

**THE NIGERIAN LEGAL SYSTEM JUSTICE AND
THE REPUGNANCY DOCTRINE**

BY

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May I seize this opportunity to thank the Benin Bar for choosing me as a resource person on this august assembly of learned men and accomplished judges from all levels of our Judiciary. When Collins Ogiegbaen Esq., and his colleagues invited me to do this paper on this occasion, my initial reaction was to turn it down on the grounds that the topic is huge and inexhaustible but on a deeper reflection, I decided to accept the invitation as my humble contribution to a topic that is not only relevant and timely but more importantly to stimulate further research on the subject.

INTRODUCTION

The main constituents of this topic are the words, the Nigerian Legal system, Justice and the Doctrine of Repugnancy. It must be stressed that in the context of our subject matter, the

Constitution of the Federal Republic of Nigeria,1999, as amended, will be our reference point. The reason being that it is the apex law from which all doctrines draw their life blood. The aforementioned Constitution has no definition of the word repugnancy. We can only infer its meaning from its history.

A SHORT HISTORY

Foreign influence in any community creates contrasting legislations which in itself was the bane of many sub-saharan colonies at the beginning of the 20th century.

The Supreme Court for the colony of Lagos was established by the Supreme Court Ordinance No.4,1876. Section 14 of the ordinance provides that the common law, the doctrines of equity and the statutes of general application in force in England on the 24th of July, 1874, should be in force in the colony.¹ Apart from the Supreme Court, there were the Prize Courts which dealt with purely merchantile matters flowing from the activities of the foreign traders and the native Africans.² In the Eastern part of Nigeria which was also known as the Oil Rivers Protectorate, the

foreign traders established courts of Equity which were not administering equity in the sense that we know it but was purely concerned with regulating trading affairs between the Europeans and the natives.³ It was later replaced by the Consular Courts manned by British officers who introduced some broad principles of English law.

The Royal Niger Company, a Chartered Company from Britain, was in charge of the Northern part of Nigeria with headquarters in Zungeru. The company established and set up a Supreme Court with a Chief Justice assisted by other Judges who exercised civil and criminal jurisdiction in all parts of Northern Nigeria.⁴ In all these regions, the local traditional courts were allowed to function and the British officers were required to respect the laws and customs of the indigenous people in so far as they were not “repugnant to humanity”.⁵ Lord James Marshall, Director of the Royal Niger Company, later Chief Justice of Nigeria observed in 1887: “

“My own experience of the West coast of Africa

is that Government has succeeded best with natives when they were treated with consideration instead of ordering the Negroes around and regarding their ways as nonsense. It is better to guide, modify and amend their customs than to destroy it by ordinance or force".⁶

This statement glaringly laid the foundation for the policy on indigenous judicial institutions and laws which in later years found its way into various statutes. On the 1st of May, 1900, three proclamations, namely: the Supreme Court Proclamation, the Criminal Procedure Proclamation and the Commissioners Proclamation introduced English Law and English legal system into Nigeria.⁷ Consequently, the Supreme Courts of the Protectorate of Northern and Southern Nigerian became superior courts of record which possessed and exercised, so far as circumstances admit, in all jurisdiction, powers and authorities which were vested in or capable of being exercised by Her Majesty's High Court of justice in England. These courts were established to administer the Common Law, the doctrines of Equity and the statute of

general application which were in force in England on the 1st of January, 1900. Thus, by the beginning of 1900, the legal and judicial machinery, according to the British notion and ideas of justice, had been established all over Nigeria.

However, the aforementioned developments created a new problem. Ethnic communities had their own distinct customary law particularly in the Northern part of the country where the Islamic law had been accepted as a way of life. Therefore, it was more out of necessity than in its wisdom that section 13 of the Supreme Court Proclamation, 1900, went on to state thus:

“Nothing in this Proclamation shall deprive the Supreme Court 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 unless such law or custom are repugnant to natural justice, equity and good conscience”⁸

This is modified by the clause that all superior courts shall entertain civil causes affecting the natives, recognize native laws

and customs when they are not repugnant to natural justice or humanity or incompatible with any ordinance especially in matters relating to marriage, contract, land and inheritance. The instructions went further to say that the fundamental law in the moslem court of Nigeria was the Maliki Code of Mohammedain Law and in the native pagan courts, the local native laws and customs.

The compelling and natural question that must flow from this is what does repugnancy mean?. The courts have been grappling with this question for a long time. The efforts to explain clearly the meaning of repugnancy clause would be supported by a search for its origins or roots and the philosophical bases for the repugnancy test.

The repugnancy clause has been traced to identical provisions in India⁹ which might have served as precedent for the Nigerian provision. The philosophical basis of the test has been found in the legal theory which believed to have guided British Colonial policy. The policy was that only those laws of the savages

that were not against the law of God or at variance with the established religions that will be allowed to exist.

But the Nigerian courts, in applying the repugnancy test do not appear to have embarked on any such historical excursion. Their decisions have been direct and simple. The tone of their judicial attitude was set in the clear pronouncement of Speed, Ag. CJ, who since 1908 confessed to the difficulty he had in offering a strict and accurate definition of this term.¹⁰

The decisions from our court all seem to suggest that the clause is not to be separated into its components so as to interpret each of the terms natural justice, equity and good conscience disjunctively¹¹. It has also been suggested that the standard intended to be applied to the repugnancy of a rule of an indigenous law cannot be the standard of the particular community to which the rule belongs, but has to be a standard external to it if the test is to have a any meaning at all.

There are arguments that local standards are not totally irrelevant and that court must interpret the test by reference to local

sentiments of what is right or wrong. This view cannot be sustained. Furthermore, the standard of conformity with the English law or principles exclusively known to European societies have been rejected as the test of repugnancy in Nigeria.

Can one then decide from the decisions of the courts any criterion of determining repugnancy? Most writers are against this¹². Opinions are divided and divergent but the courts, from their decisions, have arrived at a consensus on what amounts to repugnancy. They are as follows:

1. All indigenous laws which justify inhuman or degrading treatment such as customs supporting human sacrifices, infanticide and slavery.
2. Customary rules which could be relied upon to justify unreasonable or absurd claims or a claim which the enforcement will result in gross inconvenience.
3. A customary rule of procedure which is incompatible with the principle of *audi-alterem partem* or *nemo iudex in causa sua*.

4. Any rule or indigenous law which robs a man of his inalienable Right¹³

Repugnancy Doctrine and the Nigeria Legal System:

The most salutary influence of the application of the doctrine of repugnancy has been in the area of procedural law, the law of succession and marriage. Katsina Alu (JCA) as in then was has this to say:

“ Although the repugnancy doctrine was a British fashion which was introduced into Nigerian statute books the doctrine has to be interpreted in the context of our jurisprudence which includes the totality of our customary laws. In the application of the doctrine, a court of law should look at the total package of the customary law involved and not a watered down version of it or tutored version of it. In the application of the doctrine, a court of law is not allowed to pick

and choose certain aspects of the customary law and leave other aspect”.¹⁴ See Onwuchekwa v Onwuchekwa (1991) 5 NWLR pt 194 page 743 ratio 12.

There are however numerous cases in which the repugnancy test has been applied to invalidate rules of customary law. On account of this, the application of the repugnancy test has become the object of scathing attacks. The celebrated Taslim Elias, retired CJN, found some of the decisions on repugnancy as confusing.¹⁵ On the other hand, Prof. Nwabueze (S.A.N.) praised the repugnancy test as “a potent factor in the reformation of the customary law”.¹⁶ Abiola Ojo believes that in some instances, the test has been employed by the courts as a doctrine of progressive change in the body of customary law.¹⁷

It is not in doubt from cases in courts,¹⁸ that the repugnancy clause has played a positive role in the development of our legal system. However, a close inspection of the conclusions reached by the above scholars revealed clearly another side of the argument.

There is the argument that its full retention should be closely monitored. It is for the following reasons:

1. Whatever conditions it has made in the past, the repugnancy test is bound to evoke controversy so long as it retains its current wording.

There is the temptation to look at the doctrine as a relic of the colonial denigration of our customs.

2. It is difficult to say that the repugnancy test was not meant to impose English law standards on Customary Law. The question that could be asked is why is there no repugnancy test attached to the application

of the English law leading inevitably to the presumption that the principles of justice by which customary law is to be judged are an integral part of the English law?.

3. There is the need to re-examine the repugnancy clause and to assess whether the constitution and other laws have not taken care of the practices which the clause seeks to abolish.¹⁹

The above conclusions are a clear manifestation of the controversy that this subject has generated. Before we take a stand let us examine its scope.

THE SCOPE OF THE REPUGNANCY DOCTRINE:

It is generally accepted that for customary law to pass the repugnancy test it must not be incompatible with any written law.

Three questions can be distilled from this test. They are:

1. Whether the custom is incompatible with local Nigerian enactments alone.
2. Any legislation whether local or imported.
3. Any law in force in Nigerian which includes the common law and equity.

In Adesubokun v Yinusa,²⁰ the Supreme Court answered some of these questions. The issue before the court was whether the High Court could grant an order setting aside the probate of the will of one Suaibu, a deceased Muslim, on the ground that the applicant, the heir in Islam, had been deprived by the will of some of his inheritance under Islamic law. The High Court had earlier held that the deceased being subject to Islamic law, the validity of

his will was to be judged by reference to Islamic law. The will was therefore valid only in so far as it did not violate the rules of inheritance in Islamic law. On appeal, the Supreme Court quashed the decision of the High Court and held that in a case of incompatibility the Wills Act, of 1837 prevailed over rules of Islamic Law.

This approach, in my view will lead to chaos. In view of the different phrases used by different statutes, it could be argued that if each phrase were given its literal meaning, different standards would be used in the same jurisdiction, resulting in chaos and unmistakable absurdity. In the Northern States for instance, the High Court Law reads: “any written law”²¹ Since cases do go on appeal from the Area Courts to High Court, could the legislature have intended that the standard of validity would differ according to whether a case is in the trial court or on appeal?.

A further problem flowing from the Supreme Court’s interpretation is the consequences the above development would have on our customary laws. To subject Islamic and customary

laws to statutes of general application would amount to obliteration of our indigenous laws. Customary laws, according to Obilade,²² is so inconsistent with the English law that prescribing an incompatibility test by reference to English law would result in the total destruction of our customary law. I do not think that such a destructive and radical results were intended by the legislature. I must however add, with all emphasis, that the fact that the courts at all levels, including the Supreme Court, have continued to administer the customary law without reference to their compatibility with English law is a clear testimony that the decision in Adesubokun v Yinusa has been treated as an anomaly. In my view and with all sense of humility, the issue of choice of law should not be confused with incompatibility.

The clear issue is Yinusa's case was whether or not to give effect to the deceased testator's will given the fact that the testator died a muslim but drew his will in the English form. This is a case of choice of law for which the answer is in the relevant rules governing internal conflict of Laws or choice of laws rules. It would be only after

determining whether Islamic law applies to the case that the court could proceed to ascertain whether the law is at variance with the relevant statutes.

Let me also add that notwithstanding the variety of phrases which appear in the incompatibility clauses, the only standard of compatibility to gauge the validity of Islamic and customary law is that of its incompatibility with local statutes. What can be gleaned is that once the courts have decided that customary law governs an issue, they proceed to administer these laws notwithstanding that received English law provides differently on the matter subject to the provisions of any local statute.

From 1999 and specifically from the provisions of the 1999 Constitution, it is glaring that the Customary Courts of Appeal and the Sharia Courts of Appeal are now fully entrenched and the application of these indigenous law is subject to the Constitution and other relevant enactments that are not at variance with the Constitution.

TRANSACTIONS UNKNOWN TO CUSTOMARY LAW.

There is also the term: “transactions unknown to customary law.” It was generally accepted that the English law should replace customary law in its application to cases between natives that are unknown to customary law. In Salau v Aderibigbe

Charles J rejected the charge of redundancy and held that this rule has its own special purpose. His Lordship said thus:

“To prevent the extension of existing rules of customary law in respect of familiar transaction which are essentially different either because of their inherent novelty or of the novelty of the subject matter”.²³

The object of this legislature, according to Charles J, was driven by the fact that customary law covered only things closely connected with the customary way of life such as land and simple chartels of domestic or agricultural use, the use of which is known in the area in which the customary law operated. The legislature therefore intended to restrict customary law to transactions involving such customary objects and new chartels of a similar kind and not to allow it extend to those involving new chartels of a different kind such as motor vehicles.

The conclusion reached by the trial judge, with humility, was patently faulty as it failed to consider the flexibility of customary law and its capacity to develop with the society.

JURISPRUDENTIAL MUSINGS .

Whatever developments made in the past, the repugnancy test is bound to evoke controversy and it may be seen as a relic of the colonial denigration of our customs and tradition. It is difficult to argue convincingly that the repugnancy test was not intended to impose English law into our customary law. It cannot be explained why no repugnancy test was attached to the application of the English law leading inevitably to the presumption that customary law was regarded as an integral part of the English law.

It must however be noted that the doctrine of repugnancy was not successful in effecting changes in areas of the law of succession and distribution of estate amongst some communities in Nigeria.

In Dawodu v Danmole²⁴ the popular idea of Ori-oju-ori i.e equality among the children was rejected as the customary rule of succession among the Yorubas and the principle of “idi-igi” per stirpes was upheld as the authentic customary law of distribution of estate among the children in cases of intestacy. Also in Ogiamien

v Ogiamien,²⁵ the doctrine of repugnancy was subordinated to custom. The custom of primogeniture of the Benin custom was upheld. I could go on.

On the other hand, the Supreme Court has applied the repugnancy doctrine in which many customary rules have either been judicially abolished altogether or have had their operations modified. In Chawere v Aihenu and Johnson,²⁶ the apex Court rejected the customary rule that an adulteress ipsofacto of the adultery becomes the wife of an adulterer. In Ekpenyon Edet v Young Uyo Essien,²⁷ the Court affirmed the decision of the Provisional Court at Calabar rejecting the customary rule that if a man's wife leaves him without the dowry on the wife being repaid, he (the husband) has a claim to all the children she may have by subsequent union with any other man. In Nimota Sule & Ors v M.A. Ajisegin ²⁸ the Court rejected the notion that a male descendant was entitled to a larger share than a female descendant in the distribution of the estate of their ancestors. In Abasi Ukot Akpa v Elijah ²⁹ the court rejected the notion that the former

master of a free slave was entitled to the property of the slave.

These cases clearly place the power of using the doctrine responsibly in the hands of the present and future Nigerian judges.

CONCLUSION

This paper is not an exhaustive thesis on all the issues that determine the nature and scope of application of English law, Customary Law and Islamic law in Nigeria. But it has attempted to highlight some important issues and in the process provoke further research on the subject.

It is suggested that some serious thought be given to matters in which the Customary and Islamic laws are administered and their relationship with the English Law. It is high time these existing rules are reviewed in the light of our national aspiration for development. As stakeholders, we should define for ourselves, on our own terms, what role we wish these streams of law should play in the development of our legal system. It is strongly suggested that Nigerian should take advantage of the multiplicity of legal institutions and practices

(English, Islamic and Customary) and fashion out a legal order and search for solutions to our myriad of problems.

What is obvious is that much progress cannot be made in this direction until study and research into both Customary and Islamic laws are intensified and the two systems of law are subjected to constant evaluation.

I must conclude this paper by saying emphatically, vigorously and with humility that the Fundamental Rights provision of the 1999 Constitution of the Federal Republic of Nigeria especially the provisions guaranteeing fair trial, the dignity of the human person and freedom from discrimination e.t.c have taken care of the concerns for which the repugnancy clause was meant to cater for. Therefore, I make bold to say that, the subject itself has been adequately dealt with by our apex law. My final submission is that the concept itself is now stale and outmoded.

Ladies and gentlemen, I thank you all for your time and patience.

Hon. Justice Ohimai Ovbiagele.

NOTES

1. Quotation from pages 31-33 of African Indigenous Laws Printed

- by the Government Printer, Lagos, 1995.
2. Ibid at pages 39-42
 3. 2003, Judicial Lectures: Continuing Education for the Judiciary at pages 163-164.
 4. Judiciary Systems in Southern Nigeria by Omoniyi Adewoye 1854-1974 longman page 8.
 5. Ibid page 11.
 - 6 J.N.D. Anderson (Editor) Changing law in Developing Countries page 151.
 7. Ibid page 16.
 8. “ Law and Social Change in Nigeria” Edited by Dr. T.O. Elias, at page 266.
 9. At page 270
 10. At page 301
 11. Dawodu v Danmole, 1962, 1ANLR, page 702.
 12. Development and conflict of laws by Dr. A.C. Enikomeyi Braithwaite Publishers 1st Edition at page 66.
 13. At page 69-74.
 14. Onwuchekwa v Onwuchekwa (1991) 5NWLR, pt. 194 at 743 Ratio 12.

15. Elias, T.O. *Judicial Development of the Customary* Elias, 1975
16. Abiola Ojo “Judicial Approach to Customary law” at page 51
17. *Ibid* at page 75
18. Otaru v Otaru (1986) 3NWLR (pt 26) page 750
19. Allot A.N. *New Essays in African Laws*, London Butterworths, 1980, page 177.
20. (1971) N.N.L.R. page 77
21. Obilode, *NIGERIAN LEGAL SYSTEM*, 3rd Edition at page 51.
22. 1935 11NLR page 47
23. 1932 12 NLR page 4
24. 1967 N.M.L.R. page 245
25. 1962 1 ANLR Page 702
26. 1950 12 NLR page 518
27. 1950 12 NLR page 112.
28. 1966 E.N.L.R. page 235 at 237.