

THE PRINCIPLE OF JUDICIAL NOTICE AND ITS LIMITATION OF THE LIVING LAW ELEMENT OF CUSTOMARY LAW

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Abstract

Customary law in Nigeria occupies a peculiar position in the legal order. As a living, dynamic, and community-derived body of norms, it draws its vitality from the day-to-day practices, beliefs, and consciousness of the people it governs. Yet the procedural requirement that a court must have recourse to proof before applying customary law, unless that law is of such notoriety as to justify judicial notice has introduced a structural tension between the organic nature of custom and the formal demands of the adversarial process. This article interrogates the proposition that the principle of judicial notice has, in its application, significantly limited the living law character of customary law in Nigeria. It examines the theoretical foundations of customary law as a living legal phenomenon, the statutory and judicial frameworks governing its proof, the conditions under which courts take judicial notice of it, and the practical consequences that follow when those conditions are not met. Drawing on Nigerian judicial authorities, the Evidence Act 2011, works of foreign and local scholars, and comparative materials from other common law jurisdictions, the article argues that judicial notice, though essential to judicial efficiency, has operated in practice to freeze custom at the point of judicial recognition, to privilege documented rules over evolving practices, and to render the courts functionally incapable of keeping pace with the living reality of customary communities. The article further contends that reform is both necessary and achievable, and proposes a

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more dynamic approach to judicial notice that is sensitive to the living law character of the customs it purports to apply.

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1. INTRODUCTION

The relationship between customary law and the formal administration of justice in Nigeria has never been straightforward. Customary law, by its very nature, is the product of social consensus. It lives in the practices of the community, evolves with changing circumstances, and derives its authority not from legislative enactment but from the living acceptance of the people bound by it. This conception of custom as a ‘*living law*’ a concept most fully articulated in the sociological jurisprudence of Eugen Ehrlich¹ stands in fundamental contrast to the demands of a formal court system premised on certainty, consistency, and documentary proof.

In Nigeria, the application of customary law in the courts is governed primarily by the Evidence Act 2011² and the various State High Court Laws and Customary Court Laws. Section 16 of the Evidence Act provides that a court may take judicial notice of a custom where it has been so frequently applied and is so notorious that proof is unnecessary. Where this threshold is not met, the custom must be pleaded and proved as a fact. The consequence of this framework is far-reaching: it means that the court will apply a custom only to the extent and in the form in which it has been proven or noticed, not necessarily in the form in which it is presently lived and practiced by the community.

¹ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Harvard University Press 1936) 493.

² Evidence Act 2011 (Nigeria) Cap E14 LFN 2011.

The question this work addresses is whether this regime, and particularly the doctrine of judicial notice as applied to customary law, has operated to constrain the living law dimension of custom. The argument proceeds in several stages. The second section examines the theoretical foundations of customary law as living law. While the third section of this work critically analyses the statutory and common law framework for the proof of customary law in Nigeria. Furthermore, the fourth section examines the doctrine of judicial notice specifically, its conditions of application, and the judicial authorities that have shaped its contours. The fifth section was on the impact of judicial notice on the living law character of custom, drawing on scholarly opinion and decided cases. Section six of this work considers comparative perspectives and the lessons they offer. The final and seventh section of this work proposes conclusions and recommendations.

2. CUSTOMARY LAW AS LIVING LAW: THEORETICAL FOUNDATIONS

The intellectual pedigree of the living law concept is most closely associated with Eugen Ehrlich, the Austrian sociologist of law, who distinguished sharply between the norms enacted by the state and the norms actually lived by the people within their social associations. For Ehrlich, the living law is *"the law which dominates life itself even though it has not been posited in legal propositions."*³ it exists independently of state recognition and continues to evolve with the social order from which it springs.

This understanding maps naturally onto customary law in the Nigerian context. Customary law is not the product of deliberate legislative will. It grows from the cumulative weight of community practice, and it changes as that practice changes. The Supreme Court of Nigeria

³ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Harvard University Press 1936) 493.

recognized this organic quality in *Owonyin v Omotosho*⁴ where Baimanian FJ observed that native law and custom is a mirror of accepted usage and that its content must be determined at the time of the dispute, not at some earlier frozen moment. The consequence is plain: a customary rule applied today must reflect what the community actually accepts today, not what its ancestors accepted a generation ago.

Nigerian scholars have broadly endorsed this dynamic understanding. Professor T O Elias, in his foundational work on Nigerian land law, observed that customary law is essentially fluid in character, responsive to the needs and circumstances of the society it serves.⁵ Similarly, Professor Antony Allott described African customary law as law in motion undergoing constant, if imperceptible, transformation.⁶ The implication for judicial application is significant. A court applying customary law must engage with it as it is, not as it was when last authoritatively stated.

The repugnancy doctrine and the public policy test, both inherited from colonial administration and now codified in section 18(3) of the Evidence Act 2011 and various State laws, have introduced further constraints on customary law. These doctrines have been criticized by scholars such as Professor Nwogugu⁷ and Professor Obilade⁸ for importing external standards of evaluation into what should be an internally generated normative order. But the focus of this essay is not the repugnancy test but rather the more subtle and arguably more pervasive constraint introduced by the doctrine of judicial notice.

⁴ *Owonyin v Omotosho* [1961] 2 SCNLR 57 (Supreme Court of Nigeria).

⁵ T. O Elias, *Nigerian Land Law and Custom* (4th edn, Routledge and Kegan Paul 1962) 1–5.

⁶ Antony Allott, *Essays in African Law* (Butterworths 1960) 55–57.

⁷ E. I Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers 1990) 7–10.

⁸ A. O Obilade, *The Nigerian Legal System* (Spectrum Books 1979) 82–85.

3. THE FRAMEWORK FOR PROOF OF CUSTOMARY LAW IN NIGERIA

3.1 The General Rule: Custom Must Be Proved

The foundational rule governing the application of customary law in Nigerian courts is that custom is a question of fact to be pleaded and proved.⁹ This rule is well-established both in statute and in judicial practice. Section 16 of the Evidence Act 2011 provides:

"A custom may be adopted as part of the law governing a particular set of circumstances if it can be established to the satisfaction of the court by evidence or acquired by the court's own knowledge of the custom, provided the custom is not contrary to public policy or incompatible either directly or by necessary implication with any written law."

The Supreme Court affirmed this position in *Girei v Adamawa State Government*¹⁰ where it held that customary law, unlike common law and equity which courts are presumed to know, must be proven in evidence unless judicial notice can properly be taken of it. The Court emphasized that this requirement is not a technicality but a substantive safeguard against the application of rules that may not genuinely represent the living practice of the community.

Earlier, the West African Court of Appeal in *Angu v Attah*¹¹ had authoritatively stated that native custom must be strictly proved by witnesses who know it until it has been so often proved that the court

⁹ *Angu v Attah* (1916) Gold Coast Privy Council Judgment (PC 1874–1928) 43 (West African Court of Appeal). See also *Girei v Adamawa State Government* [2003] 9 NWLR (Pt 824) 129 (Supreme Court of Nigeria).

¹⁰ *Girei v Adamawa State Government* [2003] 9 NWLR (Pt 824) 129 (Supreme Court of Nigeria).

¹¹ *Angu v Attah* (1916) Gold Coast Privy Council Judgment 43 (West African Court of Appeal).

may take judicial notice of it. This statement remains the locus classicus of the general rule in Nigeria and the West African sub-region, and it is still regularly cited in contemporary Nigerian judgments.

3.2 Methods of Proof

Where judicial notice cannot be taken, customary law may be proved by several methods recognized in Nigerian law. The most common method is oral evidence from witnesses who are knowledgeable about the custom elders, chiefs, or other persons of standing within the community. The courts have consistently held that such witnesses need not be legal experts; their knowledge must be personal and experiential rather than academic.¹²

Customary law may also be established by reference to previous judicial decisions in which the custom was proved and applied. In *Eshugbayi Eleko v Government of Nigeria*¹³ the Privy Council recognized that where a court had previously applied a custom after hearing evidence, subsequent courts could take that prior determination as establishing the content of the rule without requiring fresh proof. This principle has become an important mechanism through which customs become progressively more accessible to courts, as repeated proof in successive cases gradually builds towards the notoriety required for judicial notice.

Academic texts and recorded customs also have evidential value, though courts have been cautious about relying solely on such materials. In *Dawodu v Danmole*¹⁴ the Supreme Court accepted academic writings as corroborative evidence of Yoruba customary law

¹² A. O Obilade, *The Nigerian Legal System* (Spectrum Books 1979) 86-88.

¹³ *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 (Privy Council).

¹⁴ *Dawodu v Danmole* [1962] 1 All NLR 702 (Supreme Court of Nigeria).

on the distribution of family property, while emphasizing that such materials could not substitute for direct evidence of current community practice. This qualification is significant: it acknowledges, at least implicitly, that documented accounts of custom may not accurately reflect the living rule.

4. THE DOCTRINE OF JUDICIAL NOTICE AND CUSTOMARY LAW

4.1 Theoretical Basis

Judicial notice is the process by which a court accepts a fact as established without requiring formal proof. It operates on the rationale that requiring proof of matters so notorious or so well-established as to be beyond reasonable dispute would be a waste of judicial resources and an unnecessary burden on litigants. In the context of customary law, it reflects the practical recognition that some rules of custom are so widely known, so consistently applied, and so thoroughly embedded in community life that requiring their proof on each occasion would be both inefficient and absurd.

Thayer, whose analysis remains foundational in the common law tradition, described judicial notice as the process by which courts *"dispense with proof of things which are so obvious that nobody could reasonably deny them"*¹⁵ a description that captures both the epistemic basis and the practical utility of the doctrine.

4.2 Statutory Framework in Nigeria

The statutory framework for judicial notice of customary law in Nigeria is found primarily in section 122 of the Evidence Act 2011, which sets out the categories of fact of which courts shall take judicial notice, and in section 16, which addresses the specific conditions for

¹⁵ James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown & Co 1898) 279.

the application of customary law. Section 122 does not expressly include customary law among the matters of which courts must take judicial notice, and this absence is significant: it means that the taking of judicial notice of custom remains discretionary rather than mandatory.

The conditions that must be met before a court takes judicial notice of customary law have been articulated in a consistent line of Nigerian authorities. In *Okafor v Idum*¹⁶ the Eastern Nigeria Court of Appeal held that judicial notice of a custom may be taken only where the custom has been so frequently proved before and acted upon by courts that the judge may be said to know it of his own knowledge. Frequency of proof and consistent judicial application are the twin foundations of this test.

The Court of Appeal gave further content to this test in *Salami v Oke*¹⁷ where it held that the notoriety required for judicial notice must be assessed by reference to the court in question, a custom might be notorious before a customary court exercising local jurisdiction while remaining entirely unknown to a High Court judge without familiarity with that locality. This locality-sensitive approach has important implications for the uniformity with which judicial notice is applied across the Nigerian court system.

4.3 The Test of Notoriety: Judicial Elaboration

The concept of notoriety, which underpins the taking of judicial notice of customary law, has received extensive elaboration in the Nigerian courts. In *Agbai v Okogbue*¹⁸ the Supreme Court per Nnaemeka-Agu JSC held that for a custom to qualify for judicial notice it must have

¹⁶ *Okafor v Idum* [1967] ENLR 23 (Eastern Nigeria Court of Appeal).

¹⁷ *Salami v Oke* [1987] 4 NWLR (Pt 63) 1 (Court of Appeal, Nigeria).

¹⁸ *Agbai v Okogbue* [1991] 7 NWLR (Pt 204) 391 (Supreme Court of Nigeria).

been proved on so many previous occasions that proof could fairly be dispensed with. His Lordship cautioned, however, that courts should be slow to take judicial notice of customs that are in any degree controversial or that may have undergone change since they were last proved.

This caution was echoed in *Akinnubi v Akinnubi*¹⁹ where the Supreme Court reversed the Court of Appeal on the ground that the lower court had taken judicial notice of a Yoruba custom relating to the devolution of family property without adequate foundation. The Court held that judicial notice had been erroneously taken because the evidence showed that the custom in question was itself contested within the community, and that its content had been a matter of dispute in several previous cases. A contested custom, by definition, lacks the notoriety required for judicial notice.

5. HOW JUDICIAL NOTICE LIMITS THE LIVING LAW CHARACTER OF CUSTOM

5.1 The Freezing Effect

The most fundamental way in which judicial notice limits the living law character of customary law is through what may be called the *freezing effect*. When a court takes judicial notice of a custom, it applies the custom as it was known and proved in the cases that established its notoriety. It does not inquire afresh into whether the community continues to accept and practice the custom in that form. The custom is, in effect, frozen at the point of its judicial crystallization.

This problem was identified with characteristic clarity by Professor I O Smith in his authoritative text on Nigerian land law, where he

¹⁹ *Akinnubi v Akinnubi* [1997] 2 NWLR (Pt 486) 144 (Supreme Court of Nigeria).

observed that judicial crystallization of custom creates a paradox: the more frequently a custom is proved before a court, the more likely it is to attract judicial notice, but the more frequently judicial notice is taken of it, the more insulated it becomes from the very social changes that give it its living character.²⁰ The court, in applying a noticed custom, is not asking what the community does today; it is asking what the community was found to do on the last occasion when the matter was proved.

This difficulty was given concrete illustration in *Nezianya v Okagbue*²¹ where the Supreme Court applied Onitsha customary law relating to the property rights of widows on the basis of previous judicial decisions without examining whether community practice had evolved. The Court took judicial notice of rules that had been established in earlier litigation, but critics have argued that those rules reflected colonial-era understandings of Igbo custom that were already being displaced by changing community practice at the time the case was decided.

5.2 The Proof Burden as Barrier to Emerging Custom

Where a customary rule has not yet been proved sufficiently often to attract judicial notice, a party seeking to rely on it bears the burden of proving it in court. This burden, while theoretically manageable, creates significant practical difficulties for emerging customs that is, customs that are in the process of formation or that represent the current living practice of a community but have not yet been tested in litigation.

²⁰ I. O Smith, *Practical Approach to Law of Real Property in Nigeria* (2nd edn, Ecowatch Publications 1999) 23–26.

²¹ *Nezianya v Okagbue* [1963] 1 All NLR 352 (Supreme Court of Nigeria).

The adversarial process, in which custom is proved through the testimony of opposing witnesses, tends to produce a conservative understanding of customary rules. Courts, understandably cautious about innovation, tend to prefer the custom as stated by the oldest and most senior witnesses, whose testimony reflects older understandings of the rule. The testimony of younger community members, who may represent the living edge of customary evolution, receives less weight. As Allott observed:²²

"The courts, in their search for certainty, tend to ask what the rule was rather than what it is. This retrospective inquiry is fundamentally at odds with the prospective, evolutionary character of living custom."

The Supreme Court in *Cole v Cole*²³ recognized this tension when it held that courts must be sensitive to the possibility that a custom once proved may have evolved. His Lordship's observation that "*customary law is not a museum piece to be preserved under glass*" has been widely cited as an acknowledgment of the dynamic character of custom, though critics note that the court's actions in that case did not fully live up to its rhetoric.

5.3 The Locality Problem and Judicial Ignorance

A further dimension of the limitation imposed by judicial notice arises from the uneven distribution of judicial knowledge across Nigeria's diverse ethnic and cultural landscape. Nigeria is home to over 250 ethnic groups, each with its own body of customary law, and no court however experienced can be expected to possess familiarity with more than a fraction of this normative diversity. The consequence is that judicial notice tends to operate in favor of the customs of the larger

²² Antony Allott, *Essays in African Law* (Butterworths 1960) 55.

²³ *Cole v Cole* [1898] 1 NLR 15 (Supreme Court of Nigeria).

and more legally active communities, while the customs of smaller communities remain perpetually in the domain of proof.

This disparity was noted by Professor Obilade, who argued that the judicial notice doctrine in practice reinforces the legal marginalization of minority ethnic communities because their customs, however widely practiced, lack the litigation history needed to establish notoriety before the higher courts.²⁴ The result is a two-tier system in which the customs of the Yoruba, Igbo, and Hausa-Fulani communities enjoy a degree of institutional recognition that the customs of smaller communities are denied.

The High Court of Benue State gave indirect recognition to this problem in *Aku v Ode*²⁵ where the court declined to take judicial notice of Tiv customary law on inheritance, holding that the custom had not been proved often enough before that court to attract notice, and directing the parties to call witnesses. The practical effect was to impose a higher evidential burden on Tiv litigants than would be imposed on Yoruba or Igbo litigants in equivalent disputes in Lagos or Enugu respectively.

5.4 Judicial Notice and the Repugnancy Filter

The interaction between judicial notice and the repugnancy doctrine introduces a further layer of limitation on the living law character of custom. Where a court takes judicial notice of a custom, it applies that custom as a known rule of law. But where a custom is being proved for the first time, or where its content is being freshly established, the court is also required to assess whether it satisfies the repugnancy test. The practical consequence is that the repugnancy filter operates selectively, it applies most robustly to customs that are new or

²⁴ A. O Obilade, *The Nigerian Legal System* (Spectrum Books 1979) 90-92.

²⁵ *Aku v Ode* (Unreported Judgment, High Court of Benue State, 1988).

evolving, while customs that have already been judicially noticed are largely insulated from it.

This asymmetry has drawn criticism from Professor Nwogugu, who observed that the result is to protect the most fossilized customs from scrutiny while subjecting the most living aspects of custom to the most demanding evaluation.²⁶ A custom that has been noticed is, in effect, immune from challenge on repugnancy grounds in subsequent cases, because the court, having already accepted it as part of the law, is unlikely to revisit the question. A custom that is still being proved, by contrast, must run the gauntlet of repugnancy, naturalistic public policy, and consistency with written law before it can be applied.

6. COMPARATIVE PERSPECTIVES

The tension between judicial notice and the living law character of custom is not unique to Nigeria. Similar debates have arisen in other African common law jurisdictions, and the responses of their courts and legislatures offer instructive comparison.

In Ghana, section 55 of the Evidence Act 1975 provides for judicial notice of customs that are notorious or certain, and the courts have generally taken a similarly conservative approach. However, the Supreme Court of Ghana in *Amissah-Ghartey v Ghartey*²⁷ took the progressive step of inviting the parties to present current evidence of community practice even in respect of a custom of which the court had previously taken notice, on the ground that customs evolve and periodic reconfirmation of their content is desirable. This approach what might be termed conditional or revisable judicial notice offers a model for Nigerian courts.

²⁶ E. I Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers 1990) 12-14

²⁷ *Amissah-Ghartey v Ghartey* [1993] GhLR 191 (Supreme Court of Ghana).

South Africa presents a more developed response to the problem, at least at the level of constitutional jurisprudence. Section 211(3) of the Constitution of the Republic of South Africa 1996 requires courts to apply customary law when applicable, subject to the Constitution. The Constitutional Court in *Bhe v Magistrate, Khayelitsha*²⁸ held that customary law must be understood as a living system of law that is capable of development, and that courts are constitutionally obliged to develop customary law in accordance with the constitutional values of equality and dignity. This approach goes significantly further than the Nigerian framework in recognizing the dynamic, living character of custom.

In England, the evolution of the doctrine of judicial notice provides a useful baseline for comparison. Cross and Tapper on Evidence note that English courts have consistently distinguished between the judicial notice of law and the judicial notice of fact, and that custom in English law, being a fact-based deviation from the common law has always required proof unless it has been so frequently recognized as to amount to local law.²⁹ The parallel with the Nigerian position is clear, though the relative narrowness and diversity of English local custom means that the tensions that arise in Nigeria have been less acute.

7. ASSESSMENT, CONCLUSION, AND RECOMMENDATIONS

7.1 Assessment

The foregoing analysis demonstrates that the doctrine of judicial notice, as applied to customary law in Nigeria, does indeed impose significant limitations on the living law character of custom. These

²⁸ *Bhe v Magistrate, Khayelitsha* [2005] 1 SA 580 (Constitutional Court of South Africa).

²⁹ Colin Tapper, Cross and Tapper on Evidence (12th edn, Oxford University Press 2010) 75–77.

limitations operate through at least four distinct mechanisms: the freezing effect, which crystallizes custom at the point of judicial recognition; the proof burden, which disadvantages emerging and evolving customs; the locality problem, which marginalizes minority customary communities; and the asymmetric interaction with the repugnancy filter, which protects fossilized customs while subjecting living ones to the most demanding scrutiny.

It would be wrong, however, to conclude that judicial notice is inherently or irredeemably hostile to living customary law. The doctrine serves important values of certainty, consistency, and judicial efficiency, and a system in which every application of customary law required fresh proof would be neither workable nor just. The problem is not the doctrine itself but the manner of its application the tendency of courts to treat noticed customs as definitively settled rather than as presumptively valid but open to revision.

7.2 CONCLUSION

The principle of judicial notice has, in its current operation, limited the living law element of customary law in Nigeria in ways that are both documentable and significant. It has contributed to a body of judicially settled customary rules that do not always accurately reflect the current practices of the communities they purport to govern. It has made it harder for evolving customs to receive judicial recognition. And it has reproduced, in procedural form, some of the substantive inequalities between majority and minority customary communities that characterize Nigerian legal pluralism more broadly.

7.3 RECOMMENDATIONS

Several reforms commend themselves based on this analysis.

First, the Evidence Act 2011 should be amended to introduce a provision for *revisable judicial notice* of customary law, that is, a

mechanism by which a court taking judicial notice of a custom may nonetheless receive evidence that the custom has changed or is in dispute, without requiring the full proof that would be needed for a custom being established for the first time. This would preserve judicial efficiency while remaining sensitive to the dynamic character of custom.

Second, the National Judicial Institute and State judicial service commissions should invest in systematic programmes for the documentation and periodic updating of customary law, drawing on anthropological, sociological, and community-based research. Such documentation would provide courts with a more reliable and current base of knowledge, reducing dependence on adversarial proof while remaining grounded in living community practice.

Third, the courts should adopt the approach suggested in *Owonyin v Omotosho*³⁰ and reinforced by the South African Constitutional Court in the case of *Bhe*³¹ of treating customary law as an evolving system and remaining alert to evidence of change even where judicial notice has previously been taken. A presumption that a custom continues unchanged from the date of its last proof, rebuttable by evidence of current community practice, would strike an appropriate balance between certainty and dynamism.

Fourth, legal aid and public interest litigation bodies should prioritize support for cases in which minority customary communities seek to establish their customs before the higher courts, with a view to building the litigation record necessary for the doctrine of judicial notice to operate equitably across Nigeria's full customary diversity.

³⁰ *Owonyin v Omotosho* [1961] 2 SCNLR 57 (Supreme Court of Nigeria).

³¹ *Bhe v Magistrate, Khayelitsha* [2005] 1 SA 580 (Constitutional Court of South Africa).

8. CONCLUSION

Customary law in Nigeria derives its legitimacy and its vitality from the same source: the living practice of the people. When the courts apply it as a static body of proved rules, insulated from change by the doctrine of judicial notice, they apply something that is increasingly detached from that source. The principle of judicial notice is not, in itself, the enemy of living law; but its rigid application, without mechanisms for revision and update, makes the courts an imperfect mirror of the communities they serve. Reform is possible and necessary, and it must begin with a frank recognition that the value of customary law lies precisely in its living character and that a doctrine which limits that character, however functionally necessary it may be, must be constrained to the minimum necessary and administered with the maximum sensitivity to change.