

THE ROLE OF THE CUSTOMARY COURT IN PROTECTING TRADITIONAL KNOWLEDGE AND CULTURAL INTELLECTUAL PROPERTY IN NIGERIA

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INTRODUCTION

"It is said that custom is a mirror of the culture of the people."²

The customs, rules traditions, ethos and culture which govern the relationship of members of a community are generally regarded as customary law of the people. Traditional knowledge and cultural intellectual property in Nigeria cannot be subsumed under the blankets of the limited popular legislations or the acceptable trending global norms. The peculiarities of the African creative genius cannot be confined or imprisoned by the constraints or considerations of literacy through western education.

Native law and custom is defined as the unrecorded tradition and history of a people. It is not declared or enacted into existence but grows or develops through time. It expresses itself not in a succession of words, but in a course of conduct. It is such conduct that has over time come to be accepted and prevail among a certain community or group of persons as a standard of conduct. It is that practice that by its common adoption and long, unvarying habit has come to have the force of law and has come to be accepted as regulating and controlling the lives and transactions of the community subject to it.³

"Traditional knowledge or indigenous knowledge is a body of knowledge, practices and innovation, often oral and undocumented, developed and shared by a community and passed on from generation to generation. It has the trappings of intellectual property in that the community or section of the community that "owns" or uses the knowledge shrouds it in secrecy or mystic practices to prevent copying. It is distinguishable from intellectual property in that it is not personally owned. It is not for a limited time."⁴

Practices, beliefs and technology in traditional societies that have been regarded as sacred, shrouded in mysticism but passed down from one generation to another. They are classified as traditional knowledge. Traditional African society was characterized by drama sketches often linked to rituals, religious festivities and activities and folklore that was used to build the African character with virtues like loyalty, honesty, industry etc.⁵

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² *BIJA & ORS V. JIME* (2016) LPELR-42973(CA) Citing the famous dictum of Obaseki, JSC, in the case of *Oyewunmi v. Ogunesan* (1990) 3 NWLR (Pt. 137) 182 at 207

³ *OLUGBOJA V. GBADEBO & ORS* (2022) LPELR-57770(CA) Per HABEEB ADEWALE OLUMUYIWA ABIRU, JCA (Pp. 54-55, paras. E-C)

⁴ Bankole Sodipo PhD, *The Oracle, Intellectual Property and Allied Rights, the Knowledge Economy and the Development Agenda*. NIALS Journal of Intellectual Property Vol. 5(2018) ISSN: 2276-8262 page 4.

⁵ Adewa E.A. "Qualities of African Folklore" (1938) 15 *Nigerian Magazine* 210. Beier Ulli "Yoruba Folk Operas" (1954) 1 *Journal of International Library of African Music* 12.

Musical works were used in rituals and festivities, helping inter alia to preserve and record historical events. Dance formed a basis of other performing arts and had strong links to religion. Artistic works including sculptures, drawings, designs on pots, clothes, leather, wood, calabashes, wall and rock painting etc.

Traditional society was ruled by royal decrees made by kings as representatives of gods and taboos that classified certain objects, activities and persons as sacred. Traditional knowledge was recognized and guarded through three main systems of enforcement of laws and norms: the family, age group, clan, King, religion, cults and guilds.⁶

The need to be deliberate about preserving our culture and traditional knowledge while not losing touch with the innately ancestral complexities is clearly a collective responsibility. Through the instrumentality of law, courts have a duty to not only interpret legal principles but to give life and preservation to the intention of laws. Not being limited to legislation, instruments, documents, rules and constitutional provisions, customary law realities are particularly ubiquitous and must be respected and cherished consistently.

MODERNITY/GLOBALIZATION DOES NOT EQUATE VERACITY OR CREDIBILITY.

A careful consideration of Section 84 of the Evidence Act 2011 reveals that the Section is concerned with the manner in which the electronic evidence sought to be relied upon is produced. The Section seeks to ensure the authenticity of the document and the integrity of the procedure used to bring it into being.⁷

With modern information communication technology, anything is possible. Manipulations happen to the extent that it takes more than mere observation with the eyes to ascertain genuineness. Computer records are extremely susceptible to tampering, hiding or destruction, whether deliberate or inadvertent. Images can be hidden in all manner of files even word processing documents and spreadsheets. Indeed, a computer generated documents can be altered without leaving any obvious trace of its alteration. Computer generated documents can also be copied, updated, intercepted or deleted.⁸

“The challenge faced by customary law in a legally pluralistic society as Nigeria is further accentuated by the fact that a clot of people especially a section of the educated elites have little or no regard for customary law. General law develops in a more articulate manner, namely through legislation and judicial pronouncement; whereas the development of customary law is silent, without direction, unrecorded, more or less unconscious and practically unnoticed”⁹

⁶ Oloko Olatunde “The Impact of Advanced Technology on the social structure of Traditional Societies”, (1964) (16)(1) Nigerian Journal of Economic and Social Studies 23.

⁷ See the case of Dickson V. Sylva & Ors (2016) LPELR- 41257 (SC)

⁸ Alaba O-Ajileye, “A guide to Admissibility of Electronic Evidence” Lawlords Publications, Abuja 2016. Page 101

⁹ S.Y. Abubakar “The Role and Development of Customary law in the Nigerian Legal System’ NJI Law Journal (2010) 3 NJILJ 33

Culture, tradition and other realities that are customary to individuals, groups or communities are unique and identifiable through expressions that are often innate. Language, tribe and native peculiarities usually classify cultural intellectual properties. Beyond nomenclatures and local descriptions, the wisdom, creativity and intelligence are often very gorgeous and ubiquitous.

From sound to graphics, peculiar occurrence to usage, modern platforms of expressions do not always enable accurate and precise understanding of cultural details. When a particular traditional knowledge is copied, exported or modified without full grasp of all the rich tentacles, the obvious likelihood is that there is a dimension of loss. Loss of ingenuity, loss of quality, loss of essence and loss of true identity.

Traditional knowledge and cultural intellectual property are intrinsically shared. They are not meant to be individualized or personified. By innate design they are shared and identified by collective ownership. From the definition that captures custom to be a mirror of accepted usage¹⁰, every tribe, dialect, language, tradition and other pedestals of culture are only properly so called when a group of people stand identified with them.

“...A chicken eats corn, drinks water, swallows pebbles, yet she complains of having no teeth. If she had teeth, would she eat gold? Let her ask the cow who has teeth yet eats grass...”¹¹ Ola Rotimi here seeks to bring to fore the need to understand contentment and the great gain that comes with it. I also humbly identify derivatives from here in dimensions of excellence and perfection which traditional knowledge and cultural intellectual property innately enjoys whether or not the codified IP rights regime effectively capture their true essence.

Townpeople, drummers, royal retainers, beads, regalia etc. always have peculiarly detailed cultural designs and purpose. An abuse or approach will reckless abandon would amount to infringement on the customary law right of the people which can be enforced by custodians and/or beneficiaries.

In the parlance of law and evidence, traditional history is a credible means of establishing title and ownership. The need to trace back to origin or roots consistently remains part and parcel of traditional knowledge.

“People find purpose in their history and heritage. A community’s stories and culture are some of the most important anchoring factors in their identity. But, these stories and culture are more important to the indigenous people and local communities for whom an existence without heritage is like being an explorer without a map-lost. This is why sustaining and celebrating cultural heritage is pivotal to ensure the growth and rootedness of every group of people...The preservation, protection and promotion of the traditional knowledge-based innovations and practices of local communities are particularly important for developing

¹⁰ Supreme Court definition

¹¹ Ola Rotimi, *The gods are not to blame*, University Press Plc, Ibadan 1979 Act two Scene one, page 26

countries. The abundance of Traditional Knowledge there and their rich biodiversity plays a critical role in their health care, food security, culture, religion, identity, environment, trade and development.”¹²

STORAGE DEVICES AND HUMANITY AS A MEDIUM

“...The land of the living was not far removed from the domain of the ancestors. There was coming and going between them, especially at festivals and also when an old man died, because an old man was very close to the ancestors. A man’s life from birth to death was a series of transition rites which brought him nearer and nearer to his ancestors...”¹³

Chinua Achebe reflected deeply on the value of culture and traditional knowledge particularly regarding the true value of community.

Under the Igbo native law and custom of Ohafia people in Ohafia Local Government Area of Abia State there is a customary law maxim known as: “nwa gazariri aha nnaya idote aha oluha” it means “a child must answer the father’s name to preserve the family identity/heritage”.

Preserving and protecting this piece of traditional knowledge would ultimately find expression in lifestyle choices, symbols, pendants and other tangible or no-tangible material realities.

Cultural Intellectual Property Rights are designed to protect artisans, craftsmen and craftswomen, entitling them to a form of compensation for their contribution to the survival of cultural heritage by transmitting traditional designs, traditional techniques and traditional cultural expressions from generation to generation.

It is trite law that a testator who is subject to a customary law has his testamentary capacity curtailed by that customary law. The Benin/Bini tradition regarding “igiogbe” being an ancestral home/house is an example of a judicially noticed customary reality.¹⁴ Another example is regarding the custom of Amaekwu Village Unwana; in the Afikpo-North Local Government Area of Ebonyi State of Nigeria where the court¹⁵ held that the Unwana customary law is one of those customary laws that limits a testator's capacity to bequeath his properties.

Intellectual Property Rights, including copyright and trademark exist as part of an international legal framework protecting original work. However, this framework does not apply to Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs): the heritage, skills, practices and creations shaped by traditional culture. The cultural Intellectual

¹² Sinduja Sivarajah, ‘Traditional Knowledge-A cultural Intellectual Property’ Cultural Intellectual Property Rights Initiative. Available online at <https://www.culturalintellectualproperty.com/post/traditional-knowledge-a-cultural-intellectual-property>

¹³ Chinua Achebe, *Things Fall Apart*, Heinemann, London (1958) Page 85

¹⁴ Asaolu & Ors V. Omoregie & Anor. (2020) LPELR -50125 (CA)

¹⁵ OTUU V. AGHA & ORS (2020) LPELR-51941(CA)

Property Rights Initiative proposes a new generation of rights related to TK and TCEs. These rights would provide legal protection against misappropriation and misuse of TK and TCEs for an indefinite period of time and fill a legal gap for indigenous and traditional communities to protect their heritage.

Traditional Knowledge (TK) includes knowledge, know-how, skills, innovations and practices that are passed between generations, in a traditional context. The living body of knowledge is developed and sustained within a community and often forms part of the cultural or spiritual identity of the group. The group often indigenous or local communities, acts as the guardian or custodian of the body of knowledge.¹⁶

“The World Intellectual Property Organization defined Traditional Cultural Expressions also called Expressions of Folklores as follows: the form in which traditional culture is expressed forming part of the identity and heritage of a traditional or indigenous local community and passed down from generation to generation which are integral to the cultural and social identities of indigenous and local communities, embodying the know-how and skills and transmit core values and beliefs. The definition was broken down to include dance, music, designs, music, names, signs and symbols, performances, ceremonies, architectural forms, handcrafts and narratives, folklores, dressings, arts and artefacts, language, native songs and many other artistic and cultural expressions which belong to and are indigenous to a particular community forming part of their identity or heritage having been passed down and transmitted from generation to generation.”¹⁷

TRADITION AND CREDIBILITY IN THE OPINION OF EXPERTS

The Evidence Act 2011 provides;
Section 68

(1) “When the court has to form an opinion upon a point of foreign law, customary law or custom, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are admissible.

(2) Persons so specially skilled as mentioned in subsection (1) of this section are called experts.”

Section 70¹⁸ provides; “In deciding questions of customary law and custom, the opinions of traditional rulers, chiefs or other persons having special knowledge of the customary

¹⁶ Traditional Arts & Ethnology Centre: Preserving cultural Diversity in Laos, *What Do you need to Know about Cultural Intellectual Property* Available online at <https://www.taechlaos.org> <accessed 6/12/2022 at 2:42PM>

¹⁷ Olowo O. Ajiboye, ‘Protecting Traditional Cultural Expressions as Intellectual Property Assets’ *AJUCCON Law Journal*, Vol 1. Maiden Edition 2022 page

¹⁸ Ibid. Evidence Act 2011

law and custom and any book or manuscript recognized as legal authority by people indigenous to the locality in which such law or custom applies, are admissible.”

The law is clear that “A customary law shall be deemed to be binding upon a person where that person-

(a) is an indigene of a place in which the customary law is in force;

(b) being in a place in which the customary law is in force, does an act in violation of the customary law;...

(d) agrees or is deemed to have agreed to be bound by the customary law.”¹⁹

The Ebira culture, particularly of Okene in Kogi State has the traditional slit drum “Agidibo” which has a popular sound that pertains to evidence, equity and justice. The sound – ‘papapadududu, papapadududu, which has been ascribed to the Ebira customary law maxim; “Akka ka virei’za, Akka ka vireche”. A direct transliteration gives; “They say, they said, could be true, they say, they said, could be false”. An effective translation of that customary law principle is directly connected to the law of evidence and the admissibility of hearsay together with the weight to be attached to evidence in general.

Interestingly, in the Yoruba bata drum/dance tradition, it is customary for the drummer to periodically speak to the dancer, the community and the rulers through sound using bata. “Opeyemi, opeyemi, pasudaisu n jona, pasuda”. Again, a direct transliteration would be “Opeyemi, flip the yam, it’s getting burnt on one side, flip the yam”. While this could be a direct word to a dancer to literally change from one dance sequence to another, it could also be used to caution kings/leaders when they err or to warn the community to do certain things differently.

The highly respected custodians of our various cultures must do more in using the platforms available locally and globally to deliberately propagate & preserve our cherished cultural values. It is no “tongue-in-cheek” talk to say that there is the pressing need for cultural realities in Nigeria to be made to find deliberate expressions in international and/or technological pedestals.

Very important to the question of jurisdiction is the case of **EKWEME THOMAS & ANOR VS. AHMADU ABUBAKAR (UNREPORTED) FCT CCA 23/10/2013 APPEAL NO FCT/CCA/CVA/2010 P. 13 PARA. 2**, where the Federal Capital Territory Customary Court of Appeal held that the customary court has unlimited jurisdiction to hear and determine **matters that raise question of customary law**

In 2021, the Federal Capital Territory Customary Court evaluated the entirety of the evidence presented in a case²⁰ where the argument of Bata’s originality and the veracity of intricacies over Salsa was presented. The court affirmed the identification of the 5 members of the family of Bata namely;

¹⁹ Section 18(1) of the Federal Capital Territory Customary Court Act 2007

²⁰ Incorporated Trustees of Intellectual Property Lawyers Association V. Black Bones Theatre Kompany (Unreported) 16/2/2021 FCT Customary Court, Pyakasa, Suit No. FCT/CC/PYS/CM/01/2021 pp. 13-14

1. "iya-ilu Baba" meaning "the lead talking drum"
2. "ejin bata" which means "to mimick the lead drum"
3. "omele abo" which is feminine in nature as the sound is not so hard
4. "omele meta" this is smaller than the others. They are three drums tied together. Two out of the three have black creamy substance on their surface called "ida" to distinguish their tone from that of the third. "Omele abo" is first, "omele kudi" is second, the third is "omele ako" which produces the sound of thunder "sasa sasa"
5. The fifth of the 5 members of the family of Bata is "Konkolo" which is traditionally given to little children to practice Bata with. It produces the "konkolo" sound.

The court also found that indeed Salsa was drawn out like a limb from Bata.

The court, while evaluating the evidence held; "PW1 was specific in identifying the instructional nature of the song; "Alaafin sofin ijo kin jo(2x), ka bere, ka naro ka kaya soke, Alaafin sofin ijo kin jo (2x)" which means; "Alaafin has given an order for me to dance, and dance I must; going down, coming up and chest up, Alaafin has given an order for me to dance and dance I must." It is clear that the drum beat, meaning and dance instructions go to the root of Bata. PW3 also gave credible evidence as to how that the celebration of a fraction of Bata seen in Salsa though now popular does not erase the potency of the true Bata original excellence and peculiarities. In response to the question whether the drums being used in Salsa do communicate in the same manner as those used in Bata, PW1 stated that Salsa is like a finger being taken off from the Bata and so it cannot be as effective and authentic..."

The following orders were made;

1. Bata dance is a medium for the communication of the culture, beliefs, religion and history of the Yoruba People of Southwest Nigeria.
2. Bata dance and its attendant ceremonies are Traditional Cultural Expressions of the Yoruba people of Southwest Nigeria.
3. The movements, choreography, instruments, performances and costume of Bata dance of the Yoruba People of Southwest Nigeria are the root source of Salsa.
4. Bata dance and its attendant ceremonies are the intellectual property and ancient heritage of the Yoruba people of Southwest Nigeria.

Intellectual property rights are not new to traditional African societies. Logical, cerebral, creative dimensions of tribal certainties have always been part of us. Tradition and Culture have always protected peculiar rights, interests and properties. Customary law rules, practices and maxims help to protect the rights of members of our communities and by extension persons or groups who subscribe to or use our traditional knowledge/products. These structures of fortification are still applicable because of their efficacy and potent elements.

Globalization has led to the push for the proliferation of traditional knowledge and cultural intellectual property beyond the localities. The need to consciously preserve, protect and

sustain the identity of these expressions should also be vigorously pursued so as not to lose grip of essentials in the pursuit of global acceptance.

The argument in favour of using prevailing intellectual property rules and sui generis solutions is not water-tight. This is because customary law is uniquely dynamic and a regimented legal regime for protection of traditional properties cannot effectively bring justice to all parties/interests concerned.

The use of native law and customary principles which communities respect will continue to remain an effective means with which particular traditional cultural properties must be protected. Indigenous customary laws ensure effective protection of the traditional cultural expressions of indigenous peoples.

It will be absolutely fallacious to assume or argue that the existing intellectual property regimes are the only obtainable dimension of protection. It is repugnant and even constitutes an impediment to the drive toward exploring already available customary law solutions that are highly effective.

Intellectual property rights that are known with western education and culture cannot completely 'cover the field' for the needed protection of traditional cultural expressions because conflict of laws and discrepancies in core values would almost always lead to solutions that are inept.

Without the shadow of a doubt, indigenous customary law remains valid and good law. Customary courts have the substantive jurisdictional powers to protect traditional knowledge and cultural intellectual property. The identification/classification of a thing/reality/property with the nomenclature "intellectual property" is not exactly what makes it so. Communities have a right and a duty to protect their cherished traditional knowledge and cultural expressions.

Native intelligence is a combination of things like budding cleverness, learning ability, structure combination, productivity and potential efficiency of individual behaviors, and intellectual perceptive proficiencies. These are vital, theoretical, and intrinsic aspects of intellectual property.

Whereas intelligence in Euro-western cultures more often remain classified on the pedestal of streamlined literacy and academics, but, there is more. There is so much more intelligence based on an understanding of nature, oral traditions, storytelling, art, and community rituals. Euro-western civilizations consistently seek to define patterns and regulate realities. The concept of natural justice equity and good conscience, for example, when juxtaposed with global notions of morality and acceptable pursuit of happiness, wealth and recognition on a globally trending scale will definitely run various arguments afloat. The quest to have all culture and tradition fit western philosophies and models of intelligence will diminish the content and value in those traditional realities. Traditional Knowledge and culture must be allowed to thrive in their unique and peculiar ways. It starts here and now. We must begin

to consciously preserve traditional knowledge and culture. It is imperative that legal practitioners, interested parties, stakeholders and concerned community representatives approach customary courts in all of the pedestals available.

Examples are;

- Native intelligence litigation
- Traditional knowledge restatement proceedings
- Declaratory reliefs
- Injunctions to protect and preserve traditional knowledge/culture
- Interpretation of customs and traditions
- Title/Ownership claims to curb culture appropriation

CONCLUSION

What you own is not always confined to what others know that you own.

How the local communities survived and thrived cannot be effectively understood by the foreigner on a voyage whose discovery places the identity of a people on the global map. It is good to have global recognition and relevance but the underlying need to respect and preserve the identity and ownership of rights must not be underestimated neither should it be left in the hands of outsiders.

Creativity is part of human nature and the dynamics of culture will always remain desirable. Some traditional knowledge and cultural intellectual properties are rightly identified by the secrecy with which they are shrouded. It is time to be deliberate about telling our stories, owning our rights, preserving our peculiarities and contributing our own dimensions to the globalization agenda.

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