THE
REPUGNANCY DOCTRINE UNDER CUSTOMARY LAW:
Issues and Challenges

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PROTOCOL

My Lords, permit me to express my sincere appreciation to the Administrator, National Judicial Institute, the Hon. Justice R.P.I Bozimo, OFR, and the Education Committee of the Institute for granting me this rare honour and privilege to present a paper at this workshop, specially organized for judges of Sharia/ Area/ Customary Courts on the topic: '*The Repugnancy doctrine under Customary law: Issues and Challenges*'

1.0 INTRODUCTION

Customary law or native law and custom is a significant source of Nigerian law. Its impact or effect on our legal systems is quite enormous. It is the indigenous law; the law that was handed down from time immemorial from ancestors and it reflects the norms and cultures of the people.

Prior to colonization of Nigeria, Customary laws were applicable in the indigenous native courts under the supervision of the chiefs/emirs or traditional rulers. The customary law then was applied in its original form without any restriction until the advent of the colonial masters.

The concept of repugnancy tests in Nigeria dates back to the colonial days when the expatriate Judges sat to adjudicate cases brought before them bordering on native law and customs. They refused to recognize and enforce Customary laws that are perceived to offend European standards of morality, values and justice in general, which they coded variously as 'natural justice', 'equity' or 'good conscience'.

Essentially, repugnancy doctrine was used to test our Customary laws for enforceability. This paper begins with the meaning, the

features and the proof of customary law. It discusses the introduction of repugnancy doctrine into the country's legal system. Attempt is made to identify reasons for the colonial courts to subject the native laws and customs to repugnancy tests and why the present courts still place conditions on the customary laws before applying them. Finally, issues and challenges will be considered along with some notable cases in which Nigerian courts have made pronouncements on the application of Repugnancy doctrine.

1.1 WHAT IS CUSTOMARY LAW?

There are obvious need to have an overview or basic understanding of Customary law before we look into the consideration of the relevance or otherwise of the doctrine of repugnancy and compatibility tests.

Aristotle (384-327 BC) the ancient Greek philosopher, proclaimed that *"man is the noblest of all animals, but separated from law and justice, he is the worst"*

This true statement, reinstates the indispensability of law in the society. Consequently communities who desire decorum and justice have developed customs and laws that become the mirror of their society.

Customary law has variously been defined by statutes, case laws as well as by textbook writers:

Section 258[1] (1) of the **Evidence Act,** Laws of the Federation, 2011 defines custom as;

"a rule which in particular district has from long usage obtain the force of law".

Consistent with the above, Section 2 of the Customary Court of Appeal law of Nasarawa State, defines customary law as;

"the rule of conduct which govern the legal relationship as established by custom and usage not forming part of the common law of England nor formally enacted by the Nasarawa State House of Assembly but includes any declarations or modification of customary law but does not include Islamic personal law".

Also, from the jurisprudence of the courts, Customary law has been interpreted in **OYEWUMI V. OGUNESAN**(1990)3NWLR, (Pt137)182,207 as:

"the organic or living law of the indigenous people of Nigeria which regulates their lives and transactions…'

Again, in the case of **NWAIGWE V. OKERE (2008) ALL FWLR (Pt 43) 870**. The Supreme Court defined customary law thus: *"Customary law generally means relating to the custom or usage of a given community. Customary law emerge from the tradition, custom and usage and practice of people in a given community which by common adoption and acquiescence on their part and by long and involving habit, it has acquired to some extent, element of compulsion and force of law"*.

Describing the nature of Customary laws, Lord Denning in **R. v. Secretary of State of Commonwealth Affairs** (1982) 2 All ER 118, said

"these Customary laws are not written down, they are handed down by tradition from one generation to another, yet beyond

doubt are well established and have the force of law within the community".

Complementing these definitions given by statutes and case laws, P.C. Lloyd in his book *'Yoruba Land Law',* defined Customary law as "*the ancient law which has always been observed being antiquity"*.

If we peruse all these definitions, it will reveal clearly that emphasis have been on *'acceptance', 'usage', antiquity, unwritten,* as well as, *force of law*.

Therefore, customary law exists when certain rules, practices and norms of a particular community which regulate the lives of the adherents are accepted as binding upon them. Customs acquire force of law when they become the undisputed rule by which certain rights, entitlements and obligation are regulated between members of the community. It may be correct to say that all peoples in Nigeria have customs. However, customary law takes different form from community to community based on cultural differences. There is therefore no single uniform set of customs prevailing in the country.

The native legal system consists of countless customs each developed and applicable to a particular ethnic group. Customary law has a jurisdiction limited to a particular cultural boundaries and it is in the possession and right of a restricted ethnic group.

Put simply, customary law is a pure law promulgated at a remote stage in the life of a community outside human memory. The observance of a customary law is rooted in the strong belief of ancestral spirits. Generally any disobedience of customary law is

considered a taboo or abomination and may attract punishment by the ancestral spirit. This is perhaps what Mark Twain had in mind in his famous quote: `*Laws are sand, customs are rock. Laws can be evaded and punishment escaped but and an openly transgressed custom brings sure punishment.'*

1.2 FEATURES OF CUSTOMARY

The question as to when a Custom becomes customary law is no doubt one of the vexed jurisprudential contentions.

A custom must satisfy the following basic features or characteristics before attaining the status of a customary law:

a. **Acceptability**:

Customary law is generally accepted as law amongst the community who practice it. They obey it voluntarily or habitually without compulsion. Where a custom is not widely accepted then it ceases to be law. In **OWONIYIN V. OMOTOSHO (1961) 1 ALL NLR** customary was defined as *"a mirror of accepted usage and be in existence at the relevant time'.*

It is the obligation of people who practice a particular custom to translate it into a binding law.

Flexibility:

Customary law adapts to changing circumstances because of its flexibility. It is dynamic and its rules change from time to time to reflect the changing social and economic conditions. In **Lewis v. Bankole (1909) 1 NLR** it was stated that one of the striking features of customary law is its flexibility as it shows unquestionable adaptability to altered circumstance without

entirely losing its character. The dynamism of customary law is illustrated in customary law rules about land ownership where it is now possible to own land individually, unlike the earlier times where land belong to the family as a group.

b. **Unwritten feature**:

Customary law is unwritten. It is neither coded nor contained in any document like the statute laws. The source of customary law depends on the recollection of elders. The people concerned carry it in their minds and pass it on to their offspring through words of mouth.

c. **Lack of uniformity**:

Customary law has no uniformity because the customs of particular people differs from one community or tribe to another. The diversity of the people of Nigeria also implies the diversity of their customs.

For example, the customary law system of an ethic group in one community may differ from the customary law system of the ethnic group in a neighbouring village even where they speak the same language. Differences in customs of ethnic groups can be traced to various factors such as language, proximity, origin, history, social structure.

d. **Superstitious nature of customs:**

Customary laws evolves from the customs and traditions of the people and tend to be superstitions and barbaric in certain aspects.

e. **Certainty:**

Customary law must be ascertainable. It must be such that the details are well known to the people at all times.

1.3 PROOF OF CUSTOMARY LAW

A proof is evidence or argument establishing a fact or truth of a statement. The Nigerian Evidence Act, 2011, provides that proof of customary law can be by calling evidence. The burden of proving a custom by evidence i.e. calling witness lies upon the person alleging its existence. [Section16 (1)(2)]

i. A custom may be judicially noticed if the courts have acted upon such customs several times in which case, it needs not be proved before such courts. [section17]

ii. Chiefs or traditional rulers and elders of a community may be called to testify as to the existence of such customs. One or two witnesses may suffice to prove a custom. However evidence of one witness which is cogent and credible is sufficient to prove the existence of the custom in question before the court. [section 70]

iii. Literally works, books or manuscripts, if any, written by renowned authors, who are known to be well vast in the customs of the particular community could be referred to, tendered and admitted in evidence. [section 72]

iv. A customary court sitting in a locality where its members are also from the same locality will not require any body to prove the existence of the custom. The chairman/ president and court members are presumed to know the custom.

v. A custom cannot be established by a few instance or any instances of recent dates as custom must be ancient and the proof must be conclusive.

1.4 REPUGNANCY DOCTRINE

The word 'repugnant' derives from the Latin, '*repugnaire*' meaning-contrary, in opposition, resistant. Blacks' Law Dictionary, (7th Ed), define 'repugnancy' as *'inconsistency, irreconcilable or contradictory to, highly distasteful or offensive, contrary to as in nature*.

The term *'repugnancy clause'* has not been defined in any Nigerian statute, and also the courts have not put in plain words, its meaning. The doctrine of repugnancy owes its origin to the medieval period and evolution of English Equity. It was introduced into Nigeria by the end of the 19th century by Ordinance 3 of 1863 which received English Law into our legal system. The doctrine is found in both the early and modem statutes dealing with the administration of justice in Nigeria. Section 19 of the Supreme Court Ordinance 1914 is one of the earliest provisions on the repugnancy doctrine and states as follows:

'Nothing in this Proclamation shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the Protectorate, such law or custom not being repugnant to natural justice, equity and good conscience'

However, Subsequent local legislations over the years have since continued to retain this legislation. In essence, every High Court in each of the 36 jurisdictions in the country and the FCT are

enjoined to observe and enforce the customary law of the people in its area of jurisdiction provided they scale through the repugnancy test.

Similarly, part V of the Customary laws 1984 (Imo State) provides as follows:

Section 16 (1) (a) *"subject to S. 247 and 249 of the Constitution and provisions of this law a Customary court or a Customary Court of Appeal shall administer.*

(a) the customary law prevailing in the area of jurisdiction…. In so far as it is not repugnant to natural justice, equity and good conscience.'

The provisions of section 16 of the Evidence Act, Laws of the Federation of Nigeria 2011 states clearly that:

"*Provided that in case of any custom relied upon in any judicial proceeding, it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience."*

Repugnancy is the process of determining the abolition or rejection of perceived unwholesome or inhuman customs on the ground that the custom is not in conformity with civilization.

With the colonization of Nigeria in 1900, the British overlords, did not totally abolish the customs and practices of the people, but introduced into the country some standards or doctrine upon which all customs and traditions of the natives will be assessed before they are applied as law. The colonial masters were prepared to tolerate customary law, but would not enforce rules that might offend European standards of morality and justice.

Based on this foreign standard, substantial rules of customary laws were found to be offensive, inconsistent with the English sense of justice and therefore declared invalid. Thus any rule of native law and custom which comes in conflict with the common law or statutes law must give way. In **ESHUGBAYI ELEKO v. OFFICER ADMINISTRATING GOVT OF NIGERIA (1931) AC 662**; Lord Atkins explains that a barbarous custom must be rejected on the ground of being repugnant to natural justice, equity and good conscience.

Like the repugnancy clause, the phrase 'natural justice', 'equity and good conscience', equally defies accurate definitions too.

However, the phrase 'natural justice', 'equity and good conscience' will refer to what is fair, what is just, what is equitable, in short, what Equity is in the old Chancery courts.

In consequence, not all customs shall be recognized as customary law unless they scale through the validity tests. The test subjects the recognition and enforcement of customary laws to a duality tests – the repugnancy and incompatibility tests. Thus through incompatibility test, customary norms would be rendered unenforceable should it conflict with State laws.

In the course of these tests, the court has established control over customary processes that is, where the courts will declare whether or not a custom is inconsistent or contradictory to natural justice or simply barbaric depending on the views of the presiding judge. The courts will observe and enforce any customary law under the following three conditions:

(i) The customary law must not be repugnant to natural justice equity and good conscience.

(ii) That such customary law must not be incompatible either directly or by implication with any law for the time being in force or

(iii) . Contrary to public policy.

The role of the courts have been restricted to either accepting a custom or rejecting its enforceability, as no customary law must be repugnant to natural justice if it is to be enforced. The consequence here is that, the onus of determining what becomes customary law shifts from the people who are governed by the customs to the Courts.

1.5 PRONOUNCEMENTS BY COURTS ON REPUGNANCY CLAUSE

Repugnancy doctrine constitutes the mechanism by which Nigerian courts abrogate any rule of customary law that conflicts with natural sense of justice. The doctrine had made some indelible marks on both the substantive and procedural areas of Nigerian law. Under the substantive law, issues of paternity clearly stood out. In **EDET v. ESSIEN (1935)12 NLR 4**, the appellant paid the dowry in respect of a woman when she was a child. Later the respondent paid dowry in respect of the same woman and took her as wife. The appellant not the biological father, claimed custody of the children on the ground that under customary law, he was the husband of the woman until the dowry paid, was refunded. The court held that any customary law which has the effect of giving the paternity of a child to a person other than his natural father is barbaric and repugnant. Similarly in **MARIYAMA**

v. SADIKU EJO (1961)NRNLR 81, The court rejected the rules of Ebira customary law that any child born within ten months of a divorce belongs to the former husband who may not necessarily be the biological father. Rejecting the rules, the court held that the native law and custom was repugnant. (See also **MERIBA v. EGWU [1976] 1 ALLNLR 266**, the traditional practice in Igbo land that allowed marriage between two women to cater for well-to-do female members of the society who were unable to conceive was declared repugnant by the Supreme Court.

1.6 IMPACT OF REPUGNANCY CLAUSE ON PROCEDURAL LAW

Repugnancy doctrine played an important role in watering down some of the harsh rules of procedure under customary law. In adjudication, courts are required to abide by the two fundamental principles of natural justice, namely, *nemo judex in causa sua* (no one shall be a judge in his own cause); and *audi alteram partem* (no one shall be condemned unheard). It was not strange then that under customary law system to have the accuser participating in the trial of the person accused, as native courts were constituted by traditional chiefs and elders of the community. Furthermore, modern concepts of presumption of innocence, burden of proof and proof beyond reasonable doubt are not grounded in customary law administration of justice. Thus most trials before native courts were ultimately found violating most of these modern requirements of a fair trial. In **MODIBO v. ADAMAWA N.A. (1956) NRNLN 101**, the court allowed the appellant who was sentenced to terms of imprisonment by a court presided over by the Lamido of Adamawa (a traditional chief), for

an offence of writing an abusive letter and personal attack on the Lamido, on the principles that no man can be a judge in his own case. Similarly in **JALO GURI v. HADEJIA N.A. (1959)4FSC 44 @46,** a procedural rule, well rooted under customary law, which prevented an accused person in a case of highway robbery, the right to cross examine witnesses or defend himself was struck down and declared repugnant to natural justice, equity and good conscience.

Other area of affirmative impact of repugnancy doctrine is on the abolition of jungle justice or trial by ordeal. Whenever there is doubt during trial, customary law allows the use of trial by ordeal to resolve issues or ascertain the truth. The use of ordeal had its genesis in the belief in the supernatural form to secure confession. Under the system, parties are subjected to some form of ordeal and whoever survives was regarded as innocent. An example is where the parties are made to swear by sacred objects. In a more serious cases, appeals may be made to the gods to cause calamity onto the guilty party. However, these customary rules or practices have been eradicated by repugnancy doctrine. The repugnancy doctrine also function in the field of punishment where inhumane punishment or brutal use of force is proscribed. The prohibition against subjecting a person to any punishment of inhumane nature has received Constitutional approval under section 34(1)(a) of the 1999 Constitution of Nigeria.

Sections 36 and 42 of the 1999 Constitution and several international covenants and protocols like the Covenant on the Eradication of Discrimination Against Women are legislations which

customary law must conform before it can be enforced. No doubt, this is what prompted the decision of the court in **MOJEKWU V. MOJEKWU (1997) 7NWLR (Pt 512) 233** where a customary law discriminatory against female children was held to be incompatible with Section 42 of the 1999 Constitution and not enforceable. In that case, the Court of Appeal held that Oli-ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience. By the Oli-ekpe custom, female children were excluded from inheriting the property of their father, such that if a man dies leaving only a female child, he will be inherited by his brother, if he leaves a male child who inherited him, but later dies, he will also be inherited by his brother. If the brother who inherited dies leaving sons, his sons will inherit the property and not the daughters of the deceased. Similarly, the patriarchal or primogeniture customary system which give credence to male inheritance is equally unconstitutional or repugnant.

One of the celebrated Nigerian cases that must be cited when discussing customs which are repugnant to written law, regarding discrimination of women from partaking in the sharing of their fathers estate is the case of Ukeje, one of the recent Supreme Court cases on the inheritance rights of women. The facts of **UKEJE V UKEJE (2014) 11 NWLR (PT.1418) 384** are as follows: Lazarus Ogbonnaga Ukeje, an indigene of Imo State, died intestate with real property in Lagos State. The appellants are his wife Mrs Ukeje and her son, both of whom obtained Letters of Administration over the deceased Estate. The letter of administration excluded his daughter (Plaintiff/Respondent) from

partaking in the sharing of her father's estate. Conversely, the respondent filed an action in the Lagos State High Court where she claimed to be a daughter of the deceased and by virtue of that fact, had a right to partake in the sharing of her late father's estate. The trial Judge nullified the letter of administration and ordered that a new letters of administration be created with the daughter. The defendants/appellants lodged an appeal which the Court of Appeal Lagos (Division) dismissed for lacking merit. Again, not satisfied with the decision, they appealed to the Supreme Court.

At the end of the matter, the Supreme Court unanimously dismissed the appeal on the grounds that no matter the circumstances of the birth of a female child, she is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from participating in her deceased father's estate is in breach of section 42(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999, a fundamental right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with **section 42(1) and (2) of the Constitution of Nigeria.**

1.7 ISSUES AND CHALLENGES

Repugnancy doctrine has indisputably contributed to the development of Nigeria customary law. It has refined and modified obnoxious rules of Customary law in terms of modern day realities.

All the same, Customary law scholars have warned that this approach may be dangerous in the sense that it could change customary law rules to what they never were. This is so because,

the doctrine has not received favour of the natives and has been criticized for supplanting indigenous law in its land. The repugnancy doctrine is seen by some natives as an unwanted reversal of a people's culture. There is need to stress here that, notwithstanding a declaration of custom by court to be repugnant, the people involved may still continue to observe such customs unabated because it is the assent of the community whose conduct it is supposed to regulate that gives a custom its validity.

A Customary law is validated by the assent of the people and not by courts, and 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 may be correct to say 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.

Evidently, some question have often arisen as to the standard which the courts employ to determine the rules of repugnancy. How does the court reach the conclusion that a customary rule is repugnant? What are the principles used by a judge in reaching that conclusion? All these are issues that are still not conclusive. It is believed however that, repugnancy tests is measured against universal morality, canon of decency and humanity considered appropriate to the situation at hand and noting that the discretion of the courts to identify repugnant customary rules is not fettered.

Most experience have shown that judges often resort to repugnancy in the sense of disgust, distaste, repellence or dishonour when they have to adjudicate on distasteful details of

criminal cases in which custom have been pleaded. In as much as it is not being advocated for the return of the obnoxious and barbarous customary rules into the Nigerian legal systems, it is argued that the retention of the colonial clause of repugnancy doctrine in our Statute books has outlived its purpose. It sends a wrong signal that the country still retains obnoxious customary laws.

1.8 CONCLUSION

The operation of the repugnancy doctrine in determining the application of Customary law should be seen as an instrument used by the British to bring our Customary law within the acceptable objective standard of moral law recognized by all nations. Judges must continue to adapt which practices pleaded as Customary law, pass or fail the repugnancy tests and this is not simply a test of legal compatibility. It is among other things, a test of what kind of practices educated Nigerian can tolerate in our modern day Nigeria. It is rather an exercise in imposing limits on the behavior of the grassroots or rural people. It is believed that judges will draw a distinction between worthy and unworthy custom or which custom is repugnant to general principles of humanity.

Apparently, we can say that the doctrine has brought positive effects on the development of our Customary laws by the elimination of gross injustice inherent in its strict application. A good Customary law must conform to the universal concept of

what is good, just and fair which must be consistent with the Constitution, our supreme norm.

THANK YOU

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