

**AN EXAMINATION OF THE VALIDITY TEST AND PROOF OF CUSTOMARY  
LAW IN NIGERIA**

**BY**

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**JULY 2026**



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A LONG ESSAY SUBMITTED TO THE FACULTY OF LAW, GODFREY OKOYE  
UNIVERSITY, ENUGU STATE OF NIGERIA

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF  
BACHELOR OF LAWS (LL.B) DEGREE

SUPERVISOR: JOY OBIANUJU NANI

JULY 2026

## **DECLARATION**

I declare that this research titled An Examination of the Validity Tests and Proof of Customary Law in Nigeria was carried out by me in the Faculty of Law, Godfrey Okoye University, Enugu. The information derived from other sources has been duly acknowledge in the text and a list of references provided in the content of these work is original and has not been submitted in part or full to this university or any other institution or body for the award of any degree or diploma.

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## CERTIFICATION

This is to certify that OFOMA GRATEFUL UCHECHUKWU an undergraduates students of The Faculty of Law, Godfrey University, Enugu with registration number u21/Law/326 carried out this research work under my supervision in passion fulfilment for the award of Degree of Bachelor of Law (LL.B)

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Date

## **DEDICATION**

This work is dedicated first and foremost to Almighty God, the source of all wisdom and strength, without whom this research would not have been possible. It is also dedicated to my beloved parents, Mr Ugochukwu Ofoma and Mrs Ijeoma Ofoma, whose unconditional love, sacrifice, and unwavering support throughout my education have been the foundation upon which I stand.

## **ACKNOWLEDGEMENTS**

All glory and honour belong to Almighty God, who has been my constant guide and strength throughout this academic journey. Without Him, none of this would have been possible.

I wish to express my sincere and heartfelt gratitude to my supervisor, Mrs Joy Obianuju Nnani, for her invaluable guidance, patience, and dedication in supervising this research. Her insightful comments and encouragement greatly shaped the quality of this work.

I am deeply grateful to all my lecturers at the Faculty of Law, Godfrey Okoye University, whose teaching and mentorship have been instrumental in shaping my legal mind. I am grateful to every member of the Faculty of Law especially my course mates and friends who in one way or another contributed to my growth as a student and as a person.

Finally, I thank my beloved father, Mr Ugochukwu Ofoma, and my dear mother, Mrs Ijeoma Ofoma, for their unconditional love, sacrifice, and unwavering support throughout my education. You are the foundation upon which I stand.

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Evidence Act 2023

High Court Law of Lagos State, Cap H3, Laws of Lagos State 2015

High Court Law of Oyo State

Land Use Act, Cap L5, LFN 2004

Marriage Act, Cap M6, LFN 2004

Matrimonial Causes Act, Cap M7, LFN 2004

Supreme Court Ordinance 1876

## **LIST OF ABBREVIATIONS**

|           |                                                 |
|-----------|-------------------------------------------------|
| ACARELAR  | African Customary and Religious Law Review      |
| CA        | Court of Appeal                                 |
| CAP / Cap | Chapter                                         |
| CFRN      | Constitution of the Federal Republic of Nigeria |
| edn       | Edition                                         |
| FSC       | Federal Supreme Court                           |
| JCA       | Justice of the Court of Appeal                  |
| JSC       | Justice of the Supreme Court                    |
| LFN       | Laws of the Federation of Nigeria               |
| LPELR     | Law Pavilion Electronic Law Report              |
| NMLR      | Nigerian Monthly Law Reports                    |
| NNLR      | Northern Nigeria Law Reports                    |
| NWLR      | Nigerian Weekly Law Report                      |
| PC        | Privy Council                                   |
| SC        | Supreme Court                                   |
| SCNJ      | Supreme Court of Nigeria Judgments              |
| SCNLR     | Supreme Court of Nigeria Law Report             |

## ABSTRACT

The tests for validity and evidence of Nigerian Customary Law within a plural Legal system The following case study aims at a critical examination of the tests of validity and evidence for Nigerian custom in Nigeria's pluralistic Legal system focusing on family, land and community based issues. This study employs a doctrinal research methodology, relying primarily on secondary sources such as legal texts, case law, statutes, scholarly articles, and legal commentaries to critically analyze the validity and evidentiary tests of Nigerian Customary Law within the plural legal system. The history behind the existing tests for validity for Nigerian Custom in Nigeria's pluralistic Legal system. Eshugbayi Eleko, Mojekwu at all 1876 Supreme Court Ordinance the first test to be relied upon on for Nigerian Custom in Nigeria's pluralistic Legal system will be analyzed. Such questions as Repugnancy Test, the incompatibility test, the public policy test, this study will be analyzed on the basis of four theories i.e. Theory of fact, judicial notice theory of living law and the integration theory to examine Nigerian legal system as been able and willing to incorporate the Nigerian custom as a legal system.

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background of the Study

Customary law is an important cornerstone of Nigeria's pluralistic legal system, which showcases the indigenous value systems, traditions, and practices that have governed the social, and the communal relations that exists among the various ethnic groups for centuries before colonial intervention took place.<sup>1</sup> With a number of over 350 ethnic groups that are widely spread across the whole country, Nigeria's customary laws are diverse and they are also so unwritten, showcasing what the very popular German jurist Friedrich Carl von Savigny referred to as the "Volksgeist" or spirit of the people.<sup>2</sup> These laws mainly deal with the governing of civil matters which include matters such as; marriage, inheritance, land tenure, succession, and chieftaincy disputes, which influences approximately 80% of the lives of daily Nigerians, particularly in the rural areas where statutory law penetration is still limited.<sup>3</sup>

The history of customary law in Nigeria can be traced to the pre-colonial times when the indigenous communities were practicing the communal systems of governing, like landholding, and dispute resolution that dealt with collective ownership and rights to usage over the individual property interests.<sup>4</sup> During this time, the customary law served as the main regulatory framework for maintaining social order, serving justice, and preserving cultural values within distinct ethnic

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<sup>1</sup> ME Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) 7 *Beijing Law Review* 430.

<sup>2</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press, 1956), 54.

<sup>3</sup> Daniel Chidike Nwuzor, Federal Ministry of Justice, *Survey on Application of Customary Law in Nigerian Communities* (Abuja: Government Printer, 2018), 23.

<sup>4</sup> Oluwabusayo Temitope Wuraola, 'Revisiting the Effects of Colonialism on the Development of Customary Laws in Nigeria' (2016) *KIU Journal of Humanities* 106.



communities.<sup>5</sup> However, the colonial era, beginning with the Royal Niger Company Charter of 1886 and subsequent ordinances such as; the Supreme Court Ordinance of 1876, this ordinance brought about a dualistic legal framework where customary law was tactically changed to the English common law.<sup>6</sup> This fundamental shift was caused by the colonial administrations needs for land acquisition, exploitation of resources, and the imposition of the Western legal rules and concepts, which fundamentally changed the indigenous legal systems and also changed the customary practices.

The post-independence era witnessed the formal recognition of the customary law as an important part of the Nigerian legal framework. The 1999 Constitution of Nigeria (as amended) states that customary law is recognized as valid law.<sup>7</sup> However, it must follow the Constitution's supremacy and respect the fundamental rights outlined in Chapter IV of the 1999 Constitution (Sections 33–46)<sup>8</sup> which guarantees the Fundamental Human Rights of citizens, including rights to life, dignity, personal liberty, fair hearing, and freedom of expression, religion, and assembly. However, in section 36(12) of the Constitution<sup>9</sup> expressly restricts the application of customary criminal law, with reason that no person shall be convicted of a criminal offence unless that offence is clearly defined and the penalty has been prescribed in a written law.

Key statutes that deal with governing the validity and proof of customary law include the Evidence Act 2023, that treats customary law as a question of fact that requires a formal proof in court proceedings. According to Igbineweka & Enakireru,<sup>10</sup> in discussing Sections 14, 16, and 18 of the

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<sup>5</sup> IA Umzurike, "Pre-colonial Legal Systems in Nigeria" (1998) 42 *Journal of African Law* 156.

<sup>6</sup> Royal Niger Company Charter Act 1886; Supreme Court Ordinance 1876, s19.

<sup>7</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended), s 315.

<sup>8</sup> Ibid, s 33.

<sup>9</sup> CFRN 1999.

<sup>10</sup> A Igbineweka and E Enakireru, 'Customary Law in Nigeria: Interrogating the Issue of Judicial Notice' (2020) 1 *African Customary and Religious Law Review (ACARELAR)* 3.

Evidence Act in detail, states that these sections of the Evidence Act have succeeded in establishing the evidentiary framework for proving customary law claims, meaning that it has formed a fairly basic two-part method for such: first the "judicial notice" of fact, or fact recognized as fact in previous judgements, and second, by providing expert or common sense testimony, either by chieftains or well-known texts.<sup>11</sup> In addition, various High Court Laws across Nigerian states have also imposed enforceability tests that the customary law in existence must satisfy before judicial application. For instance, section 26 of the Lagos State High Court Law requires that customary law should not be repugnant to natural justice, equity and good conscience, or be incompatible with any written law, or contrary to public policy.<sup>12</sup>

These validity tests which include; repugnancy to natural justice, equity, and good conscience; incompatibility with written laws; and consistency with public policy, they all originated from colonial efforts to filter out indigenous practices that are seen as; barbaric or uncivilized by the European standards. The repugnancy test, in particular, has its roots in the Supreme Court Ordinance of 1876 and it was then further developed through the judicial decisions such as the decision in the case of *Eshugbayi Eleko v Officer Administering the Government of Nigeria*,<sup>13</sup> where the Privy Council had rejected a customary practice that was a violation of the principles of fair hearing and natural justice.

The reasons behind these validity tests is mainly for balancing the preservation of cultural heritage with the protection of fundamental human rights and also to promote the progress of society. According to Kingsley Edeh Nwabueze,<sup>14</sup> in his article, stated that the following mechanisms such

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<sup>11</sup> Evidence Act 2023, s 14, 16, and 18.

<sup>12</sup> High Court Law of Lagos State, Cap H3, Laws of Lagos State 2015, s 26.

<sup>13</sup> (1931) AC 662.

<sup>14</sup> Kingsley Nwabueze Edeh, 'The Validity and Repugnance of Customary Law in Nigeria' (2026) 15.

as the; repugnancy to natural justice test, equity test, good conscience; incompatibility with written laws, and consistency with public policy are aimed at eliminating discrimination, oppressive, or outdated customs while allowing the traditional practices that are in tandem with modern regulations to continue. Courts have also increasingly used these tests to disregard certain types of customs that perpetuate gender discrimination, particularly in terms of matters in relation to inheritance matters. Notable examples include *Mojekwu v. Mojekwu*<sup>15</sup> and *Ukeje v. Ukeje*,<sup>16</sup> where the Court of Appeal and Supreme Court respectively struck down the Igbo customary laws that had excluded female children from inheriting from their deceased fathers properties.

Contemporary challenges that customary law faces in Nigeria include issues such as; rapid urbanization, globalization, human rights advocacy, and the tension in preserving cultural identity and embracing universal human rights. The Supreme Court has stated that customary law must develop in order for it to be able to meet up with the modern standards of justice and equality.<sup>17</sup> This approach has recognized the fact that customary law, known to be unwritten and gotten from communal practices, should meet up to societal changes rather than remain stagnant.

Furthermore, to prove that customary law is a question of fact under the Evidence Act presents a variety of challenges. Unlike the statutory law, in which courts would apply relying on their own knowledge, it is quite a different case when it comes to customary law. This is because customary law must be proven by parties by making use of credible witnesses, expert testimony, or judicial notice in cases where the custom have been always applied and also recognized by the courts.<sup>18</sup> This evidentiary burden acknowledges the difference in the nature of customary practices all

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<sup>15</sup>(1997) 7 NWLR (Pt. 512) 283 (CA).

<sup>16</sup> (2014) LPELR-22724 (SC).

<sup>17</sup> *Muojekwu v. Ejikeme* (2000) 5 NWLR (Pt. 657) 402 (SC).

<sup>18</sup> *Owonyin v. Omotosho* (1961) 1 All NLR 304 (SC).

around Nigeria's numerous ethnic groups while making sure that's only the genuine Customs that have been accepted by the community are recognized judicially.<sup>19</sup>

The Land Use Act of 1978, mainly through a statutory instrument, have in a great way impacted the customary land tenure systems and this was achieved by vesting all land in each state in the Governor for the use and also for the common benefit of all Nigerians. This fundamental change has led to tensions between statutory land administration and also the traditional land rights that are attributed to family land, communal holdings, and also ancestral properties.

## **1.2 Statement of the Problem**

Aside from its important function in the Nigerian legal system and its importance in the daily life of so many citizens the tests for validity and the means of proving customary law come with various challenges that reduces its effectiveness, fairness and cultural authenticity.<sup>20</sup> The repugnancy test uses old-fashioned and foreign rules to judge our Nigerian customs, this was stated by Keay, E. A, & Richardson, S. S,<sup>21</sup> where they pointed out that these judges sometimes used the repugnancy test to review the customary law from the standpoint of the principles of justice in England instead of according to local views. Because of the fact that these rules do not fit local culture, judges often end up making confusing and conflicting decisions about traditional customs and practices which end up weakening Nigerian traditions and creating a messy legal system.<sup>22</sup> The test for incompatibility can lead to various issues in diverse legal systems by requiring all customs to follow the written laws and the Constitution. This may lead to the rejection of ethnic customs

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<sup>19</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 121.

<sup>20</sup> Nwauche, ES 'The Place of Customary Law in the Constitutional State of Nigeria'(2010) 54(2), *Journal of African Law*, 263.

<sup>21</sup> EA Keay and SS Richardson, *The Native and Customary Courts of Nigeria* (1966 Sweet & Maxwell), 70.

<sup>22</sup> *Meribe v Egbu* (1976) 1 NMLR 165.

without respect to their cultural background or allowing those cultural backgrounds to adapt. It also creates certain challenges in the act of balancing formal laws with traditional practices.<sup>23</sup> Customary law also faces some challenges in the court as well mainly when it is treated as a fact under the law, this makes it hard to prove, especially in the case of oral traditions that rely on spoken words. Witnesses may be biased or unavailable, which may end up causing true claims to be rejected. Also, if the courts do not regularly recognize the customary laws easily without having to make reference to clear and written rules this would make it uncertain. This often hurts people who are already at a disadvantage.<sup>24</sup>

The test for public policy is very unclear and therefore can be easily misused, especially when it comes to issues between rural and urban areas. Also, the ban on customary criminal law in some places has created gaps in justice for traditional communities, thereby weakening their authority without providing proper means of remedy.<sup>25</sup> This study therefore looks at how Nigeria has been able to check and prove customary law. The study reviewed related Nigerian laws, court cases, and some real-life examples in order to find biases from colonial times, suggest the needed legal changes, and the ways through which the Nigerian Law in regards to customary practices can be improved.

### 1.3 Research Questions

1. What tests do Nigerian courts apply in assessing validity of customary laws in Nigeria?
2. What are the standards of proof of validity in civil proceedings?

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<sup>23</sup> AO Enabulele & PI Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(3) *Journal of African Law* 389.

<sup>24</sup> *Agidigbi v Agidigbi* (1992) 2 NWLR (Pt. 221) 98 (SC).

<sup>25</sup> OY Taiwo, 'The Public Policy Test in Nigerian Customary Law' (2016) 10(2) *African Journal of Legal Studies* 234.

3. What forms of evidence are admissible and sufficient in proving validity in Nigeria?
4. What are the flaws of proving validity and its effect on enforcement of customary law in Nigeria?

#### **1.4 Aims and Objectives of the Study**

The aim of this study is to analyze the validity tests and the methods used in proving customary laws in Nigeria and assess how effective these processes are in promoting justice and preserving Nigeria's cultural heritage. The objectives of this study include the following:

- (a) To identify and analyze the legal requirements for validity.
- (b) To examine the various tests of validity recognized in Nigerian Law.
- (c) To appraise the methods of enforcement of customary laws in Nigeria.
- (d) To analyze the burden and standard of proof required in establishing validity.
- (e) To analyze the common challenges in proving validity and propose reforms for improving the proof of validity in Nigeria.

#### **1.5 Scope of the Study**

This study is focused on how to test the validity of customary law in Nigeria. It explains the three validity tests of customary law which are the Repugnancy Test, Public Policy Test and Incompatibility Test, and explores the methods used to prove customary law in court, including relevant Nigerian laws and judicial decisions. Accordingly, it is limited to the examination of civil applications of customary law within Nigeria's legal system. The study examined the relevant provisions of the Evidence Act 2023, the 1999 Constitution of the Federal Republic of Nigeria (as

amended), the various state High Court Laws, and landmark judicial decisions from the Supreme Court of Nigeria, the Court of Appeal, and the state High Courts.

To that extent, this study did not cover Islamic(Sharia) law, because it operates as a different and personal law system in Nigeria, and it will also not examine or compare other African or Commonwealth jurisdictions, except where such comparisons Showcase specific Nigerian issues. The study also did not address customary criminal law applications, because of the constitutional prohibition under section 36(12) of the 1999 Constitution. Furthermore, the study is limited to customary law as it is applied and recognized by formal court systems. The study also did not examine traditional dispute resolution methods operating outside the formal judicial structure, except where they intersect with formal legal processes.

## **1.6 Significance of the Study**

The realization that customary law is a constituent element of the Nigerian legal system is one thing and the complex tests of validity and proofs applied to establish that a custom is recognized and enforceable is another. The difficulty lies in applying and satisfying the complex validity tests and proof standards required to establish the recognition and enforceability of a customary practice within Nigeria's legal system, which has led to confusion, inconsistent court rulings, and the marginalization of legitimate customary practices that do not meet these demanding standards.

This study will clarify how customary law practices are proved and enforced in Nigeria. It will aid legal practitioners and judges to understand how validity is established and proved under the Evidence Act to promote fairness and consistency in Nigerian courts. It will assist scholars and future scholars who may want to do a research in the areas of validity tests of customary laws in Nigerian legal system.

## 1.7 Research Methodology

This study adopted the doctrinal research design. Data was sourced from both primary and secondary sources. Primary sources of data are statutes like the Evidence Act since 2023, the 1999 Constitution of the Federal Republic of Nigeria (as amended), the land use act 1978, case laws and secondary sources of data are findings in relevant law books, journal articles and internet sources. The data collected was be subjected to content analysis.

## 1.8 Literature Review

The Supreme Court of Nigeria, has made several decisions in regards to customary law and how it is applied and also the means of checking if it is valid and also if it satisfies the requirements for proof this has significantly shaped our understanding of customary law.

Enabulele and Pius Bazuaye,<sup>26</sup> examined the relationship that exists when it comes to the validity of customary law and how it is to be enforced. They argue that most times the courts deals with the enforceability rather than the validity, as customs exist independently from judicial recognition. They criticize validity tests which are stated in the statutes as colonial impositions that wrongly judge indigenous practices using foreign standards, and they advocate for the reformation of these tests to prioritize internal community assent rather than external moral judgments.

Burabari Adule Nkor<sup>27</sup> provided a very comprehensive analysis based on history of the validity tests which traced its origin to the colonial era and the development of these colonial rules through

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<sup>26</sup> AO Enabulele and PI Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(3) *Journal of African Law* p 389.

<sup>27</sup> BA Nkor, 'The Validity of Customary Law as a Source of Nigerian Law' (26 July 2014) Nigerian Law Class Blog <<https://nigerianlawclass.wordpress.com/2014/07/26/the-validity-of-customary-law-as-a-source-of-nigerian-law-by-burabari-adule-nkor/>>accessed 17 April 2026.



judicial interpretation. Nkor also argues that the repugnancy test, that is based on vague moral concepts, has been applied differently across different regions and ethnic groups. He analyzes landmark cases such as the case of *Mariyama v. Sadiku Ejo*<sup>28</sup> to showcase how the courts have made use of these tests in order to end oppressive acts and he removed customs that are different and inconsistent from Western norms.

Nalova Kiye<sup>29</sup> compares the operation of repugnancy tests and incompatibility tests both in Nigeria and in Anglophone Cameroon. Her work showcases the way these tests, despite their ability to change and promote human rights, have led to the fragmentation between the customs recognized by the courts and practices that are actually observed in our traditional communities. Kiye argued that it disregards the legitimacy in both customary law and formal legal systems.

Taslim Elias,<sup>30</sup> work provides the foundational analysis on the place of customary law in Nigeria's pluralistic legal framework. Elias also examined the issues that arise between preserving cultural heritage and also promoting uniform legal standards. He argued that having an approach respects diversity while at the same time ensuring fundamental justice is the only solution to achieve balance between both values.

None of the scholars addressed the challenges parties face in proving customary law under sections 16 and 18 of the Evidence Act 2023, mainly regarding the evidentiary standards, witness credibility, and documentation requirements. In addition to these there is not enough analysis on

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<sup>28</sup> (1961) 1 All NLR 81.

<sup>29</sup> N Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon and Nigeria' (2011) 15(2) *African Studies Quarterly* 19-43, available at <<https://asq.africa.ufl.edu/>> accessed 17 April 2026.

<sup>30</sup> TO Elias, *Nigerian Legal System* (4th edn University of Lagos Press 1971), ch4.

how the post-2014 constitutional developments particularly the one concerning the Supreme Court decisions on fundamental rights have changed how validity tests are now applied.

Furthermore, already existing literature has not been able to comprehensively examine the tension that exist between the validity test and Nigeria's constitutional commitment to federalism and cultural diversity. This study carefully addresses the lack of comprehensive analysis to prove customary law under the Evidence Act, and also examining recent judicial developments that have shifted the customary law landscape, and finding ways for legislative and judicial reforms.

## **CHAPTER TWO**

### **CONCEPTUAL AND THEORETICAL FRAMEWORK**

## 2.1 Conceptual Framework

### 2.1.1 Customary Law

Customary law refers to the indigenous rules, norms, traditions, and practices that regulate the social, economic, familial, and communal relations that is existent among the various ethnic groups in Nigeria.<sup>31</sup> Customary law is mostly unwritten thereby it derives its authority from a long-established usage in a community, acceptance from the community and also cultural beliefs of such community rather than being put into law by a legislature.<sup>32</sup> Customary law is changing and it differs across the various ethnic groups in Nigeria which includes the Igbo ethnic group, Yoruba ethnic group, Hausa-Fulani ethnic group, and others, thereby showcasing the different views on issues like inheritance, marriage rites, land ownership, and settlement of disputes.<sup>33</sup>

Customary law has a communal nature which promotes reconciliation, restitution, and social harmony over adherence to strict rules and regulations.<sup>34</sup> It acts as a living law that grows and develops with the changes in the society while remaining rooted in traditional practices.<sup>35</sup> For example, it focuses on helping the community and family relations, often settling disputes through elders or family heads rather than taking it to court. Customary law comprises of customs, rules, and traditions which guide and regulate the relationship between the members of a particular

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<sup>31</sup> ME Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) 7 *Beijing Law Review* 430.

<sup>32</sup> ME Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) 7 *Beijing Law Review* 430 <<http://dx.doi.org/10.4236/blr.2016.74034>> accessed 18 April 2026.

<sup>33</sup> OC Aduma, NA Iguh and H Obi, 'The Role of Customary Law in Shaping Indigenous Corporate Structures in Nigeria' (2025) 3(1) *Journal of Contemporary African Legal Research and Information* (JoCARL) 45.

<sup>34</sup> M Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester University Press 1955) 23.

<sup>35</sup> A Claassens and G Budlender, 'Transformative Constitutionalism and Customary Law' (2013) 5(1) *Constitutional Court Review* 79.

community, these rules are respected through social pressure and sometimes through courts if they are recognized by the courts.<sup>36</sup>

Despite its changing nature, the unwritten characteristic leads to challenges in its consistency and also challenges in proving it, particularly when customary practices are in conflict with statutory provisions or constitutional rights.<sup>37</sup> Customary law is mainly applied to the indigenes of a particular community but may extend to others in special situations, such as matters regarding land disputes. Its organic nature shows that Nigeria has many different types of laws working together. It connects the traditional rules that existed before the colonial times with the rules that were made after Nigeria gained independence.<sup>38</sup>

### 2.1.2 Customary Courts

Customary courts serve as the primary agency that is in charge of administering customary law in Nigeria, mostly in the rural and semi-urban areas.<sup>39</sup> These courts thereby handle disputes that are in relation to marriage, inheritance, land tenure, chieftaincy matters, and minor offenses, providing accessible, affordable, and culturally relevant justice.<sup>40</sup> They emphasize mediation, community involvement, and speedy resolution, often matching outcomes with local norms in order to maintain social cohesion.<sup>41</sup>

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<sup>36</sup> J Onuh, 'Nature & Characteristics of Customary Law in Nigeria' (unpublished manuscript, Alex Ekwueme Federal University Ndufu-Alike Ikwo) <<https://www.studocu.com/row/document/alex-ekwueme-federal-university-ndufu-alike-ikwo/customary-law/nature-and-features-of-customary-law-workingversion/46513640>> accessed 18 April 2026.

<sup>37</sup> J O Asein, *Introduction to Nigerian Legal System* (2nd edn, Ababa Press Ltd, Lagos 2005) 74.

<sup>38</sup> M E Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) 7(4) *Beijing Law Review* <<https://www.scirp.org/journal/paperinformation?paperid=73207>> accessed 18 April 2026.

<sup>39</sup> UJ Idem, 'The Judiciary and the Role of Customary Courts in Nigeria' (2017) 5(6) *Global Journal of Politics and Law Research* (GJPLR) 34.

<sup>40</sup> MN Wiwoloku, 'The Role of Customary Law in the Nigerian Judicial System' (2025) 5(2) *Obafemi Awolowo University Law Journal*, 134.

<sup>41</sup> A Akinlawon and MA Ajomo, 'The Role of Customary Law in the Nigerian Legal System' <<https://akinlawonajomo.org/the-role-of-customary-law-in-the-nigerian-legal-system/>>

These courts exist under state statutes such as Customary Court Laws or Edicts in different states and derived jurisdiction from local customs, though they are within the constitutional parameters.<sup>42</sup> The judges of these courts usually consists of traditional rulers, community elders, or people familiar with the customs and they adjudicate by applying local customs. Customary courts are very important because customary law regulates the lives of a huge amounts of Nigerians especially in the grassroots settings where formal courts are very far and most people cannot afford them.<sup>43</sup>

Customary courts promote reconciliation over punishment, thereby fostering harmony and Peace in the family. If someone disagrees, they can appeal to the appellate courts, like the Customary Court of Appeal and the Court of Appeal.<sup>44</sup>

### 2.1.3 Validity Tests

Validity tests refer to the statutory and judicial criteria that determine whether a customary practice can be recognized and enforced as law in Nigeria.<sup>45</sup> These tests act as safeguards, ensuring customary norms align with fundamental principles of justice, equity, and constitutional values.<sup>46</sup> The primary tests stem from colonial-era provisions preserved in post-independence laws, requiring that customs should not be repugnant to equity, natural justice and good conscience, incompatible with existing statutes, or contrary to public policy.<sup>47</sup>

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accessed 18 April 2026.

<sup>42</sup> MN Wiwoloku, 'The Role of Customary Law in the Nigerian Judicial System' (2025) 5(2) *Obafemi Awolowo University Law Journal* 134.

<sup>43</sup> AO Oyedeji, 'The Judiciary and the Role of Customary Courts in Nigeria' (2017) 5(6) *Global Journal of Politics and Law Research* 10.

<sup>44</sup> Fatai Kazeem Abiodun and Abdul Rahman Salama, 'Reconciliation As an Alternative Dispute Resolution (ADR) in Solving Matrimonial Conflict Among Nigerian Muslim Organizations in London' (2023) *Migration Letters*, available at <<https://migrationletters.com/index.php/ml/article/download/6305/4267/17252>> accessed 10 May 2026.

<sup>45</sup> AO Enabulele and B Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 79.

<sup>46</sup> LO Nwauzi, 'Analysis of Constitutional Safeguards for the Protection of the Rights of Citizens and Enhancement of Social Justice in Nigeria' (2021) 6(1) *Donnish Journals*.

<sup>47</sup> Mikano E Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone

Under Section 18(3) of the Evidence Act 2011 and various High Court Laws, a custom must pass these filters to be enforceable.<sup>48</sup> Validity tests should prevent people from carrying out harmful practices or outdated practices thereby allowing the proper and appropriate rules to thrive. This showcases the efforts made by Nigeria in an attempt to mix traditional customs with our modern laws. Some critics have said that these tests unfairly impose Western values.<sup>49</sup> Basically, validity tests approve customs if the community accepts them but also check if they are fair and appropriate.

Nigeria makes use of three principal tests to assess customary law validity: The Repugnancy Test, the Incompatibility Test, and the Public Policy Test.

- a. The repugnancy test invalidates customs that are repugnant to natural justice, equity, and good conscience. This is a doctrine inherited from colonial ordinances and retained in statutes like Lagos State High Court Laws, Section 26(1).<sup>50</sup> This test has been applied to strike down discriminatory practices, such as in *Ukeje v. Ukeje*,<sup>51</sup> where the Supreme Court held that customary law of the Igbo's that excludes female children from inheriting from their father's property violated constitutional non-discrimination provisions under Section 42 of the Constitution of the Federal Republic of Nigeria<sup>52</sup> and was repugnant.
- b. The Incompatibility Test voids customs that conflict directly or impliedly with any law that is written and in force.<sup>53</sup> For instance, customs clashing with the 1999 Constitution or specific statutes are unenforceable. In *Mojekwu v. Mojekwu*,<sup>54</sup> the Court of Appeal

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Cameroon'(2015) 15(2) *African Studies Quarterly* 90.

<sup>48</sup> Evidence Act 2023, s 18(3).

<sup>49</sup> ES Chukwuemeka, '*Validity and Test of Customary Law (Explained)*' (2024) LawyersNG, <<https://lawyersng.com/validity-and-test-of-customary-law/>>(accessed 22 April 2026).

<sup>50</sup> Cap H5, Laws of Lagos State 2015, s 26(1).

<sup>51</sup> [2014] 11 NWLR (Pt. 1418) 384 or (2014) LPELR-22724(SC).

<sup>52</sup> 1999 (as amended), s 42.

<sup>53</sup> High Court of Lagos Act, Cap 80, Laws of the Federation and Lagos 1958, s 27(1).

<sup>54</sup> (1997) 7 NWLR (Pt. 512) 283 CA.

declared the Nnewi "Oli-ekpe" custom which allowed a brother's son to inherit to the exclusion of daughters as repugnant and incompatible with equity, though the Supreme Court later moderated aspects of the reasoning while upholding gender equality principles.

- c. The Public Policy Test ensures customs promote societal welfare and do not contravene public interest.<sup>55</sup> Customs fostering immorality, inequality, or harm fail this test.<sup>56</sup> These tests, while protective, have sometimes created a judicial customary law distinct from lived practices, highlighting the need for balanced application to avoid cultural erosion while upholding justice.<sup>57</sup>

## 2.2 Theoretical Framework

### 2.2.1 The Fact Theory

The Fact Theory is historically the oldest and, for much of Nigerian legal history, the most dominant approach to the proof of customary law. Under this theory, customary law occupies no higher a jurisprudential status than any other disputed question of fact; it must be pleaded in the originating processes, established by competent evidence, and accepted or rejected by the court on the basis of that evidence.<sup>58</sup> Section 16 of the Evidence Act 2023 stipulated that customary law was to be established as a *fact* by evidence in any proceeding in which it was relevant.<sup>59</sup> This provision

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<sup>55</sup> Yinka Oyesomi, 'Illegality of Some Nigerian Customary Practices' ThisDay/TheNigeriaLawyer (13–19 August 2018)

< <https://barristerng.com/why-some-customary-practices-in-nigeria-are-illegal-by-yinka-oyesomi/> > accessed 22 April 2026.

<sup>56</sup> Edeh Samuel Chukwuemeka, 'Proof of Customary Law in Nigeria: How Customary Law is Proven' (14 August 2020) Bschorly <<https://bscholarly.com/proof-of-customary-law-in-nigeria/>> accessed 22 April 2026.

<sup>57</sup> Kuatea Shagbaor Joseph, 'The Repugnancy Doctrine and Customary Laws in Nigeria: Analyzing Nigeria Customary Laws through the Lenses of Africanism' (31 March 2024) LawPavilion/Sabilaw < <https://lawpavilion.com/blog/the-repugnancy-doctrine-and-customary-laws-in-nigeria-analyzing-nigeria-customary-laws-through-the-lenses-of-africanism/> > accessed 22 April 2026.

<sup>58</sup> Andrew Eric Wilson Park, *The Sources of Nigerian Law* (African Universities Press 1963) 105.

<sup>59</sup> Evidence Act 2023, s 16.

was significant because it was not a novel departure but a statutory codification of what courts had already been doing for decades.<sup>60</sup>

The practical mechanics of proof under the Fact Theory required a party to do several things. First, the custom had to be specifically pleaded, a point emphasized repeatedly in Nigerian case law. Where customary law was not pleaded, courts held that it could not be relied upon at trial.<sup>61</sup> Second, the party relying on the custom had to adduce evidence of it, whether by calling witnesses who were knowledgeable about the custom or by tendering documentary evidence such as reports, records of prior judgments applying the custom, or expert assessments.<sup>62</sup> The courts also accepted, as part of this evidentiary framework, that once a custom had been established and judicially noticed in a series of prior decisions, a court might take judicial notice of it without fresh proof in every subsequent case, though the precise boundary between this and a fully-fledged judicial notice doctrine remained contested.<sup>63</sup>

In *Giwa v. Erinmilokun*,<sup>64</sup> the Supreme Court of Nigeria affirmed the orthodox position that the burden of proof of customary law lies on the party asserting it, in accordance with the general rule that he who asserts must prove. This principle has been re-stated in numerous subsequent decisions. What courts have been less consistent about is the quantum of proof required and the form that evidence must take.

The most significant criticism leveled at the Fact Theory is that it produces a paradox: if customary law is the law of the majority of Nigerians and regulates their day-to-day family, land, and

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<sup>60</sup> AN Allott, *'The Judicial Ascertainment of Customary Law in British Africa'* (1957) 20 *Modern Law Review* 244.

<sup>61</sup> E Oladeji Akanki, 'Proof of Customary Law in Nigerian Courts' (1970) 4 *Nigerian Law Journal* 36.

<sup>62</sup> Evidence Act 2023, s 16.

<sup>63</sup> AN Allott, "The Proof of Customary Law in the Courts" (1957) 6 *Journal of African Law* 14.

<sup>64</sup> *Giwa v Erinmilokun* [1961] 1 All NLR 294 (SC).



succession relationships, it is strange to insist that it must be re-proved from scratch in every case as though it were a novel or disputed fact. Critics, including Professor Antony Allott and the eminent Nigerian jurist Professor T. O. Elias, argued strongly that this approach was a colonial legacy that subordinated African legal traditions to a procedural strait-jacket designed for an entirely different legal environment.<sup>65</sup> Elias, writing in his seminal work *The Nature of African Customary Law*, observed that the insistence on treating customary law as a foreign fact to be proved in every instance was productive of delay, expense, and occasional injustice, particularly for rural litigants who could not afford to transport expert witnesses to distant courts.<sup>66</sup>

### **2.2.2 The Judicial Notice Theory**

The Judicial Notice Theory treats customary not as a foreign fact requiring proof but as a species of law that courts are entitled to know, apply, and develop without requiring parties to establish it through evidence in every case.<sup>67</sup> The theory is grounded in the recognition that customary law is the indigenous legal order of the Nigerian people and that courts exercising jurisdiction over matters governed by that law ought to approach it with the same familiarity that they bring to statutory law.<sup>68</sup>

At the level of principle, the Judicial Notice Theory draws support from the framework established in section 122 of Evidence Act 2023,<sup>69</sup> which provides for judicial notice of facts of common knowledge and of the content of Nigerian law. The argument, developed by scholars such as Professor Kodilinye and others writing in the tradition of the Restatement of African Law project,

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<sup>65</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press, Manchester 1956) 72.

<sup>66</sup> *ibid* 58.

<sup>67</sup> RE Badejogbin, 'The Conundrum of Judicial Notice as a Means of Ascertaining Customary Law in Nigerian and South African Courts amid the Convergence of Positivism and Legal Pluralism' (2019) 22 *Potchefstroom Electronic Law Journal* 31.

<sup>68</sup> AO Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1979) 162.

<sup>69</sup> Evidence Act 2023, s 122.

is that a court which regularly adjudicates customary law disputes in a given area necessarily acquires, over time, a working knowledge of the applicable customs that makes it unnecessary and indeed wasteful to require formal proof on every occasion.<sup>70</sup>

The practical expression of this theory has been most clearly visible in the structure of the customary courts themselves. Customary courts and area courts, which exercise primary jurisdiction over the bulk of customary law disputes in Nigeria, are constituted by presiding members who are selected precisely because of their knowledge of and familiarity with local customs.<sup>71</sup> The expectation built into the enabling statutes for these courts, such as the various state Customary Court Laws, is that the presiding members will draw on their personal knowledge of customary law in adjudicating disputes rather than waiting for parties to lay an evidential foundation for rules that the court is presumed to already know.<sup>72</sup>

The High Courts have, however, been more reluctant to adopt a full version of the Judicial Notice Theory.<sup>73</sup> The orthodox position of the superior courts has been that they do not possess specialized knowledge of customary law in the way that customary courts do, and that where customary law is in issue before a High Court, it must generally be proved by evidence unless it has already been so clearly established in a long line of decisions that the court can take judicial notice of it as a matter of notorious fact.<sup>74</sup> This was the approach endorsed by the Supreme Court in *Owonyin v. Omotosho*,<sup>75</sup> where the court held that while a High Court could take judicial notice of customary

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<sup>70</sup> G Kodilinye and T Aluko, *The Nigerian Law of Property* (Sweet & Maxwell, London 1973) 42.

<sup>71</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 82.

<sup>72</sup> Anthony C Diala, 'A Butterfly That Thinks Itself a Bird: The Identity of Customary Courts in Nigeria' (2019) 51(3) *Journal of Legal Pluralism and Unofficial Law* 385.

<sup>73</sup> Reg Graycar, 'The Gender of Judgments: An Introduction to *Public and Private: Feminist Legal Debates*' (Oxford University Press 1995) 162.

<sup>74</sup> Adewale OA, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 69.

<sup>75</sup> [1961] 2 SCNLR 57 (SC).

law that had been sufficiently proved in earlier decisions and recognized as applicable in the jurisdiction, it was not in a position to apply customary law on the basis of personal knowledge alone without an appropriate evidential foundation.

The principal objection to the Judicial Notice Theory in its full form is that it risks homogenizing customary law by allowing judges to apply their own understanding of local custom without the corrective discipline of evidence.<sup>76</sup> Nigeria has over two hundred and fifty ethnic groups, each with distinct customary practices.<sup>77</sup> What a judge from one community regards as an obvious and unremarkable custom may be entirely foreign to a litigant from another. The evidentiary requirement imposed by the Fact Theory, for all its inconveniences, at least ensures that the custom actually applied corresponds to the custom actually practiced in the relevant community. The risk of judicial idiosyncrasy is a real one, and it has led most senior courts to retain at least a residual requirement of proof even in cases where customary law is broadly familiar.<sup>78</sup>

### **2.2.3 The Living Law Theory**

The Living Law Theory, as applied to Nigerian customary law, draws its intellectual inspiration from the sociological jurisprudence of Eugen Ehrlich, who in his foundational work *Fundamental Principles of the Sociology of Law* argued that the living law of a society consists in the norms actually observed and practiced by people in their daily lives, as distinct from the "law in the books" enacted by legislatures or declared by courts.<sup>79</sup> In the Nigerian context, this theory has been given a distinctly indigenous application by scholars who argue that customary law must be understood

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<sup>76</sup> Emmanuel Oluwatobi Olowononi, 'The Conundrum of Judicial Notice as a Means of Ascertaining Customary Law in Nigerian and South African Courts amid the Convergence of Positivism and Legal Pluralism' (2019) 22 *Potchefstroom Electronic Law Journal* 25.

<sup>77</sup> OC Onyejekwe, 'Characteristics, Variations and Dynamics of Nigerian Cultures' (2001) 106.

<sup>78</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 219.

<sup>79</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, Cambridge MA 1936) 493.

and proved not through the frozen records of past judicial decisions but through evidence of what communities actually do, believe, and accept as binding at the time the dispute arises.

The relevance of the Living Law Theory to the proof of customary law in Nigeria flows directly from one of the most fundamental attributes of customary law itself: its dynamic and evolving character. Customary law is not static. It changes in response to economic shifts, urbanization, religious developments, statutory reform, and the changing expectations of community members.<sup>80</sup> A custom that was widely observed in 1960 may have been modified, attenuated, or entirely abandoned by 2024. Conversely, new customary practices may have crystallized in communities adapting to contemporary realities.<sup>81</sup>

This dynamic character creates a serious problem for any approach to proof that relies heavily on past judicial decisions or on the opinions of elderly witnesses whose knowledge of communal practice may be retrospective rather than current. If courts rely predominantly on earlier judgments to establish the content of customary law without requiring fresh evidence of current practice, there is a real danger that the law being applied is a judicial artifact, a fossilized version of a practice that the community itself has long since moved beyond.<sup>82</sup> This concern was voiced in the scholarly literature by S. N. C. Obi,<sup>83</sup> whose influential work on Ibo customary law drew attention to the gap between recorded custom and lived practice.

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<sup>80</sup> Anthony C Diala, 'A Critique of the Judicial Attitude towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States' (2018) *African Human Rights Law Journal* 148.

<sup>81</sup> OO Asein, *Introduction to Nigerian Legal System* (2nd edn, Ababa Press Ltd 2005) 74.

<sup>82</sup> Rachael Knight, 'Working with Customary Justice Systems: Post-Conflict and Fragile States' (International Development Law Organization 2011) 40.

<sup>83</sup> SNC Obi, *The Ibo Law of Property* (Butterworths, London 1963) 19.

The Living Law Theory demands that courts, when determining the content of a customary rule, look beyond the records to the contemporary practice of the community.<sup>84</sup> This has practical implications for the mode of proof. Under this approach, expert witnesses are not simply elderly men who recall how things were done in the past; they are persons with current and direct knowledge of how the community actually conducts itself in the relevant domain.<sup>85</sup>

In *Dawodu v. Danmole*,<sup>86</sup> the Privy Council, hearing an appeal from Nigeria, acknowledged that the courts must take into account the extent to which a customary rule has been modified or altered by changing community standards and that the mere fact that a rule was recognized in a past decision does not necessarily mean that it survives in its original form in the relevant community at the time of adjudication.<sup>87</sup>

The challenge with the Living Law Theory is essentially one of method and evidence. Determining what the "living law" of a community actually is requires sociological surveys, community consultations, or anthropological fieldwork, all of which lie beyond the ordinary resources of litigation.<sup>88</sup> The theory is therefore most effectively implemented not by requiring such evidence in every case but by creating institutional mechanisms, such as law reform commissions, customary law research bureaus, and restatement projects, through which the content of living customary law can be authoritatively ascertained and made available to courts.<sup>89</sup> The Nigerian Institute of

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<sup>84</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press 1936) 493.

<sup>85</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 79.

<sup>86</sup> [1962] 1 WLR 1053 (Privy Council).

<sup>87</sup> EO Oloyede, 'The Significance of the Living Customary Law for an Understanding of Law' in *Essays in Honour of Justice Akinola Aguda* (Federal Ministry of Justice 1991) 82.

<sup>88</sup> Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 58.

<sup>89</sup> AN Allott, *New Essays in African Law* (Butterworths 1970) 60.

Advanced Legal Studies has, over the years, undertaken research of this character, though the translation of such research into accessible and judicially reliable form has been uneven.<sup>90</sup>

#### **2.2.4 The Integration or Harmonization Theory**

The Integration or Harmonization Theory proceeds from the premise that the question of how customary law is to be proved cannot be resolved satisfactorily within any single theoretical approach and that what is required is a summary based on the ideas of the Fact Theory, the Judicial Notice Theory, and the Living Law Theory while addressing the weaknesses of each.<sup>91</sup> This theory has both a normative dimension, concerned with how the law ought to develop, and a descriptive dimension, concerned with how Nigerian courts have in practice begun to move toward a more integrated approach.<sup>92</sup>

The normative case for integration rests on the argument that customary law occupies a unique position in the Nigerian legal order that makes it unsuitable for treatment under rules designed for either ordinary facts or statutory law. It is neither a foreign fact, like the content of Ghanaian law, nor a codified rule, like a provision of the Companies and Allied Matters Act. It is the indigenous law of the land, recognized and protected by section 315 of the Constitution of the Federal Republic of Nigeria, which modifies existing laws including customary law to the extent that they are consistent with the Constitution.<sup>93</sup>

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<sup>90</sup> F Adekunle, 'Law Reform and Customary Law in Nigeria: Challenges and Prospects' (2016) 7(1) *Journal of Law, Policy and Globalization* 44.

<sup>91</sup> Kingsley Anya, 'Customary Rules and Evolution of Effective Laws' (2023) 3(1) *Journal of Jurisprudence and Contemporary Legal Issues* 15.

<sup>92</sup> OAD Olatunbosun and OJD Olanrewaju, 'The Conundrum of Judicial Notice as a Means of Ascertaining Customary Law in Nigerian and South African Courts amid the Convergence of Positivism and Legal Pluralism' (2019) 22 *Potchefstroom Electronic Law Journal* 32.

<sup>93</sup> CE Nnaemeka Onyeka, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 123.

The practical content of the Integration Theory, as elaborated in the legal literature and partially reflected in Nigerian case law, involves several elements working together. First, it retains the requirement of proof for customary law that is genuinely in dispute or that is not part of the common legal heritage of the relevant jurisdiction, consistent with the Fact Theory.<sup>94</sup> Second, it extends judicial notice to well-established customary rules that have been consistently recognized and applied by the courts over a significant period, consistent with the Judicial Notice Theory. Third, it insists that even well-established rules must be open to revision where credible evidence of a change in living practice is adduced, consistent with the Living Law Theory.<sup>95</sup> Fourth, and distinctively, it envisages an active role for the legislature and law reform agencies in codifying, restating, and updating customary law in forms that can be directly applied by courts without the full evidentiary rigmarole currently required.<sup>96</sup>

The constitutional underpinning of the Integration Theory deserves special attention. Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 provides that no person shall be convicted of a criminal offence unless it is defined and the penalty prescribed in a written law. This provision has been interpreted to restrict the application of customary criminal law, but it does not apply to civil customary law, which remains governed by the broad recognition provisions of the Constitution and the various state laws that continue to apply customary rules in family, land, and succession matters.<sup>97</sup>

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<sup>94</sup> Gordon R Woodman, 'The Constitutional Challenge of the Integration and Interaction of Customary Law in Nigeria and Ghana' (2010) 3(2) *Journal of Civil Law Studies* 240.

<sup>95</sup> OO Adeniji, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 21.

<sup>96</sup> Nigerian Law Reform Commission, *Report on the Restatement and Codification of Customary Law in Nigeria* (NLRC, Abuja 2003), 60.

<sup>97</sup> CC Nweze, *An Introduction to Nigerian Constitutional Law* (Snaap Press, Enugu 2003) 201.

At the level of judicial development, there are signs that Nigerian courts have been moving, perhaps unconsciously, toward an integrated approach. The Supreme Court in *Ukeje v. Ukeje*,<sup>98</sup> decided in 2014, struck down the Igbo customary rule that excluded female children from inheriting their father's estate on the ground that it was repugnant to natural justice and contrary to section 42 of the Constitution. In reaching this decision, the court did not require fresh proof of the content of the custom; it treated the rule as sufficiently established by the evidence on record and by its own knowledge of prior judicial decisions. What it did require, however, was an assessment of whether the rule, even if established, satisfied the validity tests imposed by law. This represents precisely the kind of integration envisaged by the harmonization theorists: proof is required where the content of the custom is disputed, but judicial notice is taken where it is well-established, and the validity tests serve as a mechanism for ensuring that established customs remain consistent with contemporary constitutional values. Scholars like Professor Nwabueze<sup>99</sup> contributed, through their writings and advocacy, to the development of a more coherent theoretical framework for the treatment of customary law in Nigerian courts.<sup>100</sup>

### CHAPTER THREE

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<sup>98</sup> [2014] 11 NWLR (Pt 1418) 384 (SC).

<sup>99</sup> BO Nwabueze, *Nigerian Land Law* (Nwamife Publishers, Enugu 1972) 19.

<sup>100</sup> MA AjaNwachuku, 'A Legal Analysis of the Nebulous Concept of Childhood in Nigeria' (2016) 7(2) *Beijing LawReview* 122.



## LEGAL FRAMEWORK OF CUSTOMARY LAW IN NIGERIA

### 3.1 Legal Framework

#### 3.1.1 High Court Laws of the States

One of the most important statutes governing the application of customary law in Nigeria is the High Court Laws of the respective States of the Federation.<sup>101</sup> These laws, which include the High Court Law of Lagos State<sup>102</sup> and the High Court Law of Oyo State,<sup>103</sup> amongst others,<sup>104</sup> each contain provisions directing courts to observe and enforce native law and custom in civil matters where the parties are subject to such custom. Section 26<sup>105</sup> of the High Court Law of Lagos State provides that the High Court shall observe and enforce native law and custom provided that such native law and custom be not repugnant to natural justice, equity and good conscience, nor be incompatible, either directly or by implication with any law for the time being in force.<sup>106</sup>

#### 3.1.2 Customary Court and Customary Court of Appeal Laws

These laws are enacted by the State Houses of Assembly to establish customary courts as courts of first instance with jurisdiction to determine civil matters arising from custom including land tenure, family relations and inheritance without the rigid proof requirements that apply in superior courts.<sup>107</sup> Customary court judges, who are considered knowledgeable in local custom, are

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<sup>101</sup> High Court Law of Lagos State, Cap. H5, Laws of Lagos State 2019, s 26.

<sup>102</sup> Cap. H5, Laws of Lagos State 2019, s 26.

<sup>103</sup> Cap. 63, Laws of Oyo State 2022, s 12(1).

<sup>104</sup> EI Nwogugu, *Family Law in Nigeria* (3rd edn, Heinemann Educational Books 2014) 22.

<sup>105</sup> Cap. H5, Laws of Lagos State 2019, s 26.

<sup>106</sup> OC Nwafor, 'Repugnancy Doctrine: An Attempt to Destroy or Preserve Customary Law' (2024) 7 *International Journal of Social Sciences and Humanities Research* 25.

<sup>107</sup> FC Anyaegbunam, 'The Judiciary and the Role of Customary Courts in Nigeria' (2020) 8(5) *Global Journal of Politics and Law Research* 53.

accorded wide powers to apply local law from personal knowledge, thereby bringing justice closer to the ordinary people, especially in rural areas.<sup>108</sup>

These laws are enacted pursuant to the powers granted by section 245 of the Constitution of the Federal Republic of Nigeria,<sup>109</sup> which establishes Customary Courts of Appeal as appellate courts to hear and determine appeals from customary courts on questions of the existence, application and interpretation of custom.<sup>110</sup> Examples include the Customary Court Laws of Lagos State,<sup>111</sup> and Western Nigeria (Oyo, Ogun, Ondo, Oshun and Ekiti State).<sup>112</sup> These appellate courts are composed of persons learned in customary law who apply all three statutory tests before affirming, reversing or remitting the decisions of the lower customary courts.<sup>113</sup>

### **3.1.3 Child Rights Act**

Sections 21 and 28<sup>114</sup> of the Act provide that any custom or practice contrary to the best interests of the child shall be void. This legislation establishes a comprehensive legal framework that effectively nullifies and prohibits any traditional, cultural, or customary practices that facilitate, endorse, or allow the marriage of minors and the economic exploitation of children through forced labor.<sup>115</sup>

### **3.1.4 Land Use Act**

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<sup>108</sup> EO Igbineweka and EE Enakireru, 'Customary Law in Nigeria: Interrogating the Issue of Judicial Notice' (2020) 11 *Journal of Commercial and Contemporary Law* 230.

<sup>109</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended), s 245.

<sup>110</sup> Hon Justice Joseph Otabor Olubor, 'Customary Court of Appeal in Nigeria: Focus on the Jurisdiction' 1.

<sup>111</sup> Ch C20, Laws of Lagos State 2018, s 18.

<sup>112</sup> Cap 31, Laws of Western Nigeria 2018, s 12(1).

<sup>113</sup> IB Eyo, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) *Journal of African Law* 16.

<sup>114</sup> Child Rights Act 2004, s 21,28.

<sup>115</sup> MA AjaNwachuku, 'A Legal Analysis of the Nebulous Concept of Childhood in Nigeria' (2016) 7(2) *Beijing Law Review* 122.

Section 1 of the Act, promulgated originally as Decree No. 6 of 1978, vests all land within each state in the Governor of that state,<sup>116</sup> thereby fundamentally altering the customary law of land tenure throughout Nigeria.<sup>117</sup>

### **3.15 Administration of Estates Laws of Lagos State<sup>118</sup>**

and its counterparts in other states, regulate the administration of the estates of deceased persons. Most of these laws permit the application of custom for the distribution of the estate of a deceased person who was subject to custom at the time of death.<sup>119</sup>

#### **3.1.6 Constitutional Provisions on Customary Law**

The starting point for any examination of the validity of customary law in Nigeria is the Constitution of the Federal Republic of Nigeria, which by virtue of section 1(1)<sup>120</sup> is supreme throughout the Federal Republic and whose provisions have binding force on all authorities and persons throughout the Federation.<sup>121</sup> The supremacy of the Constitution means that no custom, however ancient or widely accepted, can be enforced by a Nigerian court if it conflicts with any provision of the Constitution of the Federal Republic of Nigeria.<sup>122</sup> The Constitution of the Federal Republic of Nigeria thereby establishes the outer limits within which all customary rules must operate and furnishes the primary validity test against which customary law is measured.<sup>123</sup>

The most important constitutional validity test for customary law is contained in sections 42(1)<sup>124</sup> and 42(2),<sup>125</sup> of the constitution of the Federal Republic of Nigeria which together prohibit

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<sup>116</sup> Land Use Act, Cap L5, LFN 2004, s 1.

<sup>117</sup> IO Smith, *The Law of Real Property in Nigeria* (2nd edn, University of Lagos Press 2018) 198.

<sup>118</sup> Administration of Estates Law of Lagos State, Cap A2, Laws of Lagos State 2015.

<sup>119</sup> Ayoola JSC in *Salubi v Nwariaku* (2003) 7 NWLR (Pt 819).

<sup>120</sup> CFRN 1999 (as amended), s 1(1).

<sup>121</sup> Burabari Adule Nkor, 'The Validity of Customary Law as a Source of Nigerian Law' (Nigerian Law Class, 26 July 2014) 98.

<sup>122</sup> CFRN 1999 (as amended), s 1(3).

<sup>123</sup> Yemi Oke, *Constitutional Law in Nigeria* (2nd edn, Princeton Publishing 2021) 185.

<sup>124</sup> CFRN, 1999 (as amended) s 42(1).

<sup>125</sup> *Ibid* s 42(2).

discrimination and the imposition of legal disabilities on account of community, ethnic group, place of origin, sex, religion, political opinion, or circumstances of birth.<sup>126</sup> These provisions have been applied by the superior courts to strike down customary rules that discriminate on any of the prohibited grounds, and in doing so the courts have transformed these constitutional provisions into a powerful validity test. In the landmark decision of *Ukeje v Ukeje*,<sup>127</sup> the Supreme Court of Nigeria applied section 42(1) of the Constitution of the Federal Republic of Nigeria to invalidate an Igbo customary rule that excluded female children from the inheritance of a deceased father's estate, holding that no matter how long-standing a custom may be, it cannot derogate from the constitutionally guaranteed right of equality before the law.<sup>128</sup> The Court affirmed that a custom which denies any person rights or benefits on account of sex is inconsistent with the Constitution of the Federal Republic of Nigeria and is to that extent void and unenforceable.<sup>129</sup> The Court of Appeal had earlier reached a similar conclusion in *Mojekwu v Mojekwu*,<sup>130</sup> where the oli-ekpe custom of Nnewi, which vested the property of a deceased male in a male relative to the total exclusion of female heirs, was struck down both on the ground that it was repugnant to natural justice, equity and good conscience, and on the ground that it violated section 42(1) of the Constitution of the Federal Republic of Nigeria.<sup>131</sup>

The constitutional dimension of the validity test for customary law is further reinforced by section 6(1) and (2) of the Constitution, which vests the judicial powers of the Federation and each State

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<sup>126</sup> Paul Itua, 'Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) on the Rights of Inheritance' *International Journal of Law* 210.

<sup>127</sup> [2014] 11 NWLR (Pt 1418) 388 (SC).

<sup>128</sup> E C Nwagbara, 'Expanding Women's Right to Inherit Immovable Property in Igboland: Beyond the Limits of *Ukeje v Ukeje*' (2021) 9(1) *International Journal of Social Sciences and Humanities Research* 248.

<sup>129</sup> *Ukeje v Ukeje* [2014] 11 NWLR (Pt. 1418) 388 SC.

<sup>130</sup> [1997] 7 NWLR (Pt 512) 283 (CA).

<sup>131</sup> Nnamdi Egwudike, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' (2008) *International Journal of Law* 10.

in the courts established there under.<sup>132</sup> This vesting of judicial power carries with it the duty to refuse enforcement to any custom that is unconstitutional.<sup>133</sup> Section 6(6)(a) of the Constitution of the Federal Republic of Nigeria additionally provides that the judicial powers so vested include all inherent powers and sanctions of a court of law as well as the capacity to develop and administer customary law,<sup>134</sup> thereby affirming the role of the judiciary as an active participant in the growth and reformation of customary law through the consistent application of constitutional validity requirements.

### **3.1.7 Admissibility and proof of Customary Law Under the Evidence Act 2023**

The general framework for the proof of customary law in Nigerian courts is set out in section 16 of the Evidence Act.<sup>135</sup> Section 16(1) provides that a custom may be adopted as part of the law governing a particular set of circumstances if it is capable of judicial notice or if it is proved in evidence.<sup>136</sup> This provision establishes a dual basis for the operative effect of customary law in judicial proceedings: automatic recognition through judicial notice, or establishment through the formal adduction of evidence.<sup>137</sup> Section 16(2) of the Evidence Act<sup>138</sup> further provides that where a custom is not the subject of judicial notice, the party relying upon the custom bears the burden of proving its existence and content as a question of fact. The characterization of unnoticed custom as a question of fact is significant because it means that the existence and content of such a custom are susceptible to cross-examination, to the adduction of contrary evidence, and to assessment on

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<sup>132</sup> CFRN, 1999 (as amended) s 6(1) and (2).

<sup>133</sup> Nnamdi Egwudike, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' (2008) *International Journal of Law*.

<sup>134</sup> CFRN, 1999 (as amended) s 6(6)(a).

<sup>135</sup> Evidence (Amendment) Act 2023, s 16

<sup>136</sup> *Ibid*, s 16(1).

<sup>137</sup> EO Igbineweka and EE Enakireru, 'Customary Law in Nigeria' (2019) *Academic Journal of Contemporary Law and Policy (ACARELAR)* 230.

<sup>138</sup> Evidence Act 2023, s 16(2).

the balance of probabilities.<sup>139</sup> Where conflicting evidence is adduced on the nature and scope of a custom, the court shall prefer that evidence which is more convincing and more consistent, having regard to the age, consistency and widespread recognition of the custom.<sup>140</sup> The burden of proof therefore rests squarely and exclusively on the party asserting the custom, and that party cannot discharge the burden by mere assertion or bare pleading.<sup>141</sup>

i. **Judicial Notice of Custom: Section 17 of the Evidence Act 2023**

Section 17(1) of the Evidence Act 2023<sup>142</sup> provides that the court shall take judicial notice of a custom where it has been recognized by at least one superior court of record and applied in that recognition. The requirement that the custom must have been recognized and applied by a superior court of record is a stringent one: recognition alone is insufficient; the recognition must have been accompanied by application, that is, by the actual use of the custom to resolve the dispute before the court.<sup>143</sup> This dual requirement of recognition and application ensures that judicial notice is not accorded to customs that have merely been acknowledged in passing or referred to in obiter.<sup>144</sup>

The approach taken by section 17(1) of the Evidence Act reflects and codifies the principle laid down by the Supreme Court in *Romaine v Romaine*,<sup>145</sup> where it was held that a custom will only be the subject of judicial notice after it has been proved in numerous cases and has received judicial recognition over a period of years, and that a single instance of application does not suffice to entitle a custom to judicial notice.

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<sup>139</sup> Igbinwaka, O & Enakireru, E, 'Customary Law in Nigeria' in *Academic Journal of Interdisciplinary Studies*, (2014)

vol. 3, no. 1, 118.

<sup>140</sup> Niki Tobi, *Cases and Materials on Nigerian Land Law* (Malthouse Press Ltd 1997) 115.

<sup>141</sup> EO Azubuike, *The Law of Evidence in Nigeria* (Princeton Associates 2022) 389.

<sup>142</sup> Evidence (Amendment) Act 2023, s 17(1).

<sup>143</sup> EI Malemi, *The Nigerian Legal Method* (Princeton Publishing Co, Ibadan 2012) 193.

<sup>144</sup> Chigozie IN Ojiaku, 'Judicial Notice of Custom under the Evidence Act 2011' (2019) *Potchefstroom Electronic Law Journal* 20

<sup>145</sup> [1992] 4 NWLR (Pt 238) 650 (SC).

The foundational principle that native law and custom is a question of fact to be decided on evidence in each case, unless it has attained such notoriety that judicial notice was established early in Nigerian jurisprudence, drawing from colonial precedents, in the Gold Coast case of *Angu v Attah*, which influenced Nigerian courts, it was held that native law and custom is a question of fact to be decided on evidence in each case, unless it has attained such notoriety that judicial notice can be taken without proof.<sup>146</sup> This principle was adopted and reinforced by Nigerian courts.

A landmark decision on this issue is *Giwa v Erinmilkun*, where the Federal Supreme Court affirmed that native law and custom is a matter of evidence to be proved in each particular case, unless it is of such notoriety and has been so frequently followed by courts that judicial notice can be taken without requiring evidence in proof.<sup>147</sup> The court stressed on the difference in customs all across Nigeria, making it very impossible for the judges to know all of the customs all at once, thereby making proof unless the custom has already been repeatedly established and clarified in previous judgments.

## ii. **Formal Proof by Evidence: Section 18 of the Evidence Act 2023**

Where a custom is not entitled to judicial notice, it must be formally proved as a fact by evidence. Section 18 of the Evidence Act<sup>148</sup> provides that custom, when duly established, forms part of the law applicable to the parties subject to it. Section 18(1) of the Evidence Act provides that where evidence of a custom cannot be adduced by judicial notice, it shall be proved as a fact through the opinions of persons who possess special knowledge of it, either by virtue of membership of the community in which the custom prevails, or by diligent study and research.<sup>149</sup> This provision

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<sup>146</sup> (1916), Privy Council Appeal No 78 of 1915.

<sup>147</sup> (1961) All NLR 294.

<sup>148</sup> Evidence Act 2023, s 18.

<sup>149</sup> Ibid s 18(1).

reflects the two categories of competent witnesses in customary law proceedings: those who speak from direct personal experience as members of the community, and those who speak from scholarly expertise acquired through systematic research.<sup>150</sup> Section 18(3) of the Evidence Act then imposes the overriding validity requirement, providing that a custom shall not be enforced by the court if it is repugnant to natural justice, equity and good conscience.<sup>151</sup>

iii. **Opinion and Expert Evidence on Custom: Sections 43 and 68 of the Evidence Act 2023**

Section 43 of the Evidence Act<sup>152</sup> provides that statements of opinion made by persons with relevant knowledge regarding the existence of a public right, custom or general usage are admissible in evidence, provided such statements were made before any controversy regarding that right, custom or usage arose. The rationale for this rule is that a statement made prior to any dispute is less susceptible to the taint of self-interest or fabrication and therefore carries greater probative weight than a statement made in the context of litigation.<sup>153</sup> Section 43 of the Evidence Act is of particular practical importance in cases where no living witness can speak from direct personal experience to the historical origin or continuous practice of a custom, since pre-controversy statements by recognized authorities, such as colonial reports, traditional council resolutions, or anthropological studies may be admitted as evidence of the custom.<sup>154</sup> The Court of Appeal applied this principle in *Cole v Akinyele*,<sup>155</sup> where statements made by knowledgeable elders concerning a Yoruba customary inheritance rule, made before the parties fell into dispute, were admitted as evidence of the custom.

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<sup>150</sup> EI Nwogugu, *Family Law in Nigeria* (Revised edn, Heinemann Educational Books) 33.

<sup>151</sup> Evidence Act 2023, s 18(3).

<sup>152</sup> *Ibid*, s 43.

<sup>153</sup> CJ Okoye, *Law of Evidence II (Law-446)*, 'Exception to the Rule against Hearsay II' 11.

<sup>154</sup> AEW Park in *The Sources of Nigerian Law* (African University Press, 1963) 92.

<sup>155</sup> [1960] 5 FSC 84.



Section 68 of the Evidence Act <sup>156</sup> addresses the competence of expert witnesses in customary law proceedings. It provides that a witness who is an expert may give oral evidence on any matter in which he has acquired special knowledge and familiarity with customary law by membership of the community within which it prevails, or by diligent study and research.<sup>157</sup> The Supreme Court confirmed in *Esso West Africa Inc v T Oyegbola*<sup>158</sup> that a witness versed in customary law by virtue of community membership is a competent expert for the purpose of giving opinion evidence on that custom. The combined effect of sections 43 and 68 of the Evidence Act<sup>159</sup> is to ensure that courts rely only on competent and credible opinion evidence when determining the content of unnoticed customs, thereby maintaining both the integrity and the accuracy of customary law adjudication.<sup>160</sup>

#### iv. **Oral Tradition Evidence: Section 66 of the Evidence Act 2023**

Section 66 of the Evidence Act<sup>161</sup> makes specific provision for the admissibility of oral tradition evidence in land ownership proceedings. It provides that oral traditions as to the history of a family or community, including traditions relating to communal or family land ownership, are admissible in proceedings where the ownership of such land is in issue.<sup>162</sup> This provision is of considerable practical importance in Nigeria, where customary land tenure rooted in unwritten oral traditions transmitted from generation to generation forms the basis of a significant proportion of all land ownership disputes.<sup>163</sup> The section enables courts to receive evidence of ancestral grants, settlement histories and communal boundaries as recounted by family elders or community custodians,

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<sup>156</sup> Evidence Act 2023, s 68.

<sup>157</sup> IE Ochuchu, *Law of Evidence in Nigeria* ch 2, 21.

<sup>158</sup> [1969] 1 All NLR 61(SC).

<sup>159</sup> Evidence Act 2023, s 43 and s 68.

<sup>160</sup> ES Okeke, *The Law of Evidence in Nigeria* (Malthouse Press 2014) 325

<sup>161</sup> Evidence Act 2023, s 66.

<sup>162</sup> ST Hon, *Law of Evidence in Nigeria* (2nd edn, Lawhouse Port Harcourt 2014) 112.

<sup>163</sup> Adewale Taiwo, *The Nigerian Land Law* (Princeton & Associates Publishing Co Ltd 2016) 170.

without requiring the formal proof procedures ordinarily applicable to documentary evidence.<sup>164</sup> The Supreme Court made effective use of this principle in *Alade v Awo*,<sup>165</sup> where oral tradition evidence from family elders was admitted and relied upon to determine the ownership of family land under customary law.

v. **Authoritative Texts and Publications: Section 70 of the Evidence Act 2023**

Section 70 of the Evidence Act<sup>166</sup> addresses the proof of customary law by reference to authoritative texts and community testimony. Section 70(1) of the Evidence Act provides that custom may be proved by evidence of persons who are members of the community in which the custom prevails and who are conversant with it, whether through direct personal experience or through acquaintance acquired by living amongst the people of that community.<sup>167</sup> Section 70(2) of the Evidence Act further provides that the court may accept as proof of customary law any book, treatise or other publication that persons versed in the custom regard as a trustworthy and authoritative statement of the law, and whose author is or has been considered an authority on the subject.<sup>168</sup> This provision has been consistently applied in Nigerian courts in the proof of Yoruba, Igbo and Benin customary law, through the admission of testimony from chiefs and community elders and the acceptance of works by recognized anthropologists and legal scholars as authoritative texts on the applicable custom.<sup>169</sup> The Privy Council in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*<sup>170</sup> affirmed the principle that authoritative books and texts constitute admissible and cogent evidence of customary law where no other evidence is

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<sup>164</sup> IEE Okpara, *Proof of Title to Land in Nigeria* (2nd edn, Chenglo Limited 2018) 65.

<sup>165</sup> [1975] 4 SC 215.

<sup>166</sup> Evidence Act 2023, s 70.

<sup>167</sup> *Ibid*, s 70(1).

<sup>168</sup> *Ibid*, s 70(2).

<sup>169</sup> TO Elias, *The Nigerian Legal System* (Law Africa Publishing Ltd) 252.

<sup>170</sup> [1931] AC 662.

readily available, and that a court may properly rely upon such texts in the absence of direct oral testimony from community members.

vi. **Fact Judicially Noticeable Need Not Be Proved : Section 73 of the Evidence Act 2023**

Section 73 of the Evidence Act lays down the foundational rule that a court shall not require any party to prove facts of which it must take judicial notice. This provision relieves litigants of the obligation and expense of adducing evidence to establish matters that the law recognizes as sufficiently certain or notorious.<sup>171</sup>

Notwithstanding this general rule, Section 73 of the Evidence Act preserves judicial discretion in a meaningful way. Where a party calls upon the court to take judicial notice of a particular fact, the court retains the power to refuse to do so unless and until that party produces such books, documents, or other materials as the court considers necessary to satisfy itself of the fact in question.<sup>172</sup> This discretionary safeguard is significant: it ensures that the doctrine of judicial notice does not become an avenue for the introduction of disputed or unverified facts without scrutiny.<sup>173</sup> The rationale underlying Section 73 is rooted in judicial economy and common sense. Courts function more efficiently when they are not burdened with proving the obvious. For instance, it would be wasteful to require formal evidence of the laws enacted by the National Assembly or the meaning of ordinary English words.<sup>174</sup>

The doctrine of judicial notice, as structured by Sections 73 of the Evidence Act 2023, has particular significance when applied to customary law. Customary law, unlike received English law or written legislation, is not generally presumed to be known to the court; as a rule, it must be

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<sup>171</sup> Evidence Act 2023, s. 73.

<sup>172</sup> Ibid.

<sup>173</sup> T Akinola Aguda, *The Law of Evidence in Nigeria* (Sweet & Maxwell, Lagos 1966) 164.

<sup>174</sup> Aguda, TA., *The Law of Evidence in Nigeria* (2nd edn, Spectrum Books 1999) 102.

proved as a fact by the party who relies upon it.<sup>175</sup> However, the interface between judicial notice and customary law creates important qualifications to this general rule.

The starting point is that Section 73 of the Evidence Act 2023 preserves the court's discretion to decline judicial notice of any fact, including a custom unless the requesting party produces sufficient materials to satisfy the court of its existence and content.<sup>176</sup> In the context of customary law, this means that where a party invites the court to notice a particular custom as established law, the court may require the production of books, decisions of customary courts, opinions of knowledgeable persons, or other documentary evidence before acting on the invitation.<sup>177</sup> The court is thus not a passive recipient of assertions about customary rules; it retains the power to insist on verification. This is consistent with the observation of the Privy Council in *Eshugbayi Eleko v. Government of Nigeria*, that a court cannot transform a custom on its own motion, it must be satisfied of its existence by appropriate evidence.<sup>178</sup>

**vii. Facts of Which the Court Must Take Judicial Notice : SECTION 74 and 122 of the Evidence Act.**

A custom that has been the subject of previous judicial proceedings and has been conclusively established by a court of competent jurisdiction, acquires the character of judicially noticed fact for the purposes of subsequent proceedings.<sup>179</sup> Section 74 of the Evidence Act 2023, read together with Section 122, supports the view that the court takes mandatory notice of the course of proceedings and decisions of courts of record in Nigeria.<sup>180</sup> Since the decisions of superior courts form part of

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<sup>175</sup> Evidence Act 2023, s. 73.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Owonyin v Omotosho* [1961] 1 All NLR 304, 306.

<sup>178</sup> [1931] AC 662.

<sup>179</sup> *Giwa v Erinmilokun* [1961] 1 All NLR 294

<sup>180</sup> *Alkamawa v Bello* (1998) 6 SCNJ 127.

the law of Nigeria, a custom conclusively recognized in such a decision need not be re-proved in every subsequent case in which it arises. The court may act on it as an established rule, subject only to its power under Section 73 of the Evidence Act<sup>181</sup> to consult available materials for confirmation.

The practical operation of this principle is illustrated in cases where the courts have applied well-known customary rules such as the Yoruba customary law of inheritance, or the Igbo customary rules on land ownership without requiring fresh proof in every instance, relying instead on a body of prior judicial decisions that have established those rules.<sup>182</sup> In such circumstances, the mandatory judicial notice provisions of Section 74 of the Evidence Act<sup>183</sup> operate to spare the parties the cost and inconvenience of repetitive proof, while Section 73 of the Evidence Act<sup>184</sup> ensures that the court retains the ability to seek further verification where the content or scope of the custom is genuinely uncertain.

Section 122 of the Evidence Act<sup>185</sup> reinforces this framework by specifically providing that courts shall take judicial notice of matters that have become settled by a sufficient course of decisions.<sup>186</sup>

A customary rule that has been consistently applied and recognized across a series of judicial decisions may therefore graduate from a fact requiring proof to a matter of judicial notice under this provision.<sup>187</sup> This is a significant development: it means that the more frequently a custom is litigated and consistently recognized by the courts, the less the evidential burden on parties relying upon it in subsequent cases.

### **3.2 Institutional Framework For The Validity Test And Proof Of Customary Law In Nigeria**

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<sup>181</sup> Evidence Act, s73.

<sup>182</sup> *Olowu v Olowu* (1985) 3 NWLR (Pt. 13) 372, 394 per Karibi-Whyte JSC.

<sup>183</sup> Evidence Act, s 74.

<sup>184</sup> *Ibid*, s 73.

<sup>185</sup> *Ibid*, s122.

<sup>186</sup> *Ibid*, s 122.

<sup>187</sup> *Ibid*, s 73.

### **3.2.1 The Traditional and Evidentiary Institutions**

#### **3.2.1 Family Heads and Councils of Elders**

Family heads and principal family members possess direct, generational knowledge of indigenous practices, particularly those relating to land ownership, lineage, and succession. Under sections 18(1) and 68 of the Evidence Act,<sup>188</sup> such persons are recognized as competent witnesses capable of testifying to the existence and content of a custom from personal knowledge arising from community membership. They are frequently called as expert witnesses to speak to the customary practices of their specific community, and their testimony, when consistent and credible, constitutes satisfactory proof of the custom alleged.

#### **3.2.1.2 Traditional Rulers, Chiefs and Local Councils**

Recognized traditional rulers; Obas, Emirs, Obis, and their councils are the institutional custodians of unwritten community traditions. They provide oral or written declarations regarding local custom in matters of succession, land rights, and communal governance. The Evidence Act in section 43 specifically admits pre-controversy statements of opinion made by persons with relevant knowledge regarding the existence of a public right, custom or general usage,<sup>189</sup> and the Court of Appeal applied this principle in *Cole v Akinyele*, where statements made by knowledgeable elders concerning a Yoruba customary inheritance rule, made before the parties fell into dispute, were admitted as evidence of the custom.<sup>190</sup>

#### **3.2.1.3 Assessors and Local Experts**

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<sup>188</sup> Evidence Act 2023, s 18(1) and s 68.

<sup>189</sup> Evidence Act 2023, s 43.

<sup>190</sup> [1960] 5 FSC 84 (FSC).

Courts are empowered under applicable State Evidence Laws and judicial practice to sit with assessors usually knowledgeable local chiefs or elders who advise the presiding judge on the exact nature and content of the customary law in question. Section 68 of the Evidence Act further provides that a witness who is an expert may give oral evidence on any matter in which he has acquired special knowledge and familiarity with customary law by membership of the community within which it prevails, or by diligent study and research.<sup>191</sup> The Supreme Court confirmed in *Esso West Africa Inc v T Oyegbola*<sup>192</sup> that a witness versed in customary law by virtue of community membership is a competent expert for the purpose of giving opinion evidence on that custom. In addition, section 70(2) of the Evidence Act permits the court to accept as proof any book, treatise or publication that persons versed in custom regard as a trustworthy and authoritative statement of the law,<sup>193</sup> while section 66 of the Evidence Act makes specific provision for the admissibility of oral tradition evidence relating to family or community land ownership.<sup>194</sup> The Supreme Court gave effect to this provision in *Alade v Awo*,<sup>195</sup> where oral tradition evidence from family elders was admitted and relied upon to determine the ownership of family land under customary law.

### **3.2.2 The Formal Judicial Institutions**

Once customary law is presented through the evidentiary institutions described above, the formal court system is responsible for interpreting it and applying the requisite legal validity tests. The institutional hierarchy is established by the Constitution of the Federal Republic of Nigeria and by the respective State Laws governing customary courts.

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<sup>191</sup> Evidence Act 2023, s 68.

<sup>192</sup> [1969] 1 All NLR 463 (SC).

<sup>193</sup> Evidence Act 2023, s 70 (2).

<sup>194</sup> Evidence Act 2023, s 66.

<sup>195</sup> [1975] 4 SC 215 (SC).

### **3.2.2.1 Customary Courts and Area Courts**

These are the courts of first instance at the grassroots level and are primarily composed of individuals with deep knowledge of native law and custom.<sup>196</sup> They apply customary law directly to disputes involving marriage, divorce, inheritance, and land tenure. Customary court judges, considered knowledgeable in local custom, are accorded wide powers to apply indigenous law from personal knowledge, thereby bringing justice closer to the ordinary people, especially in rural areas. These courts function as primary fact-finding tribunals for the existence and content of custom, and it is at this level that the validity tests are first applied in practice.

### **3.2.2.2 State High Courts and Magistrate Courts**

Where customary law issues are litigated outside the jurisdiction of local tribunals, or where superior jurisdiction is required, State High Courts handle them. Section 26 of the High Court Law of Lagos State directs that the High Court shall observe and enforce native law and custom, provided that such custom be not repugnant to natural justice, equity and good conscience, nor incompatible with any law for the time being in force.<sup>197</sup> These courts rely on evidence provided by traditional leaders and expert witnesses, and weigh the custom established in evidence against the statutory validity tests. The judicial powers vested by section 6(1) and (2) of the Constitution of the Federal Republic of Nigeria in the State courts carry with them the duty to refuse enforcement to any custom that fails those tests.<sup>198</sup>

### **3.2.2.3 Customary Court of Appeal and Sharia Court of Appeal**

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<sup>196</sup> CFRN1999 (as amended), s 245.

<sup>197</sup> Section 26 High Court Law, Cap H5, Laws of Lagos State 2019.

<sup>198</sup> CFRN1999 (as amended), s 6(1)(2),.



These specialized appellate courts, established pursuant to section 245 of the Constitution of the Federal Republic of Nigeria,<sup>199</sup> hear and determine appeals from lower customary and area courts on questions of the existence, application, and interpretation of custom. They are composed of persons learned in customary law, and they apply all three statutory validity tests; repugnancy, incompatibility, and public policy before affirming, reversing or remitting the decisions of the lower courts. Their role is critical in ensuring that native laws and customs are accurately and consistently applied across their respective jurisdictions.

#### **3.2.2.4 Court of Appeal and Supreme Court**

As the highest appellate bodies, the Court of Appeal and the Supreme Court do not ordinarily receive fresh oral evidence of customs. Their function is supervisory and jurisprudential: they establish the landmark precedents that govern how customary laws are recognized, interpreted, and validated across the country. In *Ukeje v Ukeje*,<sup>200</sup> the Supreme Court applied section 42(1) of the Constitution of the Federal Republic of Nigeria to invalidate an Igbo customary rule that excluded female children from inheritance of a deceased father's estate, holding that no custom, however long-standing, can derogate from the constitutionally guaranteed right of equality before the law. Similarly, in *Mojekwu v Mojekwu*<sup>201</sup> the Court of Appeal struck down the *oli-ekpe* custom of the Nnewi people both on repugnancy grounds and for violating section 42(1) of the Constitution of the Federal Republic of Nigeria.<sup>202</sup> These decisions illustrate how the apex courts function as the final institutional check on the validity of customary law.

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<sup>199</sup> Ibid, s 245.

<sup>200</sup> [2014] 11 NWLR (Pt 1418) 384 (SC).

<sup>201</sup> [1997] 7 NWLR (Pt 512) 283 (CA)..

<sup>202</sup> CFRN1999(as amended), s 42(1).

**CHAPTER FOUR**

**CHALLENGES AND LIMITATIONS IN THE PROOF OF CUSTOMARY LAW IN**

**NIGERIA**

#### 4.1 The Unwritten Nature of Customary Law

The foremost problem in proving customary law lies in the fact that it is not written down; it is not made by a legislature or published in a government gazette but orally transmitted from one generation to the other by the use and practice of people within the community. It is handed down by elders, in public assemblies, and through the normal conduct of daily life.<sup>203</sup> It appears where this rule must be called in before the formal court, proof of customs is based on facts and must be established, under s.16 & 18 of Evidence Act 2023 by the one who seeks to apply this custom.<sup>204</sup>

The consequence is that the party relying on the custom must produce witnesses who can speak to its existence and content. The Supreme Court affirmed in *Owonyin v Omotosho*<sup>205</sup> that the burden of proving customary law rests entirely on the party asserting it, and that the standard must be sufficient to satisfy the conscience of the court. This burden is made heavier by the fact that oral transmission is inherently susceptible to distortion, selective recall, and deliberate exaggeration.<sup>206</sup>

Igbineweka and Enakireru have noted that courts often receive sharply conflicting oral accounts of the same custom from witnesses produced by opposing parties, making it almost impossible to identify the true rule with any confidence.<sup>207</sup> In such circumstances, the court must make a credibility assessment with little objective material to guide it. This was precisely the difficulty confronted by the Supreme Court in *Owonyin v Omotosho*<sup>208</sup> and *Zaidan v Mohssen*,<sup>209</sup> where

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<sup>203</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press, 1956) 78.

<sup>204</sup> Evidence Act 2023, s 16 and s 18.

<sup>205</sup> (1961) 1 All NLR 304 (SC).

<sup>206</sup> A Igbineweka and E Enakireru, 'Customary Law in Nigeria: Interrogating the Issue of Judicial Notice' (2020) 1 *African Customary and Religious Law Review (ACARELAR)* 7.

<sup>207</sup> *Ibid*, 8.

<sup>208</sup> (1961) 1 All NLR 304 (SC).

<sup>209</sup> (1973) 11 SC 1.

conflicting community testimony on the applicable custom required the court to choose between competing accounts without the assistance of any written record.

Documentary sources such as colonial administrative reports, anthropological monographs, and the records of native courts have been used as secondary evidence of customary rules. Keay and Richardson have also pointed out that these types of documents are likely to have been influenced by the misconceptions of those colonial officials who did not really understand the people whom they were writing about and that decisions should not rely heavily on such documents, in particular, when they contradict the live testimony of those within the community.<sup>210</sup>

Yet another issue is the constantly changing nature of customary law; even if a rule was judicially noticed in a past case, it may have long ceased to be applied by members of the community when a new case is heard. The temporal displacement of customary law has been correctly pinpointed by Nwocha; he stated that, 'The disparity between customary law recorded in the courts and customary law as lived by the community is the perpetual and undervalued cause of Nigerian error'.<sup>211</sup> The court in *Meribe v Egwu* recognizes the danger of allowing custom to become anachronistic; the court indicated that it should be tested at the time when it is invoked, and not by the interpretations given it in prior cases.<sup>212</sup>

#### **4.2 Variation Across Communities**

Nigeria possesses about 350 different ethnic groups and all of them are guided by their own indigenous customary law which contains different rules which might materially differ, or even, be in direct contradiction with, those of neighboring people.<sup>213</sup> It is this complexity of Nigeria's

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<sup>210</sup> Ibid, 71.

<sup>211</sup> Nwocha ME 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) 7(4) *Beijing Law Review* 430.

<sup>212</sup> (1976) 1 All NLR 266.

<sup>213</sup> Yemi Osinbajo 'Nigeria's Indigenous Legal Order' (2002) 46(2) *Journal of African Law* 161.

socio-legal field that poses many problems for judges required to determine and ascertain what custom is to be applied to a dispute.<sup>214</sup>

The difficulty of resolving these disputes appears more pronounced between different communities or in centers where people of varying ethnics backgrounds live and conduct business. In such cases, the court must first determine which community's customary law governs the transaction or relationship, a preliminary choice-of-law inquiry that may itself be contested. As Nwauche has observed, there is no codified conflicts-of-customary-law rule in Nigerian law, and courts have developed largely ad hoc approaches to resolving this preliminary question.<sup>215</sup>

Even within a single ethnic group, customs may vary from one town or lineage to another. The Supreme Court in *Nzekwu v Nzekwu* cautioned expressly against the assumption that a custom established in one Igbo community necessarily obtains across all Igbo communities, emphasizing that each community's customs must be proved separately.<sup>216</sup> It was the factual situation of courts occasionally erring on the side of extrapolating from the custom of one sub-group to that of the entirety of a larger ethnic nation which inspired the cautionary principle.<sup>217</sup>

Kiye, writing comparatively, has observed that variation in customary law across communities is not unique to Nigeria but characterizes customary law systems throughout Anglophone Africa.<sup>218</sup> It states that the same general principles (like a rule relating to female children's right of inheritance) can be implemented in one society in a way that is consistent with constitutional rights and in another society in a way that is demonstrative of the violation of basic rights.<sup>219</sup> This

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<sup>214</sup> Epiphany Azinge, *Sources of Nigerian Law* (Nigerian Institute of Advanced Legal Studies 1990) 77.

<sup>215</sup> ES Nwauche 'The Place of Customary Law in the Constitutional State of Nigeria' (2010) 54(2) *Journal of African Law* 267.

<sup>216</sup> (1989) 2 NWLR (Pt. 104) 373 (SC).

<sup>217</sup> Niki Tobi, *Cases and Materials on Nigerian Customary Law* (Malt House Press Ltd 1997) 98.

<sup>218</sup> Emmanuel Mikano Kiye, 'The Myth of "Judicial Customary Law": Reflections from Anglophone Cameroon' (2020) 12(1) *Inkanyiso: Journal of Humanities and Social Sciences* 181.

<sup>219</sup> *Ibid*, 183.

variation makes uniform judicial treatment extraordinarily difficult and underlines the need for community-specific proof in every case.<sup>220</sup>

Urbanization and internal migration have intensified this problem. Many Nigerians simultaneously participate in multiple customary legal communities, having been born in one community, married under the customs of another, and residing in a city where neither set of customs is widely known. Enabulele and Bazuaye have argued that courts must develop a more principled analytical framework for identifying the applicable customary law in such multi-community situations, rather than relying on the largely intuitive approaches that currently prevail.<sup>221</sup>

#### **4.3 Conflicting Evidence and Expert Testimony**

Where a custom is not judicially noticed under section 16 of the Evidence Act 2023, the party relying upon it must prove it through evidence.<sup>222</sup> In practice, this almost invariably involves the production of witnesses who are knowledgeable about the custom of the relevant community.<sup>223</sup> The problem is that opposing parties routinely produce witnesses who offer contradictory accounts of what the custom prescribes, leaving the court to resolve a conflict that cannot be determined by reference to any written authority.<sup>224</sup>

Osunbor has identified witness partiality as a particularly serious concern in this context, arguing that the social bonds of kinship, political allegiance, and shared economic interest that characterize

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<sup>220</sup> *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt. 104) 373 (SC).

<sup>221</sup> Anthony O Enabulele and Bright O Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 93.

<sup>222</sup> Evidence Act 2023, s 16.

<sup>223</sup> *Owonyin v Omotosho* (1961) 1 All NLR 304 (SC).

<sup>224</sup> Antony N Allott, *New Essays in African Law* (Butterworths African Law Series, 1965) 82.

close-knit Nigerian communities make it unrealistic to expect entirely impartial testimony on questions of custom.<sup>225</sup>

The courts have sometimes sought to resolve this difficulty by requiring corroboration of customary law testimony. In *Agboola v UBA Plc*,<sup>226</sup> the Supreme Court stated that where there is no corroboration, the testimony of one witness cannot alone prove a custom, but instead the court must seek further evidence from corroborating testimony or documentary evidence. However this strict rule of corroboration is not always applied strictly.<sup>227</sup>

Expert testimony offers one potential avenue for resolving conflicting accounts. Section 18 of the Evidence Act 2023 permits the court to receive the opinion of persons with special knowledge of a custom as evidence of its existence and content.<sup>228</sup> In practice, expert witnesses on customary law tend to be community elders, traditional rulers, or long-resident members of the relevant community. Igbineweka and Enakireru<sup>229</sup> have noted that academic experts, anthropologists or sociologists are occasionally called, particularly where the custom is complex or obscure, though their evidence may carry less persuasive weight than that of insiders with direct community experience.

The evaluation of expert testimony in customary law cases was addressed by the Supreme Court in *Agbai v Okagbue*,<sup>230</sup> where the court emphasized that the reliability of a witness on questions of customary law must be assessed not only by reference to personal credibility but also by the internal consistency of the witness's account and its concordance with other available evidence. The court

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<sup>225</sup> Ibid, 469.

<sup>226</sup> (2011) 11 NWLR (Pt. 1258) 375 (SC).

<sup>227</sup> Guy Ben-David 'The Corroborative Rule from a Comparative and Critical Perspective' (2019) *International Journal of Evidence & Proof* 79.

<sup>228</sup> Evidence Act 2023, s 18.

<sup>229</sup> Faith Osehuotue Igbineweka and Eric Omo Enakireru 'Customary Law in Nigeria: Interrogating the Issue of Judicial Notice' (2022) 2 *African Customary and Religious Law Review* 8.

<sup>230</sup> (1991) 7 NWLR (Pt. 204) 391 (SC).

further warned that interested parties frequently manipulate or selectively present the customs of their community to serve their litigation interests, and that courts must be vigilant against such manipulation.<sup>231</sup>

Asein has criticized the absence of clear judicial guidelines for the evaluation of customary law testimony, arguing that the inconsistency in approach across different courts and different regions undermines the predictability and fairness of the adjudicative process.<sup>232</sup> He recommends the development of judicially sanctioned criteria governing the qualifications of expert witnesses in customary law matters and the minimum evidentiary requirements for proof of a disputed custom.<sup>233</sup>

#### **4.4 Subjectivity in Judicial Interpretation**

Even where the factual content of a custom is established to the court's satisfaction, its application is mediated by the validity tests prescribed by Nigerian law, and the application of those tests introduces a significant element of judicial subjectivity. The most important source of this subjectivity is the repugnancy test, which requires the court to withhold recognition from any custom that is repugnant to natural justice, equity, and good conscience.<sup>234</sup>

The concepts of natural justice, equity, and good conscience are not given precise statutory definitions, and their content must be supplied by the court in each case. An issue that is 'repugnant to the judge' may well be seen by another judge as 'a lawful expression of a widely held moral

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<sup>231</sup> *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt. 104) 373 (SC).

<sup>232</sup> JO Asein, *Introduction to Nigerian Legal System* (2nd edn Ababa Press 2005) 85.

<sup>233</sup> *Ibid*, 90.

<sup>234</sup> Olayide Adigun, *Cases and Materials on Nigerian Customary Law* (University of Lagos Press, 1987) 40



consensus', especially if the custom concerned is a religious or cultural one, of which the judge is ignorant.<sup>235</sup>

This principle of English law, that "No rule of customary law is to be applied which is repugnant to established notions of justice", was set by the Privy Council in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*<sup>236</sup> however, the limits of the principle were, initially, to be established by the courts as they arose on successive cases, with no clear guiding principles.

According to Taiwo, The courts have consistently failed to give a reasoned and principled basis to public policy in the customary law domain, relying solely on the assertion that the custom is contrary to public policy without justification.<sup>237</sup> The result is a body of case law that gives little guidance to practitioners about how the test will be applied in future disputes.<sup>238</sup>

The incompatibility test, though more objective in requiring a comparison between the alleged custom and a written statutory text, also involves a degree of judicial discretion in determining whether the statute was intended to displace the customary rule, whether both can operate concurrently, and what the practical consequences of each interpretive choice would be.<sup>239</sup> Nwauche has argued that courts have sometimes been too ready to find incompatibility, effectively displacing a custom without adequate justification.<sup>240</sup>

There is not a formal binding precedent applicable in questions relating to customary law as custom is a matter of fact and not of law and, thus conflicting decisions on the existence of a particular

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<sup>235</sup> Kingsley Nwabueze Edeh, 'The Validity and Repugnance of Customary Law in Nigeria' (2026) 15.

<sup>236</sup> [1931] AC 662 (PC).

<sup>237</sup> OY Taiwo 'The Public Policy Test in Nigerian Customary Law' (2016) 10(2) *African Journal of Legal Studies* 237.

<sup>238</sup> *Ibid*, 238.

<sup>239</sup> *Meribe v Egbu* (1976) 1 NMLR 165.

<sup>240</sup> Enyinna S Nwauche, 'State Response to Outcomes of Traditional Justice Resolution Mechanisms in Commonwealth Africa: Customary Arbitration in Nigeria and Ghana' (2022) 4 *Journal of Commonwealth Law* 271.

custom have to be resolved on reference to higher authorities.<sup>241</sup> While Supreme Court decisions carry significant persuasive weight, they do not bind lower courts in customary law matters in precisely the same way as decisions on general law. This limitation perpetuates inconsistency in the system and increases the likelihood of unjust outcomes for litigants who cannot predict how a court will apply the applicable tests.

#### **4.5 Conflict Between Customary and Statutory Law**

A persistent and structurally significant source of difficulty in the application of customary law is the tension between customary norms and the provisions of both the Constitution and ordinary legislation. The Constitution of the Federal Republic of Nigeria<sup>242</sup> is the supreme law, and any rule, whether statutory, common law, or customary, that is inconsistent with its provisions is void to the extent of the inconsistency. The fundamental rights provisions in Chapter IV of the Constitution of the Federal Republic of Nigeria<sup>243</sup> have proved especially significant in shaping the boundaries of permissible customary practice.

The conflict between customary inheritance rules and the constitutional right to freedom from discrimination has generated the most prominent body of judicial decisions in this area. In *Mojekwu v Mojekwu*,<sup>244</sup> the Court of Appeal struck down the Oli-ekpe custom of Nnewi in Anambra State, which permitted a male family member to inherit the estate of a deceased male relative to the exclusion of the latter's daughters, as unconstitutionally discriminatory. The Supreme Court confirmed and extended this position in *Ukeje v Ukeje*,<sup>245</sup> delivering a definitive ruling that no

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<sup>241</sup> TO Elias, *The Nigerian Legal System* (Routledge Revivals, Taylor & Francis 2025) 186.

<sup>242</sup> 1999 (as amended), s 1(3).

<sup>243</sup> *Ibid*, s 33–46.

<sup>244</sup> (1997) 7 NWLR (Pt. 512) 283 (CA).

<sup>245</sup> (2014) LPELR-22724 (SC).

Nigerian customary law could validly deny female children the right to share in their deceased father's estate.

In *Muojekwu v Ejikeme*,<sup>246</sup> it was established that the courts have the power and responsibility to declare customary laws that infringe on constitutional rights invalid and that there is no excuse for upholding customary practices that denigrate the basic human dignity of any individual.

Conflict arises between custom and ordinary statute in areas apart from the constitution. For instance the Land Use Act 1978 which places all lands in every state under the control of the Governor and requires a statutory consent and certification for every land transaction completely dismantled the communal customary family, ancestral and communal land tenure systems and this has created an arguably inelegant body of law on the surviving customary interests in land.<sup>247</sup> Courts have had to grapple with the question of which customary land rights survive the Act's operation, producing a body of case law that is, in some respects, difficult to reconcile.<sup>248</sup>

Similar tension has also been created between the Matrimonial Causes Act and the Marriage Act with the former providing a separate statutory framework for marriages contracted there-under and leaving custom still applicable to customary marriages between persons.<sup>249</sup> In *Osamwonyi v Osamwonyi*,<sup>250</sup> the Supreme Court was required to determine if a customary dissolution of a statutory marriage could be recognized; it is an illustration of the practical problems inherent at the meeting of two systems of law. Asein argues that these meeting points necessitate a more fully

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<sup>246</sup> (2000) 5 NWLR (Pt. 657) 402 (SC).

<sup>247</sup> Land Use Act 1978, s 1.

<sup>248</sup> *Registered Trustees of the Apostolic Church v Attorney-General of Oyo State* (1984) 1 SCNLR 91.

<sup>249</sup> Matrimonial Causes Act, Cap M7, Laws of the Federation of Nigeria 2004, s 2; Marriage Act, Cap M6, Laws of the Federation of Nigeria 2004, s 33.

<sup>250</sup> (1973) 4 SC 1.

articulated and principled conflicts of laws framework than has thus far been willing to venture to articulate by the Nigerian courts.<sup>251</sup>

#### **4.6 Gender Discrimination and Human Rights Challenges**

The relationship between customary law and the constitutional guarantee of equality before the law is one of the most contested aspects of Nigerian customary law jurisprudence.<sup>252</sup> Section 42 of the Constitution of the Federal Republic of Nigeria<sup>253</sup> prohibits discrimination on grounds of sex, origin, or community, and this prohibition has been invoked by the courts with increasing frequency to invalidate customary rules that operate to the systematic disadvantage of women.

The problem of gender discrimination in customary law is not confined to the specific issue of inheritance, though that is where the leading decisions have been made. Customary rules in many Nigerian communities also govern bride price, the obligations of widows during mourning, the custody of children on dissolution of a customary marriage, and the right of women to hold and alienate property independently. Many of these rules have historically subordinated the autonomy and interests of women to the authority of male relatives or community institutions.<sup>254</sup>

In *Mojekwu v Mojekwu*, Tobi JCA described the customary exclusion of female children from inheritance as irreconcilable with the principles of natural justice and an affront to the dignity of womanhood.<sup>255</sup> The language of that decision reflects a growing judicial consensus that

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<sup>251</sup> JO Asein, *Introduction to Nigerian Legal System* (2nd edn, Ababa Press 2005) 87.

<sup>252</sup> Oluyemisi Bamgbose SAN 'Customary Law, Women's Rights and the Two Faces of Law in Nigeria' (2002) 16(3) *International Journal of Law, Policy and the Family* 406.

<sup>253</sup> 1999 (as amended), s 42.

<sup>254</sup> *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt. 512) 283 (CA) per Tobi JCA.

<sup>255</sup> *Ibid.*

constitutional rights must prevail over the perpetuation of cultural practices that inflict systemic disadvantage on women and girls.<sup>256</sup>

Nwauche has argued that judicial intervention, while necessary, is insufficient as a stand-alone response to gender discrimination in customary law.<sup>257</sup> He contends that lasting reform requires complementary legislative action giving clear statutory expression to the principle of gender equality in customary law administration as well as sustained community-level engagement to facilitate the organic evolution of customs from within the communities that practice them. Courts can invalidate specific discriminatory rules, but they cannot by themselves transform the social attitudes that sustain those rules.<sup>258</sup>

The Supreme Court's decision in *Idehen v Idehen* extended the human rights challenge to customary widowhood practices, holding that customary rules which confined a widow to her matrimonial home during a prescribed period of mourning and subjected her to degrading treatment were inconsistent with the constitutional guarantees of personal liberty and dignity and could not be sustained under any valid customary law test.<sup>259</sup>

Kiye has noted, in the comparative context, that the tension between universal human rights norms and culturally specific customary practices is a defining challenge for all post-colonial legal systems in Anglophone Africa, and that Nigerian courts have an opportunity to develop a distinctive and principled jurisprudence that neither uncritically accepts all customary practices nor imposes alien values upon communities without regard to their own capacity for internal reform.<sup>260</sup>

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<sup>256</sup> *Ukeje v Ukeje* (2014) LPELR-22724 (SC) per Rhodes-Vivour JSC.

<sup>257</sup> ES Nwauche, 'Distinction Without Difference: The Constitutional Protection of Customary Law and Cultural, Linguistic and Religious Communities' (2009) *Journal of Comparative Law in Africa* 86.

<sup>258</sup> *Ibid*, 90.

<sup>259</sup> *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 382 (SC).

<sup>260</sup> Mikano Emmanuel Kiye, 'The Importance of Customary Law in Africa: A Cameroonian Case Study' (LAP Lambert Academic Publishing, 2012) 29.

The application of the repugnancy test to gender-discriminatory customs has been criticized by some scholars as inconsistent and insufficiently rigorous, leaving in place many discriminatory practices that ought to be struck down.<sup>261</sup> At the same time, critics from a culturally relativist perspective argue that the test has been applied too aggressively, substituting the value judgements of Western-trained judges for the genuine consensus of the affected communities. Navigating these competing perspectives remains one of the most difficult challenges in Nigerian customary law jurisprudence.<sup>262</sup>

#### **4.7 Challenge in Codification of Customary Law**

The codification of customary law which simply means reducing customary rules to written, systematically organized texts has long been proposed as a remedy for the challenges of proof and inconsistency identified in the preceding sections. An authoritative written code would, in principle, address the evidential difficulties arising from the oral character of customary rules, reduce the scope for conflicting testimony, promote judicial consistency, and render customary law accessible to all Nigerians entitled to rely upon it.<sup>263</sup>

Nigeria has not been without effort in this direction. The Law Reform Commission of Nigeria undertook a detailed review of customary law codification in the 1970s, producing reports that documented the practices of various communities and proposed models for their codification.<sup>264</sup> Several states enacted restatements of customary law in specific fields, most notably matrimonial

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<sup>261</sup> *Agidigbi v Agidigbi* (1996) 6 NWLR (Pt. 454) 300 (SC).

<sup>262</sup> EO Odiaka, 'The Challenge of Applying the Repugnancy Test in Nigerian Customary Law' in *Nigerian Legal System* (Lagos, Nig Malthouse Press Ltd 2011) 123.

<sup>263</sup> Law Reform Commission of Nigeria, *Report on the Unification of Customary Law in Nigeria* (Government Printer 1975) 15.

<sup>264</sup> Edoba Omoregie (SAN) 'Law Reform and Law Review in Nigeria: Prospects and Challenges' (ResearchGate, year) <<https://www.researchgate.net>> accessed 28 May 2026, 12.

law and intestate succession, and the Customary Court Laws of various states vest customary courts with jurisdiction to apply recorded local rules.<sup>265</sup>

Despite these efforts, comprehensive codification has remained elusive. Elias concluded that the sheer diversity of customary legal systems across Nigeria's many ethnic communities makes any single national code unattainable, and that the most that can be achieved through codification is the recording and systematization of the customs of individual communities.

Beyond the practical difficulty of diversity, codification raises conceptual problems. Customary law is a living body of norms, responsive to changes in the social and economic circumstances of the community.<sup>266</sup> The act of codification; fixing rules in authoritative written form at a given moment, risks crystallizing the law in a form that no longer reflects current community practice and impeding its natural evolution. In practice, it has been argued that codification generally leads to the favored conception of customary law among learned elites and state actors taking part in the process over and above the consensus among the population at large.<sup>267</sup>

The codification process is also complicated by the requirement that any codified rule must still satisfy the validity tests imposed by Nigerian law before it can be applied by a formal court.<sup>268</sup> A carefully drafted customary law code would need to be scrutinized for compliance with the repugnancy, incompatibility, and public policy tests, which is a review process that would itself

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<sup>265</sup>TO Elias, *Nigerian Legal System* (4th edn, University of Lagos Press 1971) 40.

<sup>266</sup>Gordon R Woodman, 'The Future of Customary Law in Africa' *The Future of Customary Law in Africa* (Royal Academy of Overseas Sciences, 1997) 92.

<sup>267</sup>Tom W Bennett and Willem Vermeulen, 'Codification of Customary Law' (2000) 44(2) *Journal of African Law* 216.

<sup>268</sup>CON Ugwuanyi, 'The Challenge of Aligning Codified Customary Law with Nigerian Legal Validity Tests' *Journal of African Law* 115.

require the exercise of judicial discretion whose unpredictability the codification exercise was intended to reduce.<sup>269</sup>

In *Nwugege v Anetekhai*,<sup>270</sup> the Supreme Court acknowledged the tension between the aspiration to codify and the need to preserve the flexibility of customary law, holding that any written statement of custom must be interpreted in the light of the living practice of the community and cannot be read as exhaustively displacing the unwritten rules of that community. This position confirms that even codified customary law would not eliminate the need for the contextual factual inquiry that currently attends proof of custom in Nigerian courts.<sup>271</sup>

Osunbor has proposed selective codification as a pragmatic middle course, suggesting that the most frequently litigated areas, which include; inheritance, matrimony, and land be reduced to clear written rules, while leaving other areas to evolve in their traditional unwritten form.<sup>272</sup> Enabulele and Bazuaye have cautioned, however, that selective codification carries its own risks, including the danger that courts will apply codified rules mechanically without sensitivity to the community context from which they derive, and that un-codified areas will suffer from increased uncertainty.<sup>273</sup>

The challenges attending the proof of customary law in Nigeria are substantial, varied, and rooted in the structural characteristics of the country's pluralistic legal order.<sup>274</sup> The unwritten nature of customary law creates evidentiary difficulties that the Evidence Act 2023 alone cannot resolve. The diversity of customary practices across over 350 ethnic communities necessitates a

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<sup>269</sup> HWO Okoth-Ogendo, 'The Imposition of Law' (Academic Press, New York/London, 1979) 164.

<sup>270</sup> (1976) 11 SC 235.

<sup>271</sup> Ephraim Akpata, '*Nigerian Customary Law*' (Spectrum Law Publishing, Ibadan, 1997) 82.

<sup>272</sup> AO Osunbor, 'Law in the Society: A Critique of the Codification of Customary Law' (1987) 31(1-2) *Journal of African Law* 114.

<sup>273</sup> AO Enabulele and B Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 79.

<sup>274</sup> Niki Tobi, *The Nigerian Legal System* (2nd edn, Ababa Press Ltd, Lagos 2005) 74.



community-specific approach to proof that the formal court system is not always equipped to deliver.<sup>275</sup>

Conflicting testimony and the partial reliability of witnesses undermine the certainty with which customary rules can be established, while the subjectivity inherent in the application of the repugnancy, incompatibility, and public policy tests produces inconsistent outcomes that weaken the legitimacy of the adjudicative process.<sup>276</sup> The tension between customary law and statutory and constitutional provisions mostly illustrated in the field of gender equality continues to generate litigation and doctrinal uncertainty that no single line of decisions has fully resolved.<sup>277</sup>

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<sup>275</sup> ES Nwauche, 'Citizenship and Customary Law in Africa' (Routledge, London, 2023) 128.

<sup>276</sup> Amos Osaigbovo Enabulele and Bright Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 79.

<sup>277</sup> Celestine I Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41(2) *Harvard International Law Journal* 381.

## CHAPTER FIVE

### SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

#### 5.1 Summary of Findings

The task of this work was to examine the validity tests and the methods of proving customary law within Nigeria's pluralistic legal system. After a thorough analysis of the relevant statutory enactments, constitutional provisions, judicial decisions, and scholarly commentary, the findings of this study are as follows:

The three principal tests for the validity of customary law in Nigeria; the repugnancy test, the incompatibility test, and the public policy test are colonial-era constructs that have been retained and entrenched in the post-independence legal order through statutes such as the High Court Laws of the various states and through judicial practice.<sup>278</sup> Because customary law is predominantly unwritten and transmitted orally from generation to generation, the requirement imposed by sections 16 and 18 of the Evidence Act 2023 that it be proved as a question of fact in every proceeding places a disproportionate and frequently unrealistic evidential burden on the parties who rely upon it.<sup>279</sup> Courts regularly receive conflicting oral testimony from witnesses produced by opposing parties, and in the absence of any authoritative written record, the court is forced to make credibility determinations without objective guidance. The supremacy of the Constitution of the Federal Republic of Nigeria 1999 and the fundamental rights guaranteed in Chapter IV have

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<sup>278</sup> Evidence Act 2023, ss 16, 18.

<sup>279</sup> ME Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) 7 Beijing Law Review 430.

increasingly come into conflict with customary practices, most prominently in the field of gender equality.<sup>280</sup>

The landmark decisions in *Ukeje v Ukeje* and *Mojekwu v Mojekwu* demonstrate that no customary rule, however long-standing, may survive if it derogates from the constitutional prohibition of discrimination under section 42 of the Constitution. Similarly, in *Idehen v Idehen*, the Supreme Court invalidated customary widowhood practices that violated the constitutional guarantees of personal liberty and dignity. While this judicial intervention is a necessary corrective, it has also exposed the structural inability of the courts alone to transform the underlying social attitudes that sustain discriminatory customs.<sup>281</sup>

The repugnancy test and the public policy test, by virtue of their reliance on undefined concepts such as "natural justice, equity, and good conscience" and "public interest," vest individual judges with a broad and largely unguided discretion that has produced inconsistent and at times irreconcilable outcomes across the courts. As Taiwo has observed, courts have persistently failed to supply reasoned and principled explanations for their public policy determinations, and the body of resulting case law gives legal practitioners inadequate guidance in predicting how future disputes will be resolved. The absence of formal binding precedent in customary law matters, since custom is a question of fact and not of law, compounds this uncertainty and perpetuates arbitrariness in the adjudicative process.<sup>282</sup> The interface between sections 16, 73, 74, and 122 of the Evidence Act 2023 and the general rule that customary law must be proved as a fact creates persistent doctrinal ambiguity regarding the circumstances in which courts may dispense with formal proof by taking

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<sup>280</sup> *Meribe v Egbu* (1976) 1 NMLR 165.

<sup>281</sup> AO Enabulele and B Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts' (2019) 63(1) *Journal of African Law* 79.

<sup>282</sup> TO Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 72.

judicial notice of a custom that has been established in prior proceedings. While the superior courts have generally maintained that they cannot apply customary law on the basis of personal knowledge alone, and that judicial notice is confined to customs conclusively established in a settled course of prior decisions, the practical application of this principle varies between courts and between regions.

Nigeria's over 350 ethnic communities each possess distinct customary practices that may differ materially from those of neighbouring communities, and the absence of any codified conflicts-of-customary-law rules means that courts must resolve choice-of-law questions in multi-community disputes on a largely ad hoc basis.<sup>283</sup> Urbanization and internal migration have intensified these difficulties, creating situations in which Nigerian citizens simultaneously participate in multiple customary legal communities and cannot readily predict which community's customs a court will apply to their affairs.

Although codification of customary law has long been proposed as a remedy for the evidential and consistency challenges identified above, comprehensive codification has remained unachieved in Nigeria.<sup>284</sup> The Law Reform Commission's reports of the 1970s and the selective restatements produced by various states have not produced a coherent, nationally accessible body of codified custom.

## **5.2 Recommendations**

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<sup>283</sup> *Zaidan v Mohssen* (1973) NNLR 1 (SC).

<sup>284</sup> JO Asein, *Introduction to Nigerian Legal System* (2nd edn, Ababa Press Ltd, Lagos 2005) 87.

The analysis conducted in this study reveals structural deficiencies in the validity tests and proof mechanisms for customary law in Nigeria that require deliberate legislative, judicial, and institutional intervention. The following specific recommendations are therefore proposed:

The National Assembly, in collaboration with the Nigerian Law Reform Commission, should undertake a comprehensive review of the repugnancy, incompatibility, and public policy tests as currently formulated in the various state High Court Laws and judicial practice, with a view to replacing the vague colonial-era language of "natural justice, equity and good conscience" with precise, indigenously grounded criteria that assess customary practices against the Constitution, the fundamental rights of the individual, and the genuine consensus of the affected community.<sup>285</sup>

This reform should be carried out through a process of broad consultation with traditional institutions, community representatives, and civil society organizations, so as to ensure that the revised tests command legitimacy among the communities whose customs they govern. This will bring an end to the practice, criticized by scholars such as Keay and Richardson, of evaluating indigenous customs through a foreign moral lens.<sup>286</sup>

The National Assembly should enact dedicated legislation governing the proof of customary law in Nigerian courts, supplementing the existing provisions of sections 16 and 18 of the Evidence Act 2023 with clear rules specifying the qualifications required of expert witnesses in customary law matters, the minimum evidentiary foundation necessary to establish a disputed custom, and the circumstances in which judicial notice may properly be taken of customs established in prior proceedings.<sup>287</sup> The Federal Government should establish, under the Nigerian Institute of

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<sup>285</sup> *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 382 (SC).

<sup>286</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended), s 36(12).

<sup>287</sup> OY Taiwo, 'The Public Policy Test in Nigerian Customary Law' (2016) 10(2) *African Journal of Legal Studies* 237, 238.

Advanced Legal Studies or a newly created body, a permanent National Customary Law Research and Documentation Bureau charged with conducting systematic, community-by-community surveys of customary practices across Nigeria's ethnic communities and producing authoritative, regularly updated written records of those practices. These records should be made accessible to courts, legal practitioners, and the public, and should be structured so as to be admissible in evidence as authoritative statements of community custom under section 70(2) of the Evidence Act 2023. This institutional mechanism would directly implement the demands of the Living Law Theory by ensuring that courts have access to current, independently verified information about actual community practice, rather than being confined to aging judicial records or the potentially partial testimony of interested witnesses. The Supreme Court and the National Assembly should jointly address the absence of principled rules for resolving conflicts of customary law in multi-community disputes. The Supreme Court should, through appropriate cases, develop and articulate a structured analytical framework for identifying the applicable customary law in situations involving persons from different communities, applying the same rigour it brings to conflicts-of-laws questions in private international law. Rather than attempting a single comprehensive national code, the Law Reform Commission of Nigeria should coordinate a programme of selective, community-driven codification targeting the areas of customary law most frequently litigated before Nigerian courts, principally intestate succession, matrimonial rights and obligations, and customary land tenure.

This programme should be conducted in close consultation with the communities whose customs are to be codified, ensuring that the final texts represent current community practice rather than the preferences of legal and administrative elites. Codification should expressly preserve the dynamic character of customary law by providing for periodic review and amendment in consultation with

community institutions. In line with the constitutional mandate under section 42 of the Constitution and the emerging jurisprudence of the Supreme Court in *Ukeje v Ukeje* and *Mojekwu v Mojekwu*, the National Human Rights Commission, in collaboration with State Ministries of Justice, should conduct a systematic review of customary rules across Nigerian communities that are known to impose disadvantage on women and girls, with a view to bringing such rules to the attention of the courts or to the legislature for formal invalidation or abolition.<sup>288</sup> This institutional process would complement the case-by-case judicial intervention that has hitherto been the primary mechanism for addressing gender-discriminatory customs, and would address the concern that lasting reform requires more than judicial invalidation of individual rules but demands sustained community-level engagement and clear legislative expression of the principle of gender equality in customary law administration.

### **5.3 Conclusion**

The proof and validity of customary law represent one of the most challenging and constitutionally significant areas of Nigerian jurisprudence, for it is at this intersection that the imperatives of cultural preservation, individual rights, and institutional integrity converge most acutely. This study has demonstrated that Nigeria possesses a legally recognized framework for the administration of customary law that is anchored in the 1999 Constitution, the Evidence Act 2023, and a substantial body of Supreme Court jurisprudence. The three validity tests; repugnancy, incompatibility, and public policy together provide the formal architecture through which customary law is assessed and proved in Nigerian courts.

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<sup>288</sup> Evidence Act 2023, s 16; Evidence Act 2023, s 122.

However, the study has equally demonstrated that this formal architecture is beset by deep structural vulnerabilities. The colonial origins of the validity tests impose external standards of evaluation that sit uneasily with the claims of cultural authenticity and community self-governance. The unwritten character of customary law creates evidentiary burdens that the formal court system is ill-equipped to discharge consistently and fairly. The diversity of customary practices across Nigeria's ethnic communities generates jurisdictional fragmentation that no principled conflicts-of-law framework has yet resolved. And the absence of comprehensive and reliable documentary records of customary rules forces courts to rely on inevitably partial oral testimony in circumstances where the demand for impartiality can rarely be satisfied. The repeated failure of customary law claims before Nigerian courts is not principally a product of the inadequacy of the substantive customary rules themselves; it is above all a consequence of the institutional incapacity of the legal system to receive, evaluate, and apply those rules in a manner that is consistent, transparent, and sensitive to the living reality of community practice.

Ultimately, the revitalization of customary law's role in Nigeria's legal system requires a deliberate and sustained investment in institutional capacity through the reform of validity tests, the codification of evidentiary procedures, the establishment of research and documentation mechanisms, and the development of community-driven codification programmes. Only through such structural reform, undertaken in a spirit of genuine engagement with Nigeria's customary communities and guided by unwavering fidelity to the constitutional rights of every Nigerian, can the legitimate claims of customary law to recognition and enforcement be secured within a modern and just legal order.



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