

CUSTOMARY LAW: THE FORGOTTEN SOURCE OF LAW IN NIGERIAN JURISPRUDENCE?

Abstract

From prehistoric times up till the present, laws have been in place to regulate the affairs of people in a community and resolve their differences as well as to establish law and order. There are four major sources of law in Nigeria: Statutes, Judicial decisions, Received English Law and Customary Law. It however appears that amongst the above, customary law has the least recognition and application. Why exactly this is so is the question that actuated this research. This article was carried out using the doctrinal methodology involving the analysis of relevant texts, case law, statutes and other legal literature. It found that customary law at the present time lacks strong recognition and application and this is quite unfortunate because it is actually the most organic and least complex of the four afore-mentioned sources. It is also the only source of law which the indigenous peoples can truly call their own. Consequently, this paper suggests, inter alia, that customary law can be systematically given a pride of place by being codified or where it has been already codified, frequently revising or amending same to reflect the extant aspirations of the people bound by it. It is hoped and expected that the resuscitation of same will enrich the Nigerian jurisprudence and help in entrenching a stronger, more dynamic and more virile legal system with all the accompanying benefits.

Keywords: Customary Law, Custom, Law, Recognition, Applicability.

1. Introduction

Laws, no matter how simple, exist in every community¹; they are there to entrench peace and order, foster harmony and resolve disputes. While statutes, case law and received English law are more renowned in this clime, customary law, as will be shown in this article, ought to be put on the same pedestal with them. It is not in dispute that customary law is one of the sources of law in most African countries² and it has been in existence in Africa prior to colonialism³. Nigeria is not left out and contrary to some notions, has always had a rich and heterogeneous vestige of customs which are applied all over its geographical enclave. Even after colonialism and independence, these sets of customary law remain but their light appear to have grown dim. What are the laws handed down orally from generation to generation and what is left of them⁴? The general notion these days is that law, properly so-called, relates generally to statutes or judge-made law. This narrow view is unfortunate because the informal and organic nature of customary law makes it arguably the source of law most susceptible to adoption and acceptance by the general populace because it is 'their own'. Thinking along the same lines, a scholar has opined as follows:

It is a notorious fact that customary arbitration or Indigenous dispute resolution mechanism is still the preferred means of dispute resolution in the rural areas. The activation of the machinery of justice of a modern State, by one member of a family against another, is still seen as an invitation to enmity and a breach of family equilibrium. Settled expectation of the application of customary law should not be quashed by an unwarranted invocation of a judicially perceived modernity or questionable constitutional law scholarship⁵.

Although the above was uttered decades ago, it remains the position. It is against the foregoing background that this article seeks to analyze customary law as a source of law in Nigeria and examine fundamental issues relating thereto. This article is divided into five parts. The first is the introduction; the second examines the meaning, essence and features of customary law; the third looks at the ways in which customary law can be ascertained; the fourth appraises the applicability of customary law while the last part concludes and advances pertinent recommendations.

*By Daniel Chidike NWUZOR, PhD, Lecturer, Faculty of Law, Ebonyi State University, Abakaliki; and

*Chidebe Matthew NWANKWO, PhD, Senior Lecturer, Faculty of Law, University of Nigeria, Enugu Campus

¹ A Milner, 'The Development of African Law', 1 *Int'l L.* 192 (1967), 193.

² M Ndulo, 'African Customary Law, Customs, and Women's Rights' *Indiana Journal of Global Legal Studies*, Vol. 18, No. 1 (Winter 2011), 87.

³ GR Woodman, 'Some Realism about Customary Law- The West African Experience', 1969 *WIS. L. REV.* 128.

⁴ MLM Fletcher, 'Rethinking Customary Law in Tribal Jurisprudence', *Michigan Journal of Race and Law*, Vol. 13, 2007, 59.

⁵ RN Nwabueze, 'The Dynamics and Genius of Nigeria's Indigenous Legal Order', *Indigenous Law Journal*, spring 2002, Vol. 1, 200.

2. The Nature of Customary Law

Meaning of Customary Law

An intelligent exposition of the topic discussed in this article is impossible without properly pinpointing the meaning and essence of customary law especially from a Nigerian perspective. While there is no universally accepted definition of customary law⁶, that apparent impediment is incapable of preventing an attempt to arrive at a definition. It will do no harm to start with the view offered in *Oyewunmi Ajagunbade III v Ogunesan*⁷ where Obaseki, JSC defined customary law as:

the organic or living law of an indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would rather say that customary law goes further and imports justice to the lives of all subject to it.

In *Aku v Aneku*⁸, it was stated to be:

the 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 the subject matter to which it relates.

Furthermore, in *Nwaigwe v Okereke*⁹, the Supreme Court defined it in the following manner:

And what is customary law? Customary law generally means relating to custom or usage of a given community. Customary law emerges from the traditional usage and practice of a people in a given community, which, by common adoption and acquiescence on their part, and by long and unvarying habit, has acquired, to some extent, element of compulsion and force of law with reference to the community. And because of the element of compulsion which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable. Putting it in a more simplistic form, the customs, rules, traditions, ethos and cultures which govern the relationship of members of a community are generally regarded as customary law of the people.

It has also been defined as 'a body of rules regulating rights and imposing correlative duties being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question'¹⁰. In *Zaidan v Mohosen*¹¹, it was stated to be a law not codified by any competent parliament in Nigeria but enforceable and binding within Nigeria between the parties subject to it. Furthermore, it has been defined as 'law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws'¹². The above definition appears to suggest that while customary law may be accepted as binding, it falls short of being a law. This suggestion is misconceived in view of the fact that unlike other laws which are handed down to the populace (statutes and judicial decisions) or which are relics of colonial experience (received English law), this source of law is organic and proceeds from the hearts of the populace themselves who may choose to do away with same when it stops serving their interests or fails to live up to their aspirations. Finally, it has been described as 'a body of customs and traditions which regulate the various kinds of relationship between members of the community in their traditional setting.'¹³ It is pertinent to point out at this juncture that while it is convenient to talk of 'customary law' as a general description covering many systems¹⁴, there is no uniform customary law covering the entire country and even among the various socio-political regions in Nigeria, there are differences in customary practices¹⁵.

⁶ CMN White, 'African Customary Law: The Problem of Concept and Definition', *Journal of African Law*, Volume 9, Issue 2, summer 1965, 86.

⁷ (1990) 3 NWLR 182 at 207. This view has been adopted in other cases such as *Ogolo v Ogolo* (2004) 8 WRN 1 and *Nwagbogu v Abadom* (1994) 7 NWLR 357.

⁸ (1991) 8 NWLR (Pt. 209) 280 at 292.

⁹ (2008) All FWLR (Pt. 431) 843 at 870 SC.

¹⁰ Customary Courts Law, Revised Laws of Enugu State of Nigeria 2004, s.2. This definition is *in pari materia* with the definition offered in the same section of the Revised Laws of Anambra State of Nigeria 1979.

¹¹ (1973) 11 FSC 1.

¹² BC Garner ed, *Black's Law Dictionary* (10th ed, St. Paul: Thomson Reuters, 2014), 468.

¹³ CO Okonkwo ed, *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1979), 41.

¹⁴ AEW Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell, 1963), 65.

¹⁵ AI Iguh and LA Oti-Onyema, 'Obnoxious Igbo Cultural Practices and Panacea of the Law in Nigeria', *Nnamdi Azikiwe University Journal of Commercial and Property Law*, Vol. 7(1) 2020, 138.

To appreciate the essence of customary law, one must make a distinction between custom and customary law¹⁶. A custom is a rule of conduct¹⁷; when it becomes binding or mandatory, it transmutes into customary law¹⁸. Once the custom is accepted by the people as a code of conduct, it becomes customary law¹⁹ and the assent of the community elevates the custom to customary law by making it binding and lending to it a sanction which is enforceable²⁰. Elaborating on this distinction, it has been espoused that:

What then is the point of departure between customary law and custom *simpliciter*? In our submission, this difference lies in what the traditional courts could or could not do where the party pronounced against refuses or merely fails to give effect to the court's decision, and does not seek to prove his case to a higher tribunal. If the court was satisfied that the party in the wrong was guilty of a breach of a legal right, then the judgment of the court will have to be executed in much the same way as a judicial decision is executed in the Western world. In such a case, either masquerades or young age-grade societies are employed by the court to act as bailiffs. If on the other hand, the action was founded on a breach of a mere custom, there is no right of enforcement. The court merely apportioned blame and offers suggestions. But the party who has been wronged will have to be satisfied with whatever effect public opinion may have on the other party to the case²¹.

Therefore, whereas the breach of a custom is not sanctioned, disobedience to a customary law attracts customary sanction²². In driving the point home, juxtapose two scenarios from Chinua Achebe's *magnus opus*, *Things Fall Apart*²³. In the first scenario, Okonkwo, the main character in the book, heavily beat his second wife during the period preceding the New Yam Festival. Although this action was severely deprecated, it was not sanctioned²⁴. On the other hand, when Okonkwo accidentally shot and killed the sixteen-year old son of a man whose funeral rites were being held, he and his family had to flee Umuofia, his community and seek refuge with his Uncle in Mbanta²⁵. The sanction was illustrated as follows:

As soon as the day broke, a large crowd of men from Ezeudu's quarter stormed Okonkwo's compound, dressed in garbs of war. They set fire to his houses, demolished his red walls, killed his animals and destroyed his barn. It was the justice of the earth goddess, and they were merely her messengers. They had no hatred in their hearts against Okonkwo. His greatest friend, Obierika was among them. They were merely cleansing the land which Okonkwo had polluted with the blood of a clansman²⁶.

From the above, it is easy to surmise that the first scenario was the breach of a custom which attracted no sanction whereas the second amounted to a breach of a customary law which attracted a severe sanction. In the ensuing pages, it is imperative to have this distinction in mind.

Characteristics of Customary Law

Customary law does not owe its existence to legislative enactment or the declaration of a court²⁷. The first notable characteristic of customary law is that (with the exception of Islamic law which is perceived in Nigeria as part and parcel of customary law), it is generally unwritten²⁸. According to Ibekwe:

Regrettably enough, our own customary law is unwritten. It was handed down the ages, from generation to generation. Like a creed, it seems to live in the minds of people. This explains why so little was really known at the beginning about the vast body of laws which had always governed the affairs of our ancestors from time immemorial. Much of what is known about such laws has been drawn either from judicial decisions or from the few publications on the subject²⁹.

¹⁶ RN Nwabueze, *op cit*, 157-158.

¹⁷ *Ibid*, 158.

¹⁸ CK Allen, *Law in the Making* (Oxford: Oxford University Press, 1964), 67-70.

¹⁹ IO Igwe, 'Jurisprudential Exposition of Court System under Igbo Native Law and Customs', *Unizik Law Journal* 18, 2022, 13.

²⁰ RN Nwabueze, *op cit*, 158.

²¹ SNC Obi, *The Ibo Law of Property* (London: Butterworths, 1963), 28-29.

²² GH Boehringer, 'Aspects of Penal Policy in Africa, With Special Reference to Tanzania' (1971) 15 *JAL* 208.

²³ C Achebe, *Things Fall Apart* (New York: Anchor Books, Doubleday, 1959).

²⁴ *Ibid*, 36-39.

²⁵ *Ibid*, 124-129.

²⁶ *Ibid*, 124-125.

²⁷ JO Asein, *Introduction to Nigerian Legal System* (2nd ed, Lagos: Ababa Press Ltd, 2005), 116.

²⁸ *Ibid*, 117.

²⁹ DO Ibekwe, 'Conflict of Cultures and our Customary Law', in TO Elias, *et al*, eds, *African Indigenous Laws* (Enugu: Government Printer, 1974), 297.

This does not of course mean that there are no codifications of customary law or that they are no instances in which customary law is written down. What it rather means is that customary law is not birthed documentarily though it may subsequently assume that condition, whether wholly or in part.

Secondly, customary law is an imperative norm which is viewed by the community where it is applicable as mandatory; it is 'something more than a casual social observance'³⁰. It must be accepted by the people whose lives it seeks to regulate. Bairamian, FJ hit the nail on the head when he asseverated that customary law is 'a mirror of accepted usage'³¹. It bears noting that the acceptance meant here need not be unanimous so that in a community of a hundred people, the fact that they are some dissenters to a customary law does not nullify the fact that it is widely accepted. This acceptance or assent is a fundamental notion which lends validity, efficacy and legitimacy to it. According to Lord Atkins:

Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influence of civilization become milder without losing their essential character as a custom. It would however appear to be necessary to show that in their milder form they are still recognized in the native community as custom... It is the assent of the native community that gives a custom its validity and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate³².

Another feature of customary law is its dynamism. It is capable of adapting to changing circumstances in line with the sensibilities of the community. In the words of Nwokedi JSC in *Agbai v Okogbue*³³, 'Customary laws were 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'. This quality has been appreciated as 'one of the most striking features of West African native custom'³⁴. It remains to be said here that strong evidence is usually required to establish that a particular custom has been jettisoned³⁵. Changes in the customary law usually occur by usage and are not declared like western-style laws which are repealed or amended; however, once the changes are generally accepted, they become binding on all members of the society³⁶.

Furthermore, customary law must be in existence at the relevant time it is sought to be applied³⁷. Endorsing this, Karibi-Whyte, JSC in *Kimdey v Governor of Gongola State*³⁸ espoused that: 'It is one of the characteristics of customary law that it must be in existence at the material time'. In view of its dynamism as earlier stated, a customary law in existence a decade ago may have been abandoned. Other attributes of customary law include its flexibility³⁹, the fact that it must be generally applied in the society and its bindingness⁴⁰. Other features of customary law have been stated to include: simplicity and absence of formality; reliance on 'irrational' systems of proof⁴¹; a commonsensical (as opposed to a legalistic) approach; the fundamental desire to reconcile the parties rather than to merely resolve the dispute as well as the role of religious and ritual beliefs in the proceedings⁴². Finally, parties to a dispute subject to customary law are usually related in some manner;⁴³ there is usually a social, marital or tribal relationship amongst them⁴⁴.

³⁰ *Ibid*, 116.

³¹ *Owoniye v Omotosho* (1961) 1 All NLR 304 at 309.

³² *Eshugbayi Eleko v Government of Nigeria* (1913) AC 662 at 673.

³³ (1991) 7 NWLR 391 at 417.

³⁴ *Lewis v Bankole*, per Osborne, CJ.

³⁵ *Oloto v Dawuda* (1901) 1 NLR 58.

³⁶ RN Nwabueze, *op cit*, 167.

³⁷ E Malemi, *The Nigerian Legal System: Text and Cases* (Lagos: Princeton Publishing Co, 2012), 67.

³⁸ (1988) 2 NWLR (Pt. 77) 445 at 461 SC.

³⁹ *Balogun v Oshodi* (1929) 10 NLR 36 at 57.

⁴⁰ E Malemi, *op cit*, 67.

⁴¹ This brings to mind such issues as voodoo trial, juju oath taking and trial by ordeal in which a person's guilt is determined through queer means. For a perspective on the use of juju oaths in customary law proceedings, see A. A. Oba, 'Juju Oaths in Customary Law Arbitration and their Legal Validity in Nigerian Courts', *Journal of African Law*, 52,1 (2008), 139 as well as IKE Oraegbunam and U Frank-Igwe, 'Customary Arbitration through Oath Taking: Expanding Traditional Ways of Proving Land Ownership', *IJOCLLEP* 5(2) May 2023, 106-111. In this wise, it is prudent to bear in mind that the supernatural plays a vital role in African customary law; see JF Holleman, 'An Anthropological Approach to Bantu Law (With Special Reference to Shona Law)' (1949) 10 *Rhodes-Livingstone Journal*, 61-64.

⁴² M. Gluckman, ed, *Ideas and Procedures in African Customary Law*, Studies Presented and Discussed at the Eight International African Seminar at the Haile Selassie University, Addis Ababa, January 1966, 24.

⁴³ RN Nwabueze, *op cit*, 163.

⁴⁴ PC Lloyd, *Yoruba Land Law* (Ibadan: Publication of the Nigerian Institute of Social and Economic Research, 1962), 17-18.

Proof of Customary Law

The complex nature of customary law and its placing in the hierarchy of the sources of law make it subject to disparate means of proof⁴⁵. The extant statutory stipulation for treating customary law as a question of fact emanated from the Ghanaian case of *Angu v Attah*⁴⁶ where the Privy Council asseverated 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 will take judicial notice of them'. Restating the rule known as 'the rule in *Angu v Attah*', the then Federal Supreme Court in *Giwa v Erinmilokun*⁴⁷ articulated as follows:

It is a well established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety, and has been so frequently followed by courts that judicial notice would be taken of it without evidence required in proof.

The reasons underpinning this requirement for proof include that the diversity in the various customary laws mean that a judge may not always be familiar with the rule sought to be applied; furthermore, since much of the law remains uncoded, it is not always easy to refer to written sources⁴⁸. Another rationale is that most judges with an English-style training are usually not well versed in the customary laws in their localities⁴⁹. Furthermore, the parameters for the operation of customary law are often not certain⁵⁰.

In a scintillating dictum, the irrepressible Nnaemeka Agu JSC lamented as follows:

Our customary law is still bogged down by this annoying vestige of colonialism. There is strictly no difference or at least a clear divide between customary law and custom as such: both are subject to the same treatment. The result is that our customary law is still treated like foreign law in our own country (more than three decades) after our independence from colonial rule. This is far from satisfactory. Much as I agree with those who believe that codification will have the effect of stratifying customary law and inhibiting its growth, I believe that something can be done to rescue it from the fluttering uncertainty and contemptible inferior status to which it is now subjected. A machinery can be set up to ascertain and record these customs from elders and pundits of customary law at the community level, outside the trusting vagaries of litigation – an exercise which was successfully carried out in East Central State...between 1972 and 1976... It is to be regretted however, that whereas the authorities concerned are taking the commendable step of ridding our statute and received English law of anachronism, nothing appears to be happening in the area of customary law which forms the essential backbone of our *corpus juris Nigerianae*⁵¹.

While commending the above erudite ratiocination, it is unfortunate that in this modern epoch, nothing has been done to extirpate this conundrum. It is on the above pedestal that this article proceeds to analyze the system for proving customary law in Nigeria. As alluded in the aforesaid cases, there are two major ways in which customary law can be established in Nigeria. The first is by proving it as a fact while the second is by judicial notice⁵². In this wise, it is provided as follows: 'A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence.'⁵³ The burden of proving the said custom is upon the person alleging its existence⁵⁴. It is now proposed to treat these two modes of proof seriatim.

Judicial Notice of Customary Law

On this issue, it is expressly stipulated that a custom may be judicially noticed when it has been adjudicated upon once by a superior court of record⁵⁵. This is a departure from the old Evidence Act which had provided as follows:

A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in

⁴⁵ E Rosser, 'Customary Law: The Way Things were, Codified', *Tribal Law Journal*, Volume 8 (2007-2008), 27.

⁴⁶ (1921) PC 1874-1928, 43. It was subsequently adopted in Nigeria in *Buraimo v Gbamgboye* (1940) 15 NLR 139.

⁴⁷ (1961) All NLR 294 at 296.

⁴⁸ JO Asein, *op cit*, 121.

⁴⁹ AEW Park, *op cit*, 83.

⁵⁰ AN Allott, 'The Judicial Ascertainment of Customary Law in British West Africa', *The Modern Law Review*, May 1957, 244.

⁵¹ *Ugo v Obiekwe* (1989) 1 NWLR 566 at 583-584.

⁵² R.N Nwabueze, *op cit*, 168.

⁵³ Evidence Act (2011) As Amended, s. 16(1).

⁵⁴ *Ibid*, s. 16(2).

⁵⁵ *Ibid*, s. 17.

assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration⁵⁶.

By contrast with that of the above provision of the old Evidence Act, the extant one appears more precise and straight to the point. Essentially, a single decision of a court of superior jurisdiction suffices for the judicial notice of a rule of customary law; there is no more need as in the past for the requirement that a rule of customary law will only be judicially noticed if it has been so often proved, pronounced and acted upon by courts of superior or co-ordinate jurisdiction in the same area to such an extent that it can be said to have acquired notoriety⁵⁷. However, an eminent scholar has opined, and this work agrees, that proving customary law by means of judicial notice has the consequence of rigidifying it and impairing its features of flexibility and adaptability⁵⁸. Fortunately, there appears to be a solution to this conundrum and that is a codification of the customary laws judicially noticed and periodic amendment of these by the legislature working in conjunction with experts in customary law in the relevant localities.

Proving Customary Law as a Fact

As to this method of proof, the Evidence Act provides that where a custom cannot be established as judicially noticed, it shall be proved as a fact⁵⁹. Therefore, where a rule of customary law has not been judicially noticed, it must be established by evidence⁶⁰. This can be done through the means of expert witnesses⁶¹. These are usually chiefs or traditional rulers of the community whose customary law is in issue⁶². They are obligated, by virtue of their positions and offices, to be knowledgeable about the customary law of their area⁶³. On this point, the Evidence Act provides that 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 admissible⁶⁴. It is further provided that 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 the aforesaid provision⁶⁵. It is however pertinent to underscore that the court is not bound by such evidence. Accordingly, in *Ewa v Ita*⁶⁶, Berkeley, J, dissatisfied with the expert evidence adduced before him, quipped as follows:

A good deal of evidence was given by both sides on this question of Native law and custom. This kind of so-called expert evidence must always be treated with very great caution. The evidence of these experts is invariably coloured each by his own personal interests. The only way in which such testimony can be safely treated is to refrain from attempting to estimate individual credibility and to concentrate on drawing conclusions from the general trend of the evidence.

In the light of the above, persons seeking to establish a rule of customary law using witnesses must produce credible, knowledgeable and honest witnesses or risk the discomfiture of having the testimonies of their witnesses rejected⁶⁷. Customary law can also be proved as a fact by means of authoritative textbooks⁶⁸ as well as using assessors who sit with the judge and advise him on customary law⁶⁹. Whichever mode is utilized, it is submitted that it should be credible, intelligible and susceptible to ready acceptance, otherwise, it may be disregarded.

⁵⁶ Evidence Act (1990), s. 14(2).

⁵⁷ For the old position, see *Rabiu v Abasi* (1996) 7 NWLR (Pt. 462) 505 at 510-511 SC as well as *Romaine v Romaine* (1992) 4 NWLR (Pt. 238) 650 SC.

⁵⁸ R.N Nwabueze, *op cit*, 173.

⁵⁹ S. 18(1). See also, I.P Enemo, EA Udu et al, 'Appraisal of the Advancement of Judicial Enforcement of Customary Law in Nigeria: Challenges and Prospects', *AEFUIJ*, Vol. 1, 2024, 18.

⁶⁰ S.T Hon, *S.T Hon's Law of Evidence in Nigeria* (2nd ed, Port Harcourt: Pearl Publishers, 2013), 106.

⁶¹ For cases where it was established using witnesses, see for instance, *Adeseye v Taiwo* (1956) FSC 84; *Andre v Agbebi* (1931) 10 NLR 79 and *Owoo v Owoo* (1946) 11 WACA 81.

⁶² In *Lewis v Bankole supra* for instance, many traditional rulers and chiefs testified.

⁶³ R.N Nwabueze, *op cit*, 169.

⁶⁴ S. 73(1).

⁶⁵ S. 18(2).

⁶⁶ (1929) 9 NLR 84-85.

⁶⁷ A good example would be Ezeulu in Chinua Achebe's *Arrow of God*, a Chief Priest who supported another community in a land dispute with his own community. His honesty earned him admiration and respect from the colonial authorities.

⁶⁸ AEW Park, *op cit*, 87.

⁶⁹ TO Elias, *The Judicial Process in Commonwealth Africa* (Ghana: University of Ghana Press, 1977), 18. See also, F.O Igbineweka and E.O Enakireru, 'Customary Law in Nigeria: Interrogating the Issue of Judicial Notice', *ACARELAR* 3 (2022), 58.

3. Ascertaining the Validity of Customary Law

Every rule of customary law must conform to certain statutory requirements for it to be valid⁷⁰. Every rule of customary law must pass the following three tests to be valid:

- i. It must not be repugnant to natural justice, equity and good conscience;
- ii. It must not be incompatible either directly or by implication with any law currently in force; and
- iii. It must not be contrary to public policy⁷¹.

The Repugnancy Test

The phrase, 'repugnant to natural justice, equity and good conscience', when considered together appears imprecise as the various individual terms therein have different connotations.⁷² It has however been suggested that it be construed conjunctively to mean the universal principles of morality and fairness⁷³. This is a piece of ratiocination with which this article entirely agrees. Justifying the essence of the phrase however, it was asseverated in *Laoye v Oyetunde*⁷⁴ that it may have been intended to invalidate 'barbaric customs'. In *Agbai v Okogbue*⁷⁵ however, Nwokedi, JSC espoused the following view:

The doctrine of repugnancy in my view affords the court 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... When however customary law is confronted by a novel situation, the courts have to consider its applicability under existing social environment.

Discerning as this dictum may appear, the question has been asked⁷⁶ and this article concurs, by whose standards is a rule of customary law considered repugnant? Is it by the standard of the jurists of Greek or Roman antiquity, by the standards of our forefathers some centuries ago or by the standard of our erstwhile colonizers? This is a pertinent question that bears answering because if the standard by which a rule of customary law is measured is otiose, why should it be retained? Be that as it may, it has been espoused that, 'It is a matter of common sense that there cannot be in one colony at one and the same time two conflicting concepts of natural justice, public order or morality. If there is conflict then it is the concepts of the suzerain Power which will prevail⁷⁷.' Respectfully, it is submitted that the above should be consigned to the dustbin of history as a mere colonial relic. In fact, it brings back to mind the view expressed by Nnaemeka Agu, JSC in *Ugo v Obiekwe*⁷⁸ where he exclaimed that 'our customary law is still bogged down by this annoying vestige of colonialism'. Fortunately, this view is not universal. Coming from the opposite end of the spectrum, it has been opined that 'It can therefore be stated with confidence that inconsistency with the principles of English law is not the standard applied in determining whether a particular rule is repugnant to natural justice, equity and good conscience⁷⁹.' It is submitted that this is the better view. In a scintillating piece of legal pedagogy, it has been lucidly articulated that:

The point should however be made that in the determination of whether a customary law is repugnant to natural justice or incompatible with any law, the standard is not the principles of English law. In other words, it is not fair to conclude that the Nrachi ceremony is repugnant to natural justice because it is inconsistent or contrary to English law, in the sense of the English common law or English statute. On the contrary, the courts must have an inward look, inward in the sense of Nigerian jurisprudence. Such an Indigenous approach, if I may use that expression vaguely, will certainly reduce the usual pet expression of the English judge, 'barbaric,' in the description of our jurisprudence, an expression, Speed, Ag. CJ freely used in *Bankole*⁸⁰.

The sheer profundity of the above elucidation marks it out as a cornerstone of our jurisprudence. Nevertheless, it would appear then that there is no specific barometer to determine which laws are repugnant to natural justice, equity and good conscience⁸¹ and perhaps judges make them up as they go along presiding over cases in which

⁷⁰ JO Asein, *op cit*, 129.

⁷¹ *Ojiogu v Ojiogu* (2011) 45 NSCQR 1291. See also, EA Udu and CA Igwe, *Nigerian Legal System in Perspective* (Abakaliki: Omega Global Publishing Company Ltd, 2021), 29 as well as EA Odike, *Principles and Practice of Nigerian Law*, Volume 1 (Abakaliki: Willyrose & Appleseed Publishing Co, 2009), 32.

⁷² JO Asein, *op cit*, 130.

⁷³ GFA Sawyer, 'Internal Conflict of Laws in East Africa' in GFA Sawyer, ed., *East African Law and Social Change* (Kenya: East African Publishing House, 1967), 134.

⁷⁴ (1944) AC 170 per Lord Wright.

⁷⁵ (1991) 7 NWLR 391 at 417.

⁷⁶ JO Asein, *op cit*, 130.

⁷⁷ *Bibi v Mohammed* (1955) 28 KIR 91 at 112.

⁷⁸ *Supra*.

⁷⁹ AEW Park, *op cit*, 70.

⁸⁰ *Muojekwu v Muojekwu* (2000) 5 NWLR (Pt. 657) 402 at 431, per Niki Tobi, JCA (as he then was).

⁸¹ JO Asein, *op cit*, 130.

issues like this arise. An examination of a few cases will drive home this point⁸². In *Edet v Essien*,⁸³ it was held that a rule of customary law which awards custody of a child fathered by a husband to another, just because the dowry paid by that other had not been returned, was repugnant to natural justice, equity and good conscience. The apparent basis for the above was 'the demand of fairness that a natural father should not be deprived of his children in favour of another merely on grounds of a debt owed'⁸⁴. In another scenario, the court in *Mariyama v Ejo*⁸⁵, in considering a rule of Igbara customary law under which a child born within ten months after a divorce belonged to the ex-husband of its mother, rejected the custom's unqualified application and held that the child should be given to its putative father.

In *Re the Estate of Agboruja*⁸⁶, the Supreme Court was ready to accept the customary practice of widow inheritance then common in certain parts of Nigeria whereas the deceased's heir inherited his estate including his widows based on the notion of an African social system in which the family is treated as a composite unit. This unfortunate view of the Supreme Court illustrates clearly the fact that the determination of what is repugnant or otherwise depends on the Judge's thumb, in essence, his ideological framework or the encapsulation of his upbringing, worldview and mindset. In *Danmole v Dawodu*⁸⁷, the court rejected the Yoruba customary rule of inheritance known as *idi igi* which would have entailed the deceased's estate being divided into four equal parts according to the number of wives on the basis that it was not capable of meeting the modern notion of equality amongst children of the deceased, stating its preference for the *per capita* system known as *ori ojori*. In *Agidigbi v Agidigbi*⁸⁸, *Idehen v Idehen*⁸⁹, *Lawal Osula v Lawal Osula*⁹⁰ and *Ogiamen v Ogiamen*⁹¹, the Bini Custom which stipulates that the deceased's eldest surviving male child inherits his *igi ogbe* or homestead has been adopted and held not repugnant to natural justice, equity and good conscience. While they may be a sound basis under-girding this customary practice, in the light of the practical realities of this modern era, should it not be considered anachronistic and antiquated? In this wise, one will do well to bear in mind the well-taken view that a custom that does not allow the economic, social and political growth of a people is repugnant to natural justice, equity and good conscience⁹².

In concluding this part, one must hearken to the exhortation that a rule of customary law should not be considered in abstraction and the courts, in assessing the repugnancy or otherwise of any rule, must as a matter of necessity, consider its consequences in specific cases⁹³. It is submitted that this is a well-taken view. Finally, when judges have to decide on the repugnancy or otherwise of a rule of customary law, they should be courageous enough to examine the issues and circumstances dispassionately and with an independent mind. They should be wary of showing themselves to be more foreign than pre-independence foreign judges⁹⁴.

The Incompatibility Test

A second vital parameter for customary law to be valid and enforceable is that a rule of customary must not be incompatible, either directly or by implication, with any law for the time being in force.⁹⁵ It has been opined, and this work agrees, that this very requirement is meant to 'subjugate customary law to a higher order of law.' This is most unfortunate. While it is readily agreed that a rule of customary law, like enactments, is subservient to the Constitution for instance,⁹⁶ it is strongly submitted that there is no basis whatsoever why a rule of customary law should have to kowtow to other laws. Therefore, even an established rule of customary law, which is clearly not repugnant, has to give way to say, a subsidiary law. It is obvious that this is a vestige of our judicial and socio-legal history deprecated by Nnaemeka Agu, JSC in *Ugo v Obiekwe*⁹⁷.

⁸² See generally *ibid*, 130-134.

⁸³ (1932) 11 NLR 47.

⁸⁴ JO Asein, *op cit*, 130.

⁸⁵ (1961) NRNL 81.

⁸⁶ (1949) 19 NLR 38-39.

⁸⁷ (1958) 3 FSC 46. Note however that this was set aside on subsequent appeals to the Federal Supreme Court and the Judicial Committee of the Privy Council.

⁸⁸ (1992) 2 NWLR 98.

⁸⁹ (1991) 6 NWLR (Pt. 98) 382.

⁹⁰ (1995) 10 SCNJ 84.

⁹¹ (1967) NMLR 245.

⁹² *Akpalakpa v Igbaibo* (1996) 8 NWLR 533.

⁹³ JO Asein, *op cit*, 130.

⁹⁴ CO Akpangbo, 'Woman to Woman Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles', 1974-1977 14 ALS, 90-91.

⁹⁵ JO Asein, *op cit*, 134.

⁹⁶ On this point, see section 1(3) of the Constitution of the Federal Republic of Nigeria (199) As Amended.

⁹⁷ *Supra*.

Be that as it may, the exact purport of the wordings in some enactments in this regard have been fraught with ambiguity. For example, whereas section 13 (1) of the Oyo State High Court Law⁹⁸ utilized the phrase ‘any written law for the time being in force’, there are instances where the phrase, ‘any law for the time being in force’ is used instead⁹⁹. While both phrases may cover municipal statutes, the disparity in both is otherwise vast. For instance, whereas the first only relates to enactments, the second may include enactments as well as case law, Received English Law or even existing customary law! In fact, in *Re Adadevoh*¹⁰⁰, it was held, though obiter, that the expression ‘any law’ included the rules of common law. This is absurd and detestable to say the least so Asein was absolutely right when he asseverated that ‘Making the rules of customary law subject to English rules of common law, equity and statutes of general application is like emptying the legal system of all its customary law content in the guise of ensuring validity’.

The Incompatibility test may arise directly or by implication. An example of the former is the Abolition of the Osu System Law¹⁰¹ which expressly abolished the customary practice of the osu caste system. A vivid illustration of the latter is discernible from section 36 (12) of the 1979 Constitution¹⁰² which stipulates that a person shall not be convicted of a crime unless it is defined and a penalty therefor is prescribed in a written law¹⁰³. Flowing from this, adultery, for instance, which is a customary law offence is not valid as an offence in Southern Nigeria because there is no enactment which criminalizes it there.

The Incompatibility Test has arisen in several cases and no harm will be done by examining a few here. In *Agbai v Okogbue*¹⁰⁴, the respondent, a tailor, refused to be a member of or pay the dues of the Umunkalu Age Group of his village as he was obligated to do pursuant to their custom whereupon the appellants broke into his shop and confiscated his sewing machine. The matter went all the way from the Chief Magistrate’s Court to the Supreme Court. The apex court, in dismissing the appeal, held that the custom compelling the respondent to join the age group was subservient to the constitutional provisions relating to freedom of association and religion. In *Ukeje v Ukeje*¹⁰⁵, the penultimate court, following *Agbai v Okogbue*, denounced the Igbo custom which disentitles a lady from sharing in the estate of her deceased father as unconstitutional and invalid. Furthermore, the same court in *Uke v Iro*¹⁰⁶ deprecated the Nnewi custom which precludes a woman from giving evidence relating to land as being against the Constitution. While the above decisions are undoubtedly sound, it is reiterated that while rules of customary law should be inferior to the Constitution, statutory provisions relating to this Incompatibility Test should be circumscribed to rules of customary law being subservient to the Constitution. To do otherwise will be to perpetuate the subjugation of customary law, an antiquated and retrogressive position which should be jettisoned. The time has come for it to be freed from its shackles.

The Public Policy Test

This is the third test used in ascertaining the validity of a rule of customary law. It is provided for in the Evidence Act¹⁰⁷ as follows: ‘In 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’. It is not exactly clear what the phrase, ‘Public Policy’ means but certain Nigerian decisions have attempted to define it. In *Okonkwo v Okagbue*¹⁰⁸, the Supreme Court defined it as ‘the ideals which for the time being prevail in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest’. In *Macaulay v RZB of Austria*¹⁰⁹, the penultimate Court, relying on *Jowitt’s Dictionary of Law*, Second Edition, defined it as ‘The principles under which freedom of contract and private dealings is restricted by law for the good of community.’ It has also been defined as ‘The collective rules, principles, or approaches to problems that affect the commonwealth or promote the general good’¹¹⁰ as well as ‘the principle that a person should not be allowed to do anything that would tend to injure the public at large’¹¹¹.

⁹⁸ Cap. 46, Laws of Oyo State (1978).

⁹⁹ JO Asein, *op cit*, 134.

¹⁰⁰ (1951) 13 WACA 304 at 310.

¹⁰¹ Cap 1, Laws of Eastern Region of Nigeria, 1956; for the purpose of which, see *Ebiriukwu v Obanyerenwa* (1959) SCNLR 540.

¹⁰² Retained *ipsissima verba* in the same section of the 1999 Constitution.

¹⁰³ See *Aoko v Fagbemi* (1961) 1 All NLR 400.

¹⁰⁴ *Supra*.

¹⁰⁵ (2001) 27 WRN 142.

¹⁰⁶ (2001) 17 WRN 172.

¹⁰⁷ (2011) As Amended, s.18 (3).

¹⁰⁸ (1994) 9 NWLR (Pt. 368) 301.

¹⁰⁹ (1999) LPELR-13079 (CA).

¹¹⁰ BA Garner, *op cit*, 1426.

¹¹¹ *Ibid*.

While the above attempts at defining this term are commendable, it is submitted that this quandary has not been extirpated. For instance, what does it mean for something to be ‘generally injurious’? Smoking is extremely hazardous to the health but it has not been sanctioned as being against public interest. Gambling and drinking are often abused but in the Southern parts of Nigeria, at least, they are not legally censored. Marriage of under-aged children is widespread and avidly accepted in the North whereas adultery is not penalized in the South. Similarly, what does it mean to promote the general good? If every private contract must be aimed at doing a positive act to the benefit of the general good, then it ceases to be a private contract and becomes an act of public service. What then to do? Should one hearken to the articulate exhortation that ‘... the concept of public policy, in spite of its apparent intractability and susceptibility to judicial abuse could, in the hands of a sincere judge, be employed constructively to mould the law in the overall interest of the society to which the law belongs’?¹¹² Perhaps, but the problem lies in the fact that while the concept of public policy should not be hurriedly thrown away, one must then live in the fervent but unrealistic hope that there will be sincere judges who will constructively utilize it. Maybe an easy way out is to amend the provision which provides for it to pinpoint its meaning as follows: ‘Public Policy for this purpose is any practice which is not inimical to the accepted customary practices of the community where the custom is relied upon’.

Be that as it may, the issue has arisen in several cases. Thus, in *Alake v Pratt*¹¹³, it was held to be contrary to public policy, in sharing a man’s estate, for his children born outside wedlock to be placed on the same level as those born within. Similarly, in *Re Adadevoh*,¹¹⁴ it was held contrary to public policy to enforce a rule that encouraged sexual promiscuity. While once again appreciating the essence of public policy as a measure for testing the validity of customary law, it is submitted that it should not be perceived from the lens of a sanctimonious person of an elevated moral standing but of the ordinary person found in the community where the said rule of customary law is sought to be enforced.

In concluding this section, it is not out of place to remember the optimistic view of the acclaimed jurist, Lord Denning, MR in *Enderby Town Football Club v Football Association Ltd*¹¹⁵ when he asseverated that:

I know that over 300 years ago, Hobart, C.J said that ‘public policy is an unruly horse.’ It has often been repeated since. So unruly is the horse, it is said... ‘that no judge should ever try to mount on it, less it runs away with him.’ I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can leap fences put up by fictions and come down on the side of justice...

Against all expectations, it is hoped that we find good judges in the saddle who can sincerely and effectively control this unruly horse.

4. Conclusion and Recommendations

Flowing from the concatenation of the foregoing, it seems that customary law currently lacks a broad or high level of recognition and application in Nigeria. Instead of having to lose something by this, it rather offers us all the opportunity to undertake an introspection and ask ourselves why this source of our law has been rendered near-moribund in spite of the fact that it is meant to be the living law which ought to organically evolve in line with our hopes, wishes and aspirations. What then needs to be done to save this situation? Customary laws which have passed the arduous process of ascertainment should be codified to add vigour and legitimacy. Those which have been codified already should be regularly revised to keep them updated in line with the wishes and aspirations of those they serve. It is also suggested that the customary courts and customary courts of appeal be reinvigorated by actually appointing persons well-versed in customary law even though they should also have the advantage of being trained lawyers. The enforcement mechanism of decisions of the customary courts must be enforced just like the decisions of courts of superior records. The National Orientation Agency, the Ministries of Justice and relevant NGOs should also try to disseminate this issue widely to the populace. It may also help to convoke some sort of a session where people who are learned in the customs of a particular place such as elders, chief priests, traditional rulers and customary law experts can synthesize and aggregate ideas and produce a compendium of rules of customary law which can be presented as bills to the Legislature for enactment. The necessary corollary is that periodically, such a session will be re-convened to take another look at the customary law statutes and make the necessary amendments in line with the aspirations of the people of that area. Obnoxious customary practices should be jettisoned so that customary law will be viewed in a favourable manner by the populace. Customary arbitration should be encouraged because so many disputes which will take years to resolve following the conventional court system may be settled in weeks or even days. The notion that the various sources of law in

¹¹² JO Asein, *op cit*, 138.

¹¹³ (1955) 15 WACA 20.

¹¹⁴ *Supra*.

¹¹⁵ (1971) 1 Ch. 591 t 606.

Nigeria are in competition or that one is inherently preferable to others is a view that must be jettisoned. They can work hand in hand to realize the aspirations of the citizens of Nigeria. Instead of jettisoning this primeval, *volksgeist*-based and autochthonous law of our people, same should be wholly embraced with its *accoutrements*. In conclusion, this article has come out to rekindle this conversation and it is hoped and expected that it is treated with seriousness and given firm consideration. A country such as ours must have a dynamic jurisprudence which can sustain, drive and nurture it. What better system can offer this than its home-grown customary law?