SOCIO-LEGAL BARRIERS TO THE EXPANSION OF LEGAL AID IN NIGERIA: INITIATING LEGAL REFORM THROUGH THE CUSTOMARY COURT SYSTEM

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Abstract

The core of this study is directed towards an analysis of the laws, rules and guidelines that embody legal aid provision in present day Nigeria. This study will employ a socio-legal approach to investigate the root causes of Nigeria's limited legal aid scheme. It will also focus on the relationship between law and society and will employ appropriate empirical research methods for an in-depth understanding of significant causal factors that influence legal aid provision in Nigeria. These factors will include an examination of Nigerian legal institutions, legal processes, and legal behaviour,[1] particularly how legal institutions and legal processes affect individuals and how they are perceived by ordinary citizens and potential recipients of legal aid. This research considers the potential for other sources of law, and other legal institutions, such as customary legal systems, to be used as an additional, credible way to access, develop and expand legal aid provision in Nigeria.

This study adopts two qualitative techniques: semi-structured telephone interviews and self-administered questionnaires, which were completed and returned via email. The request for respondents was launched on social media. In total, fifteen respondents partook in the study: twelve via self-administered questionnaires and three via telephone interviews. The inquiry was focused on a people's perspective, the respondents were a variety of ages above 18, and evenly distributed by gender. They were spread across North Central, South West, South East and South South geopolitical zones of Nigeria. Therefore, they are not representative of all the regions in Nigeria; for this reason, the study was not able to capture all ethnic groups and their customary practices. However, within the 15 observations, coverage was obtained from ethnic groups that represent the Yoruba, Igbo, Delta and Kogi regions. Some of the participants were recruited through a snowball sampling strategy by primary participants. Data was analysed, and preliminary codes were established using in vivo coding procedure to categorise findings and generate key themes that could help address the research question and objectives driving the study. Hence, six key themes were uncovered.

The findings of the study reveal the various perspectives on the matter of legal aid and of customary legal practice, including the prospect of expanding the scheme through customary legal systems. The research also highlighted the limited scope of legal aid and the importance of custom and tradition in the daily activities of individuals who are bound by them. It also

[1]Banakar Reza and Travers Max (eds.) (2005) 'Introduction to Theory and Method in Socio-Legal Research' Oxford, Hart p. x.

uncovered the need to develop customary legal systems to further support and protect the rights of individuals that are embedded in their customary practices. This study presents an original contribution to knowledge on access to alternative legal institutions for the protection of legal rights via legal aid. The findings of this thesis also contribute to socio-legal studies, which are not well represented in Nigerian legal research.

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Dedication

This work is dedicated to the four pillars that held me up and kept me going, even when the path seemed hazy; my daughters; Ẹ̀míọ́lá, Moshọpẹ́, Abọ́dúnrìn and Anjọ́láolúwa Ọ̀nàfuwà.

It is also dedicated to my mother Chief Mrs Tóbì Mary Atoye-Akomolede for lighting my way through the darkest tunnels. Thank you for your relentless love and support. I love you to the moon and beyond.

Table of Contents

Chapter 1: General Introduction

"The administration of justice is at the core of any successful democracy in the world. If the Legal profession fails, anarchy will be the only beneficiary." - Justice Oyeyipo[2]

"The principle of the rule of law, from which, after all, the modern state developed, is central to our democracy, and there are no more important duties upon the state than upholding it and ensuring that citizens have access to the court." - Alister Webster QC[3]

1.1 Introduction

This study is crucial and relevant to the promotion of the provision of legal aid within the realms of human rights in present day Nigeria. Legal aid is a fundamental right derived from international and regional human rights instruments[4] which guarantees equality before the law, equal protection of the law and an effective remedy for human rights violations. In instances where legal aid for criminal and civil cases are not explicitly articulated in domestic law, the duty enshrined in these instruments ensure that the guarantees are upheld. Hence, it is deemed a distinct component of the principle of equality. Legal aid plays a vital role with regards to the provision of fair and equal justice to individuals who are at risk of being excluded from the legal system due to social disadvantage. The right to legal aid plays a fundamental role in ensuring the right to be heard in a court of law, even if a litigant is unable to afford the services of a lawyer. A typical example is the right not to be deprived of life and liberty without the due

[2]Observation by Chief Judge T.A. Oyeyipo, 'Professional Misconduct: Problems and Solutions', Paper presented at the 2003 Annual General Conference of the Nigerian Bar Association 20 (Aug. 24-29, 2003). Quoted in Okechukwu Oko (2005) 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria' Brooklyn Journal of International Law Volume 31 Issue 1 p. 12.

[3]Alister Webster QC's response to the amended legal aid proposals in the UK, regarding "states' obligation to uphold the rule of law by avoiding restricted access and ensure that its vulnerable citizens are entitled by right to equal access to courts via legal aid" http://www.libdemlawyers.org.uk/articles/alistair-webster-qc-speech-vanishing-justice-the-legal-aid-debate-14/09/2013/ (accessed 24/08/2016).

[4]The African Charter on Human and Peoples Rights (ACHPR) 1986 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); the Resolution on the Right to Recourse and Fair Trial (Tunis Resolution) 1992 ACHPR/Res.4(XI)92; the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (2003); African Commission on Human and Peoples' Rights, 2003, para. A(2)(i), and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006) ACHPR/Res.100(XXXX)06.

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process of the law and necessary representation. Thus, legal aid guarantees equal standing before the courts.

In the case of *Kuti v. AG Federation* (1985),[5] Hon Justice Kayode Eso affirmed the pertinent obligation of fundamental rights within the Nigerian judiciary system: "What is the nature of a fundamental right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence and what has been done by our constitution, since independence…" According to Dada,[6] the Nigerian constitution(s) post-independence to date[7] have always made provisions for human rights issues. However, Dada maintains that, in relation to the protection of fundamental rights enshrined in the Nigerian constitution, "it is important to do a critical content analysis of these constitutional provisions with a view of achieving their real value against the concept of universality, interrelatedness and interdependence of human rights."[8]

This study adopts a critical content review of the Nigerian constitutions from independence until today to understand the developmental process of the legislation underpinning the legal aid scheme. However, Aguda[9] a former Nigerian High Court Judge was of the opinion that, considering the state in which the majority of Nigerians lived, the attainment of equality would be almost impossible. His illustration included the underlying impact the conditions of those living in poverty would potentially have on the morale of individuals seeking access to the courts and all efforts to achieve protection for their fundamental rights, by virtue of the current 1999 Nigerian Constitution. Aguda further contended that: "The practical actualization of most of the fundamental rights cannot be achieved in a country like ours where millions are living below starvation level...In the circumstances of this nature, fundamental rights provisions enshrined in the constitution are nothing but meaningless jargon to all those of our people living below or just at starvation level."[10]

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[5]See Chief Dr. (MRS) Olufunmilayo Ransome-Kuti & ORS. v. The Attorney-General of the Federation & ORS (1985) LPELR-2940(SC).
[6]Jacob Abiodun Dada (2012) 'Human Rights under the Nigerian Constitution: Issues and Problems' International Journal of Humanities and Social Science Vol. 2 No. 12 pp. 34-35.
[7]The Constitution of the Federal Republic of Nigeria 1960, 1963, 1979, 1989 and 1999.
[8]Jacob Abiodun Dada (2012) 'Human Rights under the Nigerian Constitution: Issues and Problems' International Journal of Humanities and Social Science Vol. 2 No. 12 pp. 34-35.
[9]Aguda Akinola T. (1988) 'Judicial Process and Stability in the Third Republic,' Nat'l Concord Nov.7, at 7. In Jacob Abiodun Dada (2012) 'Impediments to Human Rights Protection in Nigeria' Annual Survey of International and Comparative Law Vol. VXIII p. 85.
[10]Ibid.

Edoumiekumo et al.[11] posit that the daily rise in poverty in Nigeria has become a matter of concern. This includes a deterioration in the general well-being of vulnerable individuals, and is directly connected to human capabilities e.g., food, water, health care, fundamental rights, security, education, and employment. These are crucial components that could adversely affect their ability to access crucial resources, such as courts and lawyers. They may also potentially hinder the expansion and efficiency of legal aid provision in Nigeria. According to a 2011 National Bureau of Statistics report, 60.9% of Nigerians in 2010 were living in "absolute poverty", compared with 54.7% in 2004.[12] In this study, I will investigate claims by Rhode[13] that, in most nations, equal protection principles such as legal aid are routinely subverted in practice. The study will also investigate how the legal aid scheme is being executed and interpreted in practice through the varied legal aid laws[14] in Nigeria. Hence a competence analysis of corresponding legal aid institutions, such as the Legal Aid Council, will examine the role and administration of such institutions and their impact on the legal aid scheme.

In addition, this study will attempt to investigate any links between the Nigerian constitution and the way the scheme is being interpreted in practice. This will include a brief inquiry into the impact of military government intervention on the national constitution and its human right obligations through case law. Regarding this subject, Okeke[15] argued that the repeated violations of human rights by the military contradict Nigeria's human rights obligations. For example, in 1966, the military declared the Constitution (Suspension and Modification) Decree 1. The decree superseded the functioning 1963 Nigerian constitution and denied Nigerian courts the competence required to deal with human rights issues such as the right to legal representation, thereby preventing them from presiding over any human rights infringement perpetrated by the military.

Legislative barriers such as *locus standi*, which relates to the jurisdictional scope of non-governmental organisations (NGOs) as third-party representatives of legal aid, will also be evaluated. This study will venture into the nature of their enterprise and the law that guides

[11]Edoumeikumo Samuel Gowon, Tamarauntari Moses Karimo and Tombofa Steve S. (2014) 'Income Poverty in Nigeria: Incidence, Gap, Severity and Correlates' American Journal of Humanities and Social Sciences Vo1. 2, No. 1 pp. 1-2.
[12]Okoroafor M.O. and Nwaeze C. (2013) 'Poverty and Economic Growth in Nigeria 1990-2011.' The Macrotheme Review, *2*(6) p. 105.
[13]Rhode Deborah L. (2001), 'Access to Justice', Fordham Law Review Volume 69 Issue 5 pp. 1785-1787.
[14]The Constitution of the Federal Republic of Nigeria 1960-1999, The Legal Aid Act of Nigeria 1976-2011.
[15]Okeke C.N (2015) 'The use of International Law in the Domestic Courts of Ghana and Nigeria' Arizona Journal of International & Comparative Law Vol. 32, No. 2 p. 401.

their legal aid activities, such as the power of authority allocated by the Legal Aid Act of 2011. The limitations *locus standi* places on their role as legal aid providers will be discussed.[16] Locus Standi refers to whether an applicant is entitled to seek redress from the courts in respect of an issue.[17] A 2001 report cited Nigeria as a country with a relatively restrictive interpretation of *locus standi*, as it limits action for judicial review to only those who have a 'personal right' to the litigation in question.[18] *Locus standi* has been a great challenge to NGOs in Nigeria, especially those who wish to take on a case by way of legal aid on behalf of individual(s) of limited means, as well as those whose rights have been infringed by governments. Litigant(s) must demonstrate sufficient interest in the matter being presented to the court. As a result of the strict rules surrounding *locus standi*, NGOs have typically found it difficult to seek redress on behalf of clients who may have been unable to exercise their rights without their assistance.[19]

The pluralistic nature of Nigeria means there is more than one constitutionally permitted legal system through which different types of courts operate.[20] Legal pluralism is a complex phenomenon which represents the basic structure of the Nigerian legal system. It also requires a comprehensive analysis for a better understanding of the interpretation of social justice through the various courts systems in Nigeria. This study is focused on the customary legal system. Hence, this study will explore the phenomenon in relation to the distinct social and cultural character of the customary legal system in Nigeria; further in chapter 5. Interpretation of rights would depend on the courts hearing them and the law guiding them. Thus, Chinamasa[21] asserts that the interpretation of rights should not be randomly applied or left dormant, as courts are generally accepted as the avenue through which the application and interpretation of the law on rights is obtained. Courts play a definitive role within the legal aid scheme; yet, in order to dispense this role effectively, they must rely on other actors that are indispensable to the protection of rights via legal aid (e.g., lawyers, paralegals or NGO representatives), which is restricted by *locus standi*. This study will also inquire into the

[16]Jacob Abiodun Dada (2012) 'Impediments to Human Rights Protection in Nigeria' Annual Survey of International & Comparative Law Vol. XVlII p. 86.
[17]Zoila Hinson and Dianne Hubbard (2012) 'Locus Standi: Standing to Bring a Legal Action' Legal Assistance Centre Paper No. 2 p. i.
[18]Institute for Human Rights and Development in Africa (2001) 'Judicial Colloquium on Locus Standi in Administrative Justice and Human Rights Enforcement' p. 4.
[19]Ibid.
[20]Common Law, Sharia Law and Customary Law court systems.
[21]Chinamasa A. Patrick 'The Protection of Human Rights in Criminal Justice Proceedings for African Jurists.' In Bassiouni M. Cherif, Motala Ziyad (1995) (eds.) 'The Protection of Human Rights in African Criminal Proceedings' p. 42.

Nigerian customary legal system and its operations with respect to the promotion of justice, fairness and the protection of human dignity. It will also consider its prospects as a feasible judicial institution by virtue of the legal aid provision. As well as propose a framework regarding how the innovation would work in practice. Ultimately, the bulk of this study will be directed towards the perception of ordinary Nigerian citizens and potential recipients of legal aid regarding seeking access and securing fundamental rights via customary legal systems, through a qualitative method of inquiry.

1.2 Overview of the Legal Aid Scheme in Nigeria

There is a consensus derived from the current literature on the obstacles facing the provision of legal aid for the disadvantaged in Nigeria. Research on the scheme posits that the main obstacle faced is the lack of readily available funding, inadequate legal and non-legal personnel, and insufficient courts and legal clinics that are required to carry out crucial legal duties.[22] There are also other documented impediments to the scheme such as the minimal budgeting allocation, a limited number of willing pro bono lawyers and inadequately wide-spread legal establishments to cater for disadvantaged individuals who seek free legal assistance.[23]

However, there are other pressing factors that have been overlooked in the literature, creating a gap in the current information on the scope and expansion of the legal aid scheme. Questions on whether enough is being done to increase the scope of its operations have emerged, for example: how are the funds managed? How many signed-up legal personnel are providing the service in Nigeria? What are the steps being taken by the courts or judges to ensure that individuals with limited means can access legal aid at the initial stage of their case? Are such barriers in any way related or fundamental to the potential beneficiaries of legal aid themselves (e.g., illiteracy, disability, language barriers or the inability to travel to areas where formal courts are mostly situated). How can these complexities be tackled to ensure that all individuals

[22]See an Overview of The State of the legal aid scheme in Nigeria (Open Society Justice Initiative). In 'Access to Legal Aid in Criminal Justice Systems in Africa' Survey Report 2011 pp. 11-21

[23]See Nigeria's 4th Periodic Country report: 2008-2010 on the Implementation of the African Charter on Human and People Rights in Nigeria, produced by the Federal Ministry of Justice, Abuja August 2011 p. 10. http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_nigeria_2011_eng.pdf (accessed 24/08/2016).

who require legal assistance have access regardless of the barriers? Is the scope of access restricted by legislation? Are potential beneficiaries dissuaded from embracing the system due to inherent norms, beliefs, and a culture of pride? Or is it a matter of distrust in the formal judiciary? This study will investigate the efficacy of legal aid provision through the Legal Aid Council's statistical review of the scheme.

1.3 Problem Statement

Currently, there is a wide range of literature regarding the legal aid scheme in Nigeria, including categorical references to the limited scope and unavailability of the pivotal provision of legal aid. However, there are still visible gaps in the existing knowledge with regards to factual data and empirical research-based conclusions on other understated yet crucial barriers impeding the expansion of legal aid in Nigeria. This thesis is directed at tackling other social issues that further deter potential beneficiaries from access to free representation in the country, as well as looking beyond the barriers that have been established by the current literature and exploring other under-researched areas that would be of benefit to the expansion of the scheme in the distant future.

Rhode,[24] regarding the debate surrounding the access to legal aid, stated that "one central problem in discussions of equal justice is a lack of clarity or consensus about what exactly the problem is." Beqiraj and McNamara,[25] in exploring the obstacles that serve as a hindrance to achieving access to justice across jurisdictions, argue that access to justice is a process and legal aid is a crucial factor in its success in both civil and criminal justice issues. However, the process must entail a thorough understanding of the law underpinning legal aid provision as well as a comprehensive understanding and awareness of such rights.[26] Hence, the principal concern of this study is to investigate and articulate the socio-legal barriers impeding the expansion of legal aid in Nigeria through empirical research.

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[24]Rhode Deborah L. (2013) 'Access to Justice: An Agenda for Legal Education and Research for the Consortium on Access to Justice' Journal of Legal Education, Volume 62, Number 4 p. 532.

[25]Beqiraj Julinda and McNamara Lawrence (2014) 'International Access to Justice: Barriers and Solutions' Bingham Centre for the Rule of Law Report. http://binghamcentre.biicl.org/documents/365_2014_ibatokyo_beqirajmcnamara_internationalaccesstojusticebarriersandsolutions.pdf (accessed 24/08/2016).

[26]Ibid.

Frynas[27] acknowledges that one of the barriers to the legal aid scheme in Africa stems from the lack of the needed, up-to-date, and well documented empirical data. The author posits that empirical data is "relatively scarce and lacking in the research on problems of access to courts in Africa". Collecting and analysing empirical data will paint a clearer picture of the impediments to the expansion of legal aid in Nigeria through the perception of ordinary individuals and allow stakeholders to act accordingly. Lack of access to fundamentals such as legal aid is grounded in the universal notion of disproportion. Inequality stems from social stratification, which emanates from a difference in social status among certain groups in society.[28] Systems of stratification are based on social class and their inability to access crucial social, political, economic, civil, and cultural resources on an equal standing. Social class in determined by an individual's status in society and is measured by race/ethnicity, gender, education, disability, income, and occupation.[29] Hence, the existence of a social division and an inequitable distributive system of income and opportunity based on class[30] which is prevalent in developing countries such as Nigeria.

Social status and mindset of individuals are crucial factors when examining access to legal aid. Limited faith in the legal system has been cited as one of the major reasons why many would not seek the assistance they need. According to Ali-Akpajiak and Pyke,[31] the majority of the Nigerian population are living under the poverty line and their numbers are on the increase due to many factors, such as the inability to access basic socio-economic institutions. Hence, restricted access to fundamental entitlements has led to economic deprivation, gross unemployment, and poor infrastructural facilities, exacerbated by ineffective poverty alleviation policies. According to Osinbajo,[32] in 2015, about 110 million Nigerians were living below the poverty line despite the policies of past governments to improve their welfare. That is, about two-thirds of over 180 million Nigerians are extremely poor with high levels of

[27]Fynas Jedrzj George (2001) 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' Social & Legal Studies, Sage Vol. 10 No. 3 p. 398.
[28]Anthias Floya (2001) The Concept of 'Social Division' and Theorising Social Stratification: Looking at Ethnicity and Class Sociology, journal?' 35(4), pp. 835-854.
[29]Grusky, D.B (1994) 'Social stratification.' Boulder: Westview. p. 2.
[30]Dabla-Norris Era, Kochhar Kalpana, Suphaphiphat Nujin, Ricka Frantisek, Tsountan Evridiki (2015) 'Causes and Consequences of Income Inequality: A Global Perspective' pp. 4-9.
[31]Ali-Akpajiak, S. C., & Pyke, T. (2003) 'Measuring Poverty in Nigeria.' Oxfam. Chapter 3 pp. 5-19.
[32]See Vanguard: Over 100m Nigerians living below poverty line – Osinbajo (vice President of Nigeria) http://www.vanguardngr.com/2015/08/over-1-million-nigerians-living-below-poverty-line-osinbajo/ (accessed 01/06/2016).

illiteracy, residing mostly in rural areas and unable to access fundamental resources such as legal aid.

Blasi[33] argues that the perception of individuals towards justice is crucial to how they perceive their own circumstances. Blasi further posits that "attitude surveys" will give a clearer picture of how individuals liaise with the judiciary. Greiner & Pattanya[34] observed that many studies suffer from methodological problems and consequently reach inconclusive arguments. They insist that, in the absence of measurable information revealing the impact of legal services on the clients, advocates of legal aid would have to rely on intuition and guesswork to make impactful decisions concerning the administration of legal aid. Frynas[35] contends that previous research on access to courts in Africa by socio-legal scholars is based on speculative evidence and mostly confined to one aspect of the subject matter: for instance, the inadequate access to legal assistance available to women in Africa.[36] Marmot[37] argued that the social status of an individual is pertinent to two human fundamental needs: to have control over one's everyday life; and the ability to engage in social activity within a society and be recognised and perceived as such.

Through empirical research, this thesis seeks to investigate and deeply understand the current status of the legal aid scheme from the perspective of ordinary individuals in Nigeria. It will further explain the scheme as they perceive it in order to understand how the scheme is being managed to benefit the people that it was established to protect.

1.4 Research Question

- To what extent can customary courts be utilised to bridge the gap and solder relations between the legal aid scheme and the disadvantaged in Nigeria?

The research question posed will highlight the impact of obstacles for individuals residing in the vast, rural areas of Nigeria and whether alternative measures such as the availability of legal

[33]Blasi Gary (2004) 'How Much Access? How Much Justice?' Fordham Law Review Vol. 73 Issue 3 p. 871.
[34]Greiner D. James & Pattanya Cassandra Wolos (2012) 'Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?' The Yale Law Journal 121 p. 2126.
[35]Fynas Jedrzj George (2001) 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' Social & Legal Studies, Sage Vol. 10 No. 3 p. 398.
[36]Ibid.
[37]Marmot, M. (2004) 'Status Syndrome Significance,' *1*(4) p. 153.

aid in customary courts would increase the provision and address the needs of individuals who need legal assistance. It will also pave the way for further exhaustive research into the long-term implications of the limited scope of legal aid on disadvantage in such areas in Nigeria.

1.5 Research Gaps, Aims and Objectives

Through empirical field work research, this thesis will endeavour to examine the various barriers that are not mentioned in the current legal aid literature in Nigeria. It will also act as a foundation of evidenced information to investigate and further clarify the documented obstacles, including many other unexplored impediments that are responsible for the failing legal aid scheme in Nigeria. This study will make efforts to ascertain that valid conclusions are drawn from unbiased primary data. Access to legal aid is an important determinant in legal matters that govern an individual's right to equality before the law. As Rhode[38] states, equal justice for all is widely proclaimed by various nations but is the most violated of human rights. That is, despite all the diverse legal systems and legislative instruments positioned within the judiciary to enforce equality before the law, it is not often achieved in practice. Rhode goes further, positing that the judiciary is one of the most disturbing institutions in terms of failing to protect fundamental rights of disadvantaged individuals. The long narratives regarding access to justice by way of legal aid do not reflect the reality of its existence.[39]

Hence, there is a need for exhaustive research and education into the justice gap to deal with unsolved legal problems and to formulate a coalition for progress.[40] This thesis will endeavour to address the gap that previous legal and socio-legal researchers have omitted in terms of groundwork research and candid data acquisition. Furthermore, it will explore the legal structures that are put in place to uphold the protection of the right to access justice via legal aid. Andrew and Nyirenda[41] explain the difference between having a comprehensive legal framework and achieving an effective order, and argue that, in the quest to achieve non-

[38]Rhode Deborah L. (2004) 'Access to Justice Equal Justice Under Law: The Gap Between Principle and Practice' Chapter 1 p. 1.
[39]Ibid.
[40]Rhode Deborah L. (2013) 'Access to Justice: An Agenda for Legal Education and Research for the Consortium on Access to Justice' Journal of Legal Education, Volume 62, No. 4 p. 532.
[41]Andrew K.C. Nyirenda SC JA2 (2014) 'The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi.' In 'Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and the Legal Profession in Botwana, Malawi and Zambia' [Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, on 6 and 7 March 2014] p. 1. http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/1.pdf (accessed 30/08/2016).

discrimination within society, substantive equality must take precedence from national legal frameworks.

This study will also examine the role of past and present Nigerian legal frameworks, which include the Constitution(s) of the Federal Republic of Nigeria (1960-1999),[42] the Nigerian Legal Aid Act(s) (1976-2011)[43] and other essential human rights instruments (e.g., the African Charter on Human and Peoples' Rights (1986)[44] and other subsidiaries[45] advocating for access to free legal representation). This will further highlight the efforts being made to achieve equal opportunities for all through legal aid, regardless of an individual's social status.

However, this study will also highlight the elements, if any, within the legal aid legislation that might directly or indirectly hinder its progress. This will include an assessment of other compelling legal institutions, such as the customary legal system, as potential tools to expand the scheme in Nigeria. Thus, there is a unique opportunity to further protect the rights of the disadvantaged by analysing and clarifying fundamental principles of fairness and equality under regional human rights instruments; and, most importantly, by clarifying how such laws are being implemented and interpreted in national legislation in Nigeria.

Rhode[46] asserted that there are various other barriers not frequently mentioned in legal aid literature. Among others, they include age, ethnicity, culture, illiteracy, gender, language barriers, geographic isolation, disability, and lack of confidence. The author went further to state that there are still many prevailing issues with regard to legal aid, which include: a lack of national data to give a true picture of the activities and progress of the scheme; the absence of an independent, systematic evaluation structure which can rate services and gather feedback

[42]See fundamental rights sections of the Nigerian Constitution(s) of the Federal Republic of Nigeria 1960, 1963, 1979, 1989 and 1999: The right to fair trial, the right to legal aid, Fundamental Objectives and Directive Principles of State Policy, Special jurisdiction of the court, Fundamental Rights (Enforcement Procedure) Rules (FREP Rules); where applicable.

[43]See the Legal Aid Act(s) of Nigeria No 56 1976; CAP 205 LFN 1990; CAP L9 LFN 2004 and CAP L9 2011: The concept of legal aid, eligibility criteria; the Legal Aid Council (LAC) and scope of legal aid representation.

[44]See the African Charter on Human and Peoples Rights (ACHPR) 1986 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[45]See the Resolution on the Right to Recourse and Fair Trial (Tunis Resolution) 1992 ACHPR/Res.4(XI)92; the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (2003); African Commission on Human and Peoples' Rights, 2003, para. A(2)(i), and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006) ACHPR/Res.100(XXXX)06.

[46]Deborah L. Rhode (2013) ʹAccess to Justice: An Agenda for Legal Education and Research for the Consortium on Access to Justice' Journal of Legal Education, Volume 62, Number 4 p. 539.

from recipients; insufficient information regarding the impact of legal aid or the lack of it on the recipients themselves (e.g., on their psychological wellbeing).[47]

Alcock[48] states that the legal profession itself is crucial to the potential major changes that could take place within the legal aid scheme. This study aims to evaluate the role of the judiciary and other legal aid providers and how they can improve and expand the provision of legal aid in Nigeria. It will also appraise where non-legal aid staff such as NGO representatives, paralegals and newly graduated law students are positioned within the legal aid process in practice. This study will review the alternative strategies, if any, put in place to assist and relieve other governmental agencies of the burden and backlog of cases subject to legal aid (e.g., non-legal aid staff). Any propositions for governments to pay more attention to the importance of legal aid, which expose negligence and disregard for the legal needs of the disadvantaged, will be examined. Alongside this, the impact of limited or non-existent access to legal aid on the disadvantaged in Nigeria will be examined from their own perspective. The theme of this study is to also fully establish the provision of legal aid as a system that is imperative to providing fair and equal access to courts in Nigeria. In the absence of free legal representation in both criminal and civil cases, disadvantaged individuals are at risk of being excluded and denied access to the legal system and compelling judicial remedies.

The justification of this study is: to gain more insight into the mechanics of the Nigerian legal aid scheme; to analyse Nigeria's position in guaranteeing the human right of access to justice and legal aid, by exploring and investigating its current legal aid system; to expand the scope of understanding on the issue of legal aid in practice and investigate other uncharted barriers affecting the scheme's expansion. The study will also include an in-depth inquiry into why the provision has remained inaccessible to the disadvantaged in Nigeria and will also explore other alternative modes of service delivery to further optimise and extend the scope of legal aid provision, most especially for those that reside in the vast, rural areas of Nigeria.

Summarily, this study will observe and analyse the opinions of various Nigerian individuals regarding their understanding of the concept of legal aid, and the potential of expanding legal aid through other avenues such as customary courts. For an in-depth understanding of the topic, this thesis will delve into the diverse literature on access to justice via legal aid, both old and new. This will include literature that is directly as well as indirectly related to the legal aid

[47]Ibid.

[48]Alcock P. C. (1976) 'Legal Aid: Whose Problem?' British Journal of Law and Society, Vol. 3, No. 2 p. 152.

scheme in Nigeria. Ultimately, this study seeks to procure answers to the crucial research question regarding policy implementation and regulation, discretion of the judiciary, the rule of law, and legal decision-making in Nigeria.

1.6 Scope of Study

This study investigates the legal aid scheme within the realms of human rights (the equal and inalienable[49] entitlements of every person). The initial focus is to establish the status of legal aid through African human rights mechanisms, such as: the African Charter on Human and Peoples' Rights; the Resolution on the Right to Recourse and Fair Trial (1992); The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (2003); and The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006). The previous and current national fundamental rights provisions contained within the Nigerian constitutions will also be examined, which is essential in order to investigate the scope of operation of legal aid since independence in 1960. In addition to the examination of other intrinsic human rights standards, connected to the security and the legal rights of individuals who cannot afford legal protection. For instance, the past and current Legal Aid Acts of Nigeria and the directives of the Legal Aid Council.

Furthermore, this study will explore the operations of the Nigerian customary court system, including the principles that underpin the interpretation of customary law in practice e.g., jurisdiction, ascertaining and validating customary law. These principles have created a distinction between living (on the ground) customary law and state (judicial) customary law whereby variants have evolved due to numerous interpretations of the same customary law. This occurs when cases heard in a Customary Court are escalated to the Customary Court of Appeal to review the customary law in question and judgement of the customary court. As a consequence, a divergent judgement from the appeal court would have no bearing on other similar cases brought before customary courts unless it goes through the appeals process or if the customary court decides to follow the judgement of the higher court and eradicate such law e.g., female inheritance matters.

[49]Jack Donelly (2013) 'Universal Human Rights in Theory and Practice' Part 1 p. 10.

In addition, this study will appraise the research question by collecting and analysing empirical data on the perception of Nigerian individuals towards the legal aid scheme and the prospects of expanding the scheme via the intrinsic customary legal system. The respondent sample was limited to Nigerian indigenes of mixed gender who are over the age of 18 and familiar with legal aid provision and the customary legal system in Nigeria. In total 15 respondents took part in the study, 3 of which participated in semi-structured telephone interviews, while the remainder completed 12 self-administered online questionnaires. All 15 participants were required to answer 14 questions.

1.7 Methodology

This study adopts a qualitative research method for an in-depth investigation of the research question. It employs the qualitative triangulation approach, using in-depth semi-structured telephone interviews and online self-administered questionnaires to collect data. This study makes the assumption that a more personal and flexible research structure is required to capture meanings in human interaction (interpretivism)[50,51] Hence, respondents give a detailed analysis of what they perceive as their reality[52] and, as a consequence, justify the motive of this study. This also means that the researcher is able to acquire knowledge as well as understand and formulate a conclusion based on the multiple perspectives.

The telephone interviews were recorded via a voice recorder. While the completed self-administered questionnaires were received electronically via email. Data collected through both approaches was stored, transcribed, and analysed using conventional (inductive) content analysis. This approach aims to generate meanings from the dataset so to identify patterns and relationships and form a theory.[53] The focus is on creating a new in-depth understanding and interpretation of social worlds and their surroundings.[54] The coding process involved both initial and focused coding. The research findings were categorised into initial preliminary codes

[50]Carson, D., Gilmore, A., Perry, C., and Gronhaug, K. (2001) 'Qualitative Marketing Research' London: Sage.
[51]Black, I. (2006) 'The Presentation of Interpretivist Research' Qualitative Market Research: An International Journal, 9(4), pp. 319-324.
[52]Carson, D., Gilmore, A., Perry, C., and Gronhaug, K. (2001) 'Qualitative Marketing Research' London: Sage.
[53]Saunders, M., Lewis, P. & Thornhill, A. (2012) 'Research Methods for Business Students' 6th edition, Pearson Education Limited pp. 154-155.
[54]Ibid. p. 149.

and then appropriate key themes for further simplification aimed at addressing the research questions, as well as the aims and objectives of the study.

1.8 Expected Research Contributions and Ramifications

The empirical research that this study intends to undertake will endeavour to attain the answers that have eluded the extant legal aid literature concerning the expansion of the legal aid scheme in Nigeria. This study is expected to make an extensive contribution to academic theory, as well as to the field of socio-legal research in Nigeria. In terms of theory, this study introduces an original narrative on the prospects of expanding legal aid provision in Nigeria through customary legal systems. With regards to socio-legal research in Nigeria, the inter-disciplinary model is still under-developed in Nigerian academia and this is reflected in the limited and inadequate data accessible to legal institutions on legal aid. The goal here is to challenge the conventional black letter law approach which merely describes the principles of law with no consideration of the realities of the wider public. Hence, this study adopts a socio-legal approach of investigating the link and far-reaching relationship between Nigerian society and the law that structures judicial decision-making. It also serves as a tool to analyse the collected empirical evidence on increasing the scope of legal aid through the Nigerian customary legal system. The outcome of the study aims, through the analysis of collected data, to increase knowledge on the topic while informing and influencing stakeholders that are responsible for reform in areas of access to appropriate judicial institutions in Nigeria (e.g., policymakers, legislators, the judiciary, NGOs, and practitioners).

1.9 Research Structure

- Chapter one: This section introduces the research topic and the primary aim of the study. It presents the background and significance of the study via an overview of legal aid provision in Nigeria. The chapter also details the gaps in the current legal aid literature through the research question, and justifies the study through its aims, objectives, and scope.
- Chapter two: This chapter examines the domestic law and institutions guiding legal aid provision in Nigeria. It will also perform a critical analysis of African human right laws and supplementary instruments affiliated with legal aid. This analysis will further test the scope and efficiency of the current legal aid laws in place at the national level. It will also

highlight the complexities within the wording and operation of the equal justice laws and how they are being interpreted and applied in practice.

- Chapter three: This chapter investigates the Nigerian Constitution from independence from colonial British rule[55] to the present day 1999 constitution on the matter of free legal representation as a fundamental right. A critical content analysis method will be adopted to further evaluate: the infrastructure of all Nigerian constitutions; the additional efforts to ensure rights of equality are protected; and the legal impediments faced. This method will produce a conclusive interpretation of legal text[56] via the wording of the constitution(s) that is specific to legal aid in Nigeria. It will identify the role and intent of the Nigerian constitution with regard to embracing African human right instruments and providing legal aid to individuals who are eligible for free legal assistance.
- Chapter four: This section critically explores the inherent characteristics of Nigerian customary court systems and considers its prospects as a tool of legal aid reform in Nigeria. It examines the historical background, progress, and practice of customary courts during the British colonial era. It also discusses the concept of customary law and the customary courts system in Nigeria. This section also looks at customary courts from a law and society perspective.
- Chapter five: This chapter is an extension of the assertions made in chapter four. It discusses the concept of contemporary customary law in practice, and the scope of their jurisdiction in the Nigerian national legal system. It considers the impact of legal pluralism and the potential drawbacks of applying law in customary courts. In addition, this section explores international human rights standards that guide customary law as well as the implementation and application of legal aid through customary courts.
- Chapter six: This section presents the methodological approach adopted to achieve the aims and objectives of this study. It also justifies the research methods utilised to answer the research question posed. This section introduces the various research paradigms that are crucial to any research, especially research that aims to investigate views of social reality. It also justifies the adoption of the interpretive approach as a means to give meaning to the personal experiences of the respondents. It highlights the rationale for choosing a qualitative research method over a quantitative one and discusses the potential limitations

[55] 1st October 1960.

[56] Weber R.P. (1990) 'Basic Content Analysis' Second (ed.) Sage University Paper Series on Qualitative Applications in the Social Sciences Issue 49 p. 9.

of the former. This chapter considers qualitative legal research methods and demonstrates the importance of empirical legal scholarship to further understand legal problems associated with society. It also highlights the benefits of an interdisciplinary research method to address the study topic. Furthermore, the process of triangulation via semi-structured telephone interviews and self-administered questionnaires was discussed to illustrate the adopted methods of data collection. Sampling, coding, and content analysis were also considered in relation to the data analysis and interpretation. This section also discusses the criteria followed to ensure trustworthiness and credibility in this study.

- Chapter seven: This chapter presents and discusses the research findings. It introduces the emergent themes that originated from the collected data and discusses each theme in relation to the research topic. In addition, this section reveals how the findings of this study reflect extant views on the provision of legal aid and the customary legal system in Nigeria. It also establishes various perspectives on expanding legal aid through Nigerian customary courts.
- Chapter eight: This chapter concludes this study. It re-examines the research question and acknowledges how the research findings address the main objectives of this study. This section also establishes the research contributions as well as the limitations that were encountered. Finally, it discusses directions for future studies.

Chapter 2: The Concept of Legal Aid in Nigeria

2.1 Introduction

This chapter introduces and examines the legal aid scheme in Nigeria. It discusses the development of the scheme within the Nigerian judiciary. It also investigates the process by which legal aid became accessible through the current and previous Nigerian Legal Aid Acts. This will include an overview of the Legal Aid Council and an analysis of the reports detailing the operations of legal aid provision in Nigeria from 2011-2017. This chapter analyses the African regional legal system through The African Charter on Human and Peoples' Rights (ACHPR) (1986) and other supplementary human rights instruments, such as The Resolution on the Right to Recourse and Fair Trial (1992), The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (2003) and The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006). This chapter will also examine how legal aid rules and guides within these instruments are interpreted and applied in practice via domestic law.

Doran and Leonard[57] posit that a legal aid scheme acts as a resource for low-income individuals experiencing legal issues. It is targeted at those who are unable to afford the services of a lawyer by providing legal representation at no cost. The concept of legal aid in Nigeria was initiated in 1961 during the African Conference on the Rule of Law held in Lagos. This conference addressed "the hollowness of a constitutional right to a fair hearing, if the financial aspect of access was ignored."[58] A bill (Legal Aid and Advice Act of 1961) was prepared; however, due to the Nigerian Civil War (1967-1970), it was abandoned. Cottrell[59] argues that an increase in court fees by the Western State government in 1969 played a decisive role in the development of legal aid.

[57]Doran Jay, Leonard Beth (2016) 'The Power of Story: How Legal Aid Narratives Affect Perceptions of Poverty' Seattle Journal for Social Justice Vol. 15 Issue 2 pp. 333-355.
[58]Sir Adetokunbo Ademola, the Chief Justice of Nigeria at that time made the initial public acknowledgement of the need for legal aid in Nigeria. A Bill titled: Legal Aid and Advice Act 1961 for Parliament was prepared by Honourable Attorney-General, Dr T.O. Elias to formally establish legal aid in Nigeria and grant low-income individuals legal aid and legal advice. Legal Aid Council of Nigeria. http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=111&Itemid=1960&lang=en (accessed 03/06/2019).
[59]Cottrell Jill (1976) 'Legislation: The New Nigerian Legal Aid Decree,' J.L.A Vol. 22 No. 1 p. 78.

Hence, in 1974, the Nigerian Legal Aid Association was established by notable senior lawyers of the Nigerian judiciary[60] to further the legal aid scheme and create "a new Nigerian nation where there is equal access to justice for all irrespective of means and where all Constitutional rights are respected [and] protected […] to ensure justice for all". Thus, legal aid was launched in various states across Nigeria.[61] The Legal Aid Act No. 56 of 1976 formally introduced the legal aid scheme into law and was later incorporated into the 1979 Constitution of the Federal Republic of Nigeria.[62] Bradway[63] identifies legal aid as a solution found by lawyers who recognised they had an additional professional obligation to the public as well as to their paying clients.

2.2 The Nigerian Legal Aid Provision

"The policy direction must elevate Legal Aid to the level of a fundamental right of deserving citizens. It must not be seen as charity for the poor but a fundamental right." Ayorinde Bolaji[64]

This study is crucial and relevant to the promotion of legal aid as a fundamental right in present day Nigeria. The right to legal aid is protected under Nigerian domestic law and plays a vital role in promoting fair and equal justice for individuals at risk of being excluded from the legal system due to their lower social status. The provision of legal aid is shaped by social as well as legal institutions which govern the behaviour and expectations of individuals. It is also an obligatory right for people who are unable to afford legal counsel in Nigeria. The availability of free legal representation is designed via legislation to protect the interests and rights of disadvantaged individuals before the courts. However, Novack[65] posits that there has been an

[60]Initiated by Chief Chimezie Ikeazor (SAN) and other founding members such as Chief Debo Akande (SAN) who was the Director of Operations. Chief (Dr) Solomon Lar C.O.N. was the Secretary General. Other active members of the association include Chief Edwin Ume-Ezeoke and Chief Adebayo Ogunsanya (SAN) who was the President of the Nigerian Bar Association during that period. https://legalaidcouncil.gov.ng/historical-profile-of-the-council/ (accessed 04/04/21).
[61]Ibid.
[62]Legal Aid Act No. 56 of 1976 came into force on 2nd day of May 1977.
[63]Bradway John S. (1954) 'Legal Aid: Its Concept, Organization and Importance,' 14 Louisiana Law Review. Vol. XIV pp. 554-567.
[64]See Ayorinde Bolaji's (SAN) interview: 'Legal Aid Should Be Elevated to the Level of a Fundamental Right.' Cited in This day (10/05/2016). http://www.thisdaylive.com/index.php/2016/05/10/legal-aid-should-be-elevated-to-the-level-of-a-fundamental-right/ (accessed 04/08/2018).
[65]Novak Andrew (2010) 'The Globalization of the Student Lawyer: Toward a Law Student Practice Rule for Indigent Criminal Defence in Sub-Saharan Africa Human Rights and Globalization' Law Review Vol. 3 p. 33.

increasing shortage of legal aid in Sub-Saharan African countries such as Nigeria despite constitutional guarantees.

2.2.1 Statutory Basis for Legal Aid in Nigeria

The fundamental right to legal aid is detailed in the current 1999 Constitution of the Federal Republic of Nigeria, where it guarantees legal representation and other free legal services (e.g., legal advice) to individuals who are deemed eligible.[66] The provision is means tested and is prescribed by the Federal Executive Council.[67] The Legal Aid Acts of Nigeria has, since its inception in 1976 and through various amendments up until the current 2011 Act, aimed to increase the scope of legal aid; however, the provision continues to face impediments that serve as barriers to access, for the individuals it was enacted to protect. Bamgbose[68] links the obstacles hindering access to legal aid to the Nigerian judiciary system. He argues that the provision is non-existent and unattainable for the disadvantaged in Nigeria and insists that developing countries such as Nigeria suffer significantly from barriers that impede access to free legal representation due to weak and inaccessible legal and judicial institutions.[69]

2.2.2 The Nigeria Legal Aid Decree/Act 1976-2011

Section 19 (1) of the **Legal Aid Decree[70] No. 56 1976** introduced the concept of free legal representation into the Nigerian judiciary. The scheme covered only criminal cases of a serious nature involving personal injury,[71] such as murder, manslaughter, grievous bodily harm and assault (omitting other serious offences such as armed robbery).[72] This included aiding or abetting offenders, as listed under s.6 of the Act.[73] Section 6 (3) allows for a defence via legal aid only in a court where the persons have a right to be defended or represented by counsel.

[66]See s. 46 (1) of the 1999 Constitution of the Federal Republic of Nigeria.
[67]McQuoid-Mason David (2003) 'Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council' Journal of African Law, Vol. 47, No. 1 p. 111.
[68]Bamgbose O. (2015) 'Access to Justice through Clinical Legal Education: A Way Forward for Good Governance and Development' 15 African Human Rights Law Journal pp. 378-396.
[69]Ibid. p. 380.
[70]Decrees were legislative acts used by the Federal Military Government of Nigeria to rule the country. Once the power is handed back to a civilian government, all qualifying decrees (some may be voided if necessary) are converted to Acts of National Assembly.
[71]Cottrell Jill (1976) 'Legislation: The New Nigerian Legal Aid Decree,' J.L.A Vol. 22 No. 1 p. 80.
[72]Ibid.
[73]See s. 6 Legal Aid Act No. 56 of 1976.

However, s. 6 (4) (b) provides for the representation by a legal practitioner before 'any' court. This potentially presents more options for litigants who may wish to be heard in a court of their choosing e.g., customary court. Section 6 (4) (c) extends legal aid to 'additional aid', including advice in civil matters.[74] Section 7 of the Legal Aid Act 1976 establishes the Legal Aid Fund.[75] Section 8 (2) of the 1976 Act defines eligible persons as those whose income does not exceed 720 Naira ($1.99)[76] per annum.[77] While Section 12 considers lawyers in private practice and lawyers serving in the National Youth Service Corps (NYSC)[78] are qualified to provide legal aid, only legal practitioners can receive payment for their services. However, lawyers serving in the NYSC[79] are paid via a government monthly allowance for their personal upkeep.[80]

Section 20 (1) establishes the **Legal Aid Act CAP 205, LFN 1990**. This Act represents a notable shift from the preceding 1976 Act,[81] to ensure that the scheme remained effective in practice. For instance, s. 7 (1) increased the scope of legal aid to include both criminal and civil matters, as specified within the Second Schedule of the act.[82] According to s. 9 (1), legal aid is granted to persons whose income does not exceed 1,500 Naira ($4.14)[83] per annum, an increase in the eligible income level.[84] Sections 13[85] and 14[86] reiterate the mandates of the 1976 Act with regards to the providers of legal aid and the remuneration afforded. With the **Legal Aid Act CAP L9, LFN 2004** (s. 7),[87] the scope of legal aid increased dramatically to incorporate

[74]The mandates that dictate the jurisdiction and additional aid of the legal aid scheme are sustained in the succeeding 1990 and 2004 Legal Aid Acts.
[75]"Funds shall be provided by the government. Contributions may be received from philanthropic persons, organisations or other."
[76]In today's currency, adjusting for inflation, this is equal to roughly $9.30: https://www.inflationtool.com/us-dollar/1976-to-present-value?amount=2 (accessed 18/03/20).
[77]"Legal aid may be approved for individuals whose income exceeds the amount prescribed, who are of limited means, on a contributory basis."
[78]See s.13 Legal Aid Act No. 56 of 1976.
[79]See National Youth Service Corps (NYSC) Official Website https://www.nysc.gov.ng/ (accessed 13/04/2021).
[80]See Current allowance for NYSC https://guardian.ng/news/buhari-approves-n33000-allowance-for-nysc-members/ (accessed 13/04/2021).
[81]However, many of the successive directives maintained those contained in the previous 1976 Act e.g., legal aid Fund.
[82]"Subject to the provisions of s.7, legal aid may be granted in respect to matters such as: (A) Murder of any degree; manslaughter, inflicting grievous bodily harm, assault/ actual bodily harm; (B) Aiding and abetting to any offence listed in A; (C) Civil claims in respect of accidents."
[83]In today's currency, adjusting for inflation since 2004, this is around $8.20: https://www.inflationtool.com/us-dollar/1990-to-present-value?amount=4 (accessed 18/03/2020)
[84]"Legal aid may be granted to those whose income exceeds the eligibility standard but of limited means, on a contributory basis."
[85]"Legal practitioners will be managed and paid by the Legal Aid Council."
[86]"Lawyers serving in the Youth Corps will receive no remuneration for their service."
[87]Section 20 (1) confirms the Legal Aid Act CAP L9, LFN 2004.

other serious criminal offences and provided extra protection for civil matters.[88] This reflects the explicit fundamental rights directive of the 1999 Nigerian constitution that pledges to protect all individuals facing litigation regardless of the category of the case. Section 9 (1) states that, to be eligible for legal aid, income of recipients must not exceed 5,000 Naira ($13.82)[89] per annum. This is a further increase in eligible income, with the added discretion to provide legal assistance if income exceeds this amount. Sections 13 and 14 remain the same as in previous Acts.[90]

The current **Legal Aid Act CAP L9, 2011**[91] repealed the 2004 Act. The scope of the provision under s. 8[92] is explicit and extensive, as compared to preceding Acts, with expansive support for both criminal and civil cases. The 2011 Act places more emphasis on fair trial rights and equal standing before the courts. Thus, s. 8 (2)[93] establishes the Criminal Defence Service, which aims to ensure that individuals accused of a criminal offence can access legal aid services. Section 8 (3) [94] initiates the Civil Litigation Service to ensure diligent defence of all,[95] while s. 8 (5) (a) empowers a legal practitioner to represent a person before any court.[96] Section 8 (7) establishes the Community Legal Service to empower disadvantaged and marginalised individuals and ensure access to services that meet the needs of recipients. Section 9 (a) and (b) declares the Federal and State Governments as the main source of funding. However, external funding by philanthropists and others permitted in previous Acts are excluded in the

[88]"Subject to the provisions of s.7, legal aid may be granted in respect to matters such as (A). Murder of any degree; manslaughter, inflicting grievous bodily harm, assault/ actual bodily harm; common assault; affray; stealing and rape. (B). Aiding and abetting to any offence listed in A. (C). Civil claims in respect of accidents and civil that cover breach of fundamental Rights as guaranteed by Chapter IV of the Constitution of the Federal Republic of Nigeria."

[89]In today's currency, adjusting for inflation, this is equal to roughly $19.50: https://www.inflationtool.com/us-dollar/2004-to-present-value?amount=14 (accessed 18/03/20).

[90]The payment of legal practitioners and non-payment of services provided by Lawyers serving in the Youth Corps remain the same under s. 13 and s. 14 of the 2004 Act.

[91]By virtue of s. 25 Legal Aid Act CAP L9, 2011.

[92]According to "s. 8(1): The grant of legal aid, advice and access to justice shall be provided by the Council in 3 broad areas, namely, Criminal Defence Service, Advice and Assistance in Civil matters including legal representation in court and Community Legal Services subject to merits and indigence tests for the parties."

[93]"The Council, shall establish, maintain and develop a service known as the Criminal Defence Service for the purpose of assisting indigent persons involved in criminal investigation or proceedings…access to such advice, assistance and representation as the interest of justice requires."

[94]"The Council shall establish and maintain a service to be known as the Civil Litigation Service for the purpose of assisting indigent persons to access such advice, assistance, and representation in court where the interest of justice demands…"

[95]Federal Ministry of Justice. The Department of Civil Litigation and Public Law. https://www.justice.gov.ng/index.php/the-ministry/departments/civil-litigation (accessed 12/11/2019).

[96]"Section (5) Legal Aid shall consist, on terms provided by this Act, of: (b) representation by a legal practitioner including all such assistance as is usually given to by a private legal practitioner before any court."

2011 Act. Lack of funding is cited as one of the main factors limiting the scope of the scheme as government funding continues to be inadequate. Thus, this inadequacy may have been reconstructed by the boost in approved legal aid providers introduced by this Act i.e., NGO representatives, Law Clinics, paralegals whose services can be secured at a lower or at no cost at all e.g., NGO's.

According to s. 10 (1), eligibility is subject to the national minimum wage,[97] which is set at 18,000 Naira (roughly $50.70, adjusting for inflation)[98] per month according to the National Minimum Wage (Amendment) Act 2011.[99] This is a substantial increment as compared to the previous eligibility criteria. The eligibility criteria are set according to the national minimum wage. This may become very problematic in a country where the majority are self-employed and unable to keep track of their annual wage. In addition, Novak[100] argues that there are many disadvantaged individuals who earn too much to qualify for legal aid but earn too little to afford legal representation due to the high costs and may be at a disadvantage if they were to face litigation.

Akin to the previous 1979, 1990 and 2004 Legal Aid Acts, Sections 15 (1) and 16 reiterate the reimbursement standards for legal assistance providers.[101] In addition to the established providers,[102] s. 17 of the 2011 Act increases the scope of legal aid providers and recognises NGOs, Law Clinics, and paralegals as legitimate legal aid providers to advance the legal aid scheme. The increased scope of providers is crucial to this study, as limited legal aid personnel is another main obstacle to access. It is also an important factor when considering the prospects of expanding legal aid through other court systems such as customary courts. For instance, NGOs are able to travel through the vast rural areas and engage with various communities through their volunteers while other legal personnel such as community-based paralegals,

[97]"Section 10 (2) and (3) allow for discretion by the Board/Governing board to grant legal aid to persons whose minimum wage exceed the amount stated, depending on their circumstance."
[98]See https://www.inflationtool.com/us-dollar/2011-to-present-value?amount=50 (accessed 18/03/20).
[99]Section 2 (1), National Minimum Wage (Amendment) Act 2011. http://www.ilo.org/dyn/travail/docs/956/National%20Minimum%20Wage%20Act%20amendment%202011.pdf (accessed 19/06/2019).
[100]Novak Andrew (2010) 'The Globalization of the Student Lawyer: Toward a Law Student Practice Rule for Indigent Criminal Defence in Sub-Saharan Africa Human Rights and Globalization' Law Review Vol. 3 p. 36
[101]"Section 15 (1) approves payment for legal practitioners for services while Lawyers serving in the Youth Corp will receive no payment for their assistance": see s.16 Legal Aid Act CAP L9, 2011.
[102]Legal practitioners and NYSC Lawyers serving in the Youth Corp.

which this study suggests could be locally trained by qualified lawyers serving in the National Youth Corp Service would be of great benefit to further expand the legal aid scheme.

Paralegals tend to be more familiar with the law, the custom and language in their area and will not need to travel too far from their locality. The Legal Aid Council[103] recognises that the bulk of Nigerian lawyers reside in the urban areas and are reluctant to travel inland due to security issues while most of the disadvantaged live in the rural areas and as such there is a pressing need for community-based paralegals to bridge the gap and ensure that free legal advice and representation is available in such areas. A proposal of how this would work on ground is further detailed in chapter 5**.**

2.2.3 Legal Aid Council (LAC)

The LAC is the principal authority for the administration of policies specific to free legal representation for the disadvantaged in Nigeria. The permissible modes of delivery of legal aid currently available within the Nigerian judiciary are pro bono lawyers, public defenders, paralegals, lawyers serving in the National Youth Service Corps (Law School graduates), legal clinics and Non-Governmental Organisations (NGOs). The first LAC was established in accordance with the provisions of s. 1 (1) of the LAC 1976[104] to oversee the execution and implementation of legal aid in Nigeria.

The LAC acknowledges that one of the main obstacles to its legal aid operations is that of insufficient funding[105] and, according to McQuoid-Mason,[106] it has been lobbying extensively for increased spending on the legal aid scheme. As a result, in 2000, the Federal Government set aside N20 million[107] for the LAC[108] to improve and extend the scope of its undertaking.

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[103]Towards a National Paralegal Movement in Nigeria (2020) https://legalaidcouncil.gov.ng/2020/07/15/towards-a-national-paralegal-movement-in-nigeria/ (accessed 08/04/2020).

[104]See s. 1 (1) Legal Aid Act 1976 A253 and subsequent Legal Aid Acts: Legal Aid Act CAP 205, LFN 1990; Legal Aid Act CAP L9, LFN 2004 and Legal Aid Act CAP L9, 2011.

[105]See Legal Aid Reports 2011-2017. http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=118&Itemid=1966&lang=en (accessed 01/07/2019).

[106]McQuoid-Mason David (2003) 'Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council' Journal of African Law, Vol. 47, No. 1 p. 110.

[107]About $200,000 or $0.0017 per capita at that time.

[108]Information by the Chairman of the Governing Council of the Legal Aid Council at the Legal Aid Council of Nigeria Workshop on Legal Aid in the New Millennium in Abuja, Nigeria, 26-27 June 2000 In McQuoid-Mason

The author believes the budget was inadequate when compared to the population, which were approximately 120 million people during that period. In 2001 the LAC submitted another budget[109] totalling N400 million,[110] but was only granted N9 million,[111] a substantial decrease from the previous year and a major setback to the scheme as it depends on government funding.

Currently, the LAC has state offices in all 36 states of the Federation, including the Federal Capital Territory (FCT), and has 23 legal aid centres in 17 of these states.[112] In 2010, the LAC secured funds to establish legal aid centres in the 774 Local Government Areas across Nigeria. The centres sought to eliminate the financial obstacles faced when pursuing legal aid support in urban areas by individuals residing in rural areas. Nonetheless, to date there are still only 23 legal aid centres.[113] This leads to questions on the efficacy of the scheme and whether there are enough legal aid offices to support disadvantaged individuals who may need free legal advice and representation across the country.

David (2003) 'Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council' Journal of African Law, Vol. 47, No. 1 p. 110.

[109]Interview with Chief Bayo Ojo S.N, Chairman of the Legal Aid Council of Nigeria, by Jude Igbanoi on 10 January 2001. Quoted in McQuoid-Mason David (2003) 'Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council' Journal of African Law, Vol. 47, No. 1 p.111.

[110]About $4 million or $0.33 per capita at that time.

[111]About $90, 000, 00 or $0.00075 per capita.

[112]Legal Aid Council of Nigeria. http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=112&Itemid=1962&lang=en (accessed 04/06/2019).

[113]Currently, the Council has established 23 Legal aid centres in: Ningi, Bauchi State; Gwagwalada, FCT; Otuocha, Anambra State; Owo, Ondo State; Ogbia, Bayelsa State; Auchi, Edo State; Karu, Nasarawa State; Shendam, Plateau State; Sagbama, Bayelsa State; Suleja, Niger State; Bida, Niger State; Katsina-Ala, Benue State; Abonnema, Rivers State; Bwari, FCT; Ungogo, Kano State; Badagry, Lagos State; Warri, Delta State; Odo-Ere, Kogi State; Kaduna South, Kaduna State; Jema'a, Kaduna State; Sabon Gari, Kaduna State; Chikun, Kaduna State; Ahmadu Bello law clinic, Kaduna State. Legal Aid Council of Nigeria Report to the Nigerian Bar Association Delivered at the 2016 Annual General Conference holding at Port-Harcourt, Rivers State from 19th to 26th August 2016 http://www.legalaidcouncil.gov.ng/docs/2016_LAC_NBA%20Report.pdf (accessed 18/06/2019).

2.2.3.1 Statistical Review of Legal Aid Provision in Nigeria 2011-2017

(Table 2.1) Statistics of Cases from April 2010 to March 2011[114]

Types of Cases	**Cases Granted**	**Case Completed**
Criminal	4118	2451
Civil	999	646
PDSS[115]	3287	3287
Total	**8404**	**6384**

(*Table 2.2)* Statistics of Cases from April 2011 to March 2012[116]

Types of Cases	**Cases Granted**	**Case Completed**
Criminal	6987	3634
Civil	1560	964
PDSS	2617	2617
Total	**11164**	**7215**

[114]The Legal Aid Council Report to the Nigerian Bar Association delivered at the 2011 Annual General Conference holding at Port Harcourt, Rivers State from the 21st – 26th August 2011. http://www.legalaidcouncil.gov.ng/docs/2011_LAC_NBA_Report.pdf (accessed 18/06/2019).
[115]Police Duty Solicitors Scheme (PDSS) established in 2004 was part of a Pre-trial Detention Project where duty solicitors intervened on behalf of the suspects held in Police custody by way of legal aid. Ibid.
[116]Legal Aid Council Report to the Nigerian Bar Association delivered at the 2012 Annual General Conference holding at Abuja, Federal Capital Territory August 2012. http://www.legalaidcouncil.gov.ng/docs/2012_LAC_NBA%20Report.pdf (accessed 18/06/2019).

(*Table 2.3)* Statistics of Cases from April 2012 to March 2013[117]

Types of Cases	**Cases Granted**	**Case Completed**
Criminal	10561	5799
Civil	2813	1196
PDSS	1407	1407
Total	**14781**	**8402**

(*Table 2.4)* Statistics of Cases from January 2013 to December 2013[118]

Types of Cases	**Cases Granted**	**Case Completed**
Criminal	9761	6223
Civil	3717	2063
PDSS	2314	2314
Total	**15,792**	**10,600**

(*Table 2.5)* Statistics of Cases from January 2014 to December 2014[119]

[117]Legal Aid Council Report to the Nigerian Bar Association delivered at the 2013 Annual General Conference holding at Calabar Cross River State August 20th – 30th 2013. http://www.legalaidcouncil.gov.ng/docs/2013_LAC_NBA_Report.pdf (accessed 18/06/2019).

[118]Legal Aid Council of Nigeria Report to the Nigerian Bar Association delivered at the 2014 Annual General Conference holding at Owerri, Imo State. August 24-29 2014. http://www.legalaidcouncil.gov.ng/docs/2014_LAC_NBA_Report.pdf (accessed 18/06/2019).

[119]Legal Aid Council of Nigeria Report to the Nigerian Bar Association delivered at the 2015 Annual General Conference holding at Abuja. 21st – 28th August 2015. http://www.legalaidcouncil.gov.ng/docs/2015_LAC_NBA%20Report.pdf (accessed 18/06/2019).

Types of Cases	Cases Granted	Case Completed
Criminal	10,452	6,702
Civil	4,898	3,522
PDSS	2,551	2,551
Total	**17,901**	**12,779**

(*Table 2.6)* Statistics of Cases from January 2015 to December 2015[120]

Types of Cases	Cases Granted	Case Completed
Criminal	6,518	3,867
Civil	3,581	2,409
PDSS	730	730
Total	**10,829**	**7,006**

(*Table 2.7)* Statistics of Criminal and Civil Cases Granted and Completed from January 2016 to December 2016[121]

Types of Cases	Cases Granted	Case Completed

[120]Legal Aid Council of Nigeria Report to the Nigerian Bar Association Delivered at the 2016 Annual General Conference holding at Port-Harcourt, Rivers State from 19th to 26th August 2016. http://www.legalaidcouncil.gov.ng/docs/2016_LAC_NBA%20Report.pdf (accessed 18/06/2019).

[121]Legal Aid Council of Nigeria Report to the Nigerian Bar Association Delivered at the 2017 Annual General Conference holding at Lagos. 18th – 24th August 2017. http://www.legalaidcouncil.gov.ng/docs/2017_LAC_NBA%20Report.pdf (accessed 16/07/2016).

Criminal	9,326	3,724
Civil	4,117	2,462
Total	**13,443**	**6,189**

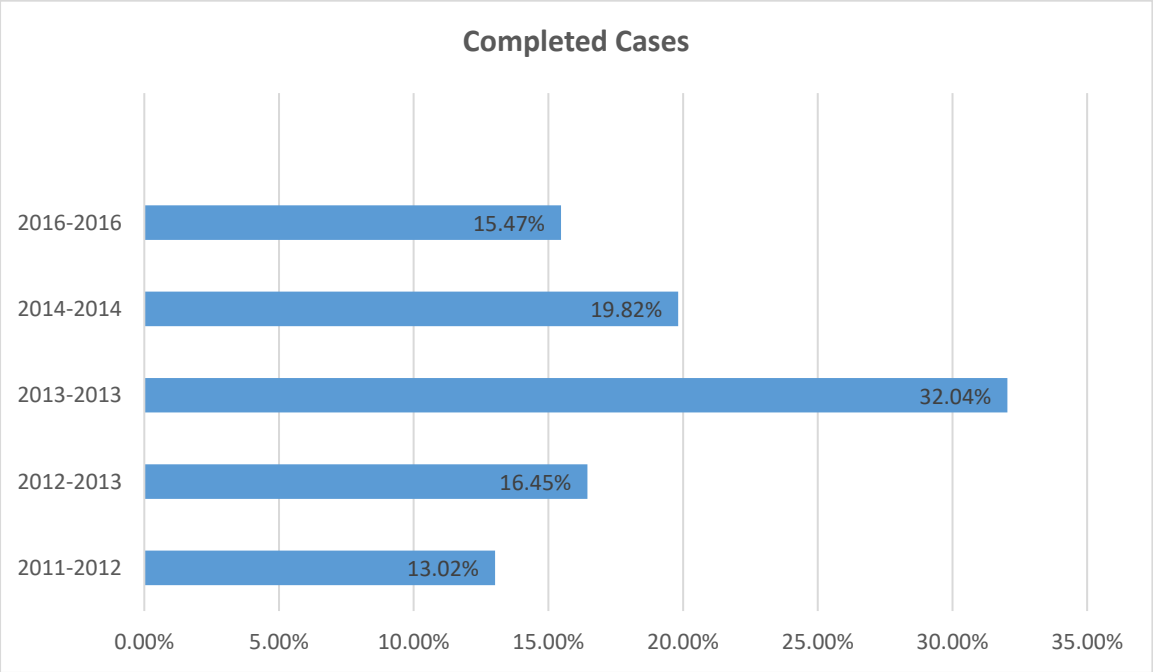

Figure 2.1 - Comparative Analysis of Completed Legal Aid Cases from 2010 to 2017

The LAC annual reports[122] provide up-to-date information on the efforts and progress of the legal aid scheme in Nigeria. In total, there are seven annual reports[123] and five[124] of these provide comparative data analysis on the LAC's overall annual performance with regards to providing legal aid to those who require it and ensuring that every case is completed.

[122]Legal Aid Council of Nigeria Report to the Nigerian Bar Association. http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=118&Itemid=1966&lang=en (accessed 19/06/2019).
[123]Legal Aid Council of Nigeria Report to the Nigerian Bar Association 2011-2017 Ibid.
[124]Legal Aid Council of Nigeria Report to the Nigerian Bar Association 2012, 2013, 2014, 2015 and 2017 Ibid.

These reports show consistent improvement in the number of completed cases between 2010 and 2017. In 2012, the LAC reported an increase of 13.02% in completed cases in 2010-11 (April-March) compared to 2011-12 (April-March). Similarly, in 2012-2013 (April-March), there was a rise of 16.45% on the previous year. In 2014, the LAC reported its greatest yearly improvement on record, equalling 32.04% increase in January-December 2013. However, this rate of improvement was not maintained, and dropped to 19.82% in 2013-2014 (January-December). There are no comparative statistics listed in the 2016 LAC report. Finally, the LAC report of 2017 reports only a 15.47% increase in 2015-2016 (January-December). The reports are crucial to establishing the current status of the scheme as well as identify specific areas that need improvement. However, the reports are generic and do not give any detail on specific areas of the country. Erugo[125] contends that despite the yearly improvements, there are concerns that the scope of legal aid remains limited and does not cover individuals who need it the most.

2.3 Legal Aid via African Regional Human Rights Instruments

According to Wiseberg,[126] as a result of regional human rights law in Africa, member states are under the obligation to uphold the fundamental rights of their citizens in the interest of equality. State parties are instructed to protect the rights and freedoms of its citizens in line with international human rights instruments such as the United Nations Universal Declaration of Human Rights (UDHR).[127] The African system is the youngest of the three existing regional human rights systems,[128] the others being the Inter-American and the European systems.[129] According to Heyns and Killander,[130] human rights are widely used and recognised in the African context through these instruments. Human rights instruments are not typically enforced and so require domestic legislative implementation before they may be applied by the courts.

[125]Erugo Sam (2016) 'Legal Assistance by Clinical Law Students: A Nigerian Experience in Increasing Access to Justice for the Unrepresented' Asian Journal of Legal Education 3(2) pp. 160–173.
[126]Wiseberg Laurie S. (1996) 'Introductory Essay.' In Lawson Edward H., Bertucci Mary Lou, Dargel Jan K. (eds.) 'Encyclopaedia of Human Rights' Second Edition Taylor & Francis p. XIX.
[127]See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[128]Baderin Mashood A., Ssenyonjo Manisuli (2011) 'Development of International Human Rights Law Before and after the UDHR.' SOAS School of Law Legal Studies Research Paper Series No.2 p. 19.
[129]Heyns Christof, Padilla David, & Zwaak Leo (2006) 'A Schematic Comparison of Regional Human Rights Systems: an update.' Sur. Revista Internacional de Direitos Humanos, *3*(4), pp. 160-169.
[130]Heyns Christof and killander Magnus (2006) 'The African Regional Human Rights System. In International Protection of Human Rights: Achievements and Challenges.' Felipe Gomez Isa & Koen de Feyer (eds.) p. 509.

Thus, the directives are written in or, as in the case of Nigeria, domesticated by the national constitution to reflect their commitment to the protection of freedom, dignity, equality, and social justice of all citizens.

2.3.1 The African Regional Legal System

The African regional legal system was initiated through the African Union (2002) (AU)[131] (formally known as the Organization of African Unity 1963 (OAU)).[132] In 1999, the OAU government issued a declaration, known as the Sirte Declaration, to establish the AU. Its goal was to further unity, and economic and social development among African states, as well as to further promote and protect the rights of Africans in accordance with the African Charter on Human and Peoples' Rights 1986 (ACHPR) and other relevant human rights instruments.[133]

The African Union (AU) initiatives were intended to act as a substructure to further access to justice mechanisms through African regional human rights instruments. Such efforts are critical to the general performance of the legal aid scheme. In addition to domestic legislation, legal aid provision depends on regional human rights instruments for administrative purposes, which include the regulation, application, execution, and enforcement of legal provisions. The AU also leads on issues such as scope of provision, access, and eligibility to ensure that member states comply with international human rights standards.

The evaluation and analysis of the nature and scope of regional human right laws are of utmost importance to the systematic sustainability of the legal aid scheme in Nigeria. This would give more insight into how African regional laws are applied and manifest through domestic law throughout Nigeria. The unique structure of the Nigerian legal system, a pluralist system incorporating English common law, indigenous customary law, and the constitutional devolution of governance to Nigeria's federal states, is of importance here.[134]

[131]See Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000.
[132]See Organization of African Unity (OAU), Charter of the Organization of African Unity, 25 May 1963.
[133]Ibid. see Objectives of the AU.
[134]Osaghae Eghosa E. (1992) 'The Status of State Governments in Nigeria's Federalism' Publius, Vol. 22, No. 3, 'The State of American Federalism,' 1991-1992 pp. 181-200.

2.3.2 African (Banjul) Charter on Human and People Rights (ACHPR 1986)[135]

The African Charter on Human and Peoples' Rights (Banjul Charter) was as a result of a demand by states, for an African human rights system that would be applicable and structured to suit the wellbeing of the African people. According to Kufuor,[136] this demand was initiated by Nnamdi Azikiwe in response to the Atlantic Charter of 1941, which gave the right to all citizens to be subject to a government of their choice. The 1941 Charter was not intended for British colonial subjects, but was instigated to deal with Europeans under Nazi authority; nonetheless, it inspired the Banjul Charter, which is the only human rights instrument that has been domesticated into the national legislation of Nigeria and marked the onset of the development of human rights norms and institutions in Africa.[137] The Banjul Charter does not explicitly provide for the provision of legal aid, but was central to the systemisation of legal aid within the African access to justice framework. In the fundamental rights enshrined in the Charter on the principle of fairness, as well as in other human rights treaties, the right to legal aid is clearly defined. In addition to civil and political rights, the Charter contained a wide range of significant social, economic, and cultural rights. Hence, it was not only extended to safeguard peoples' rights, but also places duties on citizens.[138]

According to Smith,[139] the Charter seeks to embody a uniquely African concept of human and peoples' rights which stipulates that all peoples are equal. Bondzie-Simpson[140] posits that it was instigated by the notion of self-determination. African member states felt it was their duty to liberate and completely rid the African continent of colonial domination and seek independent development. Thus, member states are mandated to adopt legislative measures to give effect to the directives contained within the Charter in their respective domestic legal systems: "[t]he Member States of the Organisation of African Unity […] shall recognise the

[135]See Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[136]Kufuor Kofi Oteng (2010) 'The African Human Rights System Origin and Evolution' Palgrave Macmillan p. 1.
[137]Odinkalu Chidi Anselm (2003) 'Back to the Future: The Imperative of Prioritising for the Protection of Human Rights in Africa' 47 Journal of African Law p. 19.
[138]Naldi J. Dino (2008) 'The African Union and the Regional Human Rights System' In Malcolm Evans Rachel Murray (eds.) 'The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006' Second Edition p. 25.
Bondzie-Simpson Ebow (1988) 'A Critique of the African Charter on Human and People's Rights' A. Howard Law Journal 31(4) p. 644.
[139]Smith Rhona K. M. (2016) 'Textbook on International Human Rights' 7th Edition Oxford University Press p. 85.
[140]Bondzie-Simpson Ebow (1988) 'A Critique of the African Charter on Human and People's Rights' A. Howard Law Journal 31(4) p. 644.

rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."[141] Unlike other international human rights treaties, state parties to the African Charter assume obligations with immediate effect. As Article 45 of the Charter stipulates, all rights contained within the Charter were justiciable before the African Commission on Human and Peoples' Rights.[142]

The Charter was also considered a system capable of tackling the gross human rights violations that continued unabated in African states.[143] The human rights violations, according to Bondzie-Simpson,[144] could be traced back to the principle of non-interference in the internal affairs of other state members. This principle reflected the closely guarded state sovereignty agenda many African states acquired after attaining independence. Nigeria played a dominant role in the process that led to a human rights system in Africa[145] to protect and promote the rights of individuals.[146] Smith[147] gave a narrow overview of the Charter and contends that it represents many African regions that have similar linguistic, religious and cultural traditions.[148] However, the author maintains that the Charter succeeded in establishing a coherent African regional legal system, despite the lengthy history of dictatorial regimes and excessive human rights violations.[149] Bondzie-Simpson considers the notion that Africa has one homogeneous culture a misconception but accepts that there are similarities among African regions. The author further asserts that the people of Africa are of multifarious ethnic groups with different social structures and cultures, [150]one of which being their traditional legal systems.

[141]See Article 1 of The African Charter on Human and People Rights.
[142]Ibe Stanley (2010) 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities' African Human Rights Journal Vol. 10 No. 1 pp. 199- 200.
[143]"Human rights abuse inflicted on the African people by internal authoritarian and dictatorial governments e.g. Idi Amin of Uganda, Jean Bedel Bokassa of Central African Republic and Francisco Marcias Nguema of Equatorial Guinea including the early surge of ethnic rivalry, irredentism and secessionism which led to "varying degrees of civil strife, authoritarianism and refugee problems."Bondzie-Simpson Ebow (1988) 'A Critique of the African Charter on Human and People's Rights' A. Howard Law Journal 31(4) pp. 644-645.
[144]Ibid.
[145]Dada Jacob Abiodun (2013) 'Human Rights Protection in Nigeria: The Past, the Present and Goals for Role Actors for the Future' Journal of Law, Policy and Globalization Vol. 14 p. 4.
[146]Bekker Gina (2007) 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' Journal of African Law, Vol. 51, No. 1 pp. 151-172.
[147]Smith Rhona K. M. (2016) 'Textbook on International Human Rights' 7th Edition Oxford University Press p. 85.
[148]Ibid. p. 85.
[149]Ibid. p. 88.
[150]Bondzie-Simpson Ebow (1988) 'A Critique of the African Charter on Human and People's Rights' A. Howard Law Journal 31(4) pp. 654-655.

2.3.3 Historical Background of the Banjul Charter

Before the Charter was adopted, many efforts were made to ratify a regional human rights instrument. In 1961, the first Congress of African Jurists, held in Lagos, Nigeria, adopted a declaration known as the 'Law of Lagos' calling on African governments to adopt an African convention on human rights with a court and a commission.[151] After the Law of Lagos Declaration, the charter establishing the Organization of African Unity (OAU) did not have a clear human rights mandate. The OAU founding charter referred state parties to the UDHR,[152] which required signatories to have due regard for the rights set out in its directives. In 1967, the first Conference of Francophone African Jurists held in Dakar, Senegal saw a relaunch of the Law of Lagos declaration,[153] and various other regional human rights related conferences and seminars followed. In 1979 a draft regional human rights instrument was proposed. After a few setbacks (e.g., the hostility of certain African governments to the idea, and a failed attempt to adopt the draft charter at a conference scheduled in Ethiopia), the draft Charter was finally adopted. Consequently, the Banjul Charter (after the efforts by the President of The Gambia to hasten the adoption of the regional human rights instrument) was finally adopted by the OAU Assembly on 28 June 1981. It came into force on 21 October 1986.[154]

"The Banjul Charter is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent."[155] Its mandates are derived from international human rights law via the United Nations UDHR.[156] In addition, the Charter explicitly imposes duties on individuals, private organisations, member state governments and all other government agencies.[157] It uprooted the inherently traditional type

[151]History of the African Charter African Commission on Human and Peoples' Rights http://www.achpr.org/instruments/achpr/history/ (accessed 03/07/2016).
[152]See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[153]Ibid.
[154]Ibid.
[155]See African Charter on Human and Peoples' Rights. https://www.achpr.org/public/Document/file/English/banjul_charter.pdf (accessed 06/06/16).
[156]The United Nations Charter is the treaty that established the United Nations (UN). The UN was adopted unanimously at the San Francisco Conference on June 26th and formally came into existence on October 24, 1945: History of the United Nations Charter.
[157]Aka P. C. (2001-2002) 'Military, Globalization, and Human Rights in Africa,' The New York Law School Journal of Human Rights 18(3) p. 364.

of governance in African states, where a state member would treat all matters within its domestic jurisdiction as free from international interference and scrutiny.[158]

While highlighting the significant amount of time that elapsed before the treaty was officially ratified, Bondzie-Simpson[159] acknowledges the significance of the Charter to the all-important socio-economic and political development in Africa. The Banjul Charter was an advancement on the African regional human rights system because within its mandates there was a clear indication of its aims and a promise to protect the legal rights of individuals.

2.3.4 Status and Applicability of the Banjul Charter in Nigerian Domestic Law

Crucial fundamental rights such as legal aid is dependent on the implementation and enforcement of international human rights instruments in domestic law. Steiner et al. [160] critique the capabilities of the Charter, arguing that it is only nominally developed and that the Commission of the ACHPR lacks resources and support from member state governments.[161] The authors held that the ACHPR also lacks a specific enforcement procedure applicable in a domestic framework. On the other hand, in *Nemi v. The State*,[162] the Supreme Court of Nigeria held that the absence of an enforcement procedure in the Charter does not constitute an impediment to the enforcement of the rights contained within it.

According to Bello CJ[163]: "since the Charter has become part of our domestic law, the enforcement of its provisions like all our other laws falls within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto." As such, the application of the Charter to enforce the rights it upholds is at the discretion of the judiciary. However, Okeke[164] posits that the Charter seems to be the only human rights treaty to which Nigeria is a signatory, and which has been domesticated into national law through the ACHPR

[158]Okpalaobi Beatrice (2012) 'An Evaluation of the Relevance and Enforceability of the African Charter on Human and Peoples' Rights in Nigeria' An African Journal of Arts and Humanities Bashir Dar Ethiopia Vol. 1 (1) p. 309.
[159]Bondzie-Simpson Ebow (1988) 'A Critique of the African Charter on Human and People's Rights' A. Howard Law Journal 31(4) p. 644.
[160]Steiner Henry J Alston Philip Goodman Ryan (2007) 'International Human Rights in Context law Politics Morals' Third Edition p. 1062-63.
[161]Ibid.
[162] See [1994] 1 LRC 376.
[163]Ibid.
[164]Okeke C.N (2015) 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' Arizona Journal of International & Comparative Law Vol. 32, No. 2 pp. 415-416.

by virtue of the (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990.[165] Thus, the recognition of legal rights via international law and the ACHPR emerged within the Nigerian domestic judiciary. The status and applicability of the Charter within Nigerian domestic law was affirmed in the case of *Abacha and Others v. Fawehinmi*.[166] The Supreme Court held that "the African Charter is thus enacted that all authorities and persons exercising legislative, executive or judicial powers in Nigeria are enjoined to give full recognition and effect to the African Charter. That is, the plenitude of the government of Nigeria cannot do anything inconsistent with the Charter."[167] The implication was that the Charter is indeed part of Nigerian domestic law and therefore enforceable in the courts like any other statute.

However, the court noted that the Nigerian constitution would take precedence if it conflicted with the provisions of the Charter. Durojaiye[168] argues for the supremacy of the Nigerian constitution over the Charter based on the dualist state ranking of the Nigerian legal system. This is where international instruments have no automatic effect on national law until after such directive has been fully incorporated by legislation. Egede[169]contends that the superiority of the Nigerian constitution over the Charter is justified based on the provisions of the supremacy of the 1999 Nigerian constitution in Section 1 (1): "[t]his Constitution is supreme, and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria". Section 1 (3) states that: "[i]f any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."[170] However, Onyemelukwe[171] deems the matter of the supremacy of the Nigerian Constitution to the Charter "restrictive as well as problematic".

[165]This Act was enacted to give full effect to "the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria." See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990.

[166]See *Abacha and Others v. Fawehinmi* (2001) AHRLR 172 (NgSC 2000) The African Charter was pitted against ouster clauses to determine supremacy.

[167]Ibid. at [23].

[168]Durojaye Ebenezer 'Litigating the right to health in Nigeria: Challenges and prospects.' In Killander Magnus (ed.) (2010) 'International law and domestic human rights litigation in Africa' p. 160.

[169]Egede Edwin (2007) 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' Journal of African Law, 51 pp. 249-254.

[170]See section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria (1999).

[171]Onyemelukwe C (2007) 'Access to Anti-Retroviral Drugs as a Component of the Right to Health in International Law: Examining the Application of the Right in Nigerian Jurisprudence' 7 African Human Rights Law Journal pp. 446-449.

He holds that such an approach will invariably undermine the directives of the Charter and frustrate all efforts to protect the legal rights of vulnerable individuals, even as a duly incorporated human rights instrument within Nigerian domestic law.

Sections 1 (1) and (3) of the 1999 Nigerian constitution (quoted above) present another flaw in the administration of justice when utilising African regional human rights law through domestic law. In the situation where a gross violation of individual rights according to the Charter is considered inconsistent with that of the Nigerian constitution, no action could be taken. In addition, there are no additional directions or clarification on the definition of 'inconsistent' or a clear example of what could potentially be regarded as such.

In addition to these issues, the implementation of the ACHPR into Nigerian national legislation has been facing various dilemmas from its onset, according to the "4th Periodic Country Report: 2008-2010". The progress report revealed the principal areas of concern for the African Commission.[172] Among these are the continued lack of awareness of the Charter and the Commission by the Nigerian public in both rural and urban areas, as well as concerns regarding "the existing barriers to access to justice such as the high cost of litigation, complexity of court process and inaccessibility of courts due to their location in mostly urban areas, which has been exacerbated by the poor transportation system."[173]

Zahn[174] offers a different perspective on the implementation problems within the Nigerian legal system. The author acknowledges that many provisions contained within the Nigerian constitution exemplify the wordings of the African Charter; however, the Nigerian legal system does not conform to the requirements embodied within the Charter. Zahn further concludes that the dilemma lies with the adopted practice of the legal system in Nigeria and not with the nature of the rights in question.

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[172] "The African Charter established the African Commission on Human and Peoples' Rights. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. Among other tasks the Commission is officially charged with three major functions: (i) the protection of human and peoples' rights, (ii) the promotion of human and peoples' rights, and (iii) the interpretation of the African Charter on Human and Peoples' Rights." http://www.achpr.org/about/ (accessed 14/07/16).

[173] Nigeria's 4th Periodic Country report: - 2008-2010 on the Implementation of the African Charter on Human and People Rights in Nigeria, Produced by the Federal Ministry of Justice, Abuja August 2011 pp. 6-10 http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_nigeria_2011_eng.pdf (accessed 14/07/2016).

[174] Zahn, R. (2009) 'Human Rights in the Plural Legal System of Nigeria.' Edinburgh Student Law Review 1(1), p. 84.

2.3.5 Article 7 (1) of the Banjul Charter in Accessing Legal Aid

The main intent of the Charter was "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation."[175] Article 7 (1) of the Charter focuses on fair trial rights, which is derived from an individual's right to be heard. Article 7 (1) (c) establishes the right to legal representation: "(1) every individual shall have the right to have his cause heard. This comprises: [...] (c) The right to defence, including the right to be defended by counsel of his own choice…"[176]

Article 7 (1) (c) does not explicitly provide for legal aid; yet the notion that an individual has the right to legal representation and to choose their defence counsel implies that this provision would enable a fair trial. This would be derived through specific laws, guidelines, and schemes to ensure that the right to a fair trial enshrined in Article 7 (1) is fulfilled. In addition, the constitutional and administrative measures that govern Article 7 is found in s. 36 of the current 1999 Nigerian Constitution, which affirms the "right to fair trial as well as fair hearing within reasonable time, presumption of innocence, legal assistance and interpretation to the accused…"[177]

The right to free legal counsel is a vital component of the right to a fair trial and the two, work in sequence with one another, especially when the litigants involved do not have the means to pay for legal representation. In addition to addressing the impediments caused by social status when accessing courts, Udombana[178] argues that "the right to a fair trial is an aspect of the 'due process of law' principle, embodying the idea of fair play and substantial justice." The right to a fair trial is a human right that consists of requisite procedural mechanisms. For instance, strategic rules are paramount to coordinate and maintain a balance of interests between the parties embroiled in litigation, particularly in the operation of judicial proceedings. During these proceedings, the right to legal aid to disadvantaged individuals cannot be excluded.

[175]See Article 45(c) of The African Charter on Human and People Rights.
[176]See Article 7(1) (c) of The African Charter on Human and People Rights.
[177]Nigeria's 4th Periodic Country report: - 2008-2010 on the Implementation of the African Charter on Human and People Rights in Nigeria, Produced by the Federal Ministry of Justice, Abuja August 2011 p. 38. http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_nigeria_2011_eng.pdf (accessed 20/05/19).
[178]Udombana J Nsongurua (2006) 'The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa' African Human Rights Journal Vol. 6 No. 2 p. 300.

Ultimately, Article 7 preserves independence and eliminates bias of litigants within the judicial system.

The directives of Article 7 (1) of the Charter suggest that equality before the courts cannot be realised if the option to be defended via legal aid is not available for individuals that require it. Hence, the right to legal representation implies a right to legal aid. The fair trial norms contained within Article 7 (1) embody the Charter in totality: for instance, many Articles contained within the Charter contain an element of the idea of fair trial, such as the right to life in Article 4.

2.3.6 The African Commission on Human and Peoples' Rights: Fair Trial Rights, Independence of Courts, and the Right to Legal Representation via Legal Aid

Fair trial rights incorporate the right to legal aid. As an independent entity, the courts can make decisions in the interest of equal justice without interference from other arms of government. In addition to Article 7, Article 26 of the Charter becomes another crucial mechanism to guarantee a fair trial via the right to legal representation through legal aid, as well as to give courts the capacity to ensure that citizens are duly protected during proceedings. "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."[179] According to Abdullahi,[180] the Nigerian Judiciary has the mandated obligation to ensure courts conduct fair trials and provide free access to counsel via legal aid; however, the Nigerian judiciary has been accused of ethnic bias, serious corruption, ineptitude, laziness, incompetence and abuse of office by the Supreme Court judges.[181] This is in addition to the loss of faith in the judicial process by the Nigerian public due to the complex practice and difficulty of accessing courts.[182]

Hence, this section discusses case law that has been re-examined by the Commission based on the directives of Article 7 and 26 of the Banjul Charter. The Commission illustrated the link

[179]See Article 26 of The African Charter on Human and People Rights.
[180]Abdullahi Ibrahim (2014) 'Independence of the Judiciary in Nigeria: A Myth or Reality?' International Journal of Public Administration and Management Research (IJPAMR), Vol. 2 No. 3 p. 55.
[181]Ibid.
[182]Ibid.

between Article 7 (1) and Article 26 in *Civil Liberties Organization v. Nigeria (2000)*.[183] In their decision, the Commission placed a lot of emphasis on Article 7 (1) of the Charter. Furthermore, it was specific about states parties' obligations to guarantee the independence of the institutions, which gives meaning and content to the right to a fair trial.[184] Thus, states are obliged to maintain the autonomy of the courts, the right to be heard on equal standing and access to legal aid.

Constitutional Rights Project and Others v. Nigeria (2000)[185] highlights the interrelation between the right to be heard and a fair trial. The Commission found, among other violations, an infringement of Article 7 (1) (a): "(1) every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force[.]"[186] The Commission argued that the decision was reached because the suit was abruptly nullified by executive decree. The Commission also posited that the dissolution of the case in progress posed a serious threat to the protection of individual rights. Finally, it was argued that vulnerable individuals will be discouraged from exercising their right to seek redress if state parties cannot uphold the directives meant to protect their citizens.

The independence of the courts is crucial to making decisions regarding access to legal aid. As such, the courts are key to bridging the gap created by various barriers associated with access to justice; however, the various military regimes in Nigeria have enacted a principle that restricts the jurisdiction of the judiciary, which puts independence of courts in jeopardy. In the case of *Civil Liberties Organisation v. Nigeria (2000),*[187] several persons, consisting of civilians and serving and ex-service military personnel, were arrested in connection with an alleged plot against the Federal Government of Nigeria in March 1995. A special military tribunal was established which prohibited the jurisdiction of Nigerian domestic courts. The rules and procedures of court martial were applied by the tribunal with no right to appeal. The

[183]AHRLR 188 (ACHPR 1995) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/390-nigeria-civil-liberties-organisation-v-nigeria-2000-ahrlr-188-achpr-1995.html (accessed 10/06/18).
[184]Ibid.
[185]AHRLR 227 (ACHPR 1999) http://www.chr.up.ac.za/index.php/browse-by-subject/401-nigeria-constitutional-rights-project-and-others-v-nigeria-2000-ahrlr-227-achpr-1999.html (accessed 04/08/18).
[186]See Article 7(1) (a) of The African Charter on Human and People Rights. http://www.achpr.org/instruments/achpr/#a7 (accessed 04/08/18).
[187]AHRLR 243 (ACHPR 1999) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/391-nigeria-civil-liberties-organisation-v-nigeria-2000-ahrlr-243-achpr-1999.html (accessed 10/06/2018).

trial was held in private, and defendants had no access to counsel of their choice. They were not made aware of the charges against them until the trial commenced and were represented by military lawyers that were appointed by the federal government. Consequently, thirteen of the civilian suspects were tried by the tribunal, convicted, and sentenced to life imprisonment for being an accessory to treason. The sentences were later reduced to 15 years imprisonment. The Commission in this case reiterated its previous decisions and declared that the trial of these persons before a special tribunal violates Article 7 (1) (d) and Article 26. In relation to the right to a fair trial which implies the right to legal aid, as highlighted in this study, the Commission found a violation of Articles 7 (1) (a), (c) and (d) and Article 26 of the African Charter.

In addition, in the case of *Civil Liberties Organisation and Others v. Nigeria (2001),*[188] five military men and a civilian were convicted and sentenced to death by a special military tribunal for an alleged plot to overthrow the Nigerian military government under General Sani Abacha. The Commission found an infringement of Article 7 (1) (c) of the Charter because the convicted persons were not given the opportunity to be represented and defended by counsel of their choice (they were represented by junior military lawyers, who were assigned to them). Therefore, the Commission also found a violation of Article 7 (1) (a). There are numerous references to the right to counsel of one's choice and the provision of legal aid by the advocates as well as the Commission because the alleged crime is considered a serious offence (one that carries the death penalty). An unfair trial will jeopardise other crucial rights of the accused if the provisions under Article 7 (1) of the Charter relating to the case are not complied with. This case also highlights the purpose of the provision under Article 7 (1) (c), which is to ensure that the accused has confidence in his legal counsel.

In *Constitutional Rights Project (in respect of Akamu and Others) v. Nigeria (2000),*[189] a case was filed by a Nigerian NGO on behalf of Akamu and Others, who were tried and sentenced to death by virtue of the Robbery and Firearms (Special Provisions) Act No. 1 of 1984. The decree creates special tribunals composed of members of the armed forces, the police and judges and does not provide for any judicial appeal of sentences. Considering the right of the accused persons to a fair trial, the Commission found a violation of Article 7 (1) (a), (c) and

[188]AHRLR 75 (ACHPR 2001) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/393-nigeria-civil-liberties-organisation-and-others-v-nigeria-2001-ahrlr-75-achpr-2001.html (accessed 10/06/18).
[189]AHRLR 180 (ACHPR 1995) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/397-nigeria-constitutional-rights-project-in-respect-of-akamu-and-others-v-nigeria-2000-ahrlr-180-achpr-1995.html (accessed 10/06/18).

(d) of the Charter. This ruling was reached because the severity of the penalty (death), the lack of impartial tribunal and the prohibition of judicial appeal. The Commission recognised that the violation of the right to fair trial can lead to the infringement of other protected freedoms under the Charter (e.g., the right to life and liberty provided for in Articles 4 and 6 respectively). There was no mention of the right to be defended by counsel of choice in this case by the authors or in the explanatory notes of the Commission. However, the latter found a violation of the right under Article 7 (1) (c) which exhibits the intersections between the subsections of Article 7 (1).

In *Constitutional Rights Project (in respect of Lekwot and Others) v. Nigeria (2000)*[190], the communication 87/93 was submitted on behalf of seven persons from Nigeria who were sentenced to death under the Civil Disturbances (Special Tribunal) Act No. 2 of 1987. "This decree does not provide for any judicial appeal against the decisions of the special tribunals and prohibits the courts from reviewing any aspect of the operation of the tribunal. […] The communication also alleges that the accused and their counsel were constantly harassed and intimidated during the trial." This led to the withdrawal of the defence counsel from the proceedings, leaving the accused persons without legal representation. In the absence of a defence counsel, the Tribunal proceeded to "condemn the accused to death for culpable homicide, unlawful assembly and breach of the peace." The Commission finds that the accused persons were denied the right to be heard before an impartial court and the right to be represented by counsel of their choice. Hence, the Commission found a violation of Article 7 (1) (a), (c) and (d) of the Charter.

In the case of *Constitutional Rights Project and Another v. Nigeria (2000),*[191] Communication 143/95 (14 December 1994) was filed by the Constitutional Rights Project, claiming that the government of Nigeria, through the State Security (Detention of Persons) Amendment Decree No. 14 of 1994, had prohibited any court in Nigeria from issuing a writ of habeas corpus. In addition, communication 150/96 (15 January 1996) was submitted by the Civil Liberties Organisation to address the implications of the (Detention of Persons) Amendment Decree No.

[190]AHRLR 183 (ACHPR 1995) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/398-nigeria-constitutional-rights-project-in-respect-of-lekwot-and-others-v-nigeria-2000-ahrlr-183-achpr-1995.html (accessed 04/08/2018).
[191]AHRLR 235 (ACHPR 1999) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/400-nigeria-constitutional-rights-project-and-another-v-nigeria-2000-ahrlr-235-achpr-1999.html (accessed 04/08/18).

14 of 1994 on the fundamental rights of the accused persons. Seven civilians[192] were detained under this decree, without charge and were refused the right to bring habeas corpus against their continued detainment. Among other things (e.g., access to medical care and their families), the accused persons were denied access to their lawyers. In its defence, the government attempts to justify Decree No. 14 with the necessity for state security. However, the Commission contends that the process of adopting extreme measures to curtail rights could create greater unrest. As such, on the matter relating to the provisions of the right to a fair trial, the Commission found the government in violation of Article 7 (1) (a), (c) and (d) of the African Charter.

In *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria (2000)*,[193] communications 137/94, 139/94, 154/96 and 161/97 were submitted to the Commission on behalf of Mr Saro-Wiwa, a writer, Ogoni activist and President of the Movement for the Survival of the Ogoni People, by International Pen, the Constitutional Rights Project, Interights and the Civil Liberties Organisation, respectively. This case concerned the detention and trial of Mr Saro-Wiwa in connection with the murder of four Ogoni leaders on 21 May 1994, plus other human rights violations that were suffered by Mr Saro-Wiwa's co-defendants. He was charged with unlawful assembly and denied access to his lawyer. The tribunal was established under the Civil Disturbances Act 1987.

The three members of the tribunal that tried the case were appointed by the military President of Nigeria General Abacha. Subsequently, the Constitutional Rights Project alleged that the trial was unfair due to the bias on the part of the tribunal members and the harassment of the defence counsel, who were not allowed to meet with the defendants in private and did not receive information on the charges. Hence, Mr Saro-Wiwa and eight co- defendants were sentenced to death. The commission held that the conduct of the trial and the execution of the victims was a clear violation of Article 7 (1)[194] and Article 26 of the ACHPR.

[192]Those detained were Mr Abdul Oroh, Mr Chima Ubani, Dr Tunji Abajom, Chief Frank Kokori, Dr Fred Eno, Honourable Wale Osun and Mr Osagie Obayunwana See ibid. at 5.
[193]AHRLR 212 (ACHPR 1998) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/406-nigeria-international-pen-and-others-on-behalf-of-saro-wiwa-v-nigeria-2000-ahrlr-212-achpr-1998.html (accessed 04/08/18).
[194]Articles 7 (1) (a), (b) (c) and (d) The African charter on Human and Peoples' Rights 1986.

In *Rights International v. Nigeria (2000),*[195] Rights International, an NGO based in the United States, submitted that Nigerian soldiers arrested and tortured Mr. Charles Baridorn Wiwa at an unknown military detention camp between 2 and 9 January 1996. The Complainant alleged that Mr. Wiwa, who was a relative of Mr Saro-Wiwa, was tortured, detained unlawfully, and denied access to a lawyer when he was later charged with unlawful assembly under Section 70 of the Criminal Code Laws of Eastern Nigeria of 1963. They claim it was violation of his right to legal representation under Article 7 (1) (c). Hence, in conclusion, the Commission held that Mr. Wiwa's right to legal representation was violated when he was denied access to counsel.

In Media Rights Agenda and Others v. Nigeria (2000),[196] Mr Niran Malaolu was arrested with three other staff of the newspaper "Diet" by armed soldiers at the editorial offices in Lagos on 28th December 1997. He was accused of publishing news titled "The Military Rumbles Again" after the announcement of alleged coup plot uncovered by the military government. Mr Malaolu was detained for 49 days without charge and no access to his lawyer, family, or medical team. He was assigned a military lawyer by the tribunal. After a secret trial on 28th April 1998, Niran Malaolu was found guilty by the tribunal of the charge of 'concealment of treason' and sentenced to life imprisonment. In their defence, the government of Nigeria contended that the trial was conducted under valid law enacted by the competent authority at that time. However, in addition to other infringements under the ACHPR, the Commission also found a violation of Articles 7 and 26.

Also, in *Media Rights Agenda and Others v. Nigeria (2000)*,[197] the defendant, Mr Nosa Igiebor, was denied access to lawyers. The commission declared in its statement that Nigeria was under the obligation to guarantee all its citizens the right to be heard. And going by the statement of the defendant, to which there was no response from the Nigerian government, the commission concluded that there was in fact a violation of Article 7 (1) (c) of the African Charter. The Commission reiterated that the right to a fair trial and the right to be defended by a counsel of choice is a human right that cannot be violated by state parties. In addition, according to the

[195]AHRLR 254 (ACHPR 1999) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/409-nigeria-rights-international-v-nigeria-2000-ahrlr-254-achpr-1999.html (accessed 04/08/2018).
[196]See AHRLR 200 (ACHPR 1998).
http://www.achpr.org/files/sessions/28th/comunications/224.98/achpr28_224_98_eng.pdf (accessed 05/07/19).
[197]See AHRLR 200 (ACHPR 1998) http://www.chr.up.ac.za/index.php/browse-by-subject/407-nigeria-media-rights-agenda-and-others-v-nigeria-2000-ahrlr-200-achpr-1998.html (accessed 04/08/18).

Charter, governments should employ special care with regard to those rights protected by constitutional or international human rights law.

In *Centre for Free Speech v. Nigeria (2000)*,[198] the commission found that there was a violation of Article 7 (1) (a), (c) and (d). The commission concluded that the four convicted journalists "were not allowed access to their lawyers [or] given the opportunity to be represented and defended by lawyers of their own choice at the trial." Furthermore, in addition to subsections (a) and (c), (d) affords the right to be tried within a reasonable time by an impartial court or tribunal, and thus could also have a cumulative effect, similar to the impacts caused by non-access to legal aid. As such, it is a vital component of the principle of equality of all before the law. There was also a mention of a contravention of Article 26 of the African Charter. The defendants were tried and convicted in secret by a "special military tribunal presided over by a serving military officer who is also a member of the Provisional Ruling Council (PRC)"; therefore, the Nigerian government failed in their duty to guarantee the independence of the courts in this case.

The cases reviewed above represent the combined efforts of the African Charter and Commission to substantially uphold the rights of individuals involved in litigation, reiterating the significance of a fair trial by appropriate legal representation within domestic courts in Nigeria. Thus, legal aid remains a definitive factor in preserving fairness and impartiality before the courts. According to Ouguergouz,[199] Article 7 (1) is one of the articles of the African Charter to which the Commission has devoted the greatest attention. The author also states that there are a handful of domestic cases where the Commission has ruled in favour of appellants based on the authority of Article 7 (1) of the Charter.[200]

However, Viljoen[201] contends that, in order to be applied with full force, the directives of the African Charter must be regarded as part of Nigerian domestic law. Hence, a policy briefing

[198]See AHRLR 250 (ACHPR 1999) http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/387-nigeria-centre-for-free-speech-v-nigeria-2000-ahrlr-250-achpr-1999.html (accessed 04/08/18).
[199]Ouguergouz Fatsah (2003) 'The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' p. 148.
[200]Ibid.
[201]Viljoen, F. (1999) 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa,' Journal of African Law, 43(1), pp. 1-17.

on the prospects of the African human rights system concluded that the absence of enforcement mechanisms within the Charter renders human rights initiatives ineffective in practice.[202]

2.4 Supplementary African Human Rights Instruments: Fair Trial Rights and Legal Aid

According to Udombana,[203] the Commission of the ACHPR has made considerable efforts to develop African human rights jurisprudence by interpreting the Charter through specific resolutions and recommendations. To ensure the legal right to a fair trial and legal aid, declarations such as the Resolution on the Right to Recourse and Fair Trial (1992), the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (2003), and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006) were enacted through the African Charter as essential supplementary tools.

2.4.1 The Resolution on the Right to Recourse and Fair Trial (Tunis Resolution) 1992

The Resolution on the Right to Recourse and Fair Trial was adopted by the African Commission on Human and Peoples' Rights, in its Eleventh Ordinary Session in Tunis, Tunisia, from 2 to 9 March 1992. This was a mechanism to further protect fundamental human rights and freedoms in litigation.[204] In addition, the resolution affirmed the right to adequate time and facilities to prepare an impending case. The resolution does not expressly make provision for the right to legal aid as detailed in Article 7 (1) of the African Charter; however, the resolution refers to Article 7 as the basis of its directives regarding legal representation and, as such, the right to legal aid will apply. Hence, "[i]ndividuals shall be entitled to have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice and the right to free assistance of an interpreter if they cannot speak the

[202]Manrique Gil Manuel and Bandone Anete, with contributions from Calvieri Anastasia (trainee) Policy Briefing (2013) 'Human Rights Protection Mechanisms in Africa: Strong Potential, Weak Capacity,' Directorate-General for External Policies of the Union p. 8. http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP(2013)491487_EN.pdf (accessed 08/07/19).

[203]Udombana Nsongurua J. (2006) 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' AHRLJ African Human Rights Journal Volume 6 No. 2 p. 300.

[204]Chenwi Lilian (2006) 'Fair Trial Rights and Their Relation to the Death Penalty in Africa,' The International and Comparative Law Quarterly, Vol. 55, No. 3 p. 611.

language used in court".[205] However, its legal aid provisions are limited to individuals in criminal cases only.

2.4.2 The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (Dakar Declaration) 2003

To strengthen the rights and duties component of the African Charter and to improve access to judicial remedies for African citizens, the Principles and Dakar Declaration were enacted under the authority of Article 45 (c) of the ACHPR.[206] This directive was ratified to further expand the provision of legal aid and takes precedence over national legal aid laws. It also instructs state parties to provide legal assistance where necessary to protect the right to a fair trial.[207] The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (2003)[208] came into force after the adoption of the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa by the Commission at its 26th session in November 1999. "Recognising the importance of the right to a fair trial and legal assistance and the need to strengthen the provisions of the African Charter relating to this right […] [it was] necessary to formulate and lay down principles and rules."[209] The Declaration also placed emphasis on the various ethnic and linguistic disparities within the African region to highlight the need for states to ensure judicial services were accessible to all citizens.[210]

The Dakar Declaration broadened the scope of state obligations to include other general principles applicable to all legal proceedings. For instance, the issue of *locus standi*[211] (which

[205]See Para 2(e)(i) and (iv) of the Resolution on the Right to Recourse and Fair Trial African Commission on Human and Peoples' Rights http://www.achpr.org/sessions/11th/resolutions/4/ (accessed 08/07/19).
[206]"To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation."
[207]'The Right to a Fair Trial: The Dakar Declaration' (2001) Journal of African Law, 45(1), p. 142.
[208]Resolution on the Right to Fair Trial and Legal Aid Assistance in Africa. https://www.achpr.org/legalinstruments/detail?id=38. (accessed 08/07/19).
[209]Ibid.
[210]See para G (c) Access to Judicial Services Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003. https://www.achpr.org/legalinstruments/detail?id=38. (accessed 08/07/19).
[211]"States must ensure, through adoption of national legislation that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or nongovernmental organization is entitled to bring an issue before judicial bodies for determination." Ibid. See Article E of The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

restricts third party representation), the role of prosecutors,[212] access to lawyers,[213] the right to legal aid and assistance[214] and access to judicial services[215] were explicitly detailed and revised in the directive, giving the right to a fair trial more prominence. The right to a counsel of choice via legal aid in both criminal as well as civil cases[216] is deeply embedded within the eligibility criteria of the mandates. In addition, more attention is paid to legal aid in criminal cases including children.[217]

2.4.3 Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006)

Nonetheless, "concerned with the continued lack of legal aid in most parts of Africa and its adverse impact on the right to access to justice", the resolution on the adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006) was approved by the African Commission on Human and Peoples' Rights at its 40th Ordinary Session, held in in 2006 in Banjul, The Gambia.[218] The declaration was adopted by consensus at the closure of the "Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa", which was held in Lilongwe, Malawi in November 2004.[219]

Unlike the Tunis Resolution and Dakar Declaration, the Lilongwe Declaration makes specific reference to the right to legal aid in criminal cases only. Crucial issues that are barriers to

[212]Ibid. See Article F of The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.
[213]"States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status." Ibid. See Article G of The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.
[214]"The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so requires, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it." Ibid. See Article H of The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.
[215]Ibid. See Article K of The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa
[216]See Article H(a), (H)(b)(1)(2), H(c) and H(d) of The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa https://www.achpr.org/legalinstruments/detail?id=38 (accessed 08/07/19).
[217]Ibid. See Article O (l)(3) of The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.
[218]See 100: Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System African Commission on Human and Peoples' Rights.
http://www.achpr.org/sessions/40th/resolutions/100/ (accessed 08/07/19).
[219]Ibid.

access, in conjunction with feasible counter measures, were also acknowledged and highlighted. This included the need to align various service providers (including the police, non-legal staff, NGOs, and justice advocates) in order to boost and expand the legal aid provision from the moment of arrest. This arrangement would also resolve matters that are rampant in Nigeria, such as unlawful detention without charge. However, its mandates provide no clear direction to individuals with civil cases. The lack of legal protection in civil cases can be equally detrimental to a disadvantaged individual considering the high volume of civil cases that are particular to women and children (e.g., in cases of unlawful eviction, personal injury, divorce, child custody, child support, contract violations and property damage). Hence, restricting access to legal aid to individuals, whether they are engaged in civil or criminal cases, is a barrier that disregards the fundamental directives of equality before the courts and pledges of access to legal aid when needed.

Advocates believe that human rights and access to justice are key to preserving the rights of citizens.[220] Human rights are fundamental to enforcing the right to free legal representation in situations where a disadvantaged individual cannot afford legal services. However, the protection of human rights and the consequent right to legal aid remains insufficient. States recognise that the right to legal assistance is central to maintaining the right to a fair trial and the administration of justice. Chenwi[221] contends that some African constitutions mandate courts to provide legal representation at the expense of the state for individuals who cannot afford the fees of a lawyer. She also argues that, due to the high cost of legal representation, disadvantaged individuals may end up being represented by inexperienced and ineffective lawyers; hence, the scepticism towards the term "in the interest of justice" and regarding whether the right to legal aid guarantees a fair trial.

Sen[222] argues that many still perceive human rights to be a mere inscription on paper. He further contends that human rights activists focus more on changing the world rather than understanding it, and therefore fail to provide equitable justifications for the protection and preservation of fundamental rights. This view has led this study to review the current Nigerian constitution as well as previous constitutions (1960-1999) to ascertain the development of legal

[220]Donnelly Jack (2013) 'Universal Human Rights Theory and Practice.' Third Edition pp. 10-13.
[221]Chenwi Lilian (2006) 'Fair Trial Rights and Their Relation to the Death Penalty in Africa.' The International and Comparative Law Quarterly, Vol. 55, No. 3 pp. 626-627.
[222]Amartya Sen (2004) 'Elements of a Theory of Human Rights.' Philosophy & Public Affairs 32, No. 4 pp. 315-356.

aid via fundamental rights directives. In spite of criticisms, the Nigerian constitution has seen a steady growth over the years, and this is reflected in the changes[223] that seek to further protect the rights of individuals via compliance with human rights directives especially fundamental rights such as legal aid. This could also be linked in part, to the mandates of the African Charter on Peoples and Human rights, which is the only international human rights instrument that is supreme when evoked against inadequate and restrictive legislation[224] contained in the Nigerian constitution. These efforts would aim to preserve the principle of constitutional supremacy.

[223]See the Fundamental Objectives and Directive Principles of State Policy and Fundamental Rights (Enforcement Procedure) Rules from 1979-1999 Nigerian Constitution.
[224]For instance, explicit access to legal aid and the principle of *locus standi*.

Chapter 3: Legal Aid: Nigerian Constitutional Review

3.1 Introduction

This chapter examines the sequence of developments regarding the right to legal aid within the Nigerian constitutional mandates. There have been five constitutions since independence:[225] 1960, 1963, 1979, 1989 and 1999. This chapter also investigates the legal aid scheme under the instructions of fundamental rights and the interpretative role of the courts, which is enshrined in all Nigerian constitutions. It will analyse how legal aid provision could be inferred from crucial constitutional rights until it was incorporated in Nigerian domestic law. This chapter will also investigate other additional directives put in place to further promote the protection of fundamental human rights in Nigeria. One such directive (the Fundamental Objectives and Directive Principles of State Policy) has been in place since the 1979 constitution came into force and has remained in all Nigerian constitutions to date. This will highlight the efforts made by way of constitutional reform to further enhance the right to legal aid for the disadvantaged within the Nigerian legal context.

A constitutional review will give more insight into how previous Nigerian constitutions have paved the way for the development of human rights in those that succeeded them. In addition, and most importantly, it will clarify how the fundamental right to legal aid has progressed via successive constitutions. It will present the role of Nigerian courts in adopting the right to legal aid in both criminal and civil cases via constitutional law, and how legal aid provision has manifested in practice in courts. An individual examination of previous and current Nigerian national constitutions will provide a firm foundation for further evaluation of the development of legal aid through the Nigerian legislative, by way of emerging constitutional structures. In addition, this chapter will accentuate the principles of equal justice that have evolved from notable sections within the national constitution, and how these relate to access to legal aid in Nigeria.

[225]Nigeria became independent in 1960 and therefore became a sovereign state independent of colonial rule and control.

3.2 Nigerian Constitutional Model

According to Fombad,[226] a constitution "forms the main source and basis of governmental rulemaking and is primarily designed to check against capricious or arbitrary rulemaking." In Nigeria, the constitution is the highest law of the land and which assigns powers and responsibilities to a three-tier level of government, consisting of federal, state, and local government. Fundamental rights, such as access to legal aid, are components of the directives of the Nigerian constitution. The effective administration of legal aid provision depends on the constitution, the legislature, and the judiciary, which together ensure that the necessary laws are established within the constitution and interpreted according to the constitution's intent.

According to Nwaubani,[227] the main function of the legislature is to "make, amend and repeal laws for the peace, order and good governance of the society", while the judiciary is tasked to interpret laws in accordance with the intentions of the directives and the rights of citizens. Aghalino[228] posits that a constitution in the Nigerian context consists of a collection of rules and principles that are employed and exercised within the state. Such directives dictate the way states are governed; hence, a constitution is a systematic template of a governmental system that authoritatively controls the organs of government. It is the process by which the power derived from the Nigerian statutory structure is allocated and utilised.[229]

According to Hardin,[230] the constitution is a legal institution driven by the need to achieve social order and justice for all individuals, especially the most vulnerable within society. It is a single document that gives governments the authority to empower and mandate specific institutions to promote social welfare. As such, norms are constantly developed to enable equitable resolutions. One such norm is the additional mandate from the 1979 constitution, which remains in the present 1999 constitution, which explicitly grants legal aid for individuals who fall under the indigent category. In effect, the constitution grants supplementary legal

[226]Fombad Charles M. (2007) 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa,' The American Journal of Comparative Law, Vol. 55, No. 1 p. 6.
[227]Nwaubani Okechukwu O. (2014) 'The Legislature and Democracy in Nigeria, (1960-2003): History, Constitutional Role and Prospects,' Research on Humanities and Social Sciences Vol.4, No.15 p. 81.
[228]Aghalino S.O (2006) 'Dynamics of Constitutional Development in Nigeria, 1914-1999,' Indian Journal of Politics Vol XL No.2 & 3 p. 2.
[229]Ibid. p. 3.
[230]Hardin Russell (2013) 'Why a Constitution.' In Galligan Denis. J, Verteeg Mila (eds.) 'Social and Political Foundations of Constitutions.' Comparative Constitutional Law and Policy p. 64.

capacity to the legislature and the judiciary to make laws and clarify the intentions of the constitution as well as uphold the principle of equality before courts.

Hardin[231] argues that a constitution has a two-dimensional mode of operation which can bring mutual advantage within the judicial system. For instance, the role holders follow the rules of their roles as defined by the specified institution via the constitution to achieve the intended level of social welfare. The author posits that, even though a constitution stipulates institutions of governments to act, it is up to the institutions in question to implement and enforce policies.[232] Currently, the legislators and the judiciary are invested with the authority to ensure that disadvantaged individuals are equally protected before the courts in line with the constitution.

To further preserve the fundamental rights and basic freedoms of citizens,[233] commencing from 1979, the Nigerian constitution featured a public policy directive where all levels of government were bestowed with the autonomy to govern their jurisdiction according to the constitution. Autonomy of jurisdiction within the Nigerian constitutional framework is a system of government whereby Nigerian individuals residing in vast, rural areas are further accounted for via local government administration, through the three-tier system, to ensure the equal distribution and allocation of intrinsic resources, such as access to legal aid. However, crucial rights could be at risk if the various arms of government who hold the authority to choose and determine areas of need do not consider legal aid to be of high priority.

Thus, actions launched via the constitution may not always automatically amount to a shared advantage. In other words, the constitution may be limited in its role of mutual advantage in certain cases because the structure of a constitutional government can only act within the devolved powers of constitutionally established institutions.[234] Nonetheless, Flaherty and Cole[235] contend that it is vital to acquire a constitutional habitat for fundamental rights for its full impact to be felt within the judiciary. Intrinsic rights, such as free legal assistance, would need to be firmly embedded within the constitution to effectively endure. If not specifically

[231]Hardin Russell (2013) 'Why a Constitution' In Galligan Denis. J, Verteeg Mila (eds.) 'Social and Political Foundations of Constitutions.' Comparative Constitutional Law and Policy p. 64.
[232]Ibid.
[233]Akpan Moses E. (1980) 'The 1979 Nigerian Constitution and Human Rights,' Universal Human Rights, Vol. 2, No. 2 p. 36.
[234]Ibid. pp. 64-65.
[235]Flaherty, M., & Cole, A. (2016) 'Access to Justice, Looking for a Constitutional Home: Implications for the Administrative Legal System,' p. 2.

defined in a constitution, complications may arise in the development and implementation process. This is due to an unclear legally binding agreement around the rights of right holders and the obligations of right givers.[236] By virtue of the constitution, Nigerian government institutions are empowered to enact and implement government policies. However, Hardin[237] contends that, due to the non-self-enforcing nature of the constitution, full provision of some aspects of fundamental rights may be limited. As such, in specific cases, enforcing the constitution may be of upmost importance in ensuring, among other crucial rights, that the dignity of citizens is respected and protected.

3.3 Nigerian Constitutional Development (1960-1999)

The legal system that is derived from the Nigerian constitution is based on English common law, Islamic Sharia law and customary law; thus, a pluralistic legal framework. The drafting of constitutions from the time of independence has been a pivotal source of support to the growth of the Nigerian legislature as an independent entity. There were four constitutions and two constitutional conferences prior to Nigeria's independence.[238] However, this chapter will focus on the protection of equal justice before the courts by virtue of the constitutions that were enacted after independence from British colonial rule in 1960. This chapter will also examine the inception and development of the provision of legal aid through domestic law in Nigeria.

The recognition of fundamental rights has always been a feature of the Nigerian constitutions from independence, and this has increased in scope over the years to guarantee the freedoms and protection of the Nigerian people, especially those considered to be of minority groups. The right to legal aid is not specifically defined in the post-independence constitutions of 1960-1979. It was only explicitly inserted into the Nigerian legal framework in the constitution of 1989. However, in the constitutions prior to this, there are instructions within the directives that indirectly require the state to provide legal aid to disadvantaged individuals in the interest of justice by way of other fundamental avenues: for example, the right to a fair trial. The 1960

[236]Ibid. pp. 2-3.
[237]Hardin Russell (2013) 'Why a Constitution,' In Galligan Denis. J, Verteeg Mila (ed.) 'Social and Political Foundations of Constitutions,' Comparative Constitutional Law and Policy p. 65.
[238]Ikpeze (2010) 'Constitutionalism and Development in Nigeria: The 1999 Constitution and Role of Lawyers,' Nnamdi Azikiwe University Journal of International Law and Jurisprudence p. 229. The Clifford Constitution of 1922, The Richards Constitution of 1946, the Macpherson Constitution of 1951 and Sir Lyttleton's Constitution 1954. The 1957 Constitutional Conferences and the 1958 Constitutional Conference. As a region under colonial control the Nigerian people were barely involved in the drafting process.

and 1963 constitutions purposely provide that a person whose fundamental rights have been contravened in any state of Nigeria can apply to the high court of that state for redress.[239]

According to Rice,[240] the right to legal representation is seldom referred to as an absolute right. Individuals would rather have to rely on inference from the systems and institutions of the state to secure their constitutionally protected rights. Such deductions are either based on constitutional guarantees of equality for all before the law, or from the legal reasoning derived from other similar imperative rights, such as the right to fair trial.[241] Rights that provide for a fair trial are profoundly connected with the right to free legal representation. In many instances, the right to fair trial may not be conceivable if access to legal aid by a disadvantaged individual is denied.

Consecutive Nigerian constitutions from 1979 to 1999 have also incorporated the directives of fundamental rights. For example, there is a directive which outlines the obligations of the state of Nigeria towards its citizens as well as what is expected of Nigerian citizens in return. This is to ensure a balance between rights and obligations, as instructed under the Fundamental Objectives and Directive Principles of State Policy on the duties of the state and private citizens. This directive focused on enhancing and facilitating Nigeria's constitutional commitment to the protection and preservation of human rights. The constitutions between 1960 and 1989 indirectly provided legal aid though other fundamental rights under the Nigerian constitution, whereas the 1979-1999 constitutions have evolved to unequivocally direct governments to provide legal aid for its disadvantaged citizens by all means necessary.

In 1979, after fourteen successive years of authoritarian military government, it became a matter of urgency to adopt and implement a new constitutional structure which would return to democratic federation and disengage from the British colonial constitutional framework. Consequently, Nigeria embraced a more executive Presidential and State model of governance to reflect a diplomatic nation-building process. The aim was to ensure that the disadvantaged and vulnerable citizens residing in the vast, rural areas of Nigeria, who were typically members of minority ethnic groups, were able to access crucial resources.[242] Unlike its predecessors, the 1979 constitution was drafted via a draft committee with significant institutional changes

[239]Seng, M. (1985) 'Democracy in Nigeria,' Black Law Journal 9 (2), p. 133.
[240]Rice Simon (2009) 'A Human Right to Legal Aid' p. 2.
[241]Ibid.
[242]Read James S. (1979) 'The New Constitution of Nigeria, 1979: "The Washington Model"?' Journal of African Law, Vol. 23, No. 2 p. 131.

targeted at modelling democratic federation. It confirmed the authority of the federal government over the independent states. It also adopted the separation of the executive from the legislative and judicial branches of government at all levels.[243]

The separation of Nigerian governmental powers places obligations on each institution and precludes interference of one by any other. It also allows each institution to monitor themselves on crucial matters of the state. Fundamental rights such as legal aid benefit from this innovation because it serves as a definitive constitutional modification that clarifies the role of the legislative in making law and the judiciary in implementing this law. Consequently, independence of the judiciary theoretically guarantees that the right to free legal representation is fully functional in the Nigerian court of law. Therefore, the 1979-1999 constitutions further instructed the legislators of the National Assembly, via the High Court of Nigeria, to guarantee the right to free legal representation for 'indigent' citizens of limited means through additional laws.

3.4 1960 Nigerian Constitution (Independence Constitution)

3.4.1 Protection of Fundamental Rights

The preference for a more federalised system of government was crucial to further protect the fundamental rights and freedoms of all Nigerian citizens regardless of their social status by ensuring that all citizens were accounted for in terms of access to constitutional guarantees. Consequently, a federal state model was implemented, as a form of compromise to preserve diverse constituent interests.[244] Powers invested in the constitution were mutually shared between interstate and local government administrations to safeguard the disadvantaged and facilitate a balanced and fair distribution of social welfare among vastly disparate ethnic groups. Prior to the validation of the 1960 constitution, the British administration set up a minority delegation, the Willink Commission, to consider the concerns of ethnic minorities and address potential conflict around the distribution of resources, the right to vote, the independence of the judiciary and the guarantee in the constitution for certain fundamental

[243]Ibid. pp. 131-132.
[244]Filippov Mikhail, Ordeshook Peter C. Shvetsova Olga (2004) 'Designing Federalism: A Theory of Self-Sustainable Federal Institutions.' Cambridge University Press p. 18.

rights.[245] This Commission conclusively recommended a provision for fundamental rights in the Nigerian Constitution and the implementation of a Bill of Rights, instead of creating more States,[246] (to enable a fair distribution of resources) as requested by majority of the minority groups during the Willink inquiry.[247]

The 1960 Nigerian constitution pioneered and introduced the Bill of Rights into the system of government. The Bill of Rights was omitted from previous pre-independence Nigerian constitutions by the British colonialists. Amachree[248] credits its origin to the unwritten concepts of the English Common Law. The incorporation of the Bill of Rights into the 1960 constitution arose from a need to mitigate the fears of ethnic minorities around the consequences for them of independence, as well as guarantee human rights protections for the Nigerian people. The values of fundamental rights incorporated into the 1960 constitution were a reflection of the principles derived from the 1953 European Convention on Human Rights[249] and the need to recognise the freedoms and protection of the rights of vulnerable citizens. Hence, the 1960 and 1963 Nigerian constitutions relied on the provision of fundamental rights to protect underlying legal entitlements such as the right to legal representation of choice before courts in criminal cases. Consequently, the 1960 independence constitution and successive constitutions have endeavoured to incorporate the protection of fundamental rights into their constitutional directives.[250]

3.4.2 Fair Trial Rights via Legal Representative of Choice

The 1960 independence constitution received its first code of fundamental rights via Chapter III under Sections 17 to 32. The right to legal aid was not notably acknowledged in the 1960 Independence Constitution; however, s. 21 of the 1960 constitution provides for the right to a fair hearing under the notion of determination of rights. This includes other pertinent constituents that guarantees fairness in the court of law but is limited to criminal cases only.

[245]'The Willink Commission Report (1958) Conclusions and Recommendations' Part VI Chapter 14 Section 5 p. 98 http://eie.ng/wp-content/uploads/2014/03/TheWillinkCommissionReport_conc_recom_lt.pdf (accessed 14/02/2016).
[246]Akpan Moses E. (1980) 'The 1979 Nigerian Constitution and Human Rights.' Universal Human Rights, Vol. 2, No. 2 pp. 27-28.
[247]The Willink Commission Report (1958) Conclusions and Recommendations Part VI Chapter 14 p. 98.
[248]Amachree G. (1965) 'Fundamental Rights in Nigeria', Howard Law Journal 11(2), p. 463.
[249]European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[250]Elaigwu, J.I. (2002) 'The Federal Republic of Nigeria', In Ottawa: Forum of Federations pp. 35-36.

Section 21 dealt in depth with the doctrine that incorporates the right to a fair hearing, but little attention was accorded to the right to legal aid. However, legal aid is a major component of the right to be heard[251] and embodies the principle of equal justice.[252]

Section 21 (1) of the 1960 Nigerian independence constitution states that: "[i]n the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality." Section 21 (2) reiterates the role of the courts in ensuring a person's right to a fair trial in criminal cases. Section 21 (5) (b) states that: "[e]very person who is charged with a criminal offence shall be entitled - to be given adequate time and facilities to prepare for his defence." Section 21 (5) (c) also provides that: "[e]very person who is charged with a criminal offence shall be entitled - to defend himself in person or by legal representatives of his own choice." Thus, the 1960 constitution guarantees rights that are vital to a fair trial, including the right to be represented by any counsel of one's own choice; however, according to Tobi,[253] the constitution is silent on who takes the financial responsibility for this right.

On the other hand, the validity of fair trial rights through legal representation of choice was challenged in the case of *Chief Obafemi Awolowo v. The Federal Minister of Internal Affairs and another*.[254] The legal counsel for Chief Awolowo, Mr E. Gratiaen, was British and permitted to practice law in Nigeria; but he was prohibited from entering Nigeria under s. 13 of the Immigration Act, 1958,[255] by the Minister of Internal Affairs. The plaintiffs contended that it contravened s. 21 (5) (c) of the 1960 constitution which entitled him to be defended by any counsel of his choice. Yet, the court rejected their submission and held that the provision of s. 21 (5) (c) is subject to the limitation that the legal practitioner chosen must be someone who, if outside Nigeria, has the right to enter Nigeria and is enrolled to practice there. As Gratiaen had no unconditional right to enter Nigeria, he could not be present to defend Chief

[251]'United Nation and the Rule of Law: Access to Justice.' https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ (accessed 04/06/19).
[252]See section 21, The Constitution of the Federation of Nigeria (1960).
[253] Tobi N. (1980) 'Right to Counsel in Nigeria International Legal Practitioner.' p. 76.
[254](1962) L.L.R. 177.
[255] "Notwithstanding anything in his ordinance contained, the Governor- General may, in his absolute discretion, prohibit the entry into Nigeria of any person, not being a native of Nigeria."

Awolowo.[256] Nonetheless, the court also held that the actions of the Minister of Internal Affairs were lawful in denying entry to Mr Gratiaen.[257]

In *Shernfe v. Commissioner of Police*,[258] the appellant applied to adjourn the case to secure legal representation and was refused by the courts. The accused conducted his own defence and was found guilty on all counts. On appeal, it was held that his constitutional right to counsel was not violated because he had not been deprived by the court to have a legal representative present.[259] The similar case of *Re Okafor, Police v. Okafor*[260] was decided on s. 22 (5) (c) of the 1963 Constitution, which entitles the accused "to defend himself in person or by legal representatives of his own choice." The courts declared that where non-representation was the fault of the accused persons or counsel, there is no violation of constitutional guarantees. On appeal, Taylor CJ declared: "s. 22 (5) (c) does not put into the hands of the accused or his counsel the power to stultify proceedings in court by withdrawing from the case in the circumstances of this case."

However, in the case of *Gokpa v. Inspector-General of Police*,[261] the courts took a different view and held that the right to legal representation was of utmost importance to the injunction that incorporates the right to a fair trial under s. 21 of the 1960 constitution. In this case the appellant was brought to court without his counsel and asked for adjournment to enable his counsel to appear. The appellant's application for adjournment was refused. Despite the absence of counsel and the non-participation of the appellant, the trial continued, and the defendant was found guilty and sentenced. On appeal, the court found an infringement of s. 21 (2) of the 1960 Independence constitution. It was held that: "in any case, the court should endeavour to see that the accused person is given a fair chance to defend himself and with the aid of counsel when he is represented by one." According to the appeal court, it was sufficient for the defendant to show that he was denied an adjournment to allow him to acquire legal representation. Hence, the prosecution infringed on his right to a fair trial when the adjournment was denied.

[256]Yancey, Elana M. (1987) 'The Administration of Criminal Justice in the United States and the Federal Republic of Nigeria: A Comparison', National Black Law Journal, 10 (1) pp. 98-99.
[257]Tobi N. (1980) 'Right to Counsel in Nigeria', International Legal Practitioner Vol. 5(ii) pp. 75-78.
[258](1962) N.R.L.R. 87.
[259] Tobi N. (1980) 'Right to Counsel in Nigeria', International Legal Practitioner Vol. 5(ii) pp. 75-78.
[260] (1954) 2 ALL N.L.R. 166.
[261]See *Gokpa v. Inspector-General of Police* (1961) APPEAL No. P/7A/61; LN-e-LR/1961/1 (FSC).

In addition, s. 21 (5) (e) also allows for persons to "have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence". Section 21 (5) (b), (c) and (e) provide individuals with entitlements that fall under the provision of legal aid.[262] However, the wording of the section does not indicate if the right "to be given adequate time and facilities" and to be represented "by legal representatives of [one's] own choice" amounts to the provision of legal aid without cost to the litigant. The section and its subsections direct states to support individuals in criminal cases in need of assistance, because "[i]f a person cannot afford legal representation, this can undermine their right to a fair trial".[263] Rice[264] argues that, to uphold the principle of fairness and equality, "courts are prepared to imply a right to legal aid in a particular context; most usually to uphold a constitutional right to fair trial."

Finding a right by implication plays a definitive role in situations where the liberty of an individual before the courts is at stake or the inability to access free legal counsel would amount to substantial injustice.[265] Within the Nigerian context, the test for the interpretation and clarification of the right to a fair hearing and the right to a fair trial was laid down by Chief Justice Ademola in the case of *Isiyaku Mohammed v. Kano Native Authority*.[266] Ademola posited that: "it is suggested that a fair hearing does not mean a fair trial […] A fair hearing must involve a fair trial […] the true test of a fair hearing is […] whether justice has been done in the case."[267] Hence, by definition, legal aid is crucial to the preservation of justice and fairness in courts.

3.5 1963 Nigerian Constitution (Republican Constitution)

3.5.1 Constitutional Sovereignty and Fundamental Rights

The 1963 constitution was another major step towards gaining total constitutional sovereignty and was the first to substantially break from the British crown. Hence, with this constitution,

[262]For instance, legal advice and legal representation in a court.
[263]'Liberty: Protecting Civil Liberties Promoting Human Rights', https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/legal-aid (accessed 18/02/2016).
[264]Rice Simon (2009) 'A Human Right to Legal Aid', Macquarie Law Working Paper No. 2007-14 p. 5.
[265]Ibid. p. 6.
[266]See *Isiyaku Mohammed v. Kano Native Authority* (1968) SC.417/67 at 240.
[267]Eso Kayode (Former Justice of the Supreme Court of Nigeria) (1990) 'The Role of Judges in Advancing Human Rights', In Commonwealth Secretariat Interights Developing Human Rights Jurisprudence Volume 3: A Third Judicial Colloquium on the Domestic Application of International Human Rights Norms p. 99.

Nigeria formally became a federal republic. The 1963 constitution, also known as the Republican Constitution, is similar to the independence constitution of 1960, and so does not explicitly provide for the right to legal aid. However, fundamental rights and freedoms such as the right to fair trial remained in the 1963 constitutional structure. There were, however, constitutional changes with respect to the judicial administration. For instance, the Judicial Service Commission was abolished and the manner in which judges were appointed to the Supreme Court re-constructed. The president was accredited with the power to appoint judges of the Supreme Court of Nigeria, but only in consultation with the Prime Minister. Nwabueze[268] argues that the 1963 constitution was not fully independent of the British crown as it did not derive its authority from its own native authority, despite being enacted by the Nigerian local legislature.

Alao[269] contended that the decision to dissolve the Judicial Service Commission was misguided because it accorded more power to the executive over the judiciary. The author stated that the judiciary represented the intentions of the constitution through interpretation in courts, and politicians should not interfere with the appointment of judges, save for those who are nonpartisan or of a professional body. Consequently, the people lost confidence in the Supreme Court due to concerns that the judiciary had compromised on its separateness and independence as protector of individual liberty, rights, and privileges.[270] Rights such as legal aid, which is not clearly specified in the constitution, may have to rely on the judge's interpretation of other closely related directives of fairness that imply the right. An independent judiciary allows for non-interference of other arms of government so that the courts can make decisions based on the intentions of the constitution, the legal principles of fairness and the needs of litigants. Legal aid guarantees equality of arms and boosts the confidence of individuals, especially those who believe the system would work against them if they were to find themselves before the courts with no means to pay for counsel.

[268]Nwabueze B.O. (1982) 'A Constitutional History of Nigeria. The 1960 and 1963 Constitutions', Chapter 4 pp. 89-90.
[269]Alao Akin (2001) 'The Republican Constitution of 1963: The Supreme Court and Federalism in Nigeria', University of Miami International and Comparative Law Review Vol. 10 Issue 2 pp. 92-93.
[270]Ibid. p. 104.

3.5.2 Chapter III: Protection of Fundamental Rights

The protection of fundamental rights continued to endure under Chapter III, s. 22 of the 1963 constitution. This includes other consecutive auxiliary clauses contained within the subsections under s. 22 that guarantee the right to a fair trial; namely, s. 22 (5) (b), (c) and (e).[271] All other mandates under the determination of rights, that also imply the right to free legal assistance under the right to fair trial, remain unchanged. Therefore, s. 22 of the 1963 constitution indirectly places duties on the state to grant all component rights that are affiliated with the right to a fair hearing, in addition to other related rights of fairness and equality before the law in criminal litigation in Nigeria.

The right to legal aid is not guaranteed under fair trial rights, but nonetheless is a crucial component to the latter if litigants are unable to afford legal counsel. Hence, such individuals run a risk of having their fair trial rights infringed in its absence; therefore, the right to legal aid is implied from the provisions of s. 22 based on the wording and the entitlements. Flyn et al. [272] argue that the right to free legal representation can be construed in fulfilment of the right to a fair trial. However, the lack of explicit instruction can act as a barrier to securing this. Due to the indirect terminology of the section, the definitive right to legal aid continued to be unclear under the 1960 and 1963 Constitutions.

3.6 1979 Nigerian Constitution

3.6.1 The Constitutional Right to Legal Aid

Section 42 of the 1979 constitution introduced legal aid provision into the Special Jurisdiction of the Courts category to further promote the principle of equality before the courts via fundamental rights.[273] According to Akpan,[274] the 1979 constitution was the first to provide Nigerian citizens with the best opportunity to preserve their human rights and basic freedoms.

[271]See 1963 Constitution of Nigeria "section 22 (5) Every person who is charged with a criminal offence shall be entitled: (b) to be given adequate time and facilities for the preparation of his defence; (c) to defend himself in person or by legal representatives of his own choice; (e) to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence."

[272] Flynn Asher, Hodgson Jacqueline, McCulloch Jude, Naylor Bronwyn Naylor (2016) 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial.' Melbourne University Law Review Vol. 40 p. 209.

[273]See s. 42 1999 Constitution of Nigeria.

[274]Akpan Moses E (1980) 'The 1979 Nigerian Constitution and Human Rights' Universal Human Rights Vol. 2, No. 2 p. 36.

It was enacted after fourteen years of military government rule to serve as the inherent focal point of the Second Republic. It was drafted, ratified, and promulgated under the Military Administration of General Obasanjo.[275] In 1975, a Constitution Drafting Committee (CDC) was established to draft the impending 1979 constitution.[276] The primary aim was to deliberate on various socio-economic and political matters,[277] and devise a template for a new democratic era that prioritised the fundamental rights of the Nigerian people.

After much consultation, the final legal draft was concluded and approved on 20 August 1976 and broadcast for public scrutiny. The constitution was formally adopted on 21 September 1978 and came into operation on 1 October 1979[278] under the authority of the newly elected civilian presidency of Ahaji Shehu Shagari. According to Moveh,[279] the 1979 constitution was widely criticised because it was regarded as a body of law imposed by the military government, rather than a document that reflected the will of the people. This is due to the belief that majority of the members were appointed by the incumbent military regime. Yet, a more realistic provision on human rights for all citizens still emerged out of this constitution.

Nigeria chose to adopt a new constitutional structure which was a departure from the normal "Westminster" model, which reflected the structure of former colonial governments.[280] Under the 1979 constitution, the American Presidential paradigm was introduced and adopted[281] to address the matter of equal distribution of resources among the diverse demographic groups of Nigeria. Akpan[282] posits that the 1979 constitution focused on human rights matters with more detail and authenticity than the preceding 1963 constitution. It provided a solid foundation for

[275]Anucha Dominic Uka (2010) 'The Impact of Constituent Assemblies (1978- 1995) on Nigerian Constitutions and Political Evolution' ETD Collection for AUC Robert W. Woodruff Library. Paper 218. p. 4.
[276]The committee was chaired by Chief F. R. A. Williams with 49 other delegates from various disciplines and line of work. Philips Claude S. (1980) Nigeria's New Political Institutions, 1975-9 The Journal of Modern African Studies, Vol. 18, No. 1, Cambridge University Press pp. 1-10.
[277]The C.D.C. formed seven sub-committees to deal with: national objectives; the executive and legislature; the judiciary; the economy; citizenship, rights, political parties, and elections; public services; and legal drafting.
[278]Philips Claude S. (1980) 'Nigeria's New Political Institutions, 1975-9.' The Journal of Modern African Studies, Vol. 18, No. 1, Cambridge University Press pp. 1-10.
[279]Moveh David O (2012) 'A Symbiosis of Constitutional Development and the Federal Imperative in Nigeria' Nnamdi Azikiwe Journal of Political Science Vol. 3 Issue 1 pp. 17-19.
[280]Read James S. (1979) 'The New Constitution of Nigeria, 1979: "The Washington Model"?' Journal of African Law, Vol. 23, No. 2 p. 131.
[281]McCormick John (2010) 'Comparative Politics in Transition', Six Edition Chapter 8 p. 448.
[282]Akpan Moses E (1980) 'The 1979 Nigerian Constitution and Human Rights', Universal Human Rights, Vol. 2, No. 2 p. 27.

democratic governance where the powers of the government were limited, and the rights and freedoms of the Nigerian people were prioritised, regardless of their social status.[283]

3.6.2 Chapter II: Fundamental Objectives and Directive Principles of State Policy and the Enforcement of Rights

The 1979 Nigerian constitution initiated the formal separation of the Legislative, Executive and Judicial organs of government, and included an additional directive for the protection of human rights under Chapter II. The Fundamental Objectives and Directive Principles of State Policy, as contained within Chapter II, are divided into sub-sections to indicate the scope of constitutionally protected rights.[284] They serve as a supplement to fundamental rights,[285] and were derived from the Constitution of India, where they played a vital role in influencing state policies and giving direction to socio-economic planning.[286]

The Objectives and Directives were unique and represented an improvement in Nigerian constitutional history. They were established to accentuate obligations of the state, in contrast to the previous 1960 and 1963 constitutions, which focused primarily on authority and rights. According to Duru et al.,[287] the Objectives and Principles were an attempt to incorporate socio-economic freedoms under the protection of human rights into the 1979 constitution. The provisions in Chapter II were also initiated to give meaning to the fundamental protections laid out in Chapter IV.[288] The Objectives set out the template which governments must endeavour to model in fulfilling their constitutional obligations, while the Directive Principles indicate the procedure required to accomplish the intended.[289] The directive emphasised the deep-seated

[283]Ibid.
[284]The fundamental objectives and directives under chapter II of the 1979 constitution of Nigeria are listed as: Political objectives, Economic objectives, Social objectives, Educational objectives, and Foreign policy objectives. Including the Directive on Nigerian culture, Obligations of the mass media and the National ethic.
[285]Affirmed in *Arch. Bishop Olubunmi Okogie v. The Attorney General of Lagos State* Federal Court of Appeal 1980 FNLR 445
[286]De Villiers, B. (1992) 'The Socio-Economic Consequences of Directive Principles of State Policy; Limitations on Fundamental Rights', South African Journal on Human Rights 8(2), p. 188
[287]Onyekachi Duru, (2012) 'The Justiciability of the Fundamental Objectives and Directive Principles of State Policy Under Nigerian Law', p. 12
[288]Ibid.
[289]Ayua, Akaayur Ignatius Dakar C.J (2005) 'Federal Republic of Nigeria In Constitutional Origins, Structure, and Change in Federal Countries' Kincaid John, Tarr Alan (eds.) p. 240-270 Quebec: McGill-Queen's University Press

commitment of all Nigerian governmental institutions to safeguard the constitutional rights and freedoms of the Nigerian people.

3.6.3 Chapter II: Safeguarding Fundamental Rights and State Obligations

By reason of Chapter II of the 1979 constitution, the primary role of governmental bodies is to implement and enforce the fundamental rights of the Nigerian people. This chapter was omitted in the directives of the previous 1960 and 1963 Nigerian constitutions; therefore, the supplementary inclusion set the standard for guaranteeing accountability and good governance by all policy-making bodies. The new development became a means of fulfilling fundamental obligations, such as the right to legal aid, towards Nigerian citizens.

The Fundamental Objectives and Directive Principles contained within the 1979 constitution serve as a pertinent avenue for citizens of Nigeria to claim their rights, most especially the less privileged and most vulnerable. It ensures that the legislative organ recognises the need for legal aid, while authorising policies and holding the judiciary to account, so as to uphold the principle of equal justice. It also confirmed that Nigerian citizens are to be held accountable for their own actions according to their duty to each other and the nation: "[t]he national ethic shall be that of discipline, self-reliance and patriotism."[290]

Okere[291] posits that the main features of the Objectives and Principles within the 1979 constitution were instituted by the Constitution Drafting Committee (CDC). The drafting process was based primarily on Nigeria's multi-ethnic population and heterogeneous structure, paying attention to the positioning of individuals within the social hierarchy[292] and their ability to access certain fundamental resources, such as free legal representation in courts. The CDC utilised the Fundamental Objectives and Directive Principles of State Policy chapter to explicitly clarify and define the role of these "objectives and directive principles."[293] The Objectives and Principles, according to the CDC, were crucial to the unity and progress of the

[290]See section 22 chapter II The Constitution of the Federal Republic of Nigeria (1979).
[291]Okere Obinna (1983) 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution', The International and Comparative Law Quarterly, Vol. 32, No. 1 pp. 214-215.
[292]Maiese Michelle (2004) 'Social Status Beyond Intractability', Guy Burgess and Heidi Burgess (eds.) Conflict Information Consortium, University of Colorado, Boulder.
[293]According to the Constitution Drafting Committee, "Fundamental Objectives are ideals towards which the Nation is expected to strive, whilst Directive Principles lay down the policies which are expected to be pursued in the efforts of the Nation to realise the national ideals." Ibid.

Nigerian people. They were intended to bridge the gap between social disparities and empower institutions to provide equitable access to crucial resources for disadvantaged individuals before the courts. They also placed obligations on all government agencies to prioritise the security and welfare of all citizens under its jurisdiction.[294] Oyovbaire[295] contends that the achievement of the objectives and the application of the directives under Chapter II were at the discretion of the Nigerian government, despite the elaborate declaration of the advent of liberal democracy. The author goes further to state that structures such as the Objectives and Principles were instead put in place to nullify the political mishaps that Nigeria had experienced in the past, as well as pave way for new objectives that would uphold the rights of Nigerian citizens.

The significance of safeguarding fundamental rights within the Nigerian legal framework was later affirmed in the case of *Ransome Kuti v. Attorney General of Federation*,[296] where the Supreme Court of Nigeria held that such rights stand "above the ordinary laws of the land and which in fact [are] antecedent to the political society itself. It is a primary condition to a civilised existence." The Supreme Court of Nigeria was of the opinion that the directives in the Nigerian constitution, and the precise interpretation of these directives, were crucial to securing constitutional rights of citizens. It was also held that the incorporation of fundamental rights into the Nigerian constitution is the duty of the state. The case reiterated that the commitment and determination of the judiciary is definitively paramount to the protection of individual human rights, as it is the only institution which can ensure that these rights are "enshrined in the constitution so that the rights could be immutable to the extent of the non-immutability of the constitution itself."[297]

The *Ransome Kuti* case established the principle of fundamental rights, an equivalent to international human rights in Nigerian legal jurisprudence. It also validates the pivotal role of the judiciary with regards to ensuring that such constitutional rights are confirmed and maintained in the Nigerian courts. Eso[298] contends that the socio-economic and political structure of Nigeria is such that the majority are poor, illiterate, and unaware of their rights.

[294]See section 14(2)(b) of The Constitution of the Federal Republic of Nigeria (1979).
[295]Oyovbaire, S. (1983) 'Structural Change and Political Processes in Nigeria', African Affairs, 82(326), p. 16
[296]See *Ransome Kuti v. Attorney General of Federation* (1985) SC 123/1984 at 229-230.
[297]Eso Kayode (Former Justice of the Supreme Court of Nigeria) (1990) 'The Role of Judges in Advancing Human Rights.' Commonwealth Secretariat Interights (ed.) In 'Developing Human Rights Jurisprudence' Volume 3: A Third Judicial Colloquium on the Domestic Application of International Human Rights Norms pp. 91-92.
[298]Ibid. pp. 95-96.

Nonetheless, in the interest of democracy the courts are duty-bound to conserve individual fundamental rights that are enshrined in the constitution.

3.6.4 The Right to Legal Aid and Governmental Constitutional Duties: Freedoms, Equality and Justice

The unequivocal right to equal justice and opportunities is specified in s. 17 (1) of the Fundamental Objectives and Directive Principles of State Policy chapter of the constitution. Section 17 (1) declares that: "the State social order is founded on ideals of Freedom, Equality and Justice." Section 17 (2) (a) facilitates the rights that are derived from this section: "[i]n furtherance of the social order - (a) every citizen shall have equality of rights, obligations and opportunities before the law." Section 17 (1) and (2) (a) are precisely defined and reiterate the duty placed on the state to assist Nigerian citizens. Section 17 (3) (g) directs the state to ensure that: "[p]rovision is made for public assistance in deserving cases or other conditions of need". However, the directives that illustrate this subsection are vague and poorly defined. The wording of s. 17 (3) (g) seems to acknowledge that disadvantaged individuals may need public assistance to acquire their inherent right to social justice; yet the scope or category of public assistance is not defined or clarified within the section.

Hence, s. 17 (3) (g) instructs state governments to ensure that state policies are directed towards securing the social objectives that are applicable under s. 17 (1), in terms of freedoms, equality and justice, as well as to endeavour to provide public assistance to individuals "in deserving cases or other conditions of need". Thus, the provision of public assistance is at the discretion of the court and will only be fulfilled if the case is deemed "deserving". The mandate accorded to the state under s. 17 (3) (g) serves as a significant legal tool to protect the rights and freedoms of disadvantaged individuals who would suffer grossly as a result of being denied impartial access to courts. Hence, the directives set out in sections 17 (2) (a) and 17 (3) (g) were to ensure that every citizen has attainable access to legal institutions. Though not explicitly defined, both sections may infer a right to legal aid for individuals in civil cases if the court deems it a potential contravention of secured fundamental rights.

3.6.5 Limitations of Constitutional Duties under Chapter II

Section 13 of the 1979 constitution declares that: "[i]t shall be the duty and responsibility of all organs of Fundamental government, and of all authorities and persons, exercising obligations of legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution." The obligations of the state under Chapter II of the 1979 constitution were meticulously drafted to administer essential rights that embody the principles of democracy and social justice. However, the 1979 constitution also contained discretionary clauses that could potentially serve as a barrier to legal aid provision depending on its interpretation by the judiciary.

For instance, s. 6 (6) (c) of the 1979 constitution acts as a clause that places limits on the scope of power that the judiciary can exercise when questioning whether "any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution".[299] The non-enforceability of fundamental objectives as directed by s. 6 (6) (c) limits the courts' ability to enforce rights.[300] The impact of the non-enforceability of fundamental objectives on crucial rights such as legal aid will be examined further under the current 1999 constitution.

3.6.6 Chapter IV: Special Jurisdiction of High Court and Legal Aid

Chapter IV of the 1979 constitution embodies protected fundamental rights that are owed to all individuals regardless of their social status. The main objective of the legal aid scheme is to reduce the disparities created by inequality. To the same degree as the previous Nigerian constitutions on the fundamental right to fair trial, s. 33 (1)[301] distinctively pledges the constitutions' commitment to safeguard the fundamental right to fair hearing against any

[299]"The judiciary powers vested in accordance with the foregoing provisions of this section shall not, except otherwise provided by the constitution extend to any issue or question as to whether any act or omission by any authority or person as whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution." See s. 6(6)(c) 1979 Constitution of Nigeria.

[300]Odike, E., Faga, H. and Nwakpu, I. (2016) 'Incorporation of Fundamental Objectives and Directive Principles of State Policy in the Constitutions of Emerging Democracies: A Beneficial Wrongdoing or a Democratic Demagoguery?' Beijing Law Review, 7, p. 263.

[301]See s. 33(1) 1979 Constitution of Nigeria: "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

"government or authority" within a reasonable time by a court or tribunal that is independent and impartial. Section 33 (6) of the 1979 Nigerian Constitution duly guarantees the right to a fair trial. The rights that constitute s. 33 (6) (b), (c) and (e)[302] are essential to the legal aid scheme and the protection of legal rights within the Nigerian judiciary, because they recognise the requirement for legal assistance by the vulnerable and less privileged and the implications of inaccessibility of representation. Thus, governments and affiliated agencies are directed via the constitution to make provisions available where necessary. However, under s. 33 (6), this obligation applies only to persons in criminal cases.[303]

Section 42 administers the special jurisdiction of High Court and legal aid in relation to the fundamental rights under Chapter IV of the 1979 Constitution. Chapter IV provides guidance and instruction on matters relating to constitutional rights. Section 42 (1) assures the commitment of the Federal State of Nigeria to uphold human rights protection in line with international law. Furthermore, it protects the legal right of individuals to be heard in a court of law if such freedoms have been contravened: "[a]ny person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."

Furthermore, s. 42 (2) confers authority to the High Court of Nigeria to deal with matters of redress: "[s]ubject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section[.]" Section 42 (3) grants extra jurisdiction to the Chief Justice to ensure rights and freedoms are duly protected through legal rules: "[t]he Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section." In fulfilling and accomplishing the obligations set out in s. 42 (1), (2) and (3), s. 42 (4) sets out role of the National Assembly with regard to assigning authority deemed necessary to the High Court, "for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section." In addition, s. 42 (4) (b) directs the National Assembly to make provisions:

[302]Section 33(6) (b) 1979 Constitution of Nigeria states that: "Every person who is charged with a criminal offence shall be entitled - to be given adequate time and facilities to prepare for his defence." Section 33(6) (c): "Every person who is charged with a criminal offence shall be entitled - to defend himself in person or by legal representatives of his own choice." Section 33(6) (e) also allows for persons to "have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence…"
[303]See s. 33 (6)(b)(c) 1979 Constitution of Nigeria.

(i) For the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and

(ii) For ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.[304]

The explicit instructions under s. 42 (1) (b) (i) are crucial to the basic protection of individual legal rights via legal aid in the 1979 and subsequent Nigerian constitutions. They specify the category of individuals to whom a duty of constitutional protection is owed, as well as a detailed scope of the powers bestowed on the Chief Justice of Nigeria and the National Assembly via the High courts to enact and implement laws to fulfil this duty. Inherent rights such as legal aid derive their legitimacy from s. 42 (4) (b) of the 1979 constitution, because the latter presents them as imperative fundamental rights. Hence, though the instructions contained within s. 42 extend beyond the affirmation of the legal aid scheme, the latter is deemed a fundamental necessity when it comes to protecting financially disadvantaged persons before the courts. Thus, s. 42 establishes the right holder and the right giver as intrinsic to the realisation of the guaranteed rights in this section. It is also a legal order that specifically places obligations on the judiciary to provide legal aid by all means necessary to individuals that fall under the indigent category.[305] However, the wording of s. 42 (4) (b) (ii) suggests the gravity of a case and an individual's right to legal aid is subject to the discretion of the courts.

Essentially, Chapter II (the Fundamental Objectives and Directive Principles of State Policy) and the directives of Chapter IV (Fundamental Rights) within the 1979 constitution were drafted to place duties on governmental bodies and institutions that are responsible for upholding freedom, equality, and justice. Therefore, the chapters should together ensure that the right to legal aid is fully implemented into the Nigerian judicial framework and enforced competently.

[304]See s. 42 (4) (b) (i) and (ii) 1979 Constitution of Nigeria.
[305]See s. 42, 1979 Constitution of Nigeria.

3.6.7 Limitations of Section 42 (4) (b) (ii) regarding the Provision of Legal Aid

Section 42 (4) (b) (i) directs states to render financial assistance to any indigent citizen of Nigeria in matters of conserving fundamental rights in the court of law; however, this directive is limited by the subsequent subsection. Section 42 (4) (b) (ii) reserves the power to determine justiciability of a case for the judiciary. The latter must determine whether the contravened rights of an individual before the courts are substantial and whether they require legal aid, under s. 42 (4) (b) (i).

Section 42 (4) does not clearly define what is to be considered substantial or how to determine if the need for legal aid is genuine. This subsection may either limit or enhance the right of an individual to be heard before the courts if the judiciary is given full jurisdiction to determine the validity of a case and eligibility for legal aid. Consequently, the fulfilment of this section will depend on the interpretation of the judiciary, without any defined dictation by the law. The exceptions of this subsection therefore pose a potential contravention of constitutionally protected fundamental rights within itself; this is especially the case considering that all fundamental rights under the Nigerian constitution are considered inalienable.

In addition to s.17 (2) (a) and (3) (g), s. 42 (4) (b) (i) illustrates the fundamental tenets of equal justice by recognising the right of an individual to 'public assistance' (though this is not explicitly defined in the section). It may be construed to refer to a type of welfare service put in place to help disadvantaged groups to procure access to pivotal resources that may otherwise be hampered by social disparity, to ensure equality before the courts in Nigeria. Ultimately, individuals are able to secure redress by virtue of this section if their fundamental right to impartiality before the law is being threatened.

Clark[306] argues for a "legislative motivation and purpose" model of interpretation in instances where a right has to be construed. The author defines legislative motivation and purpose as the goals moving legislators to vote for a given law. From the perspective of a law's foreseeable effects, the author contends that the court may have to look at the purpose of the legislation to infer a right, especially regarding equal protection and fundamental rights analysis. Ultimately,

[306]Clark Morris J. (1978) 'Legislative Motivation and Fundamental Rights in Constitutional Law.' San Diego Law Review Vol. 15 No. 5 pp. 954-956. Clarks primarily discusses the relevance of legislative motivation to the judicial decision whether to uphold or to strike down laws affecting certain "fundamental" constitutional rights. Clark posits that such conclusions are justifiable primarily because history demonstrates that legislatures have repeatedly treated suspect classes and fundamental rights in a way that denies the equal moral worth of the individuals concerned.

this aims to provide predictability and doctrinal certainty. It will also clarify the reason why certain rights are to be considered "fundamental" for constitutional purposes.[307]

For instance, the motivation behind the right to fair trial in the Nigerian national constitution(s) is to guarantee equal justice and freedoms to all Nigerian citizens in criminal matters. However, in view of this, the availability of legal aid may also be required of such legislation in the interest of guaranteeing equality, regardless of its tacit standing in the section on the right to fair trial. Chapter II and Chapter IV of the 1979 Nigerian constitution run concurrently with one another in terms of duties and responsibilities. The promulgation of the duties of the state and the inherent rights of Nigerian citizens is an indication of Nigeria's commitment to further promote the human rights principle via the constitution. The 1979 Nigerian constitution reiterates the directives of the right to a fair trial as contained within s. 21 of both the previous 1960 and 1963 Nigerian constitutions.

3.6.8 Fundamental Rights (Enforcement Procedure) Rules, 1979[308] (FREP Rules): Reinforcement of Fundamental Rights and Access to Legal Aid

The FREP Rules were an additional mechanism initiated to reinforce constitutionally established fundamental rights. Thus, this section examines enforcement procedures put in place to effect fundamental privileges such as legal aid under Nigerian domestic law. As with other inherent rights, legal aid is reliant on effective enforcement mechanisms to ensure compliance with the laws, rules and guidelines imposed by the constitution. The judiciary are an essential instrument to ensure legal aid is made available to individuals when necessary. Hence, such rights remain unassertive without the necessary binding implementation tools. In an attempt to further secure the fundamental rights of individuals, and in line with the powers granted to him by s. 42 (3) of Chapter IV[309] of the 1979 Constitution, Chief Justice A. Fatayi-Williams made rules for the practice and procedures of the High Court in order to implement the FREP Rules, commencing on 1st January 1980. The 1979 FREP Rules were the first that dealt with the issue of failures to enforce fundamental rights in Nigeria.

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[307] Ibid.

[308] Fundamental Rights (Enforcement Procedure) Rules, 1979. http://www.nigeria-law.org/FundamentalRights(EnforcementProcedure)Rules1979.htm (accessed 19/12/2019).

[309] See s. 42(3) 1979 constitution of Nigeria: "The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section."

Sanni[310] contends that the 1979 Rules were enacted to remedy the loophole created by Section 6 (6) (c) of the 1979 Constitution, which essentially rendered rights under Chapter II non-justiciable by the courts. The Chief Justice promulgated the FREP Rules to assist the judiciary in the enforcement of the crucial fundamental rights of Chapter IV, such as the (tacit) provision of legal aid. According to Nwauche,[311] "the 1979 rules were intended to facilitate a speedier and less cumbersome resolution of complaints of human rights abuse in Nigeria" through uncomplicated access to judicial institutions and legal assistance. However, later studies into the interpretation of the rules in courts of law showed that, as an interpretative measure to enforce fundamental rights, the 1979 Rules had become a highly technical and formal procedural instrument.[312]

3.6.9 Constraints of Enforcement: 1979 FREP Rules

The biggest challenge faced by many fundamental and human rights instruments is ensuring such rights are applicable and enforced in courts as the constitution intended. Hence, some constraints are deeply rooted in the procedure itself and would require an unambiguous interpretation by the judiciary. This section examines the scope of the 1979 FREP rules and the obstacles to the enforcement of fundamental rights. It will also inquire into the competence of the Rules as an enforcement mechanism of rights in Nigeria. Thus, "Order 1 Rule 2 of the FREP Rules provides that, any person who alleges that any one of the fundamental rights provided for in the Constitution and which he is entitled to has been, is being or is likely to be infringed, may apply to the court in the state where the infringement occurs or is likely to occur, for redress." The initial concern was regarding the appropriate court for the enforcement process. This caused a jurisdictional division between the Federal High Court and the High Court of Nigeria.[313] The Supreme Court of Nigeria in *Bronik Motors Ltd v. Wema Bank Ltd*[314] confirmed that both the Federal High Court and the State High Court had concurrent

[310]Sanni Abiola (2011) 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform', African Human Rights Journal p. 515.
[311]Nwauche Enyinna (2010) 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?' African Human Rights Journal p. 503.
[312]Ibid. p. 504.
[313]Felix O. & Akujobi A. (2018) 'Enforcement of Fundamental Rights in National Constitutions: Resolving the Conflict of Jurisdiction between the Federal High Court and State High Court in Nigeria', Beijing Law Review, Vol. 9, pp. 53-66.
[314](1985) 35 NCLR 296.

jurisdiction.[315] On the other hand, in *Tukur v. Government of Gongola State*,[316] Obaseki JSC[317] of the Supreme Court of Nigeria gave an insight into the scope of jurisdiction of the Federal High Court in matters that are brought to its court without the appropriate authority to decide on such matters: "enforcement of the fundamental rights in matters outside the jurisdiction of the Federal High Court […] inexorably nullifies the proceedings and judgment." In the more recent case of *Grace Jack v. UAM*,[318] the Supreme Court, through Katsina-Alu JSC, maintained that based on Order 1 Rule 2 of the FREP Rules both the Federal High Court and the State High Court have simultaneous jurisdiction to hear violation of fundamental rights matters.

Nwauche[319] contends that after the enactment of the FREP Rules, there were questions regarding their capability to enforce fundamental rights related matters in Nigerian courts due to their technical and formal nature. In *Din v. Attorney-General of the Federation*,[320] Nnaemeka Agu JSC affirmed that "the Fundamental Right (Enforcement Procedure) Rules 1979 have prescribed the correct and only procedure for the enforcement of fundamental rights which arise under Chapter IV of that Constitution". In *Obikwelu v. Speaker, House of Assembly*,[321] Araka CJ confirmed the advantages of proceeding under the Rules as an expeditious resolution to a breach of fundamental rights. In *Abacha v. Fawehinmi*,[322] the Supreme Court asserted that the 1979 FREP rules has the same authority as the African Charter on Human and Peoples' Rights in the enforcement of fundamental rights. According to Sanni,[323] the approach by Nigerian courts, which were not well versed in the enforcement of human rights, was rigid. For instance, the requirements of "leave of court"[324] were complex and regarded as unnecessary in the enforcement of rights.

[315](1989) 4 N.W.L.R (pt. 117) 517 at 547.
[316](1989) 4 N.W.L.R (Pt. 117) 208.
[317]Justice of the Supreme Court of Nigeria.
[318](2004) 5 N.W.L.R (Pt. 865) 517.
[319]Nwauche Enyinna (2010) 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?' African Human Rights Journal p. 504.
[320](1986) 1 NWLR (Pt 17) 471- 478.
[321](1984) 5 NCLR 757.
[322](2000) 6 NWLR (Pt 660) 228.
[323]Sanni Abiola (2011) 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform', African Human Rights Journal p. 515.
[324]In *Udene v. Ugwu* (1997) 3 NWLR (Pt 491) 57 The Court of Appeal held that the requirement for leave is mandatory.

There was also the issue of limitation of action where the time allowed to bring an action was considered inadequate.[325] In *EFCC v. Ekeocha*,[326] the 14 days deadline was held to be mandatory. Applicants were made to go back and forth with various step by step application actions that were complicated and resulted in the unnecessary duplication of the application process. Consequently, many cases were abandoned.[327] For individuals seeking legal aid, time and financial constraints due to procedural technicalities and conflicting court decisions could prevent potential legal aid recipients from obtaining the assistance they require. It could also frustrate the efforts of legal aid and pro bono lawyers.

In addition, initially, there was uncertainty concerning the type of claims enforced under the FREP Rules. It was later determined that only rights that are principally provided for under Chapter IV of the constitution could be enforced using the Rules.[328] The case of *Alhaji Ibrahim Abdulhamid v. Talal Akar & Anor*[329] examined and clarified the scope of the 1979 FREP rules in the enforcement of fundamental rights. The applicant instituted an action under the 1979 FREP Rules against the respondents after obtaining leave of court to do so. In the first instance, the trial judge found in favour of the applicant and awarded damages to that effect. The respondents appealed the decision, stating that the "reliefs before the High Court and as found by trial judge himself were for assault and battery, trespass to land, trespass to chattel or goods, detinue and false imprisonment [,] which are torts covered by a different procedure under the Rules of the High Court"; hence, the appellants cross-appealed. The Court of Appeal allowed the appeal and dismissed the cross-appeal, holding that "out of the four reliefs sought by the appellant, two are for an order restraining the respondents from harassing and intimidating the appellant and his family as well as seizing any of his properties. The others were for compensation for acts of harassment and intimidation committed against

[325]The motion on notice or summons for an order of the court to protect fundamental human rights must be entered for hearing within 14 days after such leave has been granted. Cited in Nwauche Enyinna (2010) 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?' African Human Rights Journal p. 506.
[326](2008) 14 NWLR (Pt 1106) 161.
[327]Sanni Abiola (2011) 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for Far-Reaching Reform', African Human Rights Journal pp. 516-517.
[328]See *Gongola State v. Tukur* [1989] 4 NWLR**.** It was held that the Court of Appeal was right in its judgment holding that the Federal High Court had jurisdiction to determine and grant the reliefs to the Respondent's in respect of the claimed violations of Chapter IV of the Constitution 1979.
[329] See *Alhaji Ibrahim Abdulhamid v. Talal Akar & Anor* S.C. 240/2001.

the appellant including the release of the seized vehicles."[330] Aloma Mariam Mukhtar JSC[331] also stated that: "a close examination of the provisions of Chapter IV of the Constitution of the Federal Republic of Nigeria 1979 does not consider any of the averments in the relief set out above to be a fundamental right[,] not to talk of its protecting them."

The decision in the case of *University of Ilorin v. Oluwadare*[332] demonstrated that the right of students to a fair hearing cannot be enforced under the FREP Rules 2009[333] until all internal remedies for redress have been exhausted. The Supreme Court held that, "the right to studentship not being among the rights guaranteed by the 1999 Constitution, the only appropriate method by which the respondent could have challenged his expulsion was for him to have commenced the action with a writ of summons under the applicable rules of court."[334]

Sanni contends that committal proceedings under Order 6, Rule 2 of the 1979 FREP Rules[335] could delay the enforcement of crucial fundamental rights by nullifying applications. This order, according to the author, went against the ultimate objective of the FREP Rules, which was to speed up human rights applications.[336] Consequently, a defendant found guilty of contempt of court may be committed to prison unless the defendant complies with the terms set out by the court.[337] In *Bonnie v. Gold*,[338] the Court of Appeal identified the fact that the 1979 Rules were deficient in the procedure to be followed in committal proceedings for contempt. In his absence, the respondent was restrained by the lower Court from presenting himself as the Odibiado of Sobe (Traditional ruler). The respondent was expected to be bound by the order that was issued by the appropriate authority of the court. It was held that, if an appellant refuse to abide by an order, any application made in furtherance of the order will be declared null and void. The appellants failed to follow the rules laid down by the High Court (Civil Procedure) Rules, and as such the lower court was right in dismissing the said application. However, the judge of the lower court, in giving judgement, believed the judge of

[330]Ibid. Judgement delivered by Sunday Akinola Akintan, J.S.C.
[331]Ibid. Judgment delivered by Aloma Mariam Mukhtar, J.S.C.
[332]*University of Ilorin & The Vice Chancellor, University of Ilorin v. Idowu Oluwadare* S.C. 165/2003.
[333]FREP Rules 2009 replaced the 1979 FREP Rules.
[334]Ibid. Judgement delivered by Sylvester Umaru Onu, J.S.C.
[335]Order 6 Rule (2) "In default of obedience of any order made by the Court or Judge under these Rules, proceedings for the committal of the party disobeying such an order will be taken. Order of Committal is in the Form 6 of the Appendix."
[336]Sanni Abiola (2011) 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for Far-Reaching Reform', African Human Rights Journal pp. 518-520.
[337]See Form 6 of the Appendix. Fundamental Rights (Enforcement Procedure) Rules, 1979.
[338]See *Bonnie v. Gold* (1996) 8 NWLR.

the higher court erred when the first appellant, Dr Osagie Obayuwana, was committed to prison for contempt considering the fact that the order of the court was not personally served on him.

Another inconvenience was the requirement of capacity to bring an action (standing/*locus standi*), contained within Order 1, Rule 2 of the FREP Rules, 1979. It was also a major obstacle to the enforcement procedure. The requirement meant that the application can only be made by the individual whose rights have been, or are likely to be, contravened. [339] Individuals that require legal aid via third parties (e.g., human rights and civil rights organisations or other NGOs) were at the risk of not being heard if the *locus standi* principle is strictly interpreted by the courts. However, some judges were able to accept applications filed on behalf of human right victims through other means, such as judicial activism. For instance, in *Captain SA Asemota v. Col SL Yesufu and Another*,[340] the court allowed the proceedings to go ahead on its own initiative.

Nwafor[341] posits that the Fundamental Rights (Enforcement Procedure) Rules, 1979 were in themselves an obstacle to the enforcement of fundamental rights. Due to the complex nature of the procedure, many law practitioners as well as the applicants did not have a clear understanding of the rules. This led to constant nullification of crucial cases by the courts for non-compliance with the rules of the procedure.[342] Procedural challenges leading to a waste of time and resources are often cited as an impediment to the provision of legal aid.[343] Hence, legal aid lawyers are discouraged from taking cases, especially if the case requires constant travel. Nwauche[344] argues that the requirement for standing to sue was developed outside the framework of the 1979 Rules and that, while questions of standing were successfully raised at the Supreme Court, it was often to the disadvantage of the party whose rights had been violated. As a consequence, it undermined public interest litigation and became a barrier by denying

[339]Sanni Abiola (2011) 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for Far-Reaching Reform', African Human Rights Journal pp. 520-521.
[340]See *Captain SA Asemota v. Col SL Yesufu and Another* (1981) 1 NSCR 420. The wife of a detained army officer was able to bring a case to court with the help of the trial judge who amended the application, suo moto. The applicant was able to sue in her own name to enforce the fundamental right of her husband to personal liberty and bring it in conformity with the FREP Rules.
[341]Nwafor Anthony. O (2009) 'Enforcing Fundamental Rights in Nigerian Courts - Processes and Challenges', African Journal of Legal Studies p. 10.
[342]Ibid.
[343]Schwartz Melanie 'Indigenous People and Access to justice in Civil and Family Law', In Flynn Asher, Hodgson Jacqueline (eds.) (2017) 'Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need',
[344]Nwauche Enyinna (2010) 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?' African Human Rights Journal p. 508.

access to authentic complaints of human rights violations. The author further contends that, while the principle of standing was based on the limiting Section 6 (6) (c) of the 1979 constitution, the type of claims enforceable under the FREP Rules was determined by the judiciary.

Apart from the aforementioned setbacks in the 1979 FREP Rules, there were other challenges that worked against their implementation in Nigerian courts. For instance, poverty, illiteracy, the high cost of litigation, the status and scope of human rights in Nigeria, and their enforcement in courts.[345]

3.7 1989 Nigerian Constitution

3.7.1 Introduction

The succeeding 1989 Nigerian constitution was promulgated during military rule in Nigeria. It was in anticipation of the transition to a Third Republic under civilian leadership, which was promised to the Nigerian people by the ruling military Head of State.[346] By virtue of the Nigerian constitutional Decree of 1987, a constitutional review committee was set up to review the extant 1979 constitution in order to make amendments based on approved recommendations from the Nigerian Political Bureau.[347] As with the preceding one, the 1989 Nigerian constitution affirms the pertinent legal structure required for the implementation of the right to legal aid for the disadvantaged in Nigeria. This is incorporated in Article 44 of the 1989 constitution of Nigeria.[348] The rights of citizens to seek redress in any state of Nigeria are clearly laid out in conformity with the obligation and jurisdictions of the National Assembly, the Chief Justice and that of the courts. This was to ensure that the right to seek a remedy for the violation of rights was feasible and achievable.

[345]Ibid.

[346]Ibrahim Badamasi Babangida was the military Head of State of the Federal Republic of Nigeria from 1985-1992. Ibrahim Babangida pledged to transfer power to a civilian administration in 1990. However, this transitional period was extended until 1992. Nigeria: 'A history of coups' (1999). http://news.bbc.co.uk/1/hi/world/africa/83449.stm (accessed 10/04/19).

[347]See preamble Constitution of the Federal Republic of Nigeria Decree 1989.

[348]See Article 44 (1); (2); (3); (4) (a); (4) (b) (i) and (ii) 1989 constitution of Nigeria.

3.7.2 Fundamental Objectives and Directive Principles of State Policy: Chapter II of the 1989 Nigerian Constitution

Accordingly, the Fundamental Objectives and Directive Principles of State Policy were retained and incorporated into Chapter II of the 1989 constitution. The subsections (1), (2) (a) and (3) (g) of Article 18 of the 1989 Nigerian constitution affirm the pledge of the state to guarantee social justice and equity through legal aid for the disadvantaged in Nigeria.[349] The directives on the right to a fair trial under fundamental rights in Chapter IV were also retained in the 1989 constitution with no change to the initial wording of the chapter that had been integrated into previous post-independence constitutions. Subsections (5) (b), (c) and (e) of Article 35 reiterate previously specified constitutional instructions on the right to a fair trial and choice of defence counsel in criminal cases only.[350]

3.8 1999 Constitution of Nigeria

3.8.1 Introduction

The 1999 Constitution of the Federal Republic of Nigeria is the fifth and current constitution in force. The national code of conduct was promulgated through Decree No. 24 by the Nigerian military government on May 5, 1999. According to the preamble of the 1999 constitution, its drafting and final approval was a combined effort of numerous consultations with all stakeholders, including the Nigerian people both home and abroad. It was agreed to utilise the 1979 constitution as a template, with amendments where necessary, to promulgate a new constitution. It was also in anticipation of handing over military power to a democratically elected government of the Nigerian people. Like the previous constitutions, the 1999 Nigerian constitution incorporates definitive human right obligations that are closely related to the provision of legal aid. Section 17 (2) (a) of the Fundamental Objectives and Directive

[349]See Chapter II; Fundamental Objectives and Directive Principles of State of the 1989 Nigerian constitution Article 18(1): "The state social order is founded on ideals of Freedom, Equality and Justice." Article 18(2)(a) "In furtherance of the social order - every citizen shall have equality of rights, obligations and opportunities before the law" Article 18(3)(g) The state shall direct its policy to ensure that - Provision is made for public assistance in deserving cases or other conditions of need."

[350]See 1989 constitution of Nigeria; Article 35(5) "Every person who is charged with a criminal offence shall be entitled: (b) To be given adequate time and facilities for the preparation of his defence; (c) to defend himself in person or by a legal practitioner of his own choice; (e) to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence."

Principles of State Policy (Chapter II)[351] guarantees rights by acknowledging the duties of states to facilitate equal protection before the law.

According to Dada,[352] "these rights which are essentially equalitarian and egalitarian in character are rooted on the belief that the attainment of [a] certain level of social and economic standard is a necessary condition for the enjoyment of the civil and political rights"; and as such, they require affirmative governmental action for their enjoyment.[353] The scope of the duty authorised by the regulation that embodies the Objectives and Principles was clarified in *Attorney-General of Ondo State v. Attorney-General of the Federation & Ors*.[354] It was held here that the obligations and responsibilities towards the realisation of rights contained within the Fundamental Objectives and Directive Principles of State Policy were not exclusive to government officials only, but to private citizens as well. The court concluded that governmental institutions do not act in isolation of the public,[355] and as such private individuals are equally accountable under the chapter. The law that was defined under this case is crucial to the realisation of protected rights, especially in matters of civil law.

3.8.2 Chapter IV: The Fundamental Right to Fair Trial and Legal Aid

Chapter IV of the 1999 constitution reiterates Nigeria's pledge to protect the fundamental rights of the Nigerian people. Section 36 (6) of the right to fair trial recall previous constitutional instructions that: "(6) [e]very person who is charged with a criminal offence shall be entitled to […] (b) be given adequate time and facilities for the preparation of his defence; (c) defend himself in person or by legal practitioners of his own choice; (e) have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence."[356] Legal aid is an inferred right under this section.

[351]See chapter II section 17(2) (a) of the 1999 constitution of Nigeria: "In furtherance of the social order- every citizen shall have equality of rights, obligations and opportunities before the law."
[352]Dada Jacob Abiodun (2012) 'Human Rights under the Nigerian Constitution: Issues and Problems.' International Journal of Humanities and Social Science Vol. 2 No. 12 p. 36
[353]Ibid.
[354]See *Attorney-General of Ondo State v. Attorney-General of the Federation & Ors.* (2002) 9 NWLR
[355]Ibid.
[356]See Chapter IV 1999 Nigerian Constitution

3.8.3 Section 46: Special Jurisdiction of the High Court and Legal Aid

Going further than the tacit provision of the right to legal aid contained within Chapter IV of the 1979 and 1989 constitutions of Nigeria, the 1999 constitution extends legal protection beyond the right to a fair trial to explicitly provide legal aid ("financial assistance") under s. 46. Hence, s. 46 (1) directs: "[a]ny person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress." The purpose of s. 46 is to give all Nigerians access to the appropriate court and legal aid if necessary, for a fair chance to seek redress, regardless of their social status. In addition, s. 46 of the 1999 Constitution recognises that the right to legal aid is essential to the wellbeing of the Nigerian populace in terms of securing basic rights. Most importantly, it is subject to improvement if deemed to be inhibiting the realisation of crucial fundamental rights through the courts.

Accordingly, s. 46 (2)[357] of the 1999 constitution provides the High Court with the primary authority to hear and determine any submitted application before it. Section 46 (2) places a duty on High Courts to ensure that constitutionally guaranteed rights are duly implemented and enforced within its State jurisdiction. In addition, s. 46 (3) further safeguards' fundamental rights via the judiciary by stating that: "the Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section."

Section 46 subsections (4) (b) (i), and (ii) instruct the National Assembly via the High Court to enact laws for the achievability of legal aid where necessary so to enable the courts to exercise their jurisdiction more effectively. Hence, the National Assembly must make arrangements "(i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real."

[357]See section 46 (2) 1999 constitution of Nigeria: "Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled under this Chapter."

3.8.4 Constraints of the Provision of Legal Aid under Section 46 (4) (b) (ii) of the 1999 Constitution of Nigeria

Consistent with s. 42 (4) (b) (ii) of the 1979 Nigerian constitution, the same section[358] of the current 1999 constitution contains limiting eligibility requirements for legal aid. This is solely dependent on the discretion of the judiciary to consider the value of contravened rights and legal aid qualification. The wording of both sections presents a potential obstacle to the primary objective of s. 46; that is, to assign the National Assembly via the Chief Justice of Nigeria the authority to empower courts with the legal capacity to ensure that disadvantaged individuals have access to equal justice via legal aid in Nigerian courts. Thus, the scope of s. 46 (4) (b) (ii) is not explicitly demonstrated in the 1999 Nigerian constitution on matters of validity and eligibility. However, the lack of clarity that leaves discretion to the judiciary in this section does not coherently represent the thought and purpose behind s. 46, including the role of the High Courts, the Chief Justice and the National Assembly, and the provision of legal aid in Nigeria.

According to Menendez,[359] the validity of fundamental rights stems from its enactment and adoption as law via the constitution. The Nigerian constitution serves as a written authoritative statement affirming the protection of fundamental rights which are indisputable. It also acts as a template, subject to amendments by the judiciary where necessary to ensure that obligations such as access to legal aid are fulfilled. However, placing sole discretion on the judiciary to validate fundamental rights that are unquestionable may in turn weaken this protection.

Individual fundamental rights of Nigerian citizens are guaranteed through the constitution by the ratifying and adopting of laws that are an integral part of the requirements of s. 46. This section also assisted in clarifying a major interpretive disparity, which created uncertainty in the Nigerian Constitutions of 1979 and earlier; namely, the definitive right to legal aid for the disadvantaged in Nigeria. Despite its limitations, the primary aim of Section 42 (4) (b) (ii) is to further protect disadvantaged individuals who are faced with litigation and unable to afford legal counsel by providing more clarity on the provision of legal aid in terms of the scope and obligations of affiliated institutions.

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[358] "The National Assembly shall make provisions for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real."

[359] Menéndez Agustín J. (2006) 'Arguing Fundamental Rights.' Menéndez Agustín J. Eriksen Erik O. (eds.) pp. 156-161.

3.8.5 Scope of Legal Aid under Section 46 (b) (i) and (ii)

Section 46 (b) (i) and (ii) extend no clear indication to suggest that such a right applies equally to disadvantaged individuals in both criminal and civil cases. The scope of its operation provides that it primarily targets individuals whose fundamental rights have been infringed upon. In the interest of parity before the courts, the right to legal aid contained within Section 46 provides unambiguous validity of the duty owed. Therefore, it is possible to deduce that the right to legal representation under s. 46 focuses on sustaining the fundamental rights of the individual to whom a duty is owed regardless of the category of case before the courts. Hence, it has the status of an inalienable right without the need to infer, unlike the constitutions of 1979 and earlier. However, Bamgbose[360] contends that, in spite of the legal aid service provided by s. 46 of the current 1999 Constitution, access to justice has not been able to make its mark and serve as an accessible right for many citizens, particularly for the disadvantaged and vulnerable in Nigeria.

3.8.6 Derogations from the Fundamental Objectives and Directive Principles of State Policy: Implications of Section 6 (6) (c) for the Provision of legal Aid in Nigeria

The Fundamental Objectives and Directive Principles of State Policy contained within the 1999 Nigerian constitution constitute a primary asset to the provision of legal aid in Nigeria. They serve to clarify the position of the rights giver and to whom the right in question is owed. Chapter II is crucial to the legal aid scheme by placing obligations on all organs of government; all authorities and persons exercising legislative, executive, or judicial powers; and all private persons to conform to, observe and apply its mandates accordingly.[361]

Olaiya[362] posits that the primary aim of the Objectives and Principles is to encourage social inclusion irrespective of social ranking in society. Social status plays a major role in access to legal aid matters. Disadvantaged and vulnerable individuals are prone to exclusion from the courts because they cannot afford to pay for the services of a lawyer. Yet, the principles and

[360]Bamgbose Oluyemisi (2015) 'Access to Justice through Clinical Legal Education: A Way Forward for Good Governance and Development.' 15 African Human Rights Law Journal p. 379.
[361]Okere Obinna (1983) 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution.' The International and Comparative Law Quarterly, Vol. 32, No. 1 p. 215.
[362]Olaiya Taiwo A. (2015) 'Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria' Journal of Politics and Law Vol. 8, No. 3 p. 23.

provisions that are paramount to this section, which seek to preserve the fundamental rights of indigent Nigerians, are deemed unenforceable by the courts due to a counter-provision contained within Section 6 (6) (c) of the 1999 constitution.[363]

Section 6 (6) (c) contains a clause that excludes courts from questioning certain matters of law and whether a judicial decision complies with mandates contained within the Objectives and Directive Principles: "[t]he judicial powers […] shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution[.]" This section therefore, restricts courts from enforcing the provisions of Chapter II of the constitution.

In addition, s. 6 (6) (c) conflicts with the purposes of s. 17 (2) (a) and (e)[364] of the Objectives and Principles incorporated in Chapter II. Section 17 (2) was put in place to further maintain social order and secure access to courts in spite of social status, as well as maintain and uphold the right to equal arms and opportunities before the courts of Nigeria. According to Okeke and Okeke,[365] the intrinsic policy embedded within the Objectives and Principles portrays a template to follow. However, s. 6 (6) (c) of the constitution represents a barrier to accomplishing the intended objective of access to courts. The author went further to argue that a government that cannot be held liable for failing to perform its assigned constitutional duties and cannot be expected to bear the responsibility of its obligations due to the non-justiciable nature of such duty.[366]

The case of *Archbishop Olubunmi Okogie v. The Attorney General of Lagos State*[367] examined the Fundamental Objectives and Directive Principles of State Policy in detail for the first time in relation to the limitations of s. 6 (6) (c). The court declared that "the Fundamental Objectives identify the ultimate objectives of the nation and the Directive Principles lay down the policies

[363]Ibid.
[364]See 1999 constitution of Nigeria s. 17 (2) "In furtherance of the social order-
(a) every citizen shall have equality of rights, obligations, and opportunities before the law.
(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained."
[365]Okeke G.N Okeke C. (2013) 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria.' IOSR Journal of Humanities and Social Sciences (IOSR-JHSS) Volume 7, Issue 6 pp. 9-10
[366]Ibid.
[367]See *Arch. Bishop Olubunmi Okogie v. The Attorney General of Lagos State* Federal Court of Appeal 1980 FNLR 445

which are expected to be pursued […] while section 13 of the Constitution makes it a duty and responsibility of the Judiciary […] to conform to and apply the provisions of Chapter II. Section 6 (6) (c) of the same constitution states that no court has jurisdiction to pronounce or question any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. In effect, s. 13 has not made Chapter II of the Constitution justiciable."[368]

Okeke[369] contends that s. 6 (6) (c) of the 1999 constitution is contradictory to the intention of Chapter II and that of access to legal aid. This serves as an impediment to the notion of transparency and accountability set out in s. 13: "[i]t shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution." Hence, s. 13 in this context, indicates responsibility without liability.[370] Section 6 (6) (c) undermines the constitutional duty that is owed to individuals with less means to protect their right to equality before the law. It also requires the duty bearer to fulfil their part of the duty owed. However, Okeke and Okeke[371] posit that there are ways to ensure that duties and obligations are satisfied by exploiting the mandates of the 1999 constitution itself. For instance, the National Assembly is empowered to make laws to fortify the provision of Chapter II of the constitution through legislation.

The authors argue that the authority of the 1999 constitution would be compromised if altered via legislation and suggest that the constitution itself should be amended to reflect the proposed intention. Furthermore, pending the adjustment of the Nigerian constitution, the authors recommend that the judiciary should bridge the gap through constitutional interpretation[372] to reflect the intentions of the chapter and mandate rights such as legal aid in Nigerian courts. For instance, in the case of *Ghana Lotto Operators Association v. National Lotteries Authority*,[373] it was held that a presumption of justiciability within the Directive Principles of State Policy was indispensable to the enforcement of fundamental human rights; and, as such, all the

[368]Ibid.
[369]Okeke (2011) 'Fundamental Objectives and Directives Principles of State Policy: A Viable Anti-Corruption Tool in Nigeria.' Nnamdi Azikiwe University Journal of International Law and Jurisprudence Vol 2 pp.175-181.
[370]Okeke G.N & Okeke C. (2013) 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria.' IOSR Journal of Humanities and Social Sciences (IOSR-JHSS) Volume 7, Issue 6 p. 13.
[371]Ibid.
[372]Ibid. p. 13.
[373]See *Ghana Lotto operators Association v. National Lotteries Authority* 2007-2008 SCGLR 1089.

provisions in the constitution were justiciable because they represent the most important rules on political governance.

Onyekachi [374] argues "that the provisions of Chapter II of the 1999 Constitution are enforceable under certain well-defined parameters". The writer posits that, if a contravention of a provision under Chapter II results in an infringement of fundamental rights in Chapter IV, the former becomes indirectly justiciable. Consequently, the enforceability of the Chapter II may be subject to the guarantee and protection of inalienable rights contained within Chapter IV of the 1999 constitution.[375] For instance, the right to legal aid in Nigeria under Chapter IV is a fundamental right that cannot exist in a vacuum. Governments, non-government institutions and including private citizens are required to fully conform to the protections contained within Chapter II of the constitution. Thus, denying a disadvantaged individual legal aid by way of s. 6 (6) (c) will be a violation of constitutionally protected fundamental rights. The infringement will also extend to the right to legal counsel contained within Article 7 (1) (c) of the African Charter.[376] Section 6 (6) (c) limits the jurisdiction of the courts when questioning organs of government on matters of conformity. It also stands as a barrier to achieving the objective of Chapter IV if fulfilment of duty is questioned before the courts.

In *A.G. Ondo v. A.G Federation*,[377] it was argued that the provisions of Chapter II of the 1999 Constitution are but non-justiciable declarations, due to the influence of Section 6 (6) of the same constitution. The Supreme Court held that the courts do not have the jurisdiction to enforce any of the provisions of Chapter II until the National Assembly enacts specific laws for their enforcement. However, the Supreme Court also stated that, despite the non-enforced status of the Objectives and Directive Principles, it would be a failure of organs of government if there were a clear disregard of their duties and responsibilities to uphold fundamental rights. The Federal High Court, in the case of *Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others*,[378] interpreted the right to life broadly under s. 33 of the 1999 constitution to include the right to a clean and healthy environment. It was held that gas flaring in the course of oil extraction violates the right to life and a healthy environment, among other

[374]Duru Onyekachi (2012) 'The Justiciability of The Fundamental Objectives and Directive Principles of State Policy under Nigerian Law.' p. 3.
[375]Ibid. p. 10.
[376]Article 7(1)(c) of the African Charter "Every individual shall have the right to have his cause heard: The right to defence, including the right to be defended by counsel of his choice."
[377]See (2002) 9 NWLR (Pt772), 222.
[378]See (2005) AHRLR 151.

fundamental rights, protected under Article 24 of the African Charter,[379] which are applicable outside Section 6 (6) (c) of the Nigerian constitution.

In some circumstances, the Directive Principles may be made justiciable based on the legal principle dependent on fundamental law. For instance, the court will have to determine the gravity of the dispute by finding sufficient connection between the contravened rights of the individual in question and the perpetrated action of the other party. The African Charter also plays a crucial role in the determination of enshrined rights, in addition to the need for redress. It was observed in the case of *Federal Republic of Nigeria v. Aneche & 3 ors*[380] that "[S]ection 6 (6) (c) of the 1999 constitution is neither total nor sacrosanct as the subsection provides leeway by the use of the words 'except as otherwise provided by this constitution'." That is, the constitution has created an opportunity for an additional section to fully guarantee the justiciability of Chapter II.

However, Dada[381] contends that regardless of the limiting clause of s. 6 (6) (c), the fundamental rights guaranteed under Chapter IV derive their legitimacy from major international human rights instruments, and are libertarian in nature, because they relate to the sanctity of the individual rights. Thus, justiciability of fundamental rights can be acquired from superior international human rights instruments that have been ratified into the Nigerian constitution as a means of overriding national law that does not conform to its mandates; for instance, rights such as the right to legal aid as implied by Article 7 (1) (c)[382] of the African Charter on Human and Peoples' Rights (Banjul Charter)[383] are applicable and therefore enforceable by the national courts of Nigeria.[384]

Olaiya[385] contends that the 1999 Nigerian constitution serves as a system that connects the state to its citizens through its duty to protect and preserve their inalienable constitutional rights. On the other hand, Chapter II clarifies the judiciary as the duty bearer fundamental to the welfare

[379]"All peoples shall have the right to a general satisfactory environment favourable to their development."
[380]Observation by Tobi Niki (JSC) Federal Republic of Nigeria *v.* Aneche & 3 ors (2004) I SCM. P. 36 at 78.
[381]Dada Jacob Abiodun (2012) 'International Journal of Humanities and Social Science Vol. 2 No. 12 Human Rights under the Nigerian Constitution: Issues and Problems.' p. 37.
[382]See Article 7(1) (c) of the African Charter: "Every individual shall have the right to have his cause heard…the right to defence, including the right to be defended by counsel of his choice…"
[383]See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1990.
[384]The status of the African Charter was affirmed in the case of *Abacha & others v. Fawehinmi* (2001) AHRLR 172 (NgSC 2000).
[385]Olaiya Taiwo A. (2015) Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria Journal of Politics and Law Vol. 8, No. 3 p. 24.

of the Nigerian people in terms of protecting legal rights via legal aid. Section 6 (6) (c) according to case law[386] renders Chapter II un-justiciable. Thus, it is not absolute; but it may be subject to judicial interpretation in relation to the rights in question, the scope of authority and other superior legal frameworks such as the African Charter. This is in addition to the intention behind the 1999 constitution regarding the obligations of the judiciary and the protection of rights.

3.8.7 Implications of Fundamental Rights (Enforcement Procedure) Rules, 2009[387] (under Chapter IV of the Constitution) and Access to Legal Aid

On 9th December 2009, via the authority of s.46 (3) and with the aim of further strengthening s. 46 (1)[388] of the 1999 Constitution,[389] the Chief Justice[390] enacted rules to advance the fundamental rights and freedoms of all Nigerian citizens. This was the second time the FREP Rules were introduced as a supplement to laws enforcing fundamental rights contained within the 1999 Nigerian constitution. Sanni[391] asserts that its main objective was to rectify the shortcomings in implementation of the previous FREP Rules of 1979. The cost of litigation and the complex and time-consuming application process have been cited as two of the major challenges of the 1979 enforcement rules. All of these serve as a barrier to disadvantaged individuals who may require access to legal aid to protect their fundamental rights before the courts if they do not have the means to pay for a lawyer.

The current 2009 FREP Rules are aimed at advancing a democratic system of government by prioritising and enforcing constitutionally protected fundamental rights.[392] The 2009 Rules repealed their predecessors to minimise technicalities and prioritise equality and fairness in the

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[386]See *A.G. Ondo v. A.G Federation; Arch. Bishop Olubunmi Okogie v. The Attorney General of Lagos State* 1980; *Federal Republic of Nigeria v. Aneche & 3* Ors (2004).

[387]Fundamental Rights (Enforcement Procedure) Rules, 2009. https://www.refworld.org/pdfid/54f97e064.pdf (accessed 19/12/2019).

[388] "Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."

[389]"The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section."

[390]Chief Justice Idris Legbo Kutigi.

[391]Sanni Abiola (2011) 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for Far-Reaching Reform.' African Human Rights Journal p. 521.

[392]Duru Onyekachi (2012) 'An Overview of the Fundamental Rights Enforcement Procedure Rules, 2009.' pp. 2-3.

Nigerian judicial system, as well as accelerate the application process by reducing time-consuming procedural and enforcement requirements. Hence, the new rules increased the scope of the human rights principles and instruments that a judge can utilise so to expand an applicant's rights and freedoms.[393] For instance, access to legal aid mandates, contained within the African Charter on Human and Peoples' Rights,[394] will be applicable and enforceable when initiating litigation concerning a breach or potential infringement of fundamental rights[395] protected by the ACHPR (Ratification and Enforcement) Act of 1990.[396] As a consequence, Preamble 3 (a) prompts Nigerian courts to explicitly interpret and apply the directives of Chapter IV of the 1999 constitution and those of the African Charter to strengthen and accomplish the protections intended by them.[397]

In addition, Preamble 3 (d) of the 2009 FREP Rules guarantees the enforcement of fundamental rights for all Nigerian citizens regardless of social status: "[t]he Court shall proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented."

3.8.8 Fundamental Rights: Legal Aid and the Principle of *locus standi*

The concept of *locus standi*, where an applicant must have sufficient interest in the matter before a standing to sue can be approved, was a significant barrier to the protection of fundamental rights in Nigeria and a matter of controversy in the pre-1999 Nigerian Constitutions. It also prohibits third party legal representation on matters of violation of fundamental rights. For instance, legal aid from a Non-Governmental Organisation (NGO) would be placed under scrutiny if *locus standi* was strictly interpreted. In *Nkemdilim v. Madukolu*,[398] it was held that "litigants in a matter must show that they have interests on the

[393]See Preamble 3(b) of the 2009 FREP Rules: "For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions…"
[394]See Preamble 3(a) of the 2009 FREP Rules: "The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realising the rights and freedoms contained within them and affording the protections intended by them."
[395]Duru Onyekachi (2012) 'An Overview of the Fundamental Rights Enforcement Procedure Rules, 2009.' pp. 4-5.
[396]See Article 7(1) (c) African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1990.
[397]Nwauche Enyinna (2010) 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?' African Human Rights Journal p. 511.
[398](1962) All NLR, 587.

subject matter which forms the essential part of the litigation". According to Ogowewo,[399] the principle of standing was formulated in the case of *Adesanya*[400] via the application of Justice Bello's test.[401] Also known as the 'civil rights' test, Justice Bello was of the view that s. 6 (6) (b) of the 1979 constitution[402] laid down the standing requirement.

In the case of *Senator Adesanya v. President of the Federal Republic of Nigeria and Others,*[403] the Supreme Court held that: "[a] party invoking the powers of the court with respect to an unconstitutional statute, must show, not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury from its enforcement and not merely that he suffers in some indefinite way in common with the public generally."[404] Thus, Justice Bello's construction of the section became a constitutional standing requirement for all cases[405] with no exemptions. The author criticised the test and argued that the section has no bearing on the standing to sue and termed it a "gigantic mistake" that would effectively exclude prospective litigants and Nigerian NGOs from initiating legal proceedings on behalf of litigants.[406]

In *Attorney General of Kaduna State v. Hassan*,[407] the court held that the concept of *locus standi* is "predicated on the assumption that no court is obliged to provide a remedy for a claim in which the applicant has a remote, hypothetical or no interest". However, in this case the court determined that "[t]he relationship of father and son ought to be sufficient to give the father interest to see that justice is done in the trial". A similar perception was affirmed in *Bendel State v. Obayuwana*,[408] where it was held that "the Constitution has not prescribed any condition precedent to be complied with before a citizen institutes an action in court". Hence,

[399]Ogowewo T. I. (1995) 'The Problem with Standing to Sue in Nigeria.' Journal of African Law, Vol. 39, No. 1, pp. 1-18.
[400](1981) 2 NCLR 358.
[401]Justice Bello's test, "standing will only be accorded to a plaintiff who shows that his civil rights and obligations have being violated or adversely affected by the act complained of."
[402]Sections 6(6): "The judicial powers vested in accordance with the foregoing provisions of this section (b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."
[403](1981) 2 NCLR 358.
[404]Ibid.
[405]Ogowewo T. I. (1995) 'The Problem with Standing to Sue in Nigeria.' Journal of African Law, Vol. 39, No. 1, pp. 1-18.
[406] Iwobi Andrew Ubaka (2004) 'Tiptoeing Through a Constitutional Minefield: The Great Sharia Controversy in Nigeria.' Journal of African Law, 48, pp. 111-64.
[407]See *Attorney General of Kaduna State v. Hassan* (1985) NWLR (Pt.8) 483.
[408][1982] 3 NCLR 206 at 2.

Ayoola JSC diverged from Justice Bello's test in *First African Trust Bank v. Ezegbu*,[409] and asserted that s. 6 (6) (b) of the 1979 Constitution focuses on the scope of judiciary powers in Nigeria, and not on individual rights to sue.

The justification of the principle of standing was to save time by avoiding frivolous litigation and protect the courts from abuse of its processes.[410] However, a strict interpretation of *locus standi* will isolate disadvantaged individuals who are unable to single-handedly launch an action through the courts due to the complexities of the process. It would also hinder individuals who are unable to afford the services of a lawyer for litigation representation. The principle of standing presented a major setback to the aims and objectives of the constitution and the African Charter on the protection of rights. In *NNPC v. Fawehinmi*,[411] Ayoola JSC revisited the test and insisted that: "Section 6 (6) (b) [...] is not intended as a catch-all, all-purpose provision to be pressed into service for determin[ing] questions ranging from *locus standi* to the most uncontroversial questions of jurisdiction."[412] In *Owodunni v. Registered Trustees of Celestial Church & Ors*,[413] Ogundare JSC affirmed Ayoola's viewpoint.[414] Consequently, the *locus standi* principle was removed from the succeeding 1999 Constitution to enable the "delivery of justice to a greater majority of people as well as help develop the Nigerian Legal System".[415]

3.8.8.1 Fundamental Rights (Enforcement Procedure) Rules, 2009: Nullification of *locus standi*

Preamble 3 (e) of the current 2009 FREP Rules invalidates the concept of *locus standi* by encouraging third party litigation on behalf of applicants seeking to protect their fundamental rights: "[t]he Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental

[409](1992) NWLR (PT. 264)132.
[410]Okeke G.N (2013) 'Re-examining the Role of Locus Standi in the Nigerian Legal Jurisprudence.' Journal of Politics and Law Vol. 6 No 3 pp. 209-215.
[411][1998] 7 N.W.L.R at 598.
[412] Ibid. at 612.
[413][2000] 10 N.W.L.R at 315.
[414] "In my respectful view, I think Ayoola J.C.A (as he then was) correctly set out the scope of section 6 subsection 6 of the Constitution ... in *NNPC v. Fawehinmi & Ors*" Ibid.., at 345.
[415]Ibid. p. 213.

organisations, may institute human rights applications on behalf of any potential applicant." Paragraph 3 (g) also affirms that: "[h]uman rights suits shall be given priority in deserving cases. Where there is any question as to the liberty of the applicant or any person, the case shall be treated as an emergency."[416] Hence, Paragraph 3 (e) of the 2009 FREP Rules re-defines the significance of fundamental rights protection contained within the 1999 constitution of Nigeria. By recognising the need for certain individuals who require legal aid to commence an action through third parties, it also recognises the consequences to the concept of equal justice if individuals are restricted from doing so.

3.8.9 Initiation of Legal Proceedings: FREP Rules 2009 and Legal Aid

The specific route to request 'leave' from the court to institute an action[417] was not detailed in the current 2009 FREP Rules. However, in the case of *Tofi v. Uba*,[418] the court held that the enforcement of fundamental rights could be launched through various avenues, such as a writ of summons, application, petition, motion, and summons. This is in contrast to the previous 1979 FREP Rules, where it was via a mandatory, intricate application process.[419] It also simplified the originating process, and so litigants are able to commence action with or without the services of a lawyer with no risk of the application being rejected on the grounds of non-compliance with the requirements of the originating process.[420] In situations where legal representation has been obtained, non-complex rules under Order II will encourage individuals who require legal assistance as well as legal aid lawyers to take the first step towards securing their fundamental rights. Order II Rule 4[421] gives leeway to applicants that are unable to swear to an affidavit by allowing a third-party representative, who has knowledge of the case, to

[416]Preamble 3 (g) of the 2009 FREP Rules.
[417]See Order II Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 "An application for the enforcement of the Fundamental Right may be made by any originating process accepted by the Court which shall, subject to the provisions of these Rules, lie without leave of Court."
[418]See *Tofi v. Uba* (1987) 3 NWLR 707. 'It was determined that an applicant may approach the court for the enforcement of his right in the manner in which he deems convenient in any given circumstances when commencing an action.'
[419]Duru Onyekachi (2012) 'An Overview of the Fundamental Rights Enforcement Procedure Rules, 2009', p. 9
[420]See Order II Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules, 2009.
[421] "The affidavit shall be made by the Applicant, but where the applicant is in custody or if for any reason is unable to swear to an affidavit, the affidavit shall be made by a person who has personal knowledge of the facts or by a person who has been informed of the facts by the Applicant, stating that the Applicant is unable to depose personally to the affidavit."

swear to an affidavit on their behalf. This could be an NGO representative, a private individual or a legal representative.

Order III Rule 1 of the 2009 FREP Rules[422] enhances access to justice by ensuring that applicants are able to secure their fundamental rights without being limited by any law or regulation. Thus, applicants can initiate an application at any time, regardless of when the violation occurred.[423] Order IV Rule 1 recognises that some applications may need to be resolved to avoid additional hardship to the liberty of the applicant, and to this end requires that the application be heard within seven days from when it was filed.[424] Reducing the timeframe from the filing of an application to obtaining a resolution will cut down costs and time for legal aid representatives. It will also ensure that disadvantaged applicants are not subject to further hardship that may arise due to a prolonged application process; for example, inability to access legal aid for long term representation may lead to continuous detention or the eventual abandonment of the case.

In addition, Order XI reiterates the commitment of Nigerian courts to the enforcement of fundamental rights.[425] Unlike in the previous 1979 FREP Rules, Order XII of the 2009 FREP Rules details the procedure to be adopted in human rights hearing cases. Applicants and legal representatives are given prior knowledge of what to expect during the proceedings. Order XIII Rule 1 protects the right to be heard in human rights matters by further restricting the scope of *locus standi*. It also grants the right to be heard to any individual, regardless of whether such individual has interest in the matter before the courts or not.[426]

[422]See Oder III Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 "An Application for the enforcement of fundamental rights shall not be affected by any limitation statute whatsoever."
[423]Duru Onyekachi (2012) 'An Overview of the Fundamental Rights Enforcement Procedure Rules.' 2009 p. 10
[424]See Order IV Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009. "The application shall be fixed for hearing within 7 days from the day the application was filed."
[425]See Order XI of the Fundamental Rights (Enforcement Procedure) Rules, 2009. "At the hearing of any application, under these Rules, the Court may make such orders, issue such writs, and give such directions as it may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution or African Charter on Human and People's Rights (Ratification and Enforcement) Act to which the applicant may be entitled."
[426]See Order XIII Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009. "Any person or body who desires to be heard in respect of any Human Rights Application and who appears to the Court to be a proper party to be heard may be heard whether or not the party has been served with any of the relevant processes, and whether or not the party has any interest in the matter."

The 2009 FREP Rules indicate Nigeria's continued commitment to enforcing fundamental rights matters in Nigerian courts. However, Nwauche[427] contends that there are still barriers within the current 1999 constitution regarding its authority on *locus standi*,[428] which are still considered good law because they have not been reversed. There are also questions as to whether the 2009 Rules have the capacity to overturn decisions of the Nigerian courts, especially those of the Supreme Court. The author suggests the overturning of the Adesanya case to erase any doubts and clarify the objectives of the 2009 FREP Rules.[429]

3.8.10 Independence of Courts: Role of the Judiciary and Access to legal Aid

"If people cannot access the legal process, the courts, then they may as well not exist." - Andrew Caplen[430]

The judiciary is a crucial component of the Nigerian legal system. The right to legal aid is deeply rooted and dependent on the competence of the judiciary. The courts play a major role in ensuring that legal aid provision is duly accessed by disadvantaged individuals faced with litigation. The primary aim of this provision is to provide avenues of justice to individuals that are before it. Through the courts, the judiciary are critical to the implementation of legal aid and its availability to the wider public. The scope and role of the judiciary is defined according to the authority that establishes its powers. In Nigeria, this is ultimately derived from the constitution.

Based on the principle of equal justice, the independence of the courts is crucial to the implementation and sustainability of legal aid. Lwabukuma[431] contends that strong legal institutions are created and sustained through limited arbitrary powers. Courts in Nigeria are a

[427]Nwauche Enyinna (2010) 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?' African Human Rights Journal pp. 504-514.
[428]See the case of *Senator Adesanya v. President of the Federal Republic of Nigeria and Others* (1981) 2 NCLR 358.
[429]Nwauche Enyinna (2010) 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?' African Human Rights Journal p. 514.
[430]'What use is the rule of law if there is no access to justice?' (2014) speech given by Andrew Caplen (President of the solicitors' branch of the legal profession) in Access to Justice at the University of Portsmouth http://www.lawsociety.org.uk/news/speeches/access-to-justice/ (accessed 17/6/18).
[431]Lwabukuna O. K. (2016) 'International Rule of Law and Development': Underpinnings of the MDGs and the Post-2015 SDGs Agenda. Journal of Peacebuilding and Development Volume: 11 issue: 2 pp. 89-94.

constitutionally separate governmental entity. However, Davis[432] posits that in Nigeria the judiciary is more than often seen as an institution that serves as an intimidating apparatus of the ruling class. As such, it is not perceived as haven for individuals of a lower social status. However, by virtue of the current 1999 constitution of Nigeria, the judiciary are given further powers to make rules and ensure that the fundamental human rights of Nigerian citizens are consistently protected via its mandates in the courts.[433]

According to Rosenburg,[434] the courts are a unique machinery of government, capable of producing significant political and social change through their organisation and mode of operation. In spite of their implicit influence on society, courts are seldom subject to empirical questions that clarify their role in effecting such change. This includes matters that could potentially reform and modify the judiciary and/or the constraints and barriers faced by courts in the process of change. [435] One such matter is whether an individual with limited means should be mandated by the courts to either seek or be presented with counsel via legal aid before commencement of a case. The author implies that the lack of empirical description on how courts can produce change could act as an impediment to its role and, as a consequence, as a potential obstacle to the execution of its duties. He argues that this is especially so in situations where the current structure of due process and court procedures are not sufficient to protect an individual faced with litigation.[436] For example, the courts should ensure that the rights of disadvantaged individuals are protected in the initial stage of litigation and guarantee that procedures are modelled in such a way to limit complex processes to save time and money in cases that may require legal aid; however, this is not always achieved.

The role of the court is linked to how much power it has at its disposal. If a court lacks power, its ability to make reform will be limited. For instance, if courts are able only to play a passive role in reform, by merely pointing out that the action before the court is contrary to the mandates of the constitution, the judiciary cannot directly effect change and must depend on

[432]Davies Arthur E. (1990) 'The Independence of the Judiciary in Nigeria: Problems and Prospects.' African Study Monographs 10(3) pp. 125-136.
[433]See Judicial powers: s. 6 and Chapter II Fundamental Objectives and Directive Principles of State Policy of the Constitution of the Federal Republic of Nigeria 1999; Preamble FREP Rules 2009.
[434]Rosenberg Gerald N (2008) 'The Hollow Hope: Can Courts Bring About Social Change?' Second Edition pp. 1-5.
[435]Ibid.
[436]Ibid. p. 5.

extraneous formal process. Consequently, change, in the form of the amendment of laws, may take time or not occur at all.

However, the Nigerian judiciary has more power than this. Through the constitution, courts in Nigeria have the power to make laws and rules as necessary to ensure that there is peace, order, and effective governance of the State. Hence, the constitution directs the courts via the National Assembly to apply an informal process of amending legislation through judicial interpretation to reflect the ultimate purposes of the original law. Thus, the in-depth instructions contained within the Fundamental Objectives and Directive Principles of State Policy, and the sections on powers bestowed on the judiciary to legislate in the interest of good governance, allows for reform of the courts by the courts in Nigeria.

3.8.11 Separation of Government Powers and Independence of the Judiciary

With regard to the role of the previous Nigerian constitutions and the protection of individual rights via legal aid, the 1979 Constitution was deemed a more unique constitution compared to the previous two of 1960 and 1963.[437] Also notable was the newly introduced division of the executive, legislature and the judiciary into separate organs of government, a feature that was retained in the subsequent 1989 and the current 1999 Nigerian constitution. It was a revolutionary innovation employed to define and clarify the significance of each organ of government as separate entities within the Nigerian system of government.[438] Thus, an independent judiciary maintains autonomy and protects its citizens on matters relating to the law.

Section 4 of the 1999 constitution dictates the scope of powers of the Legislative by virtue of the National Assembly. Section 4 (1) states that: "[t]he legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives." Subsequent sub-sections lay down the obligation of the National Assembly to make laws for peace, order and good government.[439]

[437]Eso Kayode (Former Justice of the Supreme Court of Nigeria) (1990) 'The Role of Judges in Advancing Human Rights.' In Commonwealth Secretariat Interights Developing Human Rights Jurisprudence Volume 3: A Third Judicial Colloquium on the Domestic Application of International Human Rights Norms p. 9.
[438]Ibid.
[439]Section 4(2) Constitution of the Federal Republic of Nigeria 1999: "The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to

Section 4 (5)[440] affirms the superiority of laws promulgated by the National Assembly of Nigeria, as opposed to the House of Assembly of any state of the federation, while Section 4 (7) declares: "[t]he House of Assembly of a State shall have power to make laws for the peace, order and good government of the State [...]"[441]

Section 5 confirms the scope of powers and limitations of the executive in Nigeria, which is subject to the laws made by the National Assembly.[442] Section 6 (1) asserts the capacity of the courts with respect to the laws made by the National Assembly of Nigeria: "[t]he judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation." Section 6 (2) establishes the jurisdiction of the state courts, giving them the power to adjudicate on any matter or dispute within their home jurisdictions. Section 6 (5) details the courts in Nigeria which are afforded constitutional authority.

Accordingly, Section 6 (6) is a configuration of the scope of influence held by the courts. Section 6 (6) (b) "shall extend, to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person." By virtue of the current 1999 constitution of Nigeria and previous constitutions alike, the judiciary via the courts are able to make provision for disadvantaged individuals who require legal aid in order to ensure that the legislation in question is compatible with the constitution. The official separation of the three governmental powers that was instigated in the 1979 constitution was to ultimately allow each organ of government to maintain a counterbalance in their separate activities within Nigeria. In addition, a separation of powers will uphold the rule of law which is central to the protection and prioritisation of rights of vulnerable individuals and crucial to the principle of equality before the courts.[443]

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any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution."

[440] "If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void."

[441]Section 4 (7) (a) (b) (c) Constitution of the Federal Republic of Nigeria 1999.

[442]Section 5(1)(a) and (b) Constitution of the Federal Republic of Nigeria 1999.

[443]Eso Kayode (Former Justice of the Supreme Court of Nigeria) (1990) 'The Role of Judges in Advancing Human Rights.' In Commonwealth Secretariat Interights Developing Human Rights Jurisprudence Volume 3: A Third Judicial Colloquium on the Domestic Application of International Human Rights Norms p. 97.

For instance, in the case of *Abiola v. Federal Republic of Nigeria*,[444] the Supreme Court held that the provision of s. 33 (1) of the 1979 constitution[445] explicitly provides that the independence and impartiality of a court is a definitive trait of the right to a fair hearing and crucial to the concept of social justice. According to Edeko,[446] the separation of the judiciary from the other arms of government was of high importance for the wider public to see that fundamental rights were being protected, upheld, and visibly acknowledged to have been executed accordingly. Hence, an authoritative judiciary serves as a paramount constituent to the provision of legal aid. It is a way of empowering judges to take a more unbiased, active role in the process of enabling access to legal aid in Nigerian courts. An independent judiciary embodies the rule of law and is essential for the protection of constitutionally procured fundamental rights and improving public confidence in the judiciary.

Anyebe[447] contends that, in Nigeria, "the concept of legal justice may, to a very great extent, depend on the calibre of the lawyer, whose services a litigant can afford to pay for […]" Thus, litigants that are unable to afford legal fees are at a disadvantage, and will feel less confident because of the general belief that justice will only be favourable to litigants of adequate financial means. Vanderbilt[448] argues that the trust and faith of disadvantaged individuals in the judiciary is crucial to its reform: "it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they lose their respect for the work of courts their respect for law and order will vanish […]"

Clark[449] posits that it is crucial that legislators take the initiative to acknowledge and make amends to court procedures, especially in cases that may require the courts to insist on free legal representation for disadvantaged individuals before the case commences. This is most especially the case in a situation where a judge is called upon to determine the constitutional

[444]See 7 NWLR (Pt 405) 1.
[445] "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."
[446]Edeko Sunday E. (2011) 'The Protection of the Right to Fair Hearing in Nigeria.' Sacha Journal of Human Rights Vol. 1 No.1 p. 73.
[447]Anyebe, P. A. (2012) 'Towards Fast Tracking Justice Delivery in Civil Proceedings in Nigeria.' Nigerian Institute of Advanced Legal Studies. Judicial Reform and Transformation in Nigeria: A Tribute to Hon. Justice Dahiru Musdapher, Chief Justice of Nigeria. Epiphany Azinge (ed.) p. 140.
[448]Vanderbilt, A. T. (2015) 'Challenge of Law Reform.' Princeton University Press p. 4.
[449]Clark J. Morris (1978) 'Legislative Motivation and Fundamental Rights in Constitutional Law', San Diego Law Review Volume 15 Issue 5 p. 968.

validity of a certain law.[450] Section 17 (1) of the Objectives and Principles chapter of the 1999 Nigerian constitution details the duties and responsibilities of Nigerian institutions by way of social objectives: "[t]he State social order is founded on ideals of Freedom, Equality and Justice." Accordingly, Section 17 (2) gives more insight into how freedom, equality and justice are to be achieved. However, Section 17 (2) (e) highlights the importance of the independence of the courts in attaining social order: "the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained." Subsequent constitutions up until the current 1999 Constitution of Nigeria have adopted this section to single out the role of each organ of government by entrusting each of them with constitutional responsibilities and obligations. The judiciary, being the arm of the Nigerian government that governs the right to legal aid, is required to uphold the principle of equal justice by acknowledging and resolving situations that lack equality of standing.

In Nigeria, access to legal aid matters that are brought before the court may require judicial intervention to ensure a balance of equal standing is maintained. Section 46 (3) of the 1999 constitution of Nigeria is clear and directs the Chief Justice to make rules with respect to the practice and procedure of the High Court without interference and to meet fundamental rights requirements accordingly. That is, all laws, policies and procedures must conform to the instructions of the constitution, which obliges the courts to provide the necessary resources to disadvantaged individuals who are unable to pay for the services of a lawyer to protect their rights. This section would be expected to be applicable to all legally recognised legal systems in Nigeria as legal aid is requisite to equal standing. As such, some sort of intervention is imperative in, for instance, customary courts by the overseers, to ensure that the intention of the Nigerian constitution is extended to all operational courts, more so, because such courts are traditionally excluded in the legal aid and fundamental rights conversation.

[450] Ibid.

Chapter 4: Nigerian Customary Court System in practice

"The modern formal judiciary based on state laws fails to accommodate or take cognisance of the African understanding of justice, rights, morality and doctrine of equity based on African legal conception or African legal background."[451]

4.1 Introduction

Access to judicial institutions via legal aid is a prerequisite to the fundamental right of fairness and equality. These basic components, which include the right to a fair trial, are intricately established in the Nigerian constitution and other ratified international human rights instruments (e.g., the African Charter). In addition to paramount human rights components such as fair trial is the right to legal aid: the entitlement to legal counsel paid for by the state. This is solely dependent on an individual's fundamental right to access appropriate institutions and be heard before the court of law.[452]

Woodman[453] argues that an in-depth examination of justice requires exhaustive legal study; however, he also cautions that, by frequently evaluating certain portions of the laws of African countries, the current African legal literature restricts the examination of other pivotal aspects of justice, such as social justice and other concepts that encourage equal opportunities to the less privileged in society, especially in litigation matters.[454] Rawls[455] referred to this concept as "*justice as fairness*", which is primarily concerned with "the basic structure of society". This "basic structure" comprises of the social institutions of society that distribute the main benefits and burdens of social life and, as a consequence, have a lasting effect on the lives of its citizens.[456] Thus, Okogbule[457] posits that widening the scope of legal aid operations by increasing the category of potential beneficiaries will further enhance access to the scheme.

This chapter and the next (Chapter 5) explore the inherent characteristics of Nigerian customary legal practices: their past, present, and future role in the daily activities of its many dependants.

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[451]Onyango Peter (2013) 'African Customary Law: An Introduction.' Law Africa Publishing p. xii.
[452]Boko, D.G. (2000) 'Fair Trial and the Customary Courts in Botswana: Questions on Legal Representation.' Criminal Law Forum Volume 11, Issue 4, p. 445.
[453]Woodman Gordon (1996) 'Legal Pluralism and the Search for Justice.' Journal of African Law Vol. 40, No. 2, p. 157.
[454]Ibid.
[455]Rawls J. (1971) 'A Theory of justice.' London, p. 7.
[456]Wenar Leif (2017) "John Rawls", The Stanford Encyclopaedia of Philosophy Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/spr2017/entries/rawls/ (accessed 19/02/19).
[457]Okogbule, Nlerum S. (2005) 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects.' Sur. Revista Internacional de Direitos Humanos, 2(3), pp. 100-119.

It will also examine the scope of its jurisdiction in Nigerian national legal systems, as well as how colonialism impacted and shaped its directives. It considers the continuing role of customary law as a primary source of law, and its capacity in the promotion of human rights via the principle of fairness. This chapter will examine the deep-rooted principles of customary courts as a viable source of law within the Nigerian legal system and, most importantly, as an efficient tool capable of expanding the legal aid scheme. The chapters will also explore the potential benefits of expanding legal aid, particularly in the areas where customary legal practices and institutions are prevalent. The study will also consider aspects of customary legal processes that are deemed an impediment to the realisation of justice. Furthermore, it will acknowledge the operation of intrinsic traditional justice via customary courts in other post-colonial African jurisdictions, such as Ghana, Somalia, Cameroon, Uganda, and South Africa. This chapter aims to appraise customary courts as an effective legal tool and potential avenue to expand the provision of legal aid in Nigeria, especially in the vast, rural areas of the country.

The current English common law structure in force in Nigeria is derived from the national constitution, international/regional human rights mandates and other supplementary treaties, rules and guidelines. In facilitating equality before the courts, the Nigerian judiciary continue to face various social as well as legal impediments to the provision of legal aid for the disadvantaged.[458] Adekoya[459] cites barriers such as lengthy delays in the adjudication of disputes, high costs of litigation, limited to no access to counsel and distrust in the legal system. In addition, high levels of poverty, unequal income, cultural norms, and practices including lack of education and awareness have been proven to adversely affect access to judicial institutions.[460]

There is a general accord in legal aid literature that the restrictions affecting the expansion of the scheme in Nigeria are predominantly tied to ineffective legislation with restrictive clauses, inadequate funding, and a lack of competent legal and pro-bono personnel who are willing to take on legal aid cases.[461] However, there are many other unexplored factors that are equally

[458]McQuoid-Mason D (2018) 'Challenges when Drafting Legal Aid Legislation to Ensure Access to Justice in African and other Developing Countries with Small Numbers of Lawyers: Overcoming Obstacles to Including the use of Non-Lawyers to Assist Persons in Conflict with the Law.' African Human Rights Law Journal Vol. 18 pp. 486-507.
[459]Adekoya c. Olufemi (2008) 'Poverty Legal and Constitutional Implications for Human Rights Enforcement in Nigeria.' p. 1.
[460]Ibid.
[461]Bamgbose, Oluyemisi (2015) 'Access to Justice through Clinical Legal Education: A way forward for good Governance and Development.' African Human Rights Law Journal, 15(2), pp. 378-396.

crucial to the efficient administration of the legal aid scheme but have not received adequate attention. One of these is access to informal and traditional mechanisms of justice that are easily accessible and have the potential to provide speedy, cheap, and meaningful remedies to the poor and disadvantaged.[462] According to the 2016 Global Study on Legal Aid Report,[463] the non-availability of courts in rural and remote areas is a major impediment to accessing legal aid provision, especially for women.

Customary courts evolved from native courts. This legal system was well established and already in operation in Nigeria before the British colonial legal system was implemented.[464] According to Murphy,[465] customary courts systems have been considered as one of the fundamental concepts of order by legal philosophers since the time of Plato. Murphy contends that Aristotle, for instance, held customary law to be superior to statutory (positive) law, because he believed that customary law was a manifestation of natural law (universally accepted moral principles) and was therefore enduring.[466] Smith[467] cites Roman jurists, the first professional legal specialists during the second half of the Roman Republic (509BC - 27BC), who asserted that law was established by custom as well as by legislation and treated the two sources of equal in authority. They also declared that written law may be overridden if it is contrary to an established custom or due to inactivity of such written law. However, this notion was later reversed after the close of the Middle Ages (14th-15th Century),[468] and legislation was exalted above custom.[469] Nonetheless Bennett[470] contends that customary legal systems continue to serve the goal of human dignity effectively.

Customary court systems are deeply rooted in the custom and traditional practices of indigenous peoples. According to Holden,[471] custom is the unwritten law of native people.

[462]United Nations Office on Drugs and Crime (2011) 'Handbook on Improving Access to Legal Aid in Africa', Chapter III p. 37.
[463]Global Study on Legal Aid: Global Report (2016) United Nations Office on Drugs and Crime (UNODC) p. 17.
[464]Nwagbara C. (2014) 'The Nature, Types and Jurisdiction of Customary Courts in the Nigeria Legal System', Journal of Law, Policy and Globalization Vol.25, pp. 1-7.
[465]Murphy James Bernard 'Habit and Convention in the Foundation of Custom' In Perreau-Saussine and Murphy (eds.) (2009) 'The Nature of Customary Law: Legal, Historical and Philosophical Perspectives' Cambridge: Cambridge University Press. p. 53.
[466]Ibid. p. 64.
[467]Smith Munroe (1903) 'Customary Law' I. Political Science Quarterly, Vol. 18, No. 2 pp. 256-281.
[468]Strohm R. (1990) 'The Close of the Middle Ages', In: McKinnon J. (eds) Antiquity and the Middle Ages. Man & Music. Palgrave Macmillan, London pp. 269-312.
[469]Ibid.
[470]Bennett T. W. (1993) 'Human Rights and the African Cultural Tradition Transformation', Issue 22 p. 34.
[471]Holden Livia S. (2003) 'Custom and Law Practices in Central India: Some Case Studies', South Asia Research Vol. 23 No.2 pp. 115-134 SAGE Publications.

Maluleke[472] considers traditional practices a "reflection of the values and beliefs held by members of a community for periods often spanning generations", some of which when translated in the courts are beneficial to many. However, other practices are to the detriment of certain groups, for example women.[473] Ebo[474] acknowledges the enduring nature of custom and views it as a "form of oral history which entails a re-collection of the past, a reflection of the present and a measure to determine the future". Channock[475] posits that although customary court systems are sometimes referred to as a modified colonial creation in its 'new form', there are some legal systems where inherent customs are recognised as the principal source of law in the absence of any written alternative (e.g., Somalia). Hence, customary norms have played a significant role in the formation of a majority of the world's dominant legal traditions.[476]

Woodman[477] argues that, in addition to believing customary legal practices to be inferior to national legislation in countries with more than one legal system, scholars continue to pay more attention to statutory law and judicial decision-making. Yet, in many jurisdictions, and particularly among indigenous peoples,[478] custom is authoritative[479] and regarded as a crucial source of legal norms. However, as Smith notes,[480] the data on legal procedure in the customary courts of Africa are inadequate, and the efforts of western trained lawyers to examine the role of law in customary courts in Nigerian society are also limited. Fenrich et al.[481] posit that there is a notable lack of contemporary knowledge on the status and role of customary legal practices in Africa, and this is especially so regarding rural areas where there is a large concentration of individuals who are inherently bound by their culture and ethnic traditions. There is thus, a gap

[472]Maluleke, M J. (2012) 'Culture, Tradition, Custom, Law and Gender Equality', PER: Potchefstroomse Elektroniese Regsblad, 15(1), pp. 2-22.
[473]Ibid.
[474]Ebo C. (1995) 'Indigenous Law and Justice: Some Major Concepts and Practices', In Woodman G.R. & Obilade A.O., (eds.) 'African Law and Legal Theory' pp. 33-42. Dartmouth Publishing Company Ltd., Aldershot.
[475]Chanock, M. (1995) 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform.' In Woodman G.R. & Obilade A.O., (eds.) 'African Law and Legal Theory' pp. 171-187. Dartmouth Publishing Company Ltd., Aldershot.
[476]Glenn Patrick H., (2000) 'Legal Traditions of the World.' Oxford University Press
[477]Woodman Gordon R. (2007) 'Customary Legal Norms' In David S. Clark (eds.) 'Encyclopaedia of Law & Society' pp. 379-381.
[478]Ibid.
[479]Woodman Gordon R. (2011) 'A Survey of Customary Laws in Africa in search of Lessons for the Future.' In Fenrich Jeanmarie, Galizzi Paolo, Higgins Tracy E. (eds.) (2011) 'The Future of African Customary Law.' p. 12.
[480]Smith David N. (1972) 'Man and Law in Urban Africa: A Role for Customary Courts in the Urbanization Process', The American Journal of Comparative Law, Vol. 20, No. 2 pp. 223- 246.
[481]Fenrich Jeanmarie, Galizzi Paolo, Higgins Tracy E. (eds.) (2011) 'The Future of African Customary Law.' p. 2.

in the literature on access to legal aid via alternative judicial institutions such as customary courts.

4.2 The Nature of Customary Court Systems in Nigeria

Before there was any written law in Nigeria, disputes were settled through indigenous traditional tribunals, which were based on the interpretation and application of regional customs and norms through the Chief of the community.[482]

Customary legal practices are universal and are present in all legal systems. Generally unwritten and un-codified, these laws are passed from generation to generation as a guide for living together in harmony. It provides internal regulation for communities, clubs, associations, groups of farmers and other cooperative groups,[483] and it forms the basis for a universally binding body of international laws.[484] Its scope extends to contract and tort, and family, private and public law.[485] It plays a crucial role in indigenous land right matters and continues to influence other areas of formal law such as criminal law. It also serves as a crucial legal tool for governing international relations around trading practices[486] and networks. As such, customary legal systems are fundamental to the principles of the legal aid scheme.

In Nigeria, subject to the nature of the offence, tribe or religious affiliations of the offender, cases can be heard in a customary trial court (for customary law offences), a Sha'ria court (crimes against Islam) or a state court (English common law offenses). Appeal cases are determined in their respective appeal courts, while Appellate court appeals are determined in the Supreme Court of Nigeria.[487] Hence, customary legal norms have legal authority prior to their recognition in legislation and are enforced by state law on the basis that they already have

[482]Aiyedun, Adenike, & Ordor, Ada (2016) 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa', Law, Democracy and Development, 20, pp. 155-173.
[483]Ibid.
[484]Michael Tobin B. (2011) 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights' p. 2.
[485]Bederman David J. (2010) 'Custom as a Source of Law.' Cambridge: Cambridge University Press, 2010.
[486]Presentation of Simon Morgan, at the Customary Law and Human Rights Dialogue: Customary Law, Traditional Knowledge and Human Rights' National University of Ireland Galway, on 18-19th June 2010. In Michael Tobin B. (2011) 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights.' p. 2.
[487]Patenaude Allan L. 'Customary Law.' In Wright Richard A. Miller J. Mitchell (eds.) (2005) 'Encyclopaedia of Criminology' Volume 1. Routledge. pp. 363-367.

the quality of law. However, state law (English common law) reserves the right to override any customary norm that is deemed unlawful or above their jurisdiction.[488]

According to Benda-Beckmann and Benda-Beckmann,[489] the customary legal practices of some countries, such as the *xeer* in Somalia, the *adat* in Malaysia and those of other tribes in the north-eastern Indian states of Nagaland and Mizoram, are able to exist and function alongside their national legal governance.[490] Chirayath et al.[491] contend that there is a lack of conclusive research on how the legal systems in rural areas, which are predominantly customary and specific to sub-regional cultural contexts, are interpreted in practice from the oral record. This neglect of the importance of customary practices, which regulate the way of life for many people (most of whom are living under the poverty line), has further exacerbated the lack of access to remedies. The authors contend that many governments have tried to engage with customary systems to different extents and with various results.[492] While many African countries such as Nigeria, South Africa, Uganda, and Ghana have incorporated customary legal systems into their national constitutions, many are still working to complete this process due to the complexity of diverse customary practices.

Osasona[493] argues that the lack of a functioning justice system continues to strain access to judicial institutions in many African countries such as Nigeria. According to Odinkalu,[494] many African countries are struggling to provide effective and affordable access to justice via the legal aid scheme, which is made difficult by incessant population growth. The author argues that individuals who are fortunate enough to have their case heard are faced with suspicion and distrust.[495] The outcome of litigation could depend entirely on where the person lives, whom they know and how much they earn, due to the quality of the court which varies depending on

[488]Ibid.
[489]Franz von Benda Beckmann, and Keebet von Benda Beckmann, (2006) 'How Communal Is Communal and Whose Communal Is It?' In Franz von Benda Beckmann, And Keebet von Benda Beckmann (eds) 'Changing Properties of Property' New York: Berghahan Books.
[490]Roy. D. (2005) 'Traditional Customary Laws and Indigenous peoples in Asia', Minority Rights Group International pp. 1-34.
[491]Chirayath Leila, Sage Caroline, Woolcock Michael (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' Washington, DC: World Bank p. 1.
[492]Ibid.
[493]Osasona Tosin (2015) 'Time to Reform Nigeria's Criminal Justice System', Journal of Law and Criminal Justice Vol. 3 No. 1 pp. 73-79.
[494]Odinkalu Chidi 'Poor Justice or Justice for the Poor? A Framework for Reform of Customary and Informal Justice Systems in South Africa.' In Sage Caroline & Woodcock Michael (eds.) (2006) The World Bank Legal Review: Law, Equity, and Development p. 142.
[495]Ibid.

the location. The quality of the legal system determines how favourable and reliable the conclusion to the case will be, and thus whether justice will be achieved or not.[496]

As a consequence, communities have been compelled to develop and rely on long-established judicial mechanisms, to which they are now accustomed. Such communities are outside the formal legal system due to the limited scope of the state across the country,[497] and are therefore forced to engage in informal and other customary systems that generally act independently from the state's foremost legal system. The general concern is that access to justice must extend beyond gaining access to formal and informal institutions and include access to institutions which ensure that justice is served[498] and due process is followed meticulously.

Another major and well documented problem faced by the legal aid scheme in Nigeria includes the difficulty of acquiring free legal counsel[499] and the rarely expeditious accessibility to courts for appropriate remedies.[500] The undeveloped state of public-interest litigation has also been cited as one of the reasons for the poorly functioning legal aid system in Nigeria.[501] As such, it has become a matter of concern for scholars.[502] Currently, the justice system in Nigeria is struggling to provide legal aid to needy individuals.[503] However, Idem[504] maintains that customary courts can share the burden because they have regulated the lives of a large proportion of the far-reaching townships and villages of Nigeria since before the advent of formal courts. They are regarded as the functioning forum in remote areas that are capable of the administration of justice, without the rigours and technicalities of the common law system.

[496]Ibid.
[497]Ibid.
[498]Ubink Janine M. (2016) 'Access vs. Justice: Customary Courts and Political Abuse-Lessons from Malawi's Local Courts Act', American Journal of Comparative Law Vol. 64 p. 747.
[499]Usman, D., Yaacob, N. and Rahman, A. (2016) 'An Inquiry on the Affordability of Legal Services and the Appropriateness of the Regular Courts for Consumer Redress in Nigeria', Beijing Law Review, 7, pp. 83-94.
[500]Frynas, J. G. (2001) 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners', Social & Legal Studies, 10(3), pp. 397-419.
[501]Ibid.
[502]Moppett Samantha A. Vinson Kathleen Elliott (2017) 'Closing the Legal Aid Gap One Research Question at a Time', 8 Houston Law Review: Off Rec. 15 p. 15.
[503]United Nations Office on Drugs and Crime (2011) 'Handbook on Improving Access to Legal Aid in Africa' Chapter II p. 23.
[504]Idem Udosen Jacob (2017) 'The Judiciary and the Role of Customary Courts in Nigeria', Global Journal of Politics and Law Research Vol.5, No.6, pp. 34-49.

4.3 Historical Background of Customary Courts[505] in Nigeria

Customary courts have their origin in 'native' indigenous courts, and prior to the arrival of the British colonial legal system, native courts were the principal judicial system of resolve in all statutory matters. According to Ngwogugu,[506] customary courts were managed by untrained and illiterate members who were familiar with the local customs. They were selected from their communities and they applied a simplified mode of operation. Ajayi[507] posits that the clerks to the native courts were persons who had acquired varying standards of literacy as court records were kept in English. Alongside its judicial arbitration function, customary courts also served as an executive as well as a legislative instrument of authority, for example in regulating local markets, maintenance of provincial roads[508] and land acquisition transactions.

In the Western part of Nigeria, before colonial control was effectively in place, the Supreme Court of Lagos had been established in 1876 as a Superior Court of Records by virtue of the Supreme Court of Ordinance No. 4 of 1876. All jurisdictions and powers were vested in Her Majesty's High Court of Justice, in accordance with the common law doctrine in force in England.[509] Before this time, the Supreme Court of Ordinance No. 11 of 1863, the colony of Lagos[510] and its protectorates were authorised to operate their own native laws and customs in native matters through traditional rulers, provided it was not in conflict with the colonial legal system. Subsequent Supreme Court Ordinances maintained this position to ensure that the "customs and the laws of the class or tribe or nation" were held in high regard.[511]

[505]Historically referred to as indigenous and/or native courts by the British colonial administration for the operation of customary law. Obilade, A. (1973) 'Jurisdiction in customary law matters in Nigeria: A critical examination'. Journal of African Law, 17(2), pp. 227-240.

[506]Ngwogugu E. I. (1976) 'Abolition of Customary Courts: The Nigerian Experiment', Journal of African Law, Vol. 20, No. 1 pp. 1-19.

[507]Ajayi F. A. (1960) 'The Interaction of English Law with Customary Law in Western Nigeria', Journal of African Law, Vol. 4, No. 1 pp. 40-50.

[508]Afigbo Adiele Eberechukwu (2005) 'Nigerian History, Politics and Affairs: The Collected Essays of Adiele Afigbo.' Falola Toyin (ed.) Africa World Press Inc. p. 300.

[509]Kayode Oluyemi (1975) 'Judicial Administration in a Changing Society – Customary Courts in Western Nigeria', Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America Vol. 8, No. 3/4 p. 438.

[510]English law was introduced into Lagos on March 4, 1863.

[511]Yakubu John A. (2002) 'Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria', Paper Prepared for CODESRIA'S 10th General Assembly on "Africa in the new Millennium" Kampala Uganda 8-12 December 2002 pp. 1-15.

When in operation, the right to sit at court was also subject to recognition by the protectorate government.[512] There was also a directive requesting that matters involving non-native disputes were to be referred to the Governor.[513] From 1898, the government of the Niger Coast Protectorate, with the agreement of local communities, began the creation of native courts, establishing them administratively with no statutory basis.[514] Consequently, customary courts were placed within a statutory ambit to encourage transparency and ensure activities within the courts were properly monitored, as well as curb distinct injustices that occurred within their area of authority.[515] In 1900, the Crown revoked the powers and authority of the Royal Niger Company[516] and, by virtue of the Native Courts Proclamation No. 9 of 1900, established native courts in the Protectorate of Southern Nigeria. In addition, the Native Courts Proclamation No. 5 of 1900 introduced the first statutory native courts and the eventual administrative unit of Northern Nigeria.[517]

According to Smith,[518] the 1900 proclamation created a balance of power between the local rulers and the British rulers as various tribunals, and their scope of authority were being established. It also enabled the government representative (the Resident) of each province to issue warrants establishing native courts consisting of at least four persons after consultation and the consent of the local chiefs or Emirs of each province, subject to the approval of the High Commissioner. The leaders objected to the four-member court, as it was not consistent with the customary constitution of Islamic courts, which were traditionally managed by single judges.[519] As a result, the subsequent Native Courts Proclamation No. 11 of 1904 (Northern Nigeria) amended the 1900 rule, and allowed courts comprising of only one member, so to incorporate the tradition of single judges in Islamic courts.[520]

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[512]Afigbo Adiele Eberechukwu (2005) 'Nigerian History, Politics and Affairs: The Collected Essays of Adiele Afigbo', Falola Toyin (ed.) Africa World Press Inc. p. 300.
[513]Nwagbara Chigozie (2014) 'The Nature, Types and Jurisdiction of Customary Courts in The Nigeria Legal System', Journal of Law, Policy and Globalization Vol.25 p. 1.
[514]Keay S E. & Richardson S. S. (1966) 'The Native and Customary Courts of Nigeria', London, Lagos pp. 46-53.
[515]Ibid.
[516]After the abolition of slave trade in the 1800's, a British mercantile company was empowered by Britain to administer, levy customs, make treaties and trade throughout the areas around the basin of the Niger. It also extended British influence in what later became Nigeria. Coleman, James S. (1958) 'Nigeria: Background to Nationalism.' Berkeley and Los Angeles: University of California Press. In Arowosegbe Jeremiah O. (2016) 'Ethnic minorities and the land question in Nigeria.' Review of African Political Economy, 43:148, p. 268.
[517]Keay S E. & Richardson S. S. (1966) 'The Native and Customary Courts of Nigeria', London, Lagos. pp. 46-53.
[518]Smith, David Nathan (1968) 'Native Courts of Northern Nigeria: Techniques for Institutional Development', Boston University Law Review 48, (1), pp. 49-82.
[519]Ibid.
[520]Ibid.

The Native Courts Proclamation No. 25 of 1901 was enacted to replace that of 1900 to regulate the native court system. The 1901 proclamation granted civil and criminal jurisdiction to the established statutory native courts,[521] as long as they were not repugnant to natural justice, equity and good conscience.[522] In 1906, the 1900 Proclamation was repealed and re-enacted by the Native Courts Proclamation No. 1 of 1906.[523] In 1906, the Native Courts Proclamation No. 7 commenced a de-centralisation of the native court system throughout Nigeria, and established sub-divisions of minor courts and native courts on a statutory basis.

With provisions similar to the Native Courts Proclamation No. 25 of 1901, both courts were accorded with specific commissions including the authority to preside over both civil and criminal cases between natives and non-natives.[524] However, minor courts, also known as the native councils, had limited jurisdictional authority compared to native courts. [525]

The 1906 proclamation increased the jurisdiction of indigenous courts in Nigeria and established the basic legislative pattern for subsequent developments in the native court system up until 1933. Hence, four types of native courts were recognised: namely, the

(1) Emir's courts, to be known as judicial councils;

(2) Alkali's courts, consisting of single Moslem judges, sitting with or without other persons acting as judges or mere assessors;

(3) Chief's courts (in non-Moslem areas), to be known as judicial councils; and

(4) Multi-member courts, of the type provided for in the 1900 legislation. [526]

Court members were to be appointed by Residents with the approval of the Governor. However, in Moslem areas, consultation with the local Emir was necessary before

[521]Yakubu John A. (2002) 'Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria.' Paper Prepared for CODESRIA'S 10th General Assembly on "Africa in the new Millennium" Kampala Uganda 8-12 December 2002 pp. 1-15.
[522]Nwagbara Chigozie (2014) **'**The Nature, Types and Jurisdiction of Customary Courts in the Nigeria Legal System.' Journal of Law, Policy and Globalization Vol.25 p. 1.
[523]Smith, David Nathan (1968) 'Native courts of Northern Nigeria: Techniques for Institutional Development.' Boston University Law Review 48, (1), pp. 49-82.
[524]Nwagbara Chigozie (2014) **'**The Nature, Types and Jurisdiction of Customary Courts in The Nigeria Legal System.' Journal of Law, Policy and Globalization Vol. 25 p. 1.
[525]Afigbo Adiele Eberechukwu (2005) 'Nigerian History, Politics and Affairs: The Collected Essays of Adiele Afigbo.' Falola Toyin (ed.) Africa World Press Inc. p. 300.
[526]Smith, David N. (1968) 'Native courts of Northern Nigeria: Techniques for Institutional Development.' Boston University Law Review 48, (1), pp. 49-82.

appointments were made. The Resident held pre-eminent authority to, either on their own initiative or on the application of the aggrieved party,

(a) Suspend, reduce or otherwise modify any sentence or decision of a native court;

(b) Order a re-hearing before a native court; or

(c) Transfer any cause or matter, either before trial or at any stage of the proceedings, to the Provincial Court as well as the capacity to appoint a specific native court as a court of appeal.[527]

The amalgamation of the Northern and Southern part of Nigeria in 1914, according to Afigbo,[528] was to ensure that the British and native administration formed one accord on local government policy matters. Thus, under the leadership of Lord Lugard as the Governor General and the adoption of the indirect rule mandate, three courts emerged:

(1) The Supreme Courts,

(2) Provincial Courts, and

(3) Ordinances of the Native Courts introduced to legitimise the application of English law in Nigeria.[529]

In recognition of the indigenous laws of the land and their role in maintaining law and order among the natives, Lord Lugard emphasised as a matter of British policy in dealing with the natives that: "institutions and methods, in order to command success and promote the happiness and welfare of the people, must be deep rooted in their tradition and prejudice."[530] The statement by Lord Lugard established customary law as an operational system of law in Nigeria.[531] However, according to Uwakah, [532]at the time of amalgamation Nigerian communities shared little in common with one another. The diversity caused further complexities in the new legal system due to the varied local customs in each province.

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[527]Ibid.
[528]Afigbo Adiele Eberechukwu (2005) 'Nigerian History, Politics and Affairs: The Collected Essays of Adiele Afigbo.' Falola Toyin (ed.) Africa World Press Inc. p. 283.
[529]Ibid. p. 284.
[530]Lord Frederick J.D. Lugard (1922-1965) 'The Dual Mandate in British Tropical Africa. Methods of Ruling Native Races.' Part II Special Problems Chapter X p. 211.
[531]Yakubu John A. (2002) 'Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria.' Paper Prepared for CODESRIA'S 10th General Assembly on "Africa in the new Millennium" Kampala Uganda 8-12 December 2002 pp. 1-15.
[532]Uwakah Oneyebuchi T. (1997) 'Due Process in Nigeria's Administrative Law System: History, Current Status and Future.' University Press of America p. 45.

The Supreme Court Ordinance No. 6 of 1914[533] allowed for the operation of customary law in conjunction with the repugnancy clause. Native Courts Ordinance No. 8 of 1914 saw the competent judicial system already in force in Northern Nigeria applied to the rest of the protectorate.[534] The Native Court Ordinance No. 14 of 1916 revised the 1914 Ordinance (Northern Nigeria) and was also made applicable in all Nigeria native courts.[535] Consequently, the Native Court Ordinance of 1916 graded native courts into four categories (A, B, C and D) and allocated different civil and criminal jurisdictions concerning natives between them.[536] The Native Court Ordinance No. 5 of 1918 established native courts in the protectorates by warrant[537] via a Resident who had complete control over the operation of the courts. According to Betram,[538] native courts were established in a systematic manner, each with extensive powers. However, Tibenderana[539] argues that, despite the statutory recognition of customary law and practices by English common law, the Native Court Ordinance of 1916 indirectly gave the British the power to make administrative decisions through the native leaders.

In 1933, a review of the Nigeria native court system in practice was undertaken.[540] The resulting Protectorate Courts Ordinance No. 45 1933[541] was the first legislative measure reserving original civil jurisdiction for the statutory native courts in Nigeria. [542] It stated that the High Court was not to exercise original jurisdiction in cases relating to title or land which were subject to the jurisdiction of a native court, except where the Governor in Council directed otherwise or where the case was transferred from a native court under the provisions of the Native Courts Ordinance No. 44 1933.[543] Hence, customary legal matters were to be dealt with in traditional courts where members of such courts were well versed in customary law. In

[533]1914 Nigeria Ordinances 39.
[534]Lord Hailey (1951) 'Native Administration in the British African Territories Part III. West Africa: Nigeria, Gold Coast, Sierra Leone, Gambia.' Chapter VII p. 1 London: His Majesty's Stationary Office.
[535]Afigbo Adiele Eberechukwu (2005) 'Nigerian History, Politics and Affairs: The Collected Essays of Adiele Afigbo.' Falola Toyin (ed.) Africa World Press Inc. p. 284.
[536]Dudley B. J. (1968) 'Parties and Politics in Northern Nigeria.' p. 15 Routledge London.
[537]Yakubu John A. (2002) 'Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria.' Paper Prepared for CODESRIA'S 10th General Assembly on "Africa in the new Millennium" Kampala Uganda 8-12 December 2002 pp. 1-15.
[538]Betram Anton (Sir) (1930) 'The Colonial Service.' Cambridge University Press p. 149.
[539]Tibenderana Peter K. (1988) 'The Irony of Indirect Rule in Sokoto Emirate, Nigeria, 1903-1944.' African Studies Review, Vol. 31, No. 1 pp. 67-92.
[540]Smith, David N. (1968) 'Native courts of Northern Nigeria: Techniques for Institutional Development.' Boston University Law Review 48, (1), pp. 49-82.
[541]No. 45 of 1933.
[542]Obilade Akintunde (1973) 'Jurisdiction in Customary Law Matters in Nigeria: A Critical Examination.' Journal of African Law, Vol. 17, No. 2 pp. 227-240.
[543]Ibid. No. 44 of 1933 became effective April 1, 1934.

addition, the Supreme Court Ordinance No. 23 of 1943 expanded the scope of jurisdiction of native courts.[544]

Statutory instruments, such as the Native Courts Ordinance (cap. 142) and the Native Courts (Colony) Ordinance (cap. 143)[545] 1948,[546] were empowered to administer the native law and custom in their respective jurisdictions as long as it was "not repugnant to natural justice or morality or inconsistent with any provisions of any Ordinances", as well as to enforce such provisions of the Ordinances.[547] However, in 1948 the Brooke Commission of Enquiry was appointed for the Northern, Eastern and Western Provinces of colonial Nigeria, to review the operation and jurisdiction of the native court system.[548]

In 1954, Nigeria became a Federation and was divided into three regions (Eastern, Western and Northern) and a Federal Territory (Lagos).[549] Subsequently, the two aforementioned Native Courts Ordinances[550] were both amended several times before they were finally repealed and replaced by the Customary Courts Law in 1957, after regional self-government was established.[551] Thereafter, the Eastern and Western Regions adopted the new title "Customary Court", while the Northern Region continued use of the old title of "Native Court".[552] In the Northern region, the Moslem Court of Appeal established in 1956 was replaced by the Sharia Court of Appeal in 1960; and, in 1959, the criminal jurisdiction of Native Courts was repealed.[553]

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[544]Ibid. Matters relating to marriage, family status, guardianship of children, inheritance, or disposition of property on death, subject to the usual exceptions. However, land matters were not allowed jurisdiction in all native courts.

[545]See sections 10 (i) and 9 (i) of caps. 142 and 143 respectively.

[546]Ajetunmobi, Musa Ali (2017) 'Shariah Legal Practice in Nigeria 1956-1983.' Kwara State University Press p. 271.

[547]Ajayi F. A. (1960) 'The Interaction of English Law with Customary Law in Western Nigeria.' Journal of African Law, Vol. 4, No. 1 pp. 40-50.

[548]Keay S E. & Richardson S. S. (1966) 'The Native and Customary Courts of Nigeria.' London, Lagos. pp. 46-53.

[549]Yakubu John A. (2002) 'Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria.' Paper Prepared for CODESRIA'S 10th General Assembly on "Africa in the new Millennium" Kampala Uganda 8-12 December 2002 pp. 1-15.

[550]Native Courts Ordinance (cap. 142) and the Native Courts (Colony) Ordinance (cap. 143) 1948.

[551]Ajayi F. A. (1960) 'The Interaction of English Law with Customary Law in Western Nigeria.' Journal of African Law, Vol. 4, No. 1 pp. 40-50.

[552]Ngwogugu E. I. (1976) 'Abolition of Customary Courts: The Nigerian Experiment.' Journal of African Law, Vol. 20, No. 1 pp. 1-19.

[553]Yakubu John A. (2002) 'Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria.' Paper Prepared for CODESRIA'S 10th General Assembly on "Africa in the new Millennium" Kampala Uganda 8-12 December 2002 pp. 1-15.

With the creation of the Mid-Western Region in 1963, the Customary Courts Law of 1957 was applied.[554] However, during the Nigeria military regime, which started in early 1966, customary courts in some parts of the country were reviewed and re-structured.[555] In Eastern Nigeria, the Customary Courts Edict 1966 revoked the Customary Courts (Jurisdiction) Order 1964. It also abolished the County Courts, revoked their warrants, and transferred all jurisdictional matters to the Ministry of Justice. [556] In addition, the Customary Courts (No. 2) Edict 1966 repealed the Customary Courts Law of 1957 and empowered the Military Governor to establish by warrant, customary courts of first instance, known as District Courts, and Customary Courts of Appeal.[557] Correspondingly, the Area Courts Edict 1967 replaced the native court system in new states created from the former Northern Region. Hence, Section 16 (1) of the Magistrates Court (Amendment) Edit 1971, the Customary Courts (No. 2) Edict 1966 and all subsidiary legislation in the East Central State were repealed and jurisdiction transferred to the Magistrates' Court and the High Court.[558] Nwogugu[559] argues that the 1971 legislation was enacted to end the creation of customary courts in Nigeria, the appointment of personnel in the East Central State and establish a new system of justice. However, it did not diminish the utilisation of customary courts by natives. Smith[560] posits that, regardless of the proposed changes to the customary legal system, the operation of customary courts and the nature of customary law may be crucial to the modernisation and urbanisation process in Nigeria.

4.4 Colonial Legal Authority and Nigerian Customary Legal Systems

"*Immediately white men came, justice vanished.*" [561]

This section examines the extent of statutory limitation on the application of customary law in British colonies. Including the elements that have shaped the operation of customary courts in

[554]Nwagbara Chigozie (2014) **'**The Nature, Types and Jurisdiction of Customary Courts in The Nigeria Legal System.' Journal of Law, Policy and Globalization Vol. 25 p. 2.
[555]Obilade Akintunde (1973) 'Jurisdiction in Customary Law Matters in Nigeria: A Critical Examination.' Journal of African Law, Vol. 17, No. 2 pp. 227-240.
[556]Ngwogugu E. I. (1976) 'Abolition of Customary Courts: The Nigerian Experiment.' Journal of African Law, Vol. 20, No. 1 pp. 1-19.
[557] Ibid.
[558] Ibid.
[559]Ibid.
[560]Smith D.N. (1972) 'Man and Law in Urban Africa: A Role for Customary Courts in the Urbanization Process.' American Journal of Comparative Law Vol. 20 Issue 2 pp. 223-246.
[561]Unnamed elder in Okigwe, Eastern Nigeria, quoted In Afigbo A.E. (1972) 'The Warrant Chiefs.' London, Longman. p. 283.

present day Nigeria: for instance, the conditions that must be fulfilled to gain judicial recognition of customary rulings before they are accepted, observed and enforced by state courts. Such requirements are still in force in many present-day post-colonial countries as the basis of equity and justice.

4.4.1 Repugnancy Test: Nigeria

The introduction of the English legal system into the Nigerian judiciary over a hundred years ago[562] partly preserved customary courts, as their functions within their communities were compared to those of the justices of the peace in England.[563] The system was part of the British colonial Indirect Rule mandate, which allowed the natives to remain within the jurisdiction of their own rules of custom,[564] as long as their customs were subjected to and passed the repugnancy test which served as a statutory limitation on the application of customary law. According to Kent,[565] repugnancy clauses were colonial legal devices that were exploited to overrule customary law based on 'natural justice'. Thus, Section 19 of the Supreme Court Ordinance of 1876 provides that: "[n]othing in this ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction, such Law or Custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature."[566]

The repugnancy doctrine in Nigeria emerged from the decision in the case of *Eshugbayi Eleko v. Officer Administrating the Government of Nigeria*.[567] Lord Atkin argued that the courts are

[562]The British formally colonised Nigeria in 1861: Inyang, Anietie A.; Bassey, Manasseh Edidem. (2014) 'Imperial Treaties and the Origins of British Colonial Rule in Southern Nigeria, 1860-1890.' Mediterranean Journal of Social Sciences, [S.l.], Vol. 5, No. 20, p. 1948.
[563]Marshall H. H. (1967) 'The Native and Customary Courts of Nigeria.' By E. A. Keay and S. S. Richardson (review) The International and Comparative Law Quarterly, Vol. 16, No. 1 p. 2720.
[564]Mamdani Mahmood (1996) 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism.' Princeton University Press.
[565]Kent Allison D. (2007) 'Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights under Customary Law in Africa.' Michigan Journal of International Law Volume 28 Issue 2 pp. 507-538.
[566]Subsequent enactments adopted the Repugnancy Doctrine: (I) The Supreme Court Proclamation No. 6 of 1900 (II) S. 13, The Supreme Court Ordinance No. 6 of 1914. (III) S. 20, The Supreme Court Ordinance No. 23 of 1943 (cap 211) Laws of Nigeria 1948. (IV) S.17 The Native Courts Proclamation No. 9 of 1900. 24 (V) S. 16 The Native Courts Ordinance (cap 142) Laws of Nigeria.
[567](1931) AC 662 at p. 673.

bound with the responsibility to define repugnancy as well as determine what custom is deemed applicable to the test. He also stated that "the court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience." However, the principle of the repugnancy test was clarified and justified in the post-colonial case of *Okonkwo v. Okagbue*,[568] where Uwais JSC declared that "the Repugnancy Doctrine is equivalent to the meaning of natural justice and embraces almost all, if not all, the concept of good conscience".

The semi-unified court system in Colonial British West Africa contrasted with the systems of other colonialists, such as the Spanish, French, and Portuguese, that gave primacy to the metropolitan law of the colonials over the indigenous customary system of their colonies.[569] The British colonialists operated a bifurcated system where customary courts, presided over by chiefs, exercised jurisdiction over natives according to customary law. Thus, metropolitan-style courts handled disputes involving white Europeans according to metropolitan law.[570] For most of the colonial period, there was little integration between the two systems.

In the British colonies, appeals from the native courts were usually heard in tribunals presided over by colonial commissioners.[571] The natives were, however, subject to customary legal practices on personal matters concerning marriage, succession, inheritance, testamentary dispositions and land tenure.[572] The jurisdiction of customary law also included chieftaincy and other traditional matters.[573] Hence, criminal law and adjudication were removed from the domain of customary law, to be dealt with by the colonial administration directly. In British West Africa, the customary or native courts were vertically integrated in the overall court system,[574] comprising of the Magistrate Courts and a High or Supreme Court. This gave rise to

[568](1994) 12 SCNJ 89.
[569]Ferreira, E. (1974) 'Portuguese Colonialism in Africa: The End of an Era. The Effects of Portuguese Colonialism on Education, Science, Culture and Information.' Paris, UNESCO.
[570]Benton, L. A. (2002) 'Law and Colonial Cultures: Legal Regimes in World History, 1400-1900.' Cambridge, Cambridge University Press.
[571]Elias, T.O. (1965) 'The Evolution of Law and Government in Modern Africa.' In H. Kuper and L. Kuper, (eds.) 'African Law' pp. 184-195. Berkeley, University of California Press.
[572]Ibid.
[573]See *Eshugbayi Eleko v. Government of Nigeria (*1931) AC 662.
[574]Elias, Taslim Olawale (1962) 'British Colonial Law: A Comparative Study of the Interaction Between English and Local Laws in British Dependencies.' (London: Stevens).

dualist legal systems within the Nigeria and according Uweru[575] led to conflict which arose from the application of the rules of equity.

At the time of colonial rule, all appeals from the Supreme Court (SC) were heard by the Judicial Committee of the Privy Council which sat in England. However, for a limited period, the West African Court of Appeal (WACA) lay between the SC and the Privy Council meaning that appeals from the SC went to WACA, and then appeals from WACA to the Privy Council.[576] The scope of customary courts was far-reaching and flexible during the colonial era of British West Africa. Litigants were not subject to English common law if both parties were African, and the subject matter was not answerable to state common law. If one of the litigants was African, customary law would still apply if it were considered unjust to apply English law.[577]

However, Okereafoezeke[578] criticised the test and stated that it served as an impediment to the people's responsibility in conducting changes in customary law by giving the court power over it. The author declares that it is important to allow the development of customary norms by the ethnic group that identify with it: "ideally, therefore, a people's law should emanate from a broad spectrum of the people, rather than from a few. This is the distinction between customary law imposed from the top and that developed from popular practices. Laws that are imposed by a few cannot become an acceptable means of social control[.]" Hence, a change of the repugnancy test justice policy would avoid official imposition of "customary law" and set the pace for the needed changes to justice systems in Nigeria.[579] Uweru[580] contends that there is no known repugnancy case that has been decided on the basis of conflict with any other law, and so are rather based on the universal standard of morality on what is 'good, just and fair.'

[575]Uweru, B. C., (2007) 'Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism.' African Research Review Journal, Vol. 2, No. 2. pp. 286-295.
[576]Ntephe, Peter (2012) 'Does Africa Need another Kind of Law? Alterity and the Rule of Law in Sub-Saharan Africa.' p. 249.
[577]Manuh, T. (1995) 'Law and Society in Contemporary Africa.' In Martin P. and O'Meara P. (eds.), Africa pp. 330-346. London, James Currey.
[578]Okereafoezeke, Nonso (2001) 'Judging the Enforceability of Nigeria's Native Laws, Customs, and Traditions in the Face of Official Controls.' Presented at East Carolina University Greenville at the South-eastern Regional Seminar in African Studies (Greenville, South Carolina) https://www.ecu.edu/african/sersas/papers/okereafoezeken28mar01.htm (accessed 21/01/2019).
[579]Ibid.
[580]Uweru, B. C., (2007) 'Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism.' African Research Review Journal, Vol. 2, No. 2. pp. 286-295.

However, Olawale[581] argues that the repugnancy test was not any way a malicious strategy to undermine or to judge the validity of local law and custom by the standards of Western thoughts or Christian ethics, but by the standards of decency and humanity considered appropriate to the situation in question. The case of *Dawodu v. Danmole*[582] further highlights Olawale's position on the main objective of the test, which is to administer justice on matters that are governed by customs that are deemed archaic and unjust. For instance, on the matter of inheritance in a polygamous relationship in the case of Dawodu, the Privy Council upheld a Yoruba custom of inheritance based on the *Idi-Igi* system where the estate is divided in equal shares among the number of wives, with each child then taking an equal share of the portion allotted to their mother's branch of the family. This system was contrary to the British principle of equal division to all children; however, the Privy Council accepted the custom with respect to its applicability in Nigeria. "The principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy."[583]

Furthermore, Igwe[584] contends that despite the criticism against the introduction and use of the Repugnancy doctrine in the Nigerian legal system, the doctrine has had a lasting effect and impact on the development of customary law by the elimination of some inherently unjust, inhuman, and barbarous practices. However, the author believes the clause has also contributed to the disposal of some unjust customary laws. In all, the repugnancy clause has helped develop and modernise customary legal practices in Nigeria.[585] This stance was acknowledged in the case of *Awo v. Cookey Gam*,[586] where the court held that "the principles of native law relied upon by the Plaintiffs were developed in and are applicable to a state of society vastly different from that now existing."

Hence, in the case of *Agbai v. Okogbue*,[587] Justice Nwokedi in his judgement stated that the courts could contribute to the process of developing customary legal systems to fit the changing

[581]Olawale, Elias T. (1962) 'British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies.' London: Stephens and Sons Limited.
[582]1 W.L.R 1053 (1962).
[583]Quoted in Palmer Vernon V. and Poulter Sebastian M. (1972) 'The Legal System of Lesotho.' Virgina: Michie Company Law Publishers.
[584]Igwe O.W. (2014) 'Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-Assessing Content and Relevance.' pp. 1-16.
[585]Ibid.
[586]2 NLR 100.
[587]7 N.W.L.R. (1991) Part 204, 391 at 417.

times through the application of the test, because the courts have to consider its application under existing social environment: "customary laws are formulated from time immemorial. As our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. The doctrine of repugnancy in my view affords the courts the opportunity for fine-tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws[.]"[588]

The Islamic case of *Guri v. Hadejia N/A*[589] upholds the objective of the repugnancy test and the importance of the right to legal representation and a fair hearing over customs derived from religion, deemed incompatible to natural justice, equity, and good conscience. Thus, the Supreme Court invalidated a principle of Islamic Law which denied an individual accused of robbery the right to a fair hearing, claiming there were eyewitnesses to the incident. Most African countries repealed the repugnancy provisos when they obtained independence (e.g., South Africa);[590] however, the repugnancy clause continues to be the milestone used to determine a legally acceptable custom in Nigeria. Thus, Section 18 (3) Evidence Act 2011 states: "[i]n any judicial proceeding where any custom is relied upon, it shall not be enforced if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience."[591]

4.4.2 A Question of Law or Fact? Gold Coast (Ghana)

The Gold Coast (Ghana) before independence was faced with a major drawback when their native customary law was subverted in favour of the new colonial English law. According to Korang,[592] customary law of West African countries was considered foreign when compared to the adopted English common law and its validity had to be proved before it could be accepted as a rule of law. Thus, an English judge of the Gold Coast, Smith J, held in *Hughes v. Davies and Another*[593] that "[a]s native law is foreign law it must be proved as any other fact." In

[588]Ibid.
[589](1959) 4 FSC 44.
[590]Taiwo E A. (2009) 'Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions: Some Lessons for Nigeria.' Journal for Juridical Science Vol. 34(1) pp. 89-115.
[591]Section 18(3) Evidence Act 2011.
[592]Korang Daniel (2015) 'Ascertainment of Customary Law: A Question of Law or of Fact or Both?' Journal of Law, Policy and Globalization Vol. 38, pp. 93-95.
[593]See (1909) Ren 550 at 551 cited in Ibid.

addition, the Privy Council set out the principle by which customary law would be established in *Angu v. Attah*,[594] where the Privy Council stated that: "as is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts become so notorious that the courts take judicial notice of them." This would imply that if the members of the native court were themselves possessed of expert knowledge of the custom, no proof is needed.[595] African jurists and nationalists such as Dr Nkrumah deemed the judgement too imperious and a "travesty of the local custom," which had been made foreign in its own land of origin and advocated for a reversal of such scrutiny.

However, Nii-Aponsah[596] contends that the *Angu v. Attah* rule was necessary to balance the "vast variations in local and tribal customs" that existed at the time in Ghana. The author argues that the rule was intended to clarify the process to ensure the validity of the customary law, not undermine it, citing that the procedure for identifying native law should be the same as that concerning adopted laws that originated from foreign lands. Korang[597] justifies the rule and argues that it was an earnest proposal by the colonialists to prove the existence of customary law for the benefit of sustaining it as a legitimate source of law. He further contends that the colonialists were fair and just in treating customary law as a question of fact, and not a question of law, because customary practices in Ghana differ from one community to another.

The author further posits that it was a safety device to ensure that customary legal practices emanating from diverse communities were protected and maintained in the utmost interest of justice,[598] as well as to ensure that customary courts continue to maintain relevance in any contemporary legal system. However, this rule was eventually abolished, and the Courts Act 1960[599] equipped the court with the discretion to consult recognised textbooks, refer to reported cases or to order the holding of an inquiry if it entertained any doubt as to the content or existence of any rule of customary law.[600] Thus, s. 55 (1) of Courts Act 1993 (Act 459) states

[594]See (1916) PC `24-'28, 43 cited in Ibid.
[595]Ntephe, Peter (2012) 'Does Africa Need another Kind of Law? Alterity and the Rule of Law in Sub-Saharan Africa.' p. 250.
[596]David Nii-Aponsah A. (1987-1988) 'The Rule in *Angu v. Attah* Revisited.' 16 Rev. Ghana L. pp. 281-292.
[597]Korang Daniel (2015) 'Ascertainment of Customary Law: A Question of Law or of Fact or Both?' Journal of Law, Policy and Globalization Vol.38, pp. 93-95.
[598]Ibid.
[599]CA 9. See also The Courts Act, 1971 (Act 372), s. 50.
[600]Professor Ekow Daniels W C, 'Development of Customary Law' [1991-92] VOL. XVIII RGL 68-94.

that: "[a]ny question as to existence or content of a rule of customary law is a question of law for the court and not a question of fact."

In addition, the 1975 Evidence Act[601] provides that all questions of law are to be decided by the court to ascertain the essence of customary law in relation to the existence of variations in local custom. Hence, s. 55 (2)[602] states that: "[i]f there is doubt as to the existence or content of a rule of customary law relevant in any proceedings before a court, the court may adjourn the proceedings to enable an inquiry to be made under subsection (3) of this section after the court has considered submissions made by or on behalf of the parties and after the court has considered reported cases, textbooks and other sources that may be appropriate to the proceedings."

To further support customary court practices in Ghana, s. 55 (4) declares: "[t]he court may request a House of Chiefs, Divisional or Traditional Council or other body with knowledge of the customary law in question to state its opinion which may be laid before the inquiry in written form." Korang[603] argues that s. 55 (2) and s. 55 (4) of the Courts Act 1993 (Act 459) were put in place to fill potential gaps that may occur in the process of litigation, and that, even in modern times, there is still a great measure of uncertainty in the contents of native customary law. Therefore, the confirmation of a custom from any verifiable source that may give discretion to the courts to ascertain the fact of the alleged customary practice is not certain.[604] Hence, this dual system attempts to verify the existence of such customs.

The case of *Fulani and Another v. Issah*[605] reiterates the conflict that may arise when ascertaining the validity of a specific custom before the courts, and the courts' obligation to scrutinise and verify the customary law in question. The case was regarding the determination of the true father of a child born out of wedlock according to Fulani customary law. The court allowed an appeal and held that: "in the proceedings such as there were before the trial court, it was for the court to determine the existence or otherwise of a particular customary law, namely, Fulani customary law or the content of a rule of such customary law, after having heard the parties, consulted text-books and other sources as the magistrate may consider

[601]Section 1(1) Evidence Act 1975 (NRCD 323).
[602] Courts Act, 1993 (Act 459).
[603]Korang Daniel (2015) 'Ascertainment of Customary Law: A Question of Law or of Fact or Both?' Journal of Law, Policy and Globalization Vol.38, pp. 93-95.
[604]Ibid.
[605][1980] GLR 319-332.

appropriate; and it is only when the court is still in doubt after such exercise that he may hold an inquiry and perhaps seek the assistance of an expert on that particular system of customary law." Hence, advocates of the repugnancy test believe it is imperative in the interest of justice that the applicable customary law is fair and just.

4.4.3 Repugnancy and Incompatibility Tests: Anglophone Cameroon

Before colonisation, the application of customary laws by customary courts in Cameroon was under the supervision of traditional leaders. After the defeat of Germany in World War I (which occupied Cameroon in 1884), French civil law and English common law were imported into the country. The French occupied the former Northern Cameroon (now Francophone Cameroon), while the British governed Southern Cameroon (now Anglophone Cameroon).[606]

In Anglophone Cameroon, one of the most influential and authoritative pieces of legislation enacted by the British was the Southern Cameroon High Court Law (SCHL) of 1955. The legislation establishes the competence of the High Court and legitimises the reception and continuous application of adopted English laws, practices and procedures in the territory.[607] Yet, Section 27 (1) of the SCHL also expressly stipulates the recognition and enforcement of customary law in Anglophone Cameroon, though not in totality: "[t]he High Court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom."[608]

In addition, under Decree No. 77/245 of 15 July 1977,[609] traditional chiefs are empowered, where laws and regulations do not provide otherwise, to settle disputes using customary law.

[606]Ngoh, Victor Julius (1996) 'History of Cameroon since 1800.' Limbe: Presbook.
[607]The provisions of Sections 10, 11, 12, and 15 of the SCHL, 1955 legitimized the application of English law practices in Anglophone Cameroon; Section 11 provides for the application of pre-1900 English statutes and doctrines of equity. Section 15 calls for the application of post 1900 English law in respect to issues dealing with probate, divorce, and matrimonial causes. Quoted in Kiye Mikano E. (2015) 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon.' African Studies Quarterly Volume 15, Issue 2 p. 86.
[608]Section 27(1) Southern Cameroons High Court Law 1955.
[609] "In principles, traditional chiefs are chosen from families that are customarily called upon to carryout traditional leadership role."

Kiye[610] states that, similarly to Nigeria and Ghana, and prior to their recognition by English common law, customary norms in Cameroon were also required to undertake duality tests: namely, the repugnancy and incompatibility tests. The author further contends that, despite the colonial origins of the legislation, its impact is still felt within the administration of justice in contemporary Cameroon, as the duality tests have created uncertainty and restricted the scope of customary law. Since 1960, several post-independence legislative actions in support of customary law have been enacted; but this support is only by implication. For instance, Article 2 Paragraph 2 of the 1996 Constitution of Cameroon[611] provides that the State: "shall recognize and protect traditional values that conform to democratic principles, human rights and the law." The author argues that the provisions are vague because they do not state the measures that have been adopted or are to be adopted to protect these "traditional values" and deems it a replication of section 27 (1) of the SCHL of 1955 which provides no clear standards regarding the repugnancy test, causing uncertainty in the application of customary law by statutory courts.[612]

According to Asiedu-Akrofi,[613] the application and enforcement of the repugnancy clause in Cameroon is a matter only considered and determined by state courts. Thus, the repugnancy clause is not only applicable in accordance to natural justice, equity and good conscience, but also to court procedure and the degree of punishment imposed. Over time certain customary practices (e.g., burial practices and the performance of certain ritual rites) have been eradicated as a consequence of the application of this clause by state courts.[614] However, this has led to a struggle for supremacy between divergent legal systems.[615] For instance, Article 3 of the Judicial Organisation Ordinance, 2006,[616] implicitly recognises "Customary Law Courts" as part of the Cameroonian judicial system. However, if there is a conflict between written law and custom, written law prevails;[617] making its application very limited and uncertain.

[610]Kiye Mikano E. (2015) 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon.' African Studies Quarterly Volume 15, Issue 2 pp. 85-106.
[611]Law No. 96-06 of 18 January 1996 (amending the 1972 Constitution of Cameroon).
[612]Kiye Mikano E. (2015) 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon.' African Studies Quarterly Volume 15, Issue 2 pp. 85-106.
[613]Asiedu-Akrofi Derek (1989) 'Judicial Recognition and Adoption of Customary Law in Nigeria.' The American Journal of Comparative Law, Vol. 37, No. 3 pp. 571- 593.
[614]Tchoukou Julie Ada (2016) 'Engaging with the Pluralistic Nature of African Societies: A Critical Examination of the customary legal system in Cameroon.' pp. 67-80.
[615]Fombad (1991) 'The Journal of Modern African Studies.' Vol. 29, Issue 3, pp. 443-456.
[616]Law No. 2006/015 of 29 December 2006. It amended certain provisions of the Judicial Organization Ordinance, 1972.
[617]Anyangwe C. (1987) 'The Cameroonian Judicial System.' Yaounde: CEPER, p. 243.

Kiye[618] asserts that the reforms adopted to accommodate customary legal practices have resulted in a 'legal hybrid' institution, consisting of one court structure in which more than one legal system co-exists and operates. Consequently, the amendment led to conflicts in the interpretation and application of the enacted national laws. It also became a challenging task to unify all applicable legal systems in Cameroon. Fombad[619] contends that the many of the impediments to the harmonisation of the legal systems in Cameroon are due to differences in legal culture and tradition, including the foreign law imposed by the European colonialists. In contrast to the plausible reasoning of the repugnancy test in post-colonial countries, Hannum[620] believes that the African standard of accepted behaviour corresponded with the rights asserted by the West. Nhlapo[621] posits that in some cases the standard of behaviour exceeded what was sufficiently acceptable by the West. For instance, the right to life mandate prohibiting killing as punishment in Africa was deemed wider in scope when compared to the West.[622]

4.5 Divergence in Customary Legal Practices

Customary legal systems under colonialism were regarded as inferior and allowed only minimal operation alongside English law within native jurisdictions. In addition, this tolerance was on the condition that customary laws were "not repugnant to natural justice, equity and good conscience, and not inconsistent with the written colonial law".[623] As such, many post-colonial legal systems face discrepancies when customary legal practices are considered contradictory to the national law in force. This disparity could serve as a barrier to the legal aid scheme within the customary court setting due to the uncertainty of the applicable law.

Kiye[624] explains the complexity of limitation clauses on customary legal practices. For instance, the repugnancy test has created a divergence in the rules of customary law in many legal systems. The author contends that the divergence is a consequence of the process of administering customary law through the duality tests. Hence, two versions of customary law

[618]Kiye Mikano E. (2015) 'Conflict between Customary Law and Human Rights in Cameroon: The Role of Courts in Fostering an Equitably Gendered Society.' African Study Monographs, 36 (2) pp. 75-100.
[619]Fombad (1991) 'The Journal of Modern African Studies.' Vol. 29, Issue 3, pp. 443-456.
[620]Hannum, B (1979) 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis.' Universal Human Rights, 1(2), pp. 63-87.
[621]Nhlapo N.R., (1991) 'The African family and women's rights: Friends or Foes?' Acta Juridica 71, pp. 135-146.
[622]Ibid. p. 140.
[623]Coldham Simon (2000) 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects.' Journal of African Law, Vol. 44, No. 2 p. 219.
[624]Ibid.

have evolved over the years: the lawyer's customary law and the sociologist's customary law. The author argues that, when a custom is declared repugnant and in conflict with the common law in force by the courts, the declaration only prevents its acceptance in the state legal system,[625] and thus only before the state court. However, in most cases, the rule continues to be applicable under customary law within certain districts and may not extend to other regions. Even though it is not considered valid by state law, it is regarded as such by the people. Consequently, there is a fragmentation of the legal process and a conflict in customary rules.

Woodman[626] has carried out extensive research regarding the conflict that may occur in societies that run a dual legal system and argues that divergence occurs during the process of the establishment of customary law before the court. This is because the rules recognised by the court as customary law (lawyer's customary law) do not necessarily correspond to socially accepted norms in society (sociologist's customary law). The author explains further that divergence may also occur from mistaken findings on the content of sociologists' customary law.[627] When this happens, courts would sometimes have to make judgements on the content of customary law. Woodman asserts that there have been instances where controversial points of law were settled by referring to one or a few decided cases based on weak evidence, and, because previous judgments are considered to have binding authority, courts might disregard local variations in customary practice. Once a rule has been judicially recognised, it becomes applicable to all other ethnic groups regardless of their inherent individual customs.[628]

Thus, traditional societies argue that the customary values enforced by customary courts embody the views and ethos of the local communities, whereas those enforced by state courts have undergone substantive transformation and, in most cases, are unable to correspond with the social practices within those communities. Woodman further declares that divergence is unavoidable because state law has the discretion to reject or enforce a custom but cannot modify an out-dated custom and apply the modified version in the real sense. In reality, the rejection of customary law by state courts will only be applicable to the litigants and will have

[625]Ibid.
[626]Woodman, Gordon R. (1988) 'How State Courts Create Customary Law in Ghana and Nigeria.' In Bradford W. Morse and Gordon R. Woodman (eds.) 'Indigenous Law and the State' (Dordrecht, Holland: Foris Publications): 181-219.
[627]Ibid.
[628]Ibid.

no bearing on its practice in communities[629] where people believe they are obliged by tradition to observe their customs.

Kiye[630] contends that post-colonial Cameroon, for instance, is eager to reinstate the integrity of customary legal practices and has made efforts to eradicate archaic practices that contravene human rights and gender equality via legislation. For instance, in *Elive Njie Francis v. Hannah Efeti Mangah*,[631] it was ruled that a female widow should inherit the property of her deceased husband, being his next of kin, despite the prevailing customary practice which refuses this right to women. This ruling was made on the grounds of the provisions of the 1996 Constitution of the Republic of Cameroon,[632] and s. 77 (2) of the Civil Status Ordinance of 1981 (as subsequently amended), which provides for the right to women to inherit property.

However, the use of legislation has failed to totally reform such discriminatory customary values in Cameroon. This is due to weak enforcement mechanisms and the consequent continued utilisation of discriminatory practices that have been declared unlawful by the state.[633]

In Nigeria, the customary law on matters of inheritance and succession, especially among the Yoruba and Igbo people, is prejudicial and generally favours men over women in practice. As such, it is considered unfair and repugnant to state law. Oni[634] believes that inconsistent judgements are due to the difference in the line of descent that governs inheritance rights in the various regions of Nigeria, as well as the irreconciled and unreformed customary and English common law systems that operate in Nigeria. The divergence was apparent in *Mojekwu v. Mojekwu*,[635] where an intestate died without son, brother, or a father, but was survived by two females. His male nephews claimed entitlement to his estate in accordance with the *Iri Ekpe*

[629]Ibid.
[630]Kiye Mikano Emmanuel (2015) 'Conflict between Customary Law and Human Rights in Cameroon: The Role of Courts in Fostering an Equitably Gendered Society.' African Study Monographs, 36 (2) pp. 75-100.
[631] Court of Appeal of the South West Region: Suit No. CASWP/CC/12/98: unreported. Quoted in Ibid. p. 92.
[632] "…ownership shall mean the right guaranteed to every person by law to use, enjoy and dispose of property. No person shall be deprived thereof, save for public purposes and subject to the payment of compensation under conditions determined by law…."
[633]Kiye Mikano Emmanuel (2015) 'Conflict between Customary Law and Human Rights in Cameroon: The Role of Courts in Fostering an Equitably Gendered Society.' African Study Monographs, 36 (2) pp. 75-100.
[634]Oni Babatunde Adetunji (2014) 'Discriminatory Property Inheritance Rights Under the Yoruba And Igbo Customary Law in Nigeria: The Need for Reforms.' IOSR Journal of Humanities and Social Science (IOSR-JHSS) Volume 19, Issue 2, Ver. IV pp. 30-43.
[635](1997) 7 NWLR (Pt. 512) 283.

tradition.[636] The Court of Appeal via Tobi JCA rejected the claim on the basis the case was governed by Nnewi Customary Law, and that such a customary law which discriminated against women would not be enforced as it would be repugnant to natural justice, equity, and good conscience. However, on further appeal, the Supreme Court rejected the decision of the Court of Appeal and upheld the *Iri Ekpe* custom, citing the need to respect the lived realities of people.

Iwobi[637] notes that the established institutions that "regulate the affairs of most Nigerians are archetypal bastions of male power and are suffused with patriarchal instincts and inclinations". Diala[638] argues that the disconnection between law and practice stems from several factors, ranging from legal pluralism to social, economic, cultural, and historical factors, all of which have great implications for constitutional legitimacy. Agbede[639] claims that although state law makes provisions for the regulation of marriages and inheritance, many Nigerians disregard these provisions. Consequently, what is applied in formal courts differs from what is practiced among the people that are compelled by them.[640]

According to Temngah,[641] African customary law is generally silent on discriminatory cultural practices which harm women's rights, while customary courts continue to follow and apply them. This causes a rift between customary norms and what is fundamentally accepted by common law as right and just. A prevalent example is gender discrimination in the 'dowry' and 'bride price' practices. This used to justify certain discriminatory practices against women which deny them inheritance and succession rights. In Cameroon, this concept was explained in the dictum of Justice Inglis in *Achu v. Achu*,[642] where it was held that, once dowry is paid, a woman becomes part of her husband's estate and, if they are to divorce (after a full refund of

[636]*Iri Ekpe* custom is invoked when the intestate is without sons, brothers or father and his estate is claimed in inheritance by his eldest nearest paternal male relation. Nwogugu, E.I. (2014) 'Family Law in Nigeria' Third Edition p. 425.
[637]Iwobi, Andrew U. (2008) 'No Cause for Merriment: The Position of Widows under Nigerian Law.' 20 Canadian Journal of Women and Law pp. 37-86.
[638]Diala Jane C. (2015) 'Implications of the Disconnection between Law and Practice in the Context of Gender Inequality in South-East Nigeria.' Journal of Culture, Society and Development Vol.12 pp. 63-76.
[639]Agbede Olu I. (1968) 'Recognition of Double Marriage in Nigerian Law.' International and Comparative Law Quarterly Vol. 17(3) pp. 735-743.
[640]Menski, Werner F. (2006) 'Comparative Law in a Global Context: The Legal Systems of Asia and Africa.' (Cambridge: Cambridge University Press).
[641]Temngah, J. (1996) 'Customary Law, Women's Rights and Traditional Courts in Cameroon.' Revue générale de droit, 27(3), pp. 349–356.
[642]Court of Appeal of the North West Region (Bamenda): Suit No. BCA/62/86. Reported in Ngwafor, E.N. (1993). Family Law in Anglophone Cameroon. Regina University Press, Regina p.196.

the dowry by the wife to the husband), she leaves the matrimonial home with virtually nothing except her private and personal belongings. In addition, Bennett[643] contends that culture has been used by governments to initiate segregation. For instance, in South Africa, cultural differences encouraged discrimination among the various ethnic groups and consequently served as the justification for apartheid.

Tchoukou[644] notes that an analysis of case law jurisprudence in Cameroon reflects that there is no established rule to determine the process a court must take for the application of the repugnancy clause. This opinion has also been reiterated by Nigerian scholars. For instance, Ezejiofor[645] contends that: "the courts have not developed any general theory on the basis of which rules of customary law are to be tested. Rather, they have adopted a liberal and flexible approach and have, on an ad hoc manner, invalidated or sanctioned a rule sought to be applied on the basis of their notion of what is fair and just."

Hence, the courts have adopted a discretionary approach when determining whether a customary law has passed or failed the repugnancy test. The wide discretion and flexibility of the courts has led to an increased pattern of disparity and uncertainty in application of the clause and in most instances a contradictory precedent. For instance, in the cases of the *Estate of Agboruja*[646] (a Nigerian case) and *David Tchakokam v. Keou Magdaleine*[647] (a Cameroonian case), the courts were called upon to determine whether the custom of marrying the wife of a deceased family member to another family member (also known as levirate marriage) was contrary to natural justice, equity or good conscience according to the repugnancy clause.

In the *Estate of Agboruja*, the court allowed the system of levirate marriage, and held that: "the custom by which a man's heir is his next male relative, whether brother, son, uncle or even cousin, is widespread throughout Nigeria. When there are minor children, it means that the father's heir becomes their new father. This is a real relationship, and the new fathers regard the children as their own children. Whenever this custom prevails, native courts follow it, and

[643]Bennett T. W. (1993) 'Human Rights and African Cultural Tradition Transformation.' Issue 22 p. 35.
[644]Tchoukou Julie Ada (2016) 'Engaging with the Pluralistic nature of African Societies: A Critical Examination of the customary legal system in Cameroon.' pp. 67-80.
[645]Ezejiofor, G. (1980) 'Sources of Nigerian Law.' In C. O. Okonkwo (ed.) 'Introduction to Nigerian Law.' (London: Sweet and Maxwell) pp. 1-53.
[646](1949) 19 NLR 38.
[647]Suit No. HCK/AE/K.38/97/32/92 reported in Ngassa and Time 1999. Cited in Kiye Mikano Emmanuel (2015) 'Conflict between Customary Law and Human Rights in Cameroon: The Role of Courts in Fostering an Equitably Gendered Society.' African Study Monographs, 36 (2) p. 93.

no doubt somewhere in this large country this is being done every day." The court stated that: "there can be nothing intrinsically unfair or inequitable even in the inheritance of widows […] The custom is based on what might be called the economics of one kind of African social system." While many human rights scholars would regard the ruling as unfair and repugnant to natural justice, Elias[648] terms it a customary type of insurance to guard against the neglect of the dependants of the deceased.

However, in the similar case of *David Tchakokam v. Keou Magdaleine*, the Cameroonian court explicitly declared the practice of levirate marriage repugnant and contrary to written law. The presiding judge held that: "the law will not give its blessing to a marriage that is not only obnoxious and repugnant to natural justice but obviously against the written law [...] Section 27 of the SCHL[649] clearly does not permit this court to enforce a marriage which is liable to be voided under our law." It is important to note however that, although both cases occurred in separate jurisdictions, different conclusions were reached despite the similarity in the legal traditions of Anglophone Cameroon and Nigeria.[650]

Disparity is also apparent in the female child inheritance[651] case of *Nanje Bokwe v. Margaret Akwo*.[652] The Kumba (Cameroon) customary court held that the female applicant was allowed inheritance just as the male heirs; but on appeal, it was held that a married woman was not allowed to inherit from her father's estate unless expressly stated in a will.[653] On the other hand, the ruling in *Nanje* contrasted with what was held in the case of *Nyanja Keyi Theresia & 4 Ors v. Nkwingah Francis Njanga and Keyim*,[654] where the High Court of Fako used the repugnancy clause to outlaw discriminatory inheritance practices against women.[655]

[648]Elias T.O. (1960) 'Impact of English Law upon Nigerian Customary Law.' p. 19.
[649]Section 27, Southern Cameroons High Court Law, (SCHL), 1955.
[650]Kiye Mikano Emmanuel (2015) 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon.' African Studies Quarterly. Volume 15, Issue 2 p. 93.
[651]"Customary law also dictates that, in the presence of suitable male heirs, a daughter cannot inherit on the intestacy of her deceased father." Cited in Kiye Mikano Emmanuel (2015) Conflict between Customary Law and Human Rights in Cameroon: The Role of Courts in Fostering an Equitably Gendered Society African Study Monographs, 36 (2) p. 89.
[652]Suit No. CASWP/CC/22/82: unreported. Cited in Ibid. p. 94.
[653]"The respondent is a married woman. She cannot unless so given by a will inherit from her father let alone be his next of kin. Alfred Mbongo [respondent's brother] was his father's next of kin. Alfred Mbongo is dead and has left a male heir. In fact, the respondent has no *locus standi*." Ibid.
[654]HCF/AE57/97-98 (unreported).
[655]Kiye Mikano Emmanuel (2015) 'Conflict between Customary Law and Human Rights in Cameroon: The Role of Courts in Fostering an Equitably Gendered Society.' African Study Monographs, 36 (2) p. 89.

Like many post-colonial African countries, Sierra Leone operates a bifurcated legal system where British common law coexists with the customary legal system, also known as "local courts". Thus, the formal common law system operates mainly in the urban areas while the traditional customary system dominates the rural areas. According to Maru,[656] customary courts which have existed for generations remain unchecked and, as such, many village and section chiefs adjudicate claims within their localities, issuing summons, conducting hearings, making judgments, and collecting fines based on the customary practice of their tribe without reference to applicable state law. This is in spite of the current 2011 Act which prohibits any unauthorised practice[657] and lays down the template of operation for Sierra Leone's dualist legal structure.

In addition to complying with the national constitution, the Sierra Leone Local Courts Act 2011 demands that customary law refrains from contradicting "enactments of parliament" or "principles of natural justice and equity."[658] However, in certain tribes, an underage girl can still be betrothed without her consent[659] or women barred from inheriting family property.[660] Maru[661] refers to the 2011 Act as "nominal limitations" which have minimal impact on discriminatory practices and are seldom if ever enforced; causing a divergence between certain customary practices and the statute that governs them.

[656]Maru Vivek (2007) 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide.' The Yale Journal of International Law Vol. 31 pp. 427-476.
[657]Section 44 Sierra Leone Local Courts Act 2011.
[658]Section 1 Sierra Leone Local Courts Act 2011.
[659]Before their time: Challenges to Implementing the Prohibition against Child Marriage in Sierra Leone. A report prepared by Ben Baker Amanda Elbogen Stephanie Keene (2013). https://plan-uk.org/file/beforetheirtimereportpdf/download?token=-jpyqRik (accessed 31/01/2019).
[660]Sierra Leone: 'Customary norms, religious beliefs and social practices that influence gender-differentiated land rights Food and Agriculture.' Organization of the United Nations. http://www.fao.org/gender-landrights-database/country-profiles/countries-list/customary-law/en/?country_iso3=SLE (accessed 31/01/2019).
[661]Maru Vivek (2007) 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide.' The Yale Journal of International Law Vol. 31 pp. 427-476.

4.6 Colonial Customary Courts in Practice

Harris[662] opined that colonialism transformed customary law from "a subtle, adaptable, and situational code to a system of fixed and formal rules". In addition, according to Patenaude,[663] the English common law system replacement presented customary courts with other obstacles. A major setback has been the de-valuation of customary law by the British colonialists to accommodate the English system of law as the dominant legal mandate in Nigeria. In addition to the British colonial influence, many western-trained jurists and legal scholars continue to denigrate customary law as mere custom or norms of behaviour,[664] while customary legal cultures and rationalities continued to be undermined by common law directives.[665]

In the course of time, supervised "tribal assessors" were proposed and indigenous elders elected as advisers to manage and counsel customary courts. Consequently, customary courts were given the authority to administer justice in the context of various offences, both civil and criminal, including the recommendation of the mitigation of conventional penalties[666] in areas that were regarded as beyond their administrative reach. The intention was to keep customary courts functioning on a lower hierarchical ranking order with their dealings under strict supervision of common law mandates.

An'Na'im[667] undertook a comparative study of fifteen African legal systems and concluded that: "for the majority of Africans, customary law is the most important source of law [with] which they are likely to have first and most frequent contact." Amidst the principal common law system in place, superior courts continue to acknowledge the relevance of other legal obligations that impact the lives of individuals brought before the courts. Therefore, in resolving disputes surrounding sentencing, the need to examine the relevance of customary legal practices when considering the gravity of the offence in question, especially in civil

[662]Harris, O. (1996) 'Introduction: Inside and Outside the Law.' In O. Harris (ed.) 'Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity.' p. 118. New York, Routledge.
[663]Patenaude Allan L. 'Customary Law.' In Wright Richard A. Miller J. Mitchell (eds.) (2005) 'Encyclopedia of Criminology.' Volume 1. Routledge. pp. 363-367.
[664]Ibid.
[665]Ntephe, Peter (2012) 'Does Africa Need another Kind of Law? Alterity and the Rule of Law in Sub-Saharan Africa.' p. 247.
[666]Finnane Mark (2008) 'Customary Law and the Treatment of Criminals.' In Peter Cane Joanne Conaghan (eds.) 'The New Oxford Companion to Law.' Oxford University Press p. 294.
[667]Abdullahi Ahmed An'Na'im, "Protecting Human Rights in Plural Legal Systems of Africa: A Comparative Overview," In Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa, (ed.) Abdullahi Ahmed An-na'im (London: Interights/ AFRONET/ GTZ, 1999), 39.

cases,[668] is often presented. However, Nwocha[669] argues that the declassification of customary courts has continued to work against its full recognition and codification as an effective source of law in the Nigerian legal system.

After Nigeria gained independence in 1960, constitutional law based on the English common law system continued to supersede customary law in Nigeria. Customary law is recognised to a certain extent in the Nigerian constitution but is still persistently struggling to find an enduring foothold.[670] Hence, the future of customary courts has become a matter of discussion for many African scholars. There is a fear that customary courts, which pre-date the colonial legal court system and are deemed intrinsic to the norms, traditions and behaviour of the Nigerian people, are beginning to disappear.[671] The extant literature on legal aid in Nigeria expresses the need for a more reformed, simplified legal process as well as an easily accessible court of law to help further the scope of legal aid in Nigeria; however, there is currently a lack of assertion regarding the utilisation of customary courts as an additional authority of law to expand the capacity of legal aid in Nigeria.

Legal aid is a service put in place to provide access to justice for individuals who may not have the means or capabilities to procure the services of a lawyer and, as a consequence, are unable to gain access to court and defend their rights. The concept of legal aid is embodied to a certain degree by the long-standing practice of customary courts, which achieve a large portion of the principal motive of legal aid. This motive is to break down the prevailing barriers (financial, geographical, linguistic and time-related) that impede the guarantee of equality for all individuals before the judiciary, regardless of their social standing.[672] Ubink[673] maintains that customary court practices are not without basic flaws, but considers them easily acceptable and more practicable due to their geographical proximity to those most in need of legal aid; namely, those who are disadvantaged, who are frequently members of ethnic minorities residing in

[668]Finnane Mark (2008) 'Customary Law and the Treatment of Criminals.' In Peter Cane Joanne Conaghan (eds.) 'The New Oxford Companion to Law.' Oxford University Press p. 294.
[669]Nwocha Matthew (2016) 'Customary Law, Social Development and Administration of Justice in Nigeria.' Beijing Law Review, 7 p. 430.
[670]Chuma Himonga (2011) '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 Jeanmarie, Galizizi Paolo Higgins Tracy (eds.) 'The Future of African Customary Law' p. 31.
[671]Ibid.
[672]Schetzer Louis, Mullins Joanna, Buonamano Roberto (2002) 'Access to Justice & Legal Needs A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW.' Law & Justice Foundation of New South Wales pp. 1-76.
[673]Ubink Janine M. (2016) 'Access vs. Justice: Customary Courts and Political Abuse-Lessons from Malawi's Local Courts Act.' American Journal of Comparative Law Vol. 64 p. 746.

remote, rural areas. The familiarity of the litigants with the location and the adjudicators encourages trust in the legal system. The use of the local language, as well as a simplified and flexible procedure, is fundamental to the practice of customary courts. Disputes are dealt with swiftly, eliminating the delays that could arise due to time and financial constraints in matters that require immediate attention.

4.7 Customary Courts: The Law and Society Phenomenon

"You can't even begin to talk about development if citizens don't share a sense of belonging and entitlement to their community justice system. Legal aid is such a fundamental necessity for human existence: it calls for a much greater public investment than we currently see."
Yahaya Al-Hassan Seini[674]

The law and society phenomenon concerns the belief that law is deeply embedded within society and explores how law is socially and historically constructed.[675] For instance, this phenomenon can help explain how customary rules, doctrines and institutions have impacted present day Nigeria. A brief appraisal of the concept of law and society illustrates how public values and opinions can enhance legal systems, as well as how such opinions can influence certain indigenous groups to seek remedies in customary courts. This section explores the role of customary courts through the context of law and society, and in relation to the provision of legal aid in Nigeria.

The law and society approach examines law in practice through public knowledge of its institutions to initiate social change. Legal aid provision lies within the ambit of social change because it is focused on shifting the structure of institutions in society to achieve equity, for example in improving the equitable distribution of resources. According to Coglianese,[676] social change may be achieved through law reform as well as other non-legal means such as public opinion. The author argues that public values can bring social change by encouraging effective implementation of legislation. He also believes an effective outcome can be achieved

[674]Yahaya Al-Hassan Seini, Executive Director, Legal Aid, Ghana Quoted. In 'Global Study on Legal Aid.' Global Report (2016) United Nations Office on Drugs and Crime (UNODC) p. 5.
[675]Mather Lynn (2011) 'Law and Society.' In the Oxford Handbook of Political Science Goodin Robert E. (ed.) p. 1.
[676]Coglianese Cary (2001) 'Social Movements, Law, and Society: The Institutionalization of the Environmental Movement.' University of Pennsylvania Law Review, Vol. 150, No. 1 pp. 85-86.

by developing a collaborative and interdependent relationship between social change, law, and society to push for reform in legal institutions.[677] Thus, enhancing the operation and scope of the customary courts system through legislation in Nigeria, could pave way for essential provisions such as legal aid.

Chirayath et al.[678] posit that "the vast majority of human behaviour is shaped and influenced by informal and customary normative frameworks", which can be understood via the law and society concept of how law reflects and impacts culture. According to Mather,[679] law is deeply embedded within society, and the concept of law and society reveals how "inequalities are reinforced through differential access to, and competence with, legal procedures and institutions". Macauley[680] advocates for a departure from focusing mainly on the operation of legal institutions in law and society studies (i.e., the courts, lawyers, and police). The author asserts that in addition "we must understand people's knowledge of and attitudes toward the legal system". Friedman[681] contends that every country's legal system is driven by the issue of justice and equality, which interacts with the society that surrounds it. The author argues that the relationship between law and society has been extensively researched in specific countries in the West;[682] however, there is less study on the comparisons between the legal systems or legal cultures of other societies, such as Nigeria, from the viewpoint of their impact on society.[683] The author believes in enhancing the principle of legal practice from the isolated analysis of legal text such as legislation and court decisions that have been advanced through competent legal personnel to a deeper analysis of legal rules, doctrines and institutions that exist within society.[684]

Hence, customary courts in Nigeria are a legal phenomenon that is moulded by the country's culture, economics, and political structure, as opposed to formal authoritative norms, practices and legal codes. The study of law and society in relation to the concept of customary courts

[677]Ibid.
[678]Chirayath Leila, Sage Caroline, Woolcock Michael (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.' Washington, DC: World Bank p. 2.
[679]Mather Lynn (2011) 'Law and Society.' In the Oxford Handbook of Political Science Goodin Robert E. (ed.) p. 1.
[680]Macaulay S. (1987) 'Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports.' 21 Law and Society Review 185-218 at 186.
[681]Friedman, Lawrence, Perez-Perdomo Rogelio, Gomez Manuel (2011) In 'Law in Many Societies A Reader' Stanford University Press p. 2.
[682]Ibid.
[683]Ibid.
[684]Ibid.

highlights the relations between culture and individuals' perceptions, attitudes, and opinions regarding the law.[685] It also examines whether the incorporation of the legal aid scheme into an already established customary court system would expand the scope of justice in Nigeria. As well as encourage individuals who would normally shy away from formal courts, due to its foreign and complex nature, to attend a more familiar customary court of their choosing in contemporary Nigeria Hence, customary law plays a significant role in the operation of customary courts, and most especially in the lives of the individuals that are bound by them.

[685]Ibid. p. 3.

Chapter 5: Customary Law in Contemporary Nigeria

"Increasing recognition of customary law brings with it a need for development of functional interfaces between customary and positive legal regimes."[686]

5.1 Introduction

This chapter is focused on the status of customary law in present day Nigeria, as well as the prospects of implementing legal aid via customary courts to serve the needs of disadvantaged individuals (often residing in remote, rural areas). Hence, it will also appraise the validity of customary legal systems and the manner in which various customary law practices are established and interpreted in national legislation as a source of law. It will also examine the categories of customary courts in Nigeria, in addition to the customary legal systems of other African nations. This chapter considers the complex plurality of legal orders in relation to the Nigerian customary court system. The discussion will include the role of legal orders in preserving the integrity of customary legal systems via international human rights regulations. In addition, this chapter will propose a feasible framework to assist with the transition of legal aid into customary courts.

5.2 Sources of Law in Nigeria

5.2.1 English Common Law

According to Adewoye,[687] the British colonial era in the 19th century introduced a new legal system that served as an instrument of administrative control and reflected the laws in force in Britain during that period. The present common law structure in Nigeria, the country's major legal system, is a by-product of this colonial legal system, and it derives its legitimacy from the 1999 Nigerian constitution. This is established in the 1990 Interpretation Act which provides for the construction and interpretation of Acts of the National Assembly and certain other instruments. According to Section 32 (1): "the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the

[686]Brendan Tobin, (2014) 'Indigenous Peoples Customary Law and Human Rights Why Living Law Matters.' Routledges p. 61.
[687]Adewoye O. (1973) 'Review of Elias T.O. Law and Social Change in Nigeria.' Journal of the Historical Society of Nigeria Vol. 7 No. 1 p. 149.

1st day of January 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria."[688]

Common law is well established and codified in Nigeria, where it forms a substantial part of national law and supersedes both Islamic and Customary Law. According to Nwocha,[689] scholars and citizens viewed the transplanted English system as an institution intended to benefit only the privileged in society. A very large proportion of the Nigerian population, especially those residing in remote, rural areas, became alienated from the official legal system, as they were made to adopt and abide by a system that was divergent from their beliefs and customs. Thus, the author argues that the disparities between official and customary legal systems present a clash between legal justice (remedial process) and social justice (equal access to resources), as one cannot fulfil its intended administration without the other. According to Sadurski,[690] legal justice is at the mercy of social justice. In time, individuals seeking remedies will lose trust that justice will be served if they are unable to access institutions they believe would be fair and just to their cause.

5.2.2 Customary Law

Before the advent of colonial rule in Nigeria, indigenous legal systems were customary in origin and type. Customary courts were utilised to regulate social relations and interpret customary law. Hence, customary courts and customary law are in sequence with one another. Traditionally, customary law is unwritten and as such there has always been a great reliance on the oral testimonies of chiefs, elders, and other people familiar with intrinsic customs and tradition[691] to ensure that they are maintained, and justice is served. In the case of *Alfa v. Arepo*,[692] Duffus J defined customary law as "the unwritten law or rules which are recognised and applied by the community as governing its transactions and code of behaviour in any particular matter".

[688]See Section 32(1) Nigeria Interpretation Act 1990.
[689]Nwocha Matthew (2016) 'Customary Law, Social Development and Administration of Justice in Nigeria.' Beijing Law Review, 7 p. 431.
[690]Sadurski Wojciech (1984) 'Social Justice and Legal Justice.' Law and Philosophy, Vol. 3, No. 3 pp. 329-330.
[691]Asiedu-Akrofi Derek (1989) 'Judicial Recognition and Adoption of Customary Law in Nigeria.' The American Journal of Comparative Law, Vol. 37, No. 3 pp. 571-572.
[692]See (1963) WNLR 95 at 97.

Customary law was also defined by the Supreme Court of Nigeria in the case of *Kharie Zaidan v. Fatimah Khalil Mohsen*[693]: "[a] system of law, not being the common law (of England), and not being a law enacted by a competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between parties subject to its sway."

The provision of legal aid is not specifically provided for under customary legal practices. This may be due to its unformulated nature; however, the right to legal aid is a fundamental right stipulated under the current 1999 Nigeria constitution to which all legal practices in Nigeria are duty-bound to adhere to. According to Yakubu,[694] the arrival of the British colonial rule undermined Nigerian customary law, and the use and effect of customary laws became dependent on the permissive extent of English law. Indigenous customary courts were mainly in the southern part of Nigeria and were not allowed to preside over matters relating to crime. Thus, though customary courts maintained minimal authority, in mostly rural areas, they were quickly overshadowed by the new colonial legal order.

Adewoye[695] contends that customary law was not totally eradicated during the colonial era but held limited administrative power and was treated as foreign law when it came to the higher court. After Nigeria became independent from colonial rule in 1960, customary law practices continued to function as a source of law to many regions in Nigeria, especially the rural regions. The operation of customary law also continued alongside the adopted and superior English law in force. The right to legal aid was introduced into the post-colonial constitutions, but this was not explicitly extended to customary legal practices. The judicial recognition of customary laws during colonialism was crucial to their validity and practice, and this was affirmed in *Eshugbayi Eleko v. Government of Nigeria*.[696] In this case, Lord Atkin held that "[i]t is the assent of the native community that gives a custom its validity". However, regardless of whether a custom is accepted and fully adopted and recognised as having the force of law within a locality, by the people, it must pass the validity test based on the British concept of repugnancy.[697]

[693]See (1973) All NLR 740 at 753.
[694]Yakubu John Ademola (2005) 'Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria.' Africa Development Vol. 30 No. 4 p. 201.
[695]Adewoye O. (1973) 'Review of Elias T.O. Law and Social Change in Nigeria.' Journal of the Historical Society of Nigeria Vol. 7 No. 1 p. 149.
[696]*Eshugbayi Eleko v. Government of Nigeria* (1932) A.C. 622.
[697]Taiwo E A. (2009) 'Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian positionS: Some lessons for Nigeria.' Journal for Juridical Science Vol. 34(1) pp. 89-115.

Customary courts are a vital part of the Nigerian legal system but are subject to a validity test if the legitimacy of a certain custom is under investigation. Legitimising customary law in Nigerian courts is mandatory for its adoption, and this is governed by the Evidence Act.[698] However, customary courts and area courts are not bound by the provisions of the Act, but rather are guided by it. Hence, the judges of these courts are expected to know the law within their customary jurisdictions, but proof of such custom is not required.[699] In the case of *Ogiugo v. Ogiugo*,[700] the Supreme Court held that, regarding matters of custom, "[t]he Customary Court is presumed to know the customary law of the area of its jurisdiction [.]"

The scope of customary court powers was reiterated in the case of *Okeke v. President & Members of Customary Court*.[701] It was held that: "Customary Courts have their practice and procedure as embodied in the Customary Courts Law and Rules of the State in the country where they are applicable. By virtue of the native form of customary laws, they relate to the traditional unwritten law of the people handed down from generation to generation. Where members of the Courts are familiar with the custom of a community, they can apply it without first requiring evidence." Customary law in Nigeria is derived from two sources: Sharia law, which is also referred to as Muslim law; and Non-Muslim/Ethnic law, also known as indigenous customary law. Currently, customary law is recognised to a certain extent in the 1999 Nigeria constitution and co-exists alongside national law.

5.2.3 Islamic Law (Sharia)

Like the current Nigerian common law structure, and in contrast to indigenous customary law, Islamic law is a predominantly written and borrowed doctrine, acquired from the religious beliefs of Muslim community traders in the 11th century. Its texts can be found in the Holy Quran, the Hadith of Prophet Muhammed, and other scholarly publications by Islamic jurists. By the 19th century, after the 1804 'Fulani Jihad' launched by Usman Dan Fodio, the religion

[698]Part III Section 18 The Nigeria Evidence Act 2011.
[699]Oba A.A. (2006) 'The Administration of Customary Law in a Post-Colonial Nigerian State.' 37 Cambrian L. Rev. 95 p. 101.
[700]*Ogiugo v. Ogiugo* (1999) 14 NWLR (Pt 638) 283 SC.
[701](1990) 14 NWLR (Pt. 638) 283.

had gained momentum and become more established in the Northern part of Nigeria, as well as in some parts of the South.[702]

The effects of the Jihad were widespread and influenced the way of life of both Muslims and non-Muslims, politically, socially, culturally as well as intellectually. Northern Nigeria and other parts that converted to Islam were 'Islamised' as a result of the 'holy war'. Muslims were obligated to live according to Islamic law.[703] Their inherent traditional cultures and norms were relinquished and replaced with a Muslim perspective of history and Islamic concepts, ideas and values regarding society.[704] Hence, the norms introduced by the Quran facilitated the development of the Islamic judicial institution,[705] and this other type of customary law, that was applicable to Muslims only, gained momentum.

By the time the colonialists arrived in 1861, Islam was firmly established as state religion in northern Nigeria, with Islamic law as the major legal system. Local customs were permitted, and non-Muslims were able to apply their own customary law within the Islamic jurisdictions, as Islamic law only applied to Muslims.[706] However, Islamic law was not enforced in all Muslim territories, especially in the South of Nigeria where a Western secular system was imposed.[707] Hence, Sharia law was applied on an informal basis alongside common law and indigenous customary law.[708]

Lord Frederick Lugard became the High Commissioner of the Protectorate of Northern Nigeria in 1900 and, later, was the first Governor-General of Nigeria. Under his indirect rule, existing local structures were maintained to a certain level to serve as a channel to establish rules and regulations on behalf of the British. The colonialists endeavoured to fully replace Islamic law

[702]From 1804-1810, Usman Dan Fodio waged a Jihad to cleanse and gain more believers to the Islamic faith and distinguish it from the traditional religion which was considered ungodly. The 'Sokoto Caliphate' became the largest Muslim Empire of Northern Nigeria in the 19th century. Kalu Hyacinth (2011) 'The Nigerian Nation and Religion.' (Interfaith Series Vol. 1) pp. 30-34.
[703]Oba A.A (2008) 'Islamic Law as Customary Law: The changing Perspective in Nigeria.' International and Comparative Law Quarterly Vol. 51 Issue 4 p. 822.
[704]Kalu Hyacinth (2011) 'The Nigerian Nation and Religion.' (Interfaith Series Vol. 1) p. 35.
[705]Baderin Mashood A. (ed.) (2014) 'Islamic Law in Practice.' Volume 3 p. 2.
[706]Oba A.A (2008) 'Islamic Law as Customary Law: The changing Perspective in Nigeria.' International and Comparative Law Quarterly Vol. 51 Issue 4 p. 823.
[707]Sampson Isaac T. (2014) 'Religion and the Nigerian State: Situating the de facto and de jure Frontiers of State-Religion Relations and its Implications for National Security.' Oxford Journal of Law and Religion, Vol. 3, No. 2 p. 312.
[708]Oba A.A (2008) 'Islamic Law as Customary Law: The changing Perspective in Nigeria.' International and Comparative Law Quarterly Vol. 51 Issue 4 p. 834.

with the common law mandates, but were faced with obstacles, especially in the Northern parts of Nigeria due to the strong presence of the Islamic faith.[709]

Consequently, the Islamic judicial structure was retained in the north as a parallel system of customary and magistrates' courts (including criminal cases via the 1904 Criminal Code).[710] In the South, the British discouraged Islamic law by establishing customary courts which were supported by English trained legal practitioners. As such, Muslims in the non-Islamic designated areas were forced to submit to indigenous customary law.[711] Islamic law is subject to the repugnancy test, however, and it can be held to be incompatible with any other law in force (e.g., statutes, common law or principles of equity) according to Section 6 of Protectorates Court Ordinance 1933. In the case of *Yinusa v. Adesubokan*,[712] it was held on appeal that a principle of Islamic Law, which restricts the quantity of property that a Muslim testator can give out by will, was incompatible with the 1837 Wills Act, which gives an adult the right to dispose of real and personal property by will upon their death.

The 1979 Nigerian constitution saw the creation of a Sharia and Customary Courts of Appeal, which was declared a superior court of record.[713] However, led by Zamfara state in 2000, 12 other States in Northern Nigeria have adopted the Sharia Penal System[714] by restoring the '*hadd*' offences, which is the full application of the criminal aspect of Shari'ah and appropriate punishment fixed in the *Quran*. This drastic change in Islamic tradition has met with divergent views on whether this penal code was unconstitutional, especially in punishments that involved stoning to death and amputation.[715]

5.3 The Concept of Customary Law

Customary courts are operated by intrinsic laws and rules that have been developed over time through word of mouth and operation. Customary law does not refer to a single legal system[716]

[709]Ibid.
[710]Smith David N. (1972) 'Man and Law in Urban Africa: A Role for Customary Courts in the Urbanization Process.' The American Journal of Comparative Law, Vol. 20, No. 2 pp. 223- 246.
[711]Ibid. pp. 824-825.
[712](1971) NNLR 77.
[713]Sections 240 and 245 of the 1979 Constitution.
[714]See Shari'ah penal Code Law, Law No. 10 of 2000.
[715]Weimann Gunnar J. (2007) 'Judicial Practice in Islamic Criminal Law in Nigeria—A Tentative Overview.' Islamic Law and Society, Vol. 14, No. 2 pp. 240-286.
[716]Patenaude Allan L. 'Customary Law.' In Wright Richard A. & Miller Mitchell J. (eds.) (2005) Encyclopedia of Criminology, Volume 1. Routledge. pp. 363-367.

and can be difficult to understand due its diverse origins and sources.[717] Hence, it is an operational medium which covers civil law (e.g., social disorder, marriages, divorces, adoption, inheritance, and family relations), game law (i.e., hunting and fishing), land law (e.g., ownership rights, land use) and business law (e.g., trading practices). In Nigeria, the term customary law is used to refer to indigenous customary practices and Islamic law practices, although only the latter is written. These are two legal systems which operate simultaneously in the same country,[718] which is prevalent in pluralistic societies such as Nigeria. Hence, while legal aid is a major component to guaranteeing access to courts, access cannot be assured if individuals are not able to access suitable courts of their choosing. According to Woodman,[719] the literature on access to judicial institutions in Africa is mainly focused on the analysis of the legal doctrine and certain aspects of law. However, the primary subject of social justice that centres on the principle of equality and the doctrine of human rights in Africa is seldom examined.

Customary law is a direct derivation of customary courts, and it is driven by the beliefs, philosophies, and values of indigenous people. It is believed to hold the key to the administration of legal and social justice.[720] Hart[721] describes customary law as a "social rule that is acceptable and usable in a given social group." Due to the un-codified nature of customary law, it is prone to become unstable and unpredictable; however, it is also flexible and able to progressively adapt to social and economic changes without losing momentum or integrity.[722] According to Bederman,[723] customary law "is no mere souvenir of bygone law; it is an integral and coherent part of any healthy functioning contemporary legal system". However, Rouland[724] argued that the functions of law are the same regardless of the type of legal system, especially when such law is focused on promoting social interchange, preserving the social order, and settling disputes. Thus, customary law is closely linked with indigenous peoples and, for many, it may be the only system of law they know and have easy access to.

[717]Rosser Ezra (2008) 'Customary Law: The Way Things Were, Codified.' Vol. 8 Tribal Law Journal pp. 18-33.
[718]Patenaude Allan L. 'Customary Law.' In Wright Richard A. & Miller Mitchell J. (eds.) (2005) Encyclopaedia of Criminology, Volume 1. Routledge. pp. 363-367.
[719]Woodman Gordon (1996) 'Legal Pluralism and the Search for Justice', Journal of African Law Vol. 40, No. 2, p. 152.
[720]Nwocha Matthew (2016) 'Customary Law, Social Development and Administration of Justice in Nigeria', Beijing Law Review, 7 p. 430.
[721]Hart H.L.A. The Concept of Law, p. 44.
[722]Ibid.
[723]David J. Bederman (2010) 'Custom as a Source of Law' Cambridge: Cambridge University Press, p. 57.
[724]Rouland, N. (1994) 'Legal Anthropology.' (translated by Planel, P.G.). Stanford, CA: Stanford University Press.

Fuller[725] describes customary law as a language of interaction that initially needs to be appraised in order to comprehend current common law and legal systems. In simple terms, Ryan[726] states that customary law comprises of the basic rules for living together in a group. These rules, derived from customary law, are mechanisms to control social behaviour through informal or formal means. An informal process is limited to ensuring that family members or kin comply with the rules of the group,[727] whereas a formal medium comprises of the collection of methods employed by a larger group, such as a tribe or community, to ensure the behaviour of individuals or groups complies with the rules of the larger culture or society.[728]

Asiedu-Akrofi[729] contends that customary law has proved very flexible and adaptable to changes that occur within its domain. Anyangwe[730] posits that its adaptability to moving times helps it to embrace new demands. Osbourne CJ, in 1908, acknowledged this fact in the case of *Lewis v. Bankole*:[731] "[o]ne of the most striking features of West African native law and custom [...] is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character." Joireman[732] further acknowledges the flexibility of customary law and notes its similarity to common law which evolves in response to changing circumstances and customs. Such statements establish customary legal practices as a viable tool of legal aid reform which will continue to evolve through time.

According to Chanock,[733] customary law plays an important role in states with weak, corrupt, or non-existent governments. An instance was when Somalia adopted customary law as the basis for governance after the abolition of their government in 1991. In spite of the damning

[725]Fuller, L.L. (1985) 'Human interaction and the law.' In Lord Lloyd of Hampstead and M.D.A. Freeman. London, UK: Stevens and Sons. pp. 911-921.
[726]Ryan, J. (1995) 'Doing Things the Right Way: Dene Traditional Justice' In Lac La Martre, N.W.T. Dene Cultural Institute. Calgary, Alberta: University of Calgary Press and Arctic Institute of North America.
[727]Patenaude Allan L. 'Customary Law.' In Wright Richard A. Miller J. Mitchell (eds.) (2005) Encyclopaedia of Criminology, Volume 1. Routledge. pp. 363-367.
[728]Ibid.
[729]Asiedu-Akrofi Derek (1989) 'Judicial Recognition and Adoption of Customary Law in Nigeria.' The American Journal of Comparative Law, Vol. 37, No. 3, pp. 571- 593.
[730]Anyangwe, C. (1987) 'The Cameroonian Judicial System.' CEPER, Yaoundé.
[731](1908) 1 N.L.R. 81 at 100-101.
[732]Joireman, Sandra F., (2008) 'The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law.' Political Science Faculty Publications. 70.
[733]Chanock Martin, (2005) 'Customary Law, Sustainable Development and the Failing State'. In Orebach et al. (ed.), The Role of Customary Law in Sustainable Development, pp. 338-83.

reports of lawlessness broadcast by the media, Van Notten[734] describes the Somali customary system as "an elaborate indigenous law system that is basically sound, more so than even than most legal systems in the world today […] but for a few exceptions, it is structured such that it comes very close to what in philosophy might be called 'the natural order of human beings'."[735] Dun[736] describes it as a system where institutional structures of traditional societies are based on customary rather than statutory law. However, Van Notten notes significant weaknesses in the Somali customary system: for example, "laws affronting the dignity of women and impeding economic activity".[737]

A recent study in 2011 by Vargas[738] on the Somali system reiterates the role customary legal regimes play in maintaining order. The author notes that: "Somali customary law (*xeer*) represents an integral component of the Somali way of life and continues to be the preferred and most used legal system in all Somali regions, applied in up to 80–90 percent of disputes and criminal cases." It has been argued that customary law regulates the lives of about 80% of Nigerians and, as such, Nigerian courts should embrace and implement it.[739] It would be advantageous to individuals that trust indigenous legal practices if they were to have access to proceedings with which they are familiar.

In Sierra Leone, Chirayath et al. [740] state that approximately 85% of the population falls under the jurisdiction of customary law, defined under the present 1991 Constitution[741] as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone". However, despite the widespread support of customary courts as an inclusive judicial outlet by Nigerian scholars, critics of customary courts (e.g., some of the Nigerian judiciary) argue that reform is

[734]Van Notten Michael, Spencer Heath MacCallum, (ed.) (2005) 'The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa.' Red Sea Press pp. 137-138.
[735]Ibid.
[736]Frank van Dun, 'what is Kritarchy?' In Van Notten Michael, Spencer Heath MacCallum, (ed.) (2005) 'The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa.' Red Sea Press pp.187-196.
[737]Van Notten Michael, Spencer Heath MacCallum, (ed.) (2005) 'The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa.' Red Sea Press pp. 137-138.
[738]Vargas Simojoki, Maria (2011), 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia', Working Paper Series: Enhancing Legal Empowerment: Working with Customary Justice Systems: Post Conflict and Fragile States (Rome: International Development Law Organization).
[739]Olubor Joseph Otabor (Honorable Justice) Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal.
[740]Chirayath Leila, Sage Caroline and Woolcock Michael (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.' Background paper for the World Development Report 2006: Equity and Development. pp. 1-31.
[741]The Constitution of Sierra Leone (1991) Chapter XII Article 170(3).

essential. The reform will ensure that they comply with the rules and guidelines that embody the central Nigerian legal system. Recommendations include codifying customary court practices to improve the relationship between the dominant formal and supplementary informal justice mechanisms in Nigeria.

Odinkalu[742] advocates firmly for the reform of customary courts and customary law in Nigeria, and argues that, while the customary justice system "enjoys widespread legitimacy and application among the majority of Africans", somewhat contradictorily it is "inherently racial in origin, despotic in operation, and often discriminatory and unfair in outcome". Hence, the expansion of legal aid through the customary courts system continues to be examined as a matter of necessity in this chapter. Chuma[743] argues that access to judicial systems as a means of enabling the disadvantaged in society goes beyond the concept of justice but rather a process by which justice, in the real sense, can be attained. Without access to courts of expedience, there is no justice as such, customary legal practices are increasingly being identified as a potential human rights tool[744] suited to improve access to legal institutions and in all probability further the scope of legal aid provision in Nigeria. Tobin, terms it a crucial outlet to environmental security and the protection of the resources of indigenous peoples[745] due to its focus on the norms and customs of the natives.

Onyango[746] highlights the lack of extensive research on customary legal practices and contends that it is crucial to establish "research in customary legal systems in correspondence to current socio-economic changes and new challenges facing the enforced modern judicial systems […] to create [a] predictive foundation for suitable legal knowledge for the sake of best practice, constitutionalism and rule of law." Being an inferior source of law, there are questions of authority with customary practices as they are mainly unwritten and, as such, the burden of its legitimacy is placed on the person invoking it. Woodland[747] interjects that there is a universal

[742]Odinkalu Chidi 'Poor Justice or Justice for the Poor? A Framework for Reform of Customary and Informal Justice Systems in South Africa.' In Sage Caroline, Woodcock Michael (eds.) (2006) The World Bank Legal Review: Law, Equity, and Development 141.
[743]Himonga Chuma (2011) '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 Jeanmarie, Galizizi Paolo Higgins Tracy (eds.) The Future of African Customary Law p. 46.
[744]Ibid.
[745]Tobin M. B. (2011) 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights.' p. 148.
[746]Onyango Peter (2013) 'African Customary Law System: An Introduction.' p. 1.
[747]Woodman Gordon (1996) 'Legal Pluralism and the Search for Justice.' Journal of African Law Vol. 40, No. 2, p. 152.

understanding with regards to the principle of justice; however, studies are often limited to its application in Western societies. Hence, concepts developed are implemented as a formal legal instrument and not always suited to the African way of living.[748]

In Nigeria, there are various scholars calling for the reform of the customary legal system through a focused, formal implementation of customary legal practices alongside the common law system.[749] Through empirical research, this study aims to establish that the implementation of legal aid as standard practice could potentially reform and develop the customary legal system(s) in Nigeria.

5.4 Ascertaining Customary Law

Evidence to prove that a custom exists before it can be applied forms the basis of the adoption of customary law in practice. Ascertainment of customary law means custom qualifies as law,[750] while legal aid serves as a tool to guarantee equality before the law. According to Allott,[751] the courts are faced with difficulty when applying customary law partly from the multiplicity of different tribal laws. The uncertainty regarding the limits of operation of indigenous customary law in relation to English and Islamic law is partly due to the fluid nature of customary law itself; however, indigenes hold their respective customary law in high esteem and rely on its application in both civil and criminal matters.[752]

Julian[753] believes that the validity of customary law is for those that abide by it to decide. The author posits that the credibility of a custom is based on its acceptance by the people who are governed by it: "for, given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone."

[748]Ibid.
[749]Obatusin, Simisola (2018) 'Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices using Lessons from Ugandan and South African Courts.' Columbia Journal of Transnational Law, 56 (3) pp. 1-50.
[750]Hinz, Manfred O. (ed.) (2016) 'Customary Law Ascertained: The Customary Law of the Nama, Ovaherero, Ovambanderu and San Communities of Namibia.' University of Namibia Vol. 3 Press p. 8.
[751]Allott A N. (1957) 'The Judicial Ascertainment of Customary Law in British Africa.' The Modern Law Review Vol. 20 pp. 244-268.
[752]Ibid.
[753]Watson Alan (ed.) (1998) 'The digest of Justinian.' Volume 1, Book 3:32, English Language Translation University of Pennsylvania Press.

Akanki[754] reiterates the inherent complexities of customary law and states that its unwritten nature and the multiplicity of Nigerian customs have resulted in a flexible and uncertain source of law. However, the author believes that this complexity was exacerbated during the colonial era. At this time, through a similar test used to establish local custom in England,[755] customary law had to be ascertained in Nigerian formal courts; however, personnel of the courts were either British or British-trained and did not have a deep understanding of the rules of customary law. In addition, local custom in England at that time was deemed a derogation from the general law, and Nigerian custom was judged similarly.[756] Therefore Nigerian customary law was also required to undergo vetting to establish its validity.

It was later noted, however, that English local custom was in many respects different from African customary law, and the test of antiquity (in the case of England, that a custom should date from A.D. 1189)[757] for its ascertainment was eventually abandoned.[758] Allott[759] further argues against the tests for its application and the method by which its rules are ascertained, these being acquired from the English context. In effect, modern customary law became more rigid through its administration by British courts and especially native courts influenced by English legal concepts.[760]

Hence Lord Wright's statement in *Laoye v. Oyetunde*[761]: "[t]he policy of the British Government in this, and in other respects is to use for purposes of the administration of the country the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria." To resolve the matter of ascertaining customary law, the courts took the view that if it is to be viewed as law, then it must be regarded as foreign law and be proved as a fact. This test was laid down in *Hughes v. Davies*,[762] where the court held that "as native law is foreign law it must be proved as any other fact."[763]

[754]Akanki Oladeji (1970) 'Proof of Customary Law in Nigerian Courts.' Nigerian Law Journal Vol. 4 pp. 20-36.
[755]Ibid.
[756]Ibid.
[757] The English test of antiquity was applied in the Gold Coast case of Welbeck *v.* Brown (1882) Sarbah F.C.L. 186 (Gold Coast).
[758]See *Mensah v. Wiaboe* (1926) D.Ct. 1921-1926, 178 (Gold Coast).
[759]Allott A N. (1957) 'The Judicial Ascertainment of Customary Law in British Africa.' The Modern Law Review Vol. 20 pp. 244-268.
[760]Ibid.
[761](1944) A.C. 17 at p. 172.
[762](1909) Ren. 550.
[763]Ibid. Smith J. at p. 551.

5.4.1 Exceptions to the Ascertainment Rule

The unreported (Gold Coast) case of *Angu v. Attah*[764] proposed that the best approach to validate the rules of customary law is to call on "witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them". This requirement was reiterated in the Nigerian case of *Apoesho v. Chief Odole of Ilesha*[765] by Ademola CJ: "native law and custom is a question of fact and has to be proved." However, Mwalimu[766]states that proof of customary law would depend entirely on the composition of the customary court and whether the presiding judge is well versed in the custom in question.

Thus, the rule in *Angu v. Attah* was contemplated in the West African Court of Appeal (W.A.C.A) in the Gold Coast case of *Ababio II v. Nsemfoo*.[767] The court considered whether the requirement that customary law should be proved by witnesses extended to cases before the native courts where the personnel presiding over the court are well acquainted with the custom. M'Carthy J[768] of W.A.C.A held that: "[i]f the members of a Native Court are familiar with a custom it is certainly not obligatory upon it to require the custom to be proved through witnesses [.]"[769] The exemption to the *Angu v. Attah* ascertainment rule was also applied in the cases of *Ehigie v. Ehigie*[770] and *Adedibu v. Adewoyin and another*.[771] In the latter it was held that: "native law and custom is a matter of evidence and not law."[772] In *Buraimo v. Gbamgboye*,[773] the Supreme Court (now the High Court) held that it was unnecessary to bring evidence to prove particular customs which have been well established in the courts.[774] However, in the case of *Ogbero Egri v. Ededho Uperi,*[775] the Supreme Court of Nigeria criticised a High Court judge for replacing the custom in question with his own view

[764](1916) Privy Council 1874-1928, p. 43.
[765](1964) N.M.L.R. 8 at p. 11.
[766]Mwalimu Charles (2005) 'The Nigerian Legal System: Public Law.' Volume 1 p. 37.
[767](1947), 12 W.A.C.A. 127.
[768]West African Court of Appeal (1957) J.A.L Vol. 1. No. 1 Cambridge University Press p. 128.
[769]Ibid. at p. 55.
[770]Fatayi Williams, J. stated that: "Although he is required to apply the customary law of the area of jurisdiction of the court, the President [of the customary court] is not required by statute either to be a native of the area of jurisdiction of the customary court or to have any special qualification in the customary law of the area. The only statutory qualification is that he should be a legal practitioner." (1961) All N.L.R. 842, at 845.
[771](1951) 13 W.A.C.A. at 191.
[772]Ibid. at 192.
[773](1940) 15 N.L.R. at 139.
[774]Quoted in Ehigie *v.* Ehigie (1961) All N.L.R. 871.
[775](1973) N.S.C.C. 584.

of customary law, contrary to the statutory provisions that incorporates the jurisdiction of the customary courts in Nigeria.

5.5 Validating Customary Law in Nigeria

According to Asiedu-Akrofi,[776] there are presently two ways to establish the existence of a custom before the Nigerian courts: by proof and by judicial notice. These methods are contained within national statutory provision and identically worded in the various evidence enactments of individual state jurisdictions, for instance: The Customary Courts Law of Lagos State 2011;[777] the Customary Courts Law, CAP 32, Laws of Enugu State 2004 (as Amended in 2011); the Customary Courts Rules 2011; and the Federal Capital Territory (Abuja) Customary Court Act 2007.

Currently, the procedure to validate customary law is embodied in the statutory provision of the Nigeria Evidence Act 2011,[778] and applies to all judicial proceedings in or before Courts in Nigeria. Section 16 of the Nigeria Evidence Act 2011 provides the criteria required for a custom to be admissible and adopted in any court of law. "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. 16 (2): The burden of proving a custom shall lie upon the person alleging its existence." This was reflected in the case of *Osamwonyi v. Osamwoyin*,[779] where the court held that under Benin native law and custom a daughter could not be married off to another man without her consent. The decision was based on the evidence that was tendered in court. Also, in *Obele v. Iniya Obele and Others*,[780] the six obligatory requirements needed to contract a valid marriage in Eastern Nigeria according to custom were established from the evidence of the parties involved.[781]

Furthermore, Section 17 of the Nigeria Evidence Act 2011 dictates the process of validating custom by the courts: "[a] custom may be judicially noticed when it has been adjudicated upon once by a superior court of record." In the Supreme Court case of *Kimdey and Others v.*

[776]Asiedu-Akrofi Derek (1989) 'Judicial Recognition and Adoption of Customary Law in Nigeria.' The American Journal of Comparative Law, Vol. 37, No. 3 pp. 571-593.
[777]Chapter C19 Laws of Lagos.
[778]The Nigeria Evidence Act 2011 repeals the Evidence Act, Cap. E14, Laws of the Federation of Nigeria.
[779](1971) N.S.C.C. 585 at 590.
[780]Law Reports of River State of Nigeria [L.R.R.S.N.] 4 (1973) at 4-5.
[781]Mwalimu Charles (2005) 'The Nigerian Legal System: Public law.' Volume 1 pp. 137-138.

Military Governor of Gongola State and Others,[782] there were questions regarding the nature of customary law and the correct procedure to prove rules therein in order to enforce matters relating to traditional chieftaincy appointments. The Supreme Court held that: "[t]he customary law is a question of fact to be proved by evidence. There is undoubtedly evidence before the learned judge which if accepted will lead the recognition of the custom that the right to the Longuda Chieftaincy is shared between Bonsibe and Bokumbebe. The evidence which has been admitted of the donation of burial materials and the handing over of the chieftaincy are indicative of the existence of such a custom. Customary law has been described as a mirror of accepted usage […] native law and custom which the courts enforce must be 'existing native law and custom and not that of the bygone days."

The case of *Anigbogu v. Uchejigbo*[783] is the leading accepted authority on the superiority of constitutional provisions over the rules of customary law in Nigeria. The Court of Appeal stated that the fundamental rights in the Nigeria constitution were superior to customary law.[784] However, a different position was adopted by the Federal Court of Appeal in Kaduna when it sat as a Sharia Court of Appeal in *Mallam Nasi and 2 Others v. Zaida Haruna*[785] to ascertain the rules of customary law on the matter. The court affirmed the position that "proof of customary law […] is governed by customary law" by utilising Islamic law rules to discharge the burden of proof concerning property in Islamic law rather than the common law Evidence Act.[786] This case outlined that the common law principles in matters of process and procedure as well as those of witnesses are significantly varied under Islamic law.[787]

Section 18 sets out the alternative means to ascertain a custom and the limitations to its validation. "(1): Where a custom cannot be established as one judicially noticed, it shall be proved as a fact; (2): Where the existence or the nature of a custom applicable to a given case is in issue, there may be given in evidence the opinions of persons [who] would be likely to know of its existence in accordance with section 73."[788] Section 18 (3) reaffirms the

[782](1988) 1 N.S.C.R. 827.
[783](2002) 10 N.W.L.R. 472.
[784]Ibid.
[785](2002) 3 N.W.L.R. 240.
[786]Mwalimu Charles (2005) 'The Nigerian Legal System: Public law.' Volume 1 pp. 145-149.
[787]Ibid.
[788]Nigeria Evidence Act 2011 s. 73 (1):" When the court has to form an opinion as to the existence of any general custom or right. The opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed are admissible. (2) The expression "general custom or right" includes customs or rights common to any considerable class of persons."

repugnancy clause: "[i]n any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience."

5.6 Customary Court System in Nigeria

Section 17 (2) (e) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), "in furtherance of the social order, provides for the independence, impartiality and integrity of the Courts of law and easy accessibility thereto[.]"[789] Thus, the legal basis for the exercise of judicial powers in Nigeria is derived from the Constitution of 1999. Section 6 of the CFRN 1999 classifies courts according to superiority of powers to maintain certainty and consistency in the overall judicial process.[790] Section 6 (1) states that: "[t]he judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation." Section 6 (2) affirms that: "[t]he judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.

Section 6 (3), CFRN 1999, expresses the hierarchy of courts in Nigeria: "[t]he courts to which this section relates, established by this Constitution for the Federation and for the States, specified in subsection (5) (a) to (i)[791] of this section, shall be the only superior courts of record in Nigeria; and save as otherwise prescribed by the National Assembly or by the House of Assembly of a State, each court shall have all the powers of a superior court of record."

Section 6 (5) (k), CFRN 1999, makes provision for individual States, through their Houses of Assembly, to establish customary courts, defined as: "such other court as may be authorised

[789]Section 17 (2) (e) Constitution of the Federal Republic of Nigeria (CFRN), 1999.
[790]Nwocha M.E. (2017) 'An Appraisal of Judicial Powers under the Nigerian Constitution.' International Journal of Humanities and Social Science Invention Volume 6 Issue 10 pp. 15-21.
[791]Section 6 (5) 1999 CFRN relates to:
(a) the Supreme Court of Nigeria;
(b) the Court of Appeal;
(c) the Federal High Court;
(d) the High Court of the Federal Capital Territory, Abuja;
(e) a High Court of a State
(f) the Sharia Court of Appeal of the Federal Capital Territory, Abuja;
(g) a Sharia Court of Appeal of a State;
(h) the Customary Court of Appeal of the Federal Capital Territory, Abuja;
(i) a Customary Court of Appeal of a State.

by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws." In addition, Article 29 (7) of the African Charter on Human and Peoples' Rights (Banjul Charter) acknowledges the importance of the preservation of cultural values as the core component to reinforce moral ethics and regulate social life. The article directs individuals "[t]o preserve and strengthen positive African cultural values in [their] relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society[.]"

5.6.1 Customary Courts in Practice

Currently, customary courts in Nigeria are divided into superior courts and courts with jurisdiction subordinate to the High Courts.[792] According to Idem,[793] Area and Customary Courts are courts established by individual state governments via their respective local government council[794] to exercise summary jurisdiction over native persons only; they are to apply native law and custom that is predominant within their judicial districts in both civil and criminal matters. However, punishments imposed should not be "repugnant to natural justice, equity and good conscience."[795]

The repugnancy clause represents the superior English law in place and remains the basis by which customary practices are ascertained. Section 21 of the CFRN 1999 holds that: "[t]he state shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter." In *Iaoye v. Oyetunde*,[796] Lord Wright opined that the repugnancy test is used to invalidate barbarous customs. For instance, in the case of *Mariyama v. Sadiku Ejo*,[797] the *Igbirra* custom that states that a child born 10 months after a couple has divorced belonged to the divorced husband was declared repugnant on appeal by the High Court. However, Idem[798] posits that the public prefer

[792]Oba Abdulmunini A. (2011) 'Religious and Legal Pluralism in Nigeria', Emory International Law Review Vol. 25 Issue 2 p. 889.
[793]Idem Udosen Jacob (2017) 'The Judiciary and the Role of Customary Courts in Nigeria', Global Journal of Politics and Law Research Vol. 5, No. 6 p. 35.
[794]Nwogugu E.I. (2014) 'Family Law in Nigeria', Third Edition HEBN Publishers p. 140.
[795]Idem Udosen Jacob (2017) 'The Judiciary and the Role of Customary Courts in Nigeria', Global Journal of Politics and Law Research Vol. 5, No. 6 p. 35.
[796](1994) AC 170.
[797](1961) NRNLR 81-83.
[798]Idem Udosen Jacob (2017) 'The Judiciary and the Role of Customary Courts in Nigeria.' Global Journal of Politics and Law Research Vol.5, No. 6 p. 35.

having their matters heard and determined in a Customary or Area Court because they are located nearby and, hence, easily accessible. The procedures are also simpler and court costs are cheaper than a common law court.

According to AjaNwachuku,[799] "a customary court can still call for oral evidence to establish a rule of customary law, while a magistrate court or district court that has taken judicial notice of the existence of a rule of customary law, can apply it, without asking that it be established by evidence." This is in line with Section 122 (1) of the Evidence Act 2011 of Nigeria, which states that: "no fact of which the court shall take judicial notice […] needs to be proved." However, in the Supreme Court case of *Oguanuhu & Ors v. Chiegboka*,[800] questions regarding whether customary courts had to adhere to the strict rules of the Evidence Act were observed. It was held that: "[s]trict rules of pleadings and application of provisions of the Evidence Act are not observed in those Customary or Native Courts. Their decisions however must be based on common sense and reasonableness of their findings."[801]

5.6.2 Jurisdiction of Customary Courts in Nigeria

According to Nwogugu,[802] customary courts administer the customary law that is applicable to the area where the court and the parties to the litigation are located. In the Northern part of Nigeria, customary law is infused with the Moslem law of each region.[803] Also referred to as indigenous courts, Customary Courts, Area Courts and Sharia Courts are established by the State Houses of Assembly and are deemed inferior courts, but still hold part authority over customary law jurisdictions. However, according to Section 6 (5) (f) to (i) of the 1999 Nigerian Constitution, the Sharia court of Appeal and the Customary Court of Appeal are considered superior courts. There are currently three types of indigenous courts in Nigeria, namely: Area Courts, Sharia Courts and Customary Courts:

[799]AjaNwachuku, Michael Akpa (2015) 'Determination of Paternity of the Nigerian Child – The Law: Past, Present and Future.' Research on Humanities and Social Sciences Vol. 5, No. 24 pp. 181-188.
[800](2013) vol 221 LRCN (Pt 2) 117.
[801]Ibid.
[802]Nwogugu E.I. (2014) 'Family Law in Nigeria.' Third Edition HEBN Publishers p. 140.
[803]Ibid.

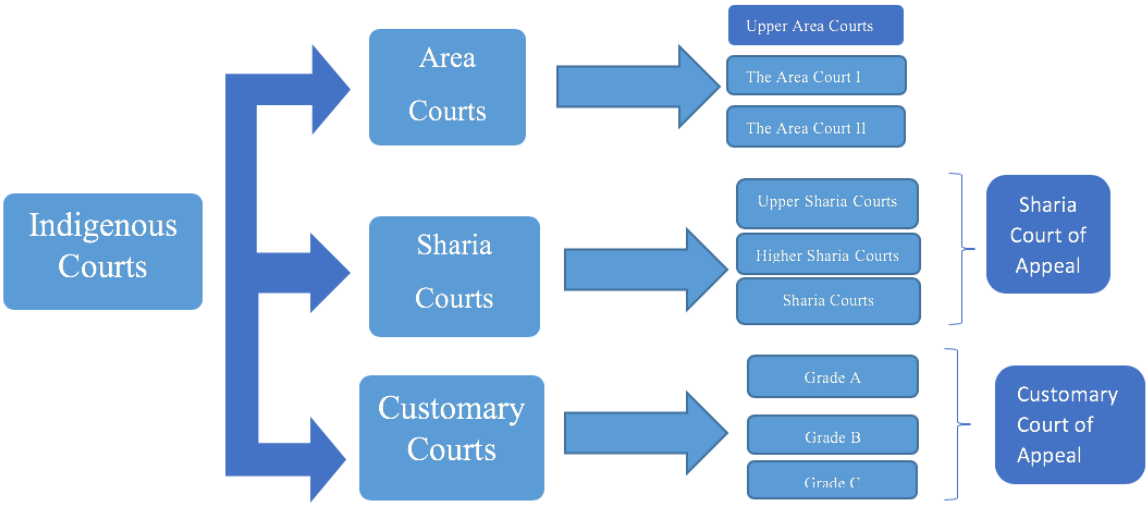

Figure 5.1 - Indigenous Courts of Nigeria

Area Courts are prevalent in the Northern part of Nigeria, including the Federal Capital territory (Abuja). They are made up of:

1). Upper Area courts

2). The Area court I

3). The Area court II

The Jurisdiction of the Area Courts include:

A). All questions of Islamic personal law.

b). Matrimonial Causes & Matters between persons married under customary law.

c). Suits relating to custody of children under customary law.

d). Civil actions involving debt demands and damages.

e). Matters relating to succession to property and the Administration of Estates under customary law. Appeal goes to the customary court of Appeal.[804]

Sharia Courts are a feature of the judicial system of the Northern States of Nigeria (e.g., in Zamfara State). The court is divided into 3 grades:

[804]Nwagbara Chigozie (2014) 'The Nature, Types and Jurisdiction of Customary Courts in The Nigeria Legal System.' Journal of Law, Policy and Globalization Vol. 25 pp. 5-6.

1). Upper Sharia court

2). Higher Sharia court

3). Sharia court.

The jurisdiction of the Sharia court relates to civil proceedings in Islamic law in respect of the rights, power, duty, liability, privilege, interest, obligation or claim in issue. Appeals from listed courts go to the Sharia Court of Appeal.[805]

The Sharia Court of Appeal was established by Section 275 of the CFRN 1999 for any 'state' that requires it.[806] In the FCT, the establishment of this court was made mandatory under Section 260, 1999 Constitution; s. 3, Sharia Court of Appeal Act, which establishes the **Sharia Court of Appeal of the Federal Capital Territory (Abuja)**. According to s. 260 (2) (a) (b), it must consist of:

(a) A Grand Kadi of the Sharia Court of Appeal; and

(b) Such number of Kadis of the Sharia Court of Appeal as may be prescribed by an Act of the National Assembly.

The main purpose of the FCT Sharia Court of Appeal is to determine questions of Islamic law and its jurisdiction,[807] as outlined in Section 262 of the 1999 Constitution. According to s. 263 of the CFRN 1999; s. 4 of the Sharia Court of Appeal Act: "[f]or the purpose of exercising any jurisdiction conferred upon it by the 1999 Constitution or any Act of the National Assembly, the Sharia Court of Appeal shall be duly constituted if it consists of at least three Kadis of the Court." Section 264, 1999 Constitution; s. 4 of the Sharia Court of Appeal Act states that: "[s]ubject to the provisions of any Act of the National Assembly, the Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja may make rules for regulating the practice and procedure of the Sharia Court of Appeal of the Federal Capital Territory, Abuja."

Customary Courts were established by the Customary Court Laws of the States of Southern Nigeria as an alternative to the Area Courts in the North. However, Customary Courts continue to exist in the Northern part of Nigeria. [808] Customary Courts in general have jurisdiction over

[805]Ibid.
[806]See s. 275-279 of the 1999 Constitution of Nigeria for Sharia Court of Appeal of a State.
[807]See s. 9-13 of the Sharia Court of Appeal Act.
[808]Nwagbara Chigozie (2014) 'The Nature, Types and Jurisdiction of Customary Courts in The Nigeria Legal System.' Journal of Law, Policy and Globalization Vol. 25 pp. 5-6.

individuals that are subject to the customary law prevailing in the area they reside; however, this may vary due to the diverse mix of cultures in Nigeria. There is also a hierarchy according to their varying powers of punishment and subject-matter jurisdiction, with "A" courts having the greatest powers:

1) Grade A Customary Court

2) Grade B Customary Court

3) Grade C Customary Court

Grade A customary courts are presided over by legal practitioners; some grade B courts are directed by the Commissioner for Justice to be presided over by legal practitioners; and the remaining Grade B and Grade C courts are managed by non-legal personnel.[809]

The Customary Court of Appeal was established by the 1999 Constitution under s. 280 for any 'state' of the Federation that requires it;[810] but, again, this court is mandatory for the **Federal Capital Territory, Abuja**, to determine questions of customary law via s. 265 (1) of the 1999 Constitution: "[t]here shall be a Customary Court of Appeal of the Federal Capital Territory, Abuja." The Court consists of a President of Customary Court of Appeal and a number of other judges of the court as may be prescribed by the House of Assembly.[811] In the case of state jurisdiction, the President and Judges of the Customary Court of Appeal of a state are appointed by the State Governor on the recommendation of the National Judicial Council, subject to the confirmation by the State House of Assembly.[812] Thus, under Section 267 of the 1999 Constitution: "[t]he Customary Court of Appeal of the Federal Capital Territory, Abuja shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the national Assembly[,] exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law."[813] Under s. 268, "for the purpose of exercising any jurisdiction […] the Customary Court of Appeal [of the FCT] shall be duly constituted if it consists of at least three Judges of that court."[814] As for other states, according to s. 282, they have no affirmed jurisdiction, but also "have both appellate and supervisory jurisdiction in civil

[809]Ibid.
[810]See s. 280-284 of the 1999 Constitution of Nigeria.
[811]See s. 265 (2) (a)(b) of the 1999 Constitution of Nigeria.
[812]See s. 281 (1) of the 1999 Constitution of Nigeria.
[813]See s. 267 of the 1999 Constitution of Nigeria.
[814]See s. 268 of the 1999 Constitution of Nigeria.

proceedings involving questions of Customary law […] as may be prescribed by the House of Assembly of the state[.]"[815]

In addition, Sections 269 and 284 of the 1999 Constitution empower the President of the Customary Court of Appeal of any state, including the FCT, to make rules for regulating the practice and procedure of their respective courts.

5.6.3 Customary Jurisdiction on Criminal Matters

Customary/Area courts are created by statute which states the offences that are within their jurisdiction.[816] Apart from capital offences, customary courts have the jurisdiction to hear and determine all the offences contained within the criminal code. However, they are subject to specific limitations when imposing punishment according to their individual customary court directives. For instance, the 2000 Customary Courts Law, Cap. 40, Vol. 2 Laws of Akwa Ibom State dictates: the jurisdiction of customary courts,[817] the venue of the court to determine criminal cases,[818] the scope of offences that can be heard and determined[819] and the provision of punishment.[820] On the other hand, in Lagos State, customary courts are not allowed to hear or determine certain criminal offences.[821] Hence, criminal matters are not well represented in general across Nigeria in customary courts. This may be due to the complex nature of criminal matters and the limited sentencing powers of the judges, especially if the matter were to induce a custodial sentence or that appropriate punishment dictated by customary law may not be adequate. There is no clear indication of why they are not well represented however, the scope of jurisdiction on criminal matters will vary from state to state, based on these factors.

[815]See s. 282 of the 1999 Constitution of Nigeria.
[816]Idem Udosen Jacob (2017) 'The Judiciary and the Role of Customary Courts in Nigeria.' Global Journal of Politics and Law Research Vol. 5, No. 6 pp. 36-38.
[817]See s. 1 of the First Schedule Customary Courts Law, Cap. 40 Vol. 2 Laws of Akwa Ibom State, Nigeria 2000.
[818]See s. 8(1) ibid.
[819]See s. 55 ibid. Offences such as assault, obstruction, and molestation.
[820]See s.7 (2) ibid.
[821]See s. 1 (2) Customary Court Law of 1994, Laws of Lagos State, Nigeria. Capital offences such as homicide, treason, sedition, rape, defilement of girls and offences relating to official secrets.

5.6.4 Customary Jurisdiction on Civil Matters

Currently, all Customary/Area Courts in Nigeria[822] have unlimited jurisdiction to administer the civil law prevailing in their jurisdiction,[823] as long as it is not repugnant to natural justice, equity and good conscience, or incompatible with any written law in force or contrary to public policy.[824] However, the scope of authority varies from state to state. According to Obilade,[825] since the first statutory native courts were established by the British, there has been a clear understanding that the matters governed by customary law were better served by customary courts, and efforts were made to ensure that customary courts maintained original civil jurisdiction over such matters.

For instance, jurisdiction on land matters was clarified in the case of *Samson Erhaboe v. Godwin Onaghise*.[826] In this case, the Edo State Customary Court of Appeal held that Section 20 (1) of the Bendel State Customary Court Edict 1984 (which is also applicable to Edo State) gives unlimited jurisdiction to area and district customary courts on matters relating to land in rural areas. As such, the Ugboko-Niro District Customary Court was deemed to have jurisdiction, as the land in question was in a village governed by the customary right of occupancy.[827]

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[822]See s. 6(1) First Schedules of Rivers State Customary Courts Law, 2014;
S. 20 (1) Areas Courts Law, Cap. 10 Laws of Kaduna State Nigeria 1990;
S. 15 (1) (a) Customary Courts Law, Cap. 32 Laws of Enugu State Nigeria 2004;
S. 12 Customary Courts Laws of Anambra State Nigeria 2010;
Customary Courts Law, Cap 21. Laws of Cross Rivers State Nigeria;
Customary Court Law of 1994, Laws of Lagos State, Nigeria. Quoted in Nwogugu, E.I. (2014) Family Law in Nigeria: Third Edition HEBN Publishers pp. 139-140; Adangor Z., Kingston Kato Gogo (2018) Composition of Customary Courts in Rivers State of Nigeria: A Case for Appointment of Chiefs as Members Journal of Law and Judicial System Volume 1, Issue 3, 2018, pp. 82-95 and HON. Justice Chukwurah C.E. An overview of the jurisdiction of Area/Customary Courts pp. 1-12.
http://nji.gov.ng/images/Workshop_Papers/2017/Area_Sharia_Customary_Judges/s2.pdf (accessed 04/04/2019).

[823]For instance, the Customary Courts Laws 2001, Kaduna State grants unlimited jurisdiction on land, matrimonial, guardianship and custody of children, inheritance upon intestacy and other causes or matters under customary law.

[824]Nwogugu, E.I. (2014) 'Family Law in Nigeria.' Third Edition HEBN Publishers pp. 139-140.

[825]Obilade Akintunde (1973) 'Customary Law Jurisdiction in Nigeria: A Critical Examination.' J.A.L Vol. 17 No. 2 pp. 227-239.

[826]See Appeal No CCA/20A/95 18th April 1996 (unreported) In. Idem Udosen Jacob (2017) The Judiciary and the Role of Customary Courts in Nigeria Global Journal of Politics and Law Research Vol. 5, No. 6 pp. 39-40.

[827]Ibid.

5.7 Customary Courts and the Concept of Legal Pluralism in Nigeria

Every society requires an effective legal framework. However, it is essential to appreciate the social and cultural specificity of each distinct context. The customary courts of any country are unique legal systems because their validity is derived from within their own borders. The Nigerian legal framework is peculiar, however, because it comprises of more than one functional legal system operating in parallel, over vast, and diverse geographical areas. This thesis contends that introducing legal aid into these already established and recognised Nigerian legal systems would guarantee that all individuals that require free legal assistance have access to it in their various jurisdictions.

Chirayath et al.[828] posit that many judicial sectors in developing countries are based on institutional transplants of legal codes of developed countries.[829] The current common law system in Nigeria obtains its legitimacy from the British common law system. It was introduced during colonialism and persevered post-independence. Hence, the local, pre-existing judicial system was and to a certain extent still is largely disregarded. Ubink and Rooij[830] argue that legal systems are not acquired solely from tradition, formal juridical norms, and the practice of law. The authors contend that culture, economics, and the political structure of a country also play a pivotal role in moulding its legal system. Hence, the divergent structure of the customary legal system in Nigeria.

5.7.1 Legal Pluralism

Legal pluralism is a concept that describes the existence of more than one legal order within a social field[831] (defined as a single political unit governed by its own distinct rules).[832] Legal pluralism is prevalent in many African legal systems[833] due to colonialism, which imposed a

[828]Chirayath Leila, Sage Caroline, Woolcock Michael (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.' Washington, DC: World Bank p. 1.
[829]Ibid.
[830]Ubink Janine, Rooij Benjamin van 'Towards Customary Legal Empowerment: An Introduction.' In Ubink Janine McInerney Thomas (eds.) (2011) 'Customary Justice: Perspectives on Legal Empowerment.' Chapter 1 pp. 7-27.
[831]John Griffiths (1986) 'what is Legal Pluralism?' The Journal of Legal Pluralism and Unofficial Law Vol. 18, Issue 24 p. 1.
[832]Mathieu Hilgers, Eric Mangez (eds.) (2015) 'Bourdieu's Theory of Social Fields Concepts and Applications.' p. 5.
[833]The Library of Congress (2016) Legal Research Guide: Customary Law in Africa. https://www.loc.gov/law/help/africa-customary-law.php (accessed 09/03/2019).

foreign legal framework. Having more than one legal structure in a society systematically divides the legal system, the people, and the government on the matter of justice. According to Woodman,[834] legal pluralism in Africa is a consequence of the British colonial indirect rule, which was an institutional device that required a form of legal pluralism to operate, especially in the vast African nations. Consequently, social structures of many indigenous peoples were faced with radical changes, putting African customary law under strain.[835]

A study in 1926 by Bronislaw Malinowski identified a "rich variety of social control, social pressure, custom, customary law, and judicial procedure within small-scale societies, [such that] anthropologists gradually realize[d] that colonized peoples had both indigenous law and European law".[836] Nigeria consists of multifarious ethnic groups and tribes, all with distinct cultures and customs. After the amalgamation of Nigeria in 1914 by the British, all indigenous groups became subject to a single governmental entity (Nigeria) and, as a consequence, relations among the disparate ethnic nationalities were re-defined. In every society, judicial institutions are fundamental and established as soon as a society is formulated. Studies on informal legal systems show that incorporating traditional legal practices into formal systems accommodates different religious and ethnic traditions within a single jurisdiction.[837]

Presently, the Nigerian legal system is pluralistic and derived from the common law system, based on the English colonial legal system, and the indigenous customary judicial system, which comprises of Islamic law and customary law. In pluralistic systems, such as that of Nigeria, the application of customary law presents the question of how it is to be established, given that it is unwritten, informal, and diverse.[838] Ehrlich[839] adopts the concept of 'living law' to describe how collective norms, in addition to legal order, determine behaviour, rights and obligations. According to Fisher et al.,[840] "there is surely no better example of living law than the customary law of tribal communities; and when tribal custom is given some formal degree

[834]Woodman Gordon (1996) 'Legal Pluralism and the Search for Justice.' Journal of African Law Vol. 40, No. 2, p. 152.
[835]Ibid.
[836]Merry, S. E. (1988) 'Legal Pluralism.' Law & Society Review, 22 (5), pp. 869-896.
[837] Ibid.
[838]The Library of Congress (2016) 'Legal Research Guide: Customary Law in Africa.' https://www.loc.gov/law/help/africa-customary-law.php (accessed 09/03/2019).
[839]Ehrlich Eugen, (1936) 'Fundamental Principles of the Sociology of Law.' Cambridge, MA: Harvard University Press.
[840]Fisher W., Horwitz M. and Reed T. (eds.), (1993) 'American Legal Realism.' New York: Oxford University Press.

of recognition […] then its development, while formalized to an extent, remains very much within the descriptive framework of legal realism."

5.7.2 Drawbacks of Legal Pluralism for Customary Legal Practices

According to Woodman,[841] the main concern regarding the concept of legal pluralism is that it is detrimental to the rule of law, which is fundamental to securing justice. It is sometimes suggested that many officials and private citizens may purposely ignore the norms of state law in favour of an un-codified customary law. This is because customary law may provide more leeway or is silent on certain matters that are regarded as corrupt and illegal under national law, such as engaging in acts of favouritism and ethnic patronage.[842] In addition, legal pluralism undermines the principle of equality before the law, which is another crucial feature to the administration of justice. This problem is caused by the various interpretations of the same customary norms and laws by different individuals.[843]

According to Ndulo,[844] legal pluralities can often act as an obstacle to human rights directives, especially on the matter of women's rights. This is often the case because customary law, and in many cases religious forums, rely on traditional norms that may be discriminatory to women on marriage, inheritance, and traditional authority issues**.** A recent judgement in Nigeria[845] reviewed the right of a female child to inherit under Igbo customary law. The exclusion of women from inheritance rights was scrutinised and quashed by the Supreme Court to reform a customary practice that was deemed archaic and discriminatory.[846] This kind of ruling becomes more common, particularly as human rights and the rights of women become more pronounced and protected under international and national legal frameworks. This case and many other customary law-based cases reiterate one of the most persistent and perhaps unmanageable problems of legal pluralism: that is, the difficulty of unifying the legal process.[847] However,

[841]Woodman Gordon (1996) 'Legal Pluralism and the Search for Justice.' Journal of African Law Vol. 40, No. 2, pp. 156-160.
[842]Ibid.
[843]Ibid.
[844]Ndulo Muna B (2017) 'Legal Pluralism, Customary Law and Women's Rights.' Southern African Public Law Vol. 32, No. 1&2 pp. 1-21.
[845]*Ukeje v. Ukeje* Suit No. SC.224/2004 (2014).
[846]Ndulo Muna B (2017) 'Legal Pluralism, Customary Law and Women's Rights.' Southern African Public Law Vol 32, No. 1&2 pp. 1-21.
[847]Ibid.

Woodman[848] states that there is empirical evidence to show that the content of customary law in Africa has changed significantly in land rights and inheritance matters. The author believes the change is due to the increased incorporation of African communities into national and international economies, political communities, and societies.[849] Swenson[850]contends that legal pluralism, which thrives in many developing countries, has vast policy and governance implications. Albrecht and Kyed[851] state that an estimated 80 to 90 per cent of disputes are handled outside the state judicial system. Thus, according to Sheleff,[852] customary law comes to exemplify tendencies that exist in all forms of law, in other words, intrinsic aspects of the very essence of law.

5.8 Customary Justice and Custom in Nigeria

In Nigeria, customary law is not managed by a single legal order. It is mainly unwritten (except for Islamic Law) and comprises of an array of norms and traditions, which are further broken down by the country's ethnic heterogeneity into diverse, individual state jurisdictions. Hence, customary law in Nigeria arises from a combination of complex traditions, norms, concepts, and legal principles that are deeply rooted and derived from each distinct tribe. Keeton[853] defines customary law as: "those rules of human action established by usage and regarded as legally binding to those to whom the rules are applicable, which are adopted by the courts and applied as sources of law, because they are generally followed by the political society, or by some part of it."

According to Woodman,[854] customary legal systems are an authentic form of law that has been subject over time to legal development through radical change and reform. The author argues that the term customary does not indicate that traditional laws remain unchanged through

[848]Woodman G.R. 'A Survey of Customary Laws in Africa in Search of Lessons for the Future.' In Fenrich Jeanmarie, Galizzi Paolo and Higgins Tracy E. (eds.) The Future of African Customary Law (2011) Cambridge University Press p. 16.
[849]Ibid.
[850]Swenson, Geoffrey (2018) 'Legal Pluralism in Theory and Practice.' International Studies Review, Vol. 20 Issue 2. p. 342.
[851]Albrecht Peter and Kyed Helena Maria (2010) 'Justice and Security: When the State Isn't the Main Provider.' Copenhagen: Danish Institute for International Studies Policy Brief.
[852]Sheleff Leon (1999) 'The Future of Tradition: Customary Law, Common Law and Legal Pluralism.' Routledge p. 13.
[853]Keeton G.W (1930) 'The Elementary Principles of Jurisprudence.' p. 48.
[854]Woodman Gordon (1996) 'Legal Pluralism and the Search for Justice.' Journal of African Law Vol. 40, No. 2, p. 156.

generations. It continues to adapt and evolve to reflect progressive social changes. The strain brought on by the necessity of legal change under British occupation has also instigated amendments to customary law. Hence, the colonial era and the imposition of English common law contributed considerably to its growth. Nonetheless, the inception of colonialism was not the beginning of legal development in Africa.[855]

Merry[856] asserts that before colonialism and the introduction of Islam, African tribes and villages lived as independent political entities. They operated the customary law system which was passed down by ancestral generations. Amidst Islamic law, customary law was also able to thrive as both legal systems are comparable in practice, especially in civil matters such as marriage, divorce, inheritance, guardianship, and child custody.[857] However, the advent of colonialism imposed a rational and formal law that created a plurality of legal orders which consequently undermined the deeply rooted indigenous legal structure.

As the colonial era progressed and legal systems were established, "customary courts" were created to give customary law a mode of legitimacy and a measure of status. This provided the colonial powers with far-reaching control over communities through traditional chiefs, whose role was "not only to settle disputes but also to proclaim the reach of government and the values of Western civilisation".[858] For instance, before and after 1906, local government districts and sub-districts in the South-Eastern part of Nigeria were divided into native court areas which consisted of a panel of traditional chiefs. The panel met at stated times in a designated venue to adjudicate over disputes in accordance with their traditional law and customs, and in compliance with the "British sense of justice and good conscience".[859]

Native courts were given the freedom to determine cases brought before them, within their jurisdictions; however, they were closely monitored by the British officers who established a direct link between the native court system and the Supreme Court.[860] At the end of each month, cases that were heard in the native courts were brought before the Supreme Court to verify that

[855]Ibid. p. 157.
[856]Merry Sally Engle (1988) 'Legal Pluralism.' Law & Society Review, Vol. 22, No. 5 p. 869.
[857]Ibid.
[858]Bennett T A (1991) 'Sourcebook of African Customary Law of Southern Africa.' In Wicomb Wilmien, Smith Henk (2011) 'Customary Communities as 'Peoples' and their Customary Tenure as 'Culture': What we can do with the Endorois Decision.' African Human Rights Law Journal Volume 11 No. 2 p. 425.
[859]Afigbo Adiele Eberechukwu (2005) 'Nigerian History, Politics and Affairs: The Collected Essays of Adiele Afigbo.' Falola Toyin (ed.) Africa World Press Inc. p. 300.
[860]Ibid.

judgement was fair and reasonable. Based on the outcome of the native court judgment, the Supreme Court would either confirm, set aside, or vary the decision of the native court and allow a re-trial if required.[861]After independence, most African countries maintained the provincial legal framework and customary governance systems, and community rules were overruled by statutes regulating traditional leadership. According to Wicomb and Smith,[862] customary law was further downgraded to a separate legal system and was never extended to fit with colonial law; therefore, it was expunged from African Westernised Courts.

In a typical African country, the great majority of the people conduct their personal activities in accordance with customary law, whose sources are the practices and customs of the people.[863] Hence, "custom is a practice that by its common adoption and long, unvarying habit has come to have the force of law, while customary law is law consisting of customs that are accepted as legal requirements or obligatory rules of conduct. They are practices that are so vital and intrinsic a part of social and economic system that they are treated as if they were laws."[864]

Section 258 (1) (d) of the current Nigeria Evidence Act 2011[865] does not explicitly define customary law, but describes custom as "a rule, which in a particular district has for long usage obtained the force of law". In *Oyewumi v. Ogunesan*,[866] the Supreme Court meticulously defined customary law as: "[t]he living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulating in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people [.]"

In the case of *Dakur v. Dapal*,[867] the Nigerian Court of Appeal via Edozie JCA defined custom as in the above act:[868] "a rule which in particular district has for long usage obtained the force of law." In *Falowo v. Banigbe & Ors*,[869] and using the exact same wording, Adekeye JCA

[861]Ibid. p. 301.
[862]Wicomb Wilmien, Smith Henk (2011) 'Customary Communities as 'Peoples' and their Customary Tenure as 'Culture': What we can do with the Endorois Decision.' African Human Rights Law Journal Volume 11 No. 2 pp. 425-426.
[863]Ndulo Muna (2011) 'African Customary Law, Customs, and Women's Rights.' Cornell Law Faculty Publications. Paper 187 pp. 87-88.
[864]Black's Law Dictionary (2009) Garner Bryan (ed.) 10th Edition p. 443.
[865]See Section 258 (1) (d) of the Nigeria Evidence Act 2011.
[866]See *Oyewumi v. Ogunesan* (1990) 3 NWLR PT. 137 P.182 at 207.
[867](1998) 10 NWLR (PT. 571) 573 at 583 para H.
[868] See Evidence Act Chapter 112 Laws of the Federation of Nigeria 1990.
[869](2007) LPELR-11850.

defined custom according to Section 2 (1) of the Evidence Act, Cap. 112, Laws of the Federation of 1990: "a rule which in a particular district has from long usage obtained the force of law." In *Aku v. Nenku*,[870] the Court of Appeal defined customary law as: "[t]he unrecorded tradition and history of the people, practiced from the dim past and which has 'grown' with the 'growth' of the people to stability and eventually become an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or subject matter to which it relates."

Customary law, also known as living or folk law exists as a social fact and arises when members of a certain community adopt a habitual form of conduct. At this point, it becomes binding as a social obligation. In Nigeria, the customary courts of every state and local governmental province have a set of distinct laws and rules governing practice and procedure. However, they have not been thoroughly documented in extant literature as a viable outlet for the adaptation of the legal aid scheme in all parts of Nigeria.

Ibbetson[871] contends that custom as a source of law operates in two apparent ways in practice: sociologically and analytically.

1) Sociologically, the values and social practices of a society will be reflected in the legal rules. For instance, values and practices that have their historical roots in social practice which are passed down from generations and continue to remain accepted as custom and a source of law.[872]

2) As an analytical instrument, it is common for well-developed legal systems to acknowledge custom as a formal source of law alongside national legislation. However, the scope of custom as a legal system is restricted and it is only seen as a supplementary source of law. Hence, conflict may occur between national law and custom due to the inconsistency of some local practices with domestic law.[873]

Furthermore, in ascertaining customary practices, the author argues that the validity of custom as a source of law is not necessarily determined by how long it has been in existence, though

[870]See Ndoma-Egba JCA (1991) 8 NWLR PT. 209 p. 280 at 292.
[871]Ibbetson David (2008) 'Custom as a Source of Law.' In Peter Cane Joanne Conaghan (eds.) The New Oxford Companion to Law Oxford University Press p. 291.
[872]Ibid.
[873]Ibid.

this is relevant to its ratification into domestic law.[874] Thus, courts are usually willing to make provision for custom to prevail if it is considered reasonable to do so. The justification of custom is often based on its acceptability and accessibility among the people governed by it. However, being supplementary to national law, the courts have a common disposition to reject a custom if they deem it inconsistent with national law.[875]

Currently, Nigerian national law recognises customary practices as a source of law in Nigeria, but only as a low-ranking, informal authority.[876] Studies on informal legal systems show that incorporating traditional and customary legal practices into formal systems is crucial for the government to accommodate different religious or ethnic traditions in a single state.[877] Chirayath et al.[878] posit that a failure to acknowledge different systems of understanding may in itself be discriminatory and inequitable. Hence, there have been calls by various, prominent legal adjudicators in Nigeria for an increased jurisdiction of customary law through customary courts,[879] thus making them a practical platform to develop and evolve without interference from domestic law. It is believed that customary legal systems are preferable, as they are indigenous to a greater majority of the Nigerian populace.[880] Consequently, governments in Nigeria have found ways of recognising customary law through Customary Courts of Appeal, subject to the repugnancy clause. Unresolved matters of custom undergo thorough investigation to reach a judgement that is fair and just.[881]

Woodman[882] posits that, realistically, customary laws outrank state laws. However, they are unlike formal legislation, which is created by those with legislative power and is usually written

[874]Ibid.
[875]'As a matter of theory in modern English law, a custom will only be acknowledged if it has existed continuously since 1189. However, this direction based on time may be subject to discretion in the absence of clear contrary evidence.' Ibid.
[876]See s. 6 1999 CFRN.
[877]U.N.D.P, U.N Women, U.N.I.C.E.F (2012) Informal Justice Systems: Chartering a Way for Human Based Engagement p. 9.
[878]Chirayath Leila, Sage Caroline and Woolcock Michael (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.' Background paper for the World Development Report 2006: Equity and Development. pp. 1-31.
[879]HON. Justice Chukwurah C.E (Customary Court of Appeal Anambra State Nigeria) 'An Overview of the Jurisdiction of Area/Customary Courts.' p. 11.
[880]HON. Justice Makeri S. H. (President Customary Court of Appeal Kaduna State Nigeria) (2007) 'Jurisdictional Issues in the Application of Customary Law in Nigeria' a Paper Delivered at 2007 all Nigeria Judges Conference pp. 27-28.
[881]Ibid.
[882]Woodman Gordon (2008) 'Customary Law.' In Peter Cane Joanne Conaghan (eds.) The New Oxford Companion to Law Oxford University Press pp. 293-294.

and enforced accordingly. Shellef[883] contends that custom is generally regarded as one of the recognised sources of law, especially in common law, which is essentially customary practice incorporated into the law by judicial mandate. Onyango[884] justifies the study and application of African customary law in current African legal systems because it is "a means towards the end, which is that of liberty and development." Custom also provides an avenue for sound law reform in terms of constitutionalism and rule of law in the independent African States.[885]

5.9 Jurisdictional Concerns with the Application of Law in Customary Courts

According to Ubink and Van Rooij,[886] since 2000 customary justice systems have become a higher priority regarding legal development projects in the African community, which aim to provide remedies to individuals who have limited to no access to the formal legal system. However, there are concerns with respect to the application of customary law in courts on matters that are deemed discriminatory, especially towards women and children.[887] One such concern is how to ascertain native law and prove it before the higher courts as valid. According to Himonga,[888] the necessity to validate customary law has hindered formal courts from playing a constitutional role in developing customary law it: "[t]he evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of verifying the true indigenous law as practiced in the community […] abuses of indigenous law tend to distort [it] and undermine its value."[889]

Another matter for consideration is the problem of traditional leaders presiding over courts when they are not well versed in common law and human rights mandates. According to Taiwo,[890] in its original form, customary law does not recognise the modern concept of division

[883]Sheleff Leon (1999) 'The Future of Tradition: Customary Law, Common Law and Legal Pluralism.' Routledge p. 12.
[884]Onyango Peter (2013) 'African Customary Law System: An Introduction.' p. 5.
[885]Ibid. p. 6.
[886]Ubink Janine,Van Rooij Benjamin 'Towards Customary Legal Empowerment.' In Ubink Janine, McInerney Thomas (eds.) (2011) 'Customary Justice: Perspectives on Legal Empowerment Legal and Governance Reform: Lessons Learned' No. 3 pp. 7-8.
[887]Ibid.
[888]Himonga Chuma (2011) '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 Jeanmarie, Galizizi Paolo Higgins Tracy (eds.)' The Future of African Customary Law.' p. 50.
[889]Ibid.
[890]Taiwo E A. (2009) 'Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions — Some lessons for Nigeria.' Journal for Juridical Science Vol. 34(1) pp. 89-115.

or separation of powers, and customary courts are sometimes presided over by traditional chiefs and elders in the community. As such they take on the role of law givers, interpreters and executors all at the same time. Hence, contemporary concepts of presumption of innocence, burden of proof and proof beyond reasonable doubt are not well grounded and executed in customary administration of justice.[891] In *Modibo v. Adamawa Native Authority*,[892] an appeal was allowed when the appellant was sentenced to imprisonment over a personal attack on one of the elders presiding over the case. It was held that the principle that no man can be a judge in his own cause applied.

Ubink and Van Rooij[893] further posit that linking state and customary administration may improve the functioning of customary justice systems by increasing their accountability, so curtailing local power abuses and human rights violations. In Nigeria, customary courts are granted jurisdiction over both civil and criminal cases subject to any statutory restrictions (e.g., the severity of a criminal case). The procedure for both types of case is fairly similar; however, some courts are not proficient enough in the law to deal with serious criminal matters,[894] and have been duly prohibited from sitting on such matters. Advocates of customary legal practices argue that, like formal courts, customary courts serve a judicial purpose which is the resolution of legal disputes. Thus, parties to litigation are able to appeal to magistrates' courts if they are not satisfied with decision of the customary court, and from there to the High Court if necessary. However, an appeal does not automatically undermine the judicial nature of the original customary proceedings,[895] as custom still forms the basis of any decision in higher courts.

There have been frequent instances where customary courts, such as the Nigerian Shari'a trial courts, were in conflict with national legislation; for example, with regard to the individual's right to due process to preserve the principle of fairness. In the case of *Jalo Guri & Anor v. Hadejia Native Authority*,[896] a deeply rooted customary rule forbidding a defendant from

[891]Ibid. p. 96.
[892]See (1956) NRNLR 101.
[893]Ubink Janine, Van Rooij Benjamin 'Towards Customary Legal Empowerment.' In Ubink Janine, McInerney Thomas (eds.) (2011) 'Customary Justice: Perspectives on Legal Empowerment Legal and Governance Reform: Lessons Learned.' No. 3 p. 13.
[894]Ibid.
[895]South African Law Commission (1999) 'The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders.' Discussion Paper 82 Project 90 p. 12. http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 07/04/2019).
[896](1959) 4 FSC 44 at 46.

defending or exonerating himself in a *hiraba* (highway robbery) was presented. However, this rule was consequently struck down on the basis that it was unfair and repugnant to natural justice, equity, and good conscience. Punishments imposed by these courts were also considered excessively inhumane (e.g., the death penalty, amputations, and floggings), especially when a defendant's conviction is based on confessions alone.[897] In addition, some deem customary courts unfair because the operators are predominately male. During the colonial era, customary law provided a way for older men within traditional societies to reclaim some of the independence and control they lost to colonisation. Through customary legal systems, they were, and are, able to assert control over women, younger men, and children.[898] In Nigeria, customary courts are generally run by elderly men of societal standing and this imbalance is widely accepted as the norm in such legal systems. However, this practice has seen a change in recent times as new customary court judges are being appointed to replace the retired, disengaged judges of which include women in some parts of the country.[899] This change is not widely established or documented in the extant literature.

Another jurisdictional concern is the limited recognition of customary law at the federal level. According to Diala,[900] recognition is non-existent and vague, and it is unclear who actually possesses legislative capacity over customary law. For instance, s.7(5)[901] of the 1999 Nigerian Constitution restricts the powers of local government councils on matters of customary legal systems; but it also does not mention a prospective law reform or review of customary law that would assign the necessary powers. Diala[902] furthers argues that the administration of legal matters such as succession, testate or intestate, are subject to variant interpretation when applied in common law, despite the comprehensive coverage of such matters by customary rules. Hence, succession under customary law has a wider meaning and scope of application than the definition prescribed by Nigerian common law. The disparity between succession

[897]Human Rights Watch (2004) 'Political Shari'a?' Human Rights and Islamic Law in Northern Nigeria. https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria (accessed 07/04/2019).
[898]Joireman, Sandra F., (2008) 'The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and Customary law.' Political Science Faculty Publications. 70.
[899]Gordi Udeajah Umuahia (2019) Abia swears in 25 customary court judges https://guardian.ng/features/law/abia-swears-in-25-customary-court-judges/ (accessed 16/04/2021).
[900]Diala Anthony C. (2014) 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa.' AHRLJ Volume 14 No. 2 pp. 633-654.
[901]See s.1 & 2 Fourth Schedule Constitution of the Federal Republic of Nigeria 1999.
[902]Diala Anthony C. (2014) 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa.' AHRLJ Volume 14 No. 2 p. 636.

under customary versus common law, according to MJ de Waal,[903] is the lack of conferred status and obligations on the 'heir' under common law. Hence, there is a high tendency for conflict and confusion when common law interprets deeply rooted customary law rules.[904]

Many succession laws are overridden when the distribution of an estate is governed by customary law, and consequently testators' rights to dispose of their property via a will are restricted.[905] For example, in 2013 the Supreme Court upheld the principle of primogeniture contained within s. 3 (1) of the Wills Law of the old Bendel State in the case of *Uwaifo v. Uwaifo*.[906] It was held that the *Igiogbe* custom of the Bini, which gives the eldest son the right to inherit the family home, overrides a father's testamentary wishes.[907] Nonetheless, despite the challenges and conflicts that customary law exhibit in relation to the principles of fairness and equality, Harper[908] argues that the "customary justice system may be the only or most strategic entry point for enhancing access to justice".

5.10 International Human Rights Standards and Customary Legal Systems

The right to legal aid and easy access to the courts system is essentially an international human right. The principle that embodies the right to equal and fair treatment of individuals before the courts is derived from a human rights concept and extends to all legal systems. According to Chandra,[909] the principle of human rights will be rendered meaningless if an individual, who is unable to pay for the services of a lawyer, is not provided with legal aid to protect their fundamental rights and, moreover, if individuals are not able to gain access to courts of convenience.[910]

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[903]MJ de Waal (1997) 'The Social and Economic Foundations of the law of Succession.' 8 Stellenbosch Law Review pp. 159-161.
[904]Ibid.
[905] Diala Anthony C. (2014) 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa.' AHRLJ Volume 14 No. 2 p. 642
[906]*Uwaifo v. Uwaifo* (2013) Law Pavilion Electronic Law Reports 20389 (SC) per Galadima JSC.
[907]Diala Anthony C. (2014) 'Reform of the customary law of inheritance in Nigeria: Lessons from South Africa.' AHRLJ Volume 14 No. 2 p. 642.
[908]Harper Erica 'Engaging with Customary Justice Systems.' In Ubink Janine, McInerney Thomas (eds.) (2011) 'Customary Justice: Perspectives on Legal Empowerment. Legal and Governance Reform: Lessons Learned.' No. 3 p. 31.
[909]Chandra, S. (2014) 'Legal Aid as a Fundamental Human Rights.' VIDHIGYA: The Journal of Legal Awareness, 9 (1) p. 23.
[910]Ibid.

The concept of human rights emerged as a result of the decline in the law and development movement[911] as a strategy of legal pressure to challenge domestic laws and force change via international human rights mandates.[912] Human rights discourse within the domain of the customary law courts is significant as human rights standards offer the possibility of fairness in three dimensions of justice. These are the (i) structural, (ii) procedural and (iii) normative dimensions.[913] The structural dimension of justice deals with participation and accountability, with specific attention paid to the protection of groups that are not firmly represented in customary courts: for instance, women, disadvantaged individuals, and children.[914]

Procedural justice embodies the guidelines for adjudication processes, which ensure that the parties to a dispute receive equal treatment and the adjudicator overseeing the case decides solely on the basis of facts and objective rules with no bias whatsoever. Normative justice consists of substantive rules that are positioned to regulate the rights, duties, and responsibilities to safeguard the rights of vulnerable groups, such as women's rights to inherit and the rights of children who are forced to marry.[915]

According to Okoth-Ogendo,[916] when colonialism came to an end and Nigeria was preparing to align itself with the international legal community as an independent state, the 'future' of customary law in Africa was discussed in series of conferences by British legal scholars. They determined ways to "construct a viable framework for the development of legal systems in the emerging states", as they considered indigenous African customary legal systems inferior to their British colonial counterpart.[917] However, in reality, many lives across Africa continued to be regulated by customary laws, as they were they were the only legal system functioning in remote areas where state jurisdiction was limited and, in most cases, non-existent.[918]

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[911]'The late 1950's and 1960's saw a rise in modern efforts to promote legal reform as a development strategy. Initiated when former colonies became independent, the outgoing colonialists were committed to modernising developing countries' substantive laws and legal institutions.' Trebilcock, M. J., & Prado, M. M. (2014) 'Advanced Introduction to Law and Development.' Edward Elgar Publishing p. 45.
[912]Cummings, Scott L. and Trubek, Louise G., (2009) 'Globalizing Public Interest Law.' UCLA Journal of International Law and Foreign Affairs, Vol. 13 pp. 11-12.
[913]U.N.D.P, U.N Women, U.N.I.C.E.F (2012) 'Study on Informal Justice System: Chartering a Way for Human Based Engagement.' p. 11.
[914]Ibid.
[915]Ibid.
[916]Okoth-Ogendo HWO (2008) 'The Nature of Land Rights under Indigenous Law in Africa' In Claassens A. & Cousins B. (eds.) Land, Power and Custom (2008) p. 9.
[917]Ibid.
[918]Fenrich Jeanmarie, Galizzi Paolo and Higgins Tracy E. (eds.) (2011) 'The Future of African Customary Law' Cambridge University Press p. 1.

Obatusin[919] contends that, regardless of the international human rights treaties signed by the Nigerian government to advance human rights principles, the majority of Africans are denied access to such norms and, as such, these rights fail to have any impact in places where customary law is predominantly utilised. Nonetheless, the customary courts system may serve as a mechanism to advance human rights mandates in Nigeria by employing 'human rights-compatible principles' inherent in customary law. Tarimo[920] believes that integration can be achieved if human rights principles are more relatable to Africans in their application.

Obatusin[921] further argues that the tension between international human rights norms and customary practices are predominantly perceptible in matters that are centred on women. The treatment of women under customary practices has received much attention in international human rights law, especially oppressive and unequal practices.[922] Unfair rules that are detrimental to the rights of women in Nigeria (e.g., child marriage, female circumcision, polygamy and divorce, child custody and inheritance) have continued as custom over time but are slowly being reformed to strike a balance between customary law and international human rights mandates.[923]

According to Chirayath et al.,[924] customary legal systems are constantly shifting and changing, and are being reinvented within the confines of their respective social structures. Thus, they are potential mechanisms for social change and legal aid reform. Tobin[925] argues that customary law is still immensely important because it is an integral component of common law and has survived through centuries. The author further posits that the recognition of customary legal regimes is forcing legislators at both national and international levels to examine the

[919]Obatusin Simisola (2018) 'Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices using Lessons from Ugandan and South African Courts.' Columbia Journal of Transnational Law, 56 (3) pp. 1-49.
[920]Tarimo Aquiline (2004) 'Human Rights, Cultural Differences and the Church in Africa.' II Morogoro, Tanzania: Salvatorianum.
[921]Obatusin, Simisola (2018) 'Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices using Lessons from Ugandan and South African Courts.' Columbia Journal of Transnational Law, 56 (3) pp. 1-49.
[922]Ibid.
[923]Ibid.
[924]Chirayath Leila, Sage Caroline and Woolcock Michael (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.' Background paper for the World Development Report 2006: Equity and Development pp. 1-31.
[925]Tobin, Brendan M. (2011) 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights.' p. 119.

underlying principles of law as it relates to socio-economic, environmental, cultural, and political matters.[926]

5.10.1 Preservation of Customary Legal practices via International Instruments in Nigeria

According to Tauli-Corpuz,[927] the maintenance and preservation of customary legal institutions and norms is crucial to self-governance and self-determination. This is acknowledged under international human rights instruments as essential to guarantee indigenous peoples' access to justice. The International Labour Organization (ILO)[928] was the first multilateral body which adopted a Convention addressing indigenous peoples[929] in 1957.[930] Nigeria became a member in 1960; however, in 1989, the 1957 convention was revised, and the Indigenous and Tribal Peoples Convention of 1989 was adopted.[931] It is also known as the ILO-convention 169. The main objective of the 1989 convention was to enhance social protection and uphold the rights of independent states, [932] as well as to enable "indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions[.]"[933] Articles 1 and 2 establish a state obligation to safeguard custom and its respective institutions:

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[926]Ibid.

[927]'Human rights, Indigenous Jurisdiction and Access to Justice: Towards Intercultural Dialogue and Respect.' Presentation by Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous peoples for the International Seminar on Investigative Techniques and Indigenous Issues Bogotá, Colombia, February 24, 2016.

[928]International Labour Organization https://www.ilo.org/global/lang--en/index.htm (accessed 18/03/19).

[929]Tauli-Corpuz Victoria 'How the UN Declaration on the Rights of Indigenous Peoples got Adopted.' http://www.tebtebba.org/index.php/all-resources/category/20-un-declaration-on-the-rights-of-indigenous-peoples?download=333:how-the-un-declaration-on-the-rights-of-indigenous-peoples-got-adopted (accessed 18/03/19).

[930]International Labour Organization Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries which was adopted in June 26, 1957.

[931]International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No.169). https://www.ilo.org/Search5/search.do?sitelang=en&locale=en_EN&consumercode=ILOHQ_STELLENT_PUBLIC&searchWhat=ILO+Indigenous+and+Tribal+Peoples+Convention%2C+1989+%28No.+169%29&searchLanguage=en (accessed 18/03/19).

[932]Tauli-Corpuz Victoria 'How the UN Declaration on the Rights of Indigenous Peoples got Adopted.'

[933]See The Right to Take Part in Cultural Life - Comments Submitted by the International Labour Organisation, Day of General Discussion – 'Right to Take Part in Cultural Life' (Article 15(1)(a) of the Covenant), (UN Doc. E/C.12/40/12), 9 May 2008, para. 2(1) p. 3. https://www2.ohchr.org/english/bodies/cescr/docs/discussion/ILO.pdf (accessed 20/03/2019).

(1) Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

(2) Such action shall include measures for: […] (b) promoting the full realisation of the social, economic, and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.

Article 4 contains further instructions to governments to ensure the mandates of the convention are fulfilled: "(1) Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned." Article 5 reiterates the objectives of the convention in relation to social, cultural, religious, and spiritual practices and their institutions: "(b) The integrity of the values, practices and institutions of these peoples shall be respected."

Article 8 of the 1989 convention guarantees the protection of customary institutions, as long as they are not incompatible with the national legal system and international human rights:

(1) In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

(2) These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Article 9 extends the scope of customary practices via international law to include methods of punishment in the framework of customary legal systems:

(1) To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

(2) The customs of these peoples regarding penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Under international law, a ratified convention is a binding agreement between nations. However, according to s. 12 (1) of the 1999 Nigerian constitution,[934] an international convention assumes the force of law under Nigerian national law only when it is enacted by the National Assembly. Hence, Article 22 of the African Charter on Human and Peoples' Rights (ACHPR) (Banjul Charter)[935] states that: "(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." Article 22 (2) place obligations on states to ensure that 22 (1) is fulfilled: "States shall have the duty, individually or collectively, to ensure the exercise of the right to development." Cultural development was not explicitly defined in the Banjul Charter; however, according to Murray and Wheatley,[936] culture in this context represents the way people address aspects of their social life through intrinsic cultural practices.

However, despite the widespread existence of traditional and customary law in African countries such as Nigeria, Chirayath et al.[937] contend that customary systems went through a period where they were almost completely neglected by the international development community.[938] Customary practices were deemed archaic and rigid, and in terms of reform they are considered too complex due to their diverse nature.[939] Subsequently, in 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[940] was adopted to oversee the protection of indigenous peoples worldwide. Article 34[941] of this 2007 declaration also affirms fundamental rights and international support for indigenous groups. However, Nigeria

[934]Section 12 (1)" No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly."
[935]'The Banjul Charter has been ratified and domesticated as law by National assembly in Nigeria.'
[936]Murray Rachel and Wheatley Steven (2003) 'Groups and the African Charter on Human and Peoples' Rights.' Human Rights Quarterly, Vol. 25, No. 1 pp. 213-236.
[937]Chirayath Leila, Sage Caroline and Woolcock Michael (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems'. Background paper for the World Development Report 2006: Equity and Development. pp. 1-31.
[938]For instance, "the World Bank has dramatically increased its efforts in promoting justice sector reform in client countries, yet none of these projects deal explicitly with traditional legal systems, despite their predominance in many of the countries involved." Ibid. p. 3.
[939]Ibid.
[940]See 61/295. United Nations Declaration on the Rights of Indigenous Peoples https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement (accessed 20/03/19).
[941]"Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

refrained from ratifying this declaration due to concerns about its implications for the rights of its multiple indigenous populations.[942]

The Banjul Charter, which has been ratified and domesticated as law by the National Assembly, has the same force of law as Nigerian statutes. The ILO convention 169 has also been ratified, but it has not been domesticated as law in Nigeria according to Section 12 (1) of the 1999 Nigeria constitution. As such, the ILO convention 169 is not legally enforceable unless further mechanisms are enacted via national legislation to ensure that customary systems are preserved. Such mechanisms have been established for other international agreements, for example to guarantee the directives of the ILO Convention 29 of 1930 on the elimination of forced or compulsory labour in Nigeria. National legislation was enacted by way of Section 73 of the Nigerian Labour Code,[943] imposing a penalty of imprisonment on defaulters.[944] The mandates contained within UNDRIP, on the other hand, are not enforceable in Nigeria due to their un-ratified status. Such crucial human rights instruments have no legitimate impact on domestic Nigerian law if they remain un-ratified. Ultimately, the rights of the majority; bound by customary law in Nigeria, continue to be undermined as protections are deemed hypothetical. As such, reform, and development of rights through the court system is hindered.

5.11 Implementing Legal Aid via Customary Courts in Nigeria

Providing legal aid to disadvantaged individuals in rural areas under the jurisdiction of customary legal systems can be challenging. There is a need, however, as communities are faced with legal issues involving crime, land, and matrimonial matters.[945] Implementing legal aid in established customary courts could increase the scope of free legal representation. It could also provide access to individuals who are more comfortable and familiar with indigenous legal processes and settings than they are with formal English common law

[942]See article written by Abdullahi Shuaibu and published by United Press International*:* 'Ogoni: Nigeria Opposes Indigenous Rights Declaration.' (2007) Unrepresented Nations and Peoples' Organization https://unpo.org/article/6763 (accessed 18/03/19).
[943]See section 73 Labour Act Chapter 198 Laws of the Federation of Nigeria 1990.
[944]Siona Ndeh Cynthia and Bukoye Teslim O. (2015) 'A Perspective on the ILO Convention on the Elimination of Forced or Compulsory Labour: The cases of Nigerian and Cameroon.' European Scientific Journal /SPECIAL/ edition Vol. 1 p. 19.
[945]Aliyu B. Abubakar (2019) 'LACON Partners Paralegals on Provision of Justice to Rural Communities.' https://leadership.ng/2019/05/23/lacon-partners-paralegals-on-provision-of-justice-to-rural-communities/ (accessed 01/02/2020).

procedure. Chirayath et al.[946] argue that focusing purely on access to formal systems gives the impression that such systems are easily accessible to everyone, which is not the case even in the most developed countries. In Nigeria, legal aid has been made available in many communities through various NGOs[947] in order to defend their rights in the more superior courts on matters that are related to custom (e.g., land, property, inheritance and forced eviction matters).[948] However, this is not a standard practice available to all litigants in a customary court setting.

Advocates have emphasised the benefits of customary legal practices as a tool to expand the scope of access to courts in Nigeria. For instance, Nwocha[949] argues that there is great "potential for customary law to contribute to both legal and social justice in a way that eliminates the bottlenecks that have bogged down the current legal and judicial system". However, the literature does not mention the added benefits of making legal aid available to individuals who would prefer to be heard in customary courts.

5.11.1 Proposed Framework for the Implementation of Legal Aid in Nigerian Customary Courts

In terms of the practicality of implementing legal aid through customary courts in Nigeria, this study proposes a viable framework that would ensure that the accessibility and flexibility of customary courts are maintained throughout the transition. This is vital to the preservation of the integrity of the customary court system. In recent times, there has been keen interest from the Nigerian Legal Aid Council to utilise paralegals to expand the scope of legal aid, especially in the rural areas. They are formally recognised as legal aid providers in the current Legal Aid Act 2011 with no limitations to their operation.[950]

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[946]Ibid. p. 5.

[947]Such as Community-based legal aid (CBLA) Programs. 'CBLA programs are limited to non-legal personnel; and does not involve actual legal counsel representation in customary courts they are also known as community-based paralegal services, which comprises of basic justice services such as legal advice, empowerment and education.' http://www.justempower.org/what-we-do/paralegals (accessed 10/08/19).

[948]Onouha Reginald Akujobi (2008) 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue.' Int'l J. Not-for-Profit L. Vol. 10 No. 2 pp. 79-93.

[949]Nwocha, M. E. (2016) 'Customary Law, Social Development and Administration of Justice in Nigeria.' Beijing Law Review 7 pp. 430-442.

[950]See s. 17 of the Nigerian Legal Aid Act 2011.

The administration of paralegals has been very successful in various African countries who have undertaken different roles from court representation, advocacy to dispute resolution and prosecution e.g., South Africa, Zimbabwe, Mozambique, Sierra Leone, Lesotho etc. Thus, paralegals are increasingly cited as crucial to improving access to legal services and a call for more recognition and an increased scope of operation has been launched by many African countries;[951] Nigeria included. Hence, a pressing need to move from traditional alternative dispute resolution to a more formal role of casework and court appearances on behalf of clients[952] In customary courts. The aim of this proposition is to guarantee legal aid to marginalised and rural communities in Nigeria.

The proposed structure would consist of a pool of potential paralegals who are indigenes with deep knowledge of customary law in their area. NYSC law graduates who are posted to such areas for the year would provide legal advice and representation to individuals within customary courts as well as train the paralegals on case management, legal advice, and representation. NYSC law graduates have been trained in the Nigerian formal legal system and are aware of the customary counterpart. As such, the paralegals will be required to assist them with understanding the customary law of the specific area. Hence, they are not tasked with converting customary law to correspond with the formal legal system or suit their personal beliefs but to preserve it, as far as it is just and right to do so. If the client is not satisfied, there are options to appeal to the Customary Court of Appeal. However, there is an opportunity to administer community legal education through this innovation, to empower indigenes as well as customary court judges to review and eradicate archaic and discriminatory customary laws to avoid lengthy appeal court cases.

This restructure would also be cost effective keeping in mind, that funding is one of the main barriers to the scheme. NYSC Law graduates are already on a monthly stipend provided by the federal government, as such, the only payment required would be for the paralegals who would be employed as civil servants on a basic grade according to their role. Additional training could also be sourced through NGO's who are self-funded.

The long-term benefits include invaluable experience for the NYSC law graduates in customary legal systems. The combined effort of both parties will bring a balance to the system i.e., not overrun by NYSC law graduates whose role would gradually become supervisory,

[951]See Access to Legal Aid in Criminal Justice Systems in Africa Survey Report 2011 pp. 23-29.
[952]Ibid.

allowing the paralegals more prominence, and conserve the informal nature of customary courts. This would maintain and develop customary courts by strengthening its operative system and granting it recognition; as a dependable legal system in Nigeria (The findings of this study in chapter 7 show that a considerable number of respondents do not trust the Nigerian customary courts system, but the majority believe legal aid should be made available in the interest of justice for communities bound by customary law as well as improve the effectiveness of the system).

In addition, this study is not advocating for a total codification of customary law (it may be necessary in some areas e.g., discriminatory matters) as it may lose its flexibility which enables it to promptly respond and adjust to societal changes, making it easily accessible. The lack of rigidness is key to its uniqueness and codification could initiate an irrevocable move to replace customary law with formal law over time, risking the integrity of customary legal practices in general. Thus, this study does not seek to off-set its intrinsic structure, but to expand its scope of operation to benefit society more effectively through legal aid, NYSC law graduates and community-based paralegals.

5.12 Legislative Provisions for Customary Courts in Nigeria

This section will examine the legality of customary courts within the current 1999 constitution of Nigeria and other statutory instruments such as the 2011 Legal Aid Act of Nigeria. It will also explore the prospects of expanding legal aid provision via customary courts in Nigeria.

According to Idem,[953] the 1999 Constitution of the Federal Republic of Nigeria (CFRN) "has made adequate provisions for States through their respective Houses of Assembly to establish Area and Customary Courts to hear and determine matters over persons subject to native laws and customs in the areas of their jurisdiction". Section 6 (1) of the 1999 Constitution states that: "[t]he judicial powers of the Federation shall be vested in the courts […] being courts established for the Federation." Section 6 (2) describes the judicial powers of individual States, while s. 6 (5) (a) to (i) list the courts of Nigeria to which s. 6 (1) relates.[954] Section 6 (5) (k)

[953]Idem Udosen Jacob (2017) 'The Judiciary and the Role of Customary Courts in Nigeria.' Global Journal of Politics and Law Research Vol. 5, No.6 p. 34.

[954]The Supreme Court; the Court of Appeal, the Federal High Court; the National Industrial Court; High Court of the Federal Capital Territory; High Court of the States; Sharia Court of Appeal of the FCT (Abuja); Customary Court of Appeal of the FCT; Sharia Court of the States and the Customary Courts of Appeal of the States.

provides judicial guarantees for people who live in a rural setting, investing powers in "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". Hence, s. 17 (2) (e) allows for: "the independence, impartiality, and integrity of courts of law, and easy accessibility thereto[.]"

In validating the status of customary courts within the 1999 constitution, Idem[955] contends that majority of cases surrounding land, marriage, custody of children and matters of inheritance in rural areas are determined by customary courts; and, by virtue of s. 6 of the CFRN 1999 (as amended), the Customary and Area Courts and their judges form part of the system of Courts of Nigeria.[956] Section 6 thus implies that the Nigerian customary courts systems are established by law and endure the same privilege accorded to formal courts. As discussed elsewhere in this thesis, s. 46 (4) guarantees the provision of legal aid, stating that: "[t]he National Assembly shall make provisions (i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed […] enabling him to engage the services of a legal practitioner to prosecute his claim[.]" In addition, the constitution also grants a fair hearing to individuals charged with a criminal offence "by a court or other tribunal established by law".[957]

The 2011 Legal Aid Act of Nigeria governs the provision of legal aid and access to justice for persons with inadequate resources. In fulfilment of s. 8 (1) of the 2011 Act,[958] the grant of legal aid by the LAC extends to three broad areas, namely the Criminal Defence Service, Advice and Assistance in Civil matters, and legal representation in court and Community Legal Services. However, eligibility is subject to a merits and indigence test. In addition, s. 8 (5) (b) provides that legal aid shall consist of: "representation by a legal practitioner including all such assistance as is usually given to by a private legal practitioner before 'any court' subject to eligibility criteria." This section affirms the availability of legal aid in any court in Nigeria, implying access to legal aid in customary courts as they are considered courts under domestic law.

[955]Idem Udosen Jacob (2017) 'The Judiciary and the Role of Customary Courts in Nigeria.' Global Journal of Politics and Law Research Vol. 5, No. 6 p. 35.
[956]Ibid.
[957]See section 36(4) Constitution of the Federal Republic of Nigeria 1999.
[958]See Second Schedule s. 8(2) Legal Aid Act, 2011.

5.13 Application of Legal Aid in Contemporary African Customary Courts

Despite the apparent complications in Nigeria being a heterogeneous society with diverse cultures, languages, and laws, Nwocha[959] argues that the people are more able to understand the customary system and to accept a settlement or determination that emanates from it. Gluckman,[960] during a study of customary legal practices in Zululand and Rhodesia, observed that: "[African courts] use the same basic doctrines as our courts do. African legal systems, like all legal systems, are founded on principles of the reasonable man, responsibility, negligence, and direct, circumstantial and hearsay evidence. African judges and laymen apply those principles skilfully and logically to a variety of situations in order to achieve justice."[961] Hence, many post-colonial and post-apartheid regions, such as South Africa and Uganda, have restructured their inherent customary courts system by increasing the scope of affordable access to courts in indigenous jurisdictions. These customary courts are closely targeted at the poor majority.[962]

In South Africa, the dual system of law provides a good example of the co-existence of different legal systems within one geopolitical State;[963] however, in Botswana, Lesotho, Swaziland, Zimbabwe and Uganda, legal representation is prohibited where there are traditional or customary courts or non-traditional community courts. For instance, in some parts of South Africa, legal representation in chiefs' and headmen's courts is prohibited. However, in the case of *Bangindawo*,[964] the prohibition against legal representation in a regional authority court was challenged by the litigants and deemed unfair and contrary to s. 35 of the Constitution of the Republic of South Africa 1996.[965] Hence, the court ruled the ban on legal aid in such courts unconstitutional. The judge held that regional authority courts are hybrid courts and are more similar to customary than western-style courts, and that they operate a concurrent jurisdiction with magistrate's courts. It is sometimes argued that the exclusion of lawyers from traditional courts is unjustified in that litigants should have the choice, if they so wish, to engage legal

[959]Nwocha, M. E. (2016) 'Customary Law, Social Development and Administration of Justice in Nigeria.' Beijing Law Review, 7, pp. 430-442.
[960]Gluckman M. (1963) 'Custom and Conflict in Africa.' 4th Edition Basil Blackwell Publishers Oxford.
[961]Ibid.
[962]Ibid.
[963]Onyango Peter (2013) 'African Customary Law: An Introduction.' p. 22.
[964]See *Bangindawo and others v. Head of Nyanda Regional Authority and Another* 1998 (3) BCLR 314 (Tk).
[965]Section 35 (3) "Every accused person has a right to a fair trial, which includes the right:
(3)(f) to choose and be represented by a legal practitioner, and to be informed of this right promptly."

practitioners to represent them in these traditional courts,[966] especially as such courts are recognised by national law as a judicial forum.

The above case shows: there is an implied need for legal representation regardless of the court; in the interest of fair justice. Thus, this study utilised a socio-legal approach to explore the research question via the collection of first-hand data consisting of varied perceptions on legal aid and the customary court system in Nigeria. The data is collected, then analysed using specific research methods to capture personal opinions, concepts, and descriptions on topic. The findings of the study are then categorised through themes to determine the prospects of the implementing legal aid through customary courts in Nigeria.

[966]South African Law Commission (1999) Discussion Paper 82 Project 90 The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders pp. 1-37. http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 01/04/2019).

Chapter 6: Research Methodology

6.1 Introduction

According to Bryman,[967] academics instigate research for various reasons. Typically, however, they do it to resolve aspects of society that elude their understanding. This might be due to a gap in the extant literature or an inconsistency in other studies on the topic in question. From such gap's questions arise and research is the means to investigate and clarify the inquiry via factual evidence (i.e., empirical data). Philosophers such as David Hume (1711-76) pioneered the empirical research tradition and argued that all knowledge of the world originate in the individual's experience. Empirical data is at its optimum capacity when a study is directly observed and collected in an unbiased and objective manner.[968]

There is a constant demand for empirical data to strengthen social institutions and pave the way for further research into how they can become more effective for the individuals that require them. Hence, empirical research requires an insightful approach to data collection and analysis so to provide information for future reference and to offer solutions to the problems under discussion. For decades, critics have argued that researchers are rarely approached as an initial step to support policy mandates, and that research is most commonly sought to support a readily adopted policy option or as a means to delay a necessary intervention.[969]

This study is grounded in socio-legal research that seeks to establish the nature and role of law in society. The main focus is to examine the way social factors affect an individual's ability to access legal aid in Nigeria. Hence, an interdisciplinary, socio-legal approach is employed as the prime mode of research. Socio-legal research continues to emerge as a single discipline, promoting interdisciplinary studies of law.[970] Over time, socio-legal research has evolved from being referred to as just sociology or social science to representing an interface with a context within which law also exists.[971]

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[967]Bryman Alan (2012) 'Social Research Methods.' Fourth Edition Oxford University Press p. 5.
[968]Ormston Rachel, Spencer Liz, Banard Matt, Snape Dawn (2014) 'The Foundations of Qualitative Research.' In Ritchie Jane, Lewis Jane, Nicholls Carol McNaughton, Ormston Rachel (eds.) 'Qualitative Research Practice: A Guide for Social Science Students and Researchers.' p. 9.
[969]Bloor Michael (2016) 'Addressing Social Problems through Qualitative Research.' In Silverman David (ed.) (2016) 'Qualitative Research.' Fourth Edition p. 17.
[970]Banakar, Reza & Travers, Max. (2005) 'Theory and Method in Socio-Legal Research.' p. xii.
[971]Wheeler S. Thomas P.A. 'Socio-Legal Studies' in DJ Hayton, (ed), Law's Future(s) (Oxford, Hart Publishing, 2002) p. 271.

The research design for this study comprises of an interpretive case study that is analysed through qualitative research methods. The qualitative research method was the preferred method for this study because of its adaptability and flexibility in data collection and analysis. It also aligns with the socio-legal focus of this study which is the need is to ask different questions regarding the role of law in a specific social situation e.g., access to legal aid in a customary court setting. This would not have been achieved with a quantitative approach. According to Boodhoo and Purmessur,[972] qualitative research provides a more realistic feel of the world than quantitative numeric and statistical analysis by giving the research a non-rehearsed, descriptive competence.

Semi-structured telephone interviews and self-administered questionnaires were used as data collection methods. The justification for each of the data collection methods used in the study is detailed in this chapter in order to demonstrate the quality and reliability of the research. In addition, the sample size of 15 for both data collection methods (combined) is limited considering; sample adequacy in qualitative inquiry is generally measured by sample composition and size. However, Sandelowski[973] contends, that small samples sizes are effective in certain studies especially, to support the intensity of case-oriented analysis which aims at collecting rich descriptions of a certain phenomenon such as this study. In other words, the more the viability of collected data from each person, the fewer participants are needed.[974]

6.2 Methodology

The concept of methodology in social science refers to the approach researchers employ to seek answers to problems identified as crucial to a research topic. This is most important for inquiries seeking to examine how individuals respond to social factors when accessing social institutions. Seumas[975] defines a social institution as an organisation or a system of organisations utilised to sustain societies, such as government, business corporations or legal

[972]Boodhoo Roshan, Purmessur Rajshree Deeptee (2009) 'Justifications for Qualitative Research in Organisations: A Step Forward' The Journal of Online Education p. 6.
[973]Sandelowski M. (1996) 'One is the Liveliest Number: The Case Orientation of Qualitative Research'. Res Nurs Health. 19(6) pp. 525–9.
[974]Morse JM. (2000) Determining Sample Size. Qual Health Res. 10(1) pp. 3–5.
[975]Seumas Miller (2019) 'Social Institutions.' The Stanford Encyclopedia of Philosophy Zalta Edward N. (ed.) https://plato.stanford.edu/archives/sum2019/entries/social-institutions/ (accessed 04/09/19).

systems. The manner in which a particular research topic is conducted[976] will depend solely on the research question posed. According to Tuli,[977] there are varieties of research methodologies and hence no single accepted methodology applicable to all questions. Wahyuni[978] notes that research methodology and research method are distinct concepts. Methodology serves as a research tool that critically enquires into the claims of specific methods, while methods lend credence to the often more abstract assertions of a methodology.[979] According to Jonker and Pennink,[980] methodology is a map to the destination, while method is the set of specific steps needed to travel on the way. Hence, the former is a general approach which establishes how to go about studying a phenomenon[981] in relation to the research question under investigation. According to Langbroek et al.,[982] many academic legal publications lack in-depth narrative and discussion on the research design and methods used. Therefore, questions of validity that underpin research are often overlooked.

Chilisa and Kawulich[983] suggest that fundamental guidelines must be identified and established when developing a methodology for research. For instance:

- What paradigm informs the methodology?
- What theoretical framework, if any, informs the research topic?
- What research approach is required based on the research question(s)?
- What types and sources of data are available to help answer the research question(s)?
- What are the best ways to collect data (i.e., what guides the choice of participants, the setting of the study and the techniques of data collection)?

[976]Taylor Steven J. Bogdan Robert, DeVau Marjorie (2016) 'Introduction to Qualitative Research Methods: A Guidebook and Resource.' p. 3.
[977]Tuli Fekede (2010) 'The Basis of Distinction Between Qualitative and Quantitative Research in Social Science: Reflection on Ontological, Epistemological and Methodological Perspectives.' Ethiopian Journal of Education and Sciences Vol. 6 No. 1 p. 99.
[978]Wahyuni Dina (2012) 'The Research Design Maze: Understanding Paradigms, Cases, Methods and Methodologies.' Journal of Applied Management Accounting Research, Vol. 10, No. 1, p. 72.
[979] Ruane, J. M. (2005) 'Essentials of Research Methods.' pp. 48-9.
[980]Jonker Jan, Pennink Bartjan (2010) 'The Essence of Research Methodology.' p. 33.
[981]David Silverman (1993) 'Beginning Research. Interpreting Qualitative Data. Methods for Analysing Talk, Text and Interaction.' Londres: Sage Publications p. 1.
[982]Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, Wibo van Rossum (2017) 'Methodology of Legal Research: Challenges and Opportunities.' Utrecht Law Review, Volume 13, Issue 3, p. 2.
[983]Chilisa Bagele and Kawulich Barbara (2012) 'Selecting a Research Approach: Paradigm, Methodology and Methods.' In Wagner Claire, Kawulich Barbara, Mark Garner (eds.) 'Doing Social Research: A Global Context' p. 4.

- What approach is applicable to the data analysis and interpretation?
- What are the ethical considerations of the study?
- How valid are the standards that inform the data collection, analysis, and interpretation of the research findings?[984]

The research design for this study is descriptive and interpretive and employs qualitative methods of analysis. This thesis relies on the traditional legal research method of using both primary and secondary sources of information. However, this study also seeks to conduct verifiable research to examine the research topic and, more importantly, answer the research question that has been posed. Banakar et al.[985] contend that authoritative data is key to understanding the mentality of the other. Testable evidence serves as an ancillary factor in exploring the phenomenon of legal aid within the Nigerian context and identifying the interests of individuals, who are the main stakeholders of legal aid.

This study aims to capture the mindset of Nigerian individuals on matters relating to access to free legal representation, with a focus on the adoption of customary courts as a legal tool to further expand the scheme. It investigates current Nigerian legal aid provision in practice by obtaining crucial data emanating from the perception of the respondents. This includes an in-depth analysis of the role of international/regional human rights instruments and Nigerian national legislation in ensuring the fundamental right to legal aid for the disadvantaged. Primary sources, consisting of legal and historical documents, are utilised. This also includes an evaluation of other legal and non-legal tools put in place to support and advance the provision of legal aid for the vulnerable in Nigeria, for example the 2011 Legal Aid Act.

There are a wide range of written works in the area of access to justice and legal aid in Nigeria. This study relies on secondary sources of information, such as library and academic databases on legal aid, human rights, and access to justice; for example, JSTOR**,** Hein Online**,** African Human Rights Law Journal and the Institute of Advanced Legal Studies Library. Other appropriate socio-legal academic literature linked to the impact of law on society is utilised.

[984]Ibid.

[985]Banakar, Reza, Travers, Max (2005) 'Theory and Method in Socio-Legal Research.' Chapter 2 p. 87.

This study also examines the literature on African regional human rights instruments, the Nigerian constitution, and other national legislation affiliated with the legal aid scheme.

Peer reviewed journals, such as the African Journal of Legal Studies, the Journal of Law and Society, and The Journal of Legal Pluralism and Unofficial Law (among many others), are used. Institutional publications are also employed, including the Journal of African Law, the African Journal of Clinical Legal Education and Access to Justice, as well as government and non-governmental published reports, documents, and newspaper articles.

The choice of this mode of research is justified by the gap in the extant literature, where there is a lack of in-depth examination of the current status of legal aid in relation to the future prospects of the scheme. This study investigates: the structure of legal aid; how the scheme has developed over time through constitutional law, rules, and guidelines; and the potential application of other sources of law to expand the scope of legal aid in Nigeria (e.g., customary courts). The method of research employed by this study also acted as a guide to identify the group of individuals that fall into the category that this study investigates. In addition, the research methods were a tool to determine the suitable sampling method, appropriate sample size and how data is to be collected, stored, and translated.

6.3 Research Paradigms

A research paradigm enables researchers to navigate the questions they want to pose and, as a consequence, identify the approaches they need.[986] Various scholars have defined the term 'paradigm' differently in line with their own understanding of the concept.[987] For instance, McNaughton et al.[988] posit that a research paradigm comprises of three elements: a belief about the nature of knowledge, a methodology and the criteria for validity. Schwandt[989] construes a paradigm to be a system that represents the beliefs, methods, commitments, and values shared across a discipline and a template that guides how problems are solved. As such, identifying a paradigm appropriate to a particular study enables the researcher to view the society in question

[986]Chilisa Bagele Kawulich Barbara (2012) 'Selecting a Research Approach: Paradigm, Methodology and Methods.' In Wagner Claire, Kawulich Barbara, Mark Garner (eds.) 'Doing Social Research: A Global Context' p. 1.
[987]Thanh Nguyen Cao and Thanh Tran Thi Le (2015) 'The Interconnection Between Interpretivist Paradigm and Qualitative Methods in Education.' American Journal of Educational Science Vol. 1, No. 2, 2015, pp. 24-27.
[988]Mac Naughton, G., Rolfe, S. A., & Siraj-Blatchford, I. (2001) 'Doing Early Childhood Research: International perspective on theory and practice.' Australia: Allen &Unwin.
[989]Schwandt T.A. (2001) 'Dictionary of Qualitative Inquiry.' 2nd Edition pp. 183-4.

in a particular manner.[990] Kivunja and Kuyini[991] posit that Thomas Kuhn (1962) pioneered the term paradigm to mean a philosophical way of thinking, deriving it from the Greek word *paradeigma* which means 'pattern'. Kuhn[992] argues that a paradigm is an acceptable means to achieve "scientific attainments that for a time give model problems and solutions for a community of researchers." That is, they are a set of structures through which the researcher views the world by moving as close to the truth as possible.

Kuhn named the quality of seeming true as 'verisimilitude', and posited that research is made possible by inquiries and verifications within the ruling paradigm of a discipline, which will evolve over time to form new paradigms.[993] Hence, a paradigm implies a pattern, structure and framework of scientific and academic ideas, values and assumptions.[994] According Guba and Lincoln,[995] paradigms may be perceived as a set of basic beliefs that deals with the fundamental concepts on which a theory, system or method is based. It represents a framework that guides research action or investigation, as well as a view of the nature of the world and the role individuals play within it.

Paradigms focus on how problems should be understood and consequently addressed. Thus, the beliefs held by the researcher will lead to the choice and application of the methodological approach, be it qualitative, quantitative, or mixed.[996] Scholars of sociology classify their paradigm through epistemology, ontology, and research methodology.

There is insufficient factual data on how individuals perceive legal aid in Nigeria. As such, a true picture of whether the provision helps individuals who need legal aid is lacking. This study seeks to answer the research question via the selected research method, which is to examine the perspective of individuals in Nigeria on access to legal aid in general, and in customary courts in particular.

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[990]Burrell G, Morgan G. (1979) 'Sociological Paradigms and Organizational Analysis.' p. 24.
[991]Kivunja Charles Kuyin Ahmed Bawa (2017) 'Understanding and Applying Research Paradigms in Educational Contexts.' International Journal of Higher Education Vol. 6, No. 5 pp. 26-41.
[992]Kuhn Thomas S. (1970) 'The Structure of Scientific Revolutions.' International Encyclopaedia of Unified Science
Volume 2 Number 2 p. viii.
[993]Hegde Dinesh S. (2015) 'Knowledge Claims: Approaches and Perspectives.' In Hegde Dinesh S. Essays on Research Methodology (ed.) Chapter 2 p. 11.
[994]Ibid.
[995]Guba Egon G. Lincoln Yvonna S. (1994) 'Competing Paradigms in Qualitative Research.' In N. K. Denzin & Y. S. Lincoln (eds.) 'Handbook of Qualitative Research' p. 107.
[996]Creswell, J. W. (2009) 'Research Design: Qualitative and Mixed Methods Approaches.' p. 6.

6.4 Ontology, Epistemology and Methodology

Neuman[997] contends that research methodology rests on a foundation of ontological and epistemological assumptions and refers to them as 'philosophical foundations.' The author argues that all scientific research rests on assumptions and principles derived from both of these foundations, which concern how and why researchers adopts a particular approach to social research.[998] "Ontology concerns the issue of what exists, or the fundamental nature of reality", and so reality can be perceived from either a realist or a nominalist position.[999] Realists see the world as pre-existing and not tied to human existence, while nominalists believe human experiences of the world are established through a scheme of interpretations and personal encounters. Epistemology concerns how well we know the world around us and how to produce knowledge and learn about reality.[1000]

According to Goldkuhl,[1001] ontology, epistemology and methodology are concepts that are entwined and work together to enable understanding of a phenomenon. Guba and Lincoln[1002] contend that research paradigms can be identified through these three concepts:

- Ontology – How does one perceive a phenomenon?
- Epistemology – How can one understand a phenomenon?
- Methodology – How can one undertake an inquiry of a phenomenon?

[997]Neuman (2014) 'Social Research Methods: Qualitative and Quantitative approaches.' (7th Edition) Pearson Education Limited pp. 91-96.
[998]Ibid.
[999]Ibid.
[1000]Ibid.
[1001]Goldkuhl, G. (2012) 'Pragmatism vs Interpretivism in Qualitative Information Systems Research', European Journal of Information Systems, 21(2), pp. 135-146.
[1002]Guba Egon G. Lincoln Yvonna S. (1994) 'Competing Paradigms in Qualitative Research.' In N. K. Denzin & Y. S. Lincoln (eds.), Handbook of Qualitative Research p. 107.

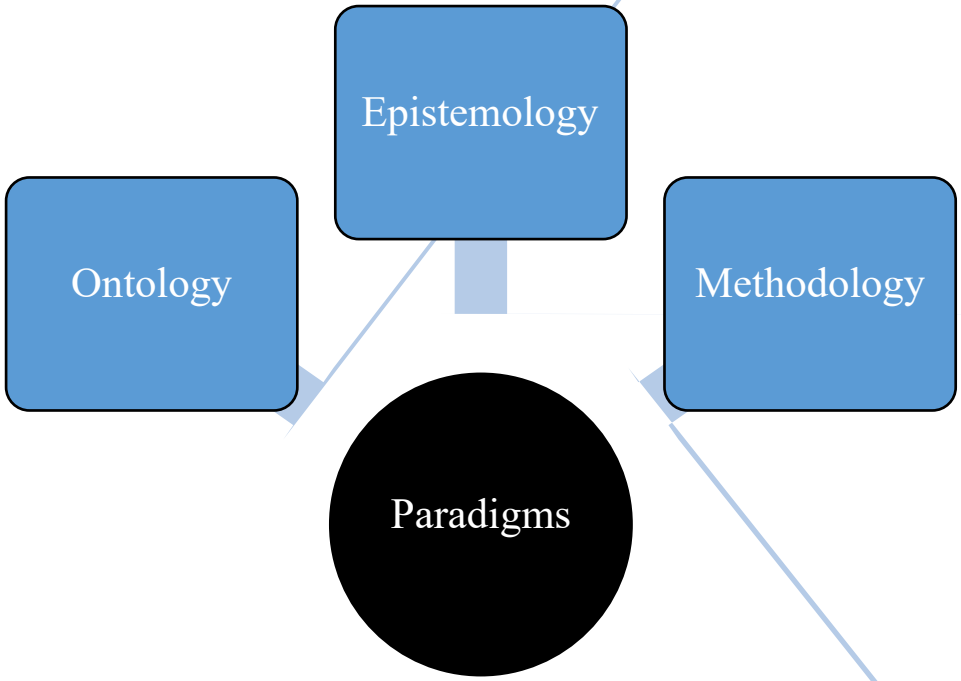

Figure 6.1 - Research Paradigms

Research paradigms are crucial to the concept of social reality embedded in research, such as understanding the motives and actions of certain individuals in society. Thus, they are also considered a 'basic belief' system because, in spite of their significance in social research, they are unable to give a clear picture regarding their ultimate truthfulness and as such must be accepted on faith.[1003]

Burrell and Morgan[1004] examined the role of paradigms as views of social reality and established another perspective. They argue that the controversy surrounding truthfulness may never be resolved and propose that a researcher should adopt whatever paradigm they feel will accord trustworthiness to their method. Hence, they propose four main paradigms which are based on contrasting sets of assumptions regarding the nature of social science and the nature of society:[1005]

- Radical-Humanist (subjective-radical change);
- Radical-Structuralist (objective-radical change);
- Functionalist (objective-regulation);

[1003]Ibid.
[1004]Burrell G, Morgan G. (1979) 'Sociological Paradigms and Organizational Analysis.' Routledge Press p. 23.
[1005]Ibid. p. 24.

- Interpretive (subjective-regulation).

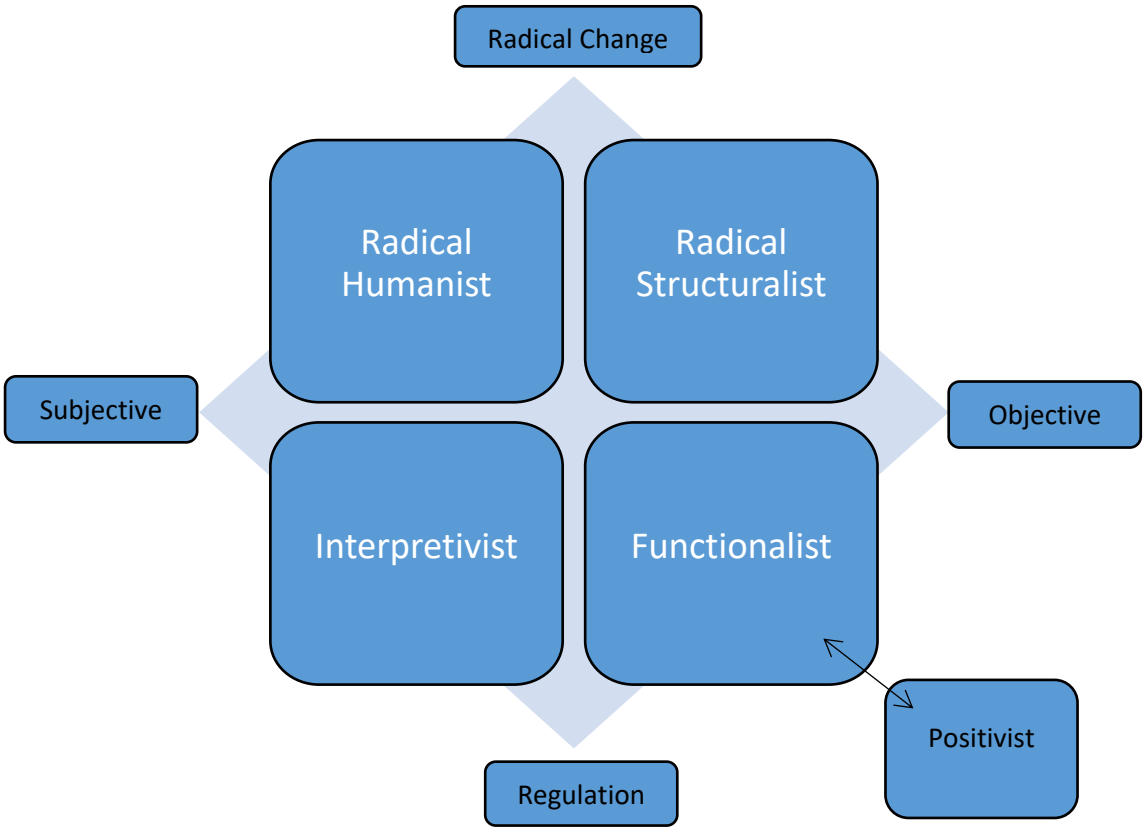

Figure 6.2 - Adapted from Burrell and Morgan's Four Paradigms for the Analysis of Social Theory[1006]

According to Morgan,[1007] each of these four paradigms reflects a network of related schools of thought that embody four exclusive views of the social world. Hence, each school is different in approach and context, but share common fundamental assumptions within their respective networks about the nature of the reality that they represent.[1008]

The *radical-humanist* paradigm is grounded in phenomena concerned with developing sociology of radical change from a subjectivist viewpoint.[1009] According to Gunbayi and Sorm,[1010] the radical-humanist paradigm provides a description of radical change, modes of domination, emancipation, deprivation, and potentiality via a subjective approach. This

[1006]Ibid. p. 22.
[1007]Morgan G. (1980) 'Paradigms, Metaphors, and Puzzle Solving in Organization Theory.' Administrative Science Quarterly, Vol. 25, No. 4 pp. 605-622.
[1008]Ibid.
[1009]Burrell G, Morgan G. (1979) 'Sociological Paradigms and Organizational Analysis.' Routledge Press p. 33.
[1010]Gunbayi I. Sorm S. (2018) 'Social Paradigms in Guiding Social research Design: The Functional, Radical Humanist and raical Structural Paradigms.' International Journal on New Trends in Education and their Implications Vol. 9 Issue. 2 pp. 57-76.

paradigm is linked to an individual's personal interpretation of a situation, as they relate to the important features of their lives.[1011] As such radical humanist researchers tend to lean towards anti-positivist, voluntarist and ideographic ideologies which essentially focus on the values that guide a person or organisation to action. The concept is based on the principle that existing social arrangements that serve as constraints to human development should be reversed and reformed.[1012]

The *radical-structuralist* paradigm is like the radical-humanist paradigm in that it is concerned with the liberation of social actors; however, in contrast, it has an objectivistic assumption of social science.[1013] Similar to the purpose of the legal aid scheme, which is to ensure uncomplicated access to justice for disadvantaged individuals in Nigeria, the main intention of the radical-structuralist paradigm is to examine structural conflicts that stand as barriers to the current structure and advocate to right such wrongs via a radical reform. . This is achieved by emphasising the external constraints caused by limited resources, and geographical and cultural restrictions (including organisational restraints emerging from procedural changes, such as time limits, costs etc.).[1014]

Chua[1015] posits three main research paradigms – positivist, interpretivist and critical – and argues that all other paradigms stem from them. Another point of view suggests that there are just two major research paradigms: positivism and interpretivism.[1016] However, according to Úrtenblad,[1017] the functionalistic and interpretive perspectives from Burrell and Morgan's four paradigms are more dominant in social science.

[1011]Stebbins Robert A. (1970) 'The Subjective Approach.' The Sociological Quarterly, Vol. 11, No. 1 pp. 32-49.
[1012]Gunbayi I. Sorm S. (2018) 'Social Paradigms in Guiding Social research Design: The Functional, Radical Humanist and Radical Structural Paradigms.' International Journal on New Trends in Education and their Implications Vol. 9 Issue. 2 pp. 57-76.
[1013]Úrtenblad Anders (2002) 'Organizational Learning: A Radical Perspective.' International Journal of Management Reviews Volume 4 Issue 1 pp. 87–100
[1014]Gunbayi I. Sorm S. (2018) 'Social Paradigms in Guiding Social research Design: The Functional, Radical Humanist and Radical Structural Paradigms.' International Journal on New Trends in Education and their Implications Vol. 9 Issue 2 pp 57-76.
[1015]Chua W. (1988) 'Interpretive Sociology and Management Accounting Research – A Critical Review', Accounting, Auditing and Accountability, 1, pp. 59-79.
[1016]Sook Oh, J. (2008) 'Documenting Children's Dialogue: A Hermeneutic Phenomenological Approach', International Journal of Education through Art, 4(1), pp. 75-81.
[1017]Úrtenblad Anders (2002) 'Organizational Learning: A Radical Perspective.' International Journal of Management Reviews Volume 4 Issue 1 pp. 87-100.

The *functionalist* paradigm is based upon the belief that society has a real existence and an inherent quality capable of creating an ordered and regulated state of affairs. Hence, Lane's[1018] definition: "the social world exists outside of humans and so can be observed and the structural laws that sustain it uncovered." The functionalist paradigm is objectivistic and rooted in regulation.[1019] It was pioneered by French theorist Auguste Comte during the 19th century in an attempt to apply the methods of the natural sciences to social phenomena.[1020] In the early 20th Century, positivism was officially recognised and adopted as the leading scientific and technical approach by constituents of the Vienna Circle,[1021] who aimed to build a scientific and technical worldview that rejects the application of philosophy as the basis of acquiring knowledge regarding the factual and natural world of realism.[1022]

Comte argued that reality could be experimental as well as objective.[1023] Now commonly known as the positivist paradigm, the functionalist paradigm assumes the existence of coherent human action and accepts that a researcher can comprehend human actions through 'hypothesis testing'.[1024] Positivist researchers frequently use methodologies such as: micro-level testing, confirmatory analysis, nomothetic experiments, quantitative analysis, laboratory experiments and deduction.[1025] However, Aliyu et al. [1026] contend that positivist methodologies are not applicable to all research, because it lacks the complexities of the outside world (e.g., in societal matters). The authors believe that the outcomes of research by means of experimental and scientific methods run the risk of not matching the results of investigations conducted in the

[1018]Lane David C. (2001) 'Rerum Cognoscere Causas: Part I— How do the ideas of system dynamics relate to traditional social theories and the voluntarism/determinism debate?' System Dynamics Review Volume 17 Number 2 pp. 97-118.
[1019]Úrtenblad Anders (2002) 'Organizational Learning: A Radical Perspective' International Journal of Management Reviews Volume 4 Issue 1 pp. 87-100.
[1020]Kim Sujin (2003) 'Research Paradigms in Organizational Learning and Performance: Competing Modes of Inquiry Information' Technology, Learning, and Performance Journal, Vol. 21, No. 1 p. 10.
[1021]'Karl Menger, Otto Neurath, Rudolf Carnap, Gustav Bergmann, Philipp Frank, Herbert Feigl, and Moritz Schlick were members of the Vienna Circle. They adopted 'logical positivism' which believed that the only kind of sensical discourse was scientific.'
[1022]Aliyu Ahmad Aliyu, Bello Muhammad Umar, Kasim Rozilah, Martin David (2014) 'Positivist and Non-Positivist Paradigm in Social Science Research: Conflicting Paradigms or Perfect Partners?' Journal of Management and Sustainability; Vol. 4, No. 3 p. 82.
[1023]Guba, E. and Lincoln, Y. (1994) 'Competing Paradigm in Qualitative Research', Handbook of Qualitative Research. 2(2), pp. 105-117.
[1024]Ibid. p. 105.
[1025]Olesen, *v.* (2004) 'Feminisms and Models of Qualitative Research.' In N. K. Denzin, & Y. S. Lincoln (eds.), Handbook of Qualitative Research. Thousand: Oaks, CA: Sage.
[1026]Aliyu Ahmad Aliyu, Bello Muhammad Umar, Kasim Rozilah, Martin David (2014) 'Positivist and Non-Positivist Paradigm in Social Science Research: Conflicting Paradigms or Perfect Partners?' Journal of Management and Sustainability; Vol. 4, No. 3 p. 83.

outside world, where a much larger number of elements or factors act together.[1027] Ultimately, it seeks to explain how the individual elements of social systems interact with one another to form a unified integral entity.

According to Scotland,[1028] the ontological position of positivism is one of realism: objects have an existence independent of the knower.[1029] According to Hughes and Sharrock,[1030] positivism explains the social world by assembling 'objective' realities that are peripheral and cannot be influenced. The viewpoint of objectivity implies that two investigators examining the same study will end up with similar results.[1031] Hence, the functionalist viewpoint is a problem-orientated approach, concerned with understanding society through in-depth investigation. The approach also seeks to provide rational explanations for social affairs and practical solutions to practical problems. These are sought by emphasising the importance of understanding society from the point of view of individuals who are engaged in the performance of the social activities in question. The positivist researcher identifies and explains 'causal linkages' of a phenomenon[1032] 'to discover causal relations among variables.'[1033]

Cohen et al. [1034] posit that the applicability of the approach would depend mainly on the nature of the research, as it is a scientific paradigm aimed at verifying or contradicting an assumption. Investigating the causal relationship between the perspectives of individuals and the legal aid scheme via other sources of law in Nigeria, such as customary courts, is key to an in-depth understanding of the phenomenon in question. As with the functionalist approach, the positivist epistemology is one of objectivism. That is, discovering absolute knowledge about an unbiased reality. As such, the researcher and the participants remain independent entities. Thus, positivist methodology is directed at explaining relationships by identifying causes which

[1027]Ibid.
[1028]Scotland James (2012) 'Exploring the Philosophical Underpinnings of Research: Relating Ontology and Epistemology to the Methodology and Methods of the Scientific, Interpretive, and Critical Research Paradigms' English Language Teaching; Vol. 5, No. 9 p. 10.
[1029]Cohen, L., Manion, L., & Morrison, K. (2007) 'Research Methods in Education' 6th Edition London: Routledge p. 9.
[1030]Hughes, J. and Sharrock, W. (1997) 'The philosophy of social research' Third Edition pp. 42-75.
[1031]Healy, M. and Perry, C. (2000) 'Comprehensive Criteria to Judge Validity and Reliability of Qualitative Research within the Realism Paradigm', Qualitative Market Research: An International Journal, 3(3), pp. 118-126.
[1032]Collis, J. and Hussey, R. (2009) 'Business Research.' Palgrave Macmillan.
[1033]Hudson, L. and Ozanne, J. (1988) 'Alternative Ways of Seeking Knowledge in Consumer Research', Journal of Consumer Research. 14(4), p. 513.
[1034]Cohen, L., Manion L. and Morrison, K. (2007) 'Research Methods in Education' (6th Edition). London: Routledge.

influence outcomes.[1035] According to Creswell,[1036] "positivists believe that different researchers observing the same factual problem will generate a similar result by carefully using statistical tests and applying a similar research process in investigating a large sample."

Kolakowski[1037] states that positivism embraces a four point doctrine: "(1) the rule of phenomenalism which asserts that there is only experience; all abstractions be they 'matter' or 'spirit' have to be rejected; (2) the rule of nominalism which asserts that words, generalizations, abstractions, etc. are linguistic phenomena and do not give new insight into the world; (3) the separation of facts from values; and (4) the unity of the scientific method."[1038] As stated above, Chua[1039] identifies three main research paradigms from which all others emanate: positivist, interpretivist and critical. According to Comstock,[1040] a critical paradigm seeks to explain social injustice and inequities which individuals can take action to change[1041] and it has been widely employed and discussed within the field of social science research. Hence, the three approaches adopt distinctively different epistemological viewpoints while generating competing methods of inquiry.[1042]

There are suggestions, for example by Sook,[1043] that the positivist and interpretivist paradigms are the two most basic and commonly used approaches. According to Hudson and Ozanne,[1044] the debate stems from the fact these are the two major philosophical paradigms, which are considered to be "summary labels that refer to general research approaches that only differ in beliefs [...] that turn into the different ways of conducting research".[1045] Hence, the quantitative

[1035]Creswell, J. W. (2009) 'Research Design: Qualitative and Mixed Methods Approaches.' Third Edition SAGE Publications. Inc. p. 7.
[1036]Creswell, J.W. (2009) Cited in Wahyuni Dina (2012) 'The Research Design Maze: Understanding Paradigms, Cases, Methods and Methodologies' Journal of Applied Management Accounting Research, Vol. 10, No. 1, p. 71.
[1037]Kolakowski L. (1972) 'Positivist Science' In Goles Tim, Hirschheim Rudy (2000) 'The paradigm is Dead, the Paradigm is Dead...Long Live the Paradigm: The Legacy of Burrell and Morgan' The International Journal of Management Science Omega, Elsevier, Vol. 28(3), p. 251.
[1038]Ibid.
[1039]Chua, W. (1988) 'Interpretive Sociology and Management Accounting Research – A Critical Review', Accounting, Auditing and Accountability, 1, pp. 59-79.
[1040]Comstock, D. E. (1982) 'A Method of Critical Research.' In Bredo E. & Feinberg W. (eds.), Knowledge and Values in Social and Educational Research pp. 370- 390.
[1041]Ibid.
[1042]Kim Sujin (2003) 'Research Paradigms in Organizational Learning and Performance: Competing Modes of Inquiry Information' Technology, Learning, and Performance Journal, Vol. 21, No. 1 pp. 9-17.
[1043]Sook Oh, J. (2008) 'Documenting Children's Dialogue: A Hermeneutic Phenomenological Approach', International Journal of Education through Art, 4(1), pp. 75- 81.
[1044]Hudson, L. and Ozanne, J. (1988) 'Alternative ways of Seeking Knowledge in Consumer Research', Journal of Consumer Research. 14(4), pp. 508-512.
[1045]Ibid. p. 508.

purist articulates assumptions that are consistent with the positivist paradigm, while the qualitative enthusiast tends towards the concept of interpretivism while rejecting the positivist assumption.[1046]

Easterby-Smith et al.[1047] note a common view on positivism that holds it is insufficient for understanding complex social occurrences and factual observations, because it is not realistic in a world created by human deeds. The positivist view is that we are "born into a world in which there are causal laws that explain patterns to our behaviour".[1048] Lee and Baskerville[1049] cite several difficulties with the induction and general applicability of this axiom. Quine[1050] argues that positivism is self-contradictory, due to the fact that it is not by itself a natural happening independent of the viewer or observer. Hence the advancement of interpretive thought, which sees the world as socially governed controlled[1051] via the norms and values of a society.

Kim[1052] explains that the "truth" in the positivistic tradition is often based on probability and, as such, researchers are prevented from achieving their own goals of finding specific truth on phenomena under investigation. The author contends that positivism made significant contributions to humanities, social sciences, and art in the early 20th century in terms of technical and scientific practice.[1053] However, the internal inconsistencies of positivism led many researchers to abandon exclusively scientific and technological approaches in favour of using more than one method to acquire in-depth knowledge of a phenomenon.[1054]

[1046]Tuli Fekede (2010) 'The Basis of Distinction Between Qualitative and Quantitative Research in Social Science: Reflection on Ontological, Epistemological and Methodological Perspectives' Ethiopian Journal of Education and Sciences Vol. 6 No. 1 p. 98.
[1047]Easterby-Smith, Mark, Thorpe, Richard, and Lowe Andy (1991) 'Management Research. An Introduction', Sage: London.
[1048]Ibid.
[1049]Lee, A. S., & Baskerville, R. L. (2003) 'Generalizing Generalizability in Information Systems Research' Information Systems Research, 14(3), pp. 221-243.
[1050]Quine, W. V. O. (1980) 'Two Dogmas of Empiricism' In H. Morick (ed.), Challenges to Empiricism pp. 46-70 London: Methuen.
[1051]Williams, M. (2000) 'Interpretivism and Generalisation', Sociology, 34(2), pp. 209-224.
[1052]Kim Sujin (2003) 'Research Paradigms in Organizational Learning and Performance: Competing Modes of Inquiry' Information Technology, Learning, and Performance Journal, Vol. 21, No. 1 pp. 9-17.
[1053]Ibid.
[1054]Ibid.

The last paradigm within Burrell and Morgan's 1979 framework is the *interpretivist* approach, which is defined simply as uncovering what agents interpret their social world to be.[1055] According to Goles and Hirschheim,[1056] the interpretivist paradigm seeks explanation within the realm of individual consciousness and subjectivity, and within the frame of reference of individual perspective. Interpretivists see society as a stable place that can be studied, but via the subjective perspective of each individual involved.[1057] Interpretivism is also known as 'constructivism',[1058] due to similar anti-positivist elements. However, Creswell[1059] contends that constructionists are more fundamental and radical in their approach and broaden their ontological observations to all angles of realities and truths, unlike the interpretivist approach, which limits its scope to social truth reality. The interpretivist paradigm was initiated in response to positivism,[1060] and emphasises the capability of the researcher to create meaning from social actors' experiences.

According to Ernest,[1061] the meaning created is profoundly affected by 'hermeneutics and phenomenology'. Hermeneutics is the detailed investigation and understanding of 'historical texts', whereas phenomenology is a design oriented by the interpretivist paradigm which holds that the opinions and meanings of individuals regarding the world are the first step to comprehending it.[1062] The methodologies used by interpretivist researchers are mainly: field experiments, exploratory analysis, idiographic experiments, induction and qualitative analysis.[1063] These aid researchers to find explanations and give meaning to personal experiences of social actors. Cohen and Manion[1064] consider interpretivist researchers as

[1055]Lane David C. (2001) 'Rerum Cognoscere Causas: Part I— How do the ideas of system dynamics relate to traditional social theories and the voluntarism/determinism debate?' System Dynamics Review Volume 17 Number 2 pp. 97-118.
[1056]Goles Tim, Hirschheim Rudy (2000) 'The paradigm is Dead, the Paradigm is Dead...Long Live the Paradigm: The Legacy of Burrell and Morgan' The International Journal of Management Science Omega, Elsevier, Vol. 28(3), pp. 249-268.
[1057]Ibid.
[1058] Burrell G, Morgan G. (1979) 'Sociological Paradigms and Organizational Analysis' Routledge Press pp. 30-33.
[1059]Creswell, J. W. (2002) 'Research Design: Qualitative and Quantitative Approaches' Thousand Oaks, CA: Sage.
[1060]Burrell G, Morgan G. (1979) 'Sociological Paradigms and Organizational Analysis' Routledge Press pp. 30-33.
[1061]Ernest, P. (1994) 'Varieties of Constructivism: Their Metaphors, Epistemologies and Pedagogical Implications', Hiroshima Journal of Mathematics Education, 2(8), pp. 1-14.
[1062]Ibid.
[1063]Ogilvy, J. (2006) 'Contribution to Discussion: Critical Questions about New Paradigm Thinking' Revision, 9(5), pp. 45-49.
[1064]Cohen, L., &Manion, L. (eds.) (1994) 'Research Methods in Education' (4th Edition). London: Longman. p. 36.

investigators who understand "the world of human experience". Therefore, connotations derived from their personal viewpoint may lead to further inquiries into social occurrences.[1065] Interpretivism is considered the most significant substitute to positivism.[1066]

6.5 Qualitative or Quantitative Research Method?

According to Yilmaz,[1067] the two major approaches to social science research are the qualitative and quantitative ones, and they differ in terms of their epistemological, theoretical, and methodological underpinnings.[1068] The author further states that the qualitative research method is still developing and becoming more differentiated in methodological approaches, while quantitative research has developed over time and, as such, has well-established strategies and methods.[1069]

For this study, a qualitative research method is employed to examine the cause and effect of social relationships. In addition, it helps organise thoughts and ideas on the legal aid scheme, alternative viable (customary) legal systems and the barriers that are undermining the scope of access in Nigeria. Bryman and Burgess[1070] highlight the uncertainty as to whether the qualitative approach is a distinct research strategy because qualitative researchers may be compelled to codify their analytic procedures in ways that are found in quantitative research. Miles's[1071] description of qualitative data as 'an attractive nuisance' stems from its volume and complexity and the implications for its analysis. Accordingly, Tuli[1072] highlights that the quantitative approach, which originated in the natural sciences (i.e., biology, chemistry, physics, and geology), was largely used in social science for much of the 20th century. During

[1065]Hughes, J. and Sharrock, W. (1997) 'The philosophy of Social Research' Third Edition pp. 42-75.
[1066]Aliyu Ahmad Aliyu, Bello Muhammad Umar, Kasim Rozilah, Martin David (2014) 'Positivist and Non-Positivist Paradigm in Social Science Research: Conflicting Paradigms or Perfect Partners?' Journal of Management and Sustainability; Vol. 4, No. 3 p. 84.
[1067]Yilmaz Kaya (2013) 'Comparison of Quantitative and Qualitative Research Traditions: Epistemological, Theoretical and Methodological Differences', European Journal of Education, Vol. 48, No. 2, pp. 311-325.
[1068]Ibid.
[1069]Ibid.
[1070]Bryman Alan, Burgess Robert G. (1994) 'Reflections on Qualitative Data Analysis' In Bryman Alan Burgess Robert G. (eds.) 'Analysing Qualitative Data', Chapter 11 p. 216.
[1071]Miles M.B. (1979) 'Qualitative Data as an Attractive Nuisance', Administrative Science Quarterly 24 pp. 590–601.
[1072]Tuli Fekede (2010) 'The Basis of Distinction Between Qualitative and Quantitative Research in Social Science: Reflection on Ontological, Epistemological and Methodological Perspectives', Ethiopian Journal of Education and Sciences Vol. 6 No. 1 p. 98.

this period, it was focused on investigating things which could be observed and objectively measured in some way.[1073]

However, over the last decades some researchers within the social sciences (e.g., sociology, anthropology) have argued that quantitative research is inadequate as a means of conducting research and generating knowledge. According to this view, to investigate a phenomenon there should be more focus on understanding the meaning of events from the perspective of the individual being examined.[1074] The qualitative method was further influenced by Max Weber who pioneered the theoretical concept of "Verstehen", an interpretative approach that focused on causation and a deep understanding of why individuals behave like they do within a certain area in society through empathetic study.[1075] Denzin and Lincoln[1076] contend that qualitative research methods are not based on a single methodology and therefore have no distinctive definition, theory or paradigm. This is because they comprise of a combination of methods and practices that are sourced externally from many different research disciplines. These include traditions related to positivism, post-positivism, foundationalism, post-foundationalism, post-structuralism, post-modernism, and norms and values of the society.[1077] However, in spite of the vague attribute of qualitative research, authors such as Hitchcock & Hughes[1078] have endeavoured to capture the central principles that underpin qualitative research and establish a clear description of what it entails.

Taylor et al.[1079] define qualitative methodology as a research approach that produces descriptive data through the written or spoken words and actions of selected participants by understanding their personal experiences. Bauer et al.[1080] contend that a researcher would need to have knowledge of qualitative distinctions between social categories before measuring and establishing how many people belong to one group or the other. Thus, it is crucial that this study utilises a qualitative method to explore the legal aid scheme in Nigeria in order to capture

[1073]Ibid.
[1074]Ibid.
[1075]Elwell, Frank, (1996) 'The Sociology of Max Weber', Rogers State University.
[1076]Denzin Norman K, Lincoln Yvonne S (2011) 'The SAGE Handbook of Qualitative Research' Fourth Edition pp. 3-6.
[1077]Ibid.
[1078]Hitchcock G. & Hughes D. (1995) 'Research and the Teacher: a Qualitative Introduction to School-Based Research' (2nd edition) (London, Taylor & Francis) p. 26.
[1079]Taylor Steven J. Bogdan Robert, DeVau Marjorie (2016) 'Introduction to Qualitative Research Methods: A Guidebook and Resource' p. 7.
[1080]Bauer, M.W. (2000) 'Chapter 8 – Classical Content Analysis: A Review', In M.W Bauer, G. Gaskell and N.C. Allum (eds.) Qualitative Researching with Text, Image and Sound A Practical Handbook, London, Thousand Oaks, New Delhi: Sage Publications p. 9.

a definitive outline of how individuals perceive the provision, and if they believe there is room for the expansion of the scope of legal aid to include the vast, rural areas of Nigeria via non-conventional legal channels.

Kirk and Miller[1081] argue that qualitative approaches are distinct from a quantitative process because "technically a 'qualitative observation' identifies the presence or absence of something, in contrast to 'quantitative observation', which involves measuring the degree to which some feature, is present". Yilmaz[1082] explains that the quantitative approach is an acceptable means to explain phenomena according to numerical data, which are analysed by way of mathematically based methods (e.g., statistics). Cresswell[1083] contends that qualitative inquiry employs different philosophical assumptions, such as: strategies of inquiry, the methods of data collection, and the final analysis and interpretation. Hence, the qualitative approach exhibits diverse perspectives ranging from social justice thinking to ideological perspectives.

However, Webley[1084] states that qualitative research does not depend on statistical quantification to explain a phenomenon but attempts to capture and identify social phenomena and their meanings through real life experiences. Flick[1085] explains that the qualitative research method is not modelled on statistical measurements but is applied by purposely recruiting participants who are expected to answer questions spontaneously from their own perspective. Hence, data collection is aimed at creating a more comprehensive picture by re-establishing the topic under study through the use of open questions. As such, qualitative research addresses issues through the subjective meaning of the research question from the mindset of research participants. It also describes the complexity of situations raised in the study as well as establishing the social experiences of participants.[1086]

[1081]Kirk, J., and Miller, M.L. (1986) 'Reliability and Validity in Qualitative Research', Beverly Hills: Sage Publications p. 9.
[1082]Yilmaz Kaya (2013) 'Comparison of Quantitative and Qualitative Research Traditions: Epistemological, Theoretical and Methodological Differences' European Journal of Education, Vol. 48, No. 2, pp 311-325.
[1083]Cresswell, J. W. (2009) 'Research design: Qualitative, Quantitative, and Mixed Methods Approaches.' Third Edition SAGE Publications. Inc. p. 173.
[1084]Webley Lisa (2010) 'Qualitative Approaches to Empirical Legal Research' In Cane P. Kritzer H. (eds.) Oxford Handbook of Empirical Legal Research Chapter 38 Oxford University Press.
[1085]Flick Uwe (2015) 'Introducing Research Methodology: A Beginner's Guide to Doing a Research Project' Second Edition p. 11.
[1086]Ibid.

According to Silverman, a qualitative approach is more favoured if the study is targeted towards exploring people's everyday behaviour. An in-depth investigation into how the social status of individuals, who fall into the disadvantaged category, affects access to legal aid in Nigeria will open up the scope of understanding on the subject matter.

Thus, a qualitative method of research seeks to decipher the viewpoint of respondents, for example with regards to how they interact with social institutions in their environment (e.g., legal systems). Bryman[1087] contends that a qualitative approach is broadly inductivist, constructivist and interpretivist. However, to carry out an investigation and reach a conclusion on a study topic, researchers are not mandated to utilise all three features when analysing collected data.[1088]

Yin[1089] cites five characteristics that distinguish the qualitative approach from other research methods:

- Studying individuals in their real-life roles without being inhibited by closed-ended questionnaires or artificial research procedures, such as a laboratory-like setting.
- Representing the views of the participants chosen for the study.
- Prioritising the meanings given to real world events by the people that live in them; explicitly heeding to and accounting for real world contextual conditions, such as the social, institutional, cultural, and environmental conditions, and how they influence human activity.
- Inference of knowledge from existing and new concepts that may further assist in explaining social behaviour and thinking. That is, moving beyond the mere documentation of an individual's daily life to a more comprehensive study of human activity through different perspectives and progress to the development of new concepts.
- Acknowledging the importance of varied sources of evidence to the eventual findings and, as a consequence, creating a medley of documentation combining all information available.[1090]

The aim of applying a qualitative research method in this study is to open new grounds for explaining how real-world conditions in Nigeria influence social thinking and behaviour of

[1087]Bryman Alan (2016) 'Social Research Methods' Fifth Edition', Oxford University Press p. 374.
[1088] Ibid.
[1089]Yin Robert K. (2016) 'Qualitative Research from Start to Finish', Second Edition pp. 8-11.
[1090]Ibid.

individuals from varied backgrounds around accessing legal aid via unconventional legal systems. In effect, new perceptions are created through the various respondents by way of their individual experiences during the data collection process. This action could further lead to other imperative revelations on the matter surrounding the problem of access to free legal counsel, which has not yet been thoroughly documented in Nigeria.

Bryne[1091] argues that qualitative research is "contextually laden, subjective, and richly detailed", and as such necessary for researchers to make detailed explanations and interpretations of data collected. However, Black[1092] posits that it is also an extremely complex research method that involves a combined interaction of the individuals with themselves, family, society, and culture. Due to the nature of this study, which focuses on the subjective perspective of each respondent, a qualitative approach supplemented by an interpretive technique is employed to thoroughly investigate the research question. The aim is to inform how the law that governs legal aid in Nigeria is applied in practice and how everyday individuals perceive it.

The ability of qualitative research to address causality has been a matter of controversy. However, according to Maxwell,[1093] a causal explanation is a legitimate and important goal for qualitative research when seeking to identify cause-effect relationships. For instance, this is important when one or more social factors (e.g., lifestyle, religion, education, custom, wealth, family) influence aspects of an individual's attitude towards other factors within their community, such as seeking legal assistance. Ultimately, a qualitative model identifies and analyses the study process, which is set in motion by a researcher to understand both the intention and the context of human action. It also serves as a platform to gather in-depth information on how social factors affect research participants[1094] and expand our understanding of how individuals interpret occurrences that happen around them.

[1091]Byrne, M. (2001) 'Disseminating and Presenting Qualitative Research Findings', AORN Journal, Vol. 74 No. 5, p. 372.
[1092]Black Ian (2006) 'The Presentation of Interpretivist Research' Qualitative Market Research: An International Journal Vol. 9 No. 4 p. 320.
[1093]Maxwell Joseph A. (2012) 'The Importance of Qualitative Research for Causal Explanation in Education', Qualitative Inquiry Vol. 18, Issue 8, p. 655.
[1094]Chowdhury Muhammad Faisol (2014) 'Interpretivism in Aiding Our Understanding of the Contemporary Social World', Open Journal of Philosophy Vol. 4 No. 3 pp. 434-435.

Snape and Spencer[1095] argue that the qualitative research method can be employed in various forms, and that the choice of research method will depend on other definitive factors ranging from the goals of the study, the characteristics of the research participants and the audience for the research. Wincup[1096] contends that qualitative research is primarily focused on identifying and recognising the role of individuals and groups in a given social construct, as well as the way individuals make sense of their subjective reality. That is, how they perceive the happenings and conditions around them, and how social factors such as customs, norms, responsibilities, and routines affect their day to day lives. In addition, it highlights how age, gender, beliefs, and ethnic origin influence the way individuals respond to social factors.[1097] For this study, a qualitative research method is a reliable means to examine the cause and effect of social relationships.

Critics of the qualitative research method believe the quantitative method to be superior and more reliable because it is not influenced by the subjective value judgment of the researcher and objectively reports reality. They argue that the outcome of a qualitative approach may be altered by the researchers' point of view, giving rise to flexibility which is considered to be a lack of structure.[1098] Quantitative procedures arguably pave the way for a broader and more generic set of findings and they are considered a systematic method in which numerical data are used to quantify or measure phenomena and produce findings.[1099] However, according to Patton,[1100] the meaning attributed to the phenomenon studied is generally ignored in quantitative studies because participants are unable to fully partake in the study by describing their feelings and experiences in their own words.

Silverman[1101] advocates the qualitative method and flexibility argument, believing it crucial for the researcher to encourage research participants to be unbarred in their responses so to concretise the study in general. According to Newman et al.,[1102] the debate between advocates

[1095]Snape Dawn, Spencer Liz (2003) 'The Foundations of Qualitative Research' In Ritchie Jane and Lewis (eds.) 'Qualitative Research Practice A Guide for Social Science Students and Researchers' Chapter 1 pp. 1-23.
[1096]Wincup Emma (2017) 'Criminological Research: Understanding Qualitative Methods' 2nd Edition p. 4.
[1097]Ibid.
[1098]Ibid.
[1099]Carr, L. (1994) 'The Strengths and Weaknesses of Quantitative and Qualitative Research: What Method for Nursing?' Journal of Advanced Nursing. 20(1), pp. 716-721.
[1100]Patton, M. Q. (2002) 'Qualitative Research & Evaluation Methods' (3rd Edition) (Thousands of Oaks, Sage).
[1101]Silverman, D. (2011) 'Interpreting Qualitative Data: A Guide to the Principles of Qualitative Research' SAGE Publications Limited pp. 120-138.
[1102]Newman Isadore Newman, Benz Carolyn R. (2009) 'Qualitative-Quantitative Research Methodology: Exploring the Interactive Continuum' pp. 2-14.

of the qualitative and quantitative approaches is deeply rooted in the various assumptions regarding the concept of reality and whether or not it can be measured. The disagreement also emerges from different opinions about how researchers can best understand a phenomenon, whether through objective or subjective methods.[1103] Ratner[1104] argues that, in spite of the general notion that qualitative methodology is purely subjectivist, it also has an objectivist strand, and believes that "to objectively comprehend peoples' psychology, the researcher must organise his subjectivity appropriately".

Regardless of the long and traditional use of the quantitative method in research, many researchers affirm the necessity of moving towards a more contemporary qualitative approach for the purposes of observing and interpreting reality from the perspective of research participants. This is partly due to the belief that quantitative research does not assist the developing and continuous inquiry of a research phenomenon.[1105] Lofland[1106] argues that a qualitative researcher aims to describe accurately a respondent's experience and thoughts rather than to judge through their own lens.

Some researchers believe that both the qualitative and quantitative methods should not be seen as antagonistic, but simply as a representation of different ends of a continuous spectrum.[1107] They argue that both forms of research are equally capable of being systematic and producing valid, dependable findings, regardless of the difference in the styles and techniques of research.[1108] Hence, both methods can be combined.

Bryman[1109] posits that qualitative research should be regarded as a research strategy that gives priority to words rather than numbers in the collection and analysis of data. The author further argues that the qualitative research method is diverse and incorporates several other research methods, such as:

[1103]Ibid.
[1104]Ratner Carl (2002) 'Subjectivity and Objectivity in Qualitative Methodology' Forum Qualitative Sozialforschung / Forum: Qualitative Social Research, 3(3), Art. 16.
[1105]Tewksbury, R. (2009) 'Qualitative versus Quantitative Methods: Understanding why Qualitative Methods are Superior for Criminology and Criminal Justice', Journal of Theoretical and Philosophical Criminology. 1(1), pp. 38-58.
[1106]Lofland, J. (1971) 'Analyzing Social Settings', Belmont, CA: Wadsworth.
[1107]Newman Isadore Newman, Benz Carolyn R. (2009) 'Qualitative-Quantitative Research Methodology: Exploring the Interactive Continuum' pp. 2-14.
[1108]Webley Lisa (2010) 'Qualitative Approaches to Empirical Legal Research' In Cane P. Kritzer H. (eds.) Oxford Handbook of Empirical Legal Research Chapter 38 Oxford University Press.
[1109]Bryman Alan (2012) 'Social Research Methods' Fourth Edition. Oxford University Press p. 380.

- Ethnography, where a researcher becomes deeply involved in the study over certain period of time to observe and understand a particular social group.
- Qualitative interviewing, which is an expansive term referring to interview techniques that are usually employed in ethnography or participant observation.
- Focus groups, which according to Kitzinger[1110] are a form of group interview that generate data by exploiting communications between research participants. As a consequence, they help participants explore and clarify their views by interacting with one another in ways that would not be easily achievable in a one-to-one interview.
- Language-based approaches in data collection. For instance, discourse analysis, which is the study of naturally occurring language in any social context to understand human experience,[1111] and conversation analysis, which is an inductive, micro-analytic and predominantly qualitative method for studying verbal and non-verbal human social interactions.[1112]
- The collection and qualitative analysis of texts and documents.[1113]

The legal aid scheme in Nigeria has been well documented in access to justice literature; however, the latter currently lacks substantial empirical evidence that depicts other definitive, limiting factors from the perspective of the typical individual. There is also a gap in the literature on the discounted technicalities in the legal system, the potential contribution from other viable legal systems in Nigeria and the enduring impact on individuals who are in need of the service. A qualitative research methodology will encourage a deeper understanding of complex recipient and legal aid personnel relations within the Nigerian legal aid setting. It will also encourage future studies into theoretical perspectives that may offer doctrinal paradigms for explaining how society influences individuals. In addition, the limitations attributed to the quantitative research method suggest that a qualitative one is well suited in this research, because the primary aim of study is to interpret and understand specific groups from their personal experiences and perception (i.e., individuals who may at one point need the services of free legal counsel). This study also seeks to explain causality[1114] in other matters relating to

[1110]Kitzinger Jenny (1995) 'Introducing focus groups' BMJ Vol. 311 p. 299.
[1111]Shanthi Alice, Wah Lee Kean, Lajium Denis (2015) 'Discourse Analysis as a Qualitative Approach to Study Information Sharing Practice in Malaysian Board Forums' International Journal on E-Learning Practices (IJELP) Volume 2 p. 159.
[1112]Hoey Elliott M. Kendrick Kobin H. (2018) 'Conversation Analysis.' In A. M. B. de Groot & P. Hagoort (eds.), 'Research Methods in Psycholinguistics: A Practical Guide' p. 1.
[1113]Bryman Alan (2016) 'Social Research Methods' Fifth Edition Oxford University Press pp. 377-378.
[1114]Bryman Alan (2012) 'Social Research Methods' Fourth Edition Oxford University Press p. 380.

barriers to the expansion of legal aid in Nigeria that arose through the process of empirical research.

6.5.1 Interpretivist Qualitative Research

The concept of interpretivism has been described by various scholars. However, the majority of the definitions remain constant and place emphasis on the viewpoint of research respondents. This perspective stems from the meaningful nature of their character and participation in both social and cultural life.[1115] Butler[1116] identifies other variations of interpretivism, for example, conservative, constructivist, critical and deconstructionist. Hence, the meanings of each category are shaped by the intention of the researcher.[1117] This study focuses on the constructivist tradition, because it is deemed central to interpretivism and shares a common interest with the interpretivists' emphasis on understanding the world through personal experiences of social actors. This is in line with the "interpretivists' belief that reality is constructed by social actors and people's perceptions of it".[1118]

Qualitative research is generally linked with interpretivism[1119] because scholars believe it increases the value of qualitative data when understanding a phenomenon.[1120] It also adopts the school of thought that affirms that an individual's knowledge of reality is a social construction by human actors.[1121] However, Myers and Avison[1122] are of the view that the term "qualitative is not a synonym for interpretive". They acknowledge that a researcher's decision to utilise a

[1115]Elster, J. (2007) 'Explaining Social Behaviour: More Nuts and Bolts for the Social Sciences' Cambridge: Cambridge University Press.
[1116]Butler T. (1998) 'Towards a Hermeneutic Method for Interpretive Research in Information Systems', Journal of Information Technology Volume 13, pp. 285-300.
[1117]Schwandt Thomas A. (1994) 'Constructivist, Interpretivist Approaches to Human Inquiry', Handbook of Qualitative Research Volume 1, pp. 118-137.
[1118]Wahyuni Dina (2012) 'The Research Design Maze: Understanding Paradigms, Cases, Methods and Methodologies' Journal of Applied Management Accounting Research, Vol. 10, No. 1, p. 71.
[1119]Goldkuhl Goran (2012) 'Pragmatism vs Interpretivism in Qualitative Information Systems Research', European Journal of Information Systems Volume 21, pp. 135-146.
[1120]Kaplan, B., & Maxwell, J. A. (1994) 'Qualitative Research Methods for Evaluating Computer Information Systems' In Anderson J.G., Aydin C.E. (eds.) 'Evaluating the Organizational Impact of Healthcare Information Systems' Health Informatics Springer, New York pp. 30-55.
[1121]Eliaeson, S. (2002) 'Max Weber's Methodologies', Journal of the History of the Behavioural Sciences Volume 36, Issue 3 pp. 241-263.
[1122]Myers M. and Avison D. (eds.) (2002) 'An Introduction to Qualitative Research in Information System' In Qualitative Research in Information Systems: A Reader Sage London p. 5.

qualitative method via an interpretive approach would depend on the researcher's underlying philosophical assumptions of the topic under investigation.[1123]

According to Willis et al.,[1124] individuals are influenced by their subjective perception of their environment; thus, their behaviour is relatively connected to the happenings in their surroundings. The interpretivist approach aims to acknowledge and understand the existence of subjective meanings in the social world.[1125] Generally, subjectivity is linked with the concept of bias; however, in social sciences the meaning ascribed to subjectivity is highly dependent upon the researcher's epistemological and ontological assumptions. Thus, the focus is on human subjects rather than the objects. Yanow and Schwartz-Shea[1126] claim that interpretivist researchers discover reality through participants' views, which emerge from the participants' background and experiences. Hence, interpretivists look for meanings and motives behind people's actions such as behaviour and interactions with others in the society,[1127] and seek to understand cultures by studying their ideas, thinking and the meanings important to them.[1128] The approach is favoured by qualitative researchers because it allows a researcher to be immersed in the day to day lives of participants as it appears to the researcher.

Interpretivism is consistent with the thought that the paradigm is not an attempt to pre-define independent and dependent variables, but an effort to understand a phenomenon through the interpretation that people assign to it.[1129] Willis[1130] argues that the goal of interpretivism is to encourage subjectivity because they believe qualitative approaches produces valuable reports necessary for researchers to fully understand contexts. Bourdieu argues that an attempt to strip

[1123]Ibid.
[1124]Willis Jerry W., Jost Muktha, Nilakanta Rema (2007) 'Foundations of Qualitative Research: Interpretive and Critical Approaches' Sage Publications p. 8.
[1125]Goldkuhl Goran (2012) 'Pragmatism vs Interpretivism in Qualitative Information Systems Research', European Journal of Information Systems Volume 21, pp. 135-146.
[1126]Yanow, D., & Schwartz-Shea, P. (2011) 'Interpretive Approaches to Research Design: Concepts and Processes' Netherlands: Routledge.
[1127]Whitley, R. (1984) 'The Scientific Status of Management Research as a Practically-Oriented Social Science' Journal of Management Studies, Volume 21 Issue 4 pp. 369-390.
[1128]Boas, F. (1995) 'Race, Language and Culture', Chicago: University of Chicago Press.
[1129]Klein E. K. Myers M.D (1999) 'A Set of Principles for Conducting and Evaluating Interpretative Field Studies in Information Systems' MIS Quarterly 23(1) pp. 67-94.
[1130]Willis, J. W. (2007) 'Foundations of Qualitative Research: Interpretive and Critical Approaches', London: Sage.

away context to achieve objectivity could inadvertently undermine the research, the analysis, and the eventual findings.[1131]

Interpretivists are known to maintain a subjective stance because they believe "different people and different groups have different perceptions of the world",[1132] hence giving the researcher the opportunity to capture all experiences before drawing a conclusion. As such, researchers are able to increase their scope of inquiry from what has occurred to see how it has occurred.[1133] Understanding the reality of people from their own experiences underpins the reasoning of an interpretivist paradigm and, as a consequence, recorded experiences are used by researchers to establish and build a coherent understanding of the subject matter.[1134]

In contrast to the ideas of the positivist paradigm, "all interpretive traditions emerge from a scholarly position that takes human interpretation as the starting point for developing knowledge about the social world".[1135] Thanh and Thanh[1136] acknowledge that the interpretivist approach in not a dominant paradigm but is favoured because it can accommodate multiple perspectives and varied versions of truths. According to Smith and Heshusius,[1137] an interpretive approach seeks to understand values, beliefs, and meanings of social phenomena by an in-depth examination of human activities and experiences.

Burrell and Morgan[1138] contend that the interpretivist paradigm is a direct product of the German idealist tradition of social thought from the mid-eighteenth century, and its foundations were established in the work of Immanuel Kant. They argue that interpretivism emulates a social philosophy which emphasises the spiritual nature of the social world. The concept's reach was initially limited and remained so for a while, but was later revived in the late 1890's when theorists such as Duthey, Weber, Huserl and Shutz further elaborated the concept and made numerous contributions towards establishing it as a framework for social analysis.[1139]

[1131]Bourdieu, P. (1992) 'Language and Symbolic Power', J. Thompson (ed.) and G. Raymond and M. Adamson (transl), Cambridge: Polity Press.
[1132]Ibid. p.194.
[1133]Lin, A. C. (1998) 'Bridging Positivist and Interpretivist Approaches to Qualitative Methods' Policy Studies Journal, 26, pp. 162-180.
[1134]Ibid.
[1135]Prasad Pushkala (2015) 'Crafting Qualitative Research Working in the Post positivist Traditions' Routledge Press p. 13.
[1136]Thanh Nguyen Cao, Thanh Tran Thi Le (2015) 'The Interconnection between Interpretivist Paradigm and Qualitative Methods in Education' American Journal of Educational Science Vol. 1, No. 2, pp. 24-27.
[1137]Smith, J. K., & Heshusius, L. (1986) 'Closing down the Conversation: The End of the Quantitative-Qualitative Debate among Educational Inquires' Educational Researcher, 15(1), pp. 4-12.
[1138]Burrell G, Morgan G. (1979) 'Sociological Paradigms and Organizational Analysis' Routledge Press p. 32.
[1139]Ibid.

The renewed interpretive thought placed more emphasis on how we order, classify, structure and interpret our world, and how we act upon these interpretations as a consequence.[1140] Morgan[1141] contends that qualitative research is deeply rooted in the speculative assumptions of the interpretative paradigm, which is founded on the belief that social reality is formed and maintained via an individual's view and experience of the world they live in.

Black[1142] states that the strength and power of the interpretivist approach lies in its ability to address the complexity and meaning of situations. An individual's perspective will present a factual viewpoint of the current status of the legal aid scheme, as well as customary court practices in Nigeria. Willis[1143] posits that interpretivists are anti-foundationalists, who maintain there is no single correct route or particular accepted method to knowledge. Reeves and Hedberg[1144] note that the "interpretivist" paradigm stresses the need to put analysis in context. Hence, it is an appropriate blueprint to identify and explore a phenomenon through the respondents own cultural context.

According to Guba,[1145] there are in general many other paradigms that are utilised to guide actions in different schools of thought. For instance, legal systems are guided by the rules of an *adversarial paradigm*, a proof system which is a justification for seeking the truth and for the utmost importance of the concept of access to justice in courts. However, the use of the interpretivist paradigm to analyse this study arises from the fact that an in-depth fact-finding inquiry is required and crucial to understand and interpret the phenomenon of legal aid as it is perceived through the views of the respondents, who are also social actors relevant to the topic.

[1140]Prasad Pushkala (2015) 'Crafting Qualitative Research Working in the Post positivist Traditions' Routledge Press p. 13.
[1141]Morgan, G. (1980) 'Paradigms, Metaphors, and Puzzle Solving in Organization Theory', Administrative Science Quarterly, pp. 605-622.
[1142]Black Ian (2006) 'The Presentation of Interpretivist Research' Qualitative Market Research: An International Journal Vol. 9 No. 4 p. 319.
[1143]Willis, J. (1995) 'A Recursive, Reflective Instructional Design Model Based on Constructivist-Interpretivist Theory', Educational Technology, 35 (6), pp. 5-23.
[1144]Reeves, T. & Hedberg, J. G. (2003) 'Interactive Learning Systems Evaluation' p. 32.
[1145]Guba Egon G. (eds.) (1990) 'The Paradigm Dialog', p. 18.

6.5.2 Qualitative Legal Research

Generally, qualitative research methods are identified more with the social sciences than with the discipline of law. Hence, legal research is not considered social science research.[1146] In addition, authors differentiate between academic legal research carried out by academics and students and legal research conducted for other legal professionals, legal practice, and government and non-government agencies. They acknowledge the good quality of legal research produced by non-legal agencies.[1147] Many common law practitioners undertake qualitative legal research on a regular basis, for example in the case-based method of establishing the law through analysis of precedent, using documents as source material.[1148]

Qualitative legal research has been used in various case studies to ascertain people's perception of law and justice through their own reality. An example is the study of alternative dispute resolution mechanisms and their relationship with legal systems (see Davis et al.'s[1149] study of the family mediation legal aid pilot in England and Wales, 2000, and Dingwall and Greatbatch's observation of family mediation sessions, 1991).[1150] Another example is the study of legal aid and access to justice matters (see Moorhead et al.'s [1151] study of legal aid models and quality of legal service delivery, 2000)[1152] to further understand legitimate perspectives through real life occurrences.

[1146]Dobinson Ian and John Francis, 'Legal Research as Qualitative Research' In McConville Mike and Chui Wing Hong (eds.) (2017) Research Methods for Law 2nd Edition Chapter 1 p. 21.
[1147]Ibid.
[1148]Webley Lisa (2010) 'Qualitative Approaches to Empirical Legal Research' In Cane P. Kritzer H. (eds.) Oxford Handbook of Empirical Legal Research Chapter 38 Oxford University Press.
[1149]Davis, G. et al. (2000) 'Monitoring Publicly Funded Family Mediation': Final Report to the Legal Services Commission, Legal Services Commission.
[1150]Webley Lisa (2010) 'Qualitative Approaches to Empirical Legal Research' In Cane P. Kritzer H. (eds.) Oxford Handbook of Empirical Legal Research Chapter 38 Oxford University Press.
[1151]Moorhead, R., Sherr, A., Webley, L., Rogers, S., Sherr, L., Paterson, A. and Domberger, S. (2001) 'Quality and Cost: Final Report on the Contracting of Civil Non-Family Advice and Assistance Pilot', Norwich: The Stationery Office.
[1152]Webley Lisa (2010) 'Qualitative Approaches to Empirical Legal Research' In Cane P. Kritzer H. (eds.) Oxford Handbook of Empirical Legal Research Chapter 38 Oxford University Press.

6.6 Empirical legal scholarship

Legal research is deemed empirical as long as it based on the analysis of legal texts and doctrine.[1153] According to Bell,[1154] the definition of empirical legal research remains unclear. The concept of empirical research is most commonly linked with methods and methodologies drawn from the social sciences. However, according to Monahan and Walker,[1155] the last 20 years of legal research via empirical methods have continued to play an important role in the in-depth study of law and as a means to address the imbalance between 'formal law' and 'practical reality'.[1156] Prior to that time, legal scholarship relied heavily on a normative analysis of the law, also known as 'black letter law'.[1157] For a long time, the assumption was that law is an independent discipline and could exist independently. However, Posner[1158] argues against this hypothesis and maintains that legal knowledge alone is not sufficient to provide solutions to legal problems. Griffiths[1159] argues that adopting new methodological approaches to law would present a clear understanding of how individuals access specific resources. Traditionally empirical legal scholarship has followed two broad traditions. The first is black letter law, which is directed towards law itself as an internal, self-sustaining set of principles accessible through court judgements and statutes, with little reference to the world outside the law.[1160]

The second is law in context, which emerged in the late 1960's and has since increased the scope of legal studies. With this latter approach, the initial focus is accorded to matters relating to the problems of society and not the law.[1161] In this context, law becomes a controversial concept because it is deemed the agent of social problems, and while the application of law may provide a full or partial solution to a problem it may not be the preferred choice.[1162] In

[1153]Vick Douglas W. (2004) 'Interdisciplinarity and the Discipline of Law' 31(2) Journal of Law and Society 163. pp. 177-180.
[1154]Bell Felicity (2016) 'Empirical Research in Law', Griffith Law Review, 25:2, pp. 262-282.
[1155]Monahan J. & Walker L. (2011) 'Twenty-Five Years of Social Science in Law', 35 Law and Human Behaviour, No. 1, pp. 72-82.
[1156]Ingleby Richard (1992) 'Solicitors and Divorce', Clarendon Press Oxford pp. 4-5.
[1157]Diamond S.S. & Mueller P. (2016) 'Empirical Legal Scholarship in Law Reviews', 6 Annual Review of Law and Social Science, pp. 581-599.
[1158] Posner Richard A. (1987) 'The Decline of Law as an Autonomous Discipline': 1962-1987 Harvard Law Review Vol. 100 pp. 761-780.
[1159] Griffiths A. (2017) 'Broadening the Legal Academy, the Study of Customary Law': The Case for Social-Scientific and Anthropological Perspectives PER / PELJ (20) pp. 1-24.
[1160]McConville Mike and Chui Wing Hong (eds.) (2017) 'Research Methods for Law', 2nd Edition p. 1.
[1161]Ibid.
[1162]Ibid.

addition, Holmes[1163] insists that law is a tool for achieving social ends and to understand law requires an understanding of social conditions. Hence, Posner[1164] suggests utilising methods in other disciplines of scientific and humanistic research to increase knowledge of the legal system. The laws, guidelines and procedures on legal aid are extensive in Nigeria; however, this is not reflected in practice or in the extant literature due to the lack of sufficient empirical data.

According to Coutin and Fortin,[1165] the rise of empirical legal scholarship suggests that there is a renewed interest in the application of social science methodologies and methods to understand the concept of law in relation to society. The initial focus was directed towards quantitative studies; however, as legal materials from other legal systems across the world become accessible,[1166] empirical research methods are increasingly being utilised as a primary template to address a variety of legal questions infused into the research process to examine the topic in detail.[1167] Post[1168] distinguishes between empirical legal scholarship and the practice of law to highlight the importance of legal scholarship. The author argues that the practice of law has no enduring effect on the advancement of legal scholarship due to relentless institutional difficulties that might obstruct the growth of serious external scholarship. He also contends that, traditionally, law schools have not possessed basic institutional mechanisms, nor have they established standards to measure achievement in the area of legal scholarship. Hence, major legal publications are guided by law students who are unable to apply scholarly standards, particularly new and debatable ones.

Akin to one of the intended outcomes of this study, Eisenburg[1169] contends that empirical legal scholarship is a pivotal tool to inform litigants, policymakers, and society as a whole about how the legal system works. He also argues that, generally, law schools pay little attention to training lawyers in how to accurately assess the state of the legal system and the legal system's performance, which is left to other independent advocates and researchers in other disciplines.

[1163]Holmes O.W. JR. (1881) 'The Common Law' Cited In Posner Richard A. (1987) The Decline of Law as an Autonomous Discipline: 1962-1987 Harvard Law Review Vol. 100 p. 762.
[1164]Posner Richard A. (1987) 'The Decline of Law as an Autonomous Discipline: 1962-1987' Harvard Law Review Vol. 100 pp. 777-780.
[1165]Coutin Susan B. and Fortin Veronique 'Legal Ethnographies and Ethnographic Law', In Sarat Austin, Ewic Patricia (eds.) (2015) 'The Handbook of Law and Society' Chapter 5 p. 71.
[1166]McConville Mike and Chui Wing Hong (eds.) (2017) 'Research Methods for Law' pp. 1-2.
[1167]Tyler Tom R. (2017) 'Methodology in Legal Research', Utrecht Law Review Volume 13 Issue 3, pp. 130-141.
[1168]Post Robert (1992) 'Legal Scholarship and the Practice of Law', University of Colorado Law Review Vol. 63 pp. 620-621.
[1169]Eisenburg Theodore (2004) 'Why Do Empirical Legal Scholarship?' 41 San Diego Law. Review pp. 1741-1746.

This drawback according to Eisenburg has created a gap in the advancement of legal research and led to a compelled reliance on non-lawyers, who do not have a comprehensive understanding of legal doctrine or the state of the law.[1170] However, traditional disciplines like anthropology, philosophy, political science, and sociology are able to overcome difficulties regarding maintaining standards. This is due to the models being built on a more stringent structural foundation, grounded in scholarly evaluation and peer review mechanisms to ensure these standards are enforced accordingly.[1171]

Epstein and King[1172] acknowledge that law scholars have been conducting empirical research over the past two decades via quantitative or qualitative data; but they argue that they have proceeded with the method with little attention to the various advancements in empirical analysis. The authors also raise an important issue with regards to the quality of the legal research being produced and argue that many legal academics lack experience in empirical legal research and so there is a need for "legally sophisticated empirical analysts". [1173] As such, the methodology of empirical analysis that is well defined in other traditional academic fields is virtually non-existent in the law reviews. As a consequence, studies produce less accurate information about the empirical world than they claim. Hence, the primary motive of empirical legal studies is to advocate legal reform, while another motive is solely to add to the extant academic knowledge.[1174]

Scholars have used various definitions to identify empirical legal scholarship. In a broader sense, Epstein and King define 'empirical evidence' as evidence about the world based on experience and observation which could also translate into an investigation of the subject matter. They state that research is deemed empirical when it is based on "data, which is just a term for facts about the world […] As long as the facts have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical."[1175]

[1170]Ibid.
[1171]Post Robert (1992) 'Legal Scholarship and the Practice of Law', University of Colorado Law Review Vol. 63 pp. 620-621.
[1172]Epstein Lee and King Gary (2002) 'The Rules of Inference', The University of Chicago Law Review Vol. 69 Issue 1.
[1173]Ibid.
[1174]Ibid.
[1175]Ibid.

Diamond and Muellar[1176] posit that in legal studies the production of original research is less common, despite persistent calls for more empirical legal scholarship. However, scholars have recently indicated that empirical legal scholarship is becoming a standard approach in the legal sphere. Several institutions have launched programs or initiatives devoted to empirical legal studies with the aim of encouraging and supporting empirical research: for example, the Harvard Law School, the Journal of Empirical Legal Studies (JELS) and, in the UK, the Nuffield Foundation, which sponsored an "Inquiry on Empirical Research in Law" which has attracted considerable interest.

According to Eisenburg,[1177] empirical scholarship has covered both criminal and civil law. For instance, a professor and colleagues at Columbia University, New York, produced a report highlighting the rate of error in the capital punishment system due to incompetent defence lawyers, uncoorporative police officers and prosecutors who withheld evidence. In civil cases, empirical scholarship has also helped uncover matters relating to a decline in civil trial, procedural constraints, court fees and award limitations.[1178]

However, advocates of factual inquiry in legal research contend that a constant review of methodology is required to reflect the regular change in legal principles and the way it impacts society, because empirical studies can inform policy-makers and the general public on a broad range of legal concerns.[1179] Hence, the principal focus of this study is to collect subjective data on the understanding of the legal aid scheme and its potential alliance with customary courts in Nigeria through the perception of specific individuals, as well as to form a valid academic conclusion based solely on the evidence collected.

6.7 The Interdisciplinary Research Method

Interdisciplinary studies are a fast-growing academic field that became fully established by the mid-1990. However, the meaning of the method of study is still being debated by its

[1176]Diamond Shari Seidman and Mueller Pam (2010) 'Empirical Legal Scholarship in Law Reviews.' The Annual Review of Law and Social Science Vol. 6 pp. 581-99.
[1177]Eisenburg Theodore (2004) 'Why Do Empirical Legal Scholarship?' 41 San Diego Law. Review pp. 1741-1742.
[1178]Ibid.
[1179]Ibid. p. 1746.

practitioners and critics.[1180] Aboelela et al.[1181] define the interdisciplinary research method as: "any study or group of studies undertaken by scholars from two or more distinct scientific disciplines […] based on a conceptual model that links or integrates theoretical frameworks from those disciplines; uses study design, methodology […] perspectives and skills of the involved disciplines throughout phases of the research process." [1182]

The methodological approach of this study will be appraised from a socio-legal perspective to further understand the workings of law through social experiences. This chapter will not exclusively assess the legal principle of the legal aid scheme but will rather assess it as a social structure aimed at providing access to free legal counsel to individuals who may need it to defend their rights in court. Tobi and Kampen[1183] posit that an in-depth study of the relationship between humans and their environment cannot be limited to one field of study but requires knowledge, ideas and research methodology from different disciplines. Thus, the socio-legal model in this research aims to increase knowledge on the reality of law as perceived by society.

6.7.1 Socio-Legal Approach

Guibentif[1184] describes socio-legal science as a sub-discipline of sociology that depicts law as a social phenomenon.[1185] Fitzpatrick[1186] contends that the identity of socio-legal studies remains undetermined, as there are unresolved questions as to whether it is social, legal or a combination of both. However, it is deeply rooted and accepted internationally as a valid field of legal inquiry that utilises sociology as a tool for data collection.[1187] This study adopts a socio-

[1180]Repko Allen F. (2008) 'Interdisciplinary Research: Process and Theory' Sage Publications.
[1181]Aboelela, S.W., Larson, E., Bakken, S., Carrasquillo, O., Formicola, A., Glied, S.A., Gebbie, K.M. (2007) 'Defining Interdisciplinary Research: Conclusions from a Critical Review of the Literature' Health Services Research 42(1), pp. 329-346.
[1182]Ibid.
[1183]Tobi Hilde and Jarl K. Kampen (2018) 'Research Design: The Methodology for Interdisciplinary Research Framework Quality & Quantity', International Journal of Methodology Volume 52 Issue 3, pp. 1209-1225.
[1184]Guibentif Pierre (2003) 'The Sociology of Law as a Sub-Discipline of Sociology Portuguese', Journal of Social Science 1(3) pp. 175-184.
[1185] Kazimierz Opalek (1971) ARSP: Archiv für Rechts-und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy Vol. 57, No. 1 pp. 37-55.
[1186]Fitzpatrick P. (1995) 'Being Social in Socio-Legal Studies', Journal of Law and Society Volume 22 Number 1 pp. 105-112.
[1187]Banakar, Reza and Travers, Max (2005) 'Introduction to Theory and Method in Socio-Legal Research' In Theory and Method in Social-Legal Research Banakar R. Travers M. (eds.), Oxford, Hart.

legal approach to epitomise the collective thoughts and knowledge of respondents on the matter of expanding the scope of legal aid through customary courts in Nigeria.

A socio-legal study is conceptually distinguished from other positivistic approaches because the research method is focused on how one understands the law as well as how law relates to a social situation.[1188] It also shares a main characteristic of 'sociology of law', a research discipline with distinct research traditions, which like socio-legal studies is focused on the societal perspective on the concept of law through the use of sociological methodologies.[1189] According to Parker,[1190] a socio-legal approach has a wide scope and, as well as sociology, it covers disciplinary approaches such as anthropology, political science, psychology and history. A common attribute with all associated disciplines is that they seek law from the 'outside'. That is, they endeavour to "explain legal phenomenon […] in terms of their social setting".[1191] Banakar and Travers[1192] posit that, while other disciplinary approaches have numerous methods texts and handbooks, there is a lack of guidance on how to research law and legal processes from a variety of social scientific standpoints.

However, Friedman[1193] argues that legal institutions are conscious of social processes and, as such, are responsible for monitoring and regulating the pace of social change. Friedman further stated that the socio-legal approach to law dates from the late 19th to the early 20th century through the writings of Henry Maine and Max Weber. The approach rests upon two concepts: firstly, that legal systems are essentially man-made objects and, secondly, that law varies in time and space according to the culture in which it is embedded.[1194]

The term socio-legal has been of established use in the United States of America since the early part of the twentieth century. In 1972 a group of academic lawyers and social scientists from the United Kingdom adopted the concept. This later became the Socio-Legal Studies

[1188]Schiff David N. (1976) 'Socio-Legal Theory: Social Structure and Law', The Modern Law Review, Vol. 39, No. 3 pp. 287-310.
[1189]Ervasti, K. (2008) 'Sociology of Law as a Multidisciplinary Field of Research' In U. Bernitz, S. Mahmoudi, & P. Seipel (eds.) Law and Society. Scandinavian Studies in Law (Vol. 53). Stockholm: The Stockholm University Law Faculty.
[1190]Parker Kunal M. 'Approaches to the Study of Law as a Social Phenomenon' In Sarat Austin, Ewic Patricia (eds.) (2015) The Handbook of Law and Society Chapter 4 p. 56.
[1191]Friedman, L. (1986) 'The Law and Society Movement' Stanford Law Review, 38 (3), pp. 763-780.
[1192]Banakar, Reza and Travers, Max (2005) 'Introduction to Theory and Method in Socio-Legal Research' In Theory and Method in Social-Legal Research Banakar R. Travers M. (eds.), Oxford, Hart.
[1193]Friedman Lawrence M. (1969) 'Law & Society Review', Vol. 4, No. 1 pp. 29-44.
[1194]Friedman, L. (1986) 'The Law and Society Movement' Stanford Law Review, 38(3), pp. 763-780.

Association (SLSA) in 1990.[1195] Fitzpatrick[1196] contends that, despite the increasing scope of socio-legal research and teaching, there has been limited input with regards to the critical analysis of what constitutes the 'socio' of socio-legal studies. The author argues that the law aspect serves as a necessary 'supplement' which intervenes in society to correct irregularities and inadequacies of society but believes that "whilst society depends on law for its possibility, law has to remain apart from it, resisting reduction in terms of society".[1197]

According to Suchman and Herz,[1198] since the mid-1990's various scholars have made considerable efforts to conjugate the study of law with the study of sociology. The link between the study of law and social science has a long and varied history which has been well-documented in numerous publications by scholars such as Tomlins[1199] and Garth and Sterling.[1200] Suchman and Herz posit that: "the relationship between law and empirical social science dates back at least to the days of Durkheim (1893), Weber (1978) and Malinowski (1959), and has continued forward into the current-day projects of the interdisciplinary law-and-society movement and of such disciplinary social science subfields as judicial politics, law and economics, the social-psychology of law, the sociology of law, legal history, and legal anthropology."[1201]

Travers[1202] believes the field of socio-legal studies is theoretically and methodologically underdeveloped from the perspective of mainstream sociology, as compared to more developed sub-fields such as the sociology of education or of organisations. Cotterrell[1203] argues that socio-legal research has not modified the most basic patterns of legal thinking. However,

[1195]Feenan D. (2013) 'Exploring the 'Socio' of Socio-Legal Studies' In: Feenan D. (eds.) Exploring the 'Socio' of Socio-Legal Studies. Palgrave Macmillan Socio-Legal Studies. Palgrave, London.
[1196]Fitzpatrick, P (1995) 'Being Social in Socio-Legal Studies' 22(1) Journal of Law and Society pp. 105-112.
[1197]Ibid.
[1198]Suchman Mark C. Mertz Elizabeth (2010) 'A New Legal Empiricism?' Assessing ELS and NLR Annual Review of Law and Social Science Vol. 6, pp. 555-579.
[1199]Tomlins Christopher (2000) 'Framing the Field of Law's Disciplinary Encounters': A Historical Narrative Law & Society Review, Volume 34, Number 4 pp. 911-972.
[1200]Garth Bryant, Joyce Sterling (1998) 'From Legal Realism to Law and Society': Reshaping Law for the Last Stages of the Social Activist State Law & Society Review, Vol. 32, No. 2 pp. 409-472.
[1201]Suchman Mark C. and Mertz Elizabeth (2010) 'A New Legal Empiricism?' Assessing ELS and NLR Annual Review of Law and Social Science Vol. 6, pp. 555-579.
[1202]Travers Max (1993) 'Putting Sociology Back into the Sociology of Law' Journal of Law and Society, Vol. 20, No. 4 pp. 438-451.
[1203]Cotterrell Roger (2012) 'Socio-Legal Studies, Law School and Legal and Social Theory' Queen Mary University of London, School of Law Legal Studies Research Paper No. 126/2012.

according to Blandy,[1204] it is an essential and reliable mechanism to research the legal and social norms developed by people and their association with one another.

6.8 Triangulation in Research

Triangulation is a process of verification that increases validity by incorporating several viewpoints and methods. It also refers to a practice used by researchers to confirm a finding by using other independent methods agree with it or, at least, do not challenge it.[1205] Triangulation is an accepted practice in social research and its origins can be traced back to Campbell and Fiskel (1959), who developed the idea of "multiple operationism".[1206] This technique was later developed by Web (1966) and elaborated further by Denzin (1970) beyond the traditional scope of research methods and designs.[1207] Denzin[1208] in the early years of study defined triangulation as "the combination of methodologies in the study of the same phenomenon". However, in another study (1970) the same author categorised triangulation into three major groups, based on the various methodologies and methods utilised by the researcher:[1209]

- The investigator triangulation uses multiple researchers to investigate the same problem, to instigate a different perception of the inquiry and help strengthen the integrity of the findings.
- Data triangulation: focuses on the participants and uses different sources of data or research instruments, such as interviews, questionnaires, focus group discussion or participant observation. Data triangulation may also involve using different participants to enhance the quality of the data by using multiple sources.
- Methodological triangulation: utilises different research methods, i.e., mixed methods, a combination of quantitative and qualitative research.[1210]

[1204]Blandy, S. (2014) 'Socio-Legal Approaches to Property Law Research' Property Law Review, 3 (3) pp. 166-175.
[1205]Ibid.
[1206]Ibid.
[1207]Yeasmin Sabina, Rahman Khan Ferdousour (2012) 'Triangulation Research Method as the Tool of Social Science Research' BUP Journal Volume 1 Issue 1 pp. 154-163.
[1208]Denzin Norman K. (1978) 'The Research Act: A Theoretical Introduction to Sociological Methods' 2nd Edition New York: McGraw-Hill.
[1209]Denzin, N. (1970) 'The Research Act in Sociology: A Theoretical Introduction to Sociological Methods', Chicago: Aldine pp. 345-360.
[1210]Ibid.

The choice of all three, two or a just one triangulation method will depend on the methodological approach adopted by the researcher. This study utilises the data triangulation technique to validate research objectives.

6.8.1 Data Triangulation

The social sciences are typically aimed at discovering new or old realities, as well as the analysis of categories, correlation, and causal explanations, and investigating the natural laws which govern them.[1211] In recent years, the use of multiple methods to examine the same dimension of a research problem has become more received by scholars and researchers. It is considered a vehicle for cross validation based on the principle that multiple viewpoints allow for greater accuracy.[1212] Chamberlain et al.[1213] advocate for the incorporation of multiple methods in research. They indicate that its application encourages creativity and extends the scope and depth of data for further interpretation and analysis.

Data triangulation addresses the issue of internal validity by using more than one method of data collection to obtain corroborating evidence[1214] and answer a research question.[1215] The justification of data triangulation is that potential inadequacies of using one technique of data collection are adequately managed by adopting other credible approaches and, as a result, the researcher takes advantage of their distinct strengths.[1216] Social scientists such as Denzin, Lincoln and Guba[1217] suggest that validation, justification and credibility in social science

[1211]Young P. (1968) 'Scientific Social Surveys and Research', New Delhi: Prentice Hall. Cited in Yeasmin Sabina, Rahman Yeasmin Khan Ferdousour (2012) 'Triangulation Research Method as the Tool of Social Science Research', BUP Journal Volume 1 Issue 1 pp. 154-163.
[1212]Jick Todd D. (1979) 'Mixing Qualitative and Quantitative Methods: Triangulation in Action', Administrative Science Quarterly, Vol. 24, No. 4, Qualitative Methodology, pp. 602-611.
[1213]Chamberlain, K., Cain, T., Sheridan, J., & Dupuis, A. (2011) 'Pluralisms in Qualitative Research: From Multiple Methods to Integrated Methods'. Qualitative Research in Psychology, 8, pp. 151-169.
[1214]Onwuegbuzie, A. J. Leech, N. L. (2007) 'Validity and Qualitative Research: An Oxymoron? Quality and Quantity', 41 p. 239.
[1215]Anney Vicent N. (2014) 'Ensuring the Quality of the Findings of Qualitative Research: Looking at Trustworthiness Criteria', Journal of Emerging Trends in Educational Research and Policy Studies 5 (2) p. 277.
[1216]Brannen, J. (1992) 'Mixing Methods: Qualitative and Quantitative Research', Avebury, UK: Aldershot.
[1217](a) Denzin, N. (1978) 'The Research Act: A Theoretical Introduction to Sociological Methods', New York: McGraw-Hill.
(b) Denzin, N. (1989) 'The Research Act: A Theoretical Introduction to Sociological Research Methods' (3rd Edition, First Published on 1970), Prentice Hall.
(c) Denzin, N. and Lincoln, Y. (1994) 'Handbook of Qualitative Research', Sage Publications.
(d) Guba, E. and Lincoln, Y. (1994) 'Competing paradigm in qualitative research', Handbook of qualitative research 2(2), pp. 105-117.

research become possible through the gathering of corroborating findings from respondents on the same topic, using diverse approaches. They argue for the difficulty to grasp reality completely by a single technique of data collection and suggest triangulation to clarify the complexity of social certainties.[1218] Harvey and Macdonald[1219] posit that data reliability is credible if researchers using the same research method are able to reach the same findings. Consequently, triangulation becomes a powerful tool to strengthen the qualitative research design.[1220] Thus, research is fully developed and well analysed, with a well-grounded level of validity and credibility,[1221] further concretising research findings.

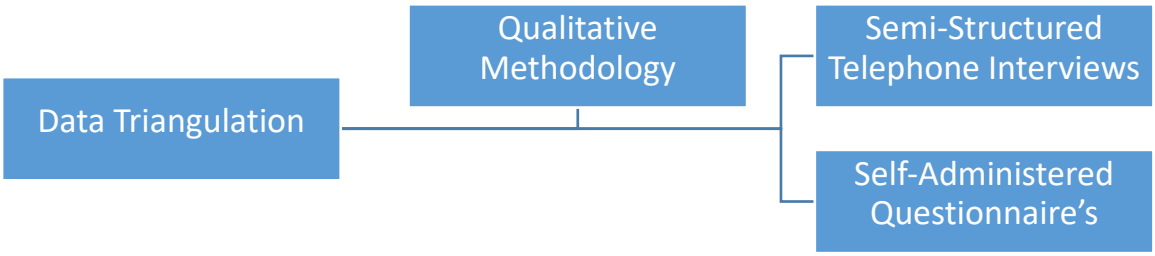

Figure 6.3 - Methodological Triangulation Adopted

In line with the three major classifications of triangulation methods proposed by Denzin, this study employs the 'data triangulation' technique to obtain crucial information from two different sources within the qualitative research methodology. This included semi-structured telephone interviews and self-administered questionnaires. The participant selection differed, but the questions posed through both approaches remained the same. The mode of data collection also differed slightly as one was delivered and received electronically via the web, and the other was conducted over the phone with the use of a digital recorder to collect data. This procedure boosts the capacity of respondents and allows the research to focus on the quality and potency of the responses of research participants, who are the focal point of this

[1218]Ibid.
[1219]Harvey, L. and MacDonald, M. (1993) 'Experiments', In Doing Sociology pp. 139-147. Macmillan Education UK.
[1220]Holtzhausen Somarie (2001) 'Triangulation as a Powerful Tool to Strengthen the Qualitative Research Design': The Resource-based Learning Career Preparation Programme (RBLCPP) as a case study. Presented at the Higher Education Close Up Conference 2, Lancaster University (16-18 July 2000).
[1221]Ibid.

study. It will ultimately enhance the credibility of collected data and further certify the validity of the eventual research findings.

6.9 Sampling in Qualitative Research

Qualitative research usually aims to reflect the diversity within a given population,[1222] rather than reaching a conclusion via an expansive pool of statistical data to validate study. It is primarily naturalistic, interpretive, and inductive, and attempts to make sense of the meaning people attach to their experiences in relation to a phenomenon.[1223] According to Denzin and Lincoln,[1224] sampling is crucial to all empirical inquiry. However, Bernard[1225] contends that it is not possible to collect data from every individual within a community to get conclusive findings; therefore, researchers collect a sample, which is a percentage and portion of a given populace.[1226] According to Marshal,[1227] sampling interacts with a subset of a population and selection will depend on the research objectives as well as the size and diversity of the study's population.

Cohen et al.[1228] contend that the quality of research may not depend solely on the suitability of the methodology utilised, but also on the suitability of the sampling strategy that is to be followed. The sampling process is a vital component of qualitative study and gives more meaning to the subject under investigation. In fieldwork research, sampling refers to an intended selection of individuals, units, or settings to be studied. According to Palys,[1229] there are two types of sampling techniques: random and non-random sampling. Unlike quantitative methods, of which the focus is random sampling, qualitative studies are able to employ many other methods depending on topic and suitability. These include purposive sampling,

[1222]Kuzel A. J. 'Sampling in Qualitative Inquiry', In Crabtree BF, Miller WL, (eds.) (1992) 'Doing Qualitative Research' London: Sage pp. 31-44.
[1223]Mayan Maria J. (2009) 'Essentials of Qualitative Inquiry', New York: Routledge p. 11.
[1224]Denzin N. and Lincoln, Y. (2000) 'Handbook of Qualitative Research', London: Sage Publications.
[1225]Bernard, R. (1995) 'Research Methods in Anthropology', Second Edition. London: Sage Publications.
[1226]Etikan, I. Abubakar, S. and Alkassim, R. (2016) 'Comparison of Convenience Sampling and Purposive Sampling', American Journal of Theoretical and Applied Statistics, 5(1), pp. 1-4.
[1227]Marshall P. (2003) 'Human Subjects Protections, Institutional Review Boards, and Cultural Anthropological Research', Anthropology, *7*6(2), pp. 269-85.
[1228]Cohen Louis, Maion Lawrence & Morrison Keith (2007) 'Research Methods in Education' Sixth Edition: Approaches to Qualitative Analysis Chapter 22 p. 100.
[1229]Palys, T. (2008) 'Purposive Sampling', The Sage Encyclopaedia of Qualitative Research Methods, 2, pp. 697-698.

convenience sampling and snowball sampling.[1230] This study employs the purposive and snowballing sampling methods to ensure a multi-dimensional base of participants.

6.9.1 Homogenous/Purposive Approach

A qualitative method enables the researcher to sample broadly and deeply enough so that all the important aspects and variations of the theme under scrutiny are acquired through the sample.[1231] Purposive sampling according to Palys[1232] is one of the most common sampling strategies within qualitative research. It involves grouping participants according to the study's pre-selected criteria relevant to the research question.[1233] This study applies the homogenous/purposive sampling method in choosing suitable participants due to the non-probability[1234] of the peculiarities that are core to the principal focus of this study. Homogenous sampling is widely used to target specific groups, which in this study are groups who may become potential recipients of free legal representation in Nigeria (e.g., working class, low-income bracket). Palinkas et al.[1235] posit that purposive sampling is broadly used for the identification and selection of information-rich cases related to the phenomenon of interest, which is deeply rooted in what a researcher wants their study to "understand, predict, explain, or describe".[1236] This is in-line with the traditional aim of the qualitative research method and the focus of this research, which is to achieve an in-depth understanding of the subject matter through the perception of selected respondents.

Homogenous, also known as purposive, sampling is a non-random method that does not need fundamental theories or a set number of participants. The researcher decides what the study

[1230]Etikan, I. Abubakar, S. and Alkassim, R. (2016) 'Comparison of Convenience Sampling and Purposive Sampling', American Journal of Theoretical and Applied Statistics, 5(1), pp. 1-4.
[1231]Elliott Robert and Timulak Ladislav (2005) 'Descriptive and Interpretive Approaches to Qualitative Research', In Miles Jeremy, Gilbert Paul (eds.) 'A Handbook of Research Methods for Clinical and Health Psychology' Chapter 11 p. 151.
[1232]Palys, T. (2008) 'Purposive Sampling', The Sage Encyclopaedia of Qualitative Research Methods, 2, pp. 697-698.
[1233]Palys T. & Atchinson C. (2008) 'Research Decisions: Quantitative and Qualitative Perspective', Thompson Nelson: Toronto, Canada.
[1234]Bryman Alan (2015) 'Social Research Methods', 5th Edition Oxford University Press p. 408.
[1235]Palinkas, L. A., Horwitz, S. M., Green, C. A., Wisdom, J. P., Duan, N., & Hoagwood, K. (2015) 'Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation', Research Administration and Policy in Mental Health, 42(5), pp. 533–544.
[1236]Rappaport, J. (1987) 'Terms of Empowerment/Exemplars of Prevention: Toward a Theory for Community Psychology', American Journal of Community Psychology, 15, p. 123.

will investigate and chooses respondents accordingly.[1237] Thus, homogeneous sampling blends people of similar backgrounds and experiences together and is often chosen when the in-depth examination of a research question is particular to a specific group of interest.[1238] As a consequence, it reduces variation in results and ultimately simplifies analysis.[1239] It also allows the researcher to gain access to a wide range of targeted individuals who are relevant to the research question.[1240]

This study targeted individuals who reside in Nigeria and who may have had direct or indirect contact with the provision of legal aid or customary court practices in Nigeria. They are more than likely to have similar backgrounds and, as such, share similar experiences on subject matter regardless of their jurisdictions. A call for participants was posted on social media (Facebook, in public mode) to recruit volunteers for the intended study. Respondents were selected based on the criteria detailed on the poster ***(See Appendix 1)***. The poster also asked those tagged in the post for assistance with recruiting other respondents who fitted the criteria required, via the snowball technique.

6.9.2 Snowball Approach

Vogt[1241] defines snowball sampling as a procedure for obtaining research participants. This is a technique where a respondent provides the investigator with the name of another subject, who in turn provides the name of a third, and so on. Snowball sampling is a technique derived from a qualitative research method which comprises of a small group of individuals who have been sampled by the researcher. The sampled participants then go on to propose other individuals who may have had relevant experience with the subject matter.[1242] It is also a feasible strategy available for instances where potential sample participants are hard to reach. Atkinson and

[1237]Oppong, S. (2013) 'The Problem of Sampling in Qualitative Research', Asian Journal of Management Sciences and Education, pp. 1-9.
[1238]Sudman, S. and Freeman, H. (1988) 'The Use of Network Sampling for Locating the Seriously Ill', Medical Care, 26(10), pp. 992-999.
[1239]Nastasi Bonnie 'Qualitative Research: Sampling & Sample Size Considerations' (Adapted from a presentation Dr. Bonnie Nastasi, Director of School Psychology Program) p. 2. https://www.scribd.com/document/282765315/Quality-Sample-Size (accessed 08/12/2018).
[1240]Bryman Alan (2015) Social Research Methods 5th Edition Oxford University Press p. 408.
[1241]Vogt, W. (1999) 'Dictionary of Statistics and Methodology: A Nontechnical Guide for the Social Sciences', London: Sage.
[1242]Bryman Alan (2015) 'Social Research Methods' 5th Edition Oxford University Press p. 415.

Flint[1243] posit that the strategy is mostly utilised to combat difficulties connected with sampling concealed populations and with populations' lack of interest in the research objectives. Consequently, this method of respondent selection will facilitate a diverse mix of participants with potentially similar experiences in different locations.

A general mistrust of the researcher and indifference to or lack of understanding of research itself may act as obstacles to acquiring suitable respondents. Researchers may have to utilise snowball sampling to gain access to participants that are a decisive aspect of the study. In some cases, it may be difficult to find adequate individuals willing to participate. For instance, Benson[1244] describes how, during fieldwork research, it became hard to find her desired participants, who were British expatriates living in France. However, after interviewing one family, they introduced her to their friends and acquaintances with similar backgrounds that were willing to participate due to the recommendation by the first participant.

Atkinson and Flint[1245] apply snowball sampling for two main reasons: firstly, it offers practical advantages to research which are intended to be principally explorative, qualitative and descriptive;[1246] secondly, it is a formal methodology for drawing inferences about the perception of a population.[1247] Snowball sampling has been identified as indispensable to this study because it eliminates the danger that the participants available may not be of any relevance to the research questions under investigation. For instance, individuals who do not reside in Nigeria or have no knowledge of the operations of the legal systems in Nigeria would not be of great benefit to the study, because they may not have up-to-date information on the research topic. In the absence of the snowball strategy, research that aims to target a certain group of participants could take more time and cost more than planned. The snowballing method also eliminates the potential of bias from respondents. Respondents sourced via this method would not have had any previous contact with the researcher.

Therefore, the researcher is not likely to influence their responses to the questions under investigation. This technique will also ensure that access to individuals who fit the criteria is

[1243]Atkinson, R. and Flint, J. (2001) 'Social Research Update', ISSN: 1360-7898, University of Surrey. p. 33.
[1244]Benson M (2011) 'The British in Rural France': Lifestyle Migration and the Ongoing Quest for a Better Way of Life Manchester University Press p. 17.
[1245]Atkinson, R. and Flint, J. (2001) 'Social Research Update', ISSN: 1360-7898, University of Surrey p. 34.
[1246]Hendricks, V., Blanken, P. and Adriaans, N. (1992) 'Snowball Sampling: A Pilot Study on Cocaine Use', Rotterdam: IVO.
[1247]Faugier, J. and Sargeant, M. (1997) 'Sampling Hard to Reach Populations', Journal of Advanced Nursing, 26, pp. 790-797.

prioritised for interview. In this study, the majority of respondents were acquired through this method due to their interest and experience in the subject matter.

6.10 Ethical Considerations

Every research study raises ethical considerations, especially if human participants are part of the study. This section of the research will consider the ethical considerations applicable, and the steps taken to minimise harm to all participants involved. Halai[1248] posits that ethical concerns in qualitative research are imperative and involve various rules that researchers should unequivocally comply with. This is to ensure that the general wellbeing of respondents is not put at any risk as a result their participation in the study. As a rule, universities set out rules and guidelines for researching in an ethically acceptable manner and researchers are under obligation to seek and obtain permission from ethics committees before any fieldwork is commenced. This study adheres to all ethical practices, including approval from the university research ethics committee to undertake research ***(See Appendix 2)***.

Qualitative research requires informed and voluntary consent from human participants. After providing selected participants with details such as how the data is to be stored and the purpose of research,[1249] informed consent must be obtained from all respondents on an understanding that participation is voluntary.[1250] All participants of this study were given a consent form to complete before the research commenced. This explained the purpose of the study, time, procedures, and rights of the participants to withdraw from the research, and contacts of the relevant people or organisations if a wellbeing issue emerged ***(See Appendix 3)***. This system is compulsory and put in place to guard against researchers coercing participants.[1251]

Participants should also be made aware of the proposed conditions for anonymity and confidentiality. The details remained within the study team and were anonymous, and their identities are not directly linkable to their comments.[1252] Before the study, respondents were

[1248]Halai, A. (2006) 'Ethics in Qualitative Research: Issues and Challenges', Working paper, 4, pp. 1-13.
[1249]Nijhawan, L. P., Janodia, M. D., Muddukrishna, B. S., Bhat, K. M., Bairy, K. L., Udupa, N., & Musmade, P. B. (2013) 'Informed Consent: Issues and Challenges', Journal of Advanced Pharmaceutical Technology & Research, 4(3), pp. 134-140.
[1250]Holloway, I., & Wheeler, S. (1996) 'Qualitative Research for Nurses', Oxford [England]: Blackwell Science.
[1251]Kerkale, J. and Pittila, I. (2006) 'Participatory Action Research as a Method for Developing Leadership and Quality', International Journal of Leadership in Education, 9(3), pp. 251-268.
[1252]Ritchie Jane and Lewis Jane (eds.) (2003) 'Qualitative Research Practice', A Guide for Social Science Students and Researchers SAGE Publications pp. 66-71.

informed of their right to anonymity and how their responses will remain confidential unless disclosure is forced due to reasons of public interest. Storing data securely is another significant factor requiring ethical consideration. According to Palys and Atchinson,[1253] the security of digital data that is gathered interactively via the Internet is a valid concern. An example is data collected through web interviews that in one way or another are computer-assisted through various messaging or networking programs. Storage of data is detailed in the ethical application and approval is an indication that the university is satisfied with the mode of storage and disposal proposed by researcher.

6.11 Primary Data Collection

According Etikan et al.,[1254] data collection is vital in any research because the data represents a better understanding of the study. Hence, sampling is significant to ensure the appropriate respondents are selected.

Social scientists use various data collection strategies within a qualitative method, such as in-depth interviews, questionnaires or focus groups.[1255] Data can be collected either in the form of primary or secondary data.[1256] This study builds its fact-finding strategy on primary data obtained from interviewees purposively sampled by the researcher to collect information for the study. Secondary data, on the other hand, which comprises of possible previous empirical studies and analysis about legal aid by previous researchers, is not used in this study. This is a safeguarding strategy to avoid any clash in the quality requirement and methodological criteria of current research.[1257]

Primary data will give an insight into the status of the subject area by providing up to date subjective perceptions from actual social actors. Primary data collection has evolved through technology advancements. Contemporary digital technologies offer the data-gathering process

[1253]Palys, T. Atchinson, C. (2012) 'Qualitative Research in the Digital Era: Obstacles and Opportunities', International Journal of Qualitative Methods, 11(4) p. 362.
[1254]Etikan, I. Abubakar, S. and Alkassim, R. (2016) 'Comparison of Convenience Sampling and Purposive Sampling', American Journal of Theoretical and Applied Statistics, 5(1), pp. 1-4.
[1255]Hoz Joop J. and Hennie Boeije R. (2005) 'Data Collection, Primary vs. Secondary', Encyclopaedia of Social Management Vol. 1 pp. 593-599.
[1256]Wahyuni Dina (2012) 'The Research Design Maze: Understanding Paradigms, Cases, Methods and Methodologies', Journal of Applied Management Accounting Research, Vol. 10, No. 1, p. 73.
[1257]Hoz Joop J. and Hennie Boeije R. (2005) 'Data Collection, Primary vs. Secondary', Encyclopaedia of Social Management Vol. 1 pp. 593-599.

the ability to optimise research time by increasing comfort, maximising efficiency and minimising error.[1258] For instance, the tape recorder has always been an essential tool for qualitative researchers, as is the contemporary digital recorder, which is more discrete and less distracting than its analogue predecessor.[1259] Instantaneous communication platforms such as email and other social media network messaging have made the circulation of information much easier and more time efficient. However, to collect the required empirical data, responses were transmitted through digital and social network technologies and were utilised as the main source of information.

6.11.1 Semi-Structured Telephone Interviews

There are various methods for collecting qualitative data. Each is an important tool, ranging from in-depth interviews, observing interactions, analysis of (social and non-social) media and focus groups. In-depth interviews are one of the essential data collecting methods in qualitative research, and it involves spoken communication between the researcher and the subject.[1260] It is frequently used in survey designs and exploratory and descriptive studies,[1261] and has been cited as the most appropriate data source for studies aimed at examining the perception of respondents on their experience for a very detailed coverage on a subject matter. The importance of interviews, for instance in this study, to gather first-hand understanding of how the legal aid scheme in Nigeria operates in practice from an individual viewpoint is seldom mentioned in the extant literature on legal aid.

For this study, three telephone interviews were conducted. According to Edwards and Holland,[1262] interviews are the most widely used technique adopted in qualitative research. The authors contend that the concept of interviewing as a tool of data collection for research means moving away from our daily understanding and knowledge of its traditional qualities. In the context of research, it becomes a qualitative, scientific method of inquiry and an investigative tool in social science.[1263] This method of investigation intensifies the capacity for

[1258]Palys, T. Atchinson, C. (2012) 'Qualitative Research in the Digital Era: Obstacles and Opportunities', International Journal of Qualitative Methods, 11(4) p. 358.
[1259]Ibid.
[1260]Carter Y. and Thomas C. (1997) 'Research Methods in Primary Care', Oxon, Radcliffe Medical Press. (eds.).
[1261]King, N. (1994) 'The Qualitative Research Interview', In Cassell, C. and Symon, G. (eds.), Qualitative Methods in Organizational Research, London: Sage.
[1262]Edwards Rosalind and Holland Janet (2013) 'what is qualitative interviewing?' p. 1.
[1263]Ibid. p. 2.

understanding individual perspectives and obtains factual confirmation on the subject matter based on participants' individual experience of it. Patton[1264] stated that the importance of interviews in qualitative research is to "to find out what is in and on someone else's mind"; the perception of a lived experience.[1265] Thus, "every word people use in telling their stories is a microcosm of their consciousness".[1266] As such, complex experiences on subject matter are best addressed in in-depth interviews because of the depth of focus and the opportunity for clarification and detailed understanding.[1267] According to Nuunkoosing,[1268] interviews can either be structured, semi-structured or unstructured. All approaches can be delivered via face-to-face or through electronic media including email, telephone, and Skype. Structured interviews give precise guided questions and are usually swift and easy to conduct.[1269] Semi-structured interviews give the interviewee the chance to elaborate on and clarify specific issues through the use of open-ended questions. Zhang and Wildermuth[1270] argue for a semi-structured approach when researchers are "working within an interpretive research paradigm in which one will assume that reality is socially constructed by the participants in the setting of interest".

Considering the nature of this inquiry, this study conducted semi-structured interviews via telephone with three selected participants. The features of a telephone interview have been proven to be identical and in no way limiting with regards to the data output if compared to face-to-face interviews.[1271] Each telephone call was recorded digitally with a voice recorder, transcribed, and then analysed. The investigation was tailored to capture answers generated from the research question, which are open-ended and exploratory in nature.[1272] This line of

[1264]Patton M. Q. (1990) 'Qualitative Evaluation and Research Methods' (2nd Edition) Newbury Park, CA; Sage.
[1265]Gunbayi I. Sorm S. (2018) 'Social Paradigms in Guiding Social Research Design: The Functional, Radical Humanist and Radical Structural Paradigms', International Journal on New Trends in Education and their Implications Vol. 9 Issue 2 pp. 57-76.
[1266]Seidman, I. (2006) 'Interviewing as Qualitative Research: A Guide for Researchers in Education and Social Sciences', 3rd Edition. p. 7, Teachers College Press: Columbia.
[1267]Ritchie Jane and Lewis Jane (eds.) (2003) 'Qualitative Research Practice A Guide for Social Science Students and Researchers', SAGE Publications p. 58.
[1268]Nunkoosing, K. (2005) 'The Problems with Interviews', Qualitative Health Research, 15(5), pp. 698-706.
[1269]Bryman, A. (2008) 'Social Research Methods', Oxford University Press.
[1270]Zhang, Y. and Widermuth, M. (N.D) 'Unstructured Interview' pp. 1-10. https://www.ischool.utexas.edu/~yanz/Unstructured_interviews.pdf (accessed 01/01/19).
[1271]Sturges, J. E., & Hanrahan, K. J. (2004) 'Comparing Telephone and Face-To-Face Qualitative Interviewing: A Research Note', Qualitative Research, 4(1), pp. 107-118.
[1272]Elliott Robert Timulak Ladislav (2005) 'Descriptive and Interpretive Approaches to Qualitative Research', In Miles Jeremy, Gilbert Paul (eds.) A Handbook of Research Methods for Clinical and Health Psychology Chapter 11 p. 149.

inquiry was employed to capture unbiased information on the subject matter of legal aid in relation to customary courts in Nigeria.

Opdenakker[1273] highlights the limitations of semi-structured interviews and states that the technique may become almost impracticable for some researchers because it takes a lot of effort, time, and expense. Another challenge is the researcher's ability to focus the study and knowing when the length and pace of the conversation is going off topic.[1274] Analysing data from semi-structured interviews requires adequate time and effort due to its bulk, and this is also considered to be a drawback to research.[1275] During semi-structured interviews, the main questions are followed up with other supplementary questions intended to further scrutinise and probe participants with regards to their experiences and perspectives. The technique's main objective is to generate in-depth data, causing the process of analysis and interpretation of data to become challenging.

Bryman[1276] affirms the downside of interviews in qualitative research but insists that they are more flexible than any other qualitative method and an effective way to keep the study tightly focused on the target topic. Edwards and Holland[1277] also contend that it is crucial that the use of a method such as semi-structured interviews should be derived from the research topic, the research questions, and the theoretical framework within which the researcher is investigating. Alsaawi[1278] notes that many researchers favour semi-structured interviews because the questions are pre-planned prior to the interview and afford the freedom to be more flexible, giving the interviewee the chance to elaborate and explain particular issues through the use of open-ended questions.[1279] In accordance with the objectives of this study, Miller and Glassner[1280] explain that the scope of qualitative interviews provide the researcher with "access

[1273]Opdenakker Raymond (2006) 'Advantages and Disadvantages of Four Interview Techniques in Qualitative Research', Forum Qualitative Sozialforschung / Forum: Qualitative Social Research, [S.l.], Vol. 7, No. 4, ISSN 1438-5627.
[1274]Whyte, W. (1960) 'Interviewing in Field Research' In R. Burgess (ed.), Field research: 111-122. London: Routledge.
[1275]Zhang, Y. and Widermuth, M. (N.D) 'Unstructured Interview' pp. 1-10. https://www.ischool.utexas.edu/~yanz/Unstructured_interviews.pdf (accessed 01/01/19).
[1276]Bryman Alan (2012) 'Social Research Methods', Fourth Edition Oxford University Press p. 469.
[1277]Edwards Rosalind and Holland Janet (2013) 'What is qualitative interviewing?' p. 2.
[1278]Alsaawi Ali (2014) 'A Critical European Journal of Business and Social Sciences', Vol. 3, No. 4, p. 151.
[1279]Ibid.
[1280]Miller Jody & Glassner Barry (2016) 'The 'Inside' and the 'Outside': Finding Realities in Interviews', In Silverman David (ed.) Qualitative Research Chapter four p. 52.

to social worlds [and] what happens within them [as well as] how individuals make sense of themselves, their experiences and their place within these social worlds."

For this study, three semi-structured telephone interviews were conducted. The research question and ethical issues were discussed, and respondents gave their consent verbally after the details of participation were read and explained. Each interview lasted 30-40 minutes. The verbal evidence was recorded with a voice recorder.

6.11.2 Justification of Telephone Interviews

Telephone interviews have been criticised by traditionalists who consider it to be an inferior method for data collection because it lacks the face-to-face element, which is necessary to build and maintain a friendly connection with participants.[1281] However, in a comparative study of qualitative face-to-face and telephone interviews, Sturges and Hanrahan[1282] concluded that the telephone provided data of comparable quantity and quality to face-to-face interviews. The study found no difference in the number of responses or depth of these responses across both interview models.

Another comparative study conducted by Vogl[1283] found no significant difference in the duration of the conversation, number of responses, the number of pauses or the need for clarification in both interview techniques. Telephone interviews are cost and time effective because they provide a rich base of participants. This is vital to capture the thoughts and experiences acquired through the multiple diversity of inherent norms and cultural traditions in Nigeria. The reasoning behind the adoption of this method was to gain further knowledge into the nature and structure of the legal aid scheme, as well as make an original contribution to the current literature that examines relations between legislation, legal institutions, legal aid providers and its recipients. This contribution consists of providing understanding of the legal aid process from a potential claimant's perspective and highlighting the significance of the

[1281]Farooq Muhammad Bilal (2015) 'Qualitative Telephone Interviews': Strategies for Success Paper submitted to the 18th Annual Waikato Management School Student Research Conference 2015 to be considered as a conference paper p. 3.
[1282]Sturges, J. E. & Hanrahan K. J. (2004) 'Comparing Telephone and Face-to-Face Qualitative Interviewing': A Research Note. Qualitative Research, 4(1), pp. 107-118.
[1283]Vogl, S. (2013) 'Telephone versus Face-to-Face Interviews': Mode Effect on Semi-Structured Interviews with Children Sociological Methodology, 43(1), pp. 133-177.

provision to those who cannot afford the services of a lawyer. Also explored are the potential benefits and obstacles of granting legal aid in customary courts.

The data collected through this method is vital to determine whether there are any links between the provision of legal aid, the (insufficient) scope of access and the perception of potential recipients to the legal aid scheme. For instance, individuals may be simply unaware of the scheme, there may not be enough legal aid lawyers to cover the vast Nigerian population, or the laws may not be effective enough. Another potential barrier to the legal aid scheme in Nigeria may be a matter of general distrust in the judicial system, or social norms based on culture and religion. Equally, there may be other unexplored factors which play a role in deterring potential recipients from access. Finally, this study reveals whether respondents believe customary courts can narrow the gap caused by insufficient access to legal institutions.

6.11.3 Self-Administered Questionnaires

Questionnaires are a research tool consisting of a mixture of open-ended and close-ended questions aimed at collecting information from respondents. Sudman et al.[1284] contend that there are limits to the length of semi-structured interviews before fatigue takes its toll and, as such, self-administered questionnaires are an alternative source of obtaining information where time and travel costs are reduced considerably.

The potential advantages of using social network sites as sources of data collection are well documented by scholars such as Boyd and Ellison, 2008;[1285] DeBruyn and Lilien, 2004; [1286] and Zimmer, 2010.[1287] However, their potential as a viable outlet for participant recruitment is not widely known,[1288] as such social networking sites can be extremely useful in acquiring samples even, and sometimes particularly, among marginalised, stigmatised or otherwise

[1284]Sudman Seymour, Greeley Andrew and Pinto Leonard (1965) 'The Effectiveness of Self-Administered Questionnaires', Journal of Marketing Research, Vol. 2, No. 3 pp. 293-297.
[1285]Atchison, C. (2000) 'Emerging Styles of Social Control on the Internet: Justice Denied', Critical Criminology: An International Journal, 9 (1-2) pp. 85-100.
[1286]De Bruyn, A., & Lilien, G. (2004) 'A multi-Stage Model of Word of Mouth through Electronic Referrals', eBusiness Research Center Working Paper February 2004 pp. 1-42.
[1287]Zimmer, M. (2010) 'But the data is already public': On the Ethics of Research in Facebook. Ethics and Information Technology, 12(4) pp. 313-325.
[1288]Palys T. Atchison, C. (2012) 'Qualitative Research in the Digital Era: Obstacles and Opportunities', International Journal of Qualitative Methods, 11(4) p. 355.

socially isolated persons who have sought to connect with others in virtual space[1289] due to the web's capacity for global reach.

For instance, Atchison[1290] developed recruitment strategies by utilising network communications technologies, such as text messaging, online discussion boards and social networking sites (e.g., Facebook and Twitter), that are designed explicitly for the rapid circulation of information among and between members of distinct social networks. One such strategy involved wording the advertisement in a way designed to attract keen participants.[1291] The questionnaire is the medium of communication between the researcher and the respondents, where the researcher articulates the questions through the questionnaire and the answers are conveyed back to the researcher.[1292] Hence there is no direct communication with the researcher and respondent.

McGuirk and O'Neill[1293] contend that questionnaires have numerous strengths and can overcome potential limitations when collecting qualitative data. Firstly, they provide insights into social trends, processes, values, attitudes, and interpretations. Secondly, they are practical research tools that are cost-effective, especially when conducted online,[1294] able to initiate extensive research over a geographically disparate population. Thirdly, they are flexible and may be combined with other forms of qualitative research such as interviews and focus groups for more in-depth results.

Questionnaires can be a powerful research method if conducted meticulously. This process allows respondents the time to consider and develop their responses,[1295] without interference from the researcher. According to De Vaus,[1296] creating a unique questionnaire would require effective organisational strategies, critical review, and reflection to help identify an appropriate participant group and how to table the relevant key questions. Researchers must also have a

[1289]Ibid.
[1290]Atchison, C. (1999) 'Navigating the Virtual Minefield: Using the Internet as a Medium for Conducting Primary Social Research', In D. Currie, D. Hay, & B. MacLean (eds.), Exploring the Social World: Social Research in Action pp. 145-158 Vancouver, BC: Collective Press.
[1291]Ibid.
[1292]Ian Brace (2018) 'Questionnaire Design': How to Plan, Structure and Write Survey Material for Effective Market Research 4th Edition
[1293]McGuirk, P. M. & O'Neill, P. (2016) 'Using Questionnaires in Qualitative Human Geography', In I. Hay (eds.), Qualitative Research Methods in Human Geography pp. 246-273. Don Mills, Canada: Oxford University Press.
[1294]Sue Valerie M, Ritter Lois A. (2012) 'Conducting Online Surveys' Sage Publications.
[1295]McGuirk, P. M. & O'Neill, P. (2016) 'Using Questionnaires in Qualitative Human Geography', In I. Hay (eds.), Qualitative Research Methods in Human Geography pp. 246-273. Don Mills, Canada: Oxford University Press.
[1296]De Vaus, D.A. (2014) 'Surveys in Social Research', 6th Edition. Chapters 7 and 8 Sydney: Allen and Unwin.

strategy in place to ascertain how the responses are to be analysed. The justification of launching an online questionnaire should be based on the objectives of the study to ensure the worth of the data collected. The content must also relate to the broader research question and the researcher must have reasonable knowledge of relevant processes, concepts, and relationships regarding the subject matter to formulate an efficient questionnaire.[1297] Thus, the research question of this study is directly linked to the chosen method of research. The questionnaire has also been meticulously tailored to obtain a variety of different perspectives from different regions in Nigeria without interference from the researcher.

It is also essential to identify the key concepts being investigated and tailor the questions in accordance with the social and cultural norms and expectations of the participant group.[1298] This is to ensure that the researcher is sensitive to the respondents' ethnic, religious and cultural beliefs and that those beliefs are not challenged via the questions.[1299] Another crucial factor is ensuring that selected participants understand the questions and have the knowledge to answer them.[1300] The text must be simple, clear, unbiased and well communicated to respondents.

This study utilises open-ended and close-ended lines of inquiry to yield in-depth responses to match the aspiration of qualitative research and understand how meaning is attached to process and practice. However, emphasis is placed on open-ended questions because they are less structured and allows respondents to narrate their understandings, experiences, and opinions in their own words.[1301] According to Cloke et al.,[1302] open questions can yield valuable and unanticipated insights, and they can open intriguing lines of intensive inquiry in situations where a person-to-person approach is not possible, including how wider processes operate in a setting. However, Bryman[1303] argues that "open questions can be effort intensive for respondents to answer and time-consuming to code". For this research, 12 self-administered

[1297]McGuirk, P. M. & O'Neill, P. (2016) 'Using questionnaires in Qualitative Human Geography', In I. Hay (eds.), Qualitative Research Methods in Human Geography pp. 246-273. Don Mills, Canada: Oxford University Press.
[1298]Madge, C. (2007) 'Developing a Geographers' Agenda for Online Research Ethics', Progress in Human Geography, *31*(5), pp. 654-674.
[1299]Papadopoulos I. (2002) 'A Model for the Development of Culturally Competent Researchers', Journal of Advanced Nursing, 37:258-64.
[1300]Babbie, E. (1992) 'The practice of Social Research' New York: Macmillan
[1301]McGuirk, P. M. & O'Neill, P. (2016) 'Using Questionnaires in Qualitative Human Geography' In I. Hay (eds.), Qualitative Research Methods in Human Geography pp. 246-273. Don Mills, Canada: Oxford University Press.
[1302]Cloke, P., Cook, I., Crang, P., Goodwin, M., Painter, J. & Philo, C. (2004) 'Practising Human Geography' London: SAGE Publications Ltd.
[1302]Bryman, A. (2013) 'Social Research Methods', 4th Edition Oxford University Press.

online questionnaires were received via email by the respondents who were required to read the attached information and sign the consent form ***(See Appendix 4).*** The focus of study and the relevant ethical issues were detailed in the information sent to respondents to consider before they took part in the inquiry.

6.12 Qualitative Data Analysis and Interpretation

Research methods are as crucial to the validity of the study as they are to the process of data analysis. Newman and Benz[1304] posit that the research outcomes are of no value or detrimental to the truth value of research if the method utilised lacks legitimacy.

In the social sciences, scholars have devised various ways to analysing qualitative data. For instance, Creswell[1305] proposed five approaches for qualitative study, namely: narrative research, phenomenology, grounded theory, ethnography, and case study. Denzin and Lincoln[1306] name six research strategies: case study, ethnography, grounded theory, life and narrative approaches, participatory research, and clinical research. Wertz et al.[1307] establish five social science methods: phenomenology, grounded theory, discourse analysis, narrative research, and intuitive inquiry. Hence, text data may be presented in verbal, print or electronic form and are generally obtained through open-ended survey questions, interviews or focus groups.[1308]According to Cohen et al.,[1309] "qualitative data analysis involves organising, accounting for and explaining the data". The authors contend that the purpose of the research must be established from the onset to determine the kind of analysis that is to be undertaken, and the appropriate setting. Establishing the purpose of a study will maintain focus and guide research via the research question.

[1304]Newman Isadore Newman, Benz Carolyn R. (2009) 'Qualitative-quantitative Research Methodology': Exploring the Interactive Continuum pp. 27-28.
[1305]Creswell, John W. (2013) 'Qualitative Inquiry and Research Design': Choosing Among Five Approaches. Third Edition. Washington DC: Sage.
[1306]Cited by Merriam, S. B. (2009) 'Qualitative Research: A Guide to Design and Implementation' (2nd Edition) San Francisco: Wiley Imprint p. 20.
[1307]Wertz F.J., Charmaz K., McMullen L.M., Josselson R., Anderson R., McSpadden E. (2011) 'Five Ways of Doing Qualitative Analysis': Phenomenological Psychology, Grounded Theory, Discourse Analysis, Narrative Research, and Intuitive Inquiry New York: The Guilford Press.
[1308]Kondracki, N. L., & Wellman, N. S. (2002) 'Content Analysis: Review of Methods and their Applications in Nutrition Education', Journal of Nutrition Education and Behaviour, 34, pp. 224-230
[1309]Cohen Louis, Maion Lawrence & Morrison Keith (2007) 'Research Methods in Education' Sixth Edition: Approaches to Qualitative Analysis Chapter 22 p. 461

Husserl[1310] acknowledges that the researcher cannot impose the meanings for the respondents, because they are the absolute sources of their own existence and experiences. Thus, remaining unbiased throughout the data collection process is central to the eventual analysis. Hence, this study follows a phenomenologist approach that only focuses on understanding and then describing the response of the participants with zero intervention from the researcher.

Throughout analysis, researchers attempt to gain a deeper understanding of what they have studied and to continually refine their interpretations.[1311] According to Wolcott,[1312] interpretation follows data analysis to make sense of the phenomenon beyond the inquiry stage. The author suggests that for researchers to organise and present their findings effectively they must identify each distinct stage of the investigative process.

6.12.1 Content Analysis

Qualitative content analysis is one of numerous research methods used to analyse text data and is regarded by researchers as a flexible method of inquiry.[1313] In general, it focuses on the characteristics of language as a means of communication with attention to the content of the text.[1314] Weber[1315] contends that the chosen content analysis approach will depend on the researcher's theoretical and substantive interests and the phenomenon being studied. Hsieh and Shannon[1316] cite content analysis as one of the widely used qualitative research techniques and define it "as a means of subjectively interpreting the content of textual data through the systematic organisation process of coding and classifying themes or patterns".[1317]

[1310]Husserl E. (1970) 'Logical Investigation', New York: Humanities Press.
[1311]Basit Tehmina (2003) 'Manual or Electronic?', The Role of Coding in Qualitative Data Analysis, Educational Research, 45:2, pp. 143-154.
[1312]Wolcott Harry F. (1994) 'Transforming Qualitative Data Description, Analysis and Interpretation', Sage Publications.
[1313]Cavanagh, S. (1997) 'Content Analysis: Concepts, Methods and Applications', Nurse Researcher, 4(3), pp. 5-16.
[1314]Tesch, R. (1990) 'Qualitative Research': Analysis Types and Software Tools. Bristol, PA: Falmer.
[1315]Weber, R. P. (1990) 'Basic Content Analysis' Beverly Hills, CA: Sage.
[1316]Hsieh Hsiu-Fang and Shannon Sarah E. (2005) 'Three Approaches to Qualitative Content Analysis', Qualitative Health Research, Vol. 15 No. 9 pp. 1277-1288.
[1317] Ibid. p. 1278.

Dating back to the 18th century in Scandinavia,[1318] content analysis was initially utilised in both qualitative and quantitative studies,[1319] and was subsequently used primarily as a quantitative research method with text data coded and described using statistics. Morgan[1320] described content analysis as the quantitative analysis of qualitative data. However, recently it has become more recognised by researchers as a suitable method of qualitative analysis.[1321] Downe-Wamboldt[1322] posits that the primary objective of content analysis is "to provide knowledge and understanding of the phenomenon under study".

According to Shannon and Hsieh,[1323] content analysis shows three distinct approaches – the conventional/inductive, directed/deductive, and summative – which are used to interpret meaning from the content of text data. In conventional content analysis, coding categories are derived directly from the text data (induction). It is usually suitable when existing theories or research literature on a phenomenon are inadequate, and there are gaps to be filled.[1324] Mayring[1325] acknowledges that conventional content analysis permits investigations to be specific to the respondent's comments. A directed approach starts with a theory or relevant research findings as a guide (deduction). The structure of a directed approach analysis is based on the preceding knowledge with specific focus on theory testing.[1326] A summative content analysis involves counting and comparisons, derived from keywords or content. The aim of this approach is to understand the contextual use of the words or content.[1327] However, the

[1318]Rosengren, K. E. (1981) 'Advances in Scandinavia Content Analysis': An Introduction. In K. E. Rosengren (ed.), Advances in Content Analysis Beverly Hills, CA: Sage pp. 9-19.
[1319]Berelson, B. (1952) 'Content Analysis in Communication Research', Glencoe, IL: Free Press.
[1320]Morgan, D. L. (1993) 'Qualitative Content Analysis': A Guide to Paths Not Taken Qualitative Health Research, Vol. 3, pp. 112-121.
[1321]Nandy, B. R., & Sarvela, P. D. (1997) 'Content Analysis Re-examined': A Relevant Research Method for Health Education. American Journal of Health Behaviour, Vol. 21, pp. 222-234.
[1322]Downe-Wamboldt, B. (1992) 'Content Analysis: Method, Applications, and Issues', Health Care for Women International, 13, pp. 313-321.
[1323]Hsieh Hsiu-Fang and Shannon Sarah E. (2005) 'Three Approaches to Qualitative Content Analysis', Qualitative Health Research, Vol. 15 No. 9 pp. 1277-1288.
[1324]Kondracki, N. and Wellman, N. (2002) 'Content analysis: Review of Methods and their Applications in Nutrition Education', Journal of Nutrition Education and Behaviour, 34, pp. 224-230.
[1325]Mayring, P. (2000) 'Qualitative Content Analysis', Forum: Qualitative Social Research, Volume 1, No. 2, Art. 20.
[1326]Kyngas, H. and Vanhanen, L. (1999) 'Content Analysis as a Research Method', Finnish Hoitotiede, 11, pp. 3-12.
[1327]Coffey, A. and Atkinson, P. (1996) 'Making Sense of Qualitative Data: Complementary Research Strategies', Thousand Oaks: Sage.

authors contend that the main differences among these three approaches are coding schemes, origins of codes and threats to trustworthiness.[1328]

The analysis of content involves two stages: the first is a detailed description of the data in its authentic form known as the basic stage; the second is known as the higher or latent stage of analysis, and it is more interpretive and concerned with the response from participants.[1329] This study uses a conventional content analysis approach to analyse research data. The justification of this approach stems from the analysis of the original content from the perspective of the respondents, obtained directly from the data with no pre-conceived grouping. This paves way for the researcher to fully engage themselves with the collected data and allow new insights to develop.[1330]

6.13 Qualitative Coding

Data analysis is a complex as well as definitive process in qualitative research due to its intuitive and creative method of inductive reasoning, thinking, and theorising.[1331] Hence, codes, categories and themes are tools to explain the phenomena by organising and making sense of textual data.[1332] According to Saldana,[1333] a code in qualitative inquiry is a researcher-generated construct that gives meaning to a participant's input for analytic purposes. It could be a word or a short phrase that expresses the contents of collected data, the latter being in the form of interview transcripts, e-mail correspondence and participant observation field notes. Bailey[1334] defines coding as a process of categorising an enormous amount of data into smaller sections that can be retrieved when needed.

[1328]Ibid.
[1329]Hickey, G. and Kipping, C. (1996) 'Issues in Research. A Multi-Stage Approach to the Coding of Data from Open-Ended Questions', Nurse Researcher, 4, pp. 81-91.
[1330]Kondracki N. and Wellman N. (2002) 'Content analysis: Review of Methods and their Applications in Nutrition Education', Journal of Nutrition Education and Behaviour, 34, pp. 224-230.
[1331]Basit Tehmina (2003) 'Manual or Electronic? The Role of Coding in Qualitative Data Analysis', Educational Research, 45:2, pp. 143-154.
[1332]Ibid.
[1333]Saldana Johnny (2013) 'The Coding Manual for Qualitative Researchers', Second Edition SAGE Publications Ltd. pp. 3-4.
[1334]Bailey C. (2006) 'A Guide to Qualitative Field Research', Sage Publications.

Miles and Huberman[1335] present two methods of creating codes. The first is an inductive approach, also known as the 'grounded' approach, used by researchers who may not want to pre-code any data until after it has been collected to generate an idea based on the responses. An inductive approach means the themes identified are strongly linked to the data itself[1336] and it is a process of coding data without trying to fit it into a pre-existing coding frame.[1337] Inductive coding does not test pre-conceived hypotheses, allowing theory to emerge via the original data. The second is where the researcher creates a provisional 'start list' of codes prior to fieldwork, which according to Glaser and Strauss[1338] could lead to an opportunistic use of theory.

This study employs the inductive approach to coding for a clear and unbiased interpretation of the data collected. It is an uncomplicated approach and allows the flexible use of data to enable appropriate coding techniques. According to Delamont,[1339] researchers must allow plenty of time and energy for the task of data analysis. Thus, coding, or categorising data plays an important role in the analysis by subdividing it and assigning categories for a better understanding of individual responses.[1340]

Coding is a crucial aspect of analysis; however, coding and analysis are not synonymous. Thus, interpretation and organisation of data enables responses to become manageable in the analysis process.[1341] Tesch[1342] employs the terms 'data condensation' or 'data distillation' to describe the stage where the establishment of categories becomes an organising tool and an important part of the outcome. Codes allocate units of meaning to the descriptive information compiled during a study and are used to find commonalities, differences, patterns, and structures within a phenomenon.[1343] Creating categories will also trigger the construction of a conceptual scheme applicable to the data. This process will induce the researcher to ask questions, compare across

[1335]Miles M. B. and Huberman A. M. (1994) 'Qualitative Data Analysis: An Expanded Sourcebook', Second Edition. Thousand Oaks, Calif.: Sage.
[1336]Patton, M.Q. (1990) 'Qualitative Evaluation and Research Methods', Second Edition. Sage.
[1337]Braun Virginia and Clarke Victoria (2006) 'Using Thematic Analysis in Psychology', Qualitative Research in Psychology Volume 3 pp. 77-101.
[1338]Glaser Barney G. and Strauss Anselm L. (2017) 'The Discovery of Grounded Theory Strategies for Qualitative Research', London, New York: Routledge.
[1339]Delamont, S. (1992) 'Fieldwork in Educational Settings: Methods, Pitfalls and Perspectives', London: Falmer.
[1340]Dey I. (1993) 'Qualitative Data Analysis: A User-Friendly Guide for Social Scientists', London: Routledge.
[1341]Basit Tehmina (2003) 'Manual or Electronic? The Role of Coding in Qualitative Data Analysis', Educational Research, 45 Volume 2, pp. 143-154.
[1342]Tesch R. (1990) 'Qualitative Research: Analysis Types and Software Tools', Basingstoke: Falmer.
[1343]Seidel and Kelle (1995) 'Different Functions of Coding in the Analysis of Textual Data', In Kelle U. (ed.), Computer-Aided Qualitative Data Analysis: Theory, Methods, and Practice. Thousand Oaks, CA: Sage.

data and re-arrange categories to make a hierarchical order of them. According to Coffey and Atkinson,[1344] codes are links between locations in the data and sets of concepts or ideas, which become a practical approach enabling the researcher to go beyond the data.

Strauss and Corbin[1345] contend that category headings can come from the blend of concepts derived from extant literature on the subject, or the words and phrases used by respondents themselves. Gough and Scott[1346] identify two distinct, albeit linked, phases to data coding: the first focusing on meanings within the research context, and the other concerning what may be meaningful to outside audiences.

6.13.1 The Coding Process

The coding process of this study went through various preliminary stages before deciding on the appropriate themes. All key themes have been generated specifically for this study, based on an in-depth analysis and interpretation of the responses. None of the key themes were obtained from a previous study, existing theorists, or written literature.

The coding process of this research followed the in vivo coding procedure to categorise the findings and generate the key themes:

Basic data	**Preliminary codes**	**Key themes**
"Legal aid is an assistance rendered to an individual without the capabilities to afford a legal counsel." *"Legal aid is essential to guaranteeing equal access to justice for all."*	➢ Awareness ➢ Knowledge ➢ Experience ➢ Attitude	➢ Perception

[1344]Coffey A. and Atkinson P. (1996) 'Making Sense of Qualitative Data', London: Sage. pp. 1-25.
[1345]Strauss A. and Corbin J. (1990) 'Basics of Qualitative Research: Grounded Theory Procedures and Techniques', London: Sage.
[1346]Gough S. and Scott W. (2000) 'Exploring the Purposes of Qualitative Data Coding in Educational Enquiry: Insights from Recent Research', Educational Studies, 26, pp. 339–54.

"Yes, I am familiar with customary legal practices in Nigeria. For instance, ethnic or non-Muslim customary legal practice and Muslim customary legal practice."		
"…lack of access to information." *"They don't attempt to get access because the system does not guarantee equal access to justice.*" *"…legal aid should be made more accessible."* *"You must have some sort of connection to be able to gain access."*	➢ Support ➢ Demand ➢ Guarantees ➢ Social status ➢ Information	➢ Accessibility
"Inherent bias law, rights and violation." *"…even when access to legal aid is granted, the bureaucracies involved tend to lead to unnecessary delays and… perversion of justice."* *"Such individuals suffer injustice in one form or another"*	➢ Violation of rights ➢ Intimidation ➢ Inequality ➢ Discrimination	➢ Equitable justice

"The legal aid scheme is not quite effective enough to address the legal needs of the disadvantaged in Nigeria." *"The current legal aid scheme in Nigeria is not well funded."*	➢ Flexibility ➢ Capability ➢ Scope ➢ Limited resources	➢ Effectiveness
"I prefer to seek redress in a formal court." *"There should be a bit more formality in customary court proceedings."* *"I would prefer legal representation via legal aid in a customary court."*	➢ Confidence ➢ Distrust ➢ Preference ➢ Detachment ➢ Barriers	➢ Credence
"Customary law is not a single body of law…but varies from place to place." *"Customary courts tend to be more informal, and the rural communities would relate better with its proceedings."*	➢ Fear ➢ Pessimism ➢ Optimism ➢ Necessity	➢ Scepticism and potentiality

Table 6.1 – Coding Process

6.14 Trustworthiness in the Qualitative Approach

Critics, who are mainly positivists, are reluctant to accept the trustworthiness of qualitative research.[1347] However, writers such as Silverman[1348] in addressing the matter of trustworthiness have proposed ways to incorporate measures that ensure research findings are reliable. Naturalist researchers have distanced themselves from the positivist paradigm; however, authors such as Guba,[1349] in response to the need to maintain trustworthiness, reliability, and validity within qualitative research, have proposed four trustworthiness concerns that a researcher needs to address irrespective of their chosen research paradigm:

- *Truth value*: How can a researcher establish confidence in his/her findings? Or how do we know if the findings presented are genuine?
- *Applicability*: How do we know or determine the applicability of the findings of the inquiry in other settings or with other respondents?
- *Consistency:* How can one know if the findings would be repeated consistently with the similar (same) participants in the same context?
- *Neutrality*: How do we know if the findings come solely from participants and the investigation was not influenced by the bias, motivations, or interests of the researchers?

To place further emphasis on the importance of trustworthiness in qualitative research, Wallendorf and Belk[1350] added a fifth factor that was not addressed in Guba's original paper:

- *Integrity*: How do we know if the findings are not false information given by the study participants?

Even though Lincoln[1351] states that the whole area of qualitative inquiry is "still emerging and being defined", Guba's concept of trustworthiness has been widely accepted by many

[1347]Shenton Andrew K. (2004) 'Strategies for Ensuring Trustworthiness in Qualitative Research Projects', Education for Information Volume 22 pp. 63-75.
[1348]Silverman D. (2001) 'Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction', 2nd Edition. London: Sage.
[1349]Guba, E. G. (1981) 'Criteria for Assessing the Trustworthiness of Naturalistic Inquiries', Educational Communication and Technology Journal, 29(2), pp. 75- 91.
[1350]Wallendorf, M., & Belk, R. W. (1989) 'Assessing Trustworthiness in Naturalistic Consumer Research', In SV - Interpretive Consumer Research, (eds.) Elizabeth C. Hirschman, Provo, UT Association for Consumer Research, pp. 69-84.
[1351]Lincoln Y.S (1995) 'Emerging Criteria for Quality in Qualitative and Interpretive Research', Qualitative Inquiry 1 pp. 275–289.

researchers.[1352] Joppe[1353] argues that data must give an accurate representation of the total population under study, and that the true test of trustworthiness and reliability is when the findings of a study are reproduced under a similar methodology.

The analysis of trustworthiness is vital to ensure that qualitative research is reliable. Seale[1354] advocates for proper quality through reliability and validity in qualitative research via a trustworthiness research report. Patton[1355] adds that reliability is a consequence of the validity of a study. However, Stenbacka[1356] contends that the debate on the relevance of reliability in qualitative study is of no essence since reliability concerns measurements and thus is more relevant in quantitative study. Lincoln and Guba[1357] propose that there is no validity without reliability, and as such "a demonstration of the former is sufficient to establish the latter".

This study complies with the aims and objectives of the research, which are focused on examining the prospects of utilising the customary legal system to expand legal aid provision in Nigeria through the experiences of the respondents. To ensure reliability, validity, and trustworthiness, it adopts the various criteria defined by Guba (1981).

6.14.1 Credibility

Lincoln and Guba[1358] argue that ensuring credibility in any research plays an important role in establishing trustworthiness. Positivist investigators support internal validity where they seek to confirm that their study tests what is proposed. According to Merriam[1359] the qualitative researcher's comparable notion of credibility must address the question of: 'how congruent are the findings with reality?'[1360]

[1352]Shenton Andrew K. (2004) 'Strategies for Ensuring Trustworthiness in Qualitative Research Projects', Education for Information Volume 22 pp. 63-75.
[1353]Joppe, M. (2000) 'The Research Process', The Quantitative Report Journal, Vol.8, No.4, pp.597-607.
[1354]Seale, C. (1999) 'Quality in Qualitative Research', Qualitative Inquiry, 5(4), pp. 266.
[1355]Patton, M. (2002) 'Qualitative Research and Evaluation Methods', Third Edition Thousand Oaks, CA Sage.
[1356]Stenbacka, C. (2001) 'Qualitative Research Requires Quality Concepts of its own', Management Decision, 39(7), pp. 551-555.
[1357]Lincoln Y.S. and Guba E.G. (1985) 'Naturalistic Inquiry', Beverly Hills: Sage. p. 316.
[1358]Ibid.
[1359]Merriam, S. (1998) 'Qualitative Research and Case Study Applications in Education', Revised and Expanded from "Case Study Research in Education." Jossey-Bass Publishers: San Francisco.
[1360]Shenton, A. (2004) 'Strategies for Ensuring Trustworthiness in Qualitative Research Projects', Education for Information, 22(2), pp. 63-75.

Guba[1361] provides numerous ways in which a researcher can achieve credibility and emphasises that using different methods compensates for their individual shortcomings and exploits their benefits. Shenton[1362] cites triangulation as the use of several methods to enhance research data. This study adopts authoritative research techniques in the form of in-depth interviews and self-administered questionnaires to validate data and identify the consistency of emergent themes. Both techniques ask the same questions, however the mode of communication differs.

Shenton[1363] believes that to ensure credibility the participants must be given the chance to turn down participation and voluntarily take part in the study. They must understand the study and be prepared to take part willingly. Hence the detailed consent forms ensure that the respondents are aware of what the study entails and their right to decline to partake in or withdraw their responses at any point of the study or after the conclusion of the study. Necessary steps have also been taken to ensure that respondents are given enough information as well as access to support services if affected adversely by the questions. According to Morrow,[1364] qualitative data can also be validated to reduce bias and increase trustworthiness in two ways: firstly, through respondent validation, which involves returning to the study participants and asking them to authenticate data; secondly, through peer review, which is where another qualitative researcher examines the data to verify its authenticity. To increase credibility of data, this study adopts the respondent validation process. The three telephone interview respondents were asked to go over their answers after it had been transcribed and interpreted by the researcher to authenticate, or disprove, the investigator's final analysis of the data.

6.15 Reflexivity

The interest in this study stems from the concept of equal standing before courts as well as access to courts of convenience in Nigeria. The intention was to focus on disadvantaged individuals, especially the multitudes that reside in rural areas, and their ability to access courts of their own choosing, such as customary courts, and benefit from schemes such as legal aid

[1361]Guba, E. (1981) 'Criteria for Assessing the Trustworthiness of Naturalistic Inquiries', Educational Communication and Technology Journal, 29, pp. 75-91.
[1362]Shenton, A. (2004) 'Strategies for Ensuring Trustworthiness in Qualitative Research Projects', Education for information, 22(2), pp. 63-75.
[1363]Ibid.
[1364]Morrow, L. (2005) 'Quality and Trustworthiness in Qualitative Research in Counselling Psychology', Journal of Counselling Psychology, 52(2), pp. 250.

as those living in the urban areas of Nigeria do. The question that arose concerned the scope of the principle of equality in the various court systems in Nigeria and whether it extends to all individuals in practice. I decided to employ a qualitative research method to incorporate primary research data into my study because of the lack of in-depth research as well as factual data on my topic. In addition, I utilised other sources of qualitative data to broaden viewpoints on the subject matter and to ensure the credibility of study (i.e., semi-structured telephone interviews and self-administered questionnaires). Both methods were specifically designed to target working class to low-income individuals residing in Nigeria to examine their mindset on marginalised groups, the current status of legal aid and access to legal aid via customary courts. Thus, this study presents possible areas of further study on the impact of the lack of access to legal aid on disadvantaged individuals living in Nigeria.

When sourcing respondents, I placed a request for volunteer respondents on social media (Facebook) for both methods. The study asked for Nigerian residents who had encountered or were familiar with the customary court process in Nigeria. For the online questionnaire, many responded and sent their email address to receive the questions. However, there was a limited response after they received the questionnaire and, on many occasions, I had to send out reminders to respondents via social media (Facebook and Facebook Messenger) to complete the questionnaire. Only a few responded, and the overall difficulty in getting respondents to complete the forms initiated the use of the snowball sampling method which provided access to other participants that fit the criteria. On the other hand, recruiting individuals for the telephone interviews was less tedious; all that was required was to schedule and agree on a convenient time. However, only a few opted for this method. The process in general was challenging; but in the end, it was a rewarding experience.

In total, I spent over six months obtaining the necessary number of respondents for this study. However, I believe my research was successful because the undertaken area of study is an under-developed area of research which presented a large scope for an original contribution and for further research. In addition, the research question was focused, and the data collected presents a major contribution to academia as well as the extant literature on how individuals perceive the legal aid scheme and customary courts in Nigeria. It also addresses the all-important question of whether customary courts could further increase the scope of legal aid to cover the vast, rural areas of Nigeria, as well as enhance access to preferred judicial institutions.

Chapter 7: Presentation and Discussion of Research Findings

7.1 Introduction

This chapter represents an integral part of this study. It submits an analysis of the primary data gathered through the questionnaires and interviews. It is an appraisal of public opinion and illustrates the perception of individuals with regards to their thoughts, experiences, and viewpoints on the matter of the legal aid scheme in Nigeria. It also highlights various positions on the prospects of utilising the current customary courts system in Nigeria to expand legal aid provision to the vast rural areas to support individuals who have limited means but wish to have their case heard and determined in a familiar customary court.

In total, data was collected from 15 respondents using 3 semi-structured telephone interviews and 12 self-administered online questionnaires. They were all required to answer the same 14 questions.[1365] Respondents are adults who reside in and are familiar with the Nigerian legal system and its institutions. The findings are categorised into key themes to address the aims and objectives of study and, most importantly, the research question. According to Maguire and Delahunt,[1366] themes are patterns within qualitative data, identified within the study and utilised to address the research query. Thus, this study identifies six thematic categorisations:

- Perception;
- Accessibility;
- Equitable Justice;
- Effectiveness;
- Credence;
- Scepticism and potentiality.

[1365] See Appendix 4

[1366] Maguire Moira, Delahunt Brid (2017) 'Doing a Thematic Analysis': A Practical, Step-by-Step Guide for Learning and Teaching Scholars. All Ireland Journal of Teaching and Learning in Higher Education (AISHE-J) Volume 8, Number 3. pp. 3352-53.

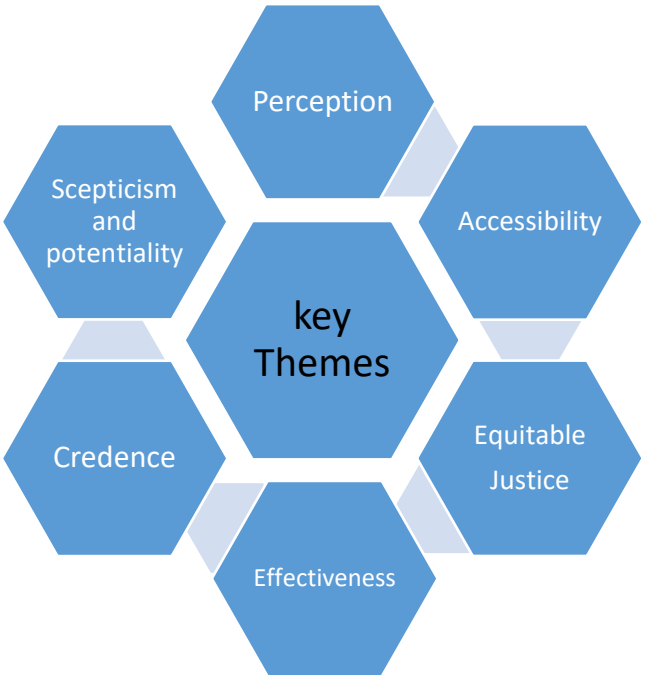

Figure 7.1 - Key Themes

The themes are original and derived from the responses gathered and analysed through the qualitative methods used in this research. They were initially ideas and concepts that arose from the data, based on the main categories which emerged. These then became the key themes, which represent the respondent's opinions on the concept of legal aid and customary courts in Nigeria. For the purposes of this analysis, respondents are classified into two groups: **QR** for questionnaire respondents and **IR** for the telephone interview respondents.

7.2 Perception

According to a 2016 study on human rights in the Republic of Moldova,[1367] measuring the public perception on fundamental rights is a pivotal tool to identify the actual impediments to the realisation of such rights. Understanding the principles of Nigerian legal aid provision from the viewpoint of the respondents is crucial to the outcome of this study. Riggs[1368] contends that

[1367]'Perceptions of Human Rights in the Republic of Moldova' (2016) p. 8. https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MDA/INT_CRC_IFS_MDA_26438_E.pdf (accessed 22/08/19).
[1368]Riggs F. W. (1979) 'The Importance of Concepts': Some Considerations on How They Might be Designated Less Ambiguously. The American Sociologist Vol. 14, No. 4 pp. 172-185.

definitive definitions are essential to the identification of concepts. This study relies on the collected data to understand the concept of free legal representation as the basis of the principle of equality within the Nigerian judiciary. The declarations represent the perspective of individuals who may at one point require legal aid to gain access to the court system in Nigeria. According to Newman,[1369] perception in this context examines the relationship between law and opinions. The author contends that, according to scholars, laws that are not in conformity with public opinion are detrimental to the general perception of law, especially among marginalised groups. In addition, Radin[1370] highlights the importance of an individual's perception when it comes to the legal concepts that guide them.

7.2.1 Perception: Nigerian Legal Aid Scheme

This section focuses on the understanding of and knowledge of respondents with regards to the legal aid scheme in Nigeria.

"Legal aid is the assistance given to people who can't afford legal representation." ***(QR 1)***

"Providing Legal assistance to those who don't have access to it or cannot afford it (more like pro bono)." ***(QR 2)***

"Legal aid is the means by which the services of a legal practitioner are freely provided for an accused person by the government in a court of law." ***(QR 3)***

"Legal aid is an assistance rendered to an individual without the capabilities to afford legal counsel." ***(QR 4)***

"My understanding of legal aid is that it relates to providing legal assistance to people that cannot afford legal representation." ***(QR 5)***

"Legal aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. It is essential to guaranteeing equal access to justice for all, especially to citizens who do not have sufficient financial means [...] provided by the Legal Aid Council (LAC), and Public Defender Office." ***(QR 6)***

[1369]Newman Graeme R., Wolfgang Marvin E. (2008) 'Comparative Deviance Perception and Law in Six Cultures', Taylor & Francis p. 1.
[1370]Radin, Margaret Jane (1989) 'Reconsidering the Rule of Law', 69 Boston University Law Review pp. 781-787.

"I think it has to do with the system put in place for people to get free advice or for people who seek practical help." ***(QR 8)***

"It is free legal advice or representation for a person who cannot afford it." ***(QR 9)***

"It means opportunity of assistance available to a litigant in the event of legal infraction where the litigant can't afford the costs associated with court processes." ***(QR 10)***

"Free legal representation is being made to help people with legal expenses." ***(IR 1)***

"Legal aid supports people who are less able to pay for legal services […] supports low-income people." ***(IR 2)***

Respondents were able to identify the concept of legal aid as a judicial safety net closely linked with individuals who are unable to afford the services of legal counsel, and as a provision put in place by the government to assist disadvantaged individuals with limited to no financial means to acquire the services of a lawyer when faced with litigation. However, some respondents took another stance and went further than a mere definition to describe legal aid as a tool that guarantees justice for the less privileged. The comments imply that the respondents understood the significance of the principle of equality in the courts system and the implications if assistance is not made available to those who are entitled to it:

"It is a free legal service; they ensure social justice and give voice to the voiceless." ***(QR 7)***

"Legal aid is a kind of humanitarian organisation which provides free legal services to less privileged persons whose cases deserve to be defended." ***(QR 12)***

"Legal aid is essential to guaranteeing equal access to justice for all." ***(QR 11)***

"It is measure for people who are not financially stable to seek remedies in the court of law […] it is given by the government." ***(IR 3)***

None of the respondents claimed to have been a recipient of legal aid:

"I have never been a recipient of Legal aid." ***(QR 9)***

"I haven't personally." ***(QR 8)***

However, two respondents understood the concept and what it entails through third party experiences:

"I haven't had such experience, but I have witnessed it in the court." ***(QR 3)***

"I have a friend who is a Nigerian police officer as well as a lawyer who represents people who cannot afford legal representation once or twice a week in the Northern part of Nigeria." ***(IR 1)***

7.2.2 Perception: Nigerian Customary Legal System

In Nigeria, the majority of the population rely on customary norms to conduct their personal activities.[1371] According to Hammett,[1372] people generally recognise a moral authority in customary law and practices. However, not all conform to its practice or usage in all aspects of their life. Part of this study was intended to observe whether any of the respondents are acquainted with or comprehend the operation of the customary legal system in Nigeria. This section details the respondents' familiarity with and understanding of the practice of the Nigerian customary legal system:

"As far as I know, customary law in Nigeria is illegal, so access to legal aid will be very difficult. However, if I had the option, I would try as much as possible to make it legal, so they too can access legal aid." ***(QR 1)***

"Yes, I am familiar with customary legal practice in Nigeria. For example, land and marital matters, but I have never been a litigant in a customary court setting." ***(QR 2)***

"I am not conversant with customary courts processes in Nigeria." ***(QR 3)***

"I am not familiar with the Nigerian customary legal practice neither have I been a litigant in the customary court process." ***(QR 4)***

"No, I am not familiar with the customary legal practice in Nigeria. I have not been a litigant either." ***(QR 5)***

[1371]Idem Udosen Jacob (2017) 'The Judiciary and Role of Customary Courts in Nigeria', Global Journal of Politics and Law Research Vol. 5, No. 6, p. 34.
[1372]Hamnett Ian (1975) 'Chieftainship and Legitimacy', (London: Routledge & Kegan Paul) cited in Bennett T. W. (1991) A Sourcebook of African Customary Law for Southern Africa, (Cape Town, Wetton, Johannesburg: Juta & co, Ltd) p. 6.

"Yes, I am familiar with customary legal practices in Nigeria. For instance, ethnic or non-Muslim customary legal practice and Muslim customary legal practice." ***(QR 7)***

"Not sure I have any knowledge on this." ***(QR 8)***

"I am not that familiar with customary law practices in Nigeria. I have never been a litigant in a customary court process. I do not know much about it, so I don't have any thoughts."

(QR 9)

"I am not aware of the customary legal practice in Nigeria." ***(QR 10)***

"Yes, claims over land […] landlord and tenant." ***(QR 11)***

"Yes and no. The only thing I know has to do with this local court arrangement, where the head of a community would just make a decision and pass a judgement or sentence people." ***(IR 1)***

"Yes, mainly family and the ones that deal with separation, divorce within the customary court […] marriages under native law and custom" ***(IR 2)***

"No, my knowledge of customary courts is little." ***(IR 3)***

Culture plays a definitive role in the day-to-day existence of a considerable number of individuals in Nigeria. Akanle[1373] argues that culture comprises of interrelated frameworks that guide the lives and behavioural patterns of its indigenes. However, based on the responses, the majority of the respondents asserted that they were not familiar with the current Nigerian customary legal system because they have not been part of the process before. The general impression from those that responded was that customary legal systems dealt mainly with civil matters.

7.3 Accessibility: Nigerian Legal Aid Scheme

According to Middleton, "the role of legal aid should be to ensure that less well-off people have access to justice on a broadly equal basis to everyone else but that this objective has to be

[1373]Akanle Olayinka (2012) 'The Ligaments of Culture and Development in Nigeria', International Journal of Applied Sociology 2(3) p. 16.

set against the background of limited resources."[1374] According to George,[1375] the delivery of justice requires access to an efficient legal system. For instance, court case delays caused by complex court processes further impact the ability to access legal aid due to limited resources. Hence, the competency of legal aid is subject to whether it is accessible to those who need the service. A study conducted by HiiL[1376] in 2018 confirmed that, annually, approximately 25 million individuals encounter various types of legal problems in Nigeria. The study also noted that the legal aid scheme, whose main purpose is to serve as a safety net for individuals with no means to procure the services of a lawyer, was not visible enough. As a consequence, those who need it the most are unable to take advantage of the provision because they do not know how to effectively access it.[1377] Another concern was that procedures involving access to legal aid were considered too complex. In addition, the 2018 study confirmed that the rich are more likely to take the necessary measures of securing legal counsel than the poor when faced with litigation, because they have the means to engage in litigation which means a likely favourable outcome on their part.[1378]

Justice Oputa[1379] contended that the majority of individuals who seek access to justice via competent judicial institutions in Nigeria were caught up in a vicious circle in different stages of the process because of one obstacle or another: "the people especially the illiterate masses of our country do not even know what their human rights are […] Where there is an awareness of the right and the knowledge or realisation of its breach or threatened breach and the courage to prosecute the claim, the prospective litigant may be too poor to embark on the luxury of a costly and prolonged litigation up to the Supreme Court." Access to legal aid is dependent on the competence of the judiciary and legal institutions, whose main role in this context is to ensure that disadvantaged citizens are aware of their right to free legal representation to ensure that they are able to attain this right before litigation commences. The inability to access legal

[1374]Sir Peter Middleton, (1997) 'Review of Civil Justice and Legal Aid (UK)': Report to the Lord Chancellor 35. Quoted in Moorhead Richard (1998) 'Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism', Journal of Law and Society, Vol. 25, No. 3 p. 3661.
[1375]George James P. (2006) 'Access to Justice, Costs, and Legal Aid', The American Journal of Comparative Law Vol. 54 p. 300.
[1376]Justice Needs and Satisfaction in Nigeria (2018) 'Legal Problems in Daily Life', HiiL user-friendly justice pp. 5-24.
[1377]Ibid.
[1378]Ibid.
[1379] Oputa C. A., (1989) 'Human Rights in the Political and Legal Culture of Nigeria', Lagos: Nigerian Law Publications Ltd. p. 94.

aid in Nigeria according to the respondents is deeply rooted in the lack of awareness of the provision, which is why it is termed a non-existent remedy.

"It is like a non-existing protocol because it is either people are not aware or do not know how to access it. I have been privileged to know about it through a friend who offers free legal services to individuals a couple of times a week. I do not think an average Nigerian knows what it is to enjoy legal aid and I don't think the government is doing enough to promote it so that people can be aware of what it entails. If people are in tune with what legal aid is all about, many of them will access it […] people will grab the opportunity." ***(IR 1)***

*"The less privileged cannot pursue their cases or seek remedies and justice. Many are in prison because of lack of legal aid. That is one of the disadvantages of getting justice in Nigeria. When you have a good case and not originally liable for the offence for which you have been alleged or there are issues with the allegations or the offence and because of finances they cannot pursue it." (****IR 3)***

"It is patchy to non-existent. Certain states in the Federation, for instance Lagos state and another in the North, where there has been some development in the provision of legal aid. In Lagos there is a government institution that handles that on behalf of the state government. I don't know if it is formalised to serve people of the state that are in need of the service […] not enough publicity on how individuals can access the service, not sure the system captures within its legislative practices the ideals of legal aid. I might be wrong, but I am certain that there isn't something like that in place. There has been an election in recent times and none of the political parties to my knowledge discussed or broached the issue of legal aid as a tool or empowering the poor and needy." ***(IR 2)***

"Government should try as much as possible to make it accessible to everyone who are in need of it." ***(QR 1)***

"There has to be much awareness about the services of Legal aid, and an enlightenment campaign. They are a lot of people who aren't aware of this organization where I am."

(QR 2)

"*Individuals that are unable to access legal aid suffer injustice in one form or the other."*

(QR 3)

"For individuals who are in need of legal aid but are unable to gain access to it, society has failed them." ***(QR 4)***

"We cannot deny the fact that the rate of poverty in Nigeria is still very high, and as such so many individuals are unable to afford legal representation and also cannot have access to legal aid." ***(QR 5)***

"Access to legal aid in Nigeria from my own perspective is that even though legal aid is active and has been of tremendous help to citizens, it should be made more accessible […] legal aid service providers should not see their services as a favour but as a right of the citizens."

(QR 6)

"There should be a process one must approach in order to get access. For instance, by looking at the legal aid societies in the community, visiting law schools, contacting the State Bar Association." ***(QR 7)***

"I think Nigeria is a biased society which should not be the case. Legal aid should be easily accessible but not everyone has access to it. You must have some sort of connection to be able to gain access. A lot of these people who fall within the lower class and due to their level of exposure, they do not even understand their rights. More awareness should be created for people." ***(QR 8)***

"I believe individuals who are in need of legal aid and cannot get access to it are at a disadvantage as they cannot afford a lawyer and will not get the chance to be represented in court." ***(QR 9)***

"The Government needs to make it available especially in women and children's cases, as they are most vulnerable economically and culturally in the country." ***(QR 10)***

"Access to lawyers through legal aid in Nigeria is not an easy task, because most lawyers are after their own pocket, so to get anybody to help is an uphill task […] hard luck for those who are in need of legal aid but not able to have access to it" ***(QR 12)***

7.4 Equitable Justice: Nigerian Legal Aid Scheme

According to Hennie van As,[1380] the legal aid system is a creation of the state to ensure that its obligation to protect the rights of its citizens are met. Hence, the main purpose of legal aid is to safeguard the rights of disadvantaged individuals that are at risk of being violated by ensuring equality of standing before the courts. According to Abel,[1381] legal aid promotes "equal justice under law" but maintains that its provision is one of the "limited redistributions that legitimates a system that consistently betrays its promises". The majority of inequalities in society stems from the unequal distribution of income and affects the disadvantaged especially when accessing judicial institutions. Moorhead and Pleasence[1382] contend that "inequalities are economic, social, and political and the capacity of legal aid programmes to redress them is limited".

Hence, a 2019 study by the World Justice Project[1383] on access to justice affirms that legal problems are a universal occurrence; however, the severity varies depending on the country in question. The study also revealed that most people would prefer to negotiate directly and resolve the matter with the other party than acquire the services of a lawyer or go to court. In addition, a considerable number of individuals claimed it was difficult or nearly impossible to raise the funds needed to resolve their problem and as such have given up any further action to resolve it further. Unresolved legal problems have in return had an adverse impact on their daily living.[1384] The results of the 2019 study specific to access to justice in Nigeria also revealed that, of the 60% who experienced a legal problem in the past two years, only 25% were able to access assistance, with only 13% being able to access legal aid. The data also revealed that typically it took respondents 14.2 months to find a solution to their problem.[1385] This section highlights the respondents' thoughts on the implications faced by disadvantaged individuals if they are unable to secure access to legal institutions through legal aid.

[1380]Hennie van As (2005) 'Legal Aid in South Africa: Making Justice Reality', Journal of African Law, Vol. 49, No. 1 p. 54.
[1381] Abel Richard (2010) 'The Paradoxes of Pro Bono', Fordham Law Review Volume 78 Issue 5 pp. 2443-2450.
[1382] Moorhead Richard and Pleasence Pascoe (2003) 'Access to Justice after Universalism: Introduction', Journal of Law and Society, Vol. 30, No. 1, After Universalism: Re-Engineering Access to Justice pp. 1-10.
[1383] World Justice Project (2019) 'Global Insights on Access to Justice': Findings from the World Justice Project General Population Poll in 101 Countries p. 7.
[1384]Ibid. p. 80.
[1385] Ibid.

"In Nigeria today, there is really no free access to legal aid. Even when such access is granted or obtained the bureaucracies involved tends to lead to unnecessary delays and at the end of the day a perversion of justice. Individuals who are unable to access legal aid tend to suffer in silence as there is no means for their grievances to be addressed." ***(QR 5)***

"I consider it a depravity of right as it is the right of every citizen to have access to legal aid […] Prisoners should be given the opportunity to access legal aid; in fact, it should be additional duties of police to ensure that contact is made with the nearest legal aid service provider." ***(QR 6)***

"They don't attempt to get access to legal aid because the system does not guarantee equal access to justice and equality of justice that satisfies the aspirations of the people. In this context, lack of access to justice is a natural disagree." ***(QR 7)***

"I am aware of people who were denied legal aid because of how complicated their issue was." ***(QR 8)***

"They also don't have access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial." ***(QR 9)***

"If I am able to change anything about the current customary court system in Nigeria, it would be to let the people determine their leaders. The present traditional leadership is hereditary and biased in favour of men, currently women are never in a position to make any inputs."

(QR 10)

"Due to the social, political and economic problems of our time, there is a duty to help rescue our society from pervasive lawlessness, corruption and anti-social activities." ***(QR 11)***

"In Nigeria I think there is a multitude of people who need it particularly those who are un-educated, unemployed, market women, poor people […] [they] really need the service in landlord/tenant relationships, where there is no balance of power and the landlord takes advantage of the lack of knowledge of the tenant and the fact that they are unsupported by legal services. Coupled with the fact that the state and federal government do not provide for a formal legal aid system and do not publicise it […] and do not provide a system at the point of need to those individuals. People are hugely under-served." ***(IR 2)***

"Justice today in Nigeria is given to the highest bidder no matter how eloquent your lawyer is. I doubt if there is any legal aid and if there is, it is ineffective." ***(IR 3)***

7.5 Effectiveness: Nigerian Legal Aid Scheme

In addition to the general drawbacks to the scheme, caused by lack of sufficient funding and inadequate legal personnel to take on cases, the legal aid scheme in Nigeria has also been subject to implementation difficulties. This is due to other factors, such as the roles of the police, the prosecutors, and the judges in facilitating and enforcing rules guiding access to legal aid, as well as the lack of public knowledge and clear understanding of the right to legal aid and the overall benefits.[1386] According to Cappelletti and Garth,[1387] "the possession of rights is meaningless without mechanisms for their effective vindication". The post-2015 development agenda[1388] and the Sustainable Development Goal 16 of the 2016[1389]focuses on effective and accountable institutions to actively engage and help improve the legal wellbeing of its citizens. Hence, fair institutions ensure equal rights and access to judicial systems. However, with regards to the scope of legal aid in Nigeria:

"I can't say much […] because I don't have any experience with the subject […] looking at the overall system in Nigeria, nothing is effective." ***(QR 1)***

"I can't say much on the subject because I don't have any experience on it." ***(QR 2)***

"The current legal aid scheme in Nigeria is not well funded. It is not effective enough to meet the challenges of the disadvantaged in Nigeria. This is because it is not considered a priority." ***(QR 3)***

"It is virtually non-existent, if it does exist, people don't know about it. Also, a general conception among disadvantaged Nigerians is that the legal system is rigged against them." ***(QR 4)***

[1386]United Nations Office on Drugs and Crime (2014) 'Early Access to Legal Aid in Criminal Justice Processes': A Handbook for Policymakers and Practitioners Criminal Justice Handbook Series pp. 38-40.
[1387]Cappelletti M. and B. Garth B., (1981) 'Access to Justice and the Welfare State', Sijthoff and Noordhoff
[1388]The Organisation for Economic Co-operation and Development (OECD) and Post-2015 'Reflections Building more Effective, Accountable, and Inclusive Institutions for all', Element 6, Paper 1 pp. 1-2. https://www.oecd.org/dac/ POST-2015%20effective%20and%20accountable%20institutions.pdf (accessed 29/07/19).
[1389]'United Nations Sustainable Development Goal 16' https://www.un.org/ruleoflaw/sdg-16/ (accessed 14/04/20).

"I believe the current legal aid scheme is not effective enough to address the needs of the disadvantaged in Nigeria. The reason for this I believe, stems from the fact that the number of legal officers drafted to render this service are on an all-time low. In addition, there are inadequate resources to fund the scheme in Nigeria." ***(QR 5)***

"The legal aid scheme in practice is not quite effective enough to address the legal needs of the disadvantaged in Nigeria. This is because in spite of the establishment of the Legal Aid Council, the poor and indigent in society still find access to justice quite challenging. Many prisons across the nation are congested by awaiting trial persons." ***(QR 6)***

"I do not believe the current legal aid scheme in place is efficient due to the lack of access to information, inherent bias law, rights and violations, inadequate number of lawyers and the need to address barriers to access." ***(QR 7)***

"Legal aid is virtually non-existent […] people don't know about it."

"Sadly, I do not believe in Nigeria legal system for anything. It isn't a fair society for the poor and most times the middle class suffer as well." ***(QR 8)***

"I do not have any opinion because I have never been a recipient of legal aid." ***(QR 9)***

"I am not conversant with the processes and dynamics of legal aid especially in Nigeria. However, the Legal Aid Council seems more to be a political and non-effective system."

(QR 10)

"Legal aid is driven by lawyers to meet the 'legal needs' of those they have identified as poor, marginalised or discriminated against. Legal aid provision is supply driven, not demand driven, leading to wide gaps between provisions that meet perceived needs and actual demand. A number of delivery models for legal aid have emerged, including duty lawyers, community legal clinics and the payment of lawyers to deal with cases for individuals who are entitled to legal aid." ***(QR 11)***

"The current legal aid scheme is not effective. Why? Because justice in Nigeria today is now given to the highest bidder, whatever you offer will determine the verdict no matter how eloquent your lawyer is." ***(QR 12)***

"I do not believe that the current legal aid scheme is effective enough. Firstly, there are over 70% of people who are currently in custody in Nigeria due to the non-affordability of legal

expenses and the judicial system is not functioning as expected. If legal aid was to be fully implemented, most of these cases would not have gone far as getting custodial sentences. How do we address this problem? The third arm of government; the legislators are not doing enough, and I am not sure if there is any law put in place to encourage people to harness what is on ground. Most offenders could not afford the legal expenses and that is why they never had any legal representation. Most importantly the funding, where would it be coming from? Ministry of Justice budget? Or is the government to put in a new funding portfolio so that people can access it? Because no one would want to work for free and I believe the lawyers in Nigeria probably would not want to work for free either." ***(IR 1)***

"I do not believe that the current legal aid scheme is effective to address the needs of the disadvantaged […] in the whole of the Federation of about 36 states including the Federal Capital Territory (Abuja), only a handful of states could you point out as having a formalised legal aid scheme in place […] and even at that it is extremely patchy." ***(IR 2)***

7.6 Credence: Nigerian Customary Legal System

Many individuals have limited confidence in customary legal practices because they believe it is an unreliable and unfair system to the most vulnerable, especially to women and children. Respondents cited corruption and favouritism as a major barrier to equitable justice in a customary court setting. In addition to the lack of resources, the non-formal process and the lack of legal qualifications by those presiding over such customary courts was also quoted as another concern with the Nigerian customary court process. However, Bennett[1390] argues that in several respects customary legal processes offer a better guarantee of procedural fairness than its western counterpart. Bennett[1391] further contends that formal court processes are alien to many indigenous people and tend to confuse the litigant. In addition, Gluckman[1392] affirms the benefits of customary courts where litigants have every opportunity to state their case in a relatively sympathetic and familiar environment. According to HiiL,[1393] most legal issues in Nigeria are dealt with through informal outlets which consist of traditional or customary

[1390]Bennett T. W. (1993) 'Human Rights and African Cultural Tradition', Transformation Issue 22 p. 32.
[1391]Bennett T. W. (1991) 'A Sourcebook of African Customary Law for Southern Africa', (Cape Town, Wetton, Johannesburg: Juta & co, Ltd).
[1392]Gluckman M. (1972) 'The Ideas in Barotse Jurisprudence', (Manchester University Press) pp. 1-26.
[1393]Justice Needs and Satisfaction in Nigeria (2018) 'Legal Problems in Daily Life', HiiL User-Friendly Justice pp. 22-25.

justice, and the organisation highlights how such informal legal institutions might fail to deliver fair results in complicated matters such as a violation of rights. However, in conclusion, the HiiL study acknowledges the unified judicial structure in operation in Nigeria via the formal, customary and sharia court systems, and the extra benefits if all legal systems are easily accessible, fair, and linked to enforcement mechanisms.[1394] This section presents the respondents' viewpoints on accessing legal aid through customary courts as opposed to formal courts in Nigeria:

"I would prefer legal representations via legal aid in a customary court to make it easier for people who are in dire need of legal assistance." ***(QR 1)***

"If I have the option, I would prefer to use a formal court because it has authority over the customary court." ***(QR 2)***

"I think customary legal practices are playing their part in the practices of law in Nigeria to some extent, but my preference is for a formal court. However, I would want a situation where more education and funds are made available to the current customary court system in Nigeria. The reason is simply because they will dispense justice more effectively at the grassroot level than what it presently obtains." ***(QR3)***

"I am not comfortable with customary courts processes. Given the option, I would prefer to seek redress in a formal court as the proceedings are more organised. There should be a bit more formality in customary court proceedings." ***(QR 5)***

"I would prefer legal representation via legal aid in a customary court; however, inadequate manpower would be a possible obstruction to the implementation of legal aid in customary courts." ***(QR 6)***

"Customary courts change gradually over time as people change their ways of doing things and getting a current lawyer might be difficult. It is often not written down and most lawyers brainstorm to fit in such positions. I am not confident with the Nigerian customary courts process, but I would not change the system as it loses its flexibility when changed. The people in such communities know what to do and what ought not to do. However, given the option, I would prefer to seek redress in a formal court. My perception of a legal aid lawyer performance

[1394] Ibid.

would not be effective and efficient because it is done for free. The zeal and determination for winning a case would be low. There is nothing motivating such lawyers." ***(QR 7)***

"I am not comfortable with customary legal practices. I think a lot has to be done to improve our legal system in general. However, if I am sure there will be fair justice in the customary process then I am open to any route as corruption is a huge barrier in Nigeria." ***(QR 8)***

"With the little I know about customary courts, I am not so comfortable with the processes […] I do not [know] so much about it, so I can't give any substantial change that I would like to do. I don't have that much knowledge on how things work in those kinds of courts." ***(QR 9)***

"The customary court experience is very slow and unacceptably fraught with bought judgements, so the poor is not well represented. My preference is for formal courts [as] the customary courts do not respect women and children especially when pitted against the male-dominated society." ***(QR 10)***

"No, I am not comfortable with customary practices, but nothing can be done. However, if given the opportunity to change the current customary court system, I would try as much as possible to work softly from the perspective others could not work on." ***(QR 11)***

"To a certain extent, I am comfortable with customary courts processes and, as such, would prefer legal representation via legal aid in a customary court. I believe it would be better because there is lesser injustice there. However, 'justice buying' may hinder the operation of legal aid in customary courts." ***(QR 12)***

"I am not comfortable with customary court processes because sometimes people just flow with the emotional being in them instead of taking a critical look at what is being presented to them. Unfortunately, with the Nigerian setting, you will have to know the man that knows the man […] it is not about people really following the rules of judgement. However, customary court operators should go through the normal process of studying law so that they can have a strong footing on the interpretation of law and how to exhibit what is expected of them rather than relying on emotion to pass judgement. To make it look like a normal court system e.g. High Court, Supreme Court." ***(QR 13)***

"Corruption stands to be a problem with customary courts if legal aid was implemented because the highest bidder will always make a way. Nigeria is a country where the highest bidder will always take the lead. If corruption can be eradicated the barriers will be reduced.

Secondly, commitment and putting those that are truly qualified to interpret the law rather than relying on what A said or B said kind of mentality. Thirdly the language being spoken should remain indigenous instead of importing a foreign language into their operations." ***(IR 1)***

"I do not know the customary court process, so I cannot say if it would be a preferred option. The customary cases I have read about do not represent or talk about the proceedings. The introduction of qualified lawyers would certainly help and enhance the existing process. However, I would choose a formal court simply because most of the processes I am used to are essentially formal and western orientated and have very limited need for customary courts; but having said that, family matters whether they are western orientated [or not] will benefit from customary legal practices. I do not rule myself out in the future if confronted by any situation that needs to approach a customary court. Access to finance would probably be a barrier to the legal aid scheme via customary courts. Does the customary court system have the expertise to locate and get finance for legal aid? What are the administrative tools within the customary legal system that would aid the provision of legal aid? If the government were to say they want to introduce legal aid in customary courts and donate vast sums of money into it, not sure if the system has the capacity to apply it in a way that would be useful to those that need it the most. Another one would be the education within the system itself, that is those who are providing the service, is the level of education of the service provider tooled up to provide the service? I am not so sure; meaning a sizeable amount of the money would be used to train up personnel to handle that." ***(IR 2)***

"To some extent I am comfortable with customary legal practices […] we need to look at the importance of customary practices because they are close to the grassroots and considering the advantages of proximity and availability. Hence, I would prefer legal representation via legal aid in a customary court because culture and tradition are given more consideration. I believe lawyers should be able to follow the practice as expected in rural areas because tradition and culture are very important to customary legal practices. The customary legal system would benefit more if the administrators are more professional and consolidate on the code of practice. However, possible barriers to the legal aid scheme in customary legal settings could be due to non-adherence to technological developments as most customary courts are still carrying files from one place to another. Favouritism can also be another problem; as they know one another." ***(IR 3)***

7.7 Scepticism and Potentiality: Customary Legal System

This section offers a close insight into the respondent's thoughts on the efficacy of the customary courts system as a tool to expand the legal aid scheme in Nigeria. According to Bennett,[1395] African society was disrupted by four centuries of indirect colonial rule and then its decolonisation, which had an adverse impact on customary legal practices. Weinrich[1396] posits that during the colonial era tribal authorities evolved and became a body of local government officials who were mostly elderly men and answerable directly to the state. The sanction by the state, according to Motshabi and Volks,[1397] empowered them to rule the courts oppressively. Hence, there is a mixture of viewpoints regarding the credibility of customary courts, as revealed by some of the respondents of this study. A few respondents were apprehensive and unconvinced of the legality and viability of customary courts in administering justice. However, a considerable number of respondents were optimistic with regards to its operations. They acknowledged the advantages of having a customary court system with the same privileges available in formal courts for individuals residing in the rural areas of Nigeria, but felt it still needed improvement.

The outcome of the collected data ultimately highlights the value of custom and traditional practices in the day to day living of individuals who are bound by them. The feedback also reflects this stance via a number of respondents' notion regarding the concept of customary courts. This includes the possibility of its inclusion in the legal aid scheme helping to transform this failing system in Nigeria. In addition, a noticeable number of the responses revealed that customary courts are considered a potential tool of developing the administration and operation of customary legal practices if the needed attention is given. The collected data also confirms the possibility of expanding the legal aid scheme to cover the various neglected regions in Nigeria if the provision is made available to those who require it:

"I believe customary courts can be utilised to expand legal aid in Nigeria if it is made legal. Due to the fact that it is illegal, those seeking legal aid in customary courts would be deprived of legal aid and the right judgement won't be passed." ***(QR 1)***

[1395]Bennett T. W. (1993) 'Human Rights and African Cultural Tradition', Transformation Issue 22 p. 34
[1396]Weinrich, AKH (1971) 'Chiefs and Councils in Rhodesia: Transition from Patriarchal to Bureaucratic Power', (London: Heinemann).
[1397]Motshabi, K and Voiles S. (1991) 'Towards Democratic Chieftaincies': Principles and Procedures, in Acta Juridica. Cited in Bennett T. W. (1993) Human Rights and African Cultural Tradition Transformation Issue 22 p. 35.

"I don't know, but I believe that customary legal practices can be utilised to expand the legal aid scheme in Nigeria." ***(QR 2)***

"I do not believe that customary legal practices can be utilised to expand legal aid provision in Nigeria neither do I agree that the disadvantaged would benefit from legal aid in customary courts. This is because the practice of law in customary courts is very limited and most cases end up in the formal courts." ***(QR 3)***

"Yes, I agree that the disadvantaged will benefit from legal aid via legal counsel in a customary court." ***(QR 4)***

"Maybe customary courts could expand the legal aid scheme in Nigeria. With regards to whether the disadvantaged would benefit from legal aid via legal counsel in a customary court, I tend to agree a bit with this proposition. This is on the basis that customary legal settings tend to be more informal, and the rural communities would relate better with its proceedings as opposed to the formal setting. With the legal aid counsel, it would aid proper organisation and make room for more people to have unhindered access to justice. However, the informal nature of the proceedings may impede its progress and not encourage some persons to patronize the method" ***(QR 5)***

"I agree that the disadvantaged will benefit immensely from being heard in a customary legal setting aided by legal counsel, especially in the vast rural areas of Nigeria because it will give the opportunity to put forward all legitimate defences and be defended properly." ***(QR 6)***

"I disagree that the disadvantaged will benefit from being heard in a customary court via legal aid and legal counsel. This is Nigeria, cases are being heard in customary legal settings aided by legal counsel. All these need to be put into action. However, customary law is not a single body of law throughout the country but varies from place to place. We have millions of communities in Nigeria, which we must put into consideration. We don't expect legal aid to be present in all communities in Nigeria. In addition, in order to get accurate information of customary legal practices and succeed in such communities, legal aid must be aware of the customary laws in the community." ***(QR 7)***

"I believe customary legal practices can help expand legal aid in Nigeria. However, they need to create more access, educate people and create awareness." ***(QR 8)***

"I believe customary legal practices can be used to help expand legal aid provision in Nigeria. I believe the disadvantaged will benefit a lot from being heard in a customary legal setting because this way they have access to good lawyers and know that they will be judged fairly. ***(QR 9)***

I believe customary legal practices can be utilised to expand legal aid provision in Nigeria but only when the state becomes precedent over the cultural/customary practices. I also accept that the disadvantaged will benefit immensely from customary legal practices via legal counsel and legal aid. For a fact, legal representation costs are exorbitant and this action in customary courts will subsidize things for every litigant. However, I foresee lack of government budgetary support and discriminatory customary practices as barriers to customary legal practices." ***(QR 10)***

"I am not sure if customary legal practices can be utilised to expand access to legal aid. However, I do not agree that the disadvantaged would benefit from litigation with legal aid in a customary court. The disadvantage of legal aid in customary courts is that the predictability and objectivity are sacrificed and that the 'madness du jour' can influence the quality of legal judgments in such instances where customary law becomes either the sole or the main source for normative behaviour." ***(QR 11)***

I agree that the disadvantaged will benefit immensely from being heard in a customary legal setting aided by legal counsel, especially in the vast rural areas of Nigeria. However, if I had the option I would abolish some outdated traditional laws because they do not fit into the system any longer. This is because there are a lot of outdated practices in rural areas and the heads of th[ese] courts are not helping matters. Whenever the cases involve parties from outside the rural areas via legal aid, they handle the cases accordingly." ***(QR 12)***

"I believe legal aid via customary courts would help improve the legal aid service. If it [were] fully utilised, over 60% of people thrown into custody would have had their cases dealt with in a simple manner. It's a case of giving them the opportunity to be represented by those that know the law and also by those that can interpret what the law says. Most cases in the Magistrate and High Court are supposed to be handled by customary courts rather than going through high profile stages. However, I would prefer to go to a formal court if it were a high-profile case to avoid being judged based on emotion. If at the end of the day the judgement passed is not in favour of the litigant, they can take it to a higher court. Individuals will benefit

from legal aid via customary courts because over 70% of the people of Nigeria fall under the illiterate bar and for customary courts it is all about understanding their culture and their wellbeing. Given that opportunity, they can easily express themselves in their language, languages, or dialect. They can explain better and whoever is representing them can add their two words under the law. It will definitely help reduce the massive influx of cases in the formal courts. The majority of people in custody in Nigeria today would not be there but are, because they have no legal representation. If such cases can be handled in a customary court through legal aid, why not? ***(IR 1)***

"Firstly, I think there is a huge need for access to legal aid with the assistance of lawyers in customary legal institutions and what is difficult to take is government abandonment of its responsibility to serve the needy. I am aware that there are legal practices that supply lawyers that are newly qualified lawyers on a Pro Bono basis to serve customary courts as part of the learning process for new lawyers, but this is nowhere near enough to the lack of service to those that need it the most. A way should be found where lawyers are encouraged to supply their services to customary courts. A lot of the experienced ones do not like to go to customary courts because there is lack of legal aid to pay for their services. If there is a legal aid scheme in place, lawyers would probably begin to take a look and consider the possibility of servicing the customary courts. As such, I believe very deeply that the disadvantaged would benefit from legal aid in a customary court simply because by definition they deal with local matters that are of importance to the local people. They live and breathe the community […] it therefore follows by definition that it would be of great advantage to the local people to have a service that provides and listens and services their needs." ***(IR 2)***

"I believe customary legal practices can expand the scope of legal aid in Nigeria because of the population of the people. There are more people in the rural areas than the urban locations […] [hence] the need. If the need of legal aid is of a higher percentage in the local areas, I think attention should be given so that legal aid can be provided in customary legal systems. The disadvantaged would benefit from legal aid in customary courts because there are a lot of outdated practices in the rural areas and legal aid would handle such cases accordingly." ***(IR 3)***

Customary legal systems are an integral part of the Nigerian legal system, considering the vast population and multifarious ethnic network of Nigerian citizens they service. Advocates contend that preserving and improving customary legal systems via domestic law would serve

beneficiaries efficiently in their respective communities. Toomey[1398] appreciates the complexities involved in the administration of customary legal systems alongside state law but argues that they also have a valuable role to play in facilitating a functional state judicial system. Odinkalu's[1399] perception of customary legal practices is that they are contradictory. On the one hand, it is a set of discriminatory, oppressive, and unfair institutions; on the other, it is a system that is considered legitimate by the majority of Africans. The author recognises the need for competent access to legal institutions for Nigerians and calls for a reform and adaptation of the customary legal system to serve the disadvantaged. Nwocha[1400] maintains that, given to the high level of illiteracy and substantial reliance on native custom and tradition by many, customary legal practices have the capacity to motivate both legal and social justice in Nigeria.

Furthermore, results from the data collected recognise the obstacles the Nigerian customary legal system may present, especially on matters of favouritism, corruption, gender discrimination and its nonchalant attitude towards children. These practices are deeply rooted and considered archaic and in conflict with the human rights principles of fairness and equality. The analysed data also suggests that some respondents believe that the interests of a considerable number of individuals would be duly served if legal aid via legal counsel is made available in customary courts. This step according to the respondents would allow civil and criminal matters under customary jurisdiction to be handled accordingly. It would also ensure that the various unlawful, discriminatory, and inequitable operations were systematically eradicated through the assistance of legal counsel who understands the customs and the implication on the victims if the fundamental rights aspect of the constitution is ignored. In time, such unfavourable practices will be forced to dissipate as precedence is set within the same indispensable customary courts.

[1398]Toomey L.T. (2010) 'A Delicate Balance: Building Complementary Customary and State Legal Systems', The Law and Development Review, Volume 3, Issue 1, pp. 156-207.
[1399]Odinkalu, C. A., 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' In Sage C. and Woolcock M. (eds.), (2006) World Bank Legal Review: Law, Equity and Development Vol. 2 p. 141.
[1400]Nwocha, M. (2016) 'Customary Law, Social Development and Administration of Justice in Nigeria', Beijing Law Review, 7, pp. 430-442.

Chapter 8: Conclusion

"The notion of due process of law permeated indigenous law; deprivation of personal liberty or property was rare; security of the person was assured, and customary legal process was characterized not by unpredictable and harsh encroachments upon the individual by the sovereign, but by meticulous, if cumbersome, procedures for decision-making. The African conception of human rights was an essential aspect of African humanism sustained by religious doctrine and the principle of accountability to the ancestral spirits."[1401]

"It is the duty of the State to ensure that every individual enjoys his or her rights to justice[1402] *and it attempts to comply with this obligation through its legal aid system."* [1403]

8.1 Introduction

This chapter concludes the study and is a deliberation of the opinions and perceptions that are pivotal to it. It also presents the outcome of the research inquiry. This chapter provides an in-depth interpretation of the study by re-visiting the research question and objectives to establish that both factors have been addressed through the research findings. It will then appraise the research contributions and indicate the implications for the current legal aid scheme in Nigeria. In addition, it will also discuss the constraints encountered during study and the prospects of future studies on the expansion of the legal aid scheme via customary legal systems in Nigeria.

8.2 Re-examination of the Research Question and Objectives

This section will review the research question in relation to the objectives of the study and how they have been addressed. This study adopted a qualitative methodological approach to consider:

[1401]Asante, SKB (1969) 'Nation Building and Human Rights in Emergent African Nations', Cornell International Law Journal Vol. 2 pp. 73-74.
[1402]Abramowitz N. (1960) 'Legal Aid in South Africa', 77 South African Law Journal 351. Quoted in Hennie van As (2005) Legal Aid in South Africa: Making Justice Reality Journal of African Law, Vol. 49, No. 1 p. 54.
[1403]Hennie van As (2005) 'Legal Aid in South Africa: Making Justice Reality', Journal of African Law, Vol. 49, No. 1 p. 54.

- To what extent can customary courts be utilised to bridge the gap and solder relations between the legal aid scheme and the disadvantaged in Nigeria?

8.2.2 Research Objectives

The aim of this study was to establish the current status of legal aid provision as well as an intelligible understanding of customary legal practices in Nigeria. It also advances the possibility of expanding the legal aid scheme and increasing the scope of its operations through alternative legal systems such as customary courts. Meeting the objectives of this study would require a confirmation that the current provision of legal aid in Nigeria is not sufficient to meet the legal needs of all individuals who require legal protection in courts. As such, it is reasonable that the legal aid system would consider expanding its enterprise by utilising other legitimate Nigerian legal systems as an addition to the traditional, formal common law system.

8.3 Research Question, Objectives and Findings

The research question of this study was addressed through themes that portray the thoughts, opinions and perceptions that were gathered via the respondents to address the issue of expanding the legal aid scheme through alternative legal systems in Nigeria. This study seeks to confirm the viability of customary legal systems as a tool to expand legal aid and establish that access to it in Nigeria should not be limited to one legal system, particularly in circumstances where there is a plurality of legal systems and ethnic categories. The research concluded that all respondents knew what legal aid was and its role within society as a tool to ensure the right of all to equality of arms before the courts and to ensure the fulfilment of the obligations of the state through the judiciary, thus ensuring that such rights are fulfilled regardless of social status. The responses also demonstrated that the current legal aid system was limited in scope and insufficient to fulfil the needs of the disadvantaged in Nigeria. It also revealed that, on average, the adult Nigerian respondents of this study were aware of the existence of customary legal practices and its importance to individuals who are bound by them.

The findings also suggest that there were reservations from some of the respondents with regards to the feasibility, validity, and capabilities of legal aid to enforce the law via the

customary legal system, referring to the unfair, biased, and discriminatory traditions that have been a major matter of concern in the customary legal settings. The drawbacks mentioned are crucial factors of interest because some respondents felt the promise of justice would not be upheld if such practices were still considered the norm and judgements were based on their directives. Hence, state legal institutions are required to adhere to human rights mandates,[1404] which place duties on the state to ensure that all constitutionally protected rights including the right to preserve one's custom and tradition are secured in conjunction with the principle of human rights. Hence, Article 17 (3) of the African Charter on Human and Peoples' Rights (ACHPR), which Nigeria ratified and domesticated into its law in 1983, emphasised the obligation of the state to ensure 'protection of morals and traditional values recognized by the community'.[1405]

Tobin[1406] highlights the conflicts between customary practices and human rights, and argues that the effectiveness of customary legal systems as a tool for securing human rights will depend on the former's recognition and support by the predominant domestic and regional law.[1407] However, a significant number of respondents submitted that more efforts should be made to reform and improve customary legal systems and their services, citing that it would ensure that they operate in a way that is transparent and equitable and would potentially be a preferred channel for cases to be heard and determined. They contend that litigants who are of little to no means would benefit immensely if legal aid were made available through the medium of legal counsel in such customary courts. This is especially the case on matters that are closely linked to custom and tradition, and of importance to their day-to-day existence, for instance, land, marriage, and inheritance matters.

Nwocha[1408] argues for the advancement of customary legal systems within the Nigerian judiciary and highlights the importance of customary courts in ensuring that cases are heard and determined within a reasonable space of time in a court of convenience and familiarity. The author admits that the system is in need of reform but emphasises the benefits to the

[1404](a)See Chapter I (Human and Peoples' Rights) of the African Charter on Human and People's Rights.
(b)See Chapter IV (Fundamental Rights) of the Constitution of the Federal Republic of Nigeria 1999.
[1405]Diala Jane C. (2015) 'Implications of the Disconnection between Law and Practice in the Context of Gender Inequality in South-East Nigeria', Journal of Culture, Society and Development Vol. 12 pp. 67.
[1406]Tobin, Brendan Michael (2011) 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights' pp. 302-305.
[1407]Ibid.
[1408]Nwocha M. E. (2016) 'Customary Law, Social Development and Administration of Justice in Nigeria', Beijing Law Review, 7, pp. 430-442 p. 431.

Nigerian judiciary and the people if customary law is blended with the conventional English legal system. This would allow the people, who are bound by their traditions, the right to choose a legal institution of convenience as opposed to being compelled to attend a court system that is regarded by a great majority as an alien and elitist institution.[1409] Nwocha further contends that a lot of time, effort and money would be conserved if cases were dealt with in a customary court of jurisdiction. Hence, without the documented difficulties peculiar to the operations of formal courts, such as high cost of litigation, complex procedures, language barriers and prolonged delay in adjudication of disputes, members of a community would be able to deal with disputes promptly and accept the attained judgement,[1410] or seek the decision of a Customary Court of Appeal if not content with the customary court ruling. Feedback from the respondents suggests that customary legal systems are considered part of Nigerian society, albeit in need of regeneration, and as such they cannot be eradicated.

In addition, Tobin[1411] believes customary legal systems deserve better recognition as an authentic statutory legal process. The author terms it an 'important dynamic source of law' because it has survived distortion and modification by various regimes such as colonialism and continues to evolve and remain relevant in the lives of indigenous individuals. It is also able to adapt to the changing social and political realities.[1412] The author acknowledges the drawbacks of certain customary practices which the indigenous people also recognise as improper but argues that the people should be able to collectively take charge on what form of 'recovery, restitution or reformulation' would be required to ensure that such inequitable practices are expunged [1413] to meet the lawful standards of impartiality. Eliminating unfavourable customary practices would have the propensity to reform and improve confidence in the Nigerian customary legal system and create a pathway for other significant benefits such as legal aid to protect worthy customs and values as a well as promote and guarantee justice.

The research findings were able to address the objectives of the study, which was to examine the extent to which customary courts could be utilised to expand legal aid to reach the vast, rural areas of Nigeria. It is worth bearing in mind also that many communities and townships

[1409]Ibid.
[1410]Ibid.
[1411]Tobin, Brendan Michael (2011) 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights' pp. 302-305.
[1412]Ibid.
[1413]Ibid.

do not have a resident magistrate's court in their community and may need to travel to a neighbouring community or local government to attend a magistrate's court that they are not familiar with. Travelling back and forth may not be an easy option for litigants if there is no guarantee that the case will be dealt with and concluded on the day. In addition, the magistrate's court may not be familiar with the matter in question if it is linked to the custom and tradition of a different community. This could cause more conflict in the ruling if all crucial circumstances are not carefully taken into consideration.

According to Ubink,[1414] the reality of access to judicial institutions in Nigeria is that many rural areas do not have access to public transport facilities or the financial means to visit courts that are outside their jurisdiction, and therefore would not attempt to pursue litigation if the process would seem unachievable from the onset. The author further contends that magistrate courts in Africa tend to operate unprofessionally, displaying poor ethical standards, especially in their imposition of a common law approach on the application of customary law. The unpredictability in such courtrooms has led to distrust in formal court structures.[1415]

8.4 Research Contributions

This study contributes to the current understanding of the legal aid scheme in Nigeria. It also presents an inclusive viewpoint on how the provision is perceived in practice. Hence the contributions are as follows.

8.4.1 Theoretical Contribution

There have been various studies giving ample insight into the legal aid system in Nigeria: Udombana J. (2006); Frynas J. F. (2001); Alcock P. C. (1976); Blasi G. (2004); Cottrell J. (1976); Dada J. A. (2013); McQuoid-Mason D. (2003); Bamgbose O. (2015). The extant literature highlights the benefits of an effective legal aid provision as well the various barriers that are impeding its successful operation in Nigeria. There are also existing in-depth studies on the law that governs custom and traditional practices, and its operations as a valid legal system, as well as the need to reform the current Nigerian customary legal system to meet the required standards of equitable justice. Supporters include: Obilade A. (1973); Mukoro A

[1414]Ubink Janine M. (2015) 'Access v. Justice: Customary Courts and Political Abuse, Lessons from Malawi's Local Courts Act', American Journal of Comparative Law pp. 12-13.
[1415]Ibid.

(2011); Nwocha M. E. (2016); Odinkalu, C. A. (2006); Oba A. A. (2011); Bennett T. W. (1993).

However, this study further advocates for an efficient legal aid system that is easily accessible and has sought to make a unique contribution to knowledge by introducing an original narrative on the prospects of expanding legal aid provision through customary legal systems in Nigeria. This is based on the notion that a substantial number of Nigerians live by their custom and traditional beliefs. The current knowledge on the obstacles facing the legal aid scheme focuses mostly on the lack of funding and the limited to non-existent access to courts. Another noted impediment is the insufficient legal personnel willing to take on cases that are subject to free legal assistance. Such barriers are accurate and well documented in the current literature on legal aid in Nigeria. However, this research expands the scope of knowledge regarding the impediments to the expansion of legal aid in Nigeria to reveal the theoretical imbalance between the right to legal aid and directives put in place by national legislation.[1416] This includes other relevant Resolutions, Declarations and Principles[1417] to ensure eligible individuals are not denied access. Consequently, it exposes the provision as being inadequate in practice and in need of an overhaul to cover the remote, rural areas of Nigeria.

The findings extensively affirm the importance of a person's perception of their individual surroundings when understanding a social phenomenon that influences their lives and development. This study shows that customs have always played a significant role in the formation of law.[1418] Societies with a high prevalence of custom and traditional beliefs, according to Obilade,[1419] do not necessarily indicate an absolute interest in customary practices. However, advocating for customary legal systems in Nigeria implies there is a need for them, and consideration must be afforded to individuals that do have interests vested in their culture and who depend on its guidance for their existence. Therefore, it also suggests that such individuals should be granted access to legal institutions that are closely linked to their customary beliefs if they believed it would efficiently address the matter in question and uphold

[1416]Constitution of the Federal Republic of Nigeria 1999 and Legal Act of Nigeria 2011.
[1417]African (Banjul) Charter on Human and People Rights (1986); The Resolution on the Right to Recourse and Fair Trial (1992); The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (2003) and The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2006).
[1418]Leon Sheleff (2000) 'The Future of Tradition: Customary Law, Common Law and Legal Pluralism', Routledge p. 4.
[1419]Obilade A. (1973) 'Jurisdiction in Customary Law Matters in Nigeria: A Critical Examination', Journal of African Law Vol. 17. No. 2 pp. 227-240.

justice as required. Hence, this study has initiated a new theoretical framework addressing a possible solution to expanding legal aid provision in Nigeria and the obstacles undermining access to legal aid in courts of convenience.

8.4.2 Contributions to Socio-legal Research in Nigeria

The consideration of expanding legal aid via customary legal systems is non-existent in current literature and reports on legal aid in Nigeria. Socio-legal studies are also an underdeveloped area of inquiry, in need of more recognition within Nigerian academia. The inter-disciplinary model adopted here challenges the conventional black letter law approach, which merely describes the principles of law with no consideration of its implications for the realities of the wider public. Unlike this approach, a socio-legal model aims to investigate the link and far-reaching relationship between society and the law that structures judicial decision-making in Nigeria. This study adopted an empirical approach via a qualitative methodological model to offer an exhaustive theoretical understanding of access to legal aid and the prospects of customary judicial institutions to expand the scheme in Nigeria.

This study also reveals how various viewpoints are experienced and expressed in the real world through selected individuals and providing new knowledge through findings based on their input. This was achieved by analysing the various viewpoints derived from the respondents and creating a medium of socio-legal research that is advantageous to the expansion of the legal aid scheme in Nigeria and capable of development by future research. Consequently, the socio-legal approach of this study has provided empirical evidence on the subject of increasing the scope and benefits of legal aid through customary legal systems. The aim of this study is to use this evidence to inform and influence stakeholders that are responsible for reform in areas of access to appropriate judicial institutions, such as policymakers, legislators, the judiciary, NGOs, and practitioners through the analysis of collected data. In addition, the methods used for data collection in this research also support the notion that telephone interviews and self-administered questionnaires are equally as effective as traditional face-face interviews. The preferred research method thus provides a reliable approach, valid results, and an increased scope on the subject matter.

8.5 Limitations of the Study

The findings of this study highlight and affirm the individual's constitutional rights to equal protection and due process before the courts through the availability of legal aid for individuals who require it. The findings also support the notion that every individual should have access to a court of their choosing in the interest of a fair trial, which is also a fundamental right. This latter need principally concerns matters that are specific to a certain type of court. For example, a legal matter firmly guided by custom and tradition is more than likely to be better dealt with in a court within its jurisdiction with the assistance of legal counsel than in a formal court. Formal courts are unlikely to be inclined to consider the matter due to complexities that might arise from a judge's inadequate knowledge on the custom that guides the issue.

The adopted methodology explored social interactions with Nigerian legal systems and their processes and was able to produce a valuable theoretical outcome. As already established in this research, there is pre-existing literature that covers both areas of interest to this study: access to legal aid and the customary courts process in Nigeria. However, the literature only explores them in isolation, and I am not aware of any current literature that combines both topics as a single entity of inquiry, as is being done in this study. Hence, it is considered a major limitation of this study because I was not able to create a literature review of past studies specific to the research, nor was I able to cross validate and compare my findings with other similar studies.

8.6 Future Research Directions

8.6.1 Introduction

Over the years, customs and traditions in the legal context have broken out of the local mould to become widely accepted as a legitimate source of law in many societies.[1420] The purpose of this study is to examine the viability of customary legal institutions as an alternative mechanism to further expand legal aid provision in Nigeria. During colonial rule in Nigeria, the British considered the Native Courts system a necessary adjunct to the British colonial practice of

[1420]Leon Sheleff (2000) 'The Future of Tradition: Customary Law, Common Law and Legal Pluralism', Routledge p. 4.

indirect rule.[1421] This system enabled the British Empire to expand extensively through the incorporation of existing indigenous political structures or political agents, such as native chiefs.[1422] The process also helped improve the standard of administration of justice in customary courts.[1423] The findings of this study point to a similar strategy where customary courts are allowed to develop and evolve through the implementation of legal aid into its operations. This also means that the wider population would be able to benefit from free legal representation in a court of their choosing. Consequently, individuals with legal knowledge who are legally qualified to represent litigants via the legal aid scheme according to the 2011 Legal Aid Act (such as Lawyers, NYSC law graduates, NGO representatives and paralegals) are able to form close relations with potential litigants. They can also gain an understanding of the custom and norms of a certain province through the advice of the native chiefs and elders to form a balance between customary law and justice.

8.6.2 Adopting a Theoretical Framework for Legal Aid

Currently the legal aid scheme has not been duly aligned with a distinct theoretical framework other than that of human rights, which is generalised. This is prevalent with many other human rights phenomena. Albiston and Sandefur[1424] recognise the pressing need to expand the research on legal aid in terms of theoretical and empirical innovations. They argue that such innovations will "close the gap between the need for, and the availability of, quality legal assistance". The authors went further to highlight the benefits of independent research and the application of a theoretical framework regarding potential recipients of legal aid. They contend that researchers who lack an explicit theory of what an effective legal system should entail risk deferring to the policy audience.[1425] In this case, researchers adopt measures to fit the needs of policymakers in terms of the identifying the problems and offering a solution to suit the policy

[1421]'The Principles of Native Administration and their Application', (1934) by Sir Donald Cameron, para. I. quoted in The Interaction of English Law with English Law with Customary Law in Western Nigeria: By Ajayi F. A. (1960), Journal of African Law, Vol. 4, No. 1 pp. 40-50.
[1422]Fisher Michael H. (1984) 'Indirect Rule in the British Empire: The Foundations of the Residency System in India', (1764-1858) Modem Asian Studies 18, 3 pp. 393-428 p. 393.
[1423]Obilade A. (1973) 'Jurisdiction in Customary Law Matters in Nigeria: A Critical Examination', Journal of African Law Vol. 17. No. 2 pp. 227-240.
[1424]Albiston Catherine R. Sandefur Rebecca L. (2013) 'Expanding the Empirical Study of Access to Justice', Wisconsin Law Review 101 pp. 101-120.
[1425]Ibid. p.111.

goals. Alcock[1426] advocates for the need to adopt a theoretical explanation of legal aid and argues that legal aid for disadvantaged individuals can only be fully assessed after identifying those interests that the law has been enacted to protect.

The scope of this thesis was not wide enough to apply a theoretical framework; however, it may be possible in future studies to adopt the Kramer's Interest Theory of Rights to understand the legal aid phenomena and the consequences on disadvantaged individuals if access is inadequate. Throughout the course of this study, I was able to delve into the interest theory as well as personally meet and interview Professor Matthew Kramer,[1427] who pioneered the theory. Interest theory is a concept that claims that the function of rights is to preserve the right holder's interests and human rights are the mechanism through which these are best identified and secured.[1428] Crucial to this is legal aid, which is fundamental for the protection of equal standing before the courts.

A theoretical framework would provide guidance regarding the concept of legal rights, and identify other crucial issues lacking in the extant research on legal aid and expand existing knowledge on the topic to produce attainable future results. Kramer[1429] posits that for "Interest theorists, the essence of legal rights consists in its tendency to safeguard some aspect of the wellbeing of its holder". It could also be argued that the interest theory framework is constructed on the concept of individual rights and duties, which are owed in return to the state for protecting their rights. Custom and culture remain a crucial aspect of an individual's wellbeing and a constitutionally protected right. Hence, the need for a theoretical approach to further understand the concept of customary rights in relation to access to legal aid and the benefits if such rights are extended to customary courts in Nigeria.

8.7 Summary

This research has raised various questions with regards to whether Nigeria's customary legal system is sufficient to administer an effective legal aid scheme in its courts, as well as the

[1426]Alcock P C (1976) 'Legal Aid: Whose Problem?' British Journal of Law and Society, Vol. 3, No. 2 p. 160.
[1427]Professor of Legal and Political Philosophy, Churchill College University of Cambridge United Kingdom.
[1428]Andrew Fagan (2009) 'The Basis and Scope of Human Rights In: Human Rights: Confronting Myths and Misunderstandings', Edward Elgar Chapter 1 p. 9.
[1429]Mathew H. Kramer (2010) 'Refining the Interest Theory of Rights', The American Journal of Jurisprudence Vol. 55 Issue 1 Article 2 p. 33.

implications of unwritten law in today's legal discourse. Ubink[1430] inquires if there is enough guidance for legal practitioners who have had no previous exposure to customary law. According to Mukoro,[1431] there are doubts regarding the authenticity of customary law, being mainly unwritten if compared to the documented common law in Nigeria. Tobin[1432] acknowledges the pending difficulties if unwritten legal concepts and rules are to become a tool for the administration of justice and protection of indigenous people's resources and knowledge. However, the author maintains that international law also includes many unwritten elements, and the unwritten nature of customary law should not be a barrier to its recognition.[1433] Mukoro further argues that customary law remains flexible because it changes from society to society and from custom to custom. On the other hand, the customary legal system has begun to evolve, and judgements are now being recorded in some courts as a reference point, particularly in areas with very similar and blended cultures.[1434] The current state of customary legal system in Nigeria reveals it is in need of development, and Badaiki[1435] declares the need to initiate a "scientific and systematic study of the customary laws of the various culture groups in the country".

Tooley [1436] contends that empirical evidence suggests that customary legal systems are of high preference to indigenous people, and he advocates for practices that will harness the strengths of both customary and state legal systems and enable them to co-exist effectively. Oyovbaire[1437] proposes the autonomy of local governments to legislate on laws that would be respected and enforced by the state in the various communities under their jurisdiction, ensuring the involvement of community members in process. Thus, there is a need for a more exhaustive investigation of the Nigerian customary legal system and its impact on society

[1430]Ubink Janine M. (2015) 'Access v. Justice: Customary Courts and Political Abuse, Lessons from Malawi's Local Courts Act', American Journal of Comparative Law pp. 12-13.
[1431]Mukoro Akkpomuvire (2011) 'The Interface Between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect', The Social Science Journal 26(2): pp. 139-145.
[1432]Tobin, Brendan Michael (2011) 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights' pp. 303-305.
[1433]Ibid.
[1434]Mukoro Akkpomuvire (2011) 'The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect', The Social Science Journal 26(2) pp. 140-141.
[1435]Badaiki A.D. (1997) 'Developmental of Customary Law', Lagos, Tiken Publishers. In Mukoro Akkpomuvire (2011) The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect the Social Science Journal 26(2) p. 145.
[1436]Toomey L.T. (2010) 'A Delicate Balance: Building Complementary Customary and State Legal Systems', The Law and Development Review, Volume 3, Issue 1, pp. 156–207.
[1437]Oyovbaire S.E. (1982) 'Federalism in Nigeria', London, Macmillan Press. In Mukoro Akkpomuvire (2011) The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect the Social Science Journal 26(2) p. 144.

through an ethnographic research method. This will give more insight into their operations and facilitate an observation of real time events as they occur and allow researchers to draw credible conclusions from findings of their study. One matter this might elucidate concerns the long-term implications of the lack of access to legal institutions on individuals that are unable to afford the expense of legal representation, as well as persons that require legal aid but are not able to access it in a court of their choosing.

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Appendices

Appendix 1

REQUEST FOR PARTICIPANTS FOR TELEPHONE INTERVIEW AND ONLINE QUESTIONNAIRE

Dear all,

I am PhD (Law) candidate looking for participants for my research which is examining: The socio-legal impediments, hindering the expansion of legal aid in Nigeria. Part of the study is focused on investigating the deep-rooted principles of 'customary courts' within the Nigerian legal system.

The research is aimed at adult individuals, living in any part of NIGERIA, who have personally encountered OR is familiar with the customary court process in Nigeria.

Research method:

1) Interview: This will be conducted through telephone, subject to the participant's availability and preferences. It will last between 30 – 40 minutes.
2) Online Questionnaire: This will be sent via email to participants. Completion should take between 20-30 minutes.

If you are interested in participating or know someone that may be interested, kindly send me a message via Facebook messenger or my personal email listed below. Please help me re-post if you can. Thank you.

Olubunmi Onafuwa
University of East London
Royal Docks School of Business and Law
University Square Campus Stratford
1 Salway Pl, London
E15 1NF

Appendix 2

17th October 2018

Dear Olubunmi,

Project Title:	**Social Legal Barriers to The Expansion of Legal Aid in Nigeria**
Principal Investigator:	**Professor K. O Kufuor**
Researcher:	**Olubunmi Eunice Onafuwa**
Reference Number:	**UREC 1718 93**

I am writing to confirm the outcome of your application to the University Research Ethics Committee (UREC), which was considered by UREC on **Wednesday 4 July 2018.**

The decision made by members of the Committee is **Approved**. The Committee's response is based on the protocol described in the application form and supporting documentation. Your study has received ethical approval from the date of this letter.

Should you wish to make any changes in connection with your research project, this must be reported immediately to UREC. A Notification of Amendment form should be submitted for approval, accompanied by any additional or amended documents: http://www.uel.ac.uk/wwwmedia/schools/graduate/documents/Notification-of-Amendment-to-Approved-Ethics-App-150115.doc

Any adverse events that occur in connection with this research project must be reported immediately to UREC.

Approved Research Site

I am pleased to confirm that the approval of the proposed research applies to the following research site.

Research Site	Principal Investigator / Local Collaborator
Telephone interviews and online questionnaires	Professor K. O Kufuor

Approved Documents

The final list of documents reviewed and approved by the Committee is as follows:

Document	*Version*	*Date*
UREC application form	3.0	27 September 2018
Participant Information sheet	2.0	27 September 2018
Consent form	1.0	21 June 2018
Research questionnaire	3.0	27 September 2018

Approval is given on the understanding that the UEL Code of Practice in Research is adhered to.

The University will periodically audit a random sample of applications for ethical approval, to ensure that the research study is conducted in compliance with the consent given by the ethics Committee and to the highest standards of rigour and integrity.

Please note, it is your responsibility to retain this letter for your records.

With the Committee's best wishes for the success of this project.

Yours sincerely,

Fernanda Silva
Administrative Officer for Research Governance
University Research Ethics Committee (UREC)
Email: **researchethics@uel.ac.uk**

Dear Olubunmi

Application ID: ETH2021-0170

Original application ID: UREC 171893

Project title: SOCIO-LEGAL BARRIERS TO THE EXPANSION OF LEGAL AID IN NIGERIA: INITIATING LEGAL REFORM THROUGH THE CUSTOMARY COURT SYSTEM

Lead researcher: Mrs Olubunmi Onafuwa

Your application to University Research Ethics Sub-Committee was considered on the 24th of May 2021.

The decision is: **Approved**

The Committee's response is based on the protocol described in the application form and supporting documentation.

Your project has received ethical approval for 4 years from the approval date.

If you have any questions regarding this application please contact your supervisor or the secretary for the University Research Ethics Sub-Committee.

Approval has been given for the submitted application only and the research must be conducted accordingly.

Should you wish to make any changes in connection with this research project you must complete 'An application for approval of an amendment to an existing application'.

Approval is given on the understanding that the UEL Code of Practice for Research and the Code of Practice for Research Ethics is adhered to.

Any adverse events or reactions that occur in connection with this research project should be reported using the University's form for Reporting an Adverse/Serious Adverse Event/Reaction.

The University will periodically audit a random sample of approved applications for ethical approval, to ensure that the research projects are conducted in compliance with the consent given by the Research Ethics Committee and to the highest standards of rigour and integrity.

Please note, it is your responsibility to retain this letter for your records.

With the Committee's best wishes for the success of the project

Yours sincerely

Fernanda Silva

Administrative Officer for Research Governance

Appendix 3

University of East London

Consent to Participate in a Programme Involving the Use of Human Participants

Title: ***Socio-Legal Barriers to the Expansion of Legal Aid in Nigeria***

I have the read the information leaflet relating to the above programme of research in which I have been asked to participate and have been given a copy to keep. The nature and purposes of the research have been explained to me, and I have had the opportunity to discuss the details and ask questions about this information.

I understand what is being proposed and the procedures in which I will be involved have been explained to me. I understand that my involvement in this study, and particular data from this research, will remain strictly confidential as far as possible. Only the researchers involved in the study will have access to the data.

I hereby freely and fully consent to participate in the study which has been fully explained to me and for the information obtained to be used in relevant research publications.

Participant's Name (BLOCK CAPITALS) ……

Participant's Signature……..

Investigator's Name (BLOCK CAPITALS) ……..

Investigator's Signature ……

Date: ……

Appendix 4

Telephone Interview and Online Questionnaire enquiry:

1) Have you heard of legal aid before? What is your understanding of legal aid?
2) Have you ever been a recipient of legal aid? What was your experience?
3) If yes, what is your opinion on the current state of the legal aid provision in Nigeria?
4) Do you believe the current legal aid scheme in practice, is effective enough to address the legal needs of the disadvantaged in Nigeria? Please state why?
5) What is your opinion with regards to individuals who are in need of legal aid but are not able to gain access to it?
6) Are you familiar with the customary legal practice in Nigeria? Which ones?
7) Have you ever been a litigant in a customary court process? What was your experience?
8) What are your thoughts on customary legal practices and access to lawyers via legal aid in the Nigeria?
9) Are you comfortable with customary courts processes?
10) If given the opportunity, what changes would you make to the current customary court system in Nigeria? Why?
11) Do you believe customary legal practices can be utilised to expand the legal aid provision in Nigeria?
12) Given the option, would you prefer legal representation via legal aid in a customary court or would you prefer to seek redress in a formal court? Why?
13) Do you agree or disagree that the disadvantaged will benefit immensely from being heard in a customary legal setting aided by legal counsel, especially in the vast rural areas of Nigeria? Why?
14) What barriers do you foresee in customary legal practices as a tool of legal aid in Nigeria? Why?

List of Tables

List of Figures

List of Cases

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