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Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-assessing Content and Relevance

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The Nigerian communities as presently constituted were norm-based. These norms regulated interactions for as long as the communities existed. Respect for these norms guaranteed peace and transformed into a heritage for these peoples. Upon colonization, the template changed and Received English law was imposed. Most of the rules that failed to meet the fancy of the colonial rulers were classified as 'repugnant'. This paper appraises the concept of the repugnancy test and seeks to locate its true content and relevance in contemporary Nigeria society.

Keywords: Repugnancy Test, Received English Criminal Law, Customary Criminal Law, Nigeria.

INTRODUCTION

Before the advent of Colonial Rule in Nigeria, our traditional communities had Customary Criminal Policies with which they regulated anti-social behaviors of members using the tool of punishment which was either prohibitive, retributive but essentially restorative. Sentencing and punishment at Customary Criminal Law as well as the English Criminal Law system were largely pre-determined but unlike the English system which allowed for a considerable measure of discretion and flexibility, the Customary Criminal Law seemed to be fixed and relatively immutable.

The British Colonial Administration began to scrutinize the Customary Criminal Laws, policies and punishments and frowned at some of the immutable high-handed punishments handed down to offenders such as beheading, stoning, drowning, burying alive and trial by ordeal which were considered as obnoxious and inhuman and were consequently abolished. The process for determining the abolition or rejection of perceived unwholesome or inhuman Customary Law on the ground that it is obnoxious is what is now very popularly known as the Repugnancy Test.

Hence, the purpose of this discussion is to consider the Repugnancy doctrine, its brief background, rationale, benefits and its applicability or place in our Customary Criminal Law Jurisprudence. In order to be able to locate the place of Repugnancy Test in our Customary Criminal Law Jurisprudence, it is important to understand the term.

MEANING OF THE TERM REPUGNANCY TEST

This term is generally used in describing the statutory limitation on the application of Customary Law and several writers used different words and phrases in describing the statutory formula laying down the conditions for the judicial recognition of Customary Law.

For example scholars like T.O. Elias[1], Dr. F.A. Ayayi S.A.N.[2], Professors M.I. Jegede[3] and J.O. Fagbunmi[4] refer to the statutory provision as Repugnancy Doctrine. Professor Allot[5], Dr. Mudiaga Odje SAN[6] and Dr. Adewoye[7] referred to it as Repugnancy Principle or Rule. Professor Nwabueze[8] and Dr., Ekow Daniels[9] adopted the term Repugnancy Clause while Park[10], Keay and Richardson[11] referred to it as Repugnancy Test.

[1]Elias, T.O. British Colonial Laws-a Comparative Study of the interaction between English and Local Law in British Dependencies (1962) pp. 103-104.
[2]Ayaji F.A. "The Interaction of English Law with Customary Law in Western Nigeria". (1960) Vol. 4 J.A.L. 40 at pp. 103-105.
[3]Jegede, M.I. Principles of Equity (1981) pp. 4-6.
[4]Fabunmi, J.O. Equity and Trusts in Nigeria (1986) pp. 41-48.
[5] Allot, A.N. "The Future of Law in Africa", Proceedings of London Conference held 28/12/59-8/1/60, p. 30; New Essays in African Law (1970) p. 173; Essays in African Law (1960) pp. 197-200.
[6] Odjie M. "Some Aspects of Judicial Development of Land in Nigeria" Proceedings and papers of the fifth Commonwealth conference at Edinburgh, Scot Land, 24-29 July 1977, pp. 93-96.
[7] Adewoye O. The Judicial System in Southern Nigeria, 1854-1954 p. 203.
[8] Nwabueze, B.O. The Machinery of Justice in Nigeria, (1963) pp. 6-8.
[9] Akow Daniels W.C. The Common Law in West Africa, 266.
[10] Park A.E.W. The Sources of Nigerian Law, (1963) p. 74.
[11] Keay E.A. and Richardson S.S. Native and Customary Courts of Nigeria, (1966) pp. 237-247.

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For our present purpose, it will suffice to say that the meaning conveyed by the various notions of Repugnancy as stated above are not in controversy. We are of the view that notwithstanding the variety of terms adopted by the writers on the subject in their examination of the statutory provisions, they are unanimous in terms of concept. This is however not our focus in this paper as to enter into the semantic discourse of the several terms concerned, except to say that enthusiasts in semantics desirous of ascertaining the distinction between the terms and phrases may need to consider in details the decision of the Supreme Court in the cases of *Western Steel Works Ltd. v. Iron & Steel Works Union*[12]*; Ojegele v. State*[13]*; Chief Fawehinmi v. Nigerian Bar Association,* No. 2[14].

Suffice it to say that the point here is that there exist specific statutory words laying down the 'Test' to which our Customary Laws generally must be subjected to before it is recognized, observed and enforced by the courts of our land. It matters not whether these statutory provisions are described as "Doctrine", "Principle", "Rule", "Clause", "Phrase" or "Test", the different descriptions mentioned above are merely verbal and simply interchangeable expressions and do not affect the issue of the hurdles statutorily placed on the way of our Customary Law before it can be recognized by the courts, hence, in our discussion of this issue, we take the liberty of using the terms interchangeably.

According to L.B. Curzon,[15] repugnancy means an inconsistency of two or more provisions in a deed or other documents. The inconsistent provisions may be struck out by the court when no other method is possible to make effective the principal intention of the parties to the document. This definition of Repugnancy is not much different from that in the Black's Law Dictionary.[16]

Akintunde Olusegun Obilade in his book[17] says that there is no definite definition for the clause, Repugnancy Test rather than what the courts of the say it is. He referred to the case in *Laoye v. Oyetunde*[18], where Lord Wright said that the Repugnancy Test is used to invalidate barbarous customs and Lord Atkin in the case of *Eshugbayi Eleko v.*

Officer Administrating the Government of Nigeria[19]*,* said that barbarous custom must be rejected on the ground of Repugnancy to Natural Justice, Equity and Good Conscience.

To him it is the court that can define Repugnancy and also determine what it constitutes and of course which Custom or Customary Law passes the Test. In *Okonkwo, v. Okagbue,* Uwais JSC said that *"…the Repugnancy Doctrine is equivalent to the meaning of natural justice and embraces almost all, if not all, the concept of good conscience".*[20] The result of all these is that the term has no precise definition but we all know how it is used even though we query the criteria.

BRIEF HISTORICAL BACKGROUND OF THE REPUGNANCY DOCTRINE

The origin of the statutory provisions containing the phrase or clause now called the Repugnancy Test applicable in the then colony of Lagos was the Supreme Court Ordinance No. 4 of 1876. Section 19 of the said Supreme Court Ordinance of 1876 provides that:

> *Nothing in this ordinance 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 said colony and territories subject to its jurisdiction, such Law or Custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature.*

This provision in the aforesaid Supreme Court Ordinance marked the beginning of subjection of our Customary Law to the Repugnancy Test. Subsequent enactments adopted the Repugnancy Doctrine and some of such enactments include;

The Supreme Court Proclamation No. 6 of 1900.[21]
The Supreme Court Ordinance No. 6 of 1914.[22]
The Supreme Court Ordinance No. 23 of 1943 (cap 211) Laws of Nigeria 1948.[23]
The Native Courts Proclamation No. 9 of 1900.[24]
The Native Courts Ordinance (cap 142) Laws of Nigeria.[25]

It is significant to mention here that the wordings and phraseology of the Supreme Court Ordinance and the Native Courts Ordinance on the repugnancy clause provide respectively as follows; *"…not repugnant to natural justice, equity and good conscience," "…not opposed to natural morality and humanity"* either mean the same thing or constitute a distinction without a difference as the ultimate goal of each is to subject our Customary Law to a qualifying test.

THE RATIONALE OR JUSTIFICATION FOR THE REPUGNANCY TEST

Despite the widespread criticism against the introduction and use of the Repugnancy doctrine in our Legal System, it must be stated that the doctrine has had appreciable effect and impact on the development of our Customary Law by the elimination of some unjust in human and barbarous practices inherent in it and in some cases throwing away some otherwise useful Customary Laws.

There appears to be no manifest legislative or statutory explanation for subjecting our Customary Laws to the Repugnancy Test. This is so because neither the legislators nor the various statutes have any explanation as to why the Customary Law must be subjected to this test before it could be recognized or enforced by the courts. However, there appears to be a judicial justification or rationale which could be found in early judicial pronouncements, few of which we may consider briefly below.

In *Laoye & Ors v. Oyetunde,*[26] Lord Wright of the Judiciary Committee of the Privy Council declared thus;

> *The policy of the British Government in this, and in other respects, is to use for purposes of the administration of the country, the native laws and customs in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The courts which have been established by the British Government have the duty of enforcing these native laws and customs so far as they are not barbarous, s part of the law of the Land.*

[12](1986)3 NWLR (pt. 36) 617, 632.
[13] (1988)1 nwlr (PT. 71) 414, 423.
[14](1989)2 NWLR (pt. 105) 558, 650.
[15]Dictionary of Law, MacDonald & Evans
[16]Black's Law Dictionary, 6th Edition, St. Paul, MINN. West Publishing Co. 1990.
[17] The Nigerian Legal System, Sweet & Maxwell 1979 London.
[18](1994) AC 170.
[19](1931) AC 662 at p. 673.
[20](1994) 12 SCNJ 89.

[21] Elias T.O. Ground Work of Nigeria Law (1953), pp. 75-76 and Obilade A.O. The Nigerian Legal System (1979) pp. 20-21.
[22] Section 13.
[23] Section 20.
[24] Section 17.
[25] Section 16.
[26]Section 10.

We hold the firm view that the word "barbarous" in the above quotation is synonymous with the repugnancy clause and from the said quotation, it would appear that the British Government, conscious of the "barbarous" nature of some of our native laws and customs, did not want to fall into the error of rejecting our Customary Laws *holus-bolus* as they needed to adopt and incorporate some of the Customary Laws considered not to be barbarous into the new legal regime, hence, the use of the Repugnancy Test to sift and reject some of the Repugnant or Barbarous Native Laws and Customs.

Another reason for the British insistence on the scrutiny of our Customary Laws is the fact that they considered themselves incapable of amending or modifying any of the customs on their own, hence the provisions in the statutes empowering the courts to scrutinize using the Repugnancy Test, any customs before recognizing and enforcing them. The words of Lord Atkin *inter alia* in the case of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria & Anr.*[27]

> *In other words, the court cannot itself transform a barbarous custom into a milder one, if it still stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience.*

This pronouncement in our respectful view showed that the colonial authorities did not want to just pick and choose neither were they ready to *suo motu* amend or modify any custom even though they really needed to use "*successful*" Customary Laws in the administration of the country as declared by Lord Wright in ***Laoye's case*** quoted above. It needs also be said that the colonial authorities saw themselves as the keeper of the conscience of native communities by virtue of the repugnancy clause. *Graham Paul J. in Ashogbon v. Odutan*[28] did not pretend on this when he said:

> *Inter alia I regard this court in its equity jurisdiction as in some measure by virtue of the jurisdiction… sections of the Supreme Court Ordinance the keeper of the conscience of native communities in regard to the absolute enforcement of alleged native custom.*

This resulted in the unfortunate fate that befell our Customary Laws since foreigners who were alien to our Customary Inheritance were now the conscience with which our Customary Laws were measured and scrutinized. As expected, most of our native laws and customs could not pass this test and the 'conscience keepers' did not hesitate in declaring them repugnant with harsh and sometimes grotesque languages. In *Lewis v. Bankole,*[29] *Speed, Acting C.J*. superciliously said of our native law and custom.

> *I do not wish to be understood to be speaking with any disrespect of the customs of your ancestors. There was much that was admirable and much which I hope will be retained for many years in the family system which they evolved, but it can hardly be denied that their ideas as to ownership of property were utterly unsuited to modern requirements, that these ideas have been dying a more or less natural death ever since the people of this country entered into commerce with European Nations, and that sooner or later either the legislature of the colony or this court in the exercise of its equitable jurisdiction will have to give the coup de grace to the whole system.*

This apparent disdain for our Customary Laws attracted much criticism from some indigenous scholars as to why our Customary Law will be subjected to the approving conscience of alien authority and consequently devaluing, ridiculing and subjecting our Customary Law to a second fiddle in our own land. These protests and agitations have however, resulted in a progressive change of attitude from the courts as any study in that regard may show although the legislature and the statutes have not changed their stance on the status of our Customary Laws.

CURRENT STATUTES PROVIDING FOR THE REPUGNANCY TEST

At this stage, we may need to consider in brief the statutes currently sustaining the 'marginalization' of our Customary by subjecting it to the Repugnancy Test. Section 18 of the High Court Laws of Rivers State, (Cap 62) 1999 (as amended) encourages the High Court to enforce and ensure the enforcement of any custom which is not repugnant to natural justice, equity and good conscience and not contrary to public policy.

The Customary Courts Law Cap 40, Laws of Rivers State of Nigeria provides thus:

> *Subject to the provisions of this Law, a Customary Court shall administer*
>
> *(a) the appropriate Customary Law in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or indirectly or by necessary implication with any written law in force in Nigeria.*[30]

The Supreme Court Act, Cap S 15 LFN 2004, provides that *the Supreme Court shall observe and enforce the observance of Customary Law to the same extent as such law is observed and enforced in the Nigerian Courts.*[31] Although this is not an express subjection of Customary Law to the Repugnancy Test, it is yet a tacit adoption or approval of repugnancy clause provisions as enforced by Nigerian Courts.

The Constitution of the Federal Republic of Nigeria 1999 (as amended) could not save our Customary Law from the disdainful treatment. In Section 21 thereof, it only declared that *"the state shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter".*

This is another way of saying that the state will only promote and protect cultural values that pass the "test". Section 16(1) of the Evidence Act 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."

A community reading of the above statutory provisions and the repugnancy rule will show that for Section 16(1) of the Evidence Act to apply, such custom must have passed the test of repugnancy. This, in our respectful view, is the basic essence of Section 17 of the Evidence Act which is to the effect that a custom can only be adopted if it has been noticed (recognized) after been adjudicated upon once or it has to pass through that test by evidence.

However, Section 18(3) of the Evidence Act comes out very clear to say that *"in any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is*

[27](1944) 10 WACA4, (1944) AC 170.
[28](1913) AC 662; (1931) ALL E.R. Rep. 44.
[29](1935) 12 NLR 7.
[30](1908) 1 NLR 81.
[31]Section 10(1).

contrary to public policy, or is not in accordance with natural justice, equity and good conscience".

From the foregoing discussion, it is very clear that from both the Substantive and Procedural Laws, our Customary Laws generally face the onerous task of passing through the scrutiny of the English trained minds manning the courts before being recognized or enforced.

Furthermore, the foregoing discussion has shown that the Repugnancy Doctrine can be used both in the strict and broad sense. If used in the broad sense, it covers the species of the tests incorporated in the statutory provisions identifiable in the forms of *"incompatibility with any current law and" "contrary to public policy"* but if used in the strict sense, it is expressed in the nine-word phrase *"not repugnant to natural justice, equity and good conscience".*

It is in our view not always convenient when discussing this statutory provision governing the recognition of Customary Law to refer separately to Repugnancy Clause Proper, the incompatibility test and the contrariety to public policy considerations. Consequently, it is usual and certainly more convenient in a discussion such as this, to lump them all up under the Repugnancy Doctrine. We do not find this approach objectionable in so far as it is understood that the lumped up description of otherwise three distinct but closely related tests is the test which our Customary Laws must pass to be recognized and enforced.

THE BENEFITS OF THE REPUGNANCY TEST

One of the greatest criticisms against the Repugnancy Test is that it seeks to relegate our Customary Law to the background, yet one can argue that the Customary Law has benefited from the Repugnancy Test in terms of its development in the following ways.

Removing and or Modernizing Archaic or Obsolete Features: The rejection of the rules of Customary Law by the application of the Repugnancy Doctrine has helped to develop and modernize the rules of Customary Law. This was the situation in the case of *Awo v. Cookey Gam*[32] where the court specifically held that *"the principles of native law relied upon by the Plaintiffs were developed in and are applicable to a state of society vastly different from that now existing".*

Adaptability to New Social Challenges: It has made Customary Law adaptable to meet new social and economic challenges. Dr. F.A. Ajayi S.A.N. captured this well when he stated this;

> *…there can be no doubt about the effects which it (i.e. Repugnancy Doctrine) has had on the development of Customary Law. It (i.e. Repugnancy Doctrine) has operated in general by striking down or excising from the corpus of Customary Law, rules which are considered to be repugnant, and in this way, it has provided some means for the adaptation of Customary Law to meet new social and economic needs which have emerged since the establishment of British Rule.*[33]

The reality on ground is that the courts are empowered to mould Customary Law to suit existing needs by the use of the Repugnancy Principle in order to chip off portions of the Customary Law which it found not to be in consonance with the ideas of justice, equity and good conscience.

This prompted Dr. T.O. Elias to observe that "*the phrase" "justice, equity and good conscience" can thus be seen as a convenient term that is ready in hand for the refashioning of certain outdated rules of Customary Law, and although the practical application of the rubric to particular cases has sometimes been surprising and even unjustifiable, the results have been on the whole, salutary and enlightening".*

We could not agree less with the observation of the erudite Dr. T.O. Elias on his observation to the extent that some of the practical application of the principle by our courts is surprising and questionable, yet the use of the principle has helped to shape or reshape our Customary Laws and make it easily identifiable which on its own makes it possible, though still difficult, for codification of our Customary Laws which has been advocated by some scholars and jurists.

THE PLACE OF REPUGNANCY TEST IN OUR CUSTOMARY CRIMINAL JURISPRUDENCE

The foregoing discussion has been with respect to Customary Law generally without specific reference or application to civil or Criminal Customary Law. In this generic sense, we hold the respectful view that the Repugnancy Test applies to both 'Civil' and 'Criminal' Customary Law. This is so because the Repugnancy Provisions in the statutes did not specify or make the test applicable to only the *"civil"* Customary Rules. It is a general provision and consequently, any Customary Civil or Criminal Rule was strictly subject to the test without exception and all the cases and pronouncements on Repugnancy did not set limits of application of the test to any particular specie of law.

This may however not be the whole truth. The reality is that the present state of our laws may suggest that the Repugnancy Test has no place in our Customary Criminal Law Jurisprudence. This is in view of the provision in Section 36(12) of the 1999 Constitution of Nigeria (as amended); which provides thus; *"subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty, therefore, is prescribed in a Written Law; and in this subsection, a Written Law refers to an Act of the National Assembly or a Law of a State, and subsidiary legislation or instrument under the provision of a law."*

This provision ordinarily has nothing to do with the Repugnancy Test but its implication and impact on the applicability of Repugnancy Doctrine to Customary Criminal Law is overwhelming in our view. The plain effect of this provision is that any act that is not so declared a crime by a Written Law is not a crime and no one can be convicted of such an alleged crime. This provision is without exception and without regard to the state of our Customary Criminal Law which is largely unwritten.

Hence, this provision can rightly be regarded as abolishing our Customary Criminal Laws which till date remain unwritten, since all efforts to codify our Customary Criminal Laws have yielded little result.[3434] Although, Nigerians from the different regions and communities know, believe and in most cases even obey and are bound by the respective Customary Criminal Laws of the respective communities, the Constitution has turned away its eyes from those aspects of our laws and has by a single provision shot out such Customary Criminal Laws which had guided and helped to shape, regulate or curb

[32]Section 17(e).
[33](1910)2 NLR 100.

[34]The Rivers State Government, Nigeria has enhanced the jurisdiction of the Customary Courts in the state to include Customary Criminal Law trials: See generally the Rivers State Customary Courts Law, No. 3, 2014.

anti-social behaviours of the people long before the colonial era simply because they are not written. Since the Constitution which is our grundnorm does not recognize our Customary Criminal Law, it does not matter what personal views we hold on this, the stark reality is that, in so far as our Customary Criminal Laws are not written, they are not enforceable and no one can be convicted of them and if this be so, as it indeed is, the natural consequence of the Constitutional provision under reference, on the subject of our discussion is that the Repugnancy Test or Doctrine has no place in the jurisprudence of our Customary Criminal Law.

While we regret the subjection of our Customary Law to the qualifying Test of Repugnancy, we bemoan the somewhat outright rejection of our Customary Criminal Laws by our own Constitution even in this age.

CONCLUSION AND RECOMMENDATION

Although the situation looks bad for our Customary Criminal Law, it is not altogether hopeless. While the subjection of our Customary Law to the Repugnancy Test may be objectionable, we sincerely hope that a systematic selection by our Local Government Councils of parts and pieces of our Customary Criminal Laws would be carried out and same passed as bye-laws, thus bringing them into conformity with the provisions of Section 36(12) of the Constitution and thereby made identifiable, recognizable and enforceable even if they would still face the Repugnancy or Inconsistency Test, after all other laws that are or become inconsistent with any provision(s) of the Constitution are to that extent void.

Finally, while it could be said that the Repugnancy Test no longer has a notable place in our Customary Criminal Law Jurisprudence, the repugnancy doctrine could be used as a veritable tool in shaping or modernizing our Customary Criminal Rules into a more acceptable standard which may be enacted into laws by the legislative arms of the Local Governments as bye-laws which could be enforced by our Customary Courts of the area thereby obviating the provision of Section 36(12) of the 1999 Constitution (as amended) which, as it stands does not recognize Customary Criminal Laws (because they are unwritten) and thereby makes the Repugnancy Test inapplicable in our Customary Criminal Law Jurisprudence.

A National and State Legislative intervention is most needed at this age of our judicial evolution to restore our Customary Criminal Law to the same (all be it unenviable) level with the Customary Civil Law and indeed the English Criminal System. The aforesaid bold step undertaken by the Rivers State Government by enlarging the jurisdiction of Customary Courts in the State to include criminal jurisdiction is highly commended.