

The Conundrum of Judicial Notice as a Means of Ascertaining Customary Law in Nigerian and South African Courts amid the Convergence of Positivism and Legal Pluralism

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Abstract

The roles of the courts have become an inevitable social reality in adjudicating customary law disputes in Nigeria and South Africa. Because these courts are established and validated along positivist practice, they inevitably require the adoption of a process for ascertaining and applying customary law since the judges of these courts are not ordinarily conversant with its norms. Hence judicial notice has been adopted as one of the ways of ascertaining customary law. The conceptualisation and theoretical basis of customary law cannot be ignored in the analysis of the process of its ascertainment. Crucial to this are theories of centralism, legal pluralism and positivism. This paper therefore identifies challenges in ascertaining customary law through judicial notice in the various cadres of courts operative in both jurisdictions amid the operation of these theories and the attendant implications thereof. It elucidates the rules that guide the judge and identifies the challenges encountered in each jurisdiction based on how each law is scripted. It also contends that while positivist rules and procedure regulate how customary law can be ascertained and applied by the courts, its application must however be limited to the point where it threatens the essence of customary law.

Keywords

Ascertainment; judicial notice; court procedure' positivism; centralism; legal pluralism

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1 Introduction

The role of the courts has become an inevitable social reality in Nigeria and South Africa. Being formally bestowed with adjudicatory functions necessary for societal equilibrium, they have had increasing impact in stabilising the polity by adjudicating over disputes based on the applicable laws of the land, which include customary law.

The adjudication of customary law in these jurisdictions has long shifted from the exclusive preserve of indigenous courts to include non-customary courts. Therefore the function of regular courts in ascertaining and applying living customary law in both countries cannot be downplayed even though established and validated along positivist practice. This inevitably requires the adoption of a process for ascertaining and applying customary law by the judges of these courts since they are not ordinarily conversant with its norms. Even though the court cannot go to the field to ascertain these norms and rules, it will not be entirely correct to state that it does not engage in ascertainment. Granted that it does not utilise sociological or anthropological methods when embarking on this exercise, it however ascertains from the flurry of evidence presented to it what the applicable customary law is or the closest to it within its limitations.¹ To do this properly, the court requires some knowledge and skills necessary for adjudication at this level - skills in logic and analysis, and evidential prowess. In other words, the court requires knowledge and skills in the process of judging and other factors that influence the process.

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¹ In some instances, anthropological methods are presented to the court as in the case of *Pilane v Pilane* 2013 4 BCLR 431 (CC).

The adoption and application of this process have not been without challenges. Generally, the court adopts two approaches which are judicial notice and presentation of evidence through facts in ascertaining and applying customary law. This paper therefore identifies challenges in ascertaining customary law through judicial notice in the various cadres of courts operative in both jurisdictions amid the operation of positivism and legal pluralism. It elucidates the rules that guide the judge and identifies the challenges encountered in each jurisdiction based on how each law is scripted. While the challenges are discussed separately under the two jurisdictions, they equally apply in both where the laws are similarly scripted.

Judicial notice is:

... [a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact.²

It pertains to the court's power to accept such a fact as law.³ Even though judicial notice was seldom used by Nigerian and South African courts in the cases analysed in this research,⁴ it is still relevant because statutorily, it remains one of the main ways of ascertaining customary law and where it is developed, it enhances the process. The dearth in utilising this method of proof is mainly because official versions of customary laws that capture the many nuanced differences between normative customary practices in a community, clan or even family are not exhaustive. Where used, it was done in relation to broad and common principles, such as male primogeniture. This was mostly in relation to official customary law assumed to be at par with the current normative practice of the communities in the dispute and developed without any reference to what the living norm might be.

² Black and Nolan *Black's Law Dictionary*.

³ See para 2 above.

⁴ The cases analysed include: *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC); *Anekwe v Nweke* (2014) LPELR-22697 (SC); *Aragbui of Iragbui-Oba Olabomi v Olabode Oyewinle* SC Suit No SC345/2012; *Bapedi Marota Mamone v The Commission of Traditional Leadership Disputes and Claims* 2014 ZASCA 30 (28 March 2014); *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC); *Danjuma Achor v Mahionu Aduku* CAA Appeal No CA/A/67/05; *Gumede (born Shange) v President of the Republic of South Africa* 2009 3 SA 152 (CC); *Maphuye Onkemetse Sophy v Balebetse Maphunye* (Bahurutshe Magistrate Court, Lehurutshe) (unreported) case number 06/2013; *Nwaigwe v Okere* (unreported) case number SC/392/2002; *Obusez v Obusez* (2007) 2 All NLR 458; *Ojiogu v Ojiogu* (2010) SC 235/2004; *Shaba Ndadile v Etsu Nupe* case number CA/A/178/07; *Temile v Awani* (Supreme Court) SC/79/96; *Ukeje v Ukeje* case number SC/224/04; *Uwaifo v Uwaifo* (2013) LPELR-20389 (SC).

2 Musings of customary law conceptualisation

The conceptualisation and theoretical basis of customary law cannot be ignored in the analysis of the process of its ascertainment. Crucial to this are theories of centralism, legal pluralism and positivism.

Centralism describes legal systems that recognise only laws that are made by the state which are "uniform", "exclusive" and administered by only state institutions.⁵ Such a statist approach denies the existence of other systems of law such as customary law, except to the extent that they have been enacted into law. The recognition of living customary law not enacted into law in Nigeria and South Africa adheres to centralist precepts because this recognition is made by constitutional provisions interpreted by the Court.⁶ However, the existence of customary law as well as other state and non-state legal systems in both countries is evidence of the operation of a pluralist system and this paper therefore adopts Griffith's position that legal centralism is a myth.⁷

Legal positivism highlights the "conventional" character of law⁸ as a social conception that is founded on norms that have been put forward in court decisions, legislation and even through practice.⁹ According to positivists, the legitimacy or authority of law derives from its source the ability to execute it and its efficacy.¹⁰

The concept of living customary law is enshrined as state law in South Africa through the constitutional provision that affirms it as "an original source of law at par" with other sources of law.¹¹ In *Mabena v Letsoalo*,¹² the high court of South Africa affirmed the concept when it held per Du Plessis J that "living law [denotes] law actually observed by African communities"¹³ and that this, rather than official statements (or versions) of customary law is

⁵ See para 2 above.

⁶ Sections 39(3) and 211 of the *Constitution of the Republic of South Africa*, 1996. See also *Mabena v Letsoalo* 1998 2 SA 1068 (T) and *Lewis v Bankole* (1909) INLR 81.

⁷ Griffiths 1986 *J Legal Plur* 4, 38-39.

⁸ Himma Date Unknown <https://www.iep.utm.edu/legalpos/>. Jeremy Bentham, John Austin and Hart were positivist. See Sweet Date Unknown <https://www.iep.utm.edu/bentham/>; Lacey *Life of HLA Hart*; and Lacey 2004 *Melb J Int'l L* Item 1.A.

⁹ Himma Date Unknown <https://www.iep.utm.edu/legalpos/>.

¹⁰ Himma Date Unknown <https://www.iep.utm.edu/legalpos/>.

¹¹ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 54. See Himonga "Future of Living Customary Law" 41. See also Badejogbin 2014/2015 *SADCLJ* 14.

¹² *Mabena v Letsoalo* 1998 2 SA 1068 (T).

¹³ Appears to be the first South African case in which the concept was used.

what courts have an obligation to ascertain and enforce in disputes involving customary law.

The same concept of living customary law has also been affirmed in Nigeria since 1908. In the Nigerian case of *Lewis v Bankole*¹⁴ where the court held that customary law "must be *existing* native law or custom and not the native law or custom of ancient times...".¹⁵ In *Kharie Zaidan v Fatima Mohsen*¹⁶ also, the Supreme Court defined customary law as "any system of law [that is neither common law nor statutory law], but which is enforceable and binding within Nigeria as between the parties subject to its sway". In *Oyewunmi v Ogunesan*,¹⁷ the Supreme Court had this to say about customary law:

Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, is regulatory in that it controls the lives and transactions of the community subject to it.

It is this organic version of customary law that ought to be ascertained and applied.

In a pluralistic state, whether weak or strong, customary law as a normative system exists as law.¹⁸ Moore, a pluralist, explained that the conception of law now includes the participation of institutions and organisations in the "context of legal obligations".¹⁹ The legal systems of both countries operate along the line of positivism and illustrations of their underlying positivist leaning can be found in the jurisdiction of their state courts to apply state laws. The analysis of the process of ascertaining and applying customary law is conducted on state institutions established and validated along positivist practice. Thus, while in its essential nature living customary law

¹⁴ *Lewis v Bankole* (1909) INLR 81 100.

¹⁵ *Lewis v Bankole* (1909) INLR 81 81. Emphasis added. The fundamental rights/bill of rights contained in the Constitutions of both countries should be used as the standard for the application of customary law rather than the repugnancy test doctrine which is said to have outlived its usefulness. This is especially for South Africa where customary law has been acknowledged as a distinct source of law.

¹⁶ *Kharie Zaidan v Fatima Mohsen* (1971) UILR (Pt II) 283 292.

¹⁷ *Oyewunmi v Ogunesan* (1990) 3 NWLR (Pt 137) 182 207E–F.

¹⁸ Weak legal pluralism is a situation where different legal norms operative within a state are recognised and regulated by state institutions while strong legal pluralism is explained as a situation where both state and non-state legal norms co-exist within the boundaries of the state and are respectively regulated by both state and non-state institutions. South African state law recognises customary law as well as common law and the Roman-Dutch law while it does not acknowledge religious norms. Nigeria recognises customary law as well as common law and Islamic norms in certain parts but fails to recognise other religious norms. See Sezgin 2004 *J Legal Plur* 102. See also Rautenbach 2010 *J Legal Plur* 145–146.

¹⁹ Moore *Law as Process* 218; Malinowski *Crime and Custom*; Bohannan 2009 *Am Anthropol* 34, 35; and Moore 1969 *BRA* 259

may not be regarded as state law or positivist law, its formal recognition by state courts and other state institutions creates official versions that may be regarded as part of state-made (positivist) law.²⁰ Customary law is state law only when it is formally acknowledged as such. In the real sense, however, it is not positivist law but encompasses social realities and practices that form the basis of its existence as norms operative in communities that are referred to as living customary law. Yet, by its very nature and operation, customary law cannot be described as positivist or contained within the structures of positivist law. This paper aligns its view in part with Van Niekerk²¹ that living customary law in the absence of state acknowledgement is law in its own right; but it also agrees with Himonga *et al* that it is state law and may also be termed as positivist law due to its formal acknowledgement by the State.²²

Both Nigeria and South Africa are pluralist states and have within their legal systems plural sources of law that incorporate customary law, the imported common law and other sources of law (including Roman-Dutch law for South Africa). Customary law is, however, recognised differently in both countries. While in South Africa it is at par with other sources of law but subject to the Constitution and legislation, in Nigeria, it is subservient to other sources of law but yet, judicial notice is one of the two ways it is ascertained and applied by the courts in both countries and this is not without challenges. Another thing they share in common is the fact that they each have to contend with the challenge of the convergence of positivism and legal pluralism in this process of ascertainment and application. Despite the divergence of positivism and pluralism in ideology and jurisprudence, a path must yet be paved to enhance their interaction as they regulate this process. One of such paths is where a statutory law in its provisions, provides for the application of the applicable customary law without specifically stating the rules and norms. This gives room for the applicable living customary law to be ascertained outside the bounds and limitations of the statute.²³ Another path relates to statutes providing for the procedure to be adopted in a proceeding while the applicable substantive law is the applicable customary law.²⁴

²⁰ According to Bennett, official versions suffer the problem of presuming the contents of customary law. See Bennett *Sourcebook of African Customary Law* 2.

²¹ Van Niekerk 2012 *SUBB Jurisprudentia* 5.

²² Himonga *et al African Customary Law* 46.

²³ Examples of such legislations are the *Recognition of Customary Marriages Act* 120 of 1998 and the various Wills Laws applicable in most of the States in Nigeria, such as the *Wills Law Bendel State* 172, *Laws of Bendel State*, 1976, *Wills Law Kaduna State* 163, *Laws of Kaduna State*, 1991, and the *Wills Law Lagos State W2*, *Laws of Lagos State*, 2004.

²⁴ Examples of such are the *Law of Evidence Amendment Act* 45 of 1988 in South Africa and the *Evidence Act*, 2011 in Nigeria.

Notwithstanding the different status of customary law in both countries, the challenges faced with respect to ascertaining and applying customary law through judicial notice are similar and present an intriguing interface between positivist rules of evidence and procedure, and, the essence of legal pluralism where the application of positivist rules compels customary law to be defined by it, and, the rejection of this definition by the latter. This paper contends that a middle ground can be paved to accommodate both ideologies albeit to a limit. While positivist rules and procedure regulate how customary law can be ascertained and applied by the courts, its application must however be limited to the point where it threatens the essence of customary law.

How customary law is ascertained and applied in courts today is influenced by how the courts operated under colonial rule because it laid the foundation for current practice. This influence is in the area of the conceptualisation of customary law fostered by the nature and structure of the courts with jurisdiction to hear customary law matters. It also includes the judges' knowledge in customary law and the policy of the colonial government which did not favour a sincere development of the rules of customary law. It is important to note, however, that despite these challenges, in certain instances, there were extensive engagements with customary norms and its concepts including its ascertainment and application which produced certain notable decisions on customary law such as the case of *Lewis v Bankole*.²⁵

3 Courts with jurisdiction to hear customary court cases

South Africa has a dual system of courts comprising courts of chiefs and headmen as customary courts and other courts made up of courts of specialised and general jurisdiction.²⁶ The status of the courts of chiefs and headmen (referred to in this paper as traditional courts) as forming part of the categories of courts in the Constitution was affirmed by the Constitutional Court in the case of *Re: certification of the Constitution of the Republic of South Africa 1996*.²⁷

²⁵ *Lewis v Bankole* (1908) INLR 81.

²⁶ Berat 1991 *Fordham Int'l LJ* 94. Berat expressed in her discussion on the transformation process of South Africa after the collapse of apartheid that customary law being the basis of the dual system of law and courts in South Africa will not be overlooked.

²⁷ *Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC). This case was instituted to affirm whether the proposals in the then proposed 1996 Constitution were in line with the constitutional policies.

The courts of general jurisdiction entertain matters of customary law. The South African courts that have jurisdiction to hear customary law cases include the Constitutional Court, the Supreme Court of Appeal, the high court, regional court, magistrate's courts, as well as other courts established or recognised by an Act of Parliament. These other courts may be similar in status to the high court or magistrate's courts. The *Law of Evidence Amendment Act* (South Africa) provides that any court may take judicial notice of customary law and this includes courts that fall under the last category mentioned here.²⁸

Nigeria on the other hand operates forms of dual and multiple court systems. At both the federal and state levels, it has customary/area courts and courts of general jurisdiction also empowered to hear cases on customary law. Courts with jurisdiction to hear customary law cases are creations of statutes and the Constitution and are categorised into courts of superior and inferior jurisdictions. These courts include the Supreme Court of Nigeria, the Court of Appeal, the high courts of the States and the Federal Capital Territory (FCT), the customary courts of appeal of the states and the FCT and customary/area courts.²⁹ It is however important to note that customary/area courts in Nigeria differ in essence from the traditional courts in South Africa. While the former are not traditional courts set up within the communities (with their higher cadres being manned mainly by legal practitioners), the later are traditional courts within the indigenous communities manned by traditional leaders.

4 The process of ascertainment

The Black's Law Dictionary broadly defines "judicial process" as including "all the acts of a court from the beginning to the end of its proceedings in a given cause".³⁰ The ascertainment of customary law forms part of the judicial process. The process of ascertainment of a legal system entails "the determination of the conditions in which its rules can be identified and applied in legal proceedings".³¹ Ascertaining customary law engages processes that contribute to how the court determines and applies

²⁸ Koyana, Bekker and Mqeke "Traditional Authority Courts" 174. The authors claim that the small claims court in South Africa falls under this category and can receive evidence of customary law in land disputes. Other specialised courts with jurisdiction in customary law such as the Land Claims court are not included here because this paper is restricted to the regular courts.

²⁹ Section 6(5) of the *Constitution of the Federal Republic of Nigeria*, 1999. Also inclusive are "[S]uch other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and such other court as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws."

³⁰ Black and Nolan *Black's Law Dictionary*.

³¹ Himonga *et al African Customary Law* 58.

customary law. Here, the power of the judge to exercise discretion is vital and is derived from the rules of evidence, court procedure rules and laws, and the inherent powers of the courts.

In Nigeria and South Africa, ascertaining customary law by formal courts is regulated by statute and the processes are broadly similar. Every court type in these countries with jurisdiction to hear cases of customary law adopts a process of ascertainment. For customary courts manned by chiefs of the particular locality, the process may be more limited. For instance, where the customary law to be applied is that of the particular community, the traditional leader may not need any external aid in ascertainment and application. Relying on his/her knowledge is a process. So also is conferring with his/her council of elders on what may be areas of uncertainty with respect to ascertaining the content of the law to be applied to the sets of facts before the court.

4.1 Nigeria

While in Nigeria, the process of ascertaining customary law is regulated by the *Evidence Act*, procedural rules of courts and the respective laws of particular courts,³² the former³³ is the main legislation that regulates the judicial ascertainment and application of customary law. It, however, excludes the customary courts of appeal, and customary and area courts in its application. This exclusion is, however, subject to an order by a constitutionally instituted authority allowing the application of all or certain provisions of the *Evidence Act*.³⁴ In accordance with this provision, the *Federal Capital Territory Customary Court Act*,³⁵ for instance, empowers

³² The *Evidence Act*, 2011 is within the purview of the exclusive legislative list of the National Assembly and therefore it applies to courts within the country. Other laws and procedural rules are enacted by the respective state legislature. For the FCT, however, its procedural rules and laws are enacted by the National Assembly. Others include *Court of Appeal Rules*, 2016; *Court of Appeal Act*, 2016; *Customary Court (Appeal) Rules, Federal Capital Territory of Abuja*, 1996; *Customary Court (Civil Procedure) Rules, Federal Capital Territory of Abuja*, 2007; *Supreme Court (Civil Procedure) Rules*, 2005.

³³ *Evidence Act*, 2011. This Act replaced the *Evidence Act*, 2004 (Laws of the Federation of Nigeria, Cap E14).

³⁴ Section 256(1)(c) of the *Evidence Act*, 2011 provides 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 proceedings in any civil cause or matter in or before any ... Customary Court of Appeal, Area Court or Customary Court unless any authority empowered to do so under the Constitution, by order published in the Gazette, confers upon any or all ... Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory, Abuja or a State, as the case may be, power to enforce any or all the provisions of this Act".

³⁵ *Federal Capital Territory Abuja Customary Court Act* 8 of 2007. See s 65 which provides that "The Customary Court and Customary Court of Appeal FCT Abuja shall

both the customary court of appeal and the customary courts within the territory to apply certain provisions of the *Evidence Act*, including provisions that pertain to the ascertainment of customary law.

The *Evidence Act* provides for two ways of proving customary law in court. According to section 16(1):

... [a] custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence.

Subsection (2) of the provision lays the burden of proving a custom on the person who alleges that the custom exists.³⁶

Clearly, the probable convergence of statutory law and customary law in the judicial resolution of disputes comes to the fore in section 16(1), as the provision authorises the court to also consider customary law among other sources of applicable law. But just as pertinent is the statutory recognition that customary law may apply in resolving a judicial matter if its existence can be proved according to the rules of evidence. It is, as it were, a convergence of positivist law and customary law. Stating that customary law may apply "as part of the law" means that customary law will apply as the substantive law.³⁷ However, statutory and common law will regulate the procedure, which includes the processes by which customary law will be ascertained.

There is a jurisprudential difference between the two methods of ascertainment. Until it is proved (ascertained), the court regards customary law³⁸ as fact rather than as law. It is therefore implied that it becomes law when its existence has been established through evidence and applied by the court in its judgment. However, when customary law can be judicially noticed, it is viewed by the court as the law on the subject. The customary law proved through evidence is viewed as law only after it is ascertained and applied by the court in its judgment.³⁹ This, as the legal pluralist may say, is a consequence of centralist views of legal theory. But what, precisely,

in Judicial Proceedings be bound by the provisions of ss 14, 15, 59, 76, 77, 78, 92, 93, 135, 136, 155, 177 and 227 of the Evidence Act".

³⁶ In *Orlu v Gogo-Abite* (2010) 8 NWLR (Pt 1196) 307 the Supreme Court held that Ikwere native law and custom of inheritance which was the basis of the plaintiff's claim of ownership was not proved in the case and judicial notice of it could not be taken because it had not been notoriously decided. There could well be situations where a court takes judicial notice of some parts of the customary law while requiring proof (facts) on other parts.

³⁷ Substantive as used here is the sense of substantive as opposed to procedural.

³⁸ Except official versions.

³⁹ Obilade *Nigerian Legal System* 97.

is judicial notice and when may a court apply it as precedent on a question of customary law?

The doctrine of judicial precedent is integral in the concept of judicial notice. According to the doctrine, the judgment of a superior court can be judicially noticed.⁴⁰

The basis for judicial notice of customary law was laid out in section 14 of the old *Evidence Act*, which provided as follows:

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.

Section 17 of the current *Evidence Act* preserves the doctrine. But it simply states that, "A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record".⁴¹ As the provision before it, this provision allows courts to exercise judicial discretion in the matter of taking judicial notice about the existence of a custom. However, the provision seems to establish a single requirement for a custom to be judicially noticed. All it requires is that a superior court has adjudicated on the custom before, and once.⁴² It would seem this provision dispenses with the old requirements that the custom of which judicial notice is sought to be taken, must have been adjudicated upon to an extent that the court could justify its bindingness in similar circumstances and in the same community. This would seem to suggest lessening of the standard for establishing precedent on an issue of customary law or for justifying judicial notice thereof.

It is important to see how this new provision could constitute a problem. The repealed law gave courts the liberty to determine the extent to which a custom may be justifiably noticed judicially, guided by the stipulation that the custom must have been considered to an extent that justifies the court to presume it is settled law on the matter. The Privy Council's position on this law in the case of *Angu v Attah*⁴³ was that for a custom to be judicially noticed, it must have been repeatedly proven in a court of law. This Ghanaian case decided by the Privy Council in 1916 formed the basis upon

⁴⁰ Sections 5(1)(a)-(l) and 6(3) of the *Constitution of the Federal Republic of Nigeria*, 1999 list the superior courts of records to include the high courts and other courts of coordinate jurisdiction in an ascending manner to the Court of Appeal and the Supreme Court.

⁴¹ Section 17 of the *Evidence Act*, 2011.

⁴² This position is also shared by Adangor 2015 *JLPG* 38-39.

⁴³ *Angu v Attah* [1916] PC Gold Coast 1874-1928 43.

which customary law was proved in Anglophone Africa including Nigeria and South Africa.⁴⁴ The decision offers a reliable standard as it affirms the agency of a frequentative process that allows scrutiny, evaluation and sifting until the actual binding rule of custom is determined and errors are eliminated.

This position was adopted in several Nigerian cases.⁴⁵ In *Olagbemi v Ajagungbade*,⁴⁶ the high court and the Court of Appeal made a number of decisions supporting the appellant/plaintiff's claim on ownership of land in Ogbomoso. There was another case on the same subject in which the Supreme Court seemingly deferred from the decisions at both the high court and the Court of Appeal. The judge at the high court considered the evidence led during trial independently from earlier judgments at the high court, Court of Appeal and the Supreme Court and differed from the position of the Supreme Court. The Supreme Court on appeal confirmed the decision of the high court which took judicial notice of the decisions of the earlier high court and Court of Appeal and elaborated that the position expressed in its judgment (at the Supreme Court) was *obiter dictum* of which a judicial notice could not be taken and the *ratio decidendi* was on a different subject and did not apply to the case. It should however be noted that these cases were adjudicated during the pendency of the *Evidence Act* which required proof to an extent. These jurisprudential developments of the standard/guideline for adopting judicial notice in ascertaining customary law though achieved under the repealed *Evidence Act* may still be adopted for the new law despite the dearth of its provisions to require such.

There are of course cases where frequent application of a custom does not necessarily confirm its authenticity. In such cases, it may not be justified to take judicial notice of the custom.⁴⁷ However, where a court is satisfied that the process employed by another court to ascertain the authenticity and accuracy of a custom now being contested before it was painstaking and left no stone unturned, the mere fact that the custom had been judicially deliberated upon only once should not prevent the court from taking judicial notice of it.

⁴⁴ Bennett *Application of Customary Law* 19.

⁴⁵ See *Giwa v Erinmilokun* (1961) 1 All NLR 294 and *Olabanji v Omokewu* (1992) NWLR (Pt 250) 671. See also *Romaine v Romaine* (1992) 4 NWLR (Pt 238) 650 where the Supreme Court cautioned the Court on its duty to make further enquiries with respect to the authenticity of the land title of a party to its satisfaction irrespective of the fact that the party may have presented a title document.

⁴⁶ *Olagbemi v Ajagungbade III* (1990) NWLR (Pt 136) 37.

⁴⁷ Obilade *Nigerian Legal System* 97.

Thus, in *Cole v Akinjole*,⁴⁸ decided prior to the enactment of the current *Evidence Act*, the court was called upon to take judicial notice of a Yoruba customary law that entitled children born outside wedlock to inherit alongside children born within wedlock. This was on the premise that the father acknowledged paternity while alive. The custom had only been proved in one case – *Alake v Pratt*.⁴⁹ The court (in *Cole*) found that the custom had been satisfactorily proved based on the weight of evidence put before the court in *Alake v Pratt* and took judicial notice of the custom.

The provision of the current *Evidence Act* requiring that once a custom has been adjudicated upon once by a superior court, it "may be judicially noticed", does not require that it must also justify its application by the judge in the particular case. While it is reasonably expected that a judge would consider that before judicially taking notice of a custom, omitting that in the provision of the statute is amiss. It should be noted that the provision preserves for the courts a considerable berth of discretion on the matter which may be erroneously exercised.

Under the previous *Evidence Act*, a court may take judicial notice of a custom from a court of co-ordinate jurisdiction as well as from a court of superior jurisdiction, meaning that judicial notice can be taken of a judgment of a customary court by another customary court. The current *Evidence Act* limits judicial notice to be taken from only superior courts of record. The implication of this is that the wealth of customary norms ascertained and applied by customary courts may not be utilised through judicial notice even though some of these customary courts outside are manned by traditional leaders who are versed in the customary norms and their decisions may be devoid of Eurocentrism and tend more towards living customary law.

A court is not necessarily bound to take judicial notice of a customary norm that has been established in a prior judicial process – even if the process was before a court of superior jurisdiction where credible evidence led before the later court with respect to the same circumstances contradicts the finding of the earlier court. The operative word "may" in section 17 of the new Act gives the later court the discretion to refrain from taking judicial notice of a customary law even if that law was ascertained by a court with superior jurisdiction. The credible contradictory evidence of the applicable customary law should constitute a justifiable reason to not take judicial notice of a customary law that has been determined by a superior court.

⁴⁸ *Cole v Akinjole* (1960) 5 FSC 84. See also *Olagbemiro v Ajagunbade III* (1990) NWLR (Pt 136) 37.

⁴⁹ *Alake v Pratt* (1955) 15 WACA 20.

Ordinarily, the principle of judicial precedent compels compliance with the decision of a superior court of record.⁵⁰ However, "judicially noticed facts may be rebuttable".⁵¹ This would happen where a court with superior jurisdiction erred when ascertaining a customary rule. For example, a court may not judicially notice a customary rule if the facts or issues in the case in which it was previously ascertained are distinguishable from the case at hand. Arguably, where the judicially noticed customary law is made without due regard to actual normative practice and the facts of the particular case, a court should be at liberty to refrain from accepting such in view of fresh credible evidence to the contrary.

When a court fails to appropriately ascertain customary law, it violates the constitutional rights of the people whose rights it is to have their lives regulated by the customary law in question and to have their disputes resolved according to that custom. It is therefore particularly crucial for courts to ascertain customary law properly as their decisions invariably become precedents or can be judicially noticed.

By requiring that "[a] custom may be judicially noticed when it has been adjudicated upon once by a superior court of record", section 17 dispenses with the need for parties to prove the facts constituting the customary norm in question. Indeed, according to section 122(1) "[n]o fact of which the court shall take judicial notice under this section needs to be proven". However, sub-section 122(2)(l) of the provision seems to introduce ambiguity over what a court shall do with a custom that has been judicially ascertained. The section provides as follows:

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.

⁵⁰ This position was recently reinforced by the Supreme Court in *Chukwuma Ogwe v Inspector General of Police* (2015) LPELR-24322 (SC) 2, 4. However, a court would not follow a precedent where the facts are not similar, or the same point is not in controversy. A court may also overrule its previous decision where that decision was made *per incuriam*, where justice will not be achieved, or where constitutionally bestowed rights will be inhibited, and where it will not enhance appropriate development of the law. See *Johnson v Lawanson* (1971) 1 NMLR 380. In this case, the Supreme Court departed from the "error" committed in the decision of the Privy Council in *Maurice Goulin v Aminu* (1957) PC Appeal 17 of 1957 but sustained that of *Awosanya v Anifowoshe* (1959) 4 FSC 94. See *Ngwo v Monye* (1970) 1 All NLR 91; *Aqua Ltd v Ondo State Sport Council* (1988) NWLR (Pt 91) 622; *Mobil Oil v Coker* (1975) ECSR 175; *Orubu v NEC* (1988) 5 NWLR (Pt 94) 323. See Asein *Introduction to Nigerian Legal System* 78, 83.

⁵¹ Zeffert *et al South African Law of Evidence* 717.

According to subsections (3) and (4) of the provision,⁵² a court may resort to books, documents or references as aids for the purpose of taking judicial notice and may decline to do so until the party alleging the fact (custom) produces such books or document.

Apparently, subsections (3) and (4) recognise the fact that courts may rely on documentary proof in addition to the judicial precedent itself for the purpose of taking judicial notice. It is another layer of evidence intended to ensure that the decision to take judicial notice is rightfully made. Scholarly or other works that document facts or authoritative statements about customary law, especially where those facts have been judicially ascertained and subjected to further anthropological studies, provide more certainty about the authenticity of the alleged custom.

However, as noted above, section 122 is not without problems, especially for living customary law. Subsection (2) employs mandatory language:

[T]he court *shall* take judicial notice of ... all general customs ... held to have the force of law in any court.

The language may appear to take away the discretionary dimension of taking judicial notice as provided for in section 17. The best probable way to reconcile the apparent contradiction between these provisions is to consider section 122 as only requiring that courts take notice of judicial pronouncements on customary law and to apply them only when they have ascertained that those pronouncements remain the law on the subject matter. In other words, in so far as sections 17 and 122 go, and as is typically expected of courts when considering precedent, a court in a customary law matter must not only acknowledge precedent, it must determine whether it remains law and is applicable in the instant case – hence, the provision that courts also consult books, documents and references.

It is this interpretation that preserves the discretion of the court, as, according to section 17, it may take judicial notice but it is not bound to do so. Courts ordinarily ought to take any judicially noticed fact or custom as the settled "law" on the issue but it may be suggested that the *Evidence Act* takes a unique approach to judicial notice. By inference, subsections (3) and (4) of section 122 bequeath the court with the leeway to consider facts that may suggest that the custom has evolved from what was ascertained in a previous case only if they have books or documents to support this. This, it is argued, will greatly hinder the ascertainment of living customary law and has the potential of promoting official customary law because the living norm

⁵² Section 122 of the *Evidence Act*, 2011.

may not have been captured in writing and official versions are often contained in written form. Therefore, where parties have reason to dispute the content of a customary law that has been judicially noticed, they should be given the chance to present evidence to the contrary.

The provision of section 1(2) of the *Law of Evidence Amendment Act* in South Africa already addresses this by stating that "the provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned". A similar provision to this in Nigeria is section 16(1) of the *Evidence Act* which provides that, "A custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed **or** can be proved to exist by evidence".⁵³ The concern is the use of the disjunctive word "or" denoting mutual exclusivity. This positivist centralist position constrains the application of living customary law.

4.2 South Africa

The main legislation regulating ascertaining and applying customary law by courts in South Africa is also the *Law of Evidence Amendment Act*.⁵⁴ This Act does not restrict its application to specific courts but provides that it applies to any court which by implication could include the traditional courts. This is different from the situation in Nigeria. The Act also provides two ways in which customary law can be ascertained by the courts. As in Nigeria, they are by judicial notice and by adducing evidence.

By virtue of section 1(1) of the *Law of Evidence Amendment Act*,

Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty

This provision gives the courts discretion with respect to how judicial notice should be applied because it does not state the detailed circumstances of how it must be done.⁵⁵ Bekker and van der Merwe state that the provision of the *Law of Evidence Amendment Act* did give the court the discretion to

⁵³ Emphasis added.

⁵⁴ *Law of Evidence Amendment Act* 45 of 1988. Other relevant rules include *Rules of the Constitutional Court*, 2003 (GN R1675 in GG 25726 of 31 October 2003) and *Rules of the Supreme Court of Appeal*, 1998 (GN R1523 in GG 19507 of 17 November 1998).

⁵⁵ Bekker and Van der Merwe 2011 *SAPL* 116-117.

apply judicial notice in ascertaining customary law and this has been done based on the "whims and fancies of the whole spectrum of justices".⁵⁶

There are divergent positions regarding whether the Act compels courts to take judicial notice of indigenous laws in its process of ascertainment and application with respect to the choice of law rules that relate to the application of customary law and common law. In *Thibela v Minister van Wet en Orde*,⁵⁷ the Supreme Court of Appeal held that section 1(1) gave courts no discretion in applying customary law where necessary and is mandatorily required to do so when it is applicable with respect to the choice of law rules between applying either customary law or common law. Academics like Kerr⁵⁸ and Bennett⁵⁹ have argued that section 1(1) makes the utilisation of judicial notice mandatory while the application of customary law is not mandatorily required.⁶⁰ In other words, while the court may not be compelled to apply customary law, it was mandated to adopt judicially noticed norms of customary law where they are available when applying customary law.

According to Himonga *et al*,⁶¹ neither the application of customary law nor the utilisation of judicial notice is mandated, as the wording of the provision clearly gives room for the exercise of discretion on the application of customary law and the adoption of judicial notice. However, the court must apply customary law "where it is applicable".⁶²

The Constitution provides in section 211(3) that "courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". This section has been explained in the scope of choice of law rules.⁶³ That is, where it is determined that customary law is applicable and not statutory or common law, then it must be applied to the case.⁶⁴ Bennett explains that the choice of law rules extends to making a choice "between different systems of customary laws". Therefore, based on section 1(1) of the *Law of Evidence Amendment Act*, the courts may utilise judicial notice as an aid to ascertain

⁵⁶ Bekker and Van der Merwe 2011 *SAPL* 127.

⁵⁷ *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (SCA). In this case, issues on customary law were to be determined by the court. The widow claimed that the deceased who was her husband had adopted her son under customary law during his lifetime.

⁵⁸ Kerr 1996 *SALJ* 409.

⁵⁹ Bennett "Conflict of Laws" 17.

⁶⁰ Also mentioned in Himonga *et al African Customary Law* 55.

⁶¹ Himonga *et al African Customary Law* 55.

⁶² Himonga *et al African Customary Law* 58–60.

⁶³ See Bennett 2009 *Am J Comp L* 7, 8.

⁶⁴ Due to the uncertainties in this the SALC recommended that parties should be given the right to make this choice and, in the absence of any choice, it should be left to the discretion of the court (*SALC Project 90* xvi).

the content of the applicable customary law where available. Based on the principles of judicial notice and judicial precedent, judges cannot exercise discretion to refrain from taking judicial notice where the circumstances require that they do.

The *Law of Evidence Amendment Act* is however silent on whether a rule of customary law may only be judicially noticed when it has been ascertained by superior courts. A glimpse into the incidence prior to the enactment of the relevant provision of the *Law of Evidence Amendment Act* sheds more light here. According to Bennett, there was a persistent dilemma with respect to the discretion of the magistrate's court to apply customary law and in what circumstances they could do so under section 54A(1) of the *Magistrate's Courts Act*⁶⁵ which was not definite and had a lacuna.⁶⁶ This provision was consequently repealed in 1988 and replaced by section 1(1) of the *Law of Evidence Amendment Act* seemingly as a solution to the uncertainty.⁶⁷ Seen from this light, it can be deduced that judicial notice is not restricted to the decisions of superior courts.

The use of the phrase "Any court may" in section 1(1) of the *Law of Evidence Amendment Act* may be interpreted to mean that the provision of the Act is applicable to the traditional courts. However, another inference that can also be made from the circumstances surrounding its enactment is that the provision may have been made without ever intending that it should apply to traditional courts (ie the provision empowering courts to take judicial notice) since it merely sought to address a dilemma faced by the magistrate's courts.⁶⁸

Another legislation that regulates judicial notice is the *Civil Proceedings Evidence Act*⁶⁹ which can also be said to apply to all laws of which customary law is one since it does not specifically exclude it. Section 5(1) of the Act provides that:

Judicial notice shall be taken of any law or government notice or of any other matter which has been published in the Gazette.⁷⁰

⁶⁵ *Magistrate's Courts Act* 32 of 1944. The *Magistrates Courts – Rules of Court Amendment Rules*, 2004 (GN R880 in GG 26601 of 23 July of 2004) regulates its proceedings.

⁶⁶ Bennett *Sourcebook of African Customary Law* 18, 119.

⁶⁷ Bennett *Sourcebook of African Customary Law* 18, 119.

⁶⁸ It may be necessary that this provision is amended to state clearly the exclusion of the courts of chiefs and headmen from its application. See the *Chiefs' and Headmen's Courts Rules*, 1967 (GN R2028 in GG 1929 of 29 December 1967) that provides for the application of customary rules in its adjudication.

⁶⁹ *Civil Proceedings Evidence Act* 25 of 1965.

⁷⁰ Section 5(2) of the *Civil Proceedings Evidence Act* 25 of 1965 provides that "A copy of the Gazette, or a copy of such law, notice or other matter purporting to be printed

It appears from the use of the disjunctive word "or" that it gives the court a choice between official and living customary law where they differ without giving priority to the official. However, it may be argued that the constitutional subjection of customary law to legislation states otherwise.

Citing the cases of *Ex Parte Minister of Native Affairs in re Yako v Beyi*⁷¹ and *Morake v Dubedube*,⁷² which were decided prior to the enactment of the current amendment to the *Law of Evidence Amendment Act*, O'Dowd explained that traditional courts can take judicial notice of native law and custom.⁷³ However, should superior courts take judicial notice of customary laws that have been recognised by the traditional courts? Would the superior courts be justified in taking judicial notice of decisions of the traditional courts on the ground that the latter are regarded as more versed in customary norms, even though they are subordinate to the superior courts? Further, should traditional courts be bound to take judicial notice of legislated customary laws?

Neither section 1 of the *Law of Evidence Amendment Act* nor section 5(1) of the *Civil Proceedings Evidence Act* (the latter applying to superior courts only) differentiate between a superior and inferior court on the matter of which court may take judicial notice of a decision of another on a question of customary law. This would suggest that other courts may take judicial notice of customary law ascertained by traditional courts. This may indeed be beneficial to the development of customary law. Other courts would have the benefit of taking judicial notice of customary norms that are more likely to have undergone a more accurate process of ascertainment by persons who are custodians of the norms or to whom customary law is a lived reality. This, however, is subject to the limitations of how the flexibility of customary law is applied contextually. And since what the Constitution recognises is living customary law,⁷⁴ to require traditional courts to apply legislated customary law would stymie the evolving nature of the law and affect the legitimacy of the court.

The *Law of Evidence Amendment Act* provides that judicial notice of customary law can be taken "in so far as such law can be ascertained readily

under the superintendence or authority of the Government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be."

⁷¹ *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 SA 388 (A). In this case, with respect to the commissioner's court is "bound by earlier judgments of the Native Appeal Court", Schreiner states that "[T]he rule of *stare decisis* should in general be observed". See Olivier 1989 *SAPL* 176.

⁷² *Morake v Dubedube* 1928 TPD 625.

⁷³ O'Dowd *Law of Evidence* 104. See also *May South African Cases and Statutes on Evidence* 117 which also has several cases on this point.

⁷⁴ *Mabena v Letsoalo* 1998 2 SA 1068 (T).

and with sufficient certainty". Though "customary law" as used here should refer to living customary law, official versions appear to be included as well, having regard to section 5(1) of the *Civil Proceedings Evidence Act*. A number of points ensue from this. First, legislated customary law would be judicially noticed because it can be readily made available such as the *Reform of Customary Law of Succession and Regulation of Related Matters Act*.⁷⁵ The challenge here is that the content of such customary law, where it has been reduced to written form (be they texts, judicial precedent, legislation and other documentary sources like reports of commission, anthropological recordings etc) may differ from the actual normative practice of the community. The differences may occur because the recordings were made in error or the customary law, though correctly captured at the time it was recorded, may have evolved over time or does not agree with the norms sought to be ascertained of a particular community.

Secondly, having regard to section 1(1) of the *Law of Evidence Amendment Act*, courts may rely on other evidence besides judicial pronouncements for the purpose of taking judicial notice of a customary law, as long as that evidence "readily" establishes the customary law and "with sufficient certainty". This may not necessarily be documentary proof but may include oral evidence⁷⁶ which gives the courts the potential of ascertaining and applying living customary law despite the tendency to rely on written materials. Zeffertt *et al* explained that indigenous law is "capable of being readily ascertained with sufficient certainty" only if the "courts have access to authoritative sources".⁷⁷ He referred to a few cases which included *Harnischfeger Corporation v Appleatory*⁷⁸ where the Supreme Court held that materials on a particular foreign law were "neither readily accessible nor ascertainable with such certainty" because the court's library as well as the library of a nearby university were deficient on them. Even though his reference is with respect to foreign law, the same provision applies to customary law. In *Hlophe v Mahlalela*⁷⁹ the court could not ascertain the Swazi law and custom pertaining to custody of minor children after the death of the mother whose *lobola* was yet to be fully paid even after checking five books.

The courts may augment scarce authorities with facts presented in evidence. In *Mabena v Letsoalo*,⁸⁰ also decided in the same year, the court lamented a dearth of authorities on the customary rule put before it that the

⁷⁵ *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

⁷⁶ Himonga *et al African Customary Law* 56.

⁷⁷ Zeffertt *et al South African Law of Evidence* 312.

⁷⁸ *Harnischfeger Corporation v Appleatory* 1993 4 SA 479 (W).

⁷⁹ *Hlophe v Mahlalela* 1998 1 SA 449 (T).

⁸⁰ *Mabena v Letsoalo* 1998 2 SA 1068 (T).

plaintiff and the mother of the bride can negotiate *lobola*. It, however, relied on facts put before it under section 1(2) of the *Law of Evidence Amendment Act* which confirmed the few documents presented to it.

Relying on judicial notice dispenses with the need to lead evidence to prove customary law.⁸¹ This is because the courts would regard the customary law as an established fact.⁸² However, relying on such recorded law forecloses the ascertainment and application of living customary law by courts. This paper argues that an approach that is more amenable to living customary law would be for courts to utilise credible evidence of a customary law to buttress what the court has judicially noticed, or to disprove the credibility of what may have been judicially noticed.

According to Zeffertt *et al*, the practice of judicial notice in South Africa lacks a clear-cut distinction between:

[A] judicially noticed fact (which at common law has the effect of being conclusively proved) and a fact that has been rebuttably presumed (that is which has been sufficiently proved).⁸³

The situation is similar in Nigeria.

A good example is the case of "sufficient certainty" which gives opportunity for living customary law to be ascertained and applied by the court as was done in *Mayelane v Ngwenyama*⁸⁴ where the Constitutional Court could have adopted the evidence given at the court of first instance on the content of customary law requiring the consent of the first wife. No doubt the evidence before the court would be sufficient to get a verdict in favour of the applicant. However, the Constitutional Court's position that such "mere assertions", the person relying on it and her witness were not sufficient to establish a customary rule especially since the outcome would invariably apply to members of the broader community,⁸⁵ supports the view that judicial notice based on such assertions is not conclusive proof of a position and must be applied cautiously by the courts.

This paper argues that different evidentiary value should attach to each. Where parties to a suit do not dispute the contents of the applicable customary law even though they must still lead credible evidence to show that it does not represent the norms of the community, there should be a rebuttable presumption that that customary law is definitive on the matter. This is because no evidence was led to conclusively prove the norm. Parties

⁸¹ O'Dowd *Law of Evidence* 103.

⁸² Zeffertt *et al South African Law of Evidence* 715.

⁸³ Zeffertt *et al South African Law of Evidence* 716.

⁸⁴ *Mayelane v Ngwenyama* 2013 4 SA 415 (CC).

⁸⁵ *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 47.

in subsequent cases should be given the opportunity to rebut the norm by presenting contrary evidence.

It should, however, be noted that where a customary norm has been conclusively proved, it is different from admitted facts which need not be proved under the applicable evidence law. In a situation where parties in a subsequent case are not in dispute with a customary norm that had been conclusively proved in an earlier judgment, the judgment in the subsequent case affirming the conclusively proved customary norm should not be treated as a situation of admitted facts. The implication for such admitted facts is that they are not binding on subsequent cases on similar subject matter involving other parties who dispute their veracity and therefore should not qualify as judicially noticed facts.

The rule of *stare decisis* creates occasions where lower courts are compelled to apply wrongly ascertained customary law.⁸⁶ The common law position on judicial notice is that if judicial notice is taken of a fact as an outcome of an inquiry, no issues will be raised again concerning the fact.⁸⁷ However, it is a difficult proposition to apply *stare decisis* to customary law. Where judicial notice is utilised to preclude the presentation of further evidence to disprove a customary law that has been judicially noticed, it may hinder the ascertainment and application of living customary law by the courts, especially given its flexible nature and contextual application. Judicial notice may have its advantages, offering a less cumbersome means of proof, but it need not be sacrosanct when it comes to customary law. A rigid application results in a less credible process for ascertaining living customary law by the courts.

Therefore, where a party has reason to dispute the content of a customary law that has been judicially noticed, he or she should be given the chance to present evidence to the contrary. The provision of section 1(2) of the *Law of Evidence Amendment Act* already addresses this by stating that "the provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned". The disjunctive word "or" used in section 1(a) of the *Evidence Act* notwithstanding, also covers this if the party who puts forth the evidence contends that judicial notice cannot be applied for reasons that it does not correspond with the customary norms of the particular community.

This paper therefore recommends that what is sought to be judicially noticed should first be affirmed by the subject community. This ensures that a

⁸⁶ Kludze "Evolution of the Different Regimes of Customary Law" 99.

⁸⁷ Zeffert *et al South African Law of Evidence* 717.

customary norm derives validity from the community and not from state institutions. It ensures that living law is taken into consideration and that however it is developed, it will be practically relevant to the community. Hence a middle ground will be established between establishing the fact of legal plurality by providing a conducive legal environment for the survival of living customary law and amid the restrictions of positivism and legal centralism.

In this regard, the provisions of the old *Evidence Act* of Nigeria offer a better way of proving customary law through judicial notice. It required a degree of proof that justifies the use of judicial notice and confines such use to laid down rules and principles. This to an extent is replicated in South Africa.

5 Conclusion

While the *Law of Evidence Amendment Act* in South Africa and the *Evidence Act* in Nigeria provide for the utilisation of judicial notice as a means of proving customary law, it must not be done at the expense of ascertaining and applying living customary law. The utilisation of judicial notice may impede this in certain circumstances. The current provision of the Nigerian *Evidence Act* is broad and gives room for wide discretion by the judge in ascertaining and applying customary law to cases. However, not providing standards and the circumstances under which the court may take judicial notice of customary law has an implication. It leaves a wide field which can be explored by the judge against ascertaining and applying living customary law. On the other hand, also considering the wording of the provisions, though the courts are bound to adopt judicially noticed facts, judges can exercise liberty to deviate from these facts where credible evidence is led to the contrary. This additional evidence may aid the ascertainment and application of living customary law. The law in South Africa is more concise but the provisions of section 5(1) of the *Civil Proceedings Evidence Act* and section 1(1) of the *Law of Evidence Amendment Act* also create a challenge with respect to judicial notice of legislated customary law over living customary law.

An approach that is more amenable to living customary law would be for courts to utilise credible evidence of a customary rule to confirm what the court has judicially noticed or to disprove the credibility of what may have been judicially noticed. Hence, there should be a clear distinction between judicially noticed facts that are sufficiently proved and those reputedly presumed. While for the latter, credible evidence can be led by the parties on the applicable living customary law to rebut the presumption, such credible evidence should also not be foreclosed for the former where necessary. Hence, the intriguing interface between positivist rules of

evidence and procedure, and, the essence of legal pluralism will be enhanced to not restrict entirely the definition of customary law to positivist rules. While positivist rules and procedure regulate how customary law can be ascertained and applied by the courts, its application must, however, be limited to the point where it threatens the essence of customary law.

Bibliography

Literature

Adangor 2015 *JLPG*

Adangor Z "What is Innovative in the Evidence Act, 2011?" 2015 *JLPG* 34-48

Asein *Introduction to Nigerian Legal System*

Asein JO *Introduction to Nigerian Legal System* (Ababa Press Lagos 2005)

Badejogbin 2014/2015 *SADCLJ*

Badejogbin RE "Interplay of the Customary Law of Testacy and Statutory Regulation of Intestacy with respect to the Transfer of Customary Law Rights in Land in South Africa" 2014/2015 *SADCLJ* 10-25

Bekker and Van der Merwe_2011 *SAPL*

Bekker JC and Van der Merwe IA "Proof and Ascertainment of the Customary Law" 2011 *SAPL* 115-127

Bennett *Application of Customary Law*

Bennett TW *The Application of Customary Law in Southern Africa* (Juta Cape Town 1985)

Bennett *Sourcebook of African Customary Law*

Bennett TW *A Sourcebook of African Customary Law for Southern Africa* (Juta Cape Town 1991)

Bennett "Conflict of Laws"

Bennett TW "The Conflict of Laws" in Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* (LexisNexis Durban 2006) 15-53

Bennett 2009 *Am J Comp L*

Bennett TW "Re-introducing African Customary Law to the South African Legal System" 2009 *Am J Comp L* 1-32

Berat 1991 *Fordham Int'l LJ*

Berat L "Customary Law in a New South Africa: A Proposal" 1991 *Fordham Int'l LJ* 92-128

Black and Nolan *Black's Law Dictionary*

Black HC and Nolan JR *Black's Law Dictionary* 6th ed (West St Paul, MN 1990)

Bohannan 2009 *Am Anthropol*

Bohannan P "The Differing Realms of the Law" 2009 *Am Anthropol* 33-42

Griffiths 1986 *J Legal Plur*

Griffiths J "What is Legal Pluralism?" 1986 *J Legal Plur* 1-55

Himonga "Future of Living Customary Law"

Himonga CN "The Future of Living Customary Law in African Legal Systems in the Twenty-first Century and Beyond, with Special Reference to South Africa" in Fenrich J, Galizzi P and Higgins TE (eds) *The Future of African Customary Law* (Cambridge University Press Cambridge 2011) 31-57

Himonga *et al African Customary Law*

Himonga CN *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Oxford University Press Cape Town 2014)

Kerr 1996 *SALJ*

Kerr AJ "The Choice of and the Application of Customary Law" 1996 *SALJ* 408-411

Kludze "Evolution of the Different Regimes of Customary Law"

Kludze AKP "Evolution of the Different Regimes of Customary Law in Ghana within the Framework of the Principle of *Stare Decisis*" in Allott AN and Woodman GR (eds) *People's Law and State Law: The Bellagio Papers* (Foris Dordrecht 1985) 97-104

Koyana, Bekker and Mqoke "Traditional Authority Courts"

Koyana DS, Bekker JC and Mqoke RB "Traditional Authority Courts" in Rautenbach C, Bekker JC and Goolam NMI (eds) *Introduction to Legal Pluralism* 3rd ed (LexisNexis Butterworths 2010) 171-186

Lacey *Life of HLA Hart*

Lacey NA *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press New York 2004)

Lacey "Judicial Discretion and Human Rights"

Lacey W "Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere" 2004 *Melb J Int'l L* 108-132

Malinowski *Crime and Custom*

Malinowski B *Crime and Custom in Savage Society* (Steven Austin Hertford 1926)

May *South African Cases and Statutes on Evidence*

May HJ *South African Cases and Statutes on Evidence* (Juta Cape Town 1962)

Moore 1969 *BRA*

Moore SF "Law and Anthropology" 1969 *BRA* 252-300

Moore *Law as Process*

Moore SF *Law as Process: An Anthropological Approach* 2nd ed (James Currey Oxford 2000)

O'Dowd *Law of Evidence*

O'Dowd AP *The Law of Evidence in South Africa* (Juta Cape Town 1963)

Obilade *Nigerian Legal System*

Obilade AO *The Nigerian Legal System* (Sweet & Maxwell London 1979)

Olivier 1989 *SAPL*

Olivier N "The Application of Customary Law in South African Courts: Some Problems and the Future" 1989 *SAPL* 171-185

Rautenbach 2010 *J Legal Plur*

Rautenbach C "Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law" 2010 *J Legal Plur* 143-177

SALC *Project 90*

South African Law Commission *Project 90: The Harmonisation of the Common Law and the Indigenous Law - Report on Conflicts of Law* (SALC Pretoria 1999)

Sezgin 2004 *J Legal Plur*

Sezgin Y "Theorizing Formal Pluralism: Quantification of Legal Pluralism for Spatio-temporal Analysis" 2004 *J Legal Plur* 101-118

Van Niekerk 2012 *SUBB Jurisprudentia*

Van Niekerk GJ "Reflections on the Interplay of African Customary Law and State Law in South Africa" 2012 *SUBB Jurisprudentia* 5-20

Zeffert et al South African Law of Evidence

Zeffert DT *et al The South African Law of Evidence* (LexisNexis Butterworths Durban 2003)

Case law

Nigeria

Alake v Pratt (1955) 15 WACA 20

Anekwe v Nweke (2014) LPELR-22697 (SC)

Angu v Attah [1916] PC Gold Coast 1874-1928 43

Aqua Ltd v Ondo State Sport Council (1988) NWLR (Pt 91) 622

Aragbui of Iragbui-Oba Olabomi v Olabode Oyewinle SC Suit No SC345/2012

Awosanya v Anifowoshe (1959) 4 FSC 94

Chukwuma Ogwe v Inspector General of Police (2015) LPELR-24322 (SC)

Cole v Akinjole (1960) 5 FSC 84

Danjuma Achor v Mahionu Aduku CAA Appeal No CA/A/67/05

Giwa v Erinmilokun (1961) 1 All NLR 294

Johnson v Lawanson (1971) 1 NMLR 380

Kharie Zaidan v Fatima Mohsen (1971) UILR (Pt II) 283

Lewis v Bankole (1908) INLR 81

Maphuye Onkemetse Sophy v Balebetse Maphunye (Bahurutshe Magistrate Court, Lehurutshe) (unreported) case number 06/2013

Maurice Goulin v Aminu (1957) PC Appeal 17 of 1957

Mobil Oil v Coker (1975) ECCLR 175

Ngwo v Monye (1970) 1 All NLR 91

Nwaigwe v Okere (unreported) case number SC/392/2002

Obusez v Obusez (2007) 2 All NLR 458

Ojiogu v Ojiogu (2010) SC 235/2004
Olabanji v Omokewu (1992) NWLR (Pt 250) 671
Olagbemi v Ajagungbade III (1990) NWLR (Pt 136) 37
Orlu v Gogo-Abite (2010) 8 NWLR (Pt 1196) 307
Orubu v NEC (1988) 5 NWLR (Pt 94) 323
Oyewunmi v Ogunesan (1990) 3 NWLR (Pt 137) 182
Romaine v Romaine (1992) 4 NWLR (Pt 238) 650
Shaba Ndadile v Etsu Nupe case number CA/A/178/07
Temile v Awani (Supreme Court) SC/79/96
Ukeje v Ukeje case number SC/224/04
Uwaifo v Uwaifo (2013) LPELR-20389 (SC)

South Africa

Alexkor Ltd v Richtersveld Community 2004 5 SA 460 (CC)
Bapedi Marota Mamone v The Commission of Traditional Leadership Disputes and Claims 2014 ZASCA 30 (28 March 2014)
Bhe v Khayelitsha Magistrate 2005 1 SA 580 (CC)
Certification of the Constitution of the Republic of South Africa 1996 1996 4 SA 744 (CC)
Ex parte Minister of Native Affairs: In re Yako v Beyi 1948 1 SA 388 (A)
Gumede (born Shange) v President of the Republic of South Africa 2009 3 SA 152 (CC)
Harnischfeger Corporation v Appleatory 1993 4 SA 479 (W)
Hlophe v Mahlalela 1998 1 SA 449 (T)
Mabena v Letsoalo 1998 2 SA 1068 (T)
Mayelane v Ngwenyama 2013 4 SA 415 (CC)

Morake v Dubedube 1928 TPD 625

Pilane v Pilane 2013 4 BCLR 431 (CC)

Shilubana v Nwamitwa 2009 2 SA 66 (CC)

Thibela v Minister van Wet en Orde 1995 3 SA 147 (SCA)

Legislation

Nigeria

Constitution of the Federal Republic of Nigeria, 1999

Evidence Act 2004

Evidence Act 2011

Federal Capital Territory Customary Court Act 8 of 2007

Wills Law Bendel State 172, *Laws of Bendel State*, 1976

Wills Law Kaduna State 163, *Laws of Kaduna State*, 1991

Wills Law Lagos State W2, *Laws of Lagos State*, 2004

South Africa

Civil Proceedings Evidence Act 25 of 1965

Constitution of the Republic of South Africa, 1996

Law of Evidence Amendment Act 45 of 1988

Magistrate's Courts Act 32 of 1944

Recognition of Customary Marriages Act 120 of 1998

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

Government publications

Nigeria

Court of Appeal Rules 17 of 2016 / *Court of Appeal Act* 7 of 2016

Customary Court (Appeal) Rules, Federal Capital Territory of Abuja, 1996

Customary Court (Civil Procedure) Rules, Federal Capital Territory of Abuja, 2007

Supreme Court (Civil Procedure) Rules, 2005

South Africa

Chiefs' and Headmen's Courts Rules 1967 (GN R2028 in GG 1929 of 29 December 1967)

Magistrates Courts – Rules of Court Amendment Rules 2004 (GN R880 in GG 26601 of 23 July of 2004)

Rules of the Constitutional Court 2003 (GN R1675 in GG 25726 of 31 October 2003)

Rules of the Supreme Court of Appeal 1998 (GN R1523 in GG 19507 of 17 November 1998)

Internet sources

Himma Date Unknown <https://www.iep.utm.edu/legalpos/>
 Himma KE Date Unknown *Legal Positivism*
<https://www.iep.utm.edu/legalpos/> accessed 9 March 2015

Sweet Date Unknown <https://www.iep.utm.edu/bentham>
 Sweet W Date Unknown *Jeremy Bentham (1748–1832)*
<https://www.iep.utm.edu/bentham/> accessed 9 March 2015

List of Abbreviations

Am Anthropol	American Anthropologist
Am J Comp L	American Journal of Comparative Law
BRA	Biennial Review of Anthropology
Fordham Int'l LJ	Fordham International Law Journal
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
JLPG	Journal of Law, Policy and Globalization
Melb J Int'l L	Melbourne Journal of International Law
SADCLJ	Southern African Development Community Law Journal
SALC	South African Law Commission
SALJ	South African Law Journal

SAPL Southern African Public Law
SUBB Jurisprudentia Studia Universitatis Babes Bolyai
Jurisprudentia