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The subjection of customary laws to repugnancy tests by Nigerian courts; the need to broaden the Horizon

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Abstract
The concept of Repugnancy tests in Nigeria date back to the colonial days till date, when the colonial overlords sat to adjudicate cases brought before them bordering on native laws and customs. They refused to recognize and enforce customary laws. The Nigeria constitution and the evidence Act recognized customary laws and state the situations and how customary laws are to be recognized and enforced. The primary objectives of this paper will therefore be to identify the reasons why the colonial courts subjected the customary laws to Repugnancy tests and the post colonial Nigeria courts are still subjecting customary laws to Repugnancy tests before applying them. This paper will approach the concept of Repugnancy by reference to the law text books, Law reports, Internet sources, Newspaper publications. The findings in this paper are that many of the Nigeria customary laws need to be further subjected to Repugnancy tests beyond those that have already undergone tests. The Nigeria constitution guaranteed freedom from discriminations based on sex, Race, ethnic and circumstances of birth. This paper will bring to the bare a few cases and instances the Nigeria courts have made pronouncements of Repugnancy This paper will make recommendations toward broadening the scope of this Repugnancy tests.

Keywords: repugnancy tests, barbaric culture, gender differential, natural justice and equity

Introduction
The subjection of customary laws to Repugnancy tests in Nigeria courts during the colonial and the post colonial era has attracted the attention and criticisms of different stakeholders, such as Judges, Lawyers, and legal analysts depending on your point of view. Notwithstanding the persistence of concern and criticisms of different stakeholders, Repugnancy tests on several Nigeria customs have continued and the Nigeria courts having been making landmark decisions in that respect. Many writers in the past and present notably Professor E I Nwogugu (1974) [1] Professor Obilade A O (1979) [2], Professor Nwebo O E (1995) [3] among others have dwelt on this subject matter of the Repugnancy tests on several Nigeria customary laws. When issues of subjection of customary law to Repugnancy tests are brought before the courts, the courts have never failed in condemning barbaric customs. The courts have set aside several Nigeria customs on the ground that such customs failed the Repugnancy tests. In some instances, courts have made conflicting decisions on the same custom. Notwithstanding scholarly efforts and Judges contributions in condemning every trace of barbaric customs, those barbaric cultural practices have persisted in many Nigeria societies. After Nigeria political independence, Nigeria courts continued subjecting several indigenous customs to repugnancy tests. In the light of these tests, Academics and other legal minded personalities have made useful contributions toward customary law reforms and it is still ongoing. The constitutional provisions of the Federal Republic of Nigeria 1999 have been a useful reference points when there is a need to subject any custom to repugnancy test. There is no doubt that a discussion of this nature will serve the immediate and future needs for advancement of Nigeria legal jurisprudence.

Definition
Customary law is the rules, practices and norms of a particular community which regulate the lives of the adherents and which they accept as binding upon them.
The customs, rules, traditions, ethos and cultures which govern the relationship of members of a given community are generally regarded as customary law of the people [4].
Customary law generally means customs and usage of a given community. Customary law emerges from traditional usage and practice of a people in a given community, which by common adoption and acquiescence on their part, and by long and unvarying habit, has acquired to some extent, element of compulsion and force of law with reference to the community. And because of the element of compulsion which it has acquired over the years by constant, consistent and community usage, it attracts sanction of different kind and enforceable [5].
The customs, rules, traditions, ethos and cultures which govern the relationship of members of a given are generally regarded as customary law of a the people
Better still the black's law dictionary [6] defines customary law as: "practice that by its common adoption and long, unvarying habit have come to have the force of law"
The British overlords recognized these customary laws and referred to them as Native laws and customs and so established Native Authority Courts. In further recognition of Native laws and customs, Courts are to apply customary laws in matters of chieftaincy, marriage, family inheritance and succession to customary property and so on.

Repugnancy test

This is a practice whereby the courts declare whether or not a custom is inconsistent or contradictory to natural justice or simply barbaric depending on the views of the presiding Judge.

Characteristics of the Nigerian Customary law

1. Generally accepted to the community: People of that community where the customary law operates accept and obey it voluntarily and habitually, not by compulsion. The customs are binding on the people. More so, the customs reflect the people's natural ways of life. The case of owonyin v. Omotosho (1961) pointed out that the customary law must be of accepted usage. It further stated that it must be in existence at the relevant time. Speak ACJ also said in Lewis v. Bankole [7] that the customary law must be an existing native law and not that of a bye gone days.
2. Flexibility: The customary laws adapt to changing circumstance. It is therefore dynamic. Its dynamism does not remove its character or substance. The flexibility was further brought to the open by Speak A C. J. in Lewis v. Bankole [8] where he pointed that customary law adapts to varying circumstance while the character remains. Also in Dawodu v Danmole [9], it was pointed out that the Yoruba custom of sharing deceased man's intestate property according to the number of wives (that is the Idi igi custom) could be set aside for an alternative custom called Ori-ojori; in which case, it would be shared according to the number of children the deceased had. The later custom helps in diffusing tension among the children. So flexibility had been in the character of the African native laws and customs before the advent of colonialism. Flexibility of African customary laws was not a creation of colonial adventure nor was it as a result of partitioning of African at the Berlin conference.
3. Unwritten feature: The old traditional or native African Society did not have any form of writing, and such, indigenous customary laws were not written down for one to consult from time to time. The people concerned carry it in their mind and pass it on to their offspring through words of mouth, yet it has survived the ages till date. There is no gain saying that it would have been better if customary laws had been written. Unfortunately the precolonial African society did not have formal western education that could have aided the documentation of African customary laws; never the less indigenous customary laws had survived despite all odds. However there have been skeletal efforts by scholars to document customary laws.
4. Customary law must be certain and not promote immorality. A customary laws must be certain and well known to the people at all times and should not be the type that would promote immorality. In Re Adedovour [10] it was held that a custom that encourage sexual immorality and promiscuity is not in conformity with African tradition. This decision clearly brought to open that Africans and their ways of life do not tolerate disrespect to elder, lustful attitude to the opposite sex and generally abhors moral laxity.
5. Customary law must be reasonable and not go against common sense. In Edet v. Essien [11] a man who had been jilted by his bride to be, later went and claimed the two children she had for another husband, on the ground that his partly paid dowry were not refunded. Carey J held that such custom which permitted that attitude of the jilted man was unreasonable.
6. No physical machinery of enforcement: There are no policemen in uniform as in the modern day to compel the obedience customary law; rather its sanctions are based on fear of the wrath of gods or deities. On serious instances, the culprit could be ostracized as when a free born in Igbo land in the south east Nigeria marries an outcast (referred in local dialect as OSU), he is ostracized. The belief is that if a freeborn marries an Osu caste person, he automatically becomes an osu whether he likes it or not. The customary law explanation is that, the family members of non Osu such victim would suffer calamities ranging from insanity to untimely death, if the culprit fails to move to the Osu clan having had sexual dealings with the Osu person. It is the fear of the unknown calamities that compel the natives to obey the customs without being compelled to do so.

Proof of Customary Law

1. The Nigeria EVIDENCE ACT [12] provides that customary law can be proven by calling
2. Evidence; the burden of proving a custom by evidence (calling witness) lies upon the person alleging its existence. The Nigeria legal jurisprudence is hinged of the concept of he who alleges must prove. He who alleges that a particular custom exist must himself establish by credible evidence that such a custom is actually in operation
3. A custom may be judicially noticed if the courts have acted upon such customs several times; in which case, it needs not to be proved before such courts or superior court [13]. Native law and customs are matter of evidence to be decided on fact as presented before the court, unless it is of such notoriety and has been so frequently followed by the court that judicial notice would be taken of it without proof of evidence. Such evidence usually based on tradition has to be averred on pleading and proved in accordance with the custom of a particular family or community [14].
4. Chiefs or traditional rulers and elders of such a community may be called testify as to the existence of such customs. One or two witnesses may suffice to prove the custom. However evidence of one witness which is cogent and credible is sufficient to prove the existence of the custom in question.
5. Literally works or books, if any, written by renowned authors, well vast in the custom of the particular community could be referred to, tendered and admitted in evidence.
6. Assessors from the community could be invited.
7. A customary court sitting in a locality where its members are also from the same locality, need no body to prove the existence of the custom. The president of the court and the other members already know the customs. It is as good as saying that the customs of the locality are judicially known.

How valid is customary law?

The British recognized Nigeria native laws and customs. Customary laws were applied provided such customs are not repugnant to natural justice, equity and good conscience. 2ndly, such customs should not be incompatible with any written law. Thirdly, such customs should not be contrary to public policy.

Lets us consider some customs held to be repugnant to natural justice, equity and good conscience

In Edet v. Essien [15] a man who had been jilted by his bride to be, later went and claimed the two children she had for another husband, on the ground that his partly paid dowry were not refunded. The court held that such custom which permitted that attitude of the jilted man was repugnant to natural justice equity and good conscience.

Again, in Re Affiong Okon Ata [16], it was held to be repugnant to natural justice, equity and good conscience, for a slave owner to turn around and administer the deceased slave property.

A culture might be held not repugnant to natural justice, equity and good conscience by court and in another similar circumstance, another court will hold the same culture to be repugnant to natural justice, equity and good conscience. It would appear therefore that repugnancy is a subjective test. It is indeed a subjective one.

Here below, a custom was held NOT repugnant to natural justice, equity and good conscience

To buttress this assertion is the case of Ugboma v Ibeneme &a nor [17]. In that case, one Rev. Ibeneme, a native of awkuzu in Anambra Local government Area of Anambra state Nigeria died intestate leaving a number of landed property at Onitsha including No. 44, New Market Road. He was survived by two sons and several daughters. The plaintiffs are the second son and six of his sisters. The first defendant is the eldest son and head of late Rev. Ibeneme's family. The first defendant sold and conveyed No. 44, New Market Road, Onitsha to the 2nd defendant. The issue before the court was whether the first defendant is entitled to sell and convey the said property to the 2nd defendant to the exclusion of the Plaintiffs. The plaintiffs in their pleadings sought the following reliefs: 1. a declaration that the property in question, being the joint property of all the children of Ibeneme, could not be sold and conveyed by the first defendant alone. 2. an order of the honourable court setting aside the sale, the deed of conveyance and 3, an order that the second defendant should account for the proceeds of the sale. The learned trial judge, Egbuna J., held, towing the line of the laid down Igbo custom in south eastern Nigeria that women are not entitled to inherit landed property from their late father.

This custom is really an unfortunate one for the Igbo woman; but none the less, the daughter of a deceased must be maintained by whoever inherited her late father's estate until the daughter becomes an independent adult or whenever she marries or dies

Here below the same custom was held to be repugnant to natural justice, equity and good conscience

Lately, in what appears to be a devine intervention, the Supreme Court of Nigeria had declared those cultures that exclude women and widows from inheritance as being repugnant to natural justice, equity and good conscience in line with the repugnancy test. We shall analyze these cases with their facts to bring out their relevance to this discussion

i.Mrs Lois Chituru Ukeje Administratrix of the estate of L.O Ukeje (Deceased) ii. Enyinnaya Lazarus Ukeje Administrator of the estate of L.O Ukeje (Deceased) and for himself and on behalf of the other children of L.O Ukeje (except the Plaintiff) v. Miss Gladys Ada Ukeje [18],

Summary of the facts are

On 27th December 1981, Lazarus Ogbonnaya Ukeje, a native of Umuahia in lmo State died intestate. He had a real property in Lagos State and for most of his life was resident in Lagos State. The first appellant got married to the deceased on 13th Deccember 1956. There are four children of the marriage. The respondent is not one of the four. After Lazarus Ogbonnaya Ukeje died, the first and second appellants (mother and son) obtained letters of administration for and over the deceased's estate. On being aware of this development, the Plaintiff/Respondent filed an action in court wherein she claimed to be a daughter of the deceased and by virtue of that fact had a right to partake in the sharing of her late father's estates. Her claims before a Lagos High Court were for:

1. A declaration that the plaintiff, as a daughter of one L.O. Ukeje (deceased), is the person entitled to the estate or one of the persons entitled to share in the estate of the said L.O. Ukeje (deceased).
2. An order that the grant of letters of administration dated 15 June 1982 made to the first and second defendants in respect of the estate of the said L.O.Ukeje (deceased) be revoked and declaring the same to be null and void to all intents and purposes in law.
3. An order of injunction restraining the first and second defendants from administering the estate of the said L.O. Ukeje (deceased) and relying on the said letters of administration dated 15 June 1982 granted to them and/or holding themselves out as administrators of the said estate to members of the public and/or transacting any business with any person in respect of the said estate of the said L.O. Ukeje (deceased).
4. An order that the first and second defendants prepare an inventory of all and singular the estate and/or render account of all monies, transactions and/or properties which have come into their possession since the grant of the said letters of administration of the estate of Mr. L.O. Ukeje (deceased).
5. An order that the grant of letters of administration of the said L.O. Ukeje (deceased) be made to the plaintiff and the second defendant.

Pleadings were filed and exchanged. The statement of claim was filed on 22 February 1983, and the statement of defence on 27 April 1983. The statement of defence was subsequently amended

five times and finally on 18 June 1990. A reply to statement of defence was filed on 9 November 1984, amended on 15 April 1986 and 24 November 1986. The first witness, the plaintiff, gave evidence on 31 May 1984.

The Plaintiff's case was closed after her mother concluded her evidence on 8 November 1985 as PW2.

Rhodes-Vivour JSC (Delivering the Lead Judgment): held thus below:

This appeal is on the paternity of the Respondent; Whether the Respondent is a daughter of. O. Ukeje (deceased). L. O. Ukeje deceased is subject to the lgbo Customary Law. Agreeing with the High Court, the Court of Appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting in her late father's estate is void as it conflicts with sections 39(1)(a) and (2) of the 1979 Constitution (as amended). This finding was affirmed by the Court of Appeal. There is no appeal on it. The findings remain inviolate.

Sections 39(1) (a) and (2) of the 1979 Constitution is now contained in the 1999 Constitution as section 42(1) (a); (2) and it states that:

"42(1) 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 of other communities, ethnic groups, places of origin, sex, religion or political opinions are made subject: or,..

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

No matter the circumstances of the birth of a female child, such a child' is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution.

In the light of all that I have been saying, the appeal is dismissed. In the spirit of reconciliations, parties to bear their own costs. The learned justice concluded in that note.

These two conflicted decisions on the similar culture threw some lights on this issue of repugnancy test. It appears subjective according to the view and cultural background of the Judges. On the first case of Ugboma v Ibeneme & anor [19] the Judge did not see anything repugnant to natural justice, equity and good conscience. The reason is not farfetched. The learned trial judge, Egbuna J was a Judge of the Igbo extraction where the custom of disinheriting of female in real property was prevalent. Egbuna J heard the case as first instance, sitting as a sole judge. In the second case and more recent decision was handed down by the Supreme Court in what is popularly referred as Ukeje v. Ukeje [20] wherein the justices unanimously held that same culture which disinherited females in real property of their late father or late husband was repugnant to natural justice, equity and good conscience. It is also instructive to note that the lead judgment was by RHODES-VIVOUR JSC, a Yoruba man who did not hail from the southeastern Nigeria where the custom was practiced. In the south west Nigeria where RHODES-VIVOUR JSC belongs, women are not disinherited from their deceased father's estate, no wonder the supreme court was quick to declare the Igbo custom as barbaric, worrisome and repugnant to natural justice, equity and good conscience, since the justices were not of the Igbo origin.

Incompatibility with existing local legislation

For the Nigerian court to enforce a custom, it must not be incompatible with any existing local legislation. The Igbo custom that disinherits a daughter from her father's estate or wife from her husband's property is incompatible with Sections 39(1) (a) and (2) of the 1979 Constitution which is now contained in the 1999 Constitution as section 42(1) (a); (2), this was why the case of i. Mrs. Lois Chituru Ukeje Administratrix of the estate of L.O Ukeje (Deceased) ii.Enyinnaya LazarusUkeje Administrator of the estate of L.O Ukeje (Deceased) and for himself and on behalf of the other children of L.O Ukeje (except the Plaintiff) v. Miss Gladys Ada Ukeje [21], was resolved in favour of the Plaintiff / Respondent.

Custom not to be contrary to public policy

In Re Adedovour [22] it was held that a custom that encourage sexual immorality and promiscuity is not in conformity with African tradition. Any custom that that offends the rule of natural justice and promotes immorality is repugnant and will not be enforced by the courts in Nigeria. It has failed the Repugnancy test.

Conclusively, for a custom to conform to modernity it must seen not to violate the provision of the Constitution of the Federal republic of Nigeria 1999 as amended, if it does, it becomes incompatible with existing local legislation and so will not be enforced. Where the custom is contrary to public policy, then it offends the rule of natural justice. It will therefore be declared repugnant to natural justice, equity and good conscience. It must not be contrary to public policy and not to promote morality. This means it must not be barbaric. In the absence of being repugnant to natural justice, equity and good conscience, such a custom will be enforced by the Nigeria courts and be upheld even on appeal. This is the position in Nigeria as it stands.

In spite of all instances of cases declared repugnant to natural justice, there are still other cultures or customary laws which the courts should watch out for and declare them barbaric and repugnant to natural justice.

Suggestions towards cleansing Nigeria of barbaric cultures in the spirit of repugnancy, equity and good conscience.

1. The state Houses of Assemblies in Nigeria should pass law entitling daughters and widows to inherit the real estate of their deceased fathers or deceased husbands. The widows should be empowered to inherit their late husband's real property whether or not the widows had male children or child at all. After all a widow did not cause the death of the husband; why then should she be made to pay a price of denial of right to property inheritance at the husband's demise? This culture should be condemned by legislation no matter the circumstances that shows up.
2. Barbarous customs, for example in some parts of south west of Nigeria whereby if a traditional king dies, someone must be buried with him. The very person that must die with him is already known and already appointed during the life time of the king. The person to accompany the dead king to the grave is called "*Obo Oba ku*" in local dialect, meaning the person to die with the

king. This Barbarous age long customs should be outlawed by the states houses of Assembly in the south west part of Nigeria. The custom had outlived its usefulness in the modern civilization of the 21st century. Imagine a living human being had to be killed so that he could accompany a dead king to the life beyond. This is utter wickedness and human insanity in the twenty first century.

3. The practice of female circumcision should also be abolished via state houses of Assembly legislations. There is no iota of sense or rationality for female circumcision. Some local folks advance the reason that failure to circumcise the female will make such uncircumcised female become sexually promiscuous. This argument is baseless and unfounded because even where the females were circumcised, such females had.
4. Also engaged in prostitution. There are several factors that drive females to promiscuity, such as poverty, lack of parental control, failure of the government to plan for the welfare of the youth population. Another reason could be peer group pressure. So to hinge promiscuity on lack of circumcision is senseless and baseless.
5. The practice of wife hospitality as practiced in some part of the middle belt states in Nigeria should also be abolished by state and federal laws. Wife hospitality is a custom whereby a man offers his wife to his male friend who visits him to have sexual intercourse with his wife as a mark of honour to the male guest. It does not matter whether the wife will approve this gesture or not. She has no choice than to accept to have sex with the husband's guest so long as the husband has given order to that effect. The male guest could repeatedly be paying visits to his friend so that he could be offered the wife frequently for sexual entertainment during the night sleep. This culture is most uncivilized and treats the female gender as a mere chattel. This is demeaning to the female gender and should be abolished with urgency.
6. The practice of widow inheritance in the southeast part of Nigeria should be abolished by the state houses of Assembly legislative instruments. Widow inheritance is a practice where by a widow is taken over automatically for cohabitation by the deceased husband's brother. The widow may bear children for her deceased husband, through the sexual assistance of the deceased husband's brother. More often than not the widow has no option of accepting or rejecting to cohabit with her deceased husband's brother. The only option is for the widow to leave the deceased husband's family and remarry or return to maiden family. This cultural practice is repugnant to natural justice, equity and good conscience.
7. Ghost marriage should be abolished by state and federal laws in Nigeria. Ghost Marriage is practiced in the south east Nigeria. This is a culture whereby a deceased man who did not have a child in his life time could still be made to father a child. This is achieved by procuring a foster husband who will then cohabit with the widow of the deceased and any child born by this arrangement belongs to the dead husband. This practice is very unholy and unwholesome. A dead man cannot be father to a child when he did not have sexual intercourse with the mother of the child or children. Marriage is between two living partners. Marriage can only be consummated by the living and not by the dead. This cultural practice is repugnant to natural justice, equity and good conscience. It is condemnable, worrisome and flesh skinning in the 21st century civilization.

Every reasonable person in this planet earth should lend his voice to condemn the above unwholesome and barbaric customary laws that still go on in Nigeria. This is why we Endeavour to bring these barbaric customs to the knowledge of both the local and international community so that a proactive action might to be put in place to curtail customs or stop such practices in its entirety, bearing in mind that the world is fast becoming a global village.

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