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Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts

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Abstract

With a view to showing that courts do not have the power to validate native law and custom, this article highlights the different roles assigned to the assent of the people governed by native law and custom, and to the court called upon to determine its judicial enforceability. It argues that customary law is validated by the assent of the people and not by courts, and that the tests contained in different statutes by which courts are permitted to intervene in the regime of customary law are tests of enforceability and not tests of validity. As a result, it argues that the term "validity test" is misleading when used in relation to the power of courts to determine the enforceability of native law and custom, and should therefore be discarded.

Keywords

Native law and custom, judicial notice, repugnancy test, validation of customary law, Nigerian Constitution, evidence

INTRODUCTION

No African scholar or judge would disagree that customary law is a veritable and effective part of Nigeria's legal system. At some point, between the cradle and the grave, customary law regulates essential parts of all Nigerians' existence. It touches everyone, first as individual members of an ethnic or cultural group. Secondly, the regime of customary law to which an individual's ethnic or cultural group is subject, touches his or her corporate existence as a member of that group.

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Customary law is a system of law that appears to have settled and generally accepted definitions. It is generally accepted that customary law is a law that reflects the practices, culture and consciousness (what historical law legal theorists call *Volksgeist*)[1] of the people subject to its sway. This is clearly reflected in the various judicial, statutory and academic definitions of customary law.

In *Owoniyi v Omotosho*, customary law was defined as "the mirror of accepted usage".[2] In line with its indigenous character, it was found to be an organic law in *Oyewumi v Ogunsesan*, where it was stated that "it is not static"[3] and also that "it is regulatory because it guides and controls the lives and transactions of the people subject to it".[4] In *Lewis v Bankole*, Osborne CJ found it to be flexible and "always subject to motives of expediency [as well as showing] … unquestionable adaptability to altered circumstance without entirely losing its character".[5] The same view was reflected in *Zaiden v Mohssen*, where it was stated that customary law is "any system 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".[6] In *Olubodun v Lawal*, Aderemi JSC defined "custom or customary law …[as] a set of rules of conduct applying to persons and things within a particular locality".[7] In addition, it was defined in *Alfa and Others v Arepo* as "unwritten law or rules which are recognized and applied by the community as governing its transactions and code of behaviour in any particular matter".[8] The cases have also shown that native law and custom "should be universally applicable within the area of acceptability"[9] and it must be "existing native law and custom and not that of by gone days".[10]

Section 258(1) of the Evidence Act, 2011, signifies legislative agreement with these judicial definitions. It defines customs as "a rule which, in a particular district, has, from long usage, obtained the force of law". On the same terms, section 2 of the Plateau State Customary Court of Appeal Law, 1979 defines it as "… the rule of conduct which governs legal relationships … established by custom and usage and not forming part of the common law of England nor formally enacted". This is in tandem with section 2 of the

1 See L Kutner "Legal philosophers: Savigny: German lawgiver" (1972) 55/2 *Marquette Law Review* 280; R Wacks *Understanding Jurisprudence* (4th ed, 2015, Oxford University Press), noting that Savigny believed that the law is located in the spirit of the people, the *Volksgeist*, and that, "like language, a society's law materializes spontaneously from its way of life".

2 1962 WNLR 1 at 5.

3 (1990) 3 NWLR 182 at 207.

4 Ibid.

5 1 NLR 80 at 100–01.

6 (1973) 1 NLR 740 at 753.

7 2008) 161 LRCN 76 at 97.

8 (1963) WNLR 95 at 97.

9 *Ojisua v Aiyebelehin* (2001) 11 NWLR (pt 723) 44 at 52–53.

10 *Lewis v Bankole*, above at note 5 at 309. See also Karibi-Whyte JSC in *Kindey and Others v Military Governor of Plateau State* (1988) 2 NWLR (pt 77) 445.

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Customary Courts Law of the defunct Eastern Region,[11] which defines customary law as "[a] rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage".

The same pattern of definition is evident in academic literature. It is reflected in Obi's definition that customary law is a "rule (or body of rules) which the members of a given community recognize as binding on themselves, and which the courts enforce if and when called upon to do so".[12] The same perspective was presented by Elias, who defined customary law as follows: "[t]he law of a given community is the body of rules which are recognized as obligatory by its members".[13] To Malemi, "customary law is a law that evolved from the established practices, customs and way of life of a people".[14] Kiye considered that "[c]ustomary law refers to custom, local usage, and belief of a particular community considered as binding on the people".[15] The unwritten nature of native law and custom is one of its defining characteristics.[16]

All these definitions emphasize the source of customary law as arising from communal social conducts, a law ingrained in the consciousness of the people without a positivist origin. This process of communal social conduct was explained by Bennett and Vermeulen as follows:

> "The community involvement in the creation of customary law occurs on two levels. On the one level, it is the simple repetition of a pattern of behaviour from which customary law springs. Provided a relatively significant number of people in the community concerned observe the pattern in question, the probability exists that the thing which is done becomes the thing which 'ought' to be done. Traditionally, legal science distinguishes mere custom from customary law by arguing that *opinio necessitatis* is the essential ingredient of the customary legal norm. This presupposes, of course, a collective act

11 Customary Courts Law, cap 32, Laws of Eastern Nigeria, 1963, now applicable in the states that succeeded to the region. Oba noted that sec 2 of the Customary Courts Law, cap 49, Revised Laws of Anambra State of Nigeria, 1979 is a reincarnation of this provision: AA Oba "The administration of customary law in a post-colonial Nigerian state" (2006) 37 *Cambrian Law Review* 95 at 95.

12 SNC Obi *Modern Family Law in Southern Nigeria* (1966, Sweet & Maxwell) at 7.

13 TO Elias *The Nature of African Customary Law* (1956, University Press) at 55.

14 E Malemi *The Nigerian Legal System: Text and Cases* (3rd ed, 2012, Princeton Publishing Co) at 64. See also A Emiola *The Principles of African Customary Law* (2005, Emiola Publishers Ltd) at 11, noting that "customary law … grows from the customs and conduct of the people and is based on the tested traditions of the particular society concerned".

15 ME Kiye "The repugnancy and incompatibility tests and customary law in anglophone Cameroon" (2015) 15/2 *African Studies Quarterly* 86 at 86.

16 AO Obilade *The Nigerian Legal System* (1979, Spectrum law Publishers) at 83, noting that "ethnic customary law is unwritten".

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> of will transforming what was formerly merely custom into customary law. In either event, it is the community which determines the law".[17]

The mode of origin of customary law raises salient questions about the limits of the power of courts in the development of customary law. Indeed, the rational and natural effects these definitions should have in defining the actual province of courts in the exercise of statutory powers to interfere in the regime of a rule of custom have long been misunderstood. This misunderstanding has contributed to the interchangeable use of the terms "validity" and "enforcement" when determining or discussing the limits of the powers of the courts called upon to enforce a rule of custom.

The aim of this article is to show that there is a marked difference regarding "validity" and "enforceability", between the people whose consciousness a custom reflects, and the courts whose province it is to determine the enforceability or otherwise of a rule of custom. It argues that, beyond determining the enforceability or otherwise of customs, courts of law lack the power to validate a rule of customary law, as this power resides in the assent of the people whose consciousness the rule of custom reflects. The article concludes that the use of the term "validity test" is misleading and should be discarded so as to give full effect to the distinct nature of customary law as a law validated by the assent of the people: the only test of its validity.

PROOF OF CUSTOMARY LAW

The test of the existence of a rule of custom as law is the ability of the party that alleges its existence to "prove in the first instance by calling witnesses acquainted with the native custom".[18] This follows the "well-established principle that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case [in the first instance of its application]".[19] The requirement of proof of customary law necessarily follows from the fact that superior court judges cannot be presumed to know the rules of customary law prevalent in their area of jurisdiction. Furthermore, being unwritten, judges have no other way of knowing than relying on those who know and live by the rules. In *Ometa v Numa*, the court observed that the question of customary law "was … entirely a question of fact and a

17 TW Bennett and T Vermeulen "Codification of customary law" (1980) 24/2 *Journal of African Law* 206 at 215.

18 *Angu v Attah* (1916) PC at 43.

19 *Giwa v Erinmilokun* (1961) All NLR 294 at 379. Obilade *The Nigerian Legal System*, above at note 16 at 85, noting that "unless a custom is judicially noticed, the party contending that it exists has to prove it as a fact". Malemi *The Nigerian Legal System*, above at note 14 at 95, noting that "a rule of customary law … has to be proved as a fact by calling evidence, at least at the first instance".

question depending upon the knowledge of tribal tenures and of the habits and customs of native people in relation to dealings with land".[20]

As against what obtains in the superior courts of record, there was once a general presumption that customary courts operating within the area of a custom need not receive evidence of the existence of a custom, as they were presumed to know such customs. In *Haav v Kundu*, the Supreme Court stated that "in all matters of customary law … the area court of the locality is presumed to know the applicable law".[21] In *Sule v Sule*, the court held that it was wrong to argue that a customary court trial judge cannot pronounce on the customary law of its area of jurisdiction without evidence of customary law being led before it.[22] In *Ogiugo v Ogiugo*, the Supreme Court reiterated that a customary court is competent to declare the customary law of its area of jurisdiction without requiring that any evidence of such customary law be led before it.[23] In keeping with this presumption, the court declared that any customary law that the customary trial court stated in its judgment to be the appropriate customary law shall be presumed to be correct until the contrary is proved.[24]

This position is well supported in academic literature on the point. Park,[25] Obilade[26] and Aigbovo[27] all agree with the view that there is no need to prove the customary law of the locality in which a court is situated.

Drawing from *Haav v Kundu*, Aigbovo observed that it is no longer necessary to show that members of the court are versed in the law of the locality.[28] In this respect, *Haav v Kundu* appears to be at variance with the rationale established by the West African Court of Appeal in *Ababio II v Nsemfoo* (*Ababio II*),[29] where the court limited to superior courts of record, the application of the rule in *Angu v Attah*[30] that customary law needs to be proved by evidence. *Ababio II* emphasized that different considerations apply to the application of customary law by customary courts. In the court's view, the requirement to call evidence is:

> "[I]ntended to apply to what may be described as British courts before which it is sought to prove a particular custom. There is no ground for extending its application to native courts of which the members are versed in their own customary law, although there is nothing to prevent a party from calling

20 (1934) 11 NLR (PC) at 18.
21 (1997) LRCN 1435; (1997) 5 NWLR (pt 505) 313 at 319. Also see *Ogiugo and Ogiugo* (1999) 73 LRCN 3681.
22 Unreported judgment of the Edo State Customary Court of Appeal, appeal no CC/2A/2003 of 26 November 2003.
23 Above at note 21 at 3684.
24 Id at 3685.
25 AEW Park *The Sources of Nigerian Law* (1963, Sweet and Maxwell) at 90.
26 Obilade *The Nigerian Legal System*, above at note 16 at 90.
27 O Aigbovo *Introduction to the Nigerian Legal System* (3rd ed, 2018, Sylva Publishers Ltd) at 71.
28 Id at 72.
29 (1947) 12 WACA 127.
30 Above at note 18.

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> witnesses to prove an alleged custom. If the members of a native court are familiar with a custom it is certainly not obligatory upon it to require the custom to be proved through witnesses."[31]

This is more so as the Evidence Act is not automatically applicable to customary courts; it must be specifically extended to customary courts. The initial hesitation regarding proof of customary law by evidence in customary courts was borne out of the belief that judges of those courts "whether trained lawyers or not are usually members of the communities which they serve, and each is well acquainted with the law of his own area"[32] as against their counterparts in non-native courts, manned by "judges … trained solely in English law".[33] This was however not a question of the nationality of judges but a question of whether the judges are "members of the communities in which they serve"[34] and thus acquainted with the law of the area of the court's jurisdiction.

Commenting on *Ababio II*, Obilade commented that "the case is no authority for the view that proof of customary law before customary courts is not in any circumstances necessary. Rather, it is authority for the view that, where the applicable customary law is that of the area of jurisdiction of a customary court and the members of the court are versed in that law, proof of the law is not necessary.[35] The Supreme Court subsequently clarified this position to the effect that the *Ababio II* rule will apply, even if only one of the judges on the bench is a member of the community and is versed in the law of the area.[36] For customary court judges to be able to presume to know the existing customary law, therefore, two qualifications are necessary: the judges should be members of the area of jurisdiction of the customary court; and must be versed in the customary law of the area."

The requirement that the judges should be versed in the applicable native law and custom is a necessary qualification to the presumption that customary court judges from the area of the court's jurisdiction know the prevailing customary law of the area. This is a sensible qualification, in that it is perfectly possible for judges from the same area not to know the native law and custom of the area, as they may have spent most of their lives outside the area. It may thus also be added that the requirement to be from the area may be reduced in respect of a judge who, though not from the area, has lived in the area for a considerable number of years and has thereby become versed in the custom prevailing in the area. Such an individual may fall into the class outlined in *Olowu v Oluwu*.[37] In that case, the Supreme Court held that Adeyinka Ayinde

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31 *Ababio II*, above at note 29 at 128.
32 Park *The Sources of Nigerian Law*, above at note 25 at 90.
33 Ibid.
34 Ibid.
35 Obilade *The Nigerian Legal System*, above at note 16 at 90–91.
36 *Ehigie v Ehigie* 1 All NLR 842.
37 (1985) 3 NWLR (pt 13) 372.

Olowu, whose parents were Yoruba indigenes from Ilesha, became a Bini indigene by choice during his lifetime by an application for acculturation made to, and approved by, the Oba of Benin; he thereby changed his personal law from Yoruba native law and custom to the Bini native law and custom. He lived all his life in Benin City, acquired landed properties, married Benin women, etc.

Nevertheless, it must be stressed that, although residence, no matter how long, would not suffice for acculturation without an intention to change one's personal law,[38] a judge who was raised within the area of jurisdiction of a court and was versed in the custom of the area, should benefit from the presumption of knowledge of the custom of the area.

It is, however, pertinent to remark that the *Ababio II* exception no longer absolutely controls the establishment of native law in customary courts. In *Ehigie v Ehigie*,[39] the Supreme Court declared that proof of customary law before a customary court was necessary, because the only statutory qualification for being president of the grade A customary court is being a legal practitioner. Indeed, being a legal practitioner does not automatically translate into being versed in native law and custom. As has in fact been pointed out, "Nigerian judges have had no formal training in customary law, the rules of which are generally not accessible in written form".[40] *Ehigie* reinstated the generally criticized reasoning of Taylor J in *Fijabi v Odumola*,[41] that the rule that custom must be proved by evidence applied quite generally to all courts.[42]

Some states of the federation appear to have heeded the call in *Ehigie* and abolished the presumption that customary court judges are embodiments of the customary law prevailing in their area, by taking advantage of section 256(c) of the Evidence Act that allows the act to be extended to customary courts, thereby requiring judges of those courts to observe and apply the Evidence Act. By virtue of a legal notice of 25 October 2001, the Edo State government extended the application of the Evidence Act to customary courts, thus requiring the same level of proof in customary law as that required in superior courts of record. In *Santus Oseyehmen v Godwin Utomi*,[43] the issue before the court was whether cohabitation amounts to marriage under the native law and custom of the Esan people. The customary court trial judge presumed that a woman who lives with a man for more than three years is

38 *Tapa v Kuka* 18 NLR 5; *Re the Estate of Aminatu AG v Tunkwase* 18 NLR 88. These cases are authority for the view that no presumption of a change in an individual's personal law arises simply from long residence in a place.

39 (1961) 1 All NLR 842.

40 Park *The Sources of Nigerian Law*, above at note 25 at 83.

41 1955–56 WRNLR 133.

42 This view was criticized by Obilade *The Nigerian Legal System*, above at note 16 at 91, arguing that the case was wrongly decided. See also Park *The Sources of Nigerian Law*, above at note 25 at 91.

43 Unreported judgment of the Edo State Customary Court of Appeal in suit no CCA/1A/2004.

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regarded as his wife under Esan native law and custom. On appeal to the Customary Court of Appeal, the court granted leave for more evidence to be adduced on the prevailing Esan native law and custom, and those who testified stated that the payment of dowry and not cohabitation was the essential requirement of a valid Esan marriage. Preferring the evidence of witnesses, the Customary Court of Appeal pointed out that:

> "The trial court's proposition that under Esan customary law, a woman who lives with a man for more than three years becomes his wife, was not supported by evidence. By the 27th day of January, 2003 when the case was first listed for hearing by the trial court, the Evidence Act, 1990 had become applicable in all customary courts in Edo state … Section 14(3) of the Evidence Act requires evidence of custom to be adduced by a witness where same cannot be judicially noticed."[44]

The alternative to proof by evidence (the presumption that judges are familiar with the customary law operating within their area of jurisdiction, even when they are not members of the communities existing within the jurisdiction of the court) has never been valid for superior court judges and it is now also safe to observe that it is no longer valid with general force for customary courts.

Nevertheless, it does not appear that the requirement for proof by evidence has been entirely well received. In *Nzekwu v Nzekwu*, Nnaemeka-Agu JSC, reasoned that "[i]t is bad enough that our customary law has to be proved as a fact in our own country nearly thirty years after independence from British rule".[45] The learned justice chose a more pejorative description in *Ugo v Obiekwe*, where he described the notion that customary law is a question of fact as an "annoying vestige of colonialism".[46] Nwauche also observed that, "by making customary law a question of fact, a lot turns on the discretion of the judge and the possibility that the content of customary law may be heavily influenced by a judicial officer. Thus the interpretation and conclusion of a judicial officer from the evidence of a customary law may significantly differ from the customary law practiced by the people".[47]

Although the latter observation has great merit, it is important to add that the subjection of customary law to evidential proof is a plausible solution to the problem of the indeterminacy that may attach to custom, given its unwritten and flexible nature. This is in addition to the point already made that, unlike all other Nigerian laws that superior courts are called upon to apply, it is only customary law that does not have a positivist origin, as either a

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44 Id at 12–13.

45 (1989) 2 NWLR (pt 104) 373 at 428.

46 (1989) 1 NWLR (pt 99) 566 at 583.

47 ES Nwauche "The constitutional challenge of the integration and interaction of customary and the received English common law in Nigeria and Ghana" (2010) 25 *Tulane European & Civil Law Forum* 37 at 43.

statutory instrument or judicial precedent. The factual element of customary law is not even the same as other facts that need to be proved in court; it is a special type of fact that reposes, not just within the knowledge of the person asserting or denying it in court, but also within the collective consciousness of members of the community subject to the custom.

The requirement that customary law has to be pleaded and proved[48] does not mean that customary law is foreign law, as the dictum of Francis Smith J in the Gold Coast case of *Hughes v Davies* seems to suggest: "[a]s native law is foreign law, it must be proved as any other fact".[49] The authors are thus in agreement with Allot that Smith J's dictum "[o]verstates the case; customary law is not foreign law, though its rules may be unknown to the judges who have to apply them; nor is the proof of customary law identical with that of other facts".[50]

The strength of the points just made, however great, does not obviate the fear expressed by Nwauche,[51] in that the requirement of proof no doubt exposes customary law to manipulation or distortion. This is momentous, as it might give scope to the existence of "two versions of customary law: one version developed by judicial officers that can be termed judicial customary law and the real customary law practiced by the people".[52] Making a similar point, Taiwo noted that courts sometimes modify customary law rules in the process of judicial interpretation, but noted that the effect of such an approach is that it transforms the customary law from what is generally acceptable as binding within the community to judicial perception of what is fair and just, but capable of distorting customary law rules.[53]

Had the Customary Court of Appeal not intervened in *Oseyehmen v Utomi*,[54] the customary trial court would have crystallized the custom of the Esan people in a direction that is completely at variance with the actual custom of the people. A similar pattern was displayed in *Osionmwanri v Osionmwanri*.[55] The part of the judgment relevant here is that governing the right of the eldest surviving son to hold the deceased's estate in trust until it is distributed. The customary trial court had used its discretion to bypass the eldest surviving son

48 *Olubodun v Lawal*, above at note 7 at 98–99, holding that "[t]he requirement of proof means that the custom must be pleaded as facts in pleadings".

49 (1909) Renner 550 at 551.

50 AN Allott "The judicial ascertainment of customary law in British Africa" (1957) 20/3 *The Modern Law Review* 244 at 246.

51 Nwauche "The constitutional challenge", above at note 47.

52 Id at 44.

53 EA Taiwo "Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions: Some lessons for Nigeria" 34/1 *Journal for Juridical Science* (2009) 89 at 111.

54 Above at note 43.

55 Unreported judgment of the Edo State Customary Court of Appeal, appeal no CCA/8A/2004.

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and appoint someone else to that role. Meanwhile, the trial court had heard evidence that, under Bini native law and custom, the eldest surviving son of a deceased man takes care of his properties on behalf of any other children. Nevertheless, the customary court trial judge used his discretion to appoint someone else, on the ground that the eldest surviving son had been prodigal and had neglected the welfare of his half brothers and sisters. The Customary Court of Appeal reversed the wrongful exercise of discretion by the customary trial court on the ground that an eldest surviving son cannot be deprived of this right.[56] The Mozambican case of *Gidja v Yingwane*[57] further illustrates this point. In this case, the parties were Shangaans (Mozambicans) living in Natal. The Court of the Native Commissioner referred to authorities on Shangaan custom, according to which it is a well-recognized custom that, when a Shangaan wife dies childless in early marriage, the guardian must, when requested by the husband, provide a substitute wife or, if unable or unwilling to do so, must refund all the *lobola* [bride price] received for the deceased wife. However, he refused to apply the custom as established in the authorities. On appeal, the Native Appeal Court endorsed the court's ruling, holding "it is not always in the interests of the Natives themselves to give the court's sanction to all their present day alleged customs. It is one of the functions of this court to interpret native law and custom in conformity with civilized idea [sic] of what is fair and just".[58] These cases evidence instances where courts manipulate customary law to appease their idea of right and wrong.

Although inappropriate, as the judge is the ultimate determinant of whether a rule of custom has been proved, it is inevitable that the judge, in his capacity as the evaluator of facts, will play a role in the development of customary law. Besides, the judge's conscience cannot be completely neutral in assessing the evidence in support of a rule of customary law against the repugnancy and public policy tests. The eventual result of this assessment will definitely be influenced by the judge's conscience. It is admitted that variation in the content of judicially applied custom from the pristine content of the custom does not always result from the deliberate construction of the custom to reflect the judges' sense of appropriateness: the pristine state of customs does naturally suffer from "wear and tear" in the course of judicial application, especially when applied by way of judicial notice. Also, the development of customary law by way of judicial accretion is incidental to the role assigned to judges. Thus:

> "A closely related question to the definition of customary law as deriving its authority from the people is whether the courts have the power to develop customary law. If such power exists a related question is the direction of this

56 Id at 14.
57 1944 NAC (N&T) 4, cited in Taiwo "Repugnancy clause", above at note 53 at 111.
58 Ibid.

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> development … The power of the courts to develop customary law is apparently not well settled. The point must be made that if development means change in any respect, the preponderance of the evidence supports the conclusion that common law courts develop customary law as they evaluate and apply the principles of that law."[59]

This must however be kept within permissible boundaries. In carrying out his functions, therefore, the judge should bear in mind that his role is to ascertain and apply a rule that is "accepted as an obligation by the community"[60] and not to reform it, as the courts tried to do in *Osionmwanri*, *Gidja v Yingwane* and *Oseyehmen v Utomi*.

It is not however the duty of any of the parties to prove that a particular custom is or is not repugnant to natural justice, equity and good conscience. That is the function of the court, and the court can raise and examine issues of repugnancy on its own motion. The view of the Supreme Court justices in *Ojiogu v Ojiogu and Another* (*Ojiogu*)[61] is thus debatable. This case arose under the Nnewi custom, under which a surviving brother of a deceased, who performs a ceremony known as *Itugha Nkwu* on the deceased's widow, is said to have married the widow, thereby extinguishing the rights of her late husband. The surviving brother who marries his late brother's widow becomes the father of any child born by the widow, even if the child was not his biological child, and he also succeeds to the deceased's property rights. Where the ceremony is not performed or the widow refuses to marry the surviving brother or remarry at all, but continues to live under her late husband's roof, she is by custom allowed all that was due to her late husband, and all the rights of her late husband accrue to the child or children she had for the late husband, particularly male children.

In *Ojiogu*, the deceased's brother (B) did not marry the widow (M). The widow became pregnant and bore the appellant (A), whom D did not initially recognize as the son of his late brother under native law and custom until the appellant attained majority and wanted to assume the position of the head of the family. At this point, B started claiming that he did marry M and that A was his first son. The trial court found for the appellant but, on appeal, the Court of Appeal revised the decision on the ground that the custom was repugnant to natural justice, equity and good conscience. The Supreme Court held that the Court of Appeal was wrong, mainly on the ground that repugnancy was not pleaded in the lower court by the parties. Specifically, Onnoghen JSC declared, "[i]n the instant case, if it was the intention of the respondents to rely on the principle of repugnancy, it was their duty to have pleaded facts to ground the said principle which they failed to do … The party relying on that principle must not only plead facts to show how

59 Nwauche "The constitutional challenge", above at note 47 at 48.
60 Obilade *The Nigerian Legal System*, above at note 16 at 84.
61 (2011) vol 192 LRCN 112.

repugnant the custom is but must also adduce evidence to establish repugnancy".[62] The learned justice continued:

> "I am not saying that in an appropriate case, the custom in issue may not be found to be repugnant to natural justice, equity and good conscience, particularly where the relevant facts, pleadings and evidence adduced to establish same are present. All that I am saying is that in the instant case, the issue of repugnancy did not arise for determination and the lower court was in grave error when it decided the appeal on this issue, which was even raised for the first time before the court."[63]

It would appear to the authors that this view by the Supreme Court was a convenient way of avoiding making a pronouncement on the enforceability of the relevant customary rule.

CUSTOMS AND CUSTOMARY LAW

There have been arguments in both academic literature and judicial decisions relating to the tangential distinction between customs and customary law. In *Ojisua v Aiyebelehin*,[64] the Court of Appeal was of the view that, "the word 'custom' may only reflect the common usage and practice of the people in a particular matter without necessarily carrying with it the force of law. This definition appears to say that the main characteristic of custom is the absence of sanction and thus flows well with John Austin's positivist formulation of 'custom as positive morality', as long as it does not receive judicial pronouncement. The element of law is important because it is that which in reality carries sanction in the event of breach".[65]

This simplistic approach by the Court of Appeal is regrettable, even more so as it is based on John Austin's positivist postulation of sanction as the basis of law.[66] Needless to say that Austin's view on the relationship between sanction and the validity of law has been rejected, even by fellow positivists.[67] Is there any reason for believing that customs lack sanctions until adjudicated upon by courts of law? Was banishment of erring kinsmen not a sanction, even before the advent of orthodox courts? Such a view cannot but play into the narrative of those like Lord Sumner, who said that, "some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with institutions of legal ideas of society".[68]

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62 Id, Onnoghen JSC at 137.
63 Id at 139.
64 Above at note 9.
65 Id at 52.
66 J Austin *Lectures on Jurisprudence* (4th ed, 1873) at 651; J Austin *The Province of Jurisprudence Determined* WE Rumble (ed) (1995, Cambridge University Press).
67 HLA Hart *The Concept of Law* (2nd ed, 1994, Oxford University Press).
68 *Re Southern Rhodesia* (1919) AC 21 at 233.

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The argument that a rule of custom is not law until acted upon by superior courts is reminiscent of the view of western writers, whose understanding of customary law suffered from a positivist outlook. Woodman presented an argument of this nature in his comment on a definition presented by Hoebel, who argued that: "a social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting".[69] Commenting on this definition, Woodman said:

> "This definition appears to be all-embracing; it enables us to identify law in England by looking at the Supreme Court of Judicature and the other courts, but at the same time enables us to identify law in societies such as that of the Eskimos. The question is how satisfactory is it for identifying customary law in Ghana and Nigeria today? On its face, it appears most helpful. The high courts and supreme courts regularly apply what they call customary law. These courts are recognized as having official authority, and their decisions are enforced by the application, in threat or in fact, of physical force by officers of the state. According to the definition, then, norms which are not so enforced are not legal."[70]

This view, if accepted, would totally extinguish customary law and, if that were the case, there would be no customary law to be presented to courts in the first place. The better view is that expressed in *Aku v Aneku*, where customary law was seen as "the unrecorded tradition and history of the people, which has 'grown' with the growth of the people to stability and eventually become an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or the subject matter to which it relates".[71] Accordingly, "[t]he binding force of custom ultimately rests on the fact that it is habitually obeyed by those subject to it. If a custom is not fortified by established usage, it is not law".[72]

Indeed, the present authors do not doubt the existence of some customs that are not backed by the psychological element of compulsion and that are therefore followed only for the sake of courtesy. Nevertheless, it is the authors' view that every society has rules that operate at the level of mere customs, and others that operate at the level of customary law and are backed by compulsion: compulsion imposed, not by the sanction of any judge or

69 EA Hoebel *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (1954, Harvard University Press) at 28.

70 GR Woodman "Some realism about customary law: The west African experience" (1969) *Wisconsin Law Review* 128 at 146.

71 (1991) 8 NWLR (pt 209) 280 at 292.

72 AN Allott *Essays in African Law* (1960, Butterworth) at 89.

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positive law, but by the general will of the people. It was on that basis that Park, while affirming that the customary practice should not only be "customary", but must also "be law", was careful to add, "[i]t is clear [that] the habitual observance of the practice by the community is not alone sufficient [and that the] … observance must be a matter of obligation, which will if necessary, be enforced".[73] It should be noted that both obligation and enforcement are engrained in the consciousness of the community. As was in fact admitted even by Niki Tobi JCA (as he then was) in *Ojisua v Aiyebelehin*, a rule of customary law essentially exists as "custom as well as law".[74]

The real question is not whether a distinction exists between custom and customary law, but what distinguishes one from the other. The distinguishing factor must be sought in whether the people assent to a particular practice as obligatory or not. While sanction may be the most obvious evidence of a customary law obligation, there are other less obvious qualities of obligations that are as defining as sanctions. Indeed, the belief that a certain rule of custom is binding and the fear of contravening it may have nothing at all to do with human sanctions. The basis of obligation of a rule of custom may well be the fear that the gods of the land punish non-compliance by some intangible punishment. Although sanction may be decisive of the obligatory nature of a rule, its absence is on the other hand not decisive of the status of a rule. Furthermore, no criteria have been developed for distinguishing one from the other, nor is there any art of telling when a custom crystallizes into customary law.

COURTS LACK THE POWER TO VALIDATE OR INVALIDATE CUSTOMARY LAW

The provisions of the Evidence Act should be read in the light of the provisions of enabling court statutes. This has the effect that customary laws are, first of all, valid laws governing the transactions of those they govern before courts are presented with the opportunity to act upon them, notwithstanding that the customs will have to be proved as facts in compliance with the Evidence Act. Hence, both pieces of legislation expressly use the words "shall not be enforced"[75] and, more particularly, enabling court statutes require courts to "observe and enforce the observance of customary law which is applicable".[76] The phrase, "which is applicable", clearly avoids any doubt as to the prior

73 Park *The Sources of Nigerian Law*, above at note 25 at 68. See also Aigbovo *Introduction to the Nigerian Legal System*, above at note 27 at 52, stating that "the practise in question must not only be custom, but it must be law, in the sense that it must be obligatory". Emiola *The Principles of African Customary Law*, above at note 14 at 7. K Eso *Further Thoughts on Law and Jurisprudence* (2003, Spectrum Books) at 359. Malemi *The Nigerian Legal System*, above at note 14 at 64.

74 Above at note 9 at 52–53.

75 Evidence Act, cap E14 Laws of the Federation of Nigeria, sec 18(3); High Court (Civil Procedure) Rules, order 32, rules 2 and 3.

76 High Court Law, cap 60 Laws of Lagos State, 1994, sec 26.

existence of customary law before it is sought to be enforced in court. The phrase also shows that the proof required by the Evidence Act is not just proof of the existence of a customary law but proof that it is applicable to the case at hand. It may therefore be the case that what is disputed in any particular case is not the existence of a rule of custom as law but its applicability in the circumstances of the case.

The starting point for understanding the narrow but salient issue discussed in this article must therefore necessarily be the provisions that define the functions of courts towards customary law.

The first, due to its general applicability to superior courts, is the Evidence Act.[77] For their relevance to this discussion, sections 16(1) and 18(3) shall be relied on at this point. Section 16(1) provides that "[a] custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence". Under section 18(3), "[i]n any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience".

There are similar provisions in the statutes establishing various courts. For instance, section 26 of the High Court of Lagos Law[78] empowers the High Court to observe and enforce the observance of customary law that is applicable and not repugnant to natural justice, equity and good conscience, nor incompatible either directly or indirectly with any law for the time being in force. The wording of section 26 is standard wording found in court statutes in Nigeria, that all require the respective courts to "administer, observe and enforce … every customary law which is applicable".[79]

When compared, one finds an obvious difference in the language of the Evidence Act and the court statutes noted above. While the latter recognize customary law as law before it has been tested in court, the former adopts language that appears to downgrade the status of customary law rules until they have been tested in court. This difference should however cast no doubt on the view taken in this article, when understood from the standpoint that the Evidence Act is adjectival in nature and that its provisions are made to govern the reception of different types of evidence.

The remarkable point that needs to be made about the statutory provisions by which courts are empowered to interfere in the regime of customary law is that none of them contains the word "validity". Nevertheless, there is a general error by judges and writers that the enforceability tests of "repugnancy to natural justice, equity and good conscience", of "incompatibility" and of "public policy" are tests of validity.[80] For instance, it is completely wrong to argue that

77 Cap E14 Laws of the Federation of Nigeria.

78 Cap 60 Laws of Lagos State, 1994.

79 See, for instance, sec 48(1) of the Kaduna State Customary Court of Appeal Law, 2001.

80 Malemi *The Nigerian Legal System*, above at note 14 at 77. Obilade *The Nigerian Legal System*, above at note 16 at 100. Park *The Sources of Nigerian Law*, above at note 25 at 68. Nwauche

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"before a rule of customary law is recognized as having force of law within a locality, it has to pass the validity test based on the British concept of repugnancy".[81] This view can only result in the erroneous view that, whenever a court declares a rule of custom unenforceable, it would mean that such a custom was not valid in the first place; this has given impetus to the courts' refusal to apply rules of customary law for all the wrong reasons. This wrong view of the test arguably also gave scope to the idea that the colonial court was "the keeper of the conscience of native communities with regard to the absolute enforcement of alleged native customs".[82] The view that courts validate customary law can only be right upon the premise of such cases as *Re Southern Rhodesia*, where the Privy Council was of the view that "[s]ome tribes are so low in the scale of social organisation that their usages and conception of rights and duties are not to be reconciled with the institution or legal ideas of civilized society".[83]

In *R v Amkeyo*,[84] a colonial court ruled that a marriage conducted under African customary law could not stand because native traditions cannot support a marriage in the proper sense of the word. In addition to declaring the "marriage" repugnant to justice and morality, the colonial court described a relationship pegged on payment of dowry (and not limited in the number of women one can marry) as "wife purchase", simply because it does not fit into the concept of "marriage" as generally understood among civilized peoples. In the view of the judge, Chief Justice Hamilton, the use of the word "marriage" to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer, which has led in the past to considerable confusion of ideas.

It is however noteworthy that it is not only European judges who have applied the repugnancy test in a manner that suggests that those who are bound by a certain custom are "so low in the scale of social organisation". In *Anekwe and Another v Maria Nweke*, for instance, Nwali Ngwuta JSC had this to say about a custom presented before the court: "[t]he custom of Awka people of Anambra State and relied on by the appellant is barbaric

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"The constitutional challenge", above at note 47 at 46. AA Oba "Religious and customary laws in Nigeria" (2011) 25 *Emory International Law Review* 881 at 894, stating that, "[w]ithin the Nigerian legal system, the colonially imposed validity tests applicable to Islamic and customary law should be repealed". CG Nnona "Woman to woman marriage and cognates in Nigerian Law: An easy coalition between customary law and human rights" (2016) 42/3 *Commonwealth Law Bulletin* 375 at 394–95, arguing that "[t]he repugnancy doctrine is too blunt a tool for assessing customary law's validity given customary law's nuances".

81 Taiwo "Repugnancy clause", above at note 53 at 95.

82 *Mojolagbe Ashongbon v Saidu Oduntan* [1935] 12 NLR 7 at 10.

83 Above at note 68 at 233.

84 (1917) 7 EALR 14, cited in JO Ambani and O Ahaya "The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era" (2015) 41 *Strathmore Law Journal* 41 at 54.

and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished".[85] One can only wonder, with due respect, whether it was not possible for his lordship to refuse to apply the custom in question without such exaggeration.

The erroneous view of using the repugnancy test as the validity test has found a prominent place in academic literature, so much so that writers have practically replaced "enforceability" with "validity" when discussing the enforceability test. In actual fact, the legislation mentioned above and other similar legislation leave no doubt as to the function the courts are empowered to perform in relation to customs: they are empowered to determine whether rights and obligations arising from customs are enforceable by the sanction of the courts and never to determine whether a custom is valid.

From a jurisprudential viewpoint, this misunderstanding creates a gap between the definition of customary law as a law that arises from the assent of the people and the legal ingredient that validates customary law in practice. As has been rightly queried by Abiola Ojo, "if it is admitted that rules of custom are a reflection of the behaviourism of the people of a particular area, and I see no escape from admitting this, would it not then be fairer to judge its validity by the local sentiments of right and wrong from any individual legal or social system, but rather from general notions [sic]".[86]

This query would have been unnecessary had the difference between "validity" and "enforceability" been appreciated and kept distinct. A rule of custom is not valid because a court has said so; its validity lies in the assent of the people. When a court holds that a particular customary law fails the repugnancy or public policy test, the court is effectively saying that the customary law does not fall within the description of customary laws it has authority to enforce. Although such a finding may have a repealing effect on the customary law, it does not, by any means, indicate that the customary law was not valid in the first place.[87] In other words, a rule of customary law ceases to be valid

85 [2014] 9 NWLR (pt 1412) 393 at 425. The same sentiment was expressed by Ogunbiyi JSC at 421–22 and Ariwoola JSC at 426–27. The better approach was presented by Muhammed JSC, reasoning (at 15) that the custom "offends the rule of natural justice, equity and good conscience …[and] that the practice must fade out". See also Nnona "Woman to woman marriage", above at note 80 at 395, noting that the history of the application of the repugnancy doctrine "reveals a tendency for its users to peer at customary law suspiciously through jaundiced lenses evinced by the word 'barbarous' and its derivatives".

86 O Abiola "Judicial approach to customary law" (1969) 3 *Journal of Islamic and Comparative Law* 44 at 44.

87 Some authors, it may appear, understand validity to mean that a custom was not valid in the first place. See Eso *Further Thoughts*, above at note 73 at 77, stating that, "for a custom to be valid in Nigeria and therefore be enforced by the courts as customary law, it must satisfy three main tests". Park *The Sources of Nigerian Law*, above at note 25 at 68, arguing that, "all rules of customary law are subject to certain general tests of validity before they can be enforced". To argue that the validity test precedes a rule of customary law is to seek to put the cart before the horse. To all intents and purposes, a rule of custom

when it is no longer recognized as such by the people. On the other hand, the refusal of a court to enforce a rule of custom, for failing the enforceability test, only denies the customary law the force of positive law; it does not strip it of its traditional aura among the people to whom it applies.

In at least one case, the Supreme Court has given impetus to this distinction. In *Okonkwo v Okagbue,* Ogundare JSC admitted that, "a declaration by the courts that a particular custom is repugnant to natural justice, equity and good conscience, does not necessarily imply that such customary law is illegal, for sometimes the practice goes on publicly after the judges' decision. In such a case, all that the courts can legitimately do, and have done, is to refuse to enforce the customary law in question".[88]

Adaramola appeared to have grasped the distinction between "validity" and "enforceability" but failed, consciously or accidentally, conclusively to uphold the effect of the distinction. Thus, despite his conviction that the purpose of the tests was not to "invalidate" "uncivilized" customs but to render them "unenforceable", he still used the terms "valid" and "invalid" to describe the application of the tests to customs. Nevertheless, he made a remarkable point in support of the present view, when he wrote:

> "Assuming … the court finds a rule of customary law to be unenforceable for being invalid … so long as it continues to constitute the living law of the people concerned, it will continue to operate within its social milieu. Our law does not provide for the judicial nullification, invalidation or illegalisation of rules of customary law that fail the test of repugnancy. It merely provides for a mandatory refusal by the court to 'observe and enforce the observance' of such a customary law which would have otherwise been applied by it".[89]

Indeed, it may be said that the effect of a court declaring a custom enforceable is a validation of the rule. The problem with such an argument is to ascribe to superior courts the power to make customary law; it contradicts the rule that the existence of a rule of custom has first to be proved by the "opinions of persons who would be likely to know of its existence".[90] In actual fact, and to all intents and purposes, the court is not even empowered to attempt to modify a custom insofar as the modification does not proceed from the conduct of the people.

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precedes the tests. The tests are not part of the ingredients of customary law, but are extrinsic to customary law and serve the purpose of browbeating customary law to external standards. The preferred view is that of Obilade *The Nigerian Legal System*, above at note 16 at 100, observing that "an applicable rule of customary law is not to be enforced by courts unless it passes the tests".

88 (1994) 9 NWLR 301 at 344–45.

89 F Adaramola *Basic Jurisprudence* (2nd ed, 2003, Nayee Publishing Co) at 102–03.

90 Evidence Act, sec 18(2).

Validity of custom arises from the assent of the people

As indicated above, a clear difference exists between "validity" and "enforcement". While not controverting the view that a rule of custom that has passed the test of enforceability and become judicially noticeable by courts becomes a rule of positive law, it must be said that courts do not, by recognizing a custom, confer either validity or effectiveness on the custom. The assent of the people subject to a custom is the reason for its validity. As rightly observed by Dworkin, customary law principles are validated by the "sense of appropriateness" on the part of the public.[91] To this, Lon Fuller, added: "the [customary law] imperceptibly becomes a part of men's common beliefs, and exercises a frictionless control over their activities which derives its sanction not from its source but from a conviction of its essential rightness".[92] Customs are a seamless but conscious part of a societal existence; they grow with society and adapt to its needs from time to time; they die when the pattern of societal behaviours changes from the direction of the custom. When considering the normative character of customary law, therefore, we must bear in mind that its normative authority does not reside in its acceptability by superior courts. If it did, it would no longer be appropriate to call it customary law.

The bottom line is as declared by Lord Atkin in *Eleko v Government of Nigeria* (*Eleko*), that "[i]t is the assent of the native community that gives a custom its validity … [and that] it must be shown to be recognized by the native community whose conduct it is supposed to regulate".[93] Even in their harshest and, if you like, most unrefined form, customs retain their normative regime of effectiveness within the core area of population of their application, insofar as the order underpinning their application remains effective.[94] In other words, the validity and application of customary law may be relative to the place in which it is sought to be applied. If its application is sought within the "inner circle" where it operates, its proximate paraphernalia of enforcement within that order and the aura the custom commands in the spirit of the people confer effectiveness independent of the opinion of any judge.

Drawing the correct inference from the recognition that it is the assent of the people that gives validity to customary law in *Eleko*, the Judicial Committee of the Privy Council had no difficulty holding:

> "[T]he more barbarous customs of earlier days may under the influence of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community *inter se*. In other

91 R Dworkin *Taking Rights Seriously* (1977, Duckworth) at 40.
92 LL Fuller *The Law in Quest of Itself* (1999, The Lawbook Exchange) at 134.
93 (1931) AC 262 at 673.
94 JW Harris "When and why does the grundnorm change?" (1971) 29/1 *The Cambridge Law Journal* 103 at 118.

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> words, the court cannot itself transform a barbarous custom into a milder one".[95]

The approach of the Privy Council is necessitated by the incapacity of courts to make or modify rules of customary law. It is thus the assent of the native community that gives a custom its validity and, therefore, whether "barbarous" or "mild", it must be shown to be recognized by the native community whose conduct it is supposed to regulate.[96] This does not detract from the power of the court to declare a custom unenforceable; if a custom perpetuates in its harsh character it must be rejected as repugnant to "natural justice, equity and good conscience".

This approach was followed by Gray CJ in *Kajubi v Kabali*,[97] where he held that the principle expressed in *Eleko* applied equally to customs in Buganda, if for "barbarous" we substitute "original", and for "milder", "modified". Accordingly, he declared, "the native community may assent to some modification of an original custom, but the modification must be made with the assent of the native community. It cannot be made by an individual or a number of individuals. Least of all can it be made by a court of law".[98]

To allow the courts to perform this role would amount to shifting the onus of determining what norm becomes customary law from the people to the court.[99] This view cannot but question the reasoning of the court in *Agbai v Okogbue*, that:

> "The doctrine of repugnancy in my view affords the courts the opportunity for fine-tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the Courts are there to enact customary laws. When however customary law is confronted by a novel situation, the Courts have to consider its application under existing social environment."[100]

It cannot be emphasized enough that the repugnancy test does not give the court the power to modify custom.

An inescapable consequence of the view that the assent of the people is the controlling factor is that it does not lie within the faculty of the court to pick and choose when and how a rule of custom should be applied, as the Supreme Court did in *Mariyama v Sadiku Ejo*.[101] The power of the court ends with

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95 Above at note 93 at 673.

96 *Okonkwo v Okagbue* (1994) 9 NWLR (pt 368) 301 at 345, holding that "[f]or custom to have the force of law, it must be approved by the consent of those who follow it".

97 (1944) 11 EACA 34.

98 Id at 47.

99 Kiye "The repugnancy and incompatibility tests", above at note 15 at 89.

100 [1991] 7 NWLR (pt 204) 391 at 417.

101 (1961) NRNLR 81. This case has been criticized on other grounds. See Obilade *The Nigerian*

declaring a rule of custom to be enforceable or unenforceable. In this case, the question was whether a customary rule that gave the parentage of a child born within ten months of divorce to the previous husband was enforceable in court. The court noted that the custom was "basically sound and would in almost every case be fair and just in its results",[102] yet the court refused to enforce the custom by treating it as a rebuttable presumption.

Curiously, while holding the custom good, just and enforceable, the court placed its application in abeyance in this particular case, on the ground that to enforce the custom in the circumstances of the case "would be contrary to natural justice and good conscience".[103] The same approach was adopted by the court in *Re Whyte*.[104] In this Nigerian case in which the deceased was a Ghanaian, the court was called upon to apply a Fanti customary law dealing with intestate succession. Under this rule, the deceased's widow and child would have been entitled to nothing if the rule were applied as known to the local people. The court held that it would be repugnant to natural justice, equity and good conscience to apply the rule in its entirety. Instead, the court apportioned the estate into two and ordered that two-thirds be shared in accordance with the custom and one-third distributed as directed by the court.

To all intents and purposes, the courts in these cases were not entitled to interfere in a regime of customary law that they had declared enforceable; courts cannot exercise their powers beyond the limit of declaring a custom enforceable or unenforceable. Any variation in the substance or application of a custom results in the substitution of the subjectivity of the judges for the assent of the people governed by the custom. This amounts to a complete violation of the limit of judicial powers. Making a similar point, Park accused the *Sadiku Ejo* court of misconstruing the statutory provisions relating to repugnancy and exercising a power they did not possess in that "there is no provision which authorizes the courts to look beyond the rule to the results of its application in specific situations [other than the authority to] come to a general conclusion about the rule, and if they find that it is not generally valid it is their duty to apply [the test] whatever the result may be".[105]

The better approach is that taken in the Nyasaland case of *Limbani v R*.[106] In this case, a native court found the accused guilty of adultery, on the ground

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Legal System, above at note 16 at 103, noting that "a custom which is invalid for any purpose is invalid for all purposes". Compare with Aigbovo *Introduction to the Nigerian Legal System*, above at note 27 at 59–60, noting that "it is generally agreed that this approach [of evaluating the result of the application of a rule of custom] is commendable", but adding that the "repugnancy test is an absolute one. When it is applied to a particular rule, the rule must either be wholly rejected …".

102 *Mariyama*, id at 83.

103 Ibid.

104 (1946) 18 NLR 70.

105 Park *The Sources of Nigerian Law*, above at note 25 at 73.

106 (1946) 6 Ny LR 6.

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that adultery is a criminal offence under customary law. On appeal, Jenkins CJ refused to accept this finding (despite previous decisions of the native court the same way), on the ground that inquiry showed that the native law and custom prevalent in the district in question did not recognize adultery as an offence, and that native court decisions alone could not make it so. What Jenkins CJ did here was effectively to terminate a customary law crime of adultery created by courts independent of the assent of the people subject to the customary law. This demonstrates a clear understanding of the difference between enforceability and validity.

Is customary law validated by precedent?

An issue that arises from the line of discussion so far and the decisions of the courts in *Eleko* and *Limbani* is of the relationship between customary law and precedent. The question may thus be asked whether precedent has a declaratory or constitutive effect on customary law. If it has a constitutive effect, this would mean that customary law is not law until it is acted upon by courts: courts validate customary law. If it is declaratory, it would mean that the courts merely declare the prior existence of customary law: the assent of the people validates customary law.

This question brings us into the realm of the positivist theory of law. Law as understood by the positivists is a product of formalism: the validity of law is considered from its compliance with the formal procedures of law-making. In its strict sense, positivism draws the validity of law from the existence of an identifiable sovereign and, insofar as the law complies with the procedures set down for law-making, its validity cannot be questioned on the basis of moral considerations. In other words, if morality has any part to play in the validity of positive law, it is mainly the morality of process, not the morality of content (except in limited cases). In *Attorney General of Bendel State v Attorney General of the Federation*[107] for instance, the test of the validity of the Allocation of Revenue (Federation of Revenue etc) Appropriation Act 1980 passed by the National Assembly was its compliance with the law-making procedures of the 1979 Nigerian Constitution. Having failed the test of compliance, it could not possess the quality of law, notwithstanding that it had been purportedly made by the sovereign, the federal government. According to Fatayi Williams JSC, "a legislature which operates a federal written constitution in which the exercise of legislative power and its limits are clearly set out has no power to ignore the conditions of law-making that are imposed by that Constitution which itself regulates its power to make laws".[108]

Note however that the positivist conception of formal validity does not restrict validity to laws made by Parliament; a law made through any other recognized means of law-making passes the test of formal validity. This is

107 (1982) 3 NCLR 1.
108 Id at 21.

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the basis upon which the positivists accept judicial precedent as a form of positive law. In the Nigerian legal system, therefore, and as pointed out by Adaramola,[109] ethnic customs that pass the test of repugnancy, natural justice and good conscience, as well as the incompatibility test would form part of positive law.

Nigerian courts are permitted to take judicial notice of customary law that has been proved before a superior court in an earlier case, and apply it without the requirement for further proof. Accordingly, section 16(1) of the Evidence Act provides that "[a] custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence". Further, under section 17, "[a] custom may be judicially noticed when it has been adjudicated upon once by a superior court of record".

It is important to state that section 17 of the Evidence Act is a marked deviation from the pre-existing provisions and judicial authorities governing the judicial notice of customary law. The previous Evidence Act provided under section 14(2) that, "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".

This provision followed a long line of cases discussing the controversy concerning the frequency of proof that would qualify a rule of custom for judicial notice. This controversy caught the attention of the Supreme Court in *Romaine v Romaine*, where the court rejected the view of the trial court that a single Supreme Court decision was sufficient for judicial notice.[110] The court preferred the view that a decision has to be so frequently applied to have attained notoriety for it to be judicially noticed. According to the court:

> "If we take the view that a single decision of the Supreme Court could be regarded as sufficient and be judicially noticed, one may ask what is the significance of the words: to the 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 the circumstances similar to those under consideration in section 14(2)? In my view, those words import the necessary requirement of notoriety into the concept …"[111]

This rule followed from the view of the Privy Council in the 1874 Gold Coast case of *Angu v Atta*, where it was held that "customary law … has to be proved in the first instance by calling witnesses acquainted with the native customs

109 Adaramola *Basic Jurisprudence*, above at note 89.
110 (1992) 5 SCNJ 25. See also *Olabanji v Omokewu* (1992) 7 SCNJ 266 at 281.
111 *Romaine*, id at 44–45.

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until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them".[112] Indeed, by the time *Egharevba v Okuonghae* was decided in 2001, the Supreme Court already regarded it to be "settled that custom is a question of fact which should be proved in cases where it has not assumed sufficient notoriety or [sic] judicially noticed".[113]

The point at which a rule of customary law becomes judicially noticeable is thus the point of its convergence with positive law, having been incorporated in precedents, and the point of divergence from native law, having been transformed from a system of native law that is unwritten, flexible and subject to the dictates of expediency to one that is codified in precedent.

Judicial notice of custom, particularly under the extant Evidence Act, creates many negative possibilities for the original character of a customary law, in that a court applying a custom that has been frozen in precedent may forget that, the first time the custom was proved, it was proved as a unique custom peculiar to the people of a certain area who looked upon the custom as binding in relation to circumstances similar to those to which a frozen judicial precedent custom is now sought to be applied.

Commenting on the interface between customary law and precedent, Woodman argues that rules recognized by the court as customary law (lawyer's customary law) do not necessarily correspond to socially accepted norms in society (sociologist's customary law). This divergence, he asserts, occurs during the process of the establishment of customary law before the court. Judicial establishment entails the institutionalization of the rule in the official legal system, thereby making it available for use by the courts. Woodman explains that the divergence may arise from mistaken findings on the content of sociologists' customary law. Further, even if such mistakes do occur, courts sometimes have to reach conclusions on the content of customary law when sociologists' customary law is in the mode of change.[114] Woodman noted that there have been instances where controversial points of law were settled by referring to one or a few decided cases that were in turn based on weak evidence and that the binding nature of previous decisions may result in the courts disregarding local variations in customary practice.[115]

This may diminish the foundational function performed by the assent of the people who look upon a custom as binding, as it makes the custom dependent on what the court accepted in its precedent, irrespective of a modification that may have occurred from the subsequent expression of the will of

112 Above at note 18 at 44.

113 (2001) 11 NWLR (pt 724) 318 at 337.

114 GR Woodman "How state courts create customary law in Ghana and Nigeria" in BW Morse and GR Woodman (eds) *Indigenous Law and the State* (1988, Foris Publications) 181, cited in Kiye "The repugnancy and incompatibility tests", above note 15 at 96–97.

115 Ibid.

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the people. The requirement that a customary law should be variously acted upon by courts before it can be judicially noticed, allows the courts to take into cognisance the different shades of the custom and how it may have changed over time, when deciding whether the rule has matured to the point where it should be judicially noticed.

In deference to the assent of the people, Osborne CJ cautiously noted in *Lewis v Bankole* that, "[t]he great danger in applying [customary law] in this court is that of crystallising it in such a way that it cannot be departed from in cases where expediency demands, and where natives themselves would depart from it".[116] With this in mind, the learned chief justice was careful to "preface … [his] findings with the remark that they are intended as findings of the general principles … and not as hard and fast findings of immutable native law".[117] The same point was forcefully made by Allott as follows:

> "The binding force of custom ultimately rests on the fact that it is habitually obeyed by those subject to it; if not fortified by established usage it is not law. But once custom has been codified or settled by judicial decision, its binding force depends on the statute or the doctrine of precedent; in short, it ceases to be customary law. A divergence is therefore not merely possible but likely between the laws as administered by the courts and that followed by the public. The doctrine of judicial notice and the doctrine of precedent do not appear to be flexible enough to meet this divergence, in the absence of statutory provision or other direction to the contrary". [118]

A less cautious court may ignore the foundational function of the assent of the people and thus apply a custom according to its own preconceptions or logic.[119] This would give impetus to the emergence of two different rules of the same customary law: one recognized by the court and frozen in precedent and another (a modified version) that became the people's law after which the original custom was acted upon by superior court. It is submitted that a customary law frozen in precedent loses its validity as customary law once it is no longer supported by the assent of the people. It is thus incumbent on the native community to insist on re-proving a rule of customary law that has been frozen in precedent if and when the rule changes.

CONCLUSION

The core purpose of this article was to show that the assent of the native people is the only factor that validates customary law. This is with a view to the conclusion that courts of law lack the faculty to validate or invalidate customary law and that their faculty is limited to determining the enforceability of

116 Above at note 5 at 100.
117 Id at 101.
118 Allott "The judicial ascertainment", above at note 50 at 258.
119 Woodman "Some realism", above at note 70 at 134.

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native law and custom. In holding this view, however, the authors acknowledge that the refusal of a superior court to enforce a rule of native law and custom effectively blocks it from becoming part of positive law and that this may have a gradual repealing effect on the custom as it may, under the influence of court judgments, become milder or abolished when the native people adapt their practice to the policy direction of the court. The views expressed in this article become quite easy to follow when it is realized, for instance, that a finding such as that in *Ukeje v Ukeje*[120] (that a native law and custom that denies succession rights to daughters is unenforceable) does not preclude the native community governed by the custom from distributing intestate property under that custom in future. It may take time, but the native community will certainly modify the discriminatory rule under the influence of the judgment. By so doing, the people will assent to a new rule governing the rights of women to inheritance within the larger corpus of their native law and custom regulating the distribution of intestate property.

It is on the grounds of the arguments provided in this article that the authors argue that the use of the phrase "validity test" in relation to the repugnancy, public policy and incompatibility tests contained in statute books should be discarded in favour of the phrase "enforceability test".

120 (2014) 11 NWLR (pt 1418) 384.

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