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Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria

Summary

The repugnancy doctrine was introduced into Nigeria in the 19th century through the received English laws. This doctrine prescribes that the courts shall not enforce any customary law rule if it is contrary to public policy or repugnant to natural justice, equity and good conscience. The doctrine is generally criticised for its use of foreign standards to assess the validity of the customary law rules. This article, however, contends that repugnancy doctrine had played a positive role in the development of customary law in Nigeria by removing its harsh aspects. Most African countries repealed the repugnancy provisos when they obtained independence but Nigeria still retains it. The article compares the positions in South Africa and Nigeria. In the South African context, this article found that repugnancy proviso had outlived its usefulness and courts now apply customary law subject to the Constitution and any legislation that specifically deals with customary law. This position, the article commends for Nigeria.

Teenstrydigheidsleerstelling en sy impak op gewoontereg: Vergelyking van Suid-Afrika en Nigerië se posisies — 'n Paar lesse vir Nigerië

Die teenstrydigheidsleerstelling was aan Nigerië bekend gestel in die 19^{de} eeu deur die ontvangs van die Engelse reg. Die leerstelling skryf voor dat die howe nie enige gewoontereg sal toepas as dit teenstrydig is met openbare beleid of onverenigbaar is met natuurlike geregtigheid, billikheid en skoon gewete. Die leerstelling word oor die algemeen gekritiseer oor die gebruik van vreemde standaarde om die geldigheid van die gewoontereg telike reëls te bepaal. Hierdie artikel voer egter aan dat die teenstrydigheidsleerstelling 'n positiewe rol in die ontwikkeling van gewoontereg in Nigerië gespeel het deur met die growwe aspekte weg te doen. Meeste Afrika-lande het die teenstrydige stipulasies afgeskaf nadat hulle onafhanklikheid verkry het maar Nigerië het dit steeds behou. Die artikel vergelyk die posisies in Suid-Afrika en Nigerië. In die Suid-Afrikaanse konteks het die artikel gevind dat teenstrydige stipulasies sy bruikbaarheid oorleef het en howe pas nou gewoontereg toe onderworpe aan die Grondwet en enige wetgewing wat spesifiek handel oor gewoontereg. Hierdie artikel beveel hierdie posisie aan vir Nigerië.

1. Introduction

The early contacts of the British with the territories which constitute the modern Nigeria were in the early 19th century and the contacts were initially with the inhabitants of the coastal areas of Lagos, Benin, Bonny, Brass, Degema and Calabar for trading purposes. In a bid to regulate their trading activities, British appointed consuls for the areas, and consular courts were equally established for the purpose of settling trade disputes.¹ Lagos was ceded to the British Crown under a Treaty of Cession in 1861, and through this treaty, Lagos became a British colony with English law introduced in the colony.² Other parts of the country were subsequently acquired as British Protectorates and English law was also introduced in those areas.³ The annexation of Lagos in 1861 could be regarded as the real beginning of British colonial conquest of Nigeria.⁴ However, before the British incursion into Nigeria, each of these territories was independent with distinct customary-law system. For instance, in the northern part of the country, the principal law administered then was the Moslem law of the *Maliki* School,⁵ while in the southern Nigeria the law in force then was unwritten indigenous/customary law.⁶

With the introduction of the English law into the country, the indigenous/customary law rules were relegated to the background, coming after the received foreign law, statutes of general application and other ordinances. The validity of these customary law rules were assessed based on the English principles and ideas of justice. Repugnancy doctrine was one of the English principles introduced to assess the validity of customary law. Based on this foreign standard, substantial rules of customary law were found offensive, inconsistent with the English sense of justice and therefore declared invalid. In this article, an attempt shall be made to examine the repugnancy clause and its impact on the Nigerian customary law. The article also compares the impact of repugnancy clause on customary laws in South Africa and Nigeria. It contends that repugnancy doctrine had played a positive role in the development of customary laws across

1 The first consul was appointed some time in 1849. Consular courts were established in reaction to the failure of the indigenous/customary courts to effectively settle the trade disputes between the indigenes, British and other foreign traders. See Obilade 1990:17-18.

2 By virtue of the Supreme Court Ordinance No. 11 of 1863, the first Supreme Court of the Colony was established in Lagos. The court was conferred with civil and criminal jurisdiction. In 1866, the British merged her colonies in West Africa and placed them under one government then known as the Government of the West African Settlements. Such territories consisted of Lagos, the Gold Coast, Sierra Leone and Gambia. Appeals from the courts established then for Lagos lay to the West Africa Court of Appeal from where appeal lay to the Judicial Committee of the Privy Council. See Obilade 1990:18.

3 They were the Northern and Southern Protectorates. These Protectorates, together with the Lagos Colony were amalgamated in 1914 to form the modern Nigeria.

4 See Uweru 2008:290.

5 The main source of this law is the Holy *Quran*, while other sources include the *sunna*, the consensus of scholars, and analogical deductions from the holy *Quran* and the practice of the Prophet. See Fyzee 1964:18-21.

6 Obilade 1990:17.

Africa by removing their harsh aspects. Most African countries repealed the repugnancy provisos when they obtained independence but Nigeria still retains it.⁷ In South African context, it is observed that repugnancy provisos had outlived their usefulness and courts now apply customary law subject to the Constitution and any legislation that specifically deals with customary law. This position, the article commends for Nigeria.

The article is divided into eight parts. Following this introduction is the second part which examines the meanings of the major words used in the article. The part also traces the origin of repugnancy clause in Nigeria. In part three, the article examines the justifications for comparing Nigerian and South African positions on repugnancy doctrine. Part four discusses the repugnancy doctrine and its impact on Nigerian customary law while the South African position is discussed in part five. Transformation and modification of customary law is discussed in part six. Part seven suggests law reform for Nigeria while conclusion forms the last part.

2. Definition of the major concepts

The terms “customary law”, “repugnancy clause” and “natural justice, equity and good conscience” are dominant in this article and thus, it is expedient, at the onset, to examine their meanings. Customary law is defined as the “custom and usages traditionally observed among the indigenous African peoples and which form part of the culture of those peoples.”⁸ It is reputed as being the law that was handed down from time immemorial from ancestors. It also represents a collection of precedents and decisions of the by-gone chiefs.⁹ Customary law entails the customs and usages traditionally observed among the indigenous people, which formed part of their cultures and religions.¹⁰ It has also been described as “a minor of accepted usage”¹¹ and “common law of the people.”¹² According to Bronstein, “culture is a critical part of the lived reality of people’s lives. It gives meaning to all our lives and is fundamental to our identities.”¹³ Thus, culture and customs are valuable and important parts of people’s lives.¹⁴ On his part, Allott asserts that custom is the “raw material out

7 In this category are countries such as Ghana, Zambia, South Africa and Zimbabwe, among others.

8 See Mqeke 2003:3.

9 See Mqeke 2003:3.

10 Although, African customary law is often perceived to be synonymous with culture and custom, Juma argues that lawyers must endeavour to distinguish “law” from “custom” to facilitate a more reasoned appreciation of the place African law ought to occupy in the legal system. He asserts: “Custom refers to practice; what people do. Law is the norm; what people ought to do.” See Juma 2007:88 at 94; See also, *Hlope v Mahlalela* 1998 (1) SA 449 (T) 457, where Van der Heever AJ observed that not “all cultural practices are indigenous law and vice versa.”

11 *Owonyin v Omotosho* (1961) All NLR 304 at 309; This definition was also adopted by the Nigerian Supreme Court of Nigeria in *Kimdey v Military Governor of Gongola State* [1988] 2 NWLR (pt 77) 445; see also, *Zaidan v Mohssen* (1973) 11 SC 1 at 21.

12 See *Ex Parte Ekepenga* FSC 204/1961 of 30/4/1962 (Unreptd.)

13 See Bronstein 1998:388 at 393.

14 See Robinson 1995:457 at 469.

of which customary norm is manufactured.”¹⁵ Customary law is derived from social practices that the community concerned accepts as obligatory.¹⁶ The most striking feature of nearly all customary laws across Africa is that, in their original form at least, they are unwritten.¹⁷

In this article, the term “customary law” is used advisedly in blanket form and should not be taken to indicate that there is a single uniform set of customs prevailing throughout Africa. Customary law varies from country to country and even within a country, there are variations based on cultural differences.¹⁸ The term customary law is therefore used generally to cover diverse customs and cultures.¹⁹ Further, in Nigerian context, the term “customary law” embraces both the ethnic/indigenous law and the Muslim law.²⁰ The former is known as the native law and custom while the latter is referred to as *shari’ah* or Islamic law. Thus, for our purpose, Islamic law and the various tribal laws are treated as customary law.²¹

The term “repugnancy clause” has not been defined in any Nigerian statute, and also Nigerian courts have not explained in details, its meaning.²² According to Lord Wright, the clause was intended to invalidate “barbaric” custom.²³ In *Eshugbayi Eleko v Officer Administering the Government of Nigeria*,²⁴ Lord Atkins explained that a barbarous custom must be rejected on the ground of being repugnancy to natural justice, equity and good conscience.²⁵ In the same vein, the phrase “natural justice, equity and good conscience” defies precise definition. Controversies and uncertainties surround its exact meaning.²⁶ Speed, Ag CJ expressed the difficulty thus:

15 See Allott 1977:1 at 5.

16 See Bennett 2004:1.

17 See Bennett 2004:2.

18 Indigenous law of succession in Nigeria varies from one ethnic group to another. For a detailed account, see Elias 1951:216-235.

19 This author had earlier alluded to the facts that the term “Customary Law” in Nigerian context embraces both Native Law in Southern Nigeria and Shari’ah Law operating in Northern Nigeria. See Taiwo 2008:183 at 187-188.

20 Professor Obilade notes as follows: “In Nigeria, customary law may be divided in terms of nature into two classes, namely, ethnic or non-Muslim customary law and Muslim law.” See Obilade, 1990: 83; Park equally alluded to this categorisation when he notes: “But tribal laws are not the only systems covered by the term ‘Customary Law’, for throughout the federation it includes Islamic Law also.” See Park 1963:130; Anderson 1970:172. However, scholar/jurist like Hon Justice Niki Tobi holds a contrary view to categorising Islamic Law as customary law. He argues: “Islamic law has a separate and distinct identity from customary law. To equate the two or give the impression that Islamic law is either an off-shoot of or appendage to customary law is to say the least, an ignorant assumption or conclusion.” See Tobi 1996:151; Uweru 2008:293; see also, *Alh. Ila Alkamawa v Alh. Hassan Bello* (1998) 6 SCNJ 127 at 136.

21 See Park 1963:65.

22 Obilade 1990:100.

23 *Laoye v Oyetunde* [1944] AC 170.

24 [1931] AC 662.

25 At 673.

26 For example, in *Abott v Sullivan* (1952) 1 KB 189 at 195, Lord Evershed expressed this difficulty and mentioned that “the principles of natural justice are easy to proclaim, but their extent is far less easy to ascertain.”

I am not sure that I know what the term 'natural justice and good conscience' means. They are high sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the term.²⁷

It is observed that the phrase has three elements and Allot submits that the three elements in the phrase are overlapping and indistinguishable. He opines that the expression simply means "fairness."²⁸ Similarly, Derrett submits that the phrase should be interpreted to simply mean "natural justice" while the words; "equity and good conscience" are to be treated as superfluous.²⁹ Fabunmi equally posits that an attempt to split the expression into its three component parts may lead to importing the technical meanings of the term "equity" into the validity of customary law.³⁰ He submits that if the technical rules of English equity were the means by which the validity of the rules of customary law were to be tested, every rule of customary law that differs from the English rules of equity would automatically be rejected.³¹ He submits further that this approach portends the risk of eliminating the rules of customary law rather than preserving them as intended by the statute.³² Under the Nigerian law, the phrase "natural justice, equity and good conscience" has two aspects namely, the negative and the positive aspects. The negative aspect is also referred to as the repugnancy doctrine while the positive aspect is called the residual justice clause.³³ These two aspects are discussed shortly.

3. Justifications for comparison

This article compares the impact of repugnancy clause on customary laws in South Africa and Nigeria. According to Hayden, to "compare" is to examine two or more entities by putting them side by side and looking for similarities and differences between or among them.³⁴ Various scholars have justified a comparative study as serving many useful purposes.³⁵ Though South Africa

27 *Lewis v Bankole* (1908) 1 NLR 83 at 84.

28 Allot 1970:44.

29 Derrett 1963:150.

30 Fabunmi:40-41.

31 Fabunmi:40-41.

32 Fabunmi:41.

33 Section 34 (1) of the High Court Law Northern Nigeria (HCLNN) Cap 49, 1963 for example introduced the repugnancy doctrine while Section 34 (4) introduced the residual justice clause.

34 Hayden 2006:4.

35 Sacco says that a comparative evaluation of different countries concerning the same or similar issues is also of great value for drafting of legislation or recommending a law reform. See Sacco 1991:1 at 4; Hervey justifies a comparative study by saying that it is a potent instrument for a better understanding of one's domestic legal system. See Hervey 1993:17; Bogdan equally asserts that realisation has come in the recent time that a lawyer like any other professional cannot limit his attention only to what occurs within the borders of his own country. He argues as follows: "The importance of learning from the experience of other countries is obvious within the fields of natural science, medicine, and technology. The same compelling need to make use of the experience of others should also be recognized within the legal field." See Bogdan 1994:20 & 29.

and Nigeria are different in terms of political, social values and traditions, the economies of the two countries as well as demographic factors are also different. Nevertheless, these two countries are comparable because of their common historical link. They both have strong connections to the British legal tradition, and the common law principles, being former British colonies. Also, both South Africa and Nigeria had at one time or the other had repugnancy clause in their laws. Further, the decisions of the South African Constitutional Court in *Bhe's* case and Nigerian Supreme Court in *Mojekwu's* case also present comparable (opposing) positions on the human rights challenge on discriminatory customary law rules.

Further, the two countries also drafted and adopted their Constitutions at relatively the same time.³⁶ While the South African Constitution recognises cultural right as justiciable rights,³⁷ the Nigerian Constitution, on the other hand, only provides for it as non-justiciable right.³⁸ Cultural right is rather categorised as “fundamental objectives and directive principles of state policy.”³⁹ The South African position jettisoning repugnancy clause as well as its constitutional recognition of customary law presents itself as a model for Nigeria.

4. Repugnancy clause under the Nigerian law

In 1876, a Supreme Court was established in Lagos Colony as Supreme Court of record with jurisdiction and powers similar to those of Her Majesty's High Court of Justice in England.⁴⁰ This court had jurisdiction in the Colony of Lagos and other adjacent territories over which the British Government had control. The court was empowered to administer the common law, the doctrines of equity and the statutes of general application in force in England as of 24 July 1874. The Ordinance which established the court stated that nothing would deprive any person of the benefit of any law or customs existing within the jurisdiction of the court provided that such law and customs are not repugnant to natural justice, equity and good conscience and not incompatible either directly or by implication with any local statute.⁴¹

The ordinance was later amended and replaced with a new one but with similar provision. For instance, the Supreme Court Proclamation provides that “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 ...”⁴² However, with the

36 While South Africa enacted her own constitution in 1996, Nigeria enacted hers in 1999.

37 See sections 30 & 31 of the 1996 South African Constitution.

38 See section 21 of the 1999 Nigerian Constitution.

39 Section 6(6)(c) of the Constitution excludes the provision of the “fundamental objectives and directive principles of state policy” in chapter II of the Constitution from the matters which courts have jurisdiction.

40 See the Supreme Court Ordinance, No 4 of 1876.

41 See Ordinance No. 4 of 1876 above; See also Yakubu 2002:1-2.

42 See section 13 of the Supreme Court Proclamation, 1900.

division of the country into three regions and subsequently, 36 states, the above provisions were incorporated into respective states laws. For example, the High Court Law of Northern Region which serves as the main source of the High Court Laws of the 19 states carved out of the Northern Region provides:

The High Court shall observe, and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom.⁴³

In terms of these provisions, the British colonial rulers did not totally do away with the customary law, but they, however, subjected its recognition and validity to the permissible extent of English principles and concepts through repugnancy clause. Existence of a rule of customary law within a particular community is one thing, its recognition by the courts is quite another thing. This is because, notwithstanding the proof of existence of such a custom by the parties, court has to consider whether or not the custom is not repugnant to natural justice, equity and good conscience before it can adopt it as having the force of law within that locality. It must, in addition, be established that such custom is not incompatible either directly or by implication with any law for the time being in force and must not be contrary to public policy. This position prevails up till date. Thus, before a rule of customary law is recognised as having force of law within a locality, it has to pass the validity test based on the British concept of repugnancy.

Writing on repugnancy doctrine, Okunniga states as follows:

As every Nigerian lawyer knows, all courts in the country, whether High or Customary are by statutes enjoined 'to observe and enforce the observance' of customary law or native law and custom of the people in so far as such rules of customary law do not conflict with the rules of 'natural justice, equity and good conscience nor with any written law in force.' As every Nigerian lawyer also knows, the phrase 'natural justice, equity and good conscience' has been interpreted to mean 'what is fair', 'what is just', 'what is of good report', 'what is equitable'; in short, what equity in the broad sense as different from technical equity of the old court of chancery, would approve Contemporary writers often refer to this doctrine as the doctrine of repugnancy.⁴⁴

43 See section 34(1) of the High Court Cap 49, 1963, Law of Northern Region of Nigeria. Similarly, Section 12(1) of the High Court Laws of Western Region of Nigeria 1959 which constitutes the main source of law to the 8 States out of the 36 Nigerian Southern States provided thus: "The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any written law for the time being in force, and nothing in this Law shall deprive any person of the benefit of any such customary law." Similar provisions also exist in section 26, High Court Law of Lagos State Cap 65, 1973, Section 22(1) Eastern Nigeria High Court Law Cap 61, 1963; Section 12(1) Western Nigerian High Court Law Cap 44, 1958.

44 Okunniga 1984:12.

In *Eshugbayi Eleko v Officer Administering the Government of Nigeria & Ors*,⁴⁵ the Privy Council held that customary law is either good or bad and the court cannot itself transform a barbarous custom into a milder one. If customary law still stands in its barbarous character, it must be rejected as repugnant to “natural justice equity and good conscience.”⁴⁶ Repugnancy doctrine therefore constitutes the tool through which Nigerian courts abrogate any rule of customary law that outrages “natural sense of justice.”⁴⁷ The doctrine has greatly influenced the development of Nigerian customary law and has left indelible marks on both the procedural and the substantive areas of Nigerian law. The impact of repugnancy clause on customary law cuts across procedural and substantive areas of Nigerian law. These areas of impact are discussed below.

4.1 Impact of repugnancy clause on procedural law

Repugnancy doctrine has played an important role in watering down harsh rules of procedure in customary law. In adjudication, courts are required to abide by the two fundamental principles of natural justice namely; *nemo iudex in causa sua* (meaning that no one shall be a judge in his own cause) and *audi alteram partem* (meaning that no one shall be condemned unheard).⁴⁸ In its original form, customary law rules do not recognise the modern concept of division or separation of powers. Native/customary courts are at times constituted by traditional chiefs and elders in the community. In the traditional sense, however, they are the law givers, the interpreters and the executors of the laws at the same time. Having this as the background, it was not strange to have the same persons acting in different capacities which modern concept of justice may not agree with. It was equally not strange under the customary law system to have the accuser participating in the trial of the person(s) he accused. Modern concepts of presumption of innocence, burden of proof and proof beyond reasonable doubt are equally not well grounded in customary administration of justice. Thus, most the trials before the native courts were ultimately found violating most of these modern requirements of a fair trial.

In *Modibo v Adamawa Native Authority*,⁴⁹ the court allowed the appeal of the appellant who was sentenced to terms of imprisonment by a court presided

45 (1931) AC 662 at 673.

46 This no doubt represents a very strict interpretation of the Native Law Ordinance. It is expected that a liberal approach should have been adopted which would enable the court to retain the good part of a custom and eliminate the bad part if the interest of the community so requires. This is suggested because the repugnancy doctrine was ostensibly meant to be used as hyssop to wash away the “sin” of customary law, and thereafter leave it pure, unsullied, and unmodified for the regulation of the lives of millions of Nigerians who come under its jurisdiction. See Okunniga 1984:12.

47 Okunniga 1984:13.

48 See *Alakija v The Medical Disciplinary Committee* (1956) 4 FSC 38; *Adeniran v The Caretaker Committee, Ife Divisional Council* (1963) 1 All NLR 39.

49 (1956) NRNLR 101; See also, *Mbi v Numany Native Authority* (1959) NRNLR 11; *Bukar of Kaligari v Bornu Native Authority* (1953) 20 NLR 159.

over by the *Lamido of Adamawa* (a traditional Chief) for an offence of writing an offensive letter and personal attack on the *Lamido*. The court rejected the plea of necessity brought forward and held that since the dispute was on personal attack on the *Lamido* himself, as such; the principle that no man can be a judge in his own cause must be maintained. Similarly, in *Jalo Guri & Anor v Hadejia Native Authority*,⁵⁰ a procedural rule well rooted under the customary law/Muslim Maliki law which prevented or denied an accused person in a case of *hiraba* (highway robbery) the right to question witnesses or defend himself or make any attempt to exonerate himself was struck down and declared repugnant to natural justice, equity and good conscience.⁵¹

Another area of positive influence of repugnancy doctrine is on the abolition of jungle justice and trial by ordeal.⁵² Whenever there is any doubt during trial, customary law allows the use of trial by ordeal to resolve issues or to ascertain the truth. The use of ordeal had its root in the belief in the supernatural force to secure a confession whenever a traditional court encounters difficulty. Under the system, parties are subjected to some form of ordeal and whoever survives the ordeal is regarded innocent.⁵³ Different types of ordeal exist and they vary from one community to another.⁵⁴ In most communities, the parties are made to swear by some sacred objects. In serious disputes, however, appeals may also be made to gods to rain down misfortune or calamity on the guilty party. All these rules and customary practices have been obliterated by repugnancy clause.⁵⁵

The repugnancy doctrine also operates in the area of punishment, and it has outlawed inhumane punishment or brutal use of force.⁵⁶ The prohibition against subjecting a person to any punishment of an inhumane nature has now received constitutional approval. Section 34(1)(a) of the 1999 Nigerian

50 (1959) 4 FSC 44 at 46.

51 Section 36 (5) (6) of 1999 Constitution which enshrines presumption of innocence and any such custom will no doubt be void as being contrary to the constitution. See also, Taiwo 2008:199.

52 The experience in the days of jungle justice was not palatable and eradication of this practice by means of repugnancy doctrine worth praising. In a typical customary law sense of justice, you need to shout *ole o!* (thief o!), three times and in the twinkling of an eye you'd have human being roasted or bleeding to death before your eyes. That was a jungle justice that does not recognise presumption of innocence and fair hearing, yet, in the eyes of customary law, it was a good justice! See section 208 of the Criminal Code which forbids trial by ordeal.

53 Ademola 1991:158.

54 For example, among the *Kalabaris* of the Niger Delta area of Nigeria, for the determination of cases of witchcraft, an accused person who swims unhurt through a river full of crocodiles is discharged of the criminal offence of witchcraft.

55 Trial by ordeal now constitutes a crime in Nigeria under the Criminal Code and Penal Code.

56 See section 2 of the Native Court Ordinance which provides: "For offences against any native law or custom a native court may, subject to the provisions of this Ordinance, impose a fine or imprisonment or both or may inflict any punishment authorized by native law or custom, provide it does not involve mutilation or torture and is not repugnant to natural justice and humanity." See section 2 of the Native Court Ordinance Cap 142, Laws of Nigeria, 1948.

Constitution prohibits inhumane punishment and it provides: “every individual is entitled to respect for the dignity of his person, and accordingly; no person shall be subjected to torture or to inhuman or degrading treatment ...”⁵⁷ Thus, Nigerian courts will apply customary law only if it passes repugnancy test and if it does not offend the English sense of justice and fairness.

4.2 Impact of repugnancy clause on substantive law

In the substantive law, Nigerian courts have equally applied the doctrine on numerous cases and this impacted greatly on the rules of customary law. Many of the customary law rules which offended the clause were either modified or completely jettisoned.

4.2.1 Paternity issue

The case of *Ekpenyong Edet v Young Uyo Essien*⁵⁸ is quite illustrative on this point. In that case, the appellant had paid the dowry in respect of a woman when she was a child. Later, the respondent also paid dowry in respect of the same woman to the woman’s parents and took her as wife. The appellant, though not the biological father, claimed custody of the children of the marriage on the grounds that under the customary law, he was the husband of the wife until the dowry paid by him was refunded. The court ruled that any customary law rule which has the effect of giving the paternity of a child to a person other than his natural father is barbaric and should be rejected as repugnant to natural justice, equity and good conscience.

Similarly in *Mariyama v Sadiku Ejo*,⁵⁹ the court rejected the rule of Igbira 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:

The native law and custom which the respondent asked us to enforce would have this girl taken for life away from her natural parent. We feel that to make such an order would be contrary to natural justice equity and good conscience and we are therefore not prepared to do so.⁶⁰

57 Section 34(1)(a) of the Constitution of the Federal Republic of Nigeria 1999.

58 (1935) 12 NLR 4.

59 (1961) NRNLR 81.

60 At 83; Also in *Meriba v Egwu* (1976) 1 All NLR 266, the traditional practice in the Igbo land of Nigeria that allowed marriage between two women to cater for well-to-do female members of the society who were unable to conceive was declared a repugnant by the Supreme Court. The court found the practice inconsistent with natural justice, equity and good conscience. Similarly, the customary law rule which had the tendency of perpetuating slavery in the society was also declared repugnant to natural justice, equity and good conscience. See *Re-Effiong* (1930) 10 NLR 65; *Abasi Ukot Akpan v Chief Elijah Henshaw* (1932) 11 NLR 47; *Kodieh v Afram* (1930) 1 WACA 12; See Ajayi 1958:569.

4.2.2 Succession and primogeniture rule

Another impact of repugnancy doctrine is apparent in the customary rules of succession and administration of estates. Courts now hold the view that for a rule of customary law rule of succession to be held valid, the rule must be fair and non-discriminatory on account of sex or any other prohibited grounds. The concepts of equality and non-discrimination have been given recognition in national and international human rights instruments.⁶¹

According to Kerr, the two basic principles of succession in customary law are primogeniture of males through males and universal succession.⁶² The rule of primogeniture permits only male issues to inherit the property of a person who dies intestate.⁶³ Under the rule, on the death of a Native, his estate devolves on his eldest son, or his eldest son's eldest male descendant.⁶⁴ If the eldest son has died leaving no male issue, the next son or his eldest male descendant inherits, and so on through the sons respectively.⁶⁵ No female child is permitted to inherit under this customary law rule.⁶⁶ Also, a widow is equally excluded from the succession.⁶⁷ If a man dies without a son, his property is inherited by his nearest male relative in the collateral line, usually his brother or his brother's male descendant.⁶⁸ This rule has been in existence in Africa since the early times as part of the African culture.⁶⁹ The concept of universal

61 See the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) by the United Nations General Assembly in December 1979; article 3 of the African Charter on Human and Peoples' Rights (1981) which provides that every individual shall be equal before the law and shall be entitled to equal protection of the law; article 18(3) thereof also obliges States Parties to elimination of every forms of discrimination against women. Article 7 of the Universal Declaration of Human Rights (1948) also guarantees the equality of all persons and freedom from any forms of discrimination. Article 26 of the ICCPR (1966) prohibits discrimination and guarantees to all persons, equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See also, Para 24 of the Beijing Declaration: Fourth World Conference on Women (September 1995) where the participating Governments declares: "We are determined to: take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women."

62 See Kerr 1994:720 at 725; Kerr 1997:346 at 350; Kerr 1990:99-100.

63 Kerr 1990:99-100.

64 Mbatha equally states that the devolution of estates under customary law follows the male lineage, by entrusting the control and administration of the family property to the heir. See Mbatha 2002:259 at 260.

65 See *Sonti v Sonti* 1929 NAC (C&O) 23 24.

66 See *Madolo v Nomawu* (1896) 1 NAC 12; *Mahashe v Hahashe* 1955 NAC 149 (S) 153; See Mbatha 2002:260-261.

67 The daughter however, has the right to be maintained while the widow equally has servitude over her late husband's land and a personal right against the heir to be maintained.

68 Kerr 1990:99.

69 Omotola 2003:181 at 182.

succession entails that under the customary law, when a man dies his heir⁷⁰ takes his [deceased] position as the head of the family and stands *in loco parentis* to the other members of the family.⁷¹

Kaganas and Murray adequately expressed the position of African women under the customary law in the following words:

Under customary law, women are always subjected to the authority of a patriarch, moving from the control of their guardians to that of their husbands. The male head of the household represents the family and a woman cannot generally contract or litigate without assistance. Husbands control virtually all the family's property while wives' rights are confined to things such as items of a personal nature. Women cannot initiate the divorce process but must enlist the help of the bride-wealth holder, who may have a vested interest in the continued existence of the marriage. Husbands, on the other hand, may simply unilaterally repudiate their wives or, if they wish to retain the bride-wealth, can rely on specified grounds. Finally, on divorce, the children 'belong' to the husband's family.⁷²

Delivering the judgment of the Supreme Court of Appeal in *Mthembu v Letsela*,⁷³ Mpati AJA said of the South African customary law of succession thus:

The customary law of succession in South Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family is heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue, the second son became heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds ... Women generally do not inherit in customary law.

The Nigerian case of *Ogunbowale v Layiwola*,⁷⁴ states the position under the Yoruba customary law.⁷⁵ In that case, the deceased was survived by three wives and three children, one from each wife. The deceased also had two houses. The second defendant who was the mother of one of the children sold and conveyed in fee simple, one of the two houses left by the deceased, claiming that she sold the property under the authority of a paper signed by the two daughters of the deceased and another relation of the latter. The question that came for determination in the case was: "what is the position in law of the wife or children of a Yoruba man in relation to his real property after his death intestate?"

70 The heir is the person who steps into the shoes of the deceased head of the family as the administrator of the family property. See Mbatha 2002:260-261; see also, Robinson 1995:457 at 460.

71 Kerr 1990:100.

72 Murray (ed) 1994:17; See also, Bennett 1999:80-81.

73 2000 3 SA 867 (SCA) 876.

74 (1975) 3 CCHCJ/HC 323 of 19 March 1975.

75 *Yoruba* is one of the major tribes in Nigeria. The *Yorubas* occupy the western part of the country.

The court, setting aside the sale of the property held that nothing by way of property devolves on the wife/wives of a Yoruba man under customary law. It held that under the customary law, a wife who had children for the deceased could continue to live in the home of the deceased with her children. A wife without any issue for the deceased if she desires to stay on with the family of the deceased would appear to have a right of occupation only. The court concluded that the second defendant had sold the property involved in this case as her own property and conveyed same to the first defendant in fee simple. She inherited no estate in the real property of her husband except the right to live there as a widow, therefore, she had no interest in the property that she could convey. What is more, she herself is an object of inheritance.

Similarly, in *Oloko v Giwa*,⁷⁶ it was held that on the death of the husband, the room allotted to a wife becomes part of the deceased's real estate and not vested in the wife. The wife is privileged to use the property not as a member of the family but with the acknowledgement of her husband's membership of the family if and only if she does not remarry outside her deceased husband's family after the death of her husband. Also, in *Bolaji v Akapo*,⁷⁷ Sowemimo J (as he then was) held as follows:

The only person entitled to a grant of a letter of administration under Yoruba native law and custom which would be applicable by virtue of S.27 of High Court of Lagos Act, were the plaintiffs, four of the Children of the deceased, but not the wives who are regarded as part of his estate.

Similar position was taken in *Davies v Davies*⁷⁸ where Beckley J held that a wife was deprived of inheritance rights in her deceased husband's estate because in intestacy under native law and custom, the devolution of property follows blood. Therefore, a wife or widow not being of the same blood with her husband had no claim to any cause. In *Suberu v Sunmonu*,⁷⁹ Jibowu FJ reiterated it that it is a well-settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property since she herself is like a chattel to be inherited by a relative of her husband. Thus, in *Osilaja v Osilaja*,⁸⁰ the Nigerian Supreme Court held that the rule that a widow cannot inherit her deceased husband's property has become so notorious by frequent proof in courts that it has become judicially noticed.

However, Omotola has likened the primogeniture rule under African customary law to the common law rule under which all the realty (immovable properties), which was vested in the intestate passed to his heir, the eldest male child, subject to the rights of the surviving spouse.⁸¹ Some chattels (movable properties) known as heirloom also descended to the heir. He argues that

76 (1939) 15 NLR 31.

77 (1968) NMLR 203; See also *Akinubi v Akinubi* [1997] 2 NWLR (pt 486) 144; (1997) 1 SCNJ 202.

78 (1929) 2 NLR 79 80.

79 (1957) 2 FSC 31.

80 (1972) 10 SC 126.

81 Omotola 2003:184.

at common law, the heir takes beneficially but in customary law, he takes on behalf of the family.⁸² In the same vein, Van Niekerk asserts that primogeniture rule plays important roles in ancient African customary societies.⁸³ He explains the evolution of male primogeniture in these words:

The reason for the emergence of the rule was to ensure the continued existence of the family or the group. It is obvious that the primary goal of the rule of male primogeniture could not have been to prejudice certain members of the community. After all, in line with *ubuntu* which is the foundation of the basic principles underlying indigenous law, the individual and the community are two sides of the same coin. The essence of *ubuntu* is encapsulated in the belief that the welfare of the individual is extricably linked to the welfare of the group or family; that, in turn, is linked to a harmonious relationship with the ancestors and with nature. The welfare of all members of the community guarantees the equilibrium and welfare of society. The group, family or collectivity cannot be seen as an entity separate from its component members.⁸⁴

One of the consequences of the basic principles of succession under the customary law is that the heir becomes owner of all the deceased's property, movable and immovable at the time of death.⁸⁵ As there is hardly a right without a corresponding duty, as the heir becomes owner of the deceased's property, he equally becomes liable for the deceased's debt. He is liable for the deceased's debts even though they exceed the value of the assets in the estate, and even though there are no assets in the estate enough to offset them.⁸⁶ Thus, in *Maguga v Scotch*,⁸⁷ the court held:

It is most characteristic of the Native law of inheritance that the view was adopted that the heir must be made answerable for the debts of the deceased, if necessary, with his own property. The heir was made answerable in the same manner as though he had contracted the debt himself or, to put it more plainly, he was made answerable in the same way as though he was the deceased himself.⁸⁸

82 This position has however changed in England since 1925. See Megarry & Wade 1984:539-548.

83 Van Niekerk 2005:474-487.

84 Van Niekerk 2005:479.

85 This does not include for examples, the property owned by the deceased's wife or property which he gave away during his life time to a junior son, family members or even strangers. See Kerr 1990:100-101.

86 Kerr 1990:104. Although customary law does not allow wives to inherit from their husbands, widows are not left destitute. The deceased's responsibilities towards his dependants, including his wife, are transmitted to his heir. She has the right to claim maintenance from the heir. See South African Law Commission 1998:8.

87 1931 NAC (T&N) 54; See also, *Dlumti v Sikade* 1947 NAC (C&O) 47.

88 Similarly, in *Umvovo v Umvovo* 1952 NAC 151 (S) 153, it was stated: "when the act ion is based on contract and one party has fulfilled his part of the contract and the other party has died before fulfilling his part, then his heir is obliged under Native law to honour the agreement. If it is not possible for the heir to do so or if he repudiates the contract he is bound to make restitution, if not of the original things given them in kind."

The primogeniture rule has been criticised on the ground that it prohibits female children from inheriting.⁸⁹ Kaganas and Murray assert that for African women, customary law openly discriminates against them.⁹⁰ Equally, in *Nonkululeko Bhe v The Magistrate, Khayelisha*,⁹¹ Ngwenya J opines as follows:

We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for the purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents' intestate like any male person ...⁹²

Nigerian customary law follows a patriarchal system which does not allow women to inherit real property. As regards her husband family, the fact that she is not a blood descendant of her husband's family deprived her of succession rights in that family. As regards her father's place, a woman by cultures is never allowed to come from her husband's house to inherit her father's property. In both cases, female loses, as she can not inherit in either side. Duncan captures this when states: "[t]raditionally the position of women, throughout their lives, is that of minor children. Before they are married, they are the children of their father; after their marriage, they are the children of their husbands; and during widowhood, they are the children of their heirs."⁹³

No doubt, gender discrimination cannot pass the repugnancy test if challenged in court. However, the position is now changing for better in view of the constitutional and human rights instruments which emphasise equality of all persons. For example, section 42(1) of the 1999 Nigerian Constitution prohibits discrimination on account of sex. It provides:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

- a. be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria

89 See Bennett 1999:80-95; Robinson 1995:457-476; Meide 1999:100; See also, Liebenberg & O'Sullivan 2001:72-73.

90 Kaganas & Murray 1994:16.

91 Unreported suit No. 9489/2002, judgment of the Cape High Court delivered on 25 September 2003. This judgment has been confirmed by the Constitutional court and is discussed *infra*.

92 *Nonkululeko Bhe v The Magistrate, Khayelisha (supra)*; Also, in *Brink v Kitshoff* NO 1996 6 BCLR 752 (CC) para 44 where O'Regan J said: "Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution."

93 See Duncan 1960:4.

of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

- b. be accorded either expressly by, or in practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

Nigeria is also a signatory to the Convention on Elimination of Discrimination against Women which emphasises the universality of the principle of equality of rights between men and women and makes provisions for measures to ensure equality of rights for women throughout the world.⁹⁴ In terms of article 2 of the Convention, State Parties condemn discrimination against women in all its form, and agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women. The States Parties equally undertake *inter alia* to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.⁹⁵ State Parties are obliged to take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices and all other practices which are based on idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁹⁶

The Nigerian Court of Appeal decision in *Augustine N Mojekwu v Caroline MO Mojekwu*⁹⁷ supports this changing attitude towards securing equality of men and women in the society.⁹⁸ Delivering the judgment of the Court of Appeal, in that case, per Niki Tobi, JCA (as he then was) expressed the following view on the *Oli-ekpe* custom:

94 Nigeria is bound by the provisions of this Convention; although, the bill domesticating it has never been passed by the Nigerian National Assembly on the ground that certain provisions of the convention violate certain religious tenets and principles.

95 See article 2(f) of the CEDAW.

96 See article 5(a) of the CEDAW.

97 [1997] 7 NWLR (pt 512) 283.

98 In that case, the appellant claimed that the deceased, the owner of the property, was his father's only brother and he predeceased his father. The deceased had two wives, the respondent, Caroline and another wife, Janet. Caroline had a son, who died in 1970 and had no issue. Janet had two daughters. The deceased bought the property in dispute from Mgbelekeke family of Onitsha under Kola tenancy. The appellant claimed that he inherited the property under native law and custom of Nnewi, their home town. He paid the necessary kola, being the consideration to the Mgbelekeke family, who recognised him as a kola tenant, being the eldest surviving son of his father and the eldest male in the Mojekwu family. The respondent denied the appellant's claim. However, under the Mgbelekeke family customary law of Onitsha, both male and female children can inherit the property of an intestate. The customary law of Nnewi is known as *Oli-ekpe* and under it, only the male can inherit. The trial judge decided that the applicable law is the *lex situs* (that is, the law where the land situates, in this case, the customary law of Mgbelekeke family of Onitsha) and not the *Oli-okpe*, which is the customary law of Nnewi. On appeal, the Nigerian Court of Appeal agreed with the trial court that the applicable law is the *lex situs*, which is the law where the land situates, in this case, the customary law of Mgbelekeke family of Onitsha.

The appellant claims to be that '*Oli-ekpe*'. Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read of about customs, which discriminate against the womenfolk in this country. They are regarded as inferior to menfolk. Why should it be so? All human beings, male and female are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi *Oli-ekpe* custom relied upon by the appellant are not consistent with our civilized world in which we all live today, including the appellant ... Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the *Oli-ekpe* custom of Nnewi is repugnant to natural justice, equity and good conscience.⁹⁹

The constitutionality of the customary rule of primogeniture was considered by the South African Constitutional Court in *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the Republic of South Africa*.¹⁰⁰ In that case, it was contended that the rule of primogeniture which precludes: (a) widows from inheriting as the intestate heirs of their late husband; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents, and (d) extra-marital children from inheriting from their fathers constitute unfair discrimination on the basis of gender and birth and form part of a scheme underpinned by male domination.¹⁰¹ The court agreed with these submissions and found primogeniture rule discriminatory and therefore inconsistent with the Constitution. The court held *inter alia*:

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.¹⁰²

99 At 304-305; See also, *Mojekwu v Ejikemi* [2000] 5 NWLR (pt 657) 403 at 429, where it was held that the "*Nrachi Nwanyiri*" customary practice of Nnewi, (eastern Nigeria) which enables a man to keep one of his daughters unmarried perpetually under his roof to raise male issues to succeed him encourages promiscuity and prostitution and therefore very discriminatory; Also, in *Meriba v Egwu* [1976] 1 All NLR 266, the traditional practice in the Igbo land of Nigeria which allowed marriage between two women to cater for well-to-do female members of society who were unable to conceive was declared a nullity by the Supreme Court because it found the traditional practice inconsistent with natural justice, equity and good conscience.

100 2005 1 BCLR 1 (hereinafter shortened as *Bhe's case*). Langa DCJ (as he then was) delivered the majority judgment which Chaskalson, CJ, Madala, Mokgoro, Moseneke, O'Regan, Sachs, Skweyiya, Yacoob & Van der Westhuizen, JJ concurred in. Ngcobo J dissented.

101 *Bhe's case* para [88].

102 *Bhe's case* para [91].

The primogeniture also violates the right of women to dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property ...¹⁰³

It is submitted that the effect of the decisions in *Mojekwu's* case and *Bhe's* case is that they have overruled earlier decisions in both jurisdictions where the primogeniture rules have been accepted as valid rule of customary law of succession.¹⁰⁴ The Court of Appeal pronouncement in *Mojekwu's* case represents a turning point in Nigerian jurisprudence, as the court scrutinised the customary law rule of inheritance through human rights lens. As a result, the case has been cited severally by women's human rights activists and proponents.

However, the Court of Appeal pronouncement in *Mojekwu's* case has been criticised and condemned by the Supreme Court when the case came before it on appeal in *Mojekwu v Iwuchukwu*.¹⁰⁵ The names of the parties changed because, when the matter was pending before the Supreme Court, Caroline Mojekwu (the original party to the suit), died and was substituted with her daughter, Mrs. Iwuchukwu. The legal issue before the Supreme Court was whether the Court of Appeal erred in holding the *Ili-ekpe* custom to be repugnant and contrary to the gender equality provisions under the constitution and pertinent international human rights instruments.

103 *Bhe's* case para [92].

104 See for example, the Nigerian case of *Ogamiem v Ogamiem* (1967) NMLR 245, where the court refused to declare the custom of primogeniture as contrary to natural justice, equity and good conscience. The court upheld the custom of primogeniture in the *Benin* kingdom which allows the eldest son to take the whole of the father's estate to the exclusion of other children of a father who died intestate. The court was satisfied that the custom imposed responsibility on the eldest son to look after the young members of the family out of the estate as a kind of *pater familias* which existed under the Roman law (at 247). See also, Ademola 1991: 162. See also, the South African case of *Mthembu v Letsela* 1997 2 SA 936 (T). In this case, the applicant averred that the primogeniture rule unfairly discriminates between persons on the ground of sex or gender and is therefore in conflict with the provisions of the Constitution which outlaws discrimination on these grounds. Le Roux, J ruled that the duty to provide sustenance, maintenance and shelter is a necessary corollary of the system of primogeniture, and it was therefore difficult to equate it this form of differentiation between men and women with the concept of "unfair discrimination" used in the Constitution. He further held that the customary law was neither contrary to public policy nor natural justice. He noted that there are other instances where a rule differentiates between men and women, but which no right-minded person considers to be unfairly discriminatory, for example the provision of separate toilet facilities. It follows that, even if this rule of succession is *prima facie* discriminatory on the ground of sex or gender and the presumption contained in section 8 (4) of the Interim Constitution comes into operation; this presumption has been refuted by the concomitant duty of support. In the finding of facts before Mynhardt, J in the same case of *Mthembu v Letsela* 1998 2 SA 657 (T), the Court confirmed the judgement of Le Roux J and held as follow: "If I were to accede ... and declare the customary law rule of succession invalid because it offends against public policy, I would be applying Western norms to a rule of customary law which is still adhered to and applied by many African people" (at 688).

105 [2004] 4 SC (pt II) 1.

The Supreme Court held that the rules of procedure precluded the Court of Appeal from determining whether *lli-ekpe* custom was repugnant since neither of the parties to the case brought the validity of the custom as a legal issue before the court. The court, per Uwaifo, JSC criticised the Court of Appeal pronouncement as follows:

I cannot see any justification for the court below to pronounce that the Nnewi native custom of '[o]li-ekpe' was repugnant to natural justice equity and good conscience ... the learned justice of appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against all customs which fail to recognize a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities.

The Supreme Court upheld the Court of Appeal judgment in the case because, in its view, it did not result in miscarriage of justice, as the *Kola tenancy* was indeed the applicable law, and thus, the respondent and her family were rightfully held to be the owners of the property in issue. It, however, held that Court of Appeal erred in holding that the *lli-ekpe* custom is repugnant to natural justice.

This decision, however, raises considerable doubt as to whether the apex court would fulfil the rights guaranteed women by international, regional and national laws by its present approach on discriminatory inheritance customs. The court is of the view that similar customs, such as those that exclude women from being family heads would not be discountenanced without hearing from the communities in question. While this sounds logical, however, the statement reveals that the court is not eager to deem such customs discriminatory since they represent the ways of life of the people in question. It is submitted that this decision could have the chilling effect of dissuading lower courts from using human rights to challenge customary law rules that exclude women from property inheritance. As considered below, this approach is in contrast with the South African position where the customary law rule is to be enforced subject to the Bill of Rights and constitutional provisions.¹⁰⁶ It is hoped that in not far a distance future, the Supreme Court will review this decision and makes its position clear on the issue.

106 See section 31(2) of the 1996 South African Constitution which provides that the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights. See also, section 211(3) of the Constitution which also provides that: "[t]he courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

5. Recognition of customary law and repugnancy clause: the South African position

Before the 1993 South African Interim Constitution, customary law was never fully recognised as a basic component of the South African legal system. Instead, Roman-Dutch law was treated as the common law of the land.¹⁰⁷ This unequal relationship began with the foundation of a settlement by the Dutch East India Company in 1652.¹⁰⁸ Bennett states, however, that the most convenient point at which to begin a history of the policies governing recognition of customary law is Britain's acquisition of the Cape in 1814, when the Netherlands formally ceded its rights to the territory.¹⁰⁹ Under the British colonial policy of the time, the local laws of the new colonies were retained in force, provided that they were suitably civilised. Roman-Dutch law was considered a civilized system; it was therefore maintained as the basic law of the colony while any other systems of law were simply ignored.¹¹⁰ This was a policy of non-recognition.¹¹¹ While the policy was workable in the Colony, it encountered resistance as the colonial rule expanded into other parts of South Africa.¹¹²

After the South African War, differences between the judicial and legal system of the four territories were clearly incompatible with the proposed merger into a union of South Africa.¹¹³ The situation was described as "chaotic state of affairs" and uncertain which was not compatible with a unified nation.¹¹⁴ In 1903, Britain convened a Commission to propose a common "native" policy for South Africa.¹¹⁵ In 1905, the Commission reported, its recommendation echoed those of the earlier Cape Commission. It observed that because customary law was so much a part of the people's lives, recognition should continue, but the ultimate goal should still be assimilation.¹¹⁶ In 1927, the government introduced the Native Administration Act 38 as part of its programme to re-

107 Bennett 2004:34.

108 Bennett 2004:34 & 35.

109 Bennett 2004:35.

110 See *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jurist 72 at 78; see also, Bennett 2004:35.

111 Once an area had been subjugated, inhabitants were to be persuaded to relinquish their tribal ways in favour of Christianity and British notion of civilisation. As a step in that direction, the colonial government set out to undermine traditional authority. Magistrates were given sole responsibility for the administration of justice, with the result that chiefs lost their judicial powers. See Bennett 2004:35-36.

112 For detailed discussions on the history of recognition of customary or indigenous law in various parts of modern South Africa, see Bennett 2004:34-44.

113 For instance, in the Transkei, only magistrates' courts could apply customary law and then only certain part of it. In British Buchuanaland, traditional leaders had largely unfettered jurisdiction and they regularly applied customary law. Natal had a codified system of customary law and indirect rule. The Cape had an established policy of non-recognition, and the Transvaal refused to countenance the basic institutions of the African family life. See Bennett 2004:40.

114 See in this regard, *Sekelini v Sekelini & Others* (1904) 21 SC 118 at 124; *Roodt v Lake & Others* (1906) 23 SC 561 at 564.

115 The Commission was chaired by Sir Godfrey Lagden.

116 See Bennett 2004:41.

establish traditional authority. The Act allowed customary law to be applied nation-wide, but only in a separate system of courts, constituted by traditional leaders and native commissioners. While the courts of traditional leaders could apply only customary law, the courts of native commissioners (together with their Appeal Court) had a discretion to apply either customary or common law in any “suits or proceedings between Natives involving questions of customs followed by Natives ...”¹¹⁷ Although, customary law was not entirely excluded from magistrates’ courts and the Supreme Court, it had to be proven in each case, as if it were a foreign law or a species of common-law custom.¹¹⁸

The application of customary law is subject to “repugnancy” proviso, namely, a provision that customary law may not be applied if it is contrary to natural justice or public policy.¹¹⁹ Bennett asserts that even during the colonial era, implementation of the repugnancy clause was complicated by the generality of its terms and vagueness as to when it could be raised.¹²⁰ He submits that courts exercised remarkable restraint in its application. They applied the repugnancy proviso only with regard “to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence.”¹²¹ Bennett further points out that as a result of this restraint, customary law was declared repugnant in only a handful of cases.¹²² These were mainly concerned with matters of personal liberty,¹²³ sexual immorality,¹²⁴ succession by illegitimate children¹²⁵ or, sometimes, plain injustice.¹²⁶

Repugnancy doctrine has not received favour of the natives and has been criticised for supplanting indigenous law in its land. Peart questioned its rationale:

The immediate question is: whose ethics are to be violated if the repugnancy clause is to be invoked? While the concept of natural law would tend to suggest a universal system, the concept of public policy would suggest a system of values pertaining to a particular society. As Marshall points out in his book *Natural justice* (at 172): ‘what is fair play, moral and humane in one country need not be so in another. Values, standards and principles vary from place to place and from time to time.’ It is clear from the legislation and the practice of the courts that customary law is not judged in terms of an African system of values but exclusively in terms of a European system, because the very existence of a repugnancy clause indicates that the customary system of law to be applied is subject to another system of law which is more general in

117 See section 11(1) of the *Native (later Black) Administration Act*.

118 See Bennett 2004:42 & 44-45.

119 See Bennett 2004:67.

120 See Bennett 2004:67-68.

121 See *Chiduku v Chidano* 1922 SR 55 at 58; *Matiyenga & Another v Chinamura & Others* 1958 SRN 829 at 831.

122 See Bennett 2004:68.

123 See *Gidja v Yingwane* 1944 NAC (N&T) 4

124 See *Linda v Shoba* 1959 NAC 22 (NE); *Palamahashi v Tshamane* 1947 NAC (C&O) 93.

125 See *Madyibi v Nguva* 1944 NAC (C&O) 36; *Qakamba & Another v Qakamba* 1964 BAC 20 (S).

126 See *Gidja v Yingwane* 1944 NAC (N&T) 4; *Mcitakali v Nkosiyaiboni* 1951 NAC 298 (S).

its application. The Common law is not ... subject to the repugnancy clause, for example. The danger is, however, that if customary law is to be struck down because it is in conflict with European notions of morality and ethics, there may be little left of customary law.¹²⁷

However, most African countries repealed the repugnancy proviso when they obtained independence. In South Africa context, it is observed that repugnancy proviso had outlived its usefulness. Bennett asserts that hardly any reference has been made to it in South Africa for the last forty years.¹²⁸ At present, the recognition and application of customary law, however, rests on a right to culture, for which special provision is made in sections 30 and 31 of the 1996 South African Constitution. Although neither section in fact makes any reference to customary law, it is generally taken to be a significant element of the African cultural tradition.¹²⁹ Similarly, section 211(3) of the Constitution recognises the importance of customary law in the society as it provides that: “[t]he courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” Also, section 31(2) of the Constitution provides that the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

It is observed that these constitutional provisions give the courts an occasion to revive the repugnancy clause in order to screen customary law for compliance with the Bill of Rights.¹³⁰ Bennett, however, submits that in principle, it would be wrong to use such a colonial anachronism for this purpose.¹³¹ He opines that “the repugnancy clause, which will always be linked to colonialism, should not be used to skirt the established methods of determining application of the Bill of Rights (especially under section 36 of the Constitution, the limitation clause).”¹³²

6. Transformation/Modification of customary law rules

Under the Nigerian legal system, rules of customary law are treated as statement of facts and as such, they need to be proved to establish its existence and validity. Because the procedure in the English established courts where the customary law rules are to be proved where based on different principles and ideas of law, the exercise is seen as subjecting the customary law to a second position in its own land. It is described as mean of relegating the indigenous law to imperial law. It is asserted that one feature of the repugnancy clause is that it presents customary law as a system of law inferior to the received

127 Peart 1982:110.

128 See Bennett 2004:68.

129 See Bennett 2004:78.

130 See *Mthembu v Letsela & Anor* 1998 (2) SA 675 (T) at 688 and 2000 (3) SA 867 (SCA) paras 40 & 47.

131 See Bennett 2004:68.

132 See Bennett 2004:68.

English law.¹³³ Thus, any rule of Native law and custom which comes in conflict with the Common law or any statutory law must give way.¹³⁴

However, courts sometimes modify customary law rules in the process of judicial interpretation. The effect of such approach is that it transforms the customary law from what is generally acceptable as binding within the community to judicial perception of what is fair and just which is capable of distorting customary law rules. The facts of the case of *Gidja v Yingwane*,¹³⁵ quite illustrate this point. In the case, the parties were *Shangaans* (Mozambicans) living in Natal. The Court of the Native Commissioner referred to authorities on *Shangaan* Custom, according to whom it is a well-recognised custom that when a *Shangaan* wife dies childless in early marriage the guardian must, when requested by the husband, provide a substitute wife or, if unable or unwilling to do so, he must refund all the *lobola* received for the deceased wife. He refused to follow these authorities, and on appeal, the Native Appeal Court endorsed the ruling of the court and held: “it is not always in the interests of the Natives themselves to give the court’s sanction to all their present day alleged customs. It is one of the functions of this court to interpret native law and custom in conformity with civilized idea of what is fair and just.”

Also, courts have sometimes employed a more liberal approach whereby the good aspects of customary law rules are upheld while the offensive parts considered repugnant are eliminated. This liberal approach was adopted in *Re White*¹³⁶ wherein, the court refused to apply the rule of customary law *in toto*. In that case, according to the *Fanti* customary law, the property of a deceased, a *Fanti*, would have gone to his sister but the Administrator-General refused to apply this rule, instead, the property was distributed between the deceased’s sister and her daughter. The court upheld this mode of distribution as equitable. 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.¹³⁷

133 Koyana 2002:104.

134 See *Nbono v Manxiweni* (1891) 6 EDC 62; *Ntame v Mbede* 3 NAC 94 (912); See also, *Eshugbayi Eleko v Officer Administering the Government of Nigeria & Ors* (1931) AC 662, 673 where the Privy Council held that customary law is either good or bad and that the court cannot itself transform a barbarous custom into a milder one. If a rule of customary law still stands in its barbarous character, it must be rejected as repugnant to “natural justice equity and good conscience.”

135 1944 NAC (N&T) 4.

136 (1946) 18 NLR 70.

137 Koyana submits that the repugnancy clause is anachronism, discriminatory and should be repealed from the statute books. He asserts that in some African countries such as Tanzania and Ghana, the repugnancy clause has been dropped from their laws. It was considered unfitting to the dignity of the indigenous laws of the people of those countries to suggest that repugnancy clause existed. See Koyana 2002:104 & 107.

7. Legislative reform and recommendations

It is conceded that the “repugnancy doctrine” was routinely employed in a legal “cleansing” mission, and was the engine for the imposition of hegemonic, foreign culture. Nevertheless, it is undisputable that repugnancy doctrine has contributed greatly to the development of Nigerian customary law. It has refined and modified obnoxious rules of customary law in tune with modern day realities. It is canvassed, however, that the application of repugnancy by the courts for decades (more than a century) should have resulted in a satisfactory obliteration of those customary law rules considered repugnant. In as much as this writer is not advocating for the return of the obnoxious and barbarous customary law rules into the body of Nigerian law, it is submitted, however, that the retention of the colonial clause of repugnancy doctrine in Nigerian statute books has outlived its purpose. It sends a wrong signal that the country still retains obnoxious customary law.

This article therefore calls for an interpretive approach on customary law that ensures its survival and adaptation to the dictates of equality in an egalitarian society. It will serve us a real good if customary law is placed on the same pedestal and status as the English law. It is further submitted, that considerable caution should be taken in the uncritical and contemporary use of the repugnancy doctrine and its precedents under the Nigerian law. Throughout Africa, post-colonial governments have paid close attention to customary law.¹³⁸ The position in South Africa presents a model for Nigeria to follow. Codification and recognition of customary law as justiciable right in the constitution (as in South Africa) will help in preserving Nigerian customary law.

8. Conclusion

This article begins with the meanings of customary law, repugnancy doctrine and the phrase “natural justice, equity and good conscience.” It discusses the origin and reception of English law as well as the introduction of repugnancy doctrine in the country. The article further examines the various High courts laws on which repugnancy doctrine is based. These provisions recognise the customary law rules provided they are not contrary to public policy, natural justice, equity and good conscience. Once a rule of customary law is declared repugnant, it will be jettisoned and declared invalid. Decisions of South African and Nigerian courts which buttressed this point are also examined. The article found that repugnancy doctrine has brought about positive effect on the development of customary law in Nigeria in the sense that harsh aspects of Nigerian customary law have been jettisoned on account of being contrary to natural justice, equity and good conscience.

¹³⁸ South African Law Commission has been forthcoming in this respect. Several aspects of customary law have been reviewed under the auspices of Project 90: The Harmonization of the Common Law and the Indigenous Law: Succession in Customary Law. Other African countries such as Ghana, Zimbabwe and Zambia have at one time or the other carried out comprehensive review of their customary law. See South African Law Commission 2000:34.

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The article further compares the South African and Nigerian positions on repugnancy doctrine. It found that South Africa has given due recognition to indigenous law by elevating it to the same pedestal with other laws. The South African Constitution obliges courts to apply customary law subject only to the Constitution and specific law on customary law. This is a bold step towards preserving customary law. On the contrary, Nigeria has not accorded similar recognition to customary law but still subjects its validity and recognition to the repugnancy test. This article therefore concludes that in order to preserve customary law in Nigeria, the South African approach on the issue should be emulated.

Bibliography

- ADEMOLA A
1991. *Customary law and the doctrine of repugnance: Marriage and succession judicial lectures, continuing, education for the judiciary*. Lagos: MIJ Professional Publishers Ltd.
- AJAYI FA
1958. Judicial approach to customary law in Southern Nigeria. (Unpublished PhD Thesis): London University.
- ALLOTT A
1977. The people as lawmakers: Custom, practice and public opinion as source of law in Africa and England. *Journal of African Law* 21(1):1-23.
- ANDERSON JND
1970. *Islamic law in Africa*. London: Frank Cases & Co.
- BENNETT TW
1999. *Human rights and African customary law under the South African Constitution*. Lansdowne: Juta.
2004. *Customary law in South Africa*. Lansdowne: Juta.
- BOGDAN M
1994. *Comparative law*. Stockholm: Kluwer Norstedts Juridik Tano.
- BRONSTEIN V
1998. Reconceptualizing the customary law debate in South Africa. *South African Journal of Human Rights* 14(3):388-410.
- DUNCAN P
1960. *Sotho laws and custom*. Cape Town: Oxford University Press.
- ELIAS TO
1956. *The nature of African customary law*. Manchester: Manchester University Press.
- FABUNMI JO
1986. *Equity and trusts in Nigeria*. Ile-Ife: University of Ife Press Ltd.
- JAGWANTH S AND KALULA E (Eds)
2001. *Equality law: Reflections from South Africa and elsewhere*. Cape Town: Juta.
- JUMA L
2007. From 'repugnancy' to 'bill of rights': African customary law and human rights in Lesotho and South Africa. *Speculum Juris*:88-112.
- KERR AJ
1990. *The customary law of immovable property and of succession*. 3rd ed. Grahamstown: Grocott & Sherry.
1994. Customary law, fundamental rights, and the Constitution. *South African Law Journal* 111(4):720-735.
1997. The bill of rights in the new Constitution and customary law. *South African Law Journal* 114(2):346-355.
1998. Inheritance in customary law under the Interim Constitution and under the present Constitution. *South African Law Journal* 115(2):262-270.
- KOYANA DS
2002. The indomitable repugnancy clause. *Obiter* 23(1):98.
- MBATHA L
2002. Reforming the customary law of succession. *South African Journal on Human Rights* 18:259-286.
- MEGARRY RE AND WADE HWR
1984. *The law of real property*. 5th ed. London: Stevens.
- MQEKE RB
2003. *Customary law and the new millennium*. Alice: Lovedale Press.
- MURRAY C (Ed)
1994. *Gender and the new South African legal order*. Cape Town: Juta.
- OBILADE AO
1990. *The Nigerian legal system*. Ibadan: Spectrum Law Publishing.

Taiwo/Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria

- OKUNNIGA AAO
1984. *Transplants and mongrels and the law: The Nigerian experiment*. An inaugural lecture series No. 60. Ile-Ife: University of Ife Press.
- OMOTOLA AJ
2003. Primogeniture and illegitimacy in African customary law: The battle for survival of culture. *Speculum Juris* 17(2):181-203.
- PARK AEW
1963. *The sources of Nigerian law*. Lagos: Sweet & Maxwell.
- PEART NS
1982. Section 11(1) of the Black Administration Act 38 of 1927: The application of the repugnancy clause. *Acta Juridica*:99.
- ROBINSON KL
1995. The minority and subordinate status of African women under customary law. *South African Journal of Human Rights* 11:457-476.
- SACCO
1991. Legal formant: A dynamic approach to comparative law. *African Journal of Comparative Law*:1.
- SOUTH AFRICAN LAW COMMISSION
1998. The harmonization of the common law and the indigenous law: Succession in customary law (Project 90) Issue Paper 12 (April 1998).
2000. Customary law: Succession (Project 90) Discussion Paper 93 (August 2000).
- TAIWO EA
2008. Justifications, challenges and constitutionality of the penal aspects of shari'ah law in Nigeria. *Griffith Law Review* 19(1):183-202.
- TOBI N
1996. *Sources of Nigerian law*. Lagos: MIJ Publishers.
- UWERU BC
2008. Repugnancy doctrine and customary law in Nigeria: A positive aspect of British colonialism. *African Research Review* 2(2):286-295.
- VAN DER MEIDE W
1999. Gender equality v right to culture: Debunking the perceived conflicts preventing the reform of the marital property regime of the "official version" of customary law. *South African Law Journal* 116:100.
- VAN NIEKERK GJ
2005. Succession, living indigenous law and *ubuntu* in constitutional court. *Obiter* 26(3):474-487.
- YAKUBU JA
1995. The application of the repugnancy doctrine topPaternity cases in Nigeria. *The African Society of International and Comparative Law* 7(1):129.
2002. Colonialism, customary law and post-colonial state in Africa: The case of Nigeria. A paper presented at the CODESRIA's 10th General Assembly on Africa in the New Millennium, Kampala, Uganda (8-12 December 2002).