**SOURCES OF LAW: Customary**

**Law**

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* The word ‘customary’ means a custom, way of life, tradition, a generally accepted behaviour or way of doing things.
* Customary law is a rule which in a particular district has from long usage, obtained the force of law.
* Customary law is a particular way of behaviour, which because it has long been established among members of a social group or tribe, can develop and acquire the force of Law or right.
* Customary Law is the law of the various indigenous peoples in Nigeria, before other systems of law came into the country to displace or modify customary law.
* It is the oldest source of Law in Nigeria having existed in the various communities and tribes before the advent of the British into Nigeria.
* It is not enacted by the legislature in Nigeria; yet it is enforceable and binding between the parties subject to its sway. See Zaidan v Mobosen [1973] 11 FSC 1.
* Observance of all traditional norms, is secured through a system of sanctions ranging from fines, to ostracism or even expulsion from the group.
* Customary law still serves the needs of ordinary citizens especially in the area of personal law including marriage, succession and property rights.
* However, its earlier application in the field of criminal law has been abolished by the operation of S. 36(12) 1999 Const. which provides that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written Law.

**DEFINITION OF CUSTOMARY LAW**

* Customary law has been defined differently by different writers;
* Prof Taslim Elias defined customary law as ‘A body of customs accepted by members of a community as binding upon them.
* Prof A.D. Badaiki defined it as law which is generated by custom. The customary law of a community is a body of customs and traditions that regulate…various kinds of relationships between the members of a community.
* In the case of Owoniyi v Omotosho [1961] 1 ALL NLR 304, the supreme court defined customary law as ‘a mirror of accepted usage among a given people’.

# Characteristics of Customary Law

• ‘Characteristics’ in this context means the main features of customary Law.

**1. It must be in existence:**

* A customary law must be in existence at the relevant time it is alleged or sought to be relied on
* The fact that a customary law is old and ancient does not make it inapplicable or unenforceable if the people recognize it as their customary law and binding on them
* However, It must be responsive to present conditions and lifestyle of the people and would not qualify if it is a relic of bygone days. See Lewis v Bankole[1908] 1 NLR 81 at 83;

Esuagbayi Eleko v Government of Nigeria [1931] AC 622 at 677

2. **It is largely Unwritten**

* Customary Law is mostly unwritten because it is not compiled, codified nor legislated in the form of a statute law
* Due to its unwritten nature therefore, the sources of customary law are still the recollection of elders and persons whose traditional roles or offices make them custodians of customary law.
* There have been arguments for and against the codification of customary law.
* Arguments for include;
	+ Documentation for posterity
	+ It will be certain and prevent it from being vague
	+ Uniformity in provision and application
* Arguments against include;
	+ It will make customary Law rigid and need amendment and this could take a long process
	+ Customary law will lose its flexibility

**3. Customary law must be accepted as a binding custom**. See Lewis v Bankole [1908] 1 NLR 81 at 83:

* To be valid, the community where the custom obtains must give assent to it or accept it as a custom. In the words of Bairaman F.J, ‘a custom is a mirror of accepted usage’
* It must enjoy the assent, recognition or acceptance of the people as a valid custom which obtains in such community.

4. **It is flexible**

* Customary law is flexible. It is elastic. It is dynamic and changes with the times, that is, it changes with the society that observes it.
* In Kimdey v Military Governor of Gongola State[1988] 2 NWLR pt 77 p 445 at 461, Karibi-whyte JSC explained that;

*One of the characteristics of native Law and which provides for its resilience is its flexibility and capacity for adaptation. It modifies itself to accord with changing conditions*

* In Agbai v Okogbue [1991] 7 N.W.L.R 391 it was stated that customary laws were formulated from time immemorial and due to its flexibility, as our society advances, they meet situations which were inconceivable at the time they took root.
* Strong evidence may, however be required to show that a particular custom has been abandoned or changed. See Oloto v Dawuda [1904] 1 N.L.R. 58
* Two examples which shows that customary law adapts to changes are;
* Customary Law used to be unwritten
* Based on customary ownership and land holding, land was considered to belong to the family or community. Therefore absolute transfer to strangers was not possible.

5**. Customary Law varies**

* Customary laws are not uniform across ethnic groups, they differ from tribe to tribe.
* Differences in the customary laws of ethnic groups can be traced to various factors such as language, proximity, origin, history and social structure. For example, the customary law system of an ethnic group in one town may be different from the customary law system of the ethnic group in a neighbouring town even though the two ethnic groups speak the same language.

**The Validity and Application of Customary Law**

* In the communal legal systems which obtained before the advent of modern legal systems, customary law enjoyed respect.
* Today, however, customary law does not enjoy the privilege of automatic enforcement .
* For a customary law to be valid and consequently enforceable, it must satisfy or pass the validity test. i.e it must meet the statutory requirements laid down for its applicability.
* The following three criteria must be satisfied by every rule of customary law for it to be valid;
1. The rule must not be repugnant to natural justice, equity and good conscience
2. The rule must not be incompatible either directly or by implication with any law for the time being in force 3) The rule must not be contrary to public policy

**A. Repugnancy Test**

* Natural justice is the inherent right of a person to have fair and just treatment by government and other persons.
* It has two main principles which are;
	+ Audi alterem patem: This means hear both parties or the various sides in a dispute before giving judgment or decision
	+ Nemo Judex In Casua sua: This means no person should be a judge in his own cause or be a judge in a matter in which he is a party or has an interest or stake.
* Simply put, it means fair hearing in all its ramifications. See Egba Native Administration v Adeyanju [1936] 13 NLR 77
* Equity means fairness, just, right, justice. A customary law must be equitable and must result in fair and just decisions.
* Good conscience means a conscience that is pure, just and good to everyone.
* They should have a moral basis
* Customs should be fair, just, for the good of all and should not be motivated by an arbitrary, retrogressive, greedy, oppressive, malicious conscience or mind
* Justifying the clause, lord wright in Laoye v Oyetunde [1944] A.C. 170 reasoned that it may have been intended to invalidate barbaric customs.
* The court will not give effect to a custom that permits or gives license to immorality.
* A custom that does not permit the economic, social and political growth of the people is contrary to the rule of natural justice, equity and good conscience.
* If the court finds a particular custom repugnant, it will refuse to enforce the customary law in question.
* The court may hold that a particular custom is valid but may refuse to enforce it in exceptional circumstances where the application of the custom will not meet the justice of the case concerned.
* A custom is not void because it is inconsistent with English principles and it need not be weighed against the standards of more advanced communities.
* But this, in practice have proved difficult for judges whose understandings of the notions of right and wrong are in conflict with habits and common conscience of the communities over which they sit.

The repugnancy test has been applied to various issues in customary law.

* See Edet v Esien[1932] 11 N.L.R. 47
* Danmole v Dawodu [1958] 3 F.S.C.46
* Okoriko v Otobo [1961] W.N.L.R. 48
* Effiong Okon Ata [1930] 10 N.L.R. 65
* Asogbon v Odutan [1935] 12 NLR 7
* However, each case must be considered on its own merit and individually.

B**. Incompatibility**

* A rule of customary law, to be valid and enforceable, must not be incompatible, either directly or by implication with any law for the time being in force.
* Customary law must not clash with the Constitution or any other Statute
* When a situation is governed exclusively by any law at that particular time, then customary law is to give way for such law to take effect.
* It has however been interpreted in different ways. See Adebusokan v Yinusa [1971] All NLR 227 and Rotibi v Savage[1944] 17 NLR 77

Examples of such customs involves those that deal with slavery, discrimination, indignity, among others.

* In Uke v Iro[2001] 17 W.R.N 172(C.A), the Court of Appeal declared that the Nwewi custom which precluded a woman from giving evidence in relation to title to land offended the constitutional provision guaranteeing equal rights to all sexes.
* See also;
* Mojekwu v Mojekwu[1997] 7 NWLR pt 512, p 283
* Re Addevoh[1951] 13 W.A.C.A 304 at 310
* Agbai v Okogbue [1991] 7. N.W.L.R 391
* Adesubokan v Yinusa [1971] N.N.L.R. 77

**C. Public policy**

* S. 14(3), Evidence Act provides that a custom shall not be enforced if it is contrary to public policy.
* Public policy means making decisions that will ensure the security and welfare of the individual and the state in general
* Public policy is usually expressed in the plans, pronouncements, policies, manifesto, programmes, actions and projects of government.
* Public policy could be used positively to keep the rules of customary law on the path of justice and for the sustenance of a better society.

There have been difficulty in parameters to be adopted in gauging the limits of public policy and most times, each case is determined according to the belief of the judge that handled it.

* A custom permitting two women to get married to each other was denied enforcement in Merigbe v Egbu [1976] 3. S.C. 23
* In Okonkwo v Okagbue [1994] 9 NWLR pt 368, p. 301, an alleged custom whereby a woman married a dead man in order to bring forth children for him, in his name was held to be contrary to public policy. See also Nzekwu v Nzekwu [1989] 2 NWLR pt 104 p.373 SC; Alake v Pratt[1955] 15 W.A.C.A. 20 and

Re Adadevoh[1951] 13 W.A.C.A. 304

**ASCERTAINMENT OR PROOF OF CUSTOMARY LAW**

* The Evidence Act makes provisions for facts which does not need to be proved by evidence in courts (s. 122

Evidence Act, 2011)

* However, it denies customary law the same status. See Oba Lipede v Sonekan [1995] 1 N.W.L.R. 668
* The reasons necessitating proof of customary law are;
	+ Diversity in the various customary Laws implies that a particular judge may not always be acquainted with the rule to be applied.
	+ Its unwritten nature hinders reference to documented authorities.
	+ Most judges with their formal training and English background are not always grounded in customary laws

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* By virtue of S. 16(1), Evidence Act 2011, there are two methods of proving customary law
	+ - By giving evidence to establish it
		- By judicial notice

**1. Proving Customary Law by Evidence**

* An alleged custom is treated as a fact that has to be strictly proved, not only by the evidence of the person alleging it, but by corroborative evidence. See Ekpenga v Ozogula II [1962] 1 S.C.N.L.R 423; Angu v Attah [1921] P.C. 1874-1928
* A bare assertion that a particular custom exists is not enough proof.
* The burden of proving a custom lies on the party who asserts and seeks to rely on it. See Olabanji v

Ajiboye[1992] 1. N.W.L.R 473 at 483

* Thus, the types of evidence that may be called to establish a custom are;
	+ Witnesses
	+ Expert Evidence
	+ Textbooks

**a. Witnesses**

* A party may call another person or persons as witness to corroborate his evidence on the existence of an alleged custom.
* However, all witnesses called to give evidence must be persons who can give direct evidence of the custom. i.e what they saw or experienced personally.
* However, summoning of a witness to mislead the court is usually a problem.

**b. Expert Evidence**

* By sections 68, 70 and 73 of the Evidence Act 2011, the law permits the opinion of persons who are specially skilled in the relevant native law and custom
* Experts in the context of customary law refers to native chiefs and others having a special knowledge of native laws and customs by virtue of their experience, position or role in the society.
* Such person must be shown to have such knowledge and experience. See Ifeajuna v Ifeajuna [1997] 7 N.W.L.R. 405
* However, the courts will still have to form its own opinion about the alleged custom and has discretion to the weight to be attached to it.
* This weight would depend largely on circumstances of a case, credibility of witness, his knowledge of the customary law concerned and the availability of other supporting evidence.
* Courts are required to reject any or all contradicting evidence as they deem fit.
* In Adewoyin v Adeyeye [1963] 1 ALL NLR 52, the court castigated the then Ooni of Ife for asserting a particular rule of customary law only for selfish reasons.

**c. Books**

* Books and manuscripts are allowed to prove a rule of customary law. See S 70, Evidence Act 2011
* These consists of material sources of Law which are cited and relied upon when they have become

authoritative sources on the subject under review

* In Adeseye v Taiwo [1956] 1 F.S.C. 84, Ajisafe’s ‘Law and Custom of the Yoruba people’ was relied on.
* In Olusesi v Oyelusi [1986] 3. N.W.L.R. 634, the court of Appeal was aided by T.O Elias’ Nigerian Land Law in the determination of royal estates.
* In the case of Adedibu v Adewoyin[1951] 13 W.A.C.A 191, it was held that for the book to be admitted as proof, it must;
* a) form a part of evidence in the case

b) be recognized by natives as a legal authority.

* In Oyelowo v Oyelowo,[1987] 2. N.W.L.R 243 Nwabueze’s Nigerian’s land law was relied upon in establishing the fact that the rightful and natural place of children in Nigeria is in the father’s house.
* The burden of proof on a party relying on a book or document to establish a custom is a heavy one because of the difficulties involved.
* Some of such difficulties are as follows;
1. A court will have to determine whether the writing is an authority on the custom in question and whether it is recognised by the community.
2. The author or writer may not have been objective. He may not be a neutral party and his writing may be partial and biased or may be mostly hearsay and largely untrue
3. The writing may not be based on personal research and investigations conducted by the author.

# Judicial Notice

* When a customary law has been previously proved or is clearly established, the court may exercise its discretion and judicially notice it and thus dispense with the need of establishing it afresh by giving evidence in the case at hand
* Section 14(2), Evidence Act, 2004 provides that a custom may be judicially noticed by the court If it has been acted upon by a court of superior or coordinate jurisdiction to an extent which justifies that persons look upon such custom as binding upon them.
* In Larinde v Afiko [1940] 6. W.A.C.A 108 the court of Appeal refused to uphold the decision of the trial court taking judicial notice of a particular Awori custom on the ground that the single decision relied upon by the trial court did not amount to frequent proof by the court.
* In Osinowo v Fagbenro [1954] 21 N.L.R. 3, the plaintiff relied on three earlier decisions in which the rule of customary law had been adopted and it was held sufficient for the court to take judicial notice of the custom.
* However, the court in Cole v Akinyele [1960] 5. F.S.C. 84 took judicial notice of a rule backed up with a single previous judgment
* Section 17 of the Evidence Act 2011 provides that a custom may be judicially noticed, if it has been adjudicated upon once by a superior court of record.
* Thus, the new position of the Law is that when a custom has been proved once in a superior court, it can be judicially noticed the next time such custom is in issue in the court.

# Proof in Customary Courts

* Ordinarily, strict proof of an alleged rule of customary law would be unnecessary in the customary courts especially where they are presided over by persons indigenous to, or otherwise conversant with the law.
* The reason for this is that the judges of these category of courts are deemed to know the native law and customs of their areas of jurisdiction
* However, the presumption of a court knowing the customary law of its area of jurisdiction is rebuttable . See Gyang v Gyang[1969] NNLR 99 at 100
* In Ehigie v Ehigie, [1961] 1 ALL NLR 871 the president of a grade A customary court had acted on his personal knowledge of Benin customary law.
* However, courts are cautious in permitting the admission of a rule of customary law otherwise than through evidence.
* This is because customary law is largely unwritten and even where the prevailing rule in one community is known, it may differ substantially from what obtains in another community.