



Balancing Restorative Justice and Indigenous Traditional Systems in Criminal Justice Jurisprudence

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Abstract

In Criminology and the Criminal Justice System, the relevance of their objectives in jurisprudence has been ongoing debate in existing literature. Criminological schools of thought oscillate from the higher values of one theoretical and doctrinal to the other. Between the deterrence, punishment, and restorative-rehabilitative divide, most literature evaluates their conclusions from the Western jurisprudential and sociological prism. Few analyses have focus on existing criminal justice systems of traditional African societies. For example, the South African Truth Commission (The Truth Commission) represents an indigenous African jurisprudential approach to criminal justice and criminological explorations of sociopolitical malaise in society. The Truth Commission highlighted the tilt towards restorative-rehabilitative essence of how most Africans approach crime and injustice. This article explores the continuing jurisprudential issues from the traditional African customary law system, using Nigeria and its film industry as a case study. The paper critically examines criminal justice and criminology systems based on their essence in the customary laws of traditional society. In conclusion, this article recommends an incorporation of the customary law regimes which tilt towards restorative justice in the scale of objectives of criminal justice.

Keywords: Criminal Justice; Nollywood; Customary Law; Nigerian copyright

Abbreviations: OCS: Osu Caste System; SATC: South African Truth Commission; CJS: Criminal Justice System; DCL: Defining Customary Law.

Introduction

African Cinematic themes popularized by Nollywood, the Nigerian film industry have brought most of traditional cultures and customary jurisprudence to the digital space and big screen. African films, which this paper refers to as 'Afrollywood,' the movies from Tanzania, Uganda, Kenya,

Ghana, and South Africa, and derivatives from the Nollywood genre preserve and disseminate most of the traditional criminal justice objectives particularly the restorative-rehabilitative classification. For example, living in Bondage, the Nigerian audiovisual cinematic work that birth the Nollywood era, depicted the African believes in restorative and rehabilitative justice impelled through the powers of a higher beings, customary laws and myth. Existing scholarly literature on sociology and criminal justice has continued the discussion on the effective objective of criminal justice and law. This article

continues the evolving discussion and will explore the consideration of including the customary and traditional justice systems of developing economies in the larger analysis of this complex subject. The article explores the complex socio-legal dynamics in criminal justice using the audiovisual African content industry, which Nigeria's Nollywood, its indigenous film industry started as an agency and a template for behavioral and policy reconceptualization. The article explores the Nigerian customary law systems as a case study for further analysis [1-4].

Customary law & criminal justice

Defining customary law: Customary law is a body of customs accepted by members of a community as binding laws among them. In preliterate Nigerian society, every community had its own type of customary law. Nigerian customary law consists of ethnic indigenous and Moslem law. Sharia, the Moslem law is not indigenous customary law but introduced into Nigeria as part of the Islamic faith. Sharia is principally in written form and derives its source from the Holy Koran, the practices of the Prophet (Sunna), and analogical deductions accepted by Islamic scholars Hadith [5-7].

Customary law and traditional society's criminal jurisprudence tilt towards a communal-oriented based sanction. Restorative Justice for the African traditional society leans towards appeasement of societal wrong and making whole the community. Ideological, theoretical, and practical tensions continue in criminal justice objectives in traditional societies and contemporary Western cultures. Some of the tension centers on the objectives of punishment and sentencing in traditional society, which defers fundamentally from Western societies. For example, African customary criminal justice emphasizes Retributive and Total Institution concept of punishment.

In South African customary law, Ubuntu, the principles of indigenous equity to restore harmony and reconciliation in society while still exerting sanctions and other forms of punishment has become mainstream legal reality. Although unwritten, indigenous customary law is unwritten but binds members of the community that accepts its authority. For example, among the Yoruba people of Lagos, customary law forbids absolute alienation of land. Customary law mostly prohibits individual land ownership. Family units have proprietary rights over land in traditional society. Contemporary economic realities have changed this customary law, as individuals now own land [8-16]. Customary law is the codification of folklore, customs and norms of traditional

society. Modern Nigerian society has formalized customary laws with its inclusion in statutes and legislation. Nigerian customary law aggregates the values, norms and beliefs of a society into an enforceable code. Traditional society enforced proprietary rights in intangible goods with customary laws. In traditional Nigerian society, norms, cultures and folklore gravitated to the status of enforceable codes, which resulted in sanction when breached. Customary law may be relevant in protecting Nollywood because Nigerians regard customary law as an authentic reflection of societal values. Traditional society ordinarily frowns on misappropriation of property of any form. Therefore, customary law will classify Nollywood films or DVD as property. The likelihood of the public appreciation of Nollywood filmmakers' creative rights may increase within the domain of customary proprietary right jurisprudence [17-25].

The african indigenous traditional legal system-Nigeria: A customary law, which is contrary to the judicial repugnancy test of equity and good conscience, is illegal. The customary law that permitted the killing of twins and which deprived women from holding real property are examples of some of the repugnant customary laws. Anyone that asserts a customary law, which the courts have taken judicial notice of needs no evidence to prove the existence of the law. The Nigerian courts examine the frequency of the practice of a customary law and its acceptance by the community as a litmus test of enforceability. The Nigerian courts also regard the continuous practice of a custom as a communal stamp of legitimacy. The practice of rejecting female children and rejecting children born out of wedlock are customs regarded by Nigerian courts as unconstitutional. Customary laws become adaptable as societal value evolves. The courts eliminated most of the customary laws that were incompatible with modern good conscience. Recently, the Nigerian Supreme Court declared unconstitutional the Igbo custom that deprives women of the right to own property. Customary laws are not uniform among ethnic or tribal groups. For example, a court recognized an Abeokuta custom rather than a Yoruba custom even though Abeokuta is a Yoruba community. A community may be of same tribal stock but may differ in the practice of culture. Each ethnic group may have different customary law based on its peculiar history, custom and geography [26-36].

Enforcement of customary law, sentencing & restorative justice: The breach of customary laws attracted sanctions. These sanctions included fines, ostracism, banishment, and in some cases capital punishment. In early societies, customary law forbade

certain castes of people within same community to inter marry. For example, the Osu caste system in Igbo communities of Eastern Nigeria instituted a class of people that custom regarded as outcast. An Osu had no marital rights nor had legal capacity to own property. The OSU caste system would not pass the constitutional test in contemporary Nigerian society [37-41].

Customary law sets boundaries on the uses of folklores in the same manner copyright do for creative works. An unauthorized use of folklore attracts similar consequences of a copyright infringement. For example, the customary law of the Ijebu Yoruba community in western Nigeria forbids women and foreigners from participating in Oro festival. Oro festival involves rendition of traditional dirge and incantations to commemorate the death of a King. The customary law of the community forbids non-initiates of Oro cult from rendering the dirge or adorning the Oro costume. The Yoruba believe that Oro festival brings prosperity and cleanses the community of evil spirits [42-47].

Process & Methodology: Substantial or Substantive Justice

Most Nigerian communities enforced folklore, norms and customs through existing social and political organization of their community. Traditional societies like the Ogboni, the Ekpe and age groups, which formed part of the political organ gram of traditional society enforced customary laws in traditional society. The enforcement of cultural norms and folklore through various stratification of society achieved socio-economic advancement of the early societies in Nigeria [48-50].

Social stratification and enforcement

The Nigerian traditional community had a system of socio-cultural stratification. The traditional societies enforced customs through tiers of stratification. The division of society along social class was prevalent in traditional Nigerian society. The family was central to regulations of societal cultures and norms. The traditional family consists of a husband, who was the head of family and wife or wives and the children. The head of a family unit had the primary responsibility to enforce laws. The family unit made for easy identification of members for effective communication of communal norms.

At the top of the social strata is the King. The different family units are accountable to their individual family heads. The groups of family heads are accountable to the clan head. The head of the clan in turn was accountable to the King. The ultimate enforcer of all taboos and folklore

through these societal units was the King. Every clansman as responsible for protecting the customs or folklore of the community. The concept of collective responsibility prevailed in customary law enforcement. The present copyright law lacks collective responsibility for infringement of creative works. Requiring an updated copyright regime to use similar socio-political templates would effectively solve the issues of Nollywood film piracy and copyright infringement. The proximity of the enforcement authorities to scenes of infringing activities may quickly nib copyright infringement in the bud [51-60].

Cultural mores in enforcement

The Hausa-Islamic culture embodies moral suasion and guide for social relationships. The moral codes of Islamic culture influence most of Nollywood movies shown in Northern Nigeria. Nollywood films shown in Northern Nigeria must conform to the Islamic mores and values. Cultural sensitivities have become a quasi-public policy, as the National Film and Video Censor Board in its regulatory activities demands cultural sensitivities as one of the criteria in granting permission for the release of a Nollywood film. Most Nollywood films in northern Nigeria adopted the Tatsuniya, a folktale of Hausa culture based on moral uprightness laid out in a narrative template about living an upright lifestyle. The Hausas deliver Tatsuniya in its original form of narration using the native Hausa language. Nollywood Hausa language films in Northern Nigeria are popular and successful in the community because of the Tatsuniya existing narrative template. Auduga is an example of the Hausa films that was a commercial success based upon Tatsuniya style narrative. Auduga is a remake of Dangerous Twins, for the northern Nigerian audience. The producers of Auduga felt that Dangerous Twins was not compliant with the northern Islamic culture. Dangerous Twins was a story of treachery and betrayal between two brothers who were twins. One of them lived in London and married a white English woman. The other twin married a Nigerian with three children and lived in Lagos, Nigeria [61,62].

The London twin entered into an agreement to swap places so that the Lagos twin could impregnate his sister in law that lives in London. The Lagos twin visited London, got his twin brother's wife pregnant and settled in with his sister in law. The London twin also took over the Lagos twin's family. However, things spiraled out of hand when the Lagos twin refused to return to his family in Nigeria. Auduga is without the plot and scenes that may offend the Islamic sensitivities of the northern Nigerian audience. In Auduga, the director cast the London twin as a lapsed Muslim whose mother did not raise him properly

according to Islamic tenets. Auduga highlighted the essentials of Sharia law of inheritance within the Hausa culture of northern Nigeria. Nollywood incorporates these cultural mores of the Nigerian communities into its cinematic themes for creative and economic advantage. Adherents of these cultures are likely to patronize Nollywood films that identify with their beliefs.

Nollywood should use the customary Islamic teaching against misappropriation of property to protect its works against piracy. Islamic Scholars have not agreed that Sharia law enjoins the protection of intangible property. However, Islamic law does not forbid protection of intangible property. Nollywood can use the Sharia jurisprudence for protecting its work from piracy with more Hausa-Islamic cinematographic themes. The beliefs and enforcement system in customary law may dissuade consumers of misappropriated Nollywood films from engaging in the illicit activities. The ground-up approach of customary law enforcement from the family unit to the larger community worked for the traditional society. The Nigerian legal system should extrapolate the effective elements of customary law into copyright enforcement [63-65].

Customary law enforcement in contemporary Africa-Nigeria

Customary laws form part of the Nigerian legal system. The Nigerian copyright laws recognize the value of existing laws thus it reasoned that, "subject to the provisions of this section copyright shall be transmissible by assignment, by testamentary disposition or by operation of law" The Nigerian copyright laws should recognize the application of customary laws in enforcing infringing activities, because it is still a recognized and operational law in Nigeria." The Nigerian courts should recognize the application of customary law in copyright enforcement. However, where customary law contravene outright with the provisions of the Copyright Act, the courts should decide the any conflict of laws issue in favor of the Copyright Act. Customary law could perform a complementary role in Nigerian copyright enforcement.

The reward systems of customary law in restorative justice

A reward system may motivate a creative industry but the reward system alone does not birth a creative industry. In the modern cultural content industries, economic realities of living sustenance demands the proper reward of creators. The majority of Nigerians live on less than \$10 a month income. Most Nigerians suffer in the mist of abundant creative talents because the political and

economic system neglects a large productive sector of its people. The expressions of folklore attracted certain intangible benefits like prestige, titles, communal honor, and communal fame to creators. The traditional Nigerian society rewarded folklore performers with community titles and honorariums. The reward system of traditional society may not have been a deliberate public policy to stimulate innovation or encourage preservation of traditional cultural norms. Folklore indirectly motivated the people to perform various folklore and art works knowing that communal appreciation was a worthy prize in the society.

For example, a hunter who killed a big game had a song made for him. Community praise singers exhort a successful hunter in public functions with oratory poems expounding his accomplishments. The community passed on these songs from one generation to another. The commemoration of a family name in the community for generations had significant value in the traditional society than using monopolistic legal rights for financial reward. The reward system of the traditional and contemporary society is not similar. The reward system in traditional society is mostly for status recognition and not economic benefits. The reward system in intellectual property policy seeks to encourage innovation and incentivize creators. Customary practices and norms rewarded creativity because of the belief in honoring the giver of the talent. Folklore and culture regard rewarding of talent as a form of showing appreciation to the deity that owns the talent. The people's obligation to communal good was a motivating factor for creativity. Customary law system supports the argument that extrinsic values do not necessarily spur creativity because artistic innovation took place in traditional society without foreseeable financial reward.

Customary Criminology and Reforms

Nigerian folklore and culture played a prominent role in the contents of early society's and traditional community's penal justice. The role of folklore in the Nigerian cultural and social space has been significant. The Nigerian film industry has tried to preserve most of customary criminal justice system. Customary law preserved most of the cultural expressions that Nollywood has highlighted in digital screens. For example, Nollywood has continued the moonlight storytelling I heard while growing up in Lagos and Onna, Akwa Ibom state of Nigeria through a broader and wider digital media. Nollywood, the Nigerian film industry interprets the norms, fashion, arts, songs, and customs of the

Nigerian community for adaptability in contemporary society.

Conclusion

Nigerian indigenous communities protected its folklore from misappropriation effectively mostly relying on its forms of criminal justice system, but contemporary society continues to struggle in search of an effective system of protection. Current Nigerian laws have taken steps to recognize customary and cultural forces as a sui generis regime in a limited sense. Such tangential recognition has impacted the restorative objective of the penal sanctions of customary and contemporary on the criminal justice system. Perhaps, current policy and legal approaches should leverage the existing practices of traditional societies for effective outcomes.

References

1. Onah J (2016) The Socio-Semiotics of Filmic Representation in Nollywood and Its Implication for Nigeria's Cultural Diplomacy. *Makurdi J Arts Cult* pp: 9-24.
2. Andrews SS (2019) Reforming Copyright Law for a Developing Africa. *J Copyright Socy USA*.
3. Haynes J (2016) *Nollywood: The Creation of Nigerian Film Genres*. Univer Chicago press books pp: 416.
4. Siegel L (2018) *Criminology Theories, Patterns and Typologies* (13th ed) pp: 640.
5. Obilade A (1991) The Relevance of Customary Law to Modern Nigerian Society in *Towards a Restatement of Nigerian Customary Law*. Yemi, Osinbajo (eds.) pp: 1-7.
6. Obilade A O (1979) *The Nigerian Legal System* Ibadan: Spectrum Books Ltd.
7. Adjin-Tetttey E (2007) Sentencing Aboriginal Offenders: Balancing Offenders' Needs the Interests of Victims and Society and the Decolonization of Aboriginal Peoples. *J Women & Law* 19(1): 179-216.
8. Dickson-Gilmore J, Prairie CL (2007) Will the Circle be Unbroken? Aboriginal Communities. *Restorative Justice and the Challenges of Conflict and Change*. University of Toronto Press, Canada, pp: 320.
9. Lohman D, Frederik A (2012) Sustainable Justice Screening of Conflict Resolution Systems for Sustainability and How Does Restorative Justice Fit into the Picture?. SSRN pp: 21.
10. Whellum P (2018) The Administration of Justice in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands: Front Line in Tensions Between Traditional Aboriginal Culture and the Criminal Law. SSRN pp: 352.
11. Thorburn M (2005) The Impossible Dreams and Modest Reality of Restorative Justice. SSRN pp: 22.
12. Broadhurst RG (2002) Crime and Indigenous People. in Graycar AP, Grabosky (eds), *Handbook of Australian Criminology*, Cambridge University Press: Melbourne 256-280.
13. Bennett T (2011) *Ubuntu: An African Equity*. SSRN pp: 33.
14. Olajide A (1991) The Equity in Nigerian Customary Law in *Towards A Restatement of Nigerian Customary Law*.
15. Amodu Tijani, Secretary V (1921) *The Judicial Committee: His Majesty's Privy Council*.
16. Alade V Aborishade (1960) *Nigeria* pp: 167.
17. Alemika E (1991) Sociology of Nigerian Customary Law System in *Towards a Restatement of Nigerian Customary Law*. Yemi Osinbaj, et al (eds.,) pp: 61.
18. Amegatcher AO (2002) Protection of Folklore by Copyright- A Contradiction in Terms. *UNESDOC* 36(2): 33.
19. Bulletin OA (1979) *The Nigerian Legal System*. NCJRS pp: 326.
20. Odje M (1991) The Repugnancy Doctrine and the Proper Development of Customary Law in Nigeria in *Towards A Restatement of Nigerian Customary Law* 25. Conference publication pp: 454.
21. Angu VA (1916) 1874-1928 Privy Council Decisions 43 (Nigeria).
22. Eshugbayi Eleko (1930) *The Judicial Committee: His Majesty's Privy Council*.
23. Ukeje V (2014) Supreme Court of Nigeria advances women's property. pp: 384.

24. Nnochiri I (2014) Inheritance: How Supreme Court Voids Discrimination against Females in Igboland. Vanguard Newspaper Nigeria.
25. Obilade AO (1979) The Nigerian Legal System by Obilade Akintunde Olusegun. Nigerian Legal System pp: 83.
26. Elias TO (1972) The Nature of African Customary Law. (3rd Ed) Manchester University Press England pp: 330.
27. Adeyemi A (1999) The Place of Customary law in Criminal Justice Administration in Nigeria in Restatement Of Nigerian Customary Law. Yemi Osinbajo et al (eds,) pp: 210-231.
28. Boparai H (1982) The Customary and Statutory Law of marriage in Nigeria. J Comp 530-557.
29. Constitution of Nigeria (1999) 42 (discriminating any Nigerian because of her status of birth, gender, ethnicity, and religious affiliation is prohibited).
30. Lawal A, Performer's Rights under Nigerian Copyright Law: An Appraisal of Rome Convention. SSRN pp: 31.
31. Omofoye T (2015) Traditionalist Hold Oro Festival in Ile-Ife. The Guardian.
32. Smythe H (1958) Social Stratification in Nigeria. 37(2): 167-171.
33. Oloko O (1964) The Impact of Advanced Technology on the Social Structure of Traditional Societies. 16 Nig J Econ & Soc. Stud pp: 23.
34. Ndulo M (2011) African Customary Law, Customs and Women's Rights. 18 Indiana J G L Stud 87(1): -120.
35. Melton A (1995) Indigenous Justice Systems and Tribal Society. Judicature pp: 126.
36. ELIAS T (1972) The Nature of African Customary Law 1. pp: 65.
37. Kabwegyere T (1973) Performance as an Incentive in Traditional Society. pp: 63-68.
38. Falola T (1984) The Political Economy of a Pre-Colonial African States: Ibadan 1830-1900. Health Trust pp: 96-100.
39. Johnson D (2000) Culture and Art in Hausa Video Films in Nigeria Video FILM. Jonath Haynes 40. pp: 200.
41. Krings M (2008) Conversion on Screen: A Glimpse at Popular Islamic Imaginations in Northern Nigeria. Africa Today 54(4): 44-68.
42. Adamu A (2010) Islam, Hausa Culture and Censorship in Northern Video Film in Viewing African Cinema in The Twenty-First Century. Mahir Saul et al (eds,) pp: 63.
43. Adamu A (2013) Transgressing Boundaries: Reinterpreting of Nollywood Films in Muslim Northern Nigeria in Global Nollywood: Transnational Dimensions of An African Video Film Industry. 297-298.
44. Krings M (2008) Conversion on Screen: A Glimpse at Popular Islamic Imagination in Northern Nigeria. JSTOR 54(4): 45-68.
45. Raslan H (2007) Sharia and the Protection of Intellectual Property -The Example Of Egypt. IDEA 47(4): 497.
46. Offiong D (1997) Conflict Resolution among the Ibibio of Nigeria. J Anthropol Res 53: 423-441.
47. Elias T (1962) The Nature of African Customary law. (2nd Ed) Manchester University Press, England 191-207.
48. Bello AA (2008) Succession to Under the Nigerian Laws. SSRN pp: 10.
49. Reuveni E (2013) Culture, Creativity, and Copyright. Ala L Rev pp: 735.
50. Madison M (2009) Beyond Creativity: Copyright law as Knowledge Law. pp: 87.
51. Mberu B (2007) Household Structure and Living Conditions in Nigeria. 69 J Marriage & Fam 513-527.
52. Agbiboa D (2012) Between Corruption and Development: The Political Economy of State Robbery in Nigeria. J Bus Ethics 108(3): 325-345.
53. Alabai A (2007) I am the Hunter who kills the Elephants and Baboons: The Auto Biological Components of the Hunter's Chant. 38 Res Afr Lit 13-23.
54. Hetcher S (2009) Desire without hierarchy: The Behavioral Economics of Copyright Incentives. 48 U Louisville L Rev pp: 817.

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55. Roin B (2014) Intellectual Property versus Prizes: Reframing the Debate. 81 U Chi L Rev pp: 999.
 56. Landes W (1989) An Economic Analysis of Copyright Law. 18 J Legal Stud pp: 325- 363.
 57. Trimble K (2013) Are Copyright Firms Incentive Intermediaries. UCLA Ent L Rev 20(1): 137.
 58. Lunney G (1996) Reexamining Copyright's Incentives- Access Paradigm. Texas A&M Law Scholar pp: 483.
 59. Balganes S (2009) Foreseeability and Copyright Incentives. Harv L Rev pp: 1569.
 60. Diakidoy I and others (1999) Student Teachers' Belief about Creativity. British Edu Res J 25(2): 225-243.
 61. Epiphany A (2013) Restatement of Customary Law of Nigeria. pp: 416.
 62. RaoRane M (2006) Aim Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions. Pac Rim L & POL'Y J pp: 827.
 63. Simon D (2011) Culture, Creativity and Copyright. 29 Cardozo Arts & Ent L J pp: 95.
 64. Hetcher S (2009) Desire without hierarchy: The Behavioral Economics of Copyright Incentives. 48 U. Louisville L Rev pp: 817.
 65. Daniel T (2004) Nollywood Confidential, Part 2: A conversation with Zeb Ejiro, Ajoke Jacobs, Tunde Kelani, and Aquila Njamah. Transition 95(13): 110-128.
 66. Pager S (2013) Cultivating Capacities for Creative Industry Upstarts. Mich St Int'l L Rev 21(3): 548-561.