CHARACTERISTICS OF CUSTOMARY LAW

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LIST OF CHARACTERISTICS

• 1. Flexibility
• 2. Unwritten Nature
• 3. Currency
• 4. Acceptability
FLEXIBILITY

• *Lewis v. Bankole (1908)* 1 NLR 81 at 100 – 101, Osborne CJ held that ‘indeed, one of the most striking features of West African Native custom, to my mind, is its flexibility. It appears to have been always subject to motivates of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics”. (underlining mine for emphasis)

• In *Alfa v. Arepo* (1963) WNLR 95 at 97, Duffus J observed that “customary law is not, however a static law and in my view, the law can and does change with the times and the rapid development of social and economic conditions”. (Underlining mine for emphasis)
FLEXIBILITY (contd.)

• In Balogun v. Oshodi (1929) 10 NLR 36 at 57, Kingdom CJ stated “I am aware that Native Law and Custom are living things and may change” – Living things grow and change, so customary law is organic and flexible because it grows to keep pace with changes in society (underlining mine for emphasis)

• Weber J also stated in Balogun v. Oshodi (supra) that “the chief characteristic feature of Native law is its flexibility”

• In Edokpolor v. Idehen (1961) WNLR 11 at 13, Thomas J held that “Customary law is not constant but relative and varies with localities”

• In Kimdey v. Military Governor of Gongola, Karibi-Whyte JSC stated “one of the characteristics of native law and which provides for its resilience is its flexibility and capacity for adaptation. It modifies itself to accord with changing conditions” (underlining mine for emphasis)
FLEXIBILITY (contd.)

• Areas where customary law has demonstrated its flexibility in Nigeria include the concept of inalienability of land, transactions conducted in writing and human rights generally.

• See the case of Dawodu v. Danmole (1958) 3 FSC 46 concerning the Yoruba customs of idi-igi and Ori Ojori and Ukeje v. Ukeje 2014 LPELR 22724 (SC) for the Igbo custom forbidding female inheritance etc.

• COMMENT – Customary law is not static. It changes as society changes. In the formulation of the historical school of jurisprudence viz Von Savigny, it “grows with the growth” of the society. Also see Agbai v Okogbue per Nwokedi JSC. It is able to adapt itself to changing ideas of what is convenient and in keeping with the altered times. Being that it is living and organic it grows and adapts itself to economic and social changes in the society it finds itself
UNWRITTEN

• In *Alfa v. Arepo (Supra)* the court held that ‘‘this law is unwritten and I agree with the above passage from Lloyds book that it owes its authority to the fact that the custom has been established from ancient days.’’

• Professor Anthony Allot in Essays in African Law, stated ‘‘First the law is unwritten. There is no written memory of the edicts and judges. They exist only in the minds of those who administer and those who are subject to the customary law. There is no pondering over legal principles, no juristic analysis, no criticism or refurbishing of old precedents. All of which depend on written texts which the justice may scrutinize as leisure’’
UNWRITTEN NATURE

• According to Lon Fuller in Anatomy of the Law, customary law is not declared or enacted but grows or develops through time and has no authoritative verbal declaration of the terms of the custom.

• An attempt to reduce the customary law of the former Anambra state into writing produced A manual of customary law by the Commissioner for Law Revision of former Anambra State Dr S.N Obi.

• Those that argue for codification of customary law in a form like the “Customary Law Manual” cited above argue that it will make customary law certain and no longer vague and it will be documented for posterity.

• Those who argue against codification point to the destructive effect of codification on the flexibility of customary law and the calcification that will result in customary law leading to the need to amend customary law. This is not the intendment of customary law as it has no known author and as such does not need such formal amendment.
• It must be the current binding custom of the people not that of past days as, such bygone customs have lost the element of acceptability needed to make it binding. Also a custom of bygone days is no longer a reflection of the ways of life of a people and so no longer qualify as customs.

• In Kimdey v Military Governor of Gongola State (1988) 2 NWLR (PT 77) p 445 at 461, Karibi-whyte JSC said that one of the requirement of customary Law is that it must be in existence at the material time. Speed Ag CJ in Lewis v. Bankole (1908) 1 NLR 81 at 83 held that the native law and custom in order to be enforceable must be existing native law and custom, and not that of by gone days. In Dawodu v Danmole (supra) the decision of the trial court rejecting the idi-igi rule as not being consonant with fairness was overturned by the Supreme Court on the basis that idi-igi was the prevailing custom at the material time.
ACCEPTABILITY

• Bairamian in OWONYIN VS OMOTOSHO 1961 1 ALL NLR 304 at 309 to be “a mirror of accepted usage”.

• In ESHUGBAYI ELEKO VS GOVERNMENT OF NIGERIA 1931 AC.662 at 673, Lord Atkin said “their Lordships entertain no doubt that the barbabous customs of earlier days may under the influences of civilisation become milder without losing their essential character as a custom. It would however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in the form to regulate the relations of the native community as custom, so as in the form to regulate the relation of the native community. It is the assent of the native community that gives a custom its validity and therefore barbarous or mild, it must be shown to be recognized by the community whose conduct it is supposed to regulate” (underlining mine for emphasis)
• Before a custom translates into law, it must be regarded as obligatory by the people. (see the definitions of professor Obilade, Black’s law dictionary, Taslim Elias etc, discussed in the earlier sub-topic on definitions of customary law). It is their acceptance of such a rule as binding and regulatory over their relationships that makes it binding. In Okonkwo and Okagbue, the lead judgment pointed out that even when the court holds a custom to be repugnant most times the society affected goes on with the practice although it can no longer be enforced legally. Even though the concurring opinion of Ogundare JSC unequivocally stated that once a custom is struck down by the court as repugnant it becomes illegal, the opinion of Uwais JSC in the lead judgment reflects that understanding that it is the agreement of the people that makes the custom a law.
In the case of Emeka v Nneka, Emeka filed an action asking the court to hold that by their customary law of inheritance in Y village, Nneka was not entitled to share the estate of their deceased father with him, being the only son. Nneka led evidence to show that the alleged custom was last applied 20 years ago and that the new custom in the village was for legitimate daughters to receive a share of the property depending on whether they were married or were still single. Emeka responded by bringing witnesses to show that there is a rule in their community that their customary law must never be changed for any reason while Nneka led evidence to show that the custom widely accepted by the people at the time was the custom allowing female children to share in their fathers estate. If you were the judge make a ruling on each of these submissions by Emeka and Nneka citing relevant authorities to buttress your point.