnaut/Lugard-dual%20mandate.pdf> (last visited Mar. 27, 2017).

24 Evidence Act Law of Federation of Nigeria (1990), § 14 which has since been replaced by Evidence Act (2011), §§ 16–19 & 73.

25 See for example: *Nigerian* cases such as *Mojekwu v. Mojekwu* [1997] 7 N.W.L.R 283; *Ukeje v. Ukeje et al.* [2001] 27 WRN 142; *Mojekwu v. Iwuchukwu* (2004) 4. S.C. (Pt.II). 1. (By substitution for Mojekwu – deceased).

Additionally, there are some prerequisites for applying customary law that are expressly provided for under Evidence Act. And they are based primarily on two grounds, either of which must be ascertained before a particular custom can be invoked in any case:

1. where the custom sought to be relied upon by any individual or group has been established in the form of judicial notice. This means that a court of co-ordinate or superior jurisdiction had, in a similar case, addressed and recognised such custom as being a custom binding on people in a particular area; or
2. by proving the existence of such custom by the individual seeking to invoke it as binding upon the class of persons in the same area and in circumstances similar to those under consideration.²⁶ This can be established through expert opinions of people such as traditional rulers, Chiefs or persons who are learned in the custom under consideration.

III. Effect of customary law in Nigeria

From the on-going socio-political crises in Nigeria, it is somewhat fiddly to determine whether the reintroduction of customary law regime is tantamount to a discovery of a treasure trove or rather Pandora's box. This inference can be drawn from the current wave of militancy in the Niger Delta, allegedly initiated by groups, such as Movement for the Survival of Ogoni People (MOSOP), Niger Delta Avengers and Movement for the Emancipation of Niger Delta (MEND)²⁷ on the one hand, and the quest for self-determination or the re-establishment of full application of Sharia law, under the guise of freedom of religion and culture, as demanded by the group referred to as Boko Haram, on the other hand.

Customary law was reintroduced with the return of Nigeria to democracy in 1999 after many successive military coups that persisted between 1966 and 1999. The propagation of the demand for rights under the principles of self-determination and/or freedom of religion and culture began. Many businessmen-turned-politicians, particularly those referred to as "money bags", jumped at the opportunity. And without any political ideology or significant party manifesto, they set their political manoeuvring machine in motion by engaging every means that they believed could secure them the desired seats in government. Accordingly, countless promises, some of which appeared to be either unrealistic or which the *promisors* may not have the political will to fulfil, were made. The unsuspecting electorates easily believed them. Consequently, the euphoria of the adoption or the acquiescence of the re-establishment of the age-old customary law (including Sharia) after having been suppressed for about three decades re-ignited various other forms of related political agitations and turbulence. Violent protests, armed insurgence, secessionist contrivance, etc. – all in the name of struggle for political and socio-cultural rights have thus become the order of the day in Nigeria. In practical terms, all of these instigated the creation of the aforementioned movements. Quite clearly, such cataclysmic consequences are not unexpected when unrealistic promises are tossed at unsuspecting electorates by politicians for political gains.

26 See judgement speech of Supreme Court Justice, Andrew Otutu Obaseki JSC, citing section 14 of the Evidence Act, Cap. 62 Laws of the Federation of Nigeria (1958) in Prince Bilewu Oyewunmi & Anr v. Amos Owoade Ogunesan (1988) S.C. 26; see also Evidence Act (2011), §§ 16–19 & 73.

27 A group known as Niger Delta Avengers has also joined the list of militant groups and is also now making some unrealistic demands.

It is however imperative to note that while MEND (in the southern part of Nigeria) and related groups allegedly embraced the amnesty that was granted them by the federal government (albeit partially²⁸), the Boko Haram movement (in northern Nigeria) has so far turned down such offer. Instead, the latter is alleged to have developed into a terrorist group.²⁹ It has been generally argued that MEND and some other similar movements tended to have legitimate aim in demanding a share of the natural resources found on their land. This inference is usually drawn mainly from two persuasive grounds:

1. the principle of fiscal federalism, as Nigeria operates a federal system;³⁰ and
2. the contents of the "Independence Constitution" of 1960³¹ and those of the "Republican Constitution" of 1963³².

While arguments for or against the former ground could be characterised by a range of insinuations, it appears that inference in the affirmative can be drawn from the latter. For instance, the constitutional provisions on the distribution of mining royalties and rent in sections 134 to 139 of the 1960 Constitution stipulate that every Region (now State) is entitled to fifty percent (50 %) of the proceeds of any mineral extraction activities (particularly mineral oil) derived by the Federation from that Region. Additionally, thirty percent (30 %) from the royalties and rent is to be credited to Distributable Pool Account. And fractions of whatever amount standing to the credit of the Distributable Pool Account shall, at every quarter, be disbursed to the Regions in specified percentage.³³

However, the 1963 Constitution³⁴ is slightly different from the 1960 Independence Constitution in this regard: while under the former, the mining royalties and rent and related matters are contained in sections 140 to 145, the latter provides for same under sections 134 to 139. They practically say the same thing. Both Constitutions are however silent on the issue of the remainder twenty percent (20 %). It appears by implication that that was the percentage to which the federal government was originally entitled in the share of the federal allocation. Another major change brought by the 1963 Constitution worth mentioning is the abolition of the position of the Queen of England as the Head of State represented by a Governor-General, thereby replacing it with the

28 "Partially", because factions of the various movements (they are many) often raise concerns that some of their members have secretly accepted gratifications from the government and their agents and have made decisions that are not in the interests of the generality of the groups. These factions therefore warn that any agreements reached with such select individuals do not represent the resolution of the movement as a body.

29 See U.S. Department of State, *Terrorist Designations of Boko Haram and Ansaru*, STATE.GOV (Nov. 13, 2013), <https://www.state.gov/j/ct/rls/other/des/266565.htm>; see also BBC Africa, *Nigeria: US 'to name Boko Haram as a terrorist group'* (Nov. 13, 2013), BBC.COM, online <http://www.bbc.com/news/world-africa-24922833> accessed (last visited Mar. 27, 2017).

30 In Alex O. Atawa Akpodiete, *What Exactly is True Federalism & SONACO*, THE NIGERIAN VOICE (Apr. 17, 2012, 21:28 CET), <http://www.thenigerianvoice.com/nvnews/87726/1/what-exactly-is-true-federalism-sonaco.html> (last visited Mar. 27, 2017), he writes that Federalism is "a system of government in which the individual states within a country have control over their own affairs, but are controlled by a central government for national decision. A republic, on the other hand is defined by the Oxford Advanced Learner's Dictionary as a country that is governed by a president and politicians elected by the people and where there is no king or queen." He further emphasises that, "that means that the Federal Republic of Nigeria is supposed to be a country (...) ruled by a president and elected politicians, but each state should have autonomy and only controlled by Abuja for national decisions."

31 Constitution of Nigeria (1960), §§ 134-139, which is regarded as independence constitution, available at <http://www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html> (last visited Mar. 27, 2017).

32 Constitution of Nigeria (1963), §§ 140-145, available at <http://www.lawnigeria.com/CONSTITUTIONHUB/Constitution/1963ConstitutionofNigeria.html> (last visited Mar. 27, 2017).

33 See Constitution of Nigeria (1960), §§ 134-139.

34 See Constitution of Nigeria (1963), §§ 140-145.

office of a President. Also abrogated is the section that made Her Majesty (the Queen of England) in Council the final arbiter in all court cases with a value of five hundred pounds (£ 500) and above that were initiated in Nigeria, thereby replacing it with Nigerian Supreme Court.

Conversely, Boko Haram is allegedly making its demand also on two grounds: (a) to introduce Sharia law in the whole of Nigeria, having been dissatisfied with the justice system that is based on common law and doctrine of equity or (b) to be allowed to secede and to form an Islamic State under the principle of self-determination.

In essence, all peoples reserve the right to demand their right of self-determination to address a lack of proper representation or oppression from any given government. However, there are certain clandestine political game plots that are usually reinvigorated and brought to bear under the guise of socio-cultural rights agitation. For example, Olayode succinctly analyses this by reference to the disorderliness in the Nigeria polity. According to Olayode,³⁵ there are four ethno-regional organisations akin to MEND and Boko Haram Movements in Nigeria, albeit seemingly milder in form, but not any less lethal in political power play. These are: Movement for the Survival of Ogoni People (MOSOP); Egbe Afenifere (Society of the lovers of good things); Ohanaeze-Ndigbo (Igbo Citizens Assembly); and the Arewa Consultative Forum (ACF). These groups can be said to represent the “who is who” in power politics in the country and have the capacity to unleash political pandemonium if things are not done their own way. These groups, as Olayode rightly observes, operate on the one hand, between the primary units of the society and the ruling collective institutions, and on the other hand, they emphasise the collective identity of specific groups, and are willing to use confrontation to achieve their objectives.³⁶

Most arguments for the reintroduction of customary law into the Nigerian legal system cite the principles of self-determination, freedom of religion, and cultural rights as normative references to justify their demand. These somewhat misconceptions are usually inferred from Articles 1 and 18, and sometimes 27 of the International Covenant on Civil and Political Rights (ICCPR) which guarantee to all peoples the right of self-determination,³⁷ as well as the right to “freedom of thought, conscience and religion” (hereafter freedom of religion). For example, Ugochukwu rightly observes that “the push to implement the Sharia often supported by northern intellectuals, and coinciding with the election of a Yoruba Head of State that signalled a power shift from north to south, [was] seen as an attempt to assert the northerners’ right to self-determination.”³⁸ And this is what it has turned out to be in recent times. While these rights are mostly framed as cultural, quite clearly, none seems to ponder the parts of the international legal instrument, which provide that some of these rights are not absolute but qualified under various paragraphs of some international legal instruments. For example, Article 18 (3) of ICCPR emphasizes the restrictions on freedom of religion, stipulating that the manifestation of a religion must take into consideration those limita-

35 Kehinde Olayode, *Self-Determination, Ethno-Nationalism and Conflicts in Nigeria*, https://www.researchgate.net/profile/Muhammad_Kamaldeen_IMAM-TAMIM/publication/235892780_Kehinde_OLAYODE_-_Self-Determination_Ethno-Nationalism_and_Conflicts_in_Nigeria/links/09e41513ea7187fc81000000.pdf (last visited Mar. 27, 2017).

36 *Infra* note 39.

37 Self-determination principles are particularly highlighted in Articles 1(2) of U.N. Charter; 1(1) of ICCPR; and 1(1) ICESCR.

38 Françoise Parent-Ugochukwu, *Book Review of Democratization and Islamic Law: The Sharia Conflict in Nigeria*, (Dec. 1, 2009), <http://www.accord.org.za/ajcr-issues/democratization-and-islamic-law-the-sharia-conflict-in-nigeria/> (last visited Mar. 27, 2017).

tions that “are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” In that connection, therefore, it is helpful to briefly examine, in practical terms, the limitations to which the manifestation of one's religion is subject. After that, attempt shall be made to critique the implication of self-determination within the context of freedom of religion which is usually relied upon by the so-called marginalised groups when asserting their rights to practice their religion as part of culture. This obviously led to the agitation for cultural rights, particularly, the reintroduction of both customary law and the penal sections of Sharia law in Nigeria.

IV. Limitation prescribed by law

The ICCPR provides that the manifestation of religion must be in accordance with the provisions of the law, and for the purpose of this analysis, the most important law in any sovereign democratic state is its constitutional law. Therefore, in a country where constitution exists, all other forms of law (should) derive their legality from that constitution, and Nigeria is no exception. Accordingly, under its 1999 Constitution,³⁹ as amended (hereafter the Constitution), all authorities and persons are bound by the provisions of the constitution, which is regarded as the supreme source of law.⁴⁰ This means that all forms of administrative practice, be it legal, political or economic, must be in accordance with its provisions. It lays down that, “the Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.”⁴¹ In order to properly govern a sovereign state, laws must be enacted and complied with. But in enacting any law, the designated legislative authorities must have the provisions and backing of the constitution in contemplation. Otherwise, such law could be declared unconstitutional and therefore void.⁴²

In most formal and informal conversations on the implication of certain provisions of the 1999 Constitution, numerous legal commentators draw various inferences from particularly section 10. While many consider that the section implies that Nigeria is a secular state, others disagree based on the fact that such proviso is not specifically contained in the constitution. The section provides that “[t]he Government of the Federation or of a State shall not adopt any religion as State Religion.”⁴³ This is the section that has attracted much controversy in most legal and socio-political discourse on Nigeria. For example, Ibrahim & Lyman⁴⁴ quote Auwalu Yadudu as stating that the “(...) Nigerian Constitution did not declare Nigeria to be a secular state and that the initiatives of the states implementing the Shari’a cannot be said to have violated Section 10 of the Constitution which prohibits any state from adopting any religion as a state religion.” With regard to Sharia law, in practice, all sections of the law are based on Islamic religion. Its administrators are mainly those

39 The Constitution of the Federal Republic of Nigeria (1999).

40 See Section 1(1) of the Constitution, which stipulates that “This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.”

41 Section 1(2) the constitution of Nigeria 1999.

42 Section 1(3) of the Nigerian Constitution 1999: “If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.”

43 Section 10 of the Nigerian 1999 Constitution.

44 Hauwa Ibrahim & Princeton Lyman, *Reflections on the New Shari’a Law in Nigeria*, COUNCIL ON FOREIGN RELATIONS, 6 (2004), http://www.cfr.org/content/publications/attachments/Reflections_on_the_New_Sharia_in_Nigeria.pdf (last visited Mar. 27, 2017).

who practice or are versed in that religion. Moreover, people of other faiths are (arguably) outside the scope of its application. The facilities are provided by the state: the judges (Kadi), the "hishba", and other workers are paid by the state. Finally, the law is not subject to repeal or amendments by the temporal reasoning of the generality of the people to reflect the realities of their everyday cross-cultural interactions among citizens residing in the area, as it is based purely on the contents of that religion and the practices of its adherents.

It has therefore generally been argued that with all of these facts present, one can only subscribe to the conviction that the movement is seeking to either re-establish a state religion in those parts of the country in violation of the constitution or (worse still) to secede from the rest of the country, which is an infringement on the territorial integrity of the sovereign nation as one entity.⁴⁵

It has also been argued that, apart from the concerns raised by non-Muslims regarding the discrimination against them in many areas, the Muslims themselves are not left out. The fact that the law applies only to Muslims or to those who wish to be bound by it means that the right to equality of all before the law is thus negated.

Let us consider two hypothetical criminal cases involving Mr. A, a non-Muslim, and a Muslim, Mr. B. Let us also presume that both of them have been found guilty (albeit by different courts) of stealing, for example, a bicycle. In sentencing, Mr. A is given a 6-month prison sentence and the reason for reaching such decision is based on the fact that Mr. A practises a religion other than Islam, or that he does not align himself with any religion at all. On the other hand, a Sharia court condemns Mr. B to have his right wrist amputated. It must be borne in mind that they are both convicted for the same offence within the same country and all circumstances of both cases are presumed the same, except the proceedings that led to the sentencing were done at two different courts.

Many legal practitioners know that the positive outcome of any legal tussle is not guaranteed by a lawyer's mere interpretive skills; it is also partly dependent on the provisions of the law that is being applied. In that regard therefore, can a nation beleaguered by overt conflict of laws, both in theory and in practice, be considered a nation with rule of law? Furthermore, can individuals be said to be guaranteed the right of equality before the law in a society where discriminatory punitive measures are purposively handed down on the ground that the legal system makes it a matter of choice (i.e. depending on the religion or culture of the defendant) as to the choice of the penalty? What does such verdict tell of a country that prohibits discrimination under its constitution? Does that not establish a prima facie case of discrimination, even though, owing to his religious beliefs, Mr. B may have agreed to be given such discriminatory sentence? What does the law (constitutional law) say in this respect? It stipulates:

"A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of

45 Although the principle of territorial integrity applies mainly in cases of international relations, it is a legal order under international law as echoed particularly in Article 2, paragraph 4 of the U.N. Charter that encourages nation states not to violate one another's territorial makeup. The same goes for ethnic groups within a sovereign state.

*other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject” (emphasis added).*⁴⁶

It is also worth mentioning that although the governments of the states where Sharia has been adopted have always maintained that the law does not apply to non-Muslims, in state schools, buses, restaurants, etc., women are separated from men without due consideration of their religion. Dress code in schools and in specific places of work is made to conform with Islamic religion. And also in states where the population is about 50 % Muslims and 50 % Christians, the application of Sharia has been seen to always ignite and degenerate to ethno-sectarian killings.

Furthermore, the Nigerian legal system is generally inundated with various rules of regional and international treaties and conventions that are binding on the state. A close look at some of them will reveal prima facie violations, particularly with regard to those customary and Sharia law rules that are applied in Nigeria today. First of these is the African Charter on Human and Peoples' Rights. Apart from Articles 3, 4, 18 and 19, which specifically prohibit discrimination and deprivation of rights, Article 2 of the Charter specifically provides that no individual should be discriminated against on any ground, be it religion, gender, race, political beliefs, ideology or ethnicity. It is also important to state categorically that most of the violations are directed at the vulnerable groups: women and children mainly from poor homes. Therefore, various Articles under African Charter on the Rights and Welfare of the Child (ACRWC) also prohibit such discriminatory and right-deprivation practices. The prohibition of discrimination is specifically laid down in Article 3. These regional instruments are binding on Nigeria pursuant to Article 26 of Vienna Convention on the Law of Treaties 1969.⁴⁷ Even if a state cites the violations resulting from the application of those rules in customary and Sharia law as being violations that were *“manifest and concerned a rule of its internal law of fundamental importance”* to this state, the overly harsh and discriminatory nature of some of these instruments may make them unacceptable as justification in modern world.⁴⁸

There are however various other provisions in both the constitution and the international treaties and conventions that can be said to have been violated by the application of these laws, which are too numerous to discuss in this article.⁴⁹

V. Principle of self-determination

Self-determination simply means the right of people under international legal order to decide their sovereignty and political status without external interference. It is a core principle of international law, arising from customary international law, but also recognised as a general principle of law. It is said, to date back to more than two centuries. And the era of the struggle of the United States (US) for independence is a pointer in that regard. Quite clearly, in the ensuing US declara-

46 The Constitution of Nigeria (1999) § 42(1)(a).

47 It provides that *“[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”* See also Article 27 of the Vienna Convention which stipulates that *“[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”* However, internal law mechanisms may be raised as justification if it can be proven beyond reasonable doubt that *“that violation was manifest and concerned a rule of its internal law of fundamental importance.”* (Article 46).

48 See Article 46 of the Vienna Convention on the Law of Treaties 1969.

49 See for example: sections of Protocol to the African Charter on Human and People's on the Rights of Women in Africa, as well as CEDAW [Convention on the Elimination of All Forms of Discrimination Against Women].

tion of independence of 1776, it was proclaimed that the government derived "*their just powers from the consent of the governed*," and in that connection, if any such government became destructive, the people should have the power to abolish such government. This ideology was later resurrected in the run-up to the World War II by the US President Franklin D. Roosevelt and the British Prime Minister Winston Churchill. And as parts of the Allies' goals in the post-war world, certain commonality principles were agreed and these culminated in the Atlantic Charter of the 14th August, 1941, and Dumbarton Oaks Proposal of 1944. The contents of these documents helped to shape the world thereafter, particularly to the effect that both the US and Great Britain agreed that they would not seek territorial expansion. This indication was emphasised by the fact that both countries affirmed their commitments to support the restoration of self-governments for all countries that had been occupied during the war and thereby allowing all peoples to choose their form of government.⁵⁰ Three relevant provisions of the Atlantic Charter on the part of US, Britain and their allies formed the foundation on which the idea of self-determination is being drawn in recent times:

1. these countries would not seek territorial gains from the war;
2. they opposed territorial changes that were against the wishes of the peoples concerned; and
3. all peoples shall have the right to choose their form of government; this meant the restoration of sovereign rights and self-government to those who had been forcefully deprived of them.

Importantly, the principle of self-determination has since been restated and recognised by various international and regional instruments, such as the U.N. Charter, ICCPR, ICESCR, the Helsinki Final Act adopted by the Conference on Security and Cooperation in Europe (CSCE) in 1975, African Charter on Human and Peoples' Rights, 1981, etc. It is useful to emphasise that in practice, there are two forms of self-determination: external and internal.

Legal Information Institute of Cornell University emphasises that contemporary notions of self-determination usually distinguish between "internal" and "external" self-determination, suggesting that self-determination exists on a spectrum. Internal self-determination may refer to various political and social rights. By contrast, external self-determination refers to full legal independence/secession for the given "people" from the larger politico-legal state.⁵¹ According to Michael C. van Walt van Praag, "*Internal self-determination can (...) mean the right to exercise cultural, linguistic, religious or (territorial) political autonomy within the boundaries of the existing state.*"⁵²

There is another tragedy currently gaining momentum in its own name in the Nigerian polity. It clamours for the creation of the state of Biafra. Those who know a bit of Nigerian history are aware that the attempt by Biafra (made up of southern Nigerians of mainly Igbo extraction) to secede from Nigeria was the reason for the civil war that claimed so many lives between 1967

50 *Milestones: 1937-1945: The Atlantic Conference & Charter, 1941*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1937-1945/atlantic-conf> (last visited Mar. 27, 2017).

51 *Self-determination*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/self_determination_international_law (last visited Mar. 27, 2017).

52 Michael C. van Walt van Praag, *Implementation of the Right to Self-determination As a Contribution to Conflict Prevention*, UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION (1999), available at <http://www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf> (last visited Mar. 27, 2017).

and 1970. Years after the war, the then military Governor, Col Chukwuemeka Odumegwu Ojukwu, who championed the secession move had admitted that attempting secession in the manner he did was not a good move and that a second one of such was not necessary. As Michael C. van Walt van Praag rightly emphasises,

"Hardly any right recognised by law is absolute. This is true also of the right of self-determination, which is not self-executing nor unilaterally applicable. When the right, in the manner in which it is claimed, clashes with other international legal principles and rights, all of these rights and principles should be weighed and balanced, keeping in mind the overall international law objective of maintenance of peace and security."⁵³

Those currently propagating the move claim that Biafra are a people for the purpose of the right to self-determination. Right or wrong, it must be emphasised that nowadays hardly any society is homogeneous. In 1983 Ernest Gellner also writes in "Nations and Nationalism" that "(...) a territorial political unit can only become ethnically homogeneous (...) if it either kills, expels or assimilates all non-nationals."⁵⁴

In the last decade or so, the preliminary phase with regard to the right to self-determination seems to have been bound up with the issue of who, in international law, are "a people". Aleksandar Pavkovic and Peter Radan, in their own right, argue that the question of any right of secession in international law fundamentally revolves around the vexed question of the meaning of "a people" in the context of the right to self-determination of peoples in international law.⁵⁵ They rightly observe that following World War II, the general view as to what amounted to a people was based primarily on the population of a state. Therefore, it was not in general contemplation that the segments of a state's population would be regarded as "a people". Consequently, secession was generally regarded as having no legal basis in international law.⁵⁶ They however further draw on Joshua Castellino and Jeremie Gilbert's submission that oppressed minorities could qualify as a people for the purpose of the right to self-determination.⁵⁷

However, it is unambiguous that the principle of self-determination with regard to the agitation of some ethnic groups in Nigeria can best be understood within the context of internal self-determination. While this right may or may not be legitimate under international law, it should be emphasised that if it were invoked, then this must also be done legitimately, i.e. in accordance with the international law. And in the case of Nigeria, how do the proponents of the state of Biafra, for instance, reconcile the issue of who they are with the various neighbouring ethnic peoples of Rivers, Cross-River, Bayelsa and Delta States extraction that may not see themselves as sharing the same historical, cultural or genealogical profiles with the core Igbo? The fact that a few indigenes of the relevant States tend to align themselves with the Biafra cause may not suffice for the purpose of meeting the condition of "a people" as required under international law. Michael C. van Walt van Praag also argues that it must be ensured that the rights and principles under which the

53 *Id.*

54 As cited in Michael Jewkes, *The Exercise of Self Determination: External and Internal Dimensions*, UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION, <http://www.unpo.org/downloads/877.pdf> (last visited Mar. 27, 2017).

55 See Aleksandar Pavkovic & Peter Radan, *In Pursuit of Sovereignty and Self-determination: Peoples, States and Secession in the International Order*, 3 *MACQUARIE LAW JOURNAL*, 1 (2003), <http://www.austlii.edu.au/au/journals/MqLJ/2003/1.html> (last visited Mar. 27, 2017).

56 *Id.*

57 *Id.*

rights to self determination is claimed by a people also takes into consideration the rights of minorities, indigenous peoples and other population groups within the territory where the right to self-determination is being claimed.⁵⁸

Legitimacy in this context can be acquired through legal means, dialogue or compromises on the part of all disputing parties. Clearly, Article 1 (1) of the binding ICCPR provides that: *"All Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."* Conversely, it is expressly provided that the realisation of that right must be *"in compliance with the provisions of the Charter of the United Nations"* (Article 1 (3) ICCPR). Additionally, a UN General Assembly Resolution provides the limit to which self-determination can be claimed by people concerned: *"Any attempt aimed at partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."*⁵⁹

The above excerpt seem to corroborate the point raised earlier with regard to limitations prescribed by law. Every political agitation in a sovereign state, particularly the pursuit of social, political and cultural rights agenda under which freedom of religion is usually sought, must comply with the law requiring that public order, safety and the fundamental rights and freedoms of others are not undermined.

Part C

Conclusion

To this end, a "Treasure trove" is a "treasure that anyone finds; specifically: gold or silver in the form of money, plate, or bullion which is found hidden and whose owner is not known."⁶⁰ This definition seems comparable to Lon L. Fuller's analysis of custom which, in other words, means customary law, which *"we may be able to describe in general the class of persons among whom [it] has come to prevail as a standard of conduct, [although] it has no definite author."*⁶¹ Customs are handed down from one generation to another. The same can be said to apply to Sharia law that dates back many centuries, and which has been criticised as fundamentally flawed on grounds of being anachronistic, draconian and overtly discriminatory. Comparatively, Pandora's box, as derived from Greek mythology, comes *"from the box, sent by the gods to Pandora, which she was forbidden to open and which loosed a swarm of evils upon humankind when she opened it (...)"*⁶² Accordingly, one would suppose that the reintroduction of customary law (including Sharia) in Nigeria, amounts to a discovery of a treasure trove. On a closer look, considering the troubles now emanating from that reintroduction, particularly, the consequent agitation for (inter alia) self-determination and the bid for secession through acts of terrorism, is it not appropriate to say that the reintroduction of such systems is tantamount to opening Pandora's box? In modern

58 Van Walt van Praag, *supra* note 53.

59 Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the UN General Assembly Resolution 1514(XV) of 14 December 1960.

60 MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/treasure%20trove> (last visited Mar. 27, 2017).

61 See FULLER, *supra* note 8.

62 MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/treasure%20trove> (last visted Mar. 27, 2017).

times, the phrase, “to open Pandora’s box” means to perform an action that may seem small or innocent, but that turns out to have severely detrimental and far-reaching consequences.⁶³

The author would like to draw this article to a close by referring to the outstanding annotations by Michael C. van Walt van Praag⁶⁴ whose views may go long way in easing part of the political tension the country faces today. He observes that implementation of (internal) self-determination does not necessarily require a one time act. He opines that the will of the people can be effected within a democratic setting by the use of the existing institutions of the state. He goes further to state that this assumes a truly democratic, fully participatory system, not one that limits the concept of democracy to decision by the numerical majority. Where only votes count, a people or community which is numerically inferior has no control over its destiny, he argues. And by way of suggestion, he emphasizes that self-determination can also be realised through one or more processes of negotiation, dialogue, and the conclusion of agreements between the state authorities and representatives of the people concerned. To this end, it must be emphasized that all the demands must be legitimate. They must meet human rights standards as well as the requirements of equity, for he who comes to equity, must come with clean hands as equity will not grant relief from a self-created hardship. These are known maxims the relevance of which are self-explanatory in this case.

63 *Definition for Pandora's box*, WIKIPAEDIA, http://en.wikipedia.org/wiki/Pandora's_box (last visited Mar. 27, 2017).

64 Van Walt van Praag, *supra* note 52.