

The Dynamics and Genius of Nigeria's Indigenous Legal Order

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This article challenges the colonial delegitimization of Nigeria's customary law. The author describes customary law's fundamental bases, and argues that these bases are what ensured customary law's survival during colonial rule, and also what provide for customary law's contemporary relevance. Globalization, increased international interaction, and the eclipse of tribal insularity necessitate a permanent form of customary law that is decipherable to foreigners and non-Indigenous people of Nigeria. However, the author opines that if rigidification of customary law is to be avoided, then the present practice of proving it as a fact ought to be retained. Factual proof is defended as an incident of the primordial nature and primary source of customary law, rather than any weakness in the comparison of customary law with the received English law.

Under Nigerian law, after a rule of customary law is proved to exist, the court must consider whether it is judicially enforceable, or whether it is repugnant to natural justice, equity and good conscience. The author argues that the 'repugnancy doctrine' was routinely employed in a legal 'cleansing' mission, and was the engine for the imposition of hegemonic, foreign culture. The author suggests caution in the uncritical and contemporary use of the repugnancy doctrine and its precedents. Other instances of non-judicial enforcement of customary law are also considered, such as the contractual exclusion of customary law, and the exclusion of customary law based on the uncustomary nature of the subject matter of litigation.

Finally, the author addresses the specific question of the constitutionality of customary law. Customary law's patriarchal foundation and general discrimination against women and female children are problematic issues that require sensitive and imaginative judicial use of customary law. The author argues that the Nigerian judiciary should undertake careful constitutional and sociological analysis before striking down any rule of customary law. The court should make reference to South Africa's constitutional experience, which has comparative similarities to Nigeria. The article concludes with a call for an interpretive approach to customary law that ensures its survival and adaptation to the dictates of equality in an egalitarian society.

I INTRODUCTION

An assessment of Nigeria's Indigenous legal order, normatively characterized as customary law, is undertaken in this paper with a view to showing its resourcefulness and ineffaceability in the wake of the colonial expansionist policies of some Western countries, especially Britain, which led to the political and legal colonization of Nigeria until 1 October 1960. Consequently, I shall demonstrate how customary law utilized the tools of flexibility, traditional legal education, absence of writing and the polycentric nature of its disputes to withstand the societal dynamism engendered by the Western colonial invasion of Nigeria. Ironically, these characteristics, which served customary law well during colonial rule, are now threatened by some reformist activities of post-independent Nigeria and some of its scholars. Therefore, this paper examines the necessity or desirability of such reforms.

Modernity has challenged customary law in various ways, particularly with regards to the right of women and female children. Its patriarchal foundation apparently renders it odious to notions of equality and non-discrimination in a free and egalitarian society. Generally, customary law has discriminated against women and female children in some ways that may not stand the test of modernity or equality. Women and female children would seem to be better treated under the received law than customary law. This has presented a sort of dilemma to judges who want to maintain the sanctity of customary law, and at the same time safeguard the rights of women and female children to equal treatment with their male counterparts. Consequently, there has been justifiable argument for an interpretation of customary law that accommodates gender equality.¹ This paper examines some of the cases in which Nigerian judges have confronted this issue on constitutional grounds and suggests ways of reconciling customary law with the constitutionally protected Bill of Rights.

Customary law is the starting-point of Nigeria's legal history. Before the emergence of colonial rule, customary law held sway and enjoyed monolithic application in the geographical territory currently known as Nigeria, composed of erstwhile politically and legally independent nationalities. However, this exclusive dispensation of customary law is not synonymous with substantive similarity. The different regions of Nigeria, or its various nationalities, were, and still are, under different customary law systems, which may overlap in certain specific matters. For instance, the Ibo customary law applies to the Ibo people in eastern Nigeria, the Yoruba customary law to the Yorubas in western Nigeria and Islamic or Moslem

law is regarded as customary law² by the Hausa / Fulani in northern Nigeria. Even within a particular nationality or region, like the Ibos in eastern Nigeria, variations are noticeable in the customary laws of its various communities or groups.

Customary law, by its nature, is geographically and tribally sensitive³ and, in the case of Islamic law, religiously sensitive.⁴ This sensitivity, in addition to the colonizers' sense of legal superiority and supreme contempt for the savages' Indigenous legal order, militated against the application of customary law to British colonialists. Consequently, English law was introduced in Nigeria, beginning with Lagos in 1863 and extending to the rest of the country in 1900.⁵ English law initially applied to British citizens and other foreign nationals subject to British protection, while customary law continued to apply to the Natives of Nigeria.⁶

Gradually, English law became applicable to the Natives of Nigeria, alongside customary law, by means of legal mechanisms and statutes that are the subject of this paper. Currently, the body of Nigerian jurisprudence consists of⁷ customary law, received English law, and law made by the Nigerian legislature or any other law making authority in Nigeria. The contemporaneous application of the above forms of law is systematically

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1. Jill Zimmerman, "The Reconstitution of Customary Law in South Africa: Method and Discourse" (2001) 17 Harv. Black Letter L.J. 197.
 2. *Adesubokan v. Yunusa*, [1971] 1 ALL N.L.R. 225 (S.C. Nigeria) at 229; A. G. Karibi-Whyte, *The Relevance of the Judiciary in the Polity – In Historical Perspective* (Lagos: Nigerian Institute of Advanced Legal Studies, 1987) at 31.
 3. In *Egharevba v. Orunonghae*, [2001] 11 N.W.L.R. [Pt. 724] 318 (C.A. Nigeria) at 337, Ibiyeye, J.C.A. observed: "There is need for more cogent and convincing evidence that the custom of *Igiogbe* has extra-territorial application outside Benin Kingdom." *Igiogbe* is a Benin, mid-western Nigerian custom that entitles the eldest son of the deceased to inherit the land and building wherein the deceased lived until death.
 4. *Kharie Zaidan v. Mohsse*, [1973] 1 ALL N.L.R. [Pt. 11] (S.C. Nigeria) at 86. The Supreme Court of Nigeria held that Moslem law, as customary law, was applicable in a case litigated in a Nigerian court between Moslem Lebanese nationals, domiciled in Lebanon, and concerning property in Nigeria.
 5. A quintessential Nigerian reception statute, substantially similar to earlier reception statutes, is Section 45(1) of the *Interpretation Act, Cap. 89, Laws of the Federation of Nigeria and Lagos 1958*: "Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation."
 6. Throughout this paper, I use the word 'Native' to indicate Indigenous peoples of Nigeria.
 7. A.N. Allot, *New Essays In African Law* (London: Butterworths, 1970) at 9-27; T.O. Elias, "Law In A Developing Society" in M.L. Marasinghe & W.E. Conklin, eds., *Essays On Third World Perspectives In Jurisprudence* (Singapore: Malayan Law Journal PTE., 1984) 375-393.

harmonized by legislation and judicial interpretation, which are subjected to close scrutiny in the subsequent pages.⁸

II MEANING OF CUSTOMARY LAW

Customary law is capable of having different meanings to an anthropologist or sociologist, as compared to a legal theorist.⁹ To appreciate the meaning of

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8. The judicial approach to harmonization of Nigeria's diverse jurisprudence is generally stated by Combe, C.J. in *Labinjoh v. Abake*, [1924] 5 N.L.R. 33 at 36: "The general rule is that, if there is a [N]ative law and custom applicable to the matter in controversy, and if such law and custom is not repugnant to natural justice, equity and good conscience or incompatible with any local Ordinance, and if it shall not appear that it was intended by the parties that the obligations under the transaction should be regulated by English law, the matter in controversy shall be determined in accordance with such [N]ative law and custom".
9. For W.H. Rattigan, "customary law, or as it is called, *mores majorum* or *consuetudinarium* is composed of a large body of rules observed by communities, evidenced by long usages and founded on pre-existing rules sanctioned by the will of the community. It exists independently of a sovereign authority," in *Digest of Customary Law*, 13th ed., (Delhi: The University Book Agency, 1953) at 8; I.A. Schapera stated in *A Handbook of Tswana Law and Custom* (London: Frank Cass and Co., 1938) at 37:

Tswana, like ourselves, have attained a stage of legal development where certain rules of conduct can, in the last resort, be enforced by the material power of compulsion vested in the tribal courts. These courts can compel a man to carry out obligations he has neglected to fulfill, or to make restitution or pay compensation for damage he has done, or to suffer punishment for an offence he has committed. The rules of conduct distinguished from the rest by this ultimate sanction of judicial enforcement may for all practical purposes be regarded as the 'laws' of the Tswana.

In *Kharie Zaidan v. Fatima Khalil Mohssen*, [1973] 1 ALL N.L.R. 86 at 101, the Supreme Court of Nigeria defined customary law as: "[a]ny systems of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway". I believe that this definition is intended to include systems of customary law outside Nigeria. Recently, the same court, in *Bilewu Oyewumi v. Amos Owoade Oginesa*, [1990] 3 N.W.L R (Pt. 196) 182 (C.A. Nigeria) at 207, gave a more detailed definition of customary law: "Customary law is the organic or living law of the [I]ndigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static, is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people. I would say that customary law goes further to impart justice to the lives of those subject to it". Similarly, in *Aku v. Aneku*, [1991] 8 N.W.L.R [Pt. 209] 280, the Nigerian Court of Appeal defined customary law as: "The unrecorded tradition and history of the people which has 'grown' with the 'growth' of the people to stability and eventually becomes an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of a law with respect to place or the subject matter to which it relates". However, John Austin, in *Lectures on Jurisprudence or The Philosophy of Positive Law*, vol. 1, 5th ed., (London: John Murray, 1885) at 87, described it thus:

customary law, one must differentiate between a custom and a customary law.¹⁰ A custom is a rule of conduct. When such a rule of conduct attains a binding or obligatory character it becomes a customary law.¹¹ It is the assent of the community that gives a rule of conduct its obligatory nature and entails that it is supported by a sanction and enforceable. Sanction under customary law, however, does not have the same nature as the sanctions of a modern state, with its full machinery for the administration of justice. Customary sanction takes the form of ostracism, compensation, propitiation, restoration or apology. It is this element of sanction that distinguishes a custom from customary law.¹²

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.

10. According to a South African writer: "Bantu law is often spoken of as Bantu custom. This is a common-law point of view, arising from the fact that Bantu law is unwritten, and since it was originally only ascertainable orally from the Bantu themselves, it was viewed by courts applying the common law as similar to trade custom. There is, however, a clear distinction between Bantu law and Bantu custom, although they are inextricably interwoven", See S.M. Seymour, *Bantu Law in South Africa* (Johannesburg: Juta & Co., 1970) at 13.
11. Sir Carleton Kemp Allen, *Law In The Making* (Oxford: Oxford University Press, 1964) at 67-70.
12. The investigator must remember from the outset that there is a clear *distinction* ... between *law* and *custom*, difficult though the operation often is. Where Native Court records exist, these might be consulted in cases of doubt or difficulty, always subject of course to a scrupulous observance of the law of averages. But where such records do not cover the points at issue, one useful but by no means conclusive test would be to ask whether the alleged practice is *law*, which the Native Courts would enforce, or *custom*, which they would not; perhaps it is better to say, whether the particular practice is recognised by the majority of the local community as binding on all and sundry, or whether it is merely conventional or permissive.

T.O. Elias, "The Problem of Reducing Customary Law to Writing" in A.K.R. Kiralfy, ed., *British Legal Papers* (London: Stevens & Sons, 1958) at 61. Dr. S.N.C. Obi was even more forthright in *The Ibo Law of Property* (London: Butterworths, 1963) at 28-29:

A breach of custom does not occasion any injury to the infringer, because it is not backed by sanction, but a breach of customary law attracts the imposition of the appropriate traditional sanction. For instance, it is a custom of the Ibos of Nigeria that a father obtains a wife for the first son.¹³ Every father ordinarily would like to do that, but no father suffers any legal injury or sanction for failure to get a wife for his first son. Likewise, no son may successfully compel his father under such custom to get a wife for him. It is a mere custom, the breach of which does not attract any sanction. Two examples of custom are the requirements of Yoruba custom that a person genuflect when greeting an elderly person, and that one wears facial tribal marks.¹⁴ Breach of the above attracts no sanction at all. An infringer may be denounced for being rude or modern, but that is the end of the matter. However, a breach of a rule of customary law, *e.g.*, adultery, attracts the full weight of customary sanctions: there will be propitiation followed by ostracism.¹⁵

Therefore, customary law refers to those customs generally accepted by a particular community as binding, the breach of which is supported by customary sanction. This definition covers the distinction between custom and customary law based on the availability of sanction.¹⁶ It also emphasizes

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

13. M.M. Green, *Ibo Village Affairs*, 2d ed., (New York: Frederick A. Praeger, 1964) at 36.
14. An analysis of the different Yoruba tribal marks is contained in Samuel Johnson, *The History of the Yorubas* (Lagos: CSS Bookshop, 1921) at 104-109.
15. G.H. Boehringer, "Aspects of Penal Policy in Africa, With Special Reference to Tanzania" (1971) 15 J. A. L. 182 at 208.
16. Schapera set out to define customary law anthropologically but ended up in a legal definition. He began with a distinction between custom and customary law. He seems to have concluded that sanction was attached to every rule of conduct whether in custom or customary law. Apparently convinced that sanction, in the circumstances, cannot be a basis for the distinction between custom and customary law, he sought the criterion for the distinction in judicial enforcement and thus defined customary law as Schapera, *supra* note 9 at 35-38. But what happens to those rules of conduct that have not come before the courts for judicial enforcement? How do we determine whether they are mere customs or customary law? It suffices to say that sanction is the basis of distinction between custom and customary law.

the general acceptance of a rule of conduct or custom by a community which gives it its binding and enforceable character.

III THE EVIDENTIARY PROBLEM OF CUSTOMARY LAW

The foremost obstacle to any systematic discussion of customary law is its unwritten form. How do we capture its most authoritative statement? When we want to know the elements of a crime, the punishment for it, or the constitutional protection for a right in Nigeria and Canada, we consult the *Criminal Code* or the *Constitution Act*, respectively. But what do we do when, for instance, we want to know the customary law stipulation as to the legitimacy of a child? What is the primary source for a foreign scholar who comes to Nigeria for research on its customary laws?

The truth is that customary law is not in any written form, like a code or constitution. It is embedded in the mind and heart of every Native whose customary law is at issue. This makes a discussion of proof for customary law in a court very interesting. The ascertainment of customary law is, however, not as much of a problem for a Native as for a foreigner. In Nigerian traditional society, the education of a child from birth includes special lectures on the procedural and substantive contents of customary law. Therefore, before the child becomes an adult, he or she already has a mastery of customary law. For instance, in Iboland, a child who attains the age of ten to twelve years is initiated into age-grade society and masquerade cults. These societies teach the child civil rights and obligations and also the customs and customary laws of the tribe. This type of education is passed from generation to generation so that the Natives of a tribe neither have problems with knowledge of their customary law, nor is anybody able to claim ignorance of the customary law.

However, the pre-colonial Nigerian tribes formerly subject to the sole regulation of their customary laws had their tribal boundaries opened to foreign interaction and civilization. The period of tribal insularity thereafter ended. Customary law is no longer the sole concern of Natives because foreigners who intermingle with them can be affected by customary law stipulations. So, such foreigners need to know the customary law provisions. For instance, a foreigner may have consensual sexual intercourse with a Native person of sixteen years under the foreign legal system, but such actions are criminalized by customary law, which is unknown to the foreigner. The need, therefore, for a written or permanent record of customary law is obvious. Many suggestions have been put forward on how to solve this problem of unwritten customary law.

Various writers have suggested that customary law should be reduced to a code or put into a form of restatement, like the *American Restatement*, or that the various customary laws in the country should be ascertained and unified.¹⁷ Of interest are the recent efforts of the state governments of the former Anambra and Imo states¹⁸ of Nigeria who reduced their customary laws to the *Customary Law Manual*.¹⁹ In the style of a code, it states uniform principles or rules of customary law applicable in those states, with local variations where such exist. The ambition of this project is demonstrated in the foreword to the *Manual*: "it is an authentic statement of the customary laws of the East-Central state of Nigeria and I am confident that the handbook will be of great assistance not only to the legal profession but also to everyone interested in the society in which we live."²⁰ The problem with this effort is that it has the tendency to rigidify or fossilize customary law. A code, restatement or manual, unless periodically reviewed, may enjoy such favour of citation by superior courts that their provisions are made inflexible and unquestioning statements of the customary law.²¹ Such a result may materially depart from the real evolutionary nature of customary law. Perhaps the best solution is to continue the present practice of proving customary law as fact by calling witnesses versed in customary law, which has the advantage of leaving customary law's flexibility unimpaired.²²

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17. William Twining, "The Place of Customary Law in the National Legal Systems of East Africa" (Lectures, University of Chicago Law School, Chicago, April-May 1963) 32-53; E. Cotran, "The Place of Customary Law in East Africa" in *East African Law Today* (London: The British Institute of International and Comparative Law, 1966) at 72; T. O. Elias, "Towards a Common Law in Nigeria" in T.O. Elias, ed., *Law and Social Change in Nigeria* (Lagos: University of Lagos and Evans Brothers, 1972) at 254; Dr. Nwakanma Okoro, "Integration of the Customary and the General (English) Laws of Succession in Eastern Nigeria" (Integration of Customary and Modern Legal Systems: a Conference, Faculty of Law, University of Ife, Ibadan, Nigeria, 24-29 August 1964) (Ibadan, Nigeria: University of Ife, 1964) at 242.
 18. It is a notorious fact that due to recent state creations in Nigeria, the Abia, Ebonyi and Enugu states were created out of the former Anambra and Imo states.
 19. Prepared by Dr. S.N.C. Obi (Enugu: The Government Printer, 1977) [hereinafter *Customary Law Manual*].
 20. Dr. Obumneme Onwuamaegbu, former Attorney-General of former East-Central state of Nigeria, *ibid.* at xxxvi.
 21. The *Customary Law Manual* enjoys authoritative citation by appellate courts in Nigeria. See e.g., *Muojekwu v. Ejikeme*, [2000] 5 N.W.L.R. [Pt. 657] 402 at 431 (C.A. Nigeria).
 22. S. Roberts, "The Settlement of Family Disputes in the Kgatla Customary Courts: Some New Approaches" (1971) 15 J. A. L. at 60; C. M. N. White, "Matrimonial Cases in the Local Courts of Zambia" (1971) 15 J. A. L. at 251.

IV CHARACTERISTICS OF CUSTOMARY LAW

A major feature of customary law is that it is unwritten. As I said above, its rules are well known by members of the community whose conduct it regulates. Justice Dan Ibekwe (as he then was) said extra-judicially:

Regrettably enough, our own customary law is unwritten. It was handed down the ages, from generation to generation. Like a creed, it seems to live in the minds of people. This explains why so little was really known at the beginning about the vast body of laws which had always governed the affairs of our ancestors from time immemorial. Much of what is known about such laws has been drawn either from judicial decisions or from the few publications on the subject.²³

The result is that customary law remains largely uncertain for a lawyer who has to advise his client, and requires a reasonably certain state of the law. But if customary law is reduced to a permanent form, then that will destroy its intrinsic character of being unwritten; and this will render it alien to some of the people whose law it is and whose conduct it is meant to regulate. Consider telling an eighty-year-old illiterate Ibo person that customary law, the knowledge of which he or she gained from his or her ancestors, is to be ascertained from a customary law manual, restatement or code! This would give the elder person cause for laughter. He or she would think that it is English law that is being talked about and not customary law, which is known to be unwritten.

The point is that the Anglicization of customary law by its reduction to writing will render it strange to some of the people it is meant to regulate. Perhaps Nigeria's, and indeed Africa's, greatest contribution to the world's jurisprudence lies in the evolution, articulation and presentation of a unique customary law that is unwritten, yet indestructible and ineffaceable.²⁴ This is the challenge and genius of our customary law.

23. D.O. Ibekwe, "Conflict of Cultures and Our Customary Law" in T.O. Elias, *et al.*, eds., *African Indigenous Laws* (Enugu: Government Printer, 1974) at 297 [Proceedings of Workshop held at Nsukka, Nigeria, 7-9 August, 1974].

24. "But non-literacy did not prove fatal to the preservation of customary doctrine. Apart from the elders, who were deemed to be natural repositories of the law, there were traditional functionaries, well-versed in forensic science and learned in the law, who had special responsibilities in directing the proceedings in the courts and acted generally as legal experts. In Ashanti, for example, every chief had an *okyeame* who was at once spokesman on affairs of state and "attorney-general" of the state. The institution of legal specialization facilitated the process of transmitting the legal heritage from generation to generation by oral tradition." S.K.B. Asante, "A Hundred Years of a National Legal System in Ghana: A Review and Critique" in *Proceedings and Papers of the Sixth Commonwealth Law Conference, Lagos, Nigeria, 17-23 August* (Lagos: Academy Press, 1980) at 152 [hereinafter *Sixth Commonwealth Law Conference Papers*].

Another feature of customary law is that parties to a dispute subject to customary law are usually no strangers to each other. There is usually a tie, social, marital or tribal, binding them.²⁵ For instance, land disputes are usually between people related by blood. This is in contradistinction to modern land adjudication, which may be between parties who are strangers to each other and may even be of different nationalities. Apparently for this reason, disputes in an African setting are considered to disrupt the societal or family equilibrium. The main aim of the adjudicators will be to restore that equilibrium and this might only be achieved by not deciding strictly on the rights of the parties. Legal rights are not emphasized as much as reconciliation. Thus, an African justice system is mainly reconciliatory.²⁶ For instance, a man or woman may have several pieces of land and the relatives have none. This landowner might have allowed one of the relatives to occupy one of those pieces of land but without alienating it to him or her. The beneficiary of this possessory grant may be in occupation for a long time. When a dispute arises between the owner and the relative as to ownership of the allotted piece of land, the customary court judges, while acknowledging the legal ownership of the land, may decide in favour of the relative. The basis may be that since the real owner has several other pieces of land, he or she should, in the spirit of brotherhood and family cohesion, allow the relative to own or settle on that single, gifted piece of land. The real owner will be persuaded to accept this decision. If customary law were in a permanent form, the court in the above hypothetical case would not be able to do what it considered to be equitable. It would simply have declared ownership under customary law, written or unwritten, in favour of the owner.²⁷

25. P.C. Lloyd, *Yoruba Land Law* (Ibadan: Published for the Nigerian Institute of Social and Economic Research, 1962) at 17-18.

26. "Igbo legal procedures aim essentially at readjusting social relations. Social justice is more important than the letter of the law ... The resolution of a case does not have to include a definitive victory for one of the parties involved. Judgment among the Igbo ideally involves a compromise and consensus. They insist that a good judgment 'cuts into the flesh as well as the bone' of the matter under dispute. This implies a 'hostile' compromise in which there is neither victor nor vanquished; a reconciliation to the benefit of – or a loss to both parties": V.C. Uchendu, *The Igbo of Southeast Nigeria* (New York: Holt, Rinehart and Winston, 1965) at 14; but this reconciliatory posture of African customary law, at least for Malawi, seems to be doubted by Martin Chanock, "Neo-Traditionalism And The Customary Law In Malawi" [1977-80] 16 A. L. S. 80 at 83-84.

27. The inherent danger in permanency of customary law is implicit in Justice Mukhtar's observation: "The custom of the Ijebu-Ife has been codified into Exh. 'L' and any provision or requirement not contained in it remains inapplicable and worthless," in *Adelaja v. Oguntayo*, [2001] 6 N.W.L.R. [Pt. 710] 593 (C.A. Nigeria) at 621.

Again, to qualify as customary law, even in medieval Europe, a norm must be generally accepted by the people subject to it.²⁸ This position is clearly affirmed by the Privy Council in *Eshugbayi Eleko v. Government of Nigeria*,²⁹ where Lord Atkin stated:

Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character as custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the [N]ative community as custom, so as in the form to regulate the relations of the [N]ative community *inter se* ... [I]t is the assent of the [N]ative community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the [N]ative community whose conduct it is supposed to regulate.

What is the proof that, when customary law is reduced to writing, it will continue to be the customary law that is generally accepted by the members of the community whose lives it is meant to regulate? Would it not better represent what the compilers alleged or accepted to be the customary law? However, it is possible that all the members of a community may decide to ratify the text.

Customary law remains flexible, evolutionary, and capable of adaptation to changing circumstances. Gluckman stated:

The view that customary law was ancient and immutable, retaining its principles through long periods of time, its origins lost in the mists of antiquity, has been discarded. Not only are customary laws changing today but also they were subject to constant change in the pre-colonial past.³⁰

In *Lewis v. Bankole*, Osborne C.J. opined: “[o]ne of the most striking features of West African [N]ative custom ... is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics.”³¹ With the introduction, in Nigeria, of Western civilization, education and improved transportation, which led to increased mobility across tribal boundaries in search of employment or business, there arose an increased burden of compliance with some customary law stipulations. For instance, the negotiations and betrothal that precede a

28. Walter Ullmann, *Law and Politics in the Middle Ages* (New York: Cornell University Press, 1975) at 193.

29. [1931] A. C. 662 at 673.

30. M. Gluckman, *Ideas and Procedures in African Customary Law* (London: Oxford University Press, 1969) at 9.

31. [1909] 1 N.L.R. 100-101.

customary law marriage and may be necessary for its validity under customary law usually turn out to be onerous requirements where the parties intending to get married, or any of them, reside outside their tribe. Customary law became flexible enough to deal with this type of case by requiring minimal evidence for validity of customary marriages and readily inferring validity from acts that indicate steps to comply with customary law.

Some cases further illustrate the changeability or evolutionary nature of customary law. For instance, it was the original position in customary law that land was totally inalienable. It belonged to either a family or the community. But through the process of evolution the concept of inalienability of land was discarded in favour of transferability by way of sale.³² Thus, Webber, J. in *Barimah Balogun and Scottish Nigerian Mortgage and Trust Co. Ltd. v. Saka Chief Oshodi* stated:

It seems to me that [N]ative law existent during the last fifty years has recognized alienation of family land, even by a domestic, provided the permission of the family is obtained ... The chief characteristic of [N]ative law is its flexibility—one incident of land tenure after another disappears as the times change—but the most important incident of tenure which has crept in and become firmly established as a rule of [N]ative law is alienation of land.³³

In the same vein, Graham Paul, C.J. opined in *Kadiri Balogun v. Tijani Balogun & Ors.*, "...as a matter of historical fact and of judicial decision, it is now too late in the day to say that under (Lagos) [N]ative law and custom family property is inalienable so as to give the grantee absolute ownership."³⁴

The adaptation of customary law to changing political, social and economic circumstances of the society was further evidenced in the case of *Ewa Ekeng Inyang v. Efan Ekeng Ita & Ors.*³⁵ The issue in that 1929 case was the determination of the rights of two rival claimants to the headship of the Ewa Ekeng House at Calabar, Nigeria. The defendant holder of the headship held it by virtue of election, *i.e.*, by voting at a family meeting. The plaintiff claimed the headship by right of primogeniture, as the eldest male member of the family. The plaintiff contended that any kind of popular election was contrary to customary law and therefore *ultra vires*. On this contention, Berkeley, J., commented:

32. *Ibid.* at 83, 104.

33. [1931]10 N.L.R. 36 at 51, 53-54.

34. [1943] 9 W.A.C.A. 73 at 82.

35. [1929] 9 N.L.R. 84.

Before the Government came to Calabar, and established law and order, it is certain that the headship of a house belonged as of right to the senior male member of that house. But he took it at his peril. If he failed to find support within the family only two courses were open to him. Either he went into exile or else he stayed and was put to death. In either case the succession to the vacancy devolved on the next senior male, if he chose to take it up. Human nature is much the same all over the world, and it is absolutely certain that there must have been occasions on which the next senior male, knowing that he had no chance of winning the support of the family, had sufficient intelligence to stand aside rather than risk such perilous promotion ... [I]t is obvious that even before the advent of the Government, the theory of election, though in a very rudimentary form, was already inherent in the family system of the Efik people of Calabar. With the coming of the Government the rule of law was substituted for the rule of violence. It was no longer possible to put an unpopular head to death. Therefore an unpopular head, being no longer in fear of his life, was under no compulsion to seek security in exile. The family was saddled with the unpopular head and had no means of getting rid of him. The only remedy for such a state of affairs was to take steps to see that no man should become head of the house unless he had behind him the support of the family. No doubt in the majority of cases the senior man was sufficiently suitable, and became head without opposition. But when he was not suitable the family had no hesitation in selecting some other member in his stead. This was only common sense, and a natural adaptation of custom to make it conform to a change in condition.

The plaintiff is asking this court to put the clock back. He wishes to deprive the family of any choice in the matter of their head. He ignores the changed circumstances of the times and wishes to revert to a custom the safeguards and checks upon which can no longer be applied.³⁶

If in 1929, when this decision was given, the original customary law on the promotion to the headship of the family had been reduced to writing, the court would have just applied that custom and there would have been no room for the flexibility shown in this case.³⁷ The decision would have been different and would not have reflected the new custom, promotion based on election, which sought to make sure that a family was not saddled with an unpopular head. Reducing customary law to a permanent form, unless periodically reviewed, would destroy its characteristic of flexibility and adaptability to changing circumstances and needs of the society.

36. *Ibid.* at 85-86.

37. *Adelaja v. Oguntayo*, *supra* note 27; however, in *Edozien v. Edozien*, [1998] 13 N.W.L.R. [Pt. 580] 133 (C.A. Nigeria) at 152, Justice Rowland sought to limit the effect of codification of customary law: "I have no doubt in my mind that it is only where the declaration of customary law is exhausted on the point that any other custom will be excluded. But where there is a lacuna, as in this case, the court is free to receive evidence to fill the yawning gap".

Finally, changes in the customary law usually evolve from usage and are not declared, as in Western legal systems where a statute could repeal or amend a law by making declarations to that effect. The explanation seems to be that most traditional societies, like the Ibos, did not have a legislature or sovereign who could declare such changes in the customary law. Once a new customary law has evolved and is generally accepted,³⁸ it becomes binding on all the members of the community and any member who resists its application does so at the risk of customary sanctions.

V PROOF OF CUSTOMARY LAW

Before a court of law considers the enforceability of customary law, the alleged customary law, in order to provide the rule of decision, must be proved to exist by the party who relies on it. It is instructive to separate the issue of validity of customary law from its judicial enforcement or recognition. Issues of validity of customary law will involve a disquisition on its existence, in contradistinction to enforcement questions, which require the court to determine the circumstances under which a valid or existing customary law would be accorded judicial recognition. Consequently, modern judicial process does not give a rule of customary law its validating force. The above observation also seems to be true for English customs, which are one of the main constitutive elements of the English common law. As Sir Carleton Kemp Allen submitted:

The primary function of modern judicial analysis is to examine the nature and reality of *existing* custom, not to invent new customs or arbitrarily to abolish those which are proved to exist ... We shall find that the chief purport of these rules or tests is to determine whether the general and particular customs of our law are, *as a matter of established fact*, proved to be recognized social practice ... To this extent custom is still self-contained, self-sufficient, and self-justified law in England – that, in the main, with exceptions which will presently be noted, and which do not seriously affect the guiding principle, *if a custom is proved in an English court by satisfactory evidence to exist and to be observed, the function of the court is merely to declare the custom operative law*. In other words, the custom does not derive its inherent validity from the authority of the court, and the ‘sanction’ of the court is declaratory rather than constitutive.³⁹

In England, a custom is proved to exist, and therefore enforceable, if it satisfies the tests of antiquity, continuance, peaceable enjoyment,

38. Lord Atkin, *supra* note 29.

39. Allen, *supra* note 11 at 129-130 [emphasis in text].

reasonableness, certainty, compulsory force and consistency.⁴⁰ While these English tests are not neatly bifurcated as to validity and enforcement of customs, for reasons stated in the above quotation, Nigerian jurisprudence evolved a dichotomized test for the two questions, and very often the courts in Nigeria have refused to enforce a custom proved to exist and therefore valid.⁴¹

The *Evidence Act*⁴² has established two methods of proving the existence of customary law:

- A) proving it as a fact; or,
- B) by judicial notice.

Section 14(1) provides:

A custom⁴³ may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.

This seems to be a legislative enactment of the rule enunciated by the Privy Council in *Angu v. Attah*:

As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the [N]ative customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.⁴⁴

A Proving Customary Law as a Fact

Like questions of fact in any judicial inquiry, customary law may be proved by calling witnesses who are versed in the customary law sought to be established or denied. They become expert witnesses as far as that customary law is concerned and are usually chiefs or traditional rulers of the

40. H.F. Jolowicz, *Lectures On Jurisprudence*, ed. by J.A. Jolowicz, (London: University of London, 1963) 208-213.

41. *Muojekwu v. Muojekwu*, [1997] 7 N.W.L.R. [Pt. 512] 283 (C.A. Nigeria). The Nigerian Court of Appeal refused to enforce or recognize an existing rule of Nnewi customary law, *Oli-ekpe*, under which a deceased's nephew inherits his property, as against the deceased's female child or children, if the deceased died without a male issue or a surviving brother.

42. Laws of the Federation of Nigeria, 1990, Cap. 112, vol. VII [hereinafter *Evidence Act*].

43. *Ibid.* Section 2(1) defines 'custom' as, "a rule which, in a particular district has from long usage obtained the force of law."

44. [1921] Privy Council Judgment [1874-1928] 43.

community whose customary law is at issue.⁴⁵ By virtue of their customary offices or positions, it is their duty to know the customary law of their people. They may be called as witnesses by either or both of the parties in a case. The court is, however, not bound by such evidence.⁴⁶ For instance, in *Ricardo v. Abal*,⁴⁷ concerning priority of choice on partition of the deceased's estate in accordance with customary law, the court commented:

Now both these witnesses were called by the plaintiff and knew, of course, what evidence they were expected to give. Nevertheless in the absence of any other evidence, I cannot reject their testimony on that ground, nor do I consider it inherently improbable. I quite believe that they have correctly described the proper procedure in cases of partition of family property, and it is not unreasonable to believe that priority of choice should be given to the eldest born, irrespective of sex.

In Nigeria, the use of an expert witness is the most common means of establishing customary law.⁴⁸ It must be emphasized that in using expert witnesses of customary law, the court is neither abdicating its judicial duty to determine the existence of a particular custom nor delegating it to the customary law experts. As with all expert opinions, the court reserves the right to reject or accept such opinions in the light of prevailing circumstances.⁴⁹

The fact of customary law may also be proved by the use of authoritative textbooks.⁵⁰ For such authoritative operation, *Larbi v. Cato*⁵¹ suggests that the author of such a textbook must be dead at the time the book is cited in court, though the book remains of persuasive authority. But

45. In *Lewis v. Bankole*, *supra* note 31 at 94, there was a huge assemblage of famous traditional rulers and chiefs who served as expert witnesses in that case.

46. In *Ewa Ekeng Inyang v. Efan Ekeng Ita*, *supra* note 35 at 84-85, Berkeley, J. observed: "A good deal of evidence was given by both sides on this question of [N]ative law and custom. This kind of so-called expert evidence must always be treated with very great caution. The evidence of these experts is invariably coloured each by his own personal interests. The only way in which such testimony can be safely treated is to refrain from attempting to estimate individual credibility and to concentrate on drawing conclusions from the general trend of the evidence".

47. [1926] 7 N.L.R. 58 at 59.

48. *Adeseye v. Taiwo*, [1956] F.S.C. 84 (S.C. Nigeria); *Andre v. Agbebi*, [1931] 10 N.L.R. 79; *Owoo v. Owoo*, [1946] 11 W.A.C.A. 81.

49. As Irwin, J. observed in *Salami v. Salami*, [1957] W.N.L.R. 10 (H.C. Nigeria) at 11: "The first defendant called Jolaoso, a member of the Ake Grade "A" Court [*i.e.*, customary court], as an expert witness. He said that at Abeokuta the Dawodu [*i.e.*, eldest surviving son of the deceased] is entitled to a greater share than the other children. I am not satisfied that this witness was impartial and I do not accept his evidence that the rules of inheritance at Abeokuta are in this respect different from those which appear to be well settled by a line of cases in which the parties were Yorubas".

50. A.E.W. Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell, 1963) at 87-79; Section 59 of the *Evidence Act*, *supra* note 42.

51. [1960] G. L. R. 146 (C.A. Nigeria) at 153 .

in *Amoo v. Adigun*,⁵² the court authoritatively relied on the book of a living person, Mr. T. O. Elias (later: professor of law, Chief Justice of Nigeria, and judge of the International Court of Justice at Hague), to hold that under an Indigenous mortgage transaction or pledge, the mortgagee owed a duty of account to the mortgagor in certain circumstances. Section 59 of the *Evidence Act*⁵³ deals with the admission of a textbook on customary law: "... any book or manuscript recognized by the [N]atives as a legal authority [is] relevant." This was judicially interpreted in *Adedibu v. Adewoyin*,⁵⁴ where the West African Court of appeal stated the two conditions that must be satisfied for the operation of the section:

- (a) the book or manuscript must form part of the evidence in the case; and,
- (b) it must be shown, as a fact, that such book or manuscript is recognised by members of the community concerned as a legal authority.

In this particular case, the litigants gave contradictory evidence on the applicable customary law to the headship of their family, *i.e.*, *Mogaji*. The judge rejected both sides' versions, but relied on H. L. Ward-Price's book, *Memorandum of Land Tenure in the Yoruba Provinces*.⁵⁵ This book was neither tendered in evidence nor referred to by counsel for the parties; yet the declaration sought by the plaintiff was granted on the strength of it. On appeal, the West African Court of Appeal held that Ward-Price's book was wrongly relied on by the judge, because it was in breach of Section 59 of the *Evidence Act*.

Another method of proof, which is not common in Nigeria, is the use of assessors who sit with the judge and advise him or her on customary law.⁵⁶

Proof of customary law as fact seems preferable to codification or other attempts to reduce customary law to a permanent form. Textbooks on customary law will also help in its ascertainment, and subsequent editions ensure that such books are kept abreast of developments in customary law. Factual proof seems to be the only approach that leaves customary law with its flexibility. Where there is a change in customary law or need to adjust it to changing circumstances, these can be established as fact, at the same time leaving its unwritten nature unimpaired. When this method of proof is involved, textbooks or other written evidence of customary law take a secondary position. They are merely considered as part of the facts to be

52. [1957] W. R. N.L.R. 55 (H.C. Nigeria).

53. *Supra* note 42.

54. [1951] 13 W.A.C.A. 191.

55. H.L. Ward-Price, *Memorandum of Land Tenure in the Yoruba Provinces* (Lagos: Printed by the Government Printer, 1933).

56. T.O. Elias, *The Judicial Process in Commonwealth Africa* (Ghana: University of Ghana, 1977) at 18, 20; Park, *supra* note 50 at 89-90.

taken into consideration in ascertaining the particular customary law at issue.

B Judicial Notice of Customary Law

A party who wishes the court to recognize and enforce a particular customary law may request the court to take judicial notice of the law, instead of proving it as a fact. Again, the *Evidence Act* has laid down the conditions that must be fulfilled before judicial notice is taken of a custom. Section 14(2) provides:

A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

The above section has been the subject of much judicial interpretation. The expression "same area" seems to connote a geographical location and to mean that a case establishing the customary law of area 'A' may not be the basis of judicial notice of the customary law of area 'B'. Thus, in *Santos v. Ikosi Industries Ltd. & Anor.*,⁵⁷ it was held that judicial notice cannot be taken of Native law and custom relating to ownership of 'beach land' of Epe on the basis of a Calabar custom relating to beach land which was judicially affirmed in *Henshaw v. Henshaw*.⁵⁸ The court observed:

Epe and Calabar are widely separated in distance, one in the colony, the other within the Eastern provinces of the protectorate; they are inhabited by people of different tribes with different languages and customs. Clearly when it is sought to rely upon a custom at Epe, that custom must be proved for Epe and what the custom may be at Calabar is irrelevant.⁵⁹

However, in *Taiwo v. Dosunmu and Another*,⁶⁰ Brett, J.S.C., observed:

We are of the view that in applying section 14(2) of the Evidence Act the courts must treat the reference to 'the same area' as meaning an area in which some grounds appear for supposing the custom to be uniform. On the material before us no grounds are disclosed for supposing that the customs of the Fanti or Ga of Ghana are the same as those of the Yoruba of Lagos in this matter. We are not saying that in ascertaining the customs of a particular area the decisions which establish the customs of neighbouring areas may not be helpful, but they

57. [1942] 8 W.A.C.A. 29.

58. [1927] 8 N.L.R. 77.

59. *Supra* note 56 at 36.

60. [1966] N.M.L.R. 94 (S.C. Nigeria).

cannot be conclusive. Coming to Nigerian decisions, in *Archibong v. Archibong*, Robinson, J., held that under the customary law of Calabar the representatives of a sub-branch of a family could sue the head of a house to which the family belonged for an account and for the sub-branch's proper share of rents received. The trial judge in this case held that that distinction was distinguishable on the grounds that a specific act of delinquency had been proved.

Brett, J.S.C., concluded that there was no evidence that the customary law of Lagos was the same as that of Calabar on the question of the duty of the head of a house to render accounts. This case, therefore, seems to establish that "same area" means an area with uniform customary law and does not necessarily refer to geographical location as we observed above, *i.e.*, where the court that delivered the first precedent and the court being asked to take judicial notice of it are within the same geographical location.

The courts seem to proceed on the presumption that a uniform customary law applies in contiguous areas. Thus in *Salami v. Salami*,⁶¹ it was held that, in the absence of satisfactory evidence to the contrary, the customary rules regulating the distribution of an intestate's estate in Abeokuta were not different from those which appear to be well settled by a line of cases in which the parties were Yorubas. According to Section 14(2) of the *Evidence Act*, before judicial notice is taken of a custom, a court of superior or co-ordinate jurisdiction in the same area must have acted upon it to an extent that justifies the conclusion that the people in that area accept the same as a correct statement of their customary law in the circumstances.

How many decisions on a particular custom would be sufficient to warrant the judicial notice of it? A similar requirement in *Angu v. Attah*⁶² was that the custom must have become notorious by frequent proof. This phrase is absent in S.14(2) above. The courts have not been consistent in the application of the criterion of judicial notice in Section 14(2). *Larinde v. Afiko*⁶³ held that a single case was sufficient to justify judicial notice of a customary law. But *Olubanji v. Omokewu*,⁶⁴ held that a customary law can only be judicially noticed after it had been considered, accepted and applied in many decisions. Also in *Kareem v. Ogunde*,⁶⁵ it was held that the Native law and custom whereby a Yoruba person's children are entitled to succeed to the intestate property had been firmly established by numerous cases and did not have to be proved by evidence. In other words, *Kareem* posited that there should be many cases on a point of customary law before judicial

61. *Supra* note 49.

62. *Supra* note 44.

63. [1940] 6 W.A.C.A. 108.

64. [1992] 6 N.W.L.R. (Pt. 250) 671 (C.A. Nigeria).

65. [1972] ALL N.L.R. 75 (S.C. Nigeria)

notice of it is taken by the courts. In *Cole v. Akinyele*,⁶⁶ and *Alake v. Pratt*,⁶⁷ three previous decisions on a customary law were held sufficient to warrant judicial notice of it. In *Onisiwo v. Fagbenro*,⁶⁸ the court relied only on a single previous decision as a judicial notice of a customary law. However, in *Odunsi v. Ojora*,⁶⁹ two previous decisions were held insufficient to take judicial notice of a customary law.

This myriad of contradictory decisions does not permit an accurate prophecy of judicial notice of a particular customary law. The decisions seem to have been inspired by the peculiar facts and circumstances of each case. However, it seems that the recent trend is to insist on more than one previous decision before judicial notice can be taken of a particular customary law.⁷⁰

A major disadvantage of ascertaining customary law by means of judicial notice is its tendency to rigidify customary law and impair its characteristics of flexibility and adaptability.⁷¹ Take for instance a court in the year 2002 taking judicial notice of a customary law established in a case, or even cases, decided before 1930. This means that changes that have taken place in the intervening seventy-one years will be neglected! The court would have applied the lawyer's customary law, *i.e.*, judicially noticed, but not the people's customary law, which may have changed since 1930. Therefore, this method of ascertaining customary law shows that there could be a difference between the customary law applied by the court and the same customary law as known to the people who are subject to it.

Finally, on the whole question of proof of customary law, one common impression amongst African scholars is troubling. They view the requirement of proving customary law as a fact as assigning customary law an inferior status *vis-à-vis* the received English law. Dr. T.O. Elias' observation epitomizes this common view, which has even been given statutory underpinning in Ghana:

Progressive opinion is that, despite all these modes of ascertaining customary law, it is no longer acceptable, whether as a rule of law or of practice, that customary law in independent African States should still be treated as a fact to be proved, like any other matter of fact or of foreign law, by calling evidence of it from these extraneous sources ... The right trail has fortunately been blazed by Ghana which in its *Courts Act, 1960*, provided that customary law should no longer be treated as a matter of fact, but as law; and that, if the

66. [1960] S.C.N.L.R. 84 (S.C. Nigeria).

67. [1955] 5 W.A.C.A. 20.

68. [1954] 21 N.L.R. 3.

69. [1969] 1 ALL N.L.R. 283 (S.C. Nigeria).

70. *Olubanji v. Omokewu*, *supra* note 64.

71. Similar fears were expressed by Osborne, C. J. in *Lewis v. Bankole*, *supra* note 31 at 101.

judges who are to apply a particular rule of customary law feel any doubt, they are free to consult whatever sources, such as by empanelling a group of persons to inform themselves before applying the law ... This, it is submitted, is the right course for all independent Commonwealth African States to take.⁷²

To demand that customary law should be treated like the received English law as regards proof pushes nationalism and patriotism to the extreme. The primary evidence for received English law materially differs from that of customary law. Upon what basis, then, is the analogy drawn?

As has been mentioned above, customary law is largely unwritten. The Ghana statutory experiment does not lend itself to recommendation,⁷³ as it allows judges to apply what they think is the customary law, without proper checks and balances. Though in Ghana⁷⁴ the Court is allowed, if it entertains any doubt as to the existence or content of a rule of customary law, to consult reported cases and textbooks, it may be that the customary law alleged has not been the subject of judicial pronouncement or analysis by an author. The chances are slim that the judge's view of customary law will properly represent the true customary law that, by definition, is known to all the members of a community and generally accepted by them. What if the judge is not a Native or comes from a different customary law background? This objection is not mitigated by the Ghana provision allowing the judges, should they think fit, to have recourse to extra-judicial opinion on the customary law.⁷⁵ Lawyers for the parties may not have the opportunity of cross-examining the source of this opinion, which nonetheless might determine the rights of their clients.⁷⁶ The original method, proof as a fact, is superior, as it allows such persons to give direct evidence of the customary law and be cross-examined.⁷⁷

72. *Elias*, *supra* note 56 at 27-28; *Asante*, *supra* note 24; Eugene Cotran, "The Place and Future of Customary Law in East Africa" in *East African Law Today* (London: The British Institute of International and Comparative Law, 1966) at 74, 76.

73. The Ghanaian statutory provision on the matter was reviewed extensively and applied by Taylor, J. in *Ibrahim v. Amalibini*, [1978] 1 G.L.R. 368 (H.C. Nigeria).

74. Section 50 (2) *Courts Act*, 1971 (Act 372).

75. *Ibid.* at Section 50 (2) (3).

76. *Ibid.* at Section 50 (3)(b). "Provided that the Court may request a House of Chiefs, State Council or other body possessing knowledge of the customary law in question to state its opinion which may be laid before the inquiry in written form."

77. South African Law Commission has recommended that customary law should continue to be proved as a fact: *The Harmonisation of the Common Law and the Indigenous Law: Conflicts of Law* (Discussion Paper 76, Project 90, April 1998) at 96-108 [hereinafter *Harmonisation*].

VI EXCLUSION OF OTHERWISE APPLICABLE CUSTOMARY LAW

Having proved a custom to exist, either as a fact or by means of judicial notice, the court proceeds to determine whether it should receive judicial recognition. What circumstances allow an otherwise valid customary law to be excluded? These grounds are statutory. Section 26 of the *High Court Law*⁷⁸ provides:

26(1) The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of customary law.

(3) No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or questions may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.

The above provision clearly stipulates three situations for non-application of customary law:

- a) repugnant to natural justice, equity, and good conscience;
- b) agreement by parties to exclude customary law; or
- c) transactions unknown to customary law.

A Repugnancy Doctrine: Customs Repugnant to Natural Justice, Equity, and Good Conscience

What does this phrase mean? It has rightly been called, "the trinity of legal virtues."⁷⁹ It seems that what was intended is not an importation of the different, and often nebulous, meanings of the three constituent elements of that phrase, *i.e.*, natural law, equity, and good conscience.⁸⁰ Otherwise, the application of customary law would be tested against the technical rules of natural justice and equity. Therefore, the phrase should be construed as a whole and should mean the universal principles of morality and fairness.⁸¹

78. *High Court of Lagos State Law* Cap. 60, Laws of Lagos State, 1994.

79. Jill Cottrell, "The Reception of English Law in the Commonwealth: The Need for Integration" in *Sixth Commonwealth Law Conference Papers*, *supra* note 24 at 187.

80. Taylor, J., thought this was the implication. See *Ibrahim v. Amalibini*, *supra* note 73.

81. G.F.A. Sawyerr, "Internal Conflict of Laws in East Africa" in G.F.A. Sawyerr, ed., *East African Law and Social Change* (Kenya: East African Publishing House, 1967) 134; Park, *supra* note 50 at 70.

That phrase is really a cleansing and modernizing provision, originally entrenched by the colonial government to divest customary law of its ostensibly 'barbaric' relics. As Lord Wright declared in *Laoye v. Oyetunde*:⁸²

The policy of the British Government in this and other respects is to use for purposes of the administration of the country the [N]ative laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances ... [s]o far as they are not barbarous.

But then, what is the touchstone of natural justice, equity, and good conscience? Is it the British or African standard? G. F. A. Sawyerr⁸³ submitted: "The result of this attitude was that 'British' was substituted for 'natural' justice and the touchstone of the fitness of local laws for application to local peoples was the British standard of justice." In support of this view is the case of *Hakam Bibi v. Mohammed*,⁸⁴ which held that, "it is a matter of common sense that there cannot be in one colony at one and the same time two conflicting concepts of natural justice, public order or morality. If there is conflict then it is the concepts of the Suzerain Power which will prevail." But Park⁸⁵ disagrees: "It can therefore be stated with confidence that inconsistency with the principles of English law is not the standard applied in determining whether a particular rule is repugnant to natural justice, equity and good conscience."⁸⁶ It is difficult to share Park's confidence. The preponderance of judicial authority and utterances of judges, mainly foreign, who were confronted with the application of the repugnancy doctrine clearly show that it was English justice and social values that were used as the criteria for 'natural justice, equity, and good conscience.'

The bigotry involved in the application of this phrase was eloquently declared and manifested in the 1917 case of *R. v. Amkeyo*.⁸⁷ There, Hamilton, C.J., in considering whether the incidents of a Christian marriage were applicable to a customary marriage,⁸⁸ declared:

In my opinion, the use of the word "marriage" to describe the relationship entered into by an African [N]ative with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerable confusion of ideas. I know of no word that correctly describes it; "wife-

82. [1944] A. C. 170 at 172-173.

83. *Supra* note 81 at 135.

84. [1955] 28 K.L.R. 91 at 112 (H.C. Nigeria).

85. Park, *supra* note 50 at 70.

86. He is supported by *Rufai v. Igbirra Native Authority*, [1957] N.R.N.L.R. 178, where it was held that a customary rule which deprived the appellant of a legal right which he would have had under English common law was not for that reason contrary to natural justice.

87. [1917] 7 E.A.L.R. 14 (H.C. Nigeria).

88. A polygamous or potentially polygamous marriage.

purchase” is not altogether satisfactory, but it comes much nearer to the idea than that of “marriage” as generally understood among civilised peoples.

The elements of a so-called marriage by [N]ative custom differ so materially from the ordinarily accepted idea of what constitutes a civilised form of marriage that it is difficult to compare the two.

In the first place the woman is not a free contracting agent but is regarded rather in the nature of a chattel, for the purchase of which a bargain is entered into between the intending husband and the father or nearest male relatives of the woman. In the second place there is no limit to the number of women that may be so purchased by one man, and finally the man retains a disposing power over the woman he has purchased.

Women so obtained by a [N]ative man are commonly spoken of, for want of a more precise term as “wives” and as “married women,” but having regard to the vital difference in the relationship of the parties to a union by [N]ative custom, from that of the parties to a legal marriage, I do not think that it can be said that the [N]ative custom approximates in any way to the legal idea of marriage.

About forty-five years later, the above *dictum* was approved by Sir Ronald Sinclair in the case of *Abdul Rahman Bin Mohamed and Another v. R.*:⁸⁹

[T]he marriage appears to have all the elements of “wife purchase,” the description given to an African customary marriage in *Amkeyo's* case. There was no religious ceremony or indeed any ceremony at all. The first appellant merely paid Shs. 200 for her which money was paid through her father to her former husband to release her. Either party could buy his or her release at any time.

No doubt, customary marriage in the above cases was assessed against the background of Christian marriage under English law. Accordingly, whether a customary union was entitled to the description of a marriage depended on its approximation or conformity with a Christian or foreign judge's idea of marriage. Does the payment of bride wealth really convert an African marriage ceremony to a wife-purchase? Does it not signify the love and commitment of the husband just like the marriage vow, or even pre-nuptial contract, in an English marriage ceremony? Does the participation of the families of the bride and bridegroom not signify the bond the union creates and the seriousness it imports? Is there evidence that a husband or wife of an African marriage is less loving or devoted to his or her partner than the spouse of Christian marriage? Therefore, to describe an African marriage ceremony as a “wife-purchase” is not only an abuse of language but smacks

89. [1963] E.A.L.R. 188 (H.C. Nigeria) at 192-193.

of the provincialism, bigotry and ignorance, roundly condemned by Cardozo, J. in *Loucks et al. v. Standard Oil of New York*.⁹⁰ Though the facts of *Loucks* case⁹¹ are not directly on the point, they demonstrate the unfairness of treating with condescension or outright contempt, rights and institutions, *i.e.*, customary marriage, cognizable under a legal system foreign to a particular judge.⁹² In advocating greater respects and readiness to enforce rights, or cultural institutions as in this paper, vested under a foreign law, Justice Cardozo observed:

Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home [in New York State].

In the same vein, James, L.J. in *In Re Goodman's Trust*⁹³ condemned a veiled contempt for the application of foreign law:

And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing.⁹⁴

The point being made is that, in striking down customary law under the triple formula (natural justice, equity, and good conscience), an English sense of justice was used as the standard and the judges, especially the colonial judges, proceeded from a Western superiority complex and self-

90. [1918] 120 N.E. (N.Y.) 198 at 201.

91. *Ibid.* The plaintiffs were administrators of the deceased who was run down in Massachusetts due to the negligence of the defendants' employees, in the course of their employment. The deceased was survived by a wife and two children resident in New York. The plaintiffs brought an action in New York claiming damages under a Massachusetts death statute. Even though New York had a similar statute, its remedies were different from that of Massachusetts. At that time some cases in New York required that for a right of action under a foreign statute to be enforceable in New York, there must be a substantially similar law in New York. This rule provided an opening for refusing the enforcement of a right vested under a foreign law. Consequently, Cardozo, J. held that the rule, if ever accepted in New York, had to be abandoned.

92. For instance, a foreign judge's prejudicial consideration of a customary marriage as involving elements of commerciality or 'wife-purchase'.

93. [1881] 17 Ch. D. 266.

94. *Ibid.* at 298.

proclaimed cleansing mission.⁹⁵ The proclivity to reject customary law on the basis of the above mental attitude, *i.e.*, for being contrary to natural justice, equity, and good conscience, was fostered by the elliptical nature of the triple formula that deprived it of any objective criterion and analysis.⁹⁶

For instance, many people are likely to differ on what amounts to good conscience. The result has been a huge field of judicial discretion in which the judge's idea of civilization becomes the litmus test by which a customary law must be adjudged valid and acceptable. As G. F. A. Sawyerr noted, "no matter how well-established a custom was, its application in any particular case depended on the discretion of the judge before whom the issue arose."⁹⁷

However, with the independence of Nigeria in 1960 and the appointment of more Indigenous judges, a more Nigerian sense of justice and values has come to be the standard of natural justice, equity and good conscience.⁹⁸ Thus in *Ejiamike v. Ejiamike*,⁹⁹ the plaintiff was the Okpala (head) of his father's household at Onitsha and the defendants were members of the household. The plaintiff's case was that the defendants who were jointly managing the property of their late father, in disregard of his right as the Okpala, were letting out some of the houses to tenants and collecting rents. The plaintiff tendered evidence and called many witnesses to establish his right to manage the said property as the Okpala according to Onitsha custom. The defendants did not cross-examine the witnesses nor object to the customary law relied on. They claimed that the customary law relied on by the plaintiff was repugnant to natural justice, equity, and good conscience. The judge held that this was not sufficient for the defendants, because they had to show how it was so repugnant:

95. As the judge said in *Ashogbon v. Odunta*, [1935] 12 N.L.R. 7 at 10: "I regard this court in its equity jurisdiction as in some measure by virtue of the jurisdiction sections of the Supreme Court Ordinance 'the keeper of the conscience' of [N]ative communities in regard to the absolute enforcement of alleged [N]ative customs".

96. T.O. Elias said: "It must nevertheless be said that in so many of the cases decided on this principle, no consistent principle is discernible and that some of the decisions are hard to justify. This is probably an area in which the court has not made a very notable contribution". *Supra* note 56 at 53.

97. Sawyerr, *supra* note 81 at 134.

98. Similarly, Justice Sachs, of the Constitutional Court of South Africa, has recommended that African values and Indigenous law should form part of the total values animating the interpretation of South African Constitution. See *S. v. Makwanyane*, [1995] 3 S A 391 at 513-521. To make sense in a modern African society, it seems that Indigenous values and law that ought to be reflected in judicial interpretation should exclude aspects that patently and irremediably infringe the rights of women and female children to equality and other rights. Respect for women, their contractual and legal capacity, and ability to own and transfer property are some of those values that should animate relevant judicial determination.

99. [1972] E.C.S.N.L.R. 130 (H.C. Nigeria).

Is there a universal standard of natural justice, equity and good conscience? Or should the test be subjective and related to the conscience and moral susceptibilities of a given community at a given period of development? It is my view that in this case the onus is on the defendants to establish that the custom relied on by the plaintiff was repugnant to good conscience of the average Onitsha man in 1972.¹⁰⁰

Similarly, Justice Niki Tobi recently observed:

The point should however be made that in the determination of whether a customary law is repugnant to natural justice or incompatible with any written law, the standard is not the principles of English law. In other words, it is not fair to conclude that the Nrachi ceremony is repugnant to natural justice because it is inconsistent or contrary to English law, in the sense of the English common law or English statute. On the contrary, the courts must have an inward look, inward in the sense of Nigerian jurisprudence. Such an [I]ndigenous approach, if I may use that expression vaguely, will certainly reduce the usual pet expression of the English judge, “barbaric,” in the description of our jurisprudence, an expression, Speed, Ag. C.J. freely used in *Bankole*.¹⁰¹

However, some Indigenous judges sometimes prove to be more foreign than pre-independent foreign judges.¹⁰² This is due to their readiness to condemn a rule of customary law as barbarous, at the slightest excuse. Their legal education in England and other countries of the West could be accountable for this. I do not suggest that customary law is beyond reproach and that an Indigenous judge should be faithful to traditionalism in the face of obvious injustice perpetuated by a rule of customary law. This injustice is likely to arise in various areas of customary law concerning the rights of women and female children. I am only suggesting that Indigenous judges are more likely to appreciate customary law and should, as far as practicable, be able to attune it to the dictates of modernity in ways that save the customary law and still make it relevant to contemporary society.

The repugnancy doctrine has been successfully applied in several cases. In *Edet v. Essien*,¹⁰³ the plaintiff had paid the dowry for a woman and married her. She later left him and entered into a new marriage with another man, by whom she subsequently had two children. The plaintiff then alleged that, under a rule of Native law and custom, he was entitled to the custody of these children, since his dowry had not been repaid to him. It was held that such a rule of customary law was not conclusively proved and, even if

100. *Ibid.*

101. *Muojekwu v. Muojekwu*, [2000] 5 N.W.L.R. [Pt. 657] 402 (C.A. Nigeria) at 431.

102. C.O. Akpangbo, “Woman to Woman Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles” [1974-1977] 14 A.L.S. 87 at 90-91.

103. [1932] 11 N.L.R. 47.

proved to exist, it was repugnant to natural justice, equity and good conscience. In *Mariyamo v. Sadiku Ejo*,¹⁰⁴ the court held that the custom which entitled a man to a child born by his former wife ten months after the marriage was repugnant to natural justice, equity and good conscience. In *Meribe v. Egwu*,¹⁰⁵ the Supreme Court held *obiter* that a "woman to woman" marriage under customary law was repugnant to natural justice, equity and good conscience. This was without a consideration of the customary benefit of such arrangement, such as a wife marrying another wife for the husband, thus helping a barren woman to get a child indirectly, through the second woman. Recently, again in *obiter*, the same court held in *Peter Chinweze v. Veronica Masi*,¹⁰⁶ that the custom that makes a person, born some years after the death of the mother's husband, a child of the deceased, is repugnant.¹⁰⁷ This was contrary to the settled customary rule on the matter, though some of the cases that decided the point in favour of customary law were not brought to its attention.¹⁰⁸

In *Okonkwo v. Okagbue*,¹⁰⁹ one Nnayelugo Nnebue Okonkwo of Ogbotu village died in 1931 and was survived by five sons. The plaintiff was one of the five sons. Okonkwo also left behind two sisters who were the first and second defendants. Though married, both were childless and claimed to have separated from their respective husbands and returned to the family home at Ogbotu village. About 1961, thirty years after the death of Okonkwo, the first and second defendants, acting under Onitsha customary law, married the third defendant for their deceased brother Okonkwo, with consent of the elders of Ogbotu village and the Okonkwo family, as well as its head. Since that said marriage the third defendant had given birth to six sons, who answered Okonkwo's name. The plaintiff and his own brothers

104. [1961] N.R.N.L.R. 81 (H.C. Nigeria).

105. [1976] 1 ALL N.L.R. 266 at 275.

106. [1989] ALL N.L.R. 1 (S.C. Nigeria).

107. The said Supreme Court decision was ably criticized by K.S.A. Ebeku, "The Legal Status of Nigerian Children Born By A Widow: *Chinweze v. Masi* Revisited" (1994) 38 J. A. L. at 46.

108. For instance, in *Amachree v. Goodhead*, [1922-1923] 4 N.L.R. 101 at 102, Berkeley, J. in a similar situation observed: "Mr. Macaulay further suggested that on the death of her husband, many years before, the woman Soduko ceased to belong to the Goodhead house, reverted to her own house of Amachree, and that therefore her child born afterwards in concubinage belonged to the house of Amachree. But this was not the opinion of the Native Court which in February 1907, decided to the contrary effect contingent upon dowry being paid. Finally Counsel submitted that it was repugnant to natural justice to leave the child in the custody of the house into which its mother had married, when the child's own blood relations were anxious to have its custody. I certainly think it is a pity that some such arrangement could not have been arrived at amicably, but I just as certainly cannot uphold the contention that the existing arrangement is repugnant either to natural law or humanity. On the other hand the [N]ative law and custom on the subject is clearly indicated by the two Native Court decisions and the written admission of the maternal grandmother".

109. [1994] 9 N.W.L.R. [Pt. 368] 301 (S.C. Nigeria).

refused to acknowledge these children as their brothers. The plaintiff, acting on behalf of himself and his brothers, brought a representative action against the defendants claiming (a) a declaration that, by Onitsha Native law and custom, the first and second defendants by themselves cannot marry the third defendant for their late brother, Okonkwo, and that the alleged marriage was thus null and void; (b) that the third defendant was not the wife of the late Okonkwo; (c) an order of court that all the children of the third defendant were not the issues of late Okonkwo; and, (d) a declaration that the children of the third defendant could not inherit both the real and personal property of late Okonkwo.

Both the High Court and the Court of Appeal held that the alleged Onitsha customary law, which allowed marriage to a deceased person, was valid in view of the consents of the family and the village before the marriage. On appeal the Supreme Court held that this Onitsha Native law and custom was not only repugnant to natural justice, equity and good conscience but also contrary to public policy. The purported marriage was declared null and void. The Supreme Court observed:

A conduct that might be acceptable a hundred years ago may be heresy these days and *vice versa*. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised international community which we share. We must not forget that we are a part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current social conditions, experiences and perceptions of the people. After all, custom is not static.¹¹⁰

This onslaught against customary law has continued. In a spate of recent decisions, the Nigerian Court of Appeal has struck down many diverse rules of customary law on the basis of the repugnancy doctrine.¹¹¹

B Agreement by Parties to Exclude Customary Law

Where enforceable customary law would have been applicable but the parties agreed, expressly or implicitly, that the transaction would be regulated by another system of law, the court will give effect to their

110. *Ibid.*

111. For instance: *Akpalakpa v. Igbaibo*, [1996] 8 N.W.L.R. [Pt. 468] 553 (C.A. Nigeria), concerning a custom that allegedly militates against economic, political and social development of Native people; *Muojekwu v. Muojekwu*, *supra* note 41 and *Muojekwu v. Ejikeme* *supra* note 21, both of which concern a custom that discriminates against female children.

intention. In *Griffin v. Talabi*,¹¹² a Native purchased the land in dispute from Chief Oloto in 1928 and was given a document couched in English law form: evidencing an agreement for sale, acknowledging receipt of the purchase money and containing an undertaking to execute a formal conveyance.¹¹³ Under English law, the document conferred only an equitable interest in respect of the land.¹¹⁴ It was contended that since both parties in the 1928 transaction were Natives and illiterates, customary law regulated the transaction and conferred an indefeasible title to the land on the purchaser. The West African Court of Appeal rejected this contention and held that the documents, "clearly evidence a transaction the nature of which is unknown to [N]ative law and custom, which are concerned neither with covenants to convey nor with the execution of formal conveyances."¹¹⁵ It added that the documents and conduct of the parties show an intention that customary law should not govern the transaction.¹¹⁶ English law was therefore held to govern the case.

Also in *Okolie v. Ibo*,¹¹⁷ there was a dispute between two Ibos residing in Jos regarding the supply of fuel. One of them was a transporter and the other operated a filling station. It was held that the nature of their respective occupations, the transaction between them and the commodity in which they dealt indicated that neither Islamic law, applicable in Jos, nor Ibo customary law should apply. The parties were therefore held to have intended the application of English law.

In *Akpalakpa v. Igbaibo*,¹¹⁸ the transaction between the parties, a customary grant of land by the plaintiffs to the defendants, was reduced to a memorandum in writing, tendered in the proceedings as Exhibit B. The plaintiffs claimed, among other things, that the defendants were liable to forfeit the land under customary law, and therefore sought to tender evidence of the applicable customary law. The defendants replied that the rights of the parties were not regulated by customary law, but by Exhibit B, under which the defendants' grant was absolute, and evidence of customary law was therefore inadmissible. In accepting that the rights of the parties were exclusively determined by Exhibit B,¹¹⁹ Justice Rowland observed:

The general rule therefore is that where the parties have embodied the terms of their contract or any grant or other disposition of property in a written

112. [1948] 12 W.A.C.A. 371.

113. *Ibid.* at 372.

114. *Ibid.* at 373.

115. *Ibid.* at 372-373.

116. *Ibid.* at 372.

117. [1958] N.R.N.L.R. 89 (H.C. Nigeria).

118. *Supra* note 111.

119. *Ibid.* at 545.

document, extrinsic evidence is not admissible to add to [sic] vary, subtract from or contradict the terms of the written instrument ... Exhibit B was the document which governed all the rights of the parties in the transaction as borne out from the totality of the evidence ... I therefore make bold to say that the contents of Exhibit B which are binding on the parties cannot be added to or varied by extrinsic evidence as the learned counsel for the appellants [*i.e.*, plaintiffs at the lower court] has postulated in his brief of argument.¹²⁰

C Transactions Unknown to Customary Law

I shall illustrate the operation of this category with a conflict between customary and English laws of succession. The question here was whether a Native who went through a Christian marriage ceremony, that is, a monogamous marriage, and died intestate, had by that uncustomary marriage excluded the application of the customary law of succession to his or her estate. In other words, is a Christian marriage a transaction unknown to customary law? The importance of these questions, and the answers thereto, can only be fully appreciated when one understands the different effects of customary and English laws of succession. Ten of them exist:¹²¹

1. Under customary law, a wife has no succession rights beyond that of actual abode in her late husband's house;¹²² but English law gives her well-defined succession rights. Though a wife's non-succession right under customary has been re-stated by the Nigerian Court of Appeal in the recent cases of *Akinnubi v. Akinnubi*¹²³ and *Obusez v. Obusez*,¹²⁴ it has a discriminatory effect, and it is thus doubtful whether a frontal challenge of the customary law will survive a constitutional test.

2. The succession rights of daughters under English law are much ampler and better defined than under Ibo customary law. For instance, Paragraph 156 of the *Customary Law Manual*¹²⁵ states the general rule with respect to immovables: "Where a man is survived by daughters but is not survived by sons, the daughters have no right to inherit his compound or any of his other lands or houses."¹²⁶ However, the position has now changed with the recent case of *Muojekwu v. Muojekwu*.¹²⁷ The deceased and owner of the property in dispute, situated at Onitsha, was a Native of Nnewi and subject

120. *Ibid.* at 547.

121. Okoro, *supra* note 17 at 248-251; Obi, *supra* note 12 at 221-222.

122. *In re The Estate of Agboruja*, [1948-1950] 19 N.L.R. 38; *Suberu v. Sunmonu*, [1957] S.C.N.L.R. 45 (S.C. Nigeria); *Nezianya v. Okagbue*, [1963] 1 ALL N.L.R. 352 (S.C. Nigeria).

123. [1997] 2 N.W.L.R. [Pt. 486] 144 (C.A. Nigeria).

124. [2001] 15 N.W.L.R. [Pt. 736] 377 (C.A. Nigeria).

125. *Supra* note 19 at 103.

126. Similar rule with respect to personal and economic trees is in Paragraphs 175, 176, 181, 188, and 191 of the *Customary Law Manual*, *ibid.* at 114-125.

127. [1997] 7 N.W.L.R. [Pt. 512] 283 (C.A. Nigeria).

to Nnewi customary law. The property was held under Kola tenancy and governed by Onitsha customary law. The deceased was survived by two wives and two daughters, born by the first wife. The deceased's second wife, defendant/respondent in this suit, had an only child, a son, who died without an issue. The second wife and one of the daughters of the deceased lived in the deceased's property at Onitsha.

The deceased also had a brother who survived him but died in 1963. The deceased's brother was survived by his son, the plaintiff/appellant, that is, the deceased's nephew. The plaintiff claimed, in the main, that as the eldest surviving male member of the deceased's family, he was entitled under Nnewi law of customary law, *Oli-ekpe*, to succeed to the deceased's property in Onitsha, as against the deceased's daughters and the defendant. The Court of Appeal held that since the property in dispute was immovable, it was governed by the *lex situs*, that is Onitsha customary law, under which female children are also entitled to succeed to the deceased's property.¹²⁸

Though this conclusion was enough to dispose of the case, the Court of Appeal went on to comment in *obiter* on the character of the alleged *Oli-ekpe* rule of Nnewi customary law.

It is clear from the Record that 'Oli-ekpe' is a Nnewi custom under which males and not females inherit the father's property ... Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilised sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against the womenfolk in this country. They are regarded as inferior to the menfolk. Why should it be so? All human beings – male and female – are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people ... Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'Oli-ekpe' custom of Nnewi, is repugnant to natural justice, equity and good conscience.¹²⁹

3. Under customary law, the children and wife of a deceased, in matrilineal societies, have no rights of succession to the deceased's estate; but English law gives them full rights of succession. However, the customary law position here, as in many other instances considered in this

128. *Ibid.* at 300, 304.

129. *Ibid.* at 304-305.

itemization, may be altered by the use of a testamentary instrument.¹³⁰ In *Adesubokan v. Yunusa*,¹³¹ the Supreme Court of Nigeria held that a Moslem subject to Moslem law, that is, customary law, could by means of a Will validly made under the applicable *Wills Act 1837*, deprive a son of that son's inheritance right under Moslem law.

4. Under Boki (in eastern Nigeria) customary law, only the father, eldest brother or uncle of the deceased, to the exclusion of the children and wife, have rights of succession; but with application of the English law of succession, the children and wife of the deceased would be entitled to succession rights.

5. Among the Kalabari and Nembe (in south-eastern Nigeria), children of an *igwa* marriage belong to and have succession rights in their mother's family; but the application of the English law of succession entitles such children to succession rights in their father's estate.

6. Under customary law, a husband's succession rights to the wife's estate are inferior to and subjected to the succession rights of the children; however, English law gives a husband defined rights in his wife's estate.

7. Customary law of succession recognizes group succession under which children of a deceased become entitled to undivided shares in the deceased's real property, which becomes family property; and the practical effect of the English rule of primogeniture is a virtual destruction of the concept of family property.

8. While succession under English law is beneficial and not onerous, it is both under customary law. A successor under English law succeeds only to assets; but under customary law, he or she succeeds to both assets and liabilities of the deceased, for instance, he or she could be liable for the deceased's personal debts.¹³²

9. While the Crown has a right of succession under English law, for example, *bona vacantia* and right of *escheat*, no such rights are recognized under customary law.

10. Customary law recognizes oral deathbed declarations, that is, a nuncupative will, by which a man or woman may distribute his or her assets; however, English law does not recognize this method of testate distribution except by way of *donatio mortis causa*.

130. In Benin, mid-western Nigeria, and under the *Wills Law, Cap. 172, Laws of Bendel State 1976*, applicable thereto, the deceased may not, by the use of a testamentary device, deprive his eldest son of that son's Benin customary law right to inherit the immovable property, in Benin, wherein the deceased lived until death. See *Egharevba v. Orunongha*, *supra* note 3.

131. [1971] 1 ALL N.L.R. 225 (S.C. Nigeria).

132. Gordon Woodman, "The Family as a Corporation in Ghanaian and Nigerian Law" [1974-1977] 11 A.L.S. 1 at 27.

These differences show the importance and implication of a determination of the question: which law of succession, English or customary, governs the estate of a Nigerian Native who went through a Christian form of marriage and died intestate?

A decision that it is English law totally obviates the application of customary law, with all its consequences as evidenced in the ten differences highlighted above. The Nigerian courts have grappled with this problem over the years. The decisions show a cleavage of approaches. One view maintains that, since the incidents of a Christian marriage are unknown to customary law, it is the English law of succession that applies to the estate of persons who married thereunder and died intestate. In other words, a Christian marriage transaction is unknown to customary law, the application of which should therefore be excluded. The contrary view rejects any notion that Christian marriage has such a talismanic and automatic effect on the law of succession. It holds that the applicable law depends on the facts and circumstances of each case. We shall now look at some of the cases on the topic, starting with those that support the first view.

*Cole v. Cole*¹³³ seems to be the first case. There the deceased, James William Cole, had contracted a Christian marriage in Sierra Leone in 1864. He died intestate in Lagos and was survived by his wife, a brother, and a 'lunatic' son. The brother sought a declaration that he was the customary heir of the deceased and as such should succeed to the property and be declared trustee for the son. The widow, however, claimed that since the deceased had contracted a Christian marriage, the English law of intestate succession, not the customary law, should govern, and that the son was therefore the lawful heir. The lower court gave judgment for the brother, but on appeal the Full Court held that English law should govern succession to the deceased's estate. Brandford Griffith, J., elaborated:

Let us compare the position of the parties respectively in [N]ative and Christian marriages ... By [N]ative law a man can marry as many wives as he can afford to pay for. The wife does not take the husband's name, nor do the husband and wife become one person, but the wife remains a member of her family and often continues to live in her own house apart from the husband. The wife's property remains her own. By strict [N]ative law when a man dies his eldest brother on his mother's side takes his widow as his wife—that is the [N]ative method of providing for the widow. It is a consequence of the loose tie of the [N]ative marriage that by strict [N]ative law a man's eldest brother on his mother's side inherits. The brother is part of the man's family. The wife and her children are part of the wife's family.

133. [1898] 1 N.L.R. 15.

The position of a man and a woman who marry according to Christian rites is entirely different. Christian marriage imposes on the husband duties and obligations not recognised by [N]ative law. The wife throws in her lot with the husband. She enters his family, her property becomes his. In fact, a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to [N]ative law.

In such circumstances can it be contended that the question of inheritance to the deceased in the present case should be decided in accordance with the principles of [N]ative law and custom? I think not.¹³⁴

The learned justice therefore held English law to be applicable by virtue of the Christian marriage, without factually ascertaining the life-style of the deceased, Cole, during his lifetime.¹³⁵ Did the deceased live and conduct himself like a monogamously married Englishman? Could the deceased, a Nigerian Native married in 1874, according to the report, be said to have been aware of and intended the application to his estate of the English law of intestate succession?

The above questions depict the gaps in the *ratio* of *Cole v. Cole*. The case was nevertheless followed by many other cases. In *Coker v. Coker*,¹³⁶ Brookes, J., restated the rule in the *Cole* case by holding that, “[t]he intestate estate of a [N]ative who contracts a Christian or civil marriage is removed from the operation of [N]ative law of succession and brought under the common law [of England].”¹³⁷ In *Adegbola v. Folaranmi*,¹³⁸ the deceased, a Native of Oyo (western Nigeria), contracted a customary marriage and the plaintiff was the only child of that union. Thereafter, the deceased was taken as a slave to the West Indies, where, during a stay of about forty years, he converted to Christianity and married a woman in the Roman Catholic faith. Returning with his wife, of the Christian marriage, to Nigeria, he purchased land, built a house, and took up residence in Lagos. In 1900, he died intestate. His wife by the Christian marriage continued to occupy the house and property until her own death in 1918. She left a will devising the Lagos property to the defendant. The plaintiff sought recovery of the house,

134. *Ibid.* at 21-22.

135. Justice Griffith observed: “Were such a contention [i.e., that customary law was applicable] to hold good then an educated [N]ative Lagos gentleman—maybe a doctor, or a barrister, or a clergyman, or a bishop (for there are all such)—marrying an educated [N]ative lady out of the colony and coming to reside permanently in Lagos would have his estate subject to [N]ative law in case he died intestate, his widow being required by a strict, undiluted [N]ative law to act as wife to her brother-in-law in order to obtain support”. *Ibid.* at 22. But there was no evidence in the Report to show that the deceased lived a lifestyle comparable to those of the professionals mentioned by His Lordship.

136. [1943] 17 N.L.R. 55.

137. *Ibid.* at 57.

138. [1921] 3 N.L.R. 89.

claiming that since she was the deceased's only child, she was entitled to the property according to Native law and custom.¹³⁹ The defendant, however, contended that since the deceased had contracted a Christian marriage, the English law of intestate succession should govern; therefore, since the plaintiff was not a lawful child of the deceased, she had no right to share in the estate.¹⁴⁰ The court, holding itself bound by *Cole's* case,¹⁴¹ gave judgment for the defendant.

An automatic application of the principle in *Cole's* case is manifest in *Gooding v. Martins*.¹⁴² Here the deceased had first contracted a Christian marriage under which the plaintiffs were born. After the death of his first wife, he married under Native law and custom. The defendants were the children of the customary marriage. The issue before the court was whether the defendants were to have any share in the deceased's estate. Again, the court relied on *Cole's* case, that the defendants had no claim to their father's estate.¹⁴³

However, the contrary view looks at the facts and circumstances of each case and is equally supported by a good number of cases. In *Asiata v. Goncallo*,¹⁴⁴ decided just two years after *Cole v. Cole*, the deceased, a Yoruba and Mohammedan, had been seized as a slave and taken to Brazil where he married the same woman twice: first according to Islamic rites and then according to Christian rites. During his stay in Brazil, two daughters were born. When he returned to Nigeria with his wife, he married a second woman under Islamic law. Upon the deceased's death intestate, the plaintiff, the only child of the second marriage, brought an action claiming a share of the estate. The Divisional Court applied *Cole's* case and held that the action was governed by English law. The Full Court, however, held that the second marriage was valid and applied Islamic law, thereby giving the plaintiff and the other children of the deceased an equal share of the estate.

However, the above conclusion was not easy to reach. The judges in that case were confronted with the obstructive precedent of the *Cole* case. As it was, frantic efforts were made to distinguish *Cole*. Speed, A.C.J., opined: "I do not admit that the parties in this case contracted a Christian

139. *Ibid.* at 91.

140. *Ibid.*

141. *Ibid.* at 92.

142. [1942] 8 W.A.C.A. 108.

143. The same result was reached in *The Administrator-General v. Onwo Egbuna*, [1945] 18 N.L.R. 1; and *Hastrup v. Coker*, [1927] 8 N.L.R. 68 at 71, where Petrides, J. held, "I have no hesitation in deciding that it is not in fact necessary to prove that the deceased was a professing Christian when he married, as the law will presume that the parties, by going through a marriage according to Christian rites, intended to be bound by its consequences unless there was evidence to the contrary, of which there was none".

144. [1900] 1 N.L.R. 41.

marriage at all. They were Mohammedans, and they merely for local reasons went through the marriage ceremony in Christian form.¹⁴⁵ Justice Speed's unwillingness to admit the existence of the Christian marriage did not derogate from the legal existence of that marriage. If there was no Christian marriage, why was the reference to *Cole* necessary? Justice Speed's line of distinction was tenuous indeed. In fact, in the same case, Griffith, J., stated, "there can be no doubt that the Christian marriage ... was legal."¹⁴⁶ He, however, stated that the distinction lay in the fact that while *Cole* dealt with the application of intestacy law, *Asiata* was concerned with the validity of the second customary marriage. This is an obvious avoidance of *Cole's* case, for the issue of the validity of the second customary marriage was only incidental to the main issue, which was the application of the intestacy law.¹⁴⁷ However, Griffith, J., adopted the right approach by considering the peculiar facts and circumstances of the case before him, namely, the deceased's manner of life. He observed:

But it may fairly be argued that assuming the marriage to be legal, still it would be contrary to justice that, Selia (the first wife) having impliedly contracted by her Christian marriage for monogamy, her offspring should suffer by the breach of that contract by their father. But the contract which a Christian marriage would ordinarily imply was clearly not implied in the present case as Selia not only went through a Mohammedan ceremony of marriage first but does not appear to have raised the slightest objection to her husband's subsequent marriages and wives, whilst after her husband's death she recognised the validity of his second marriage by requiring the plaintiff as well as her own daughters to sign a paper in connexion with the sale of some of her husband's property. It is clear that Selia recognised that her union with Alli [deceased] was not monogamous ...¹⁴⁸

Therefore, the court without expressly overruling *Cole* set up an approach and solution manifestly distinct from and contrary to *Cole's*.

The approach in *Asiata* was followed by *Smith v. Smith*.¹⁴⁹ There, the deceased contracted a Christian marriage in Sierra Leone in 1876. He later purchased some property and took up residence in Lagos. After his death intestate, his widow and children continued to occupy the deceased's property. Later, the daughters, basing their claim on customary law, brought

145. *Ibid.* at 44.

146. *Ibid.* at 42.

147. This is evidenced by His Lordship's conclusion: "I am of opinion that the marriage with Asatu [*i.e.*, the second marriage] was legal, and that therefore the issue of it is lawful and entitled to the usual rights of a child under Mohammedan law". *Ibid.* at 43.

148. *Ibid.* Earlier, at page 42, he observed that: "It is clear from the evidence that Alli was a *bona fide* follower of the prophet, and as such was legally entitled to marry many wives".

149. [1924] 5 N.L.R. 105.

an action for partition. The defendant, the deceased's male child, opposed the action on the ground that he was the deceased's heir at law and was therefore solely entitled to the property. He relied upon *Cole v. Cole* and argued that since his parents had contracted a Christian marriage, English law must govern intestate succession. In giving judgment for the plaintiffs and rejecting the defendant's contention, Van Der Meulen, J., expatiated:

Counsel appearing for the defendant has based his claim solely upon the decision in the case of *Cole v. Cole* and has contended that the effect of that decision is to lay it down as a binding rule that when parties have been married according to the rites of the Church of England their property must devolve according to the English law and not according to [N]ative law and custom.

I have very carefully perused that decision and I am unable to find that any such general rule is laid down thereby; I do not consider that the case goes further than to decide that in such cases it might be inequitable for the [N]ative law and custom as to succession to property to be applied. It would be quite incorrect to say that all the persons who embrace the Christian faith, or who are married in accordance with its tenets, have in other respects attained that state of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English laws and standards. Any such general proposition would in my opinion be no less unjust in its operation and effects than the converse proposition—with which I think the court must have been concerned in the case of *Cole v. Cole* that because a man is a [N]ative the devolution of his property must be regulated in accordance with [N]ative law and custom, irrespective of his education and general position in life.¹⁵⁰

The completeness of the above needs no gloss save to say that, instead of an automatic application of English law where a Native went through a Christian form of marriage, each case depends on its peculiar facts, circumstances, manner of life of the deceased, and the need to achieve a just result.¹⁵¹

Again, in *Onwudinjoh v. Onwudinjoh*,¹⁵² there was evidence of a Christian marriage between the deceased and a woman called Agnes, but only a customary relationship between him and another woman called Chinelo; the question arose as to the rights of their children to the deceased's estate. Sir Louis Mbanefo, C.J. stated:

150. *Ibid.* at 107.

151. Christian marriage provides only "very strong evidence of his desire and intention to have his life generally regulated by English laws and customs, but it is by no means conclusive evidence". *Ibid.*

152. [1957] E.R.N.L.R. 1 (H.C. Nigeria).

Were I to follow the long line of cases based upon the decision in *Cole v. Cole*, there would be little difficulty. The Full Court in *Cole's case* laid down the proposition that a Christian marriage, to quote the words of Sir Brandford Griffith, "clothes the parties to such marriage and their offspring with a status unknown to [N]ative law." Native law and custom does not then apply to such marriages, and succession to the parties to such marriages is therefore to be governed by English law. That resumé of the decision erred on the side of simplicity, but the propositions stated I think are propositions which had been repeatedly extracted from the case and followed by the courts in this country.

In *Ajayi v. White*,¹⁵³ the deceased had been the widow of Reverend James White, whom she had married according to the provisions of the *Marriage Ordinance*, but who predeceased her. She had three children, one of whom was the defendant in the case. Her other children married under Native law and custom. The plaintiffs were the deceased's grandchildren by those customary law marriages. Upon the deceased's death intestate, the plaintiffs brought an action for partition of the property in their grandmother's estate, basing their claim upon customary law and invoking the application of *Smith's case*. The court dismissed the defendant's contention that, because of the Christian marriage between his parents, English law must be applied to the estate. It was held that while a Christian marriage was strong evidence that succession should be regulated by English law, it was not conclusive of the question. It merely created a refutable presumption. Accordingly, Baker, A.C.J., held: "The original owner was no doubt the wife of an educated man but it is very doubtful whether she was literate or knew anything about the English law of succession; if she had done so it is more than probable she would have made a will."¹⁵⁴

So, why was *Cole v. Cole* not expressly overruled in *Asiata's* line of cases? The reason is that, on its facts, *Cole's* case was, and still is, a just decision. A contrary view in that case would have had the unsavoury effect of disinheriting a man's son in favour of a third party, namely, the man's brother. That was why *Asiata's* line of cases limited *Cole's* case to its peculiar facts. There is no doubt that *Asiata's* line of cases is much preferable to the suggested mechanical approach in *Cole's* case, *i.e.*, an

153. [1946] 18 N.L.R. 41.

154. *Ibid.* at 44. Absence of a Will also provided the anchorage for the application of customary law in *Smith v. Smith*, *supra* note 147 at 107-108: "In the present case, at the time of the death of John Gustavus Smith, his wife and children were all living on the property in dispute, and it may be conjectured that he in all probability bought this property in order that it might be their family home and that they should continue to live there; had he wished to alter the position which existed at the time of his death, it is probable that he would have given some indications of such an intention by making a will or in some other manner". Consequently, it is not far-fetched to conclude that where an educated Native goes through a form of Christian marriage, absence of a Will constitutes a strong piece of evidence, among others, that he does not intend the application of English law on his death intestate.

unquestioning application of English law just because of the presence of a Christian marriage. *Asiata's* approach admirably seeks to apply the law of succession that is best in accord with the presumed intention of the deceased. To the extent that *Cole v. Cole* laid down a binding proposition, it is unlikely that Nigerian courts will follow it in future, more so as it inexorably impinges on the customary law of succession. The guiding principle has been correctly re-stated by Aderemi, J.C.A. in the recent case of *Obusez v. Obusez*:¹⁵⁵

There can be no doubt that *prima facie*, customary law governs the inheritance if the deceased is a person subject to customary law and marries under the [N]ative law and custom or if he dies without going through any form of marriage. Where, however, a person who is subject to customary law went on to transact a marriage under the Act, this raises a presumption that the distribution of his estate shall be regulated by the Marriage Act. This presumption can be rebutted by the manner of life of the deceased suggestive that the deceased wanted customary law to apply.¹⁵⁶

Therefore, following *Asiata's* line of cases, whether a Christian marriage amounts to a transaction unknown to customary law depends on the circumstances of each case and the deceased's manner of life and habits.

VII THE CONSTITUTIONALITY OF CUSTOMARY LAW

I suggested earlier that the validity of customary law is outside of judicial jurisdiction. Theoretically, judges only enforce or recognize a rule of customary law in contradistinction to its validation.¹⁵⁷ Customary law comes into existence by its pre-conflict and pre-judicial acceptance as obligatory by members of the community subject to it.¹⁵⁸ This general acceptance constitutes its tree of validity or *grundnorm*, not judicial *imprimatur*.

But when we factor constitutional considerations into the equation, a new realm of problems arises. Certain interpretational ambiguity may be seen in the recent and frequent subjection of customary law to constitutional standards.¹⁵⁹ The various statutes¹⁶⁰ that empower the courts to disregard a

155. [2001] 15 N.W.L.R. [Pt. 736] 377 (C.A. Nigeria).

156. *Ibid.* at 399-400.

157. See discussion *supra* pp. 160-161.

158. See discussion *supra* p. 157.

159. See for example, *Muojekwu v. Muojekwu*, *supra* note 41; *Muojekwu v. Ejikeme*, *supra* note 21.

160. For instance S. 26 *High Court Law*, Lagos State, *supra* note 5.

customary law do not give an invalidation power, whereas a declaration of unconstitutionality purportedly does.¹⁶¹

This goes too far. A court that finds a particular customary law unable to pass the crucible test should merely refuse to enforce it, and stop at that. A further step, deconstitutionalization of the law, would amount to unjustifiable expansion of judicial power. A judicially unenforceable customary law can still validly regulate the conduct of people subject to it. It is merely denied the support of a modern State's punitive machinery. However, constitutional nullification would seem to extirpate the particular rule of customary law. It is the extant nature of this constitutional power that I doubt.

In apparent contestation of the above perspective is the supremacy clause of the *1999 Constitution of Nigeria*:¹⁶²

1(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

1(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

“[A]ny other law” in Section 1(3) above would seem to include customary law and, therefore, justify judicial power of deconstitutionalization. The matter is however far from easy. Section 318 of the same Constitution defines ‘Act’ as any law made by the National Assembly or taking effect as such and ‘Law’ as law enacted by the House of Assembly of a State. It does not seem that customary law, with regard to its primordial origin, comes within the purview of Section 1(3). But considerable complication is added by Section 315 of the *1999 Nigerian Constitution*, dealing with an existing law:

315(1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be –

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and

161. Unlike Nigeria, South Africa's Constitution contains and configures customary law into its constitutional hierarchy of supremacy of laws: Section 211(3) “The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”.

162. (Lagos: Federal Government Press, 1999).

(b) a law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make law.

(2) The appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.

(3) Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say –

- (a) any other existing law;
- (b) a law of a House of Assembly;
- (c) an Act of the National Assembly; or
- (d) any provision of this constitution

(4) In this section, the following expressions have the meanings assigned to them, respectively ...

(b)“existing law” means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date.

No doubt, the judicial power to deconstitutionalize a rule of customary law, under Section 315(3), avails only if customary law qualifies as an existing law. It is arguable that to the extent customary law deals with matters either within Federal or State legislative competence, it qualifies as an existing law under Section 315(1) (a) and (b). Moreover, Section 315(4)(b) use of the phrase “means any law and includes any rule of law” seems to leave no doubt that customary law is contemplated.

This is also the extra-judicial conclusion of a recently retired Nigerian Supreme Court Justice, Justice Karibi-Whyte, who argued that the definition of existing law, under Section 274 of the *1979 Constitution of Nigeria*,¹⁶³ includes customary law.¹⁶⁴ However, with the greatest respect to Justice

163. That section is similar to Section 315 of the *1999 Constitution*.

164. Karibi-Whyte, *supra* note 2 at 31.

Karibi-Whyte, his professedly undoubted conclusion was not premised on a dynamic analysis of the interpretational and jurisprudential questions raised by the constitutional definition of an 'existing law'. In fact, the matter is not at all free from doubts.

Recall that the word 'law' is scattered throughout Section 315. If, for a moment, we accept as axiomatic the interesting Austinian jurisprudential postulation that customary law is not law until it is recognized and enforced by the courts as agents of the sovereign,¹⁶⁵ and Holland's formidable juristic support,¹⁶⁶ then customary law would be completely outside the purview of Section 315. It would mean that deconstitutionalization can only be visited upon those customary law rules, which have in the past received judicial enforcement or recognition and are now thought to be repugnant or obnoxious. In other words, only such previously recognized rules of customary law qualify as law and as 'existing law' under the constitutional definition. Consequently, a judge who is confronted with a rule of customary law for the first time in court, and refuses to recognize or enforce it, does not seem to have the further power to declare it unconstitutional. I am not saying that in all cases I agree with Holland and Austin that customary law is not law until it receives the stamp of judicial authority. I am only suggesting that for the purpose of constitutional declaration of nullity, customary law is not law.¹⁶⁷ It is in this connection that one inexorably comes to terms with the Historical School's¹⁶⁸ ascription of overriding supremacy to customary law.

South Africa's judicial and constitutional experience guarantees that my contention's utility does not sound in mere pedagogy. Despite South Africa's considerable constitutional recognition of customary law and its containment within South Africa's constitutional order, there is still significant controversy as to the horizontality of the South African's

Hence in order to render the continued application of these laws possible, the Constitution [*i.e.*, 1979, Section 274] has saved all existing laws at the time of its coming into force. These undoubtedly include – (a) the common law of England, the doctrines of Equity and statutes of general application in force in England in 1900, (b) Statutes of the Legislatures of this country, (c) Customary law, which includes Islamic law, customary law has always been in existence even before the advent of the exercise of Imperial jurisdiction.

165. John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1861) at 148.
166. T.E. Holland submitted: "It is certain that customs are not laws when they arise, but that they are largely adopted into the law by the State recognition" in *The Elements of Jurisprudence*, 12th ed., (Oxford: Clarendon Press, 1916) at 60.
167. A contrary suggestion will nullify almost every rule of customary law on constitutional grounds, since customary law's patriarchal foundation makes it inexorably susceptible to constitutional declarations against discrimination.
168. A jurisprudential school of thought espoused by the German jurist von Savigny. See Holland, *supra* note 166 at 63; Allen, *supra* note 11 at 87-89.

Constitution,¹⁶⁹ with the potentiality of nullifying constitutionally inconsistent customary law rules.¹⁷⁰ To appreciate the sting of my argument, one only needs to compare Nigeria's *Muojekwu v. Muojekwu*,¹⁷¹ which seemingly blazed the trail of constitutionality of customary law in Nigeria, with South Africa's *Mthembu v. Letsela*,¹⁷² delivered about six months before *Muojekwu's* case.

Both cases concern a customary law rule of male primogeniture and its consistency with the Bill of Rights, especially the prohibition against discrimination. The constitutionality of the customary law rule was properly raised and argued by the parties in *Mthembu's* case, but only raised and determined in the judgments of *Muojekwu's* case and *Muojekwu v. Ejikeme*.¹⁷³ In an impassioned and decontextualized argument, the Nigerian Justices struck down the customary law rule of male primogeniture. However, in a most commendable show of sociological jurisprudence, Le Roux J., in *Mthembu's* case, embarked upon a disquisition on the social context of the allegedly offending customary law rule. The learned judge disavowed mechanical constitutional scholarship, dictating a mundane juxtaposition and appraisal of the customary law rule of male primogeniture against constitutional Bill of Rights:

The question that has to be pertinently considered, therefore, is whether this rule of succession *unfairly* discriminates between persons on the ground of sex or gender. It is common cause that in rural areas where this rule most frequently finds its application, the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system and belonging to a particular house. It is clear from Professor Bennett's opinion ... that a widow in particular may remain at the deceased's homestead and continue to use the estate property and that the heir may not eject her at whim. He quotes numerous decisions of the Native Appeal Court in support of this proposition, and he submits that accordingly the customary law rule cannot be said to discriminate unfairly against women. This view of the rule relating to succession has much to commend itself. If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture ... I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in s. 8 of the Constitution ... In view of the manifest acknowledgement of customary law as a system existing parallel to the common law by the Constitution (*vide* ss. 33(3) and 181(1)) and

169. Horizontal application signifies that a constitution equally applies to purely private relations.

170. This controversy is evident in *Mthembu v. Letsela & Anor.*, [1997] 2 S.A. 936; and *Harmonisation*, *supra* note 77 at 20-24.

171. *Supra* note 41.

172. [1995] 2 S A 936.

173. [2000] 5 N.W.L.R. [Part 657] 402 (C.A. Nigeria).

the freedom granted to persons to choose this system as governing their relationship (as implied in s. 31), I cannot accept the submission that the succession rule is necessarily in conflict with s. 8. Neither is it contrary to public policy or natural justice as envisaged in Act 45 of 1988.¹⁷⁴

One only needs to remind Nigerian judges of the recent warning of the South African Law Commission that: “The repugnancy proviso—a mark of colonial paternalism—is not an appropriate medium for determining the constitutional validity of customary law. This is an issue deserving a more thoughtful and a more rigorous discourse.”¹⁷⁵

The moral of this cursory analysis is that the constitutionality of a repugnant rule of customary law is a field strewn with many more thorns and pitfalls than our judges would seem to notice or want us to believe. The Constitution is an organic document that embodies a people’s aspirations, and evidences their historical evolution. It should not easily be employed in the disintegration of a pre-existing legal order. Such a constitutional function would be ahistorical.

VIII CONCLUSION

The meaning of customary law emphasizes the difference between a custom and customary law. The characteristics of customary law and the evidentiary problem of customary law were analyzed to suggest that the best way of ascertaining customary law in court is by proving it as a fact. This method of proof allows customary law to retain its pristine characteristics. I examined the three criteria by which an otherwise applicable customary law will be excluded. Customary law was challenged by the introduction of colonial law and civilization, and adequately responded by the exercise of its unwritten and flexible characteristics.

Moreover, this paper testifies to the significant legal task confronting Nigerian policy makers, the Nigerian legislature, and especially Nigerian judges. The judiciary has the arduous task of synthesizing the heterogeneous body of Nigerian jurisprudence¹⁷⁶ into an agreeable whole that may be called the Nigerian common law. In this process of legal harmonization, our Indigenous jurisprudence has suffered an unacceptable degree of delegitimization and deconstitutionalization.¹⁷⁷

No doubt, some of the circumstances that justified and legitimized some rules of customary law have become anachronistic in the twenty-first

174. *Supra* note 170 at 945 – 946 [emphasis in original].

175. *Harmonisation*, *supra* note 77 at 41.

176. See discussion *supra* p. 150.

177. See generally discussion *supra* s. VI.

century. But it is moot that judicial invalidation of customary law should be preceded by a frontal inquiry into the anachronism, iniquity, constitutionality, and anti-developmentality of customary law. In other words, it is undesirable to strike down a rule of customary law by means of *obiter dictum*. The repugnancy or constitutionality of a rule of customary law must be directly in issue, raised by the parties in the pleadings and argued in court, before its invalidation is acceptable. This cautionary measure ensures that, for customary law, antiquity neither become synonymous with barbarism, nor an Achilles' heel in its enforcement.

It is very tempting for Nigerian judges that received western education and adopt a western lifestyle to find customary law discordant with their perception of reality or modernity. But defining modernity is difficult. Is allowing same sex marriage a modern value? By means of legislative or judicial activities in Vermont,¹⁷⁸ Nova Scotia, Ontario, British Columbia and Alberta,¹⁷⁹ it seems the answer may be yes. Yet Nigerian judges, on the basis of the same modernity, have found that woman to woman marriage in Iboland repugnant to natural justice, equity and good conscience.¹⁸⁰ No regard was even given to the disempowerment of women that the decision entails. It further erodes the rights of women under customary law. I wonder whether customary law's variant of a same sex relationship, woman to woman marriage, intended to perpetuate a lineage, is not more modern than some Nigerian judges perception of modernity, which has provided the anchorage for considerable delegitimization of customary law.

Contemporary historical fact underscores the western world's recantation of its jaundiced conceptualization of Indigenous culture and sociology. The western world is now having recourse to Indigenous sociology and solutions, previously regarded as barbaric. Tattooing, which partly invited the ignoble comparison of our ancestors to non-human forms, is now the acceptable fashion of modernity. Recourse is increasingly had to ethno-pharmacology as the basis of drug manufacture in the West.¹⁸¹ Is it not ironic that while our Indigenous ways of life continue to sharpen modernity in the West, they are taken to define barbarism in our juridical milieu?

178. Legislation and text available online: <<http://www.leg.state.vt.us/baker/baker.cfm>>; See also Ross Sneyd, "Gov. Signs Gay Unions Bill: Vt. 1st State to Give Gay Couples Rights of Marriage" The Associated Press, online: <<http://abcnews.go.com/sections/us/DailyNews/vermont000426.html>> (date accessed: 16 December 2001).

179. CBC News, "Same Sex Couples may Adopt in Nova Scotia," online: <http://cbc.ca/cgi-bin/templates/view.cgi?news/2001/07/09/ns_adoption010709> (date accessed: 16 December 2001).

180. See above discussion on page 173.

181. Tom Greaves, ed., *Intellectual Property Rights For Indigenous Peoples: A Sourcebook* (Oklahoma: Society for Applied Anthropology, 1994) c. 4-7.

Modernity does not provide conceptual confidence for the nullification of some rules of customary law.

It should not be forgotten that the majority of Nigeria's one hundred and twenty million people are likely to be illiterate, living in rural areas and regulated by rules of customary law. It is a notorious fact that customary arbitration or Indigenous dispute resolution mechanism is still the preferred means of dispute resolution in the rural areas. The activation of the machinery of justice of a modern State, by one member of a family against another, is still seen as an invitation to enmity and a breach of family equilibrium. Settled expectation of the application of customary law should not be quashed by an unwarranted invocation of a judicially perceived modernity or questionable constitutional law scholarship.