NEED FOR STATUTORY INTERVENTION IN THE CONTINUED OPERATION OF THE REPUGNANCY DOCTRINE IN NIGERIA.

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Abstract

There have been several agitations against the continued application of the repugnancy doctrine to customary law rules by our courts. This has led to an unending controversy and debates by the legal practitioners on one hand and law academics on the other hand. This is due to the failure of our courts to formulate a broad and discernable guideline for the application of the doctrine and this has left the discretion of our courts unfettered in such situations. The researcher's findings show that most of the judges or courts are led into allowing their nuances and personal idiosyncrasies to becloud their sense of judgment in customary law matters. This has created a very big ambiguity in the law. In this paper an attempt is made to show that there is need for a legislative intervention which will provide for the abolition of the repugnancy doctrine or provisions for their modifications be made in the statute. This no doubt will not only enhance the status of customary law but also insulate it from the personal idiosyncrasies of our judges and modernizing influences of a given society.

When the British colonized Nigeria, they did not abolish customary law, they did not however allow the undiluted application of customary law. There was no attempt however by the British to abolish customary law. This would have been both futile and contrary to the well established British policy of perceiving as far as was compatible with imperial rule, the institutions of newly dependent territories. Consequent upon that fact therefore, the continued application of customary law was permitted.

The truth however is that the face and character of customary law was fundamentally changed by the introduction of English law in the then emergent country of Nigeria. This is because the application of customary law was now made subject to some conditions as evident by the plethora of legislations providing for the application

of customary law. One of the earliest enactments that introduced English law into Nigeria was ordinance No. 4 of 1876. Section 18 of this ordinance enjoined the British established courts in the then colony of Lagos, to observe Native laws and customs of the people of the colony, such laws and customs not "being repugnant to natural justice, equity and good conscience."

It could therefore be said that this ordinance was the first enactment introducing the repugnancy doctrine as a test of the validity of any customary law rule in Nigeria. The amalgamation of the colony of Lagos with the protectorate of southern Nigeria on the 1st day of January 1900 saw the enactment of ordinance No. 17 1906. the ordinance was enacted in order to make applicable to the new protectorate of southern Nigeria, the provisions of ordinance no. 4 of 1876, inclusive of section 18 earlier referred to. Similar steps had earlier been taken in respect of the protectorate of Northern Nigeria by means of proclamation. The point being made here is to try to show how the repugnancy test found itself in the Nigeria statue books. The position now however that is the various tests which customary law has to satisfy to be valid is now contained in the different High Court laws of the states, Magistrate Courts law and some other legislations.

> The different High Court laws direct the courts to enforce native law and custom law provided that such native law and custom is not "repugnant to natural justice, equity and good conscience, nor incompatible with any law for the time being in force." The proviso to section 17 (3) of the Evidence Act also provides as follows: *"In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equality and good conscience."*

The Origin and Philosophical Basis of the Repugnancy Test

This test is otherwise known as the repugnancy doctrine. The origin is not very clear. It has in fact been suggested that the doctrine has little connection with English law. Rather its origin has been traced to the Roman-Conical law which had been prevalent in most of the medieval European states. However as can be seen from our earlier discussion, the test became part of Nigerian jurisprudence in 1876 by virtue of ordinance No 4 of that year. Closely allied to the mystery surrounding the origin of the doctrine is the reluctance of the court to define the phrase "repugnant to natural justice, equity and good conscience." Osborne C.J. in *Lewis v Bankole* (1908) emphatically stated as follows:

I am not sure that I know what the terms natural justice and good conscience mean. They are high sounding phrases and it would of cause not be difficult 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.

What is however not in doubt is the effect of the doctrine. The doctrine invalidates any customary or native law that is deemed to be repugnant to natural justice, equity and good conscience. It is the most controversial test to be passed before

customary law is enforced. The doctrine has given the courts wide discretion in the interpretation and application of the customary law which has at times been severely criticized. It has in fact been said by Prof. Chijioke Ogwurike of the blessed memory that the test along with other tests for the validity of customary law has shifted the locus for the assent needed for the validity of a customary law rule from the natives to the courts.

Prof. Ogwurike has further contended that a rule of customary law is not valid unless and until it has been declared as such by the courts. He asserts that an examination of what courts do in fact with customary rules will show that no customary rule is regarded as binding until accepted as such.

The Writer therefore maintains that if the validity of customary law rests on the assent of the native community, the mere existence of a customary rule will be enough to give it the force of law and the court will be compelled to enforce it. The attitude of the courts which picks the customary law rules to enforce has therefore shifted the locus of assent to the courts.

However, not all writers share the above sentiment. There is in fact a school of thought led by the late T.O. Elias which sees some philosophical basis in the evolution of the test in the need to sublimate some of the harsher aspects of the indigenous native laws and customs by disallowing certain obnoxious customs and practices such as the killing of twins at birth.

Diametrically opposed to this school of thought however, is an alternative school which sees the evolution of the doctrine not only in the realm of law but also in the realm of colonial politics. To this school of thought the repugnancy test is a tool used by the British colonialist to subjugate customary law to English law. It is their further view that the repugnancy doctrine has totally prohibited customary law from being developed to cope with the socio-economic development of Nigeria, and therefore stultify the growth of the law. The philosophical basis of the doctrine is to stultify the growth of the law.

The philosophical basis of the doctrine therefore can be seen in the design by the British colonialist to subordinate customary law to English law. The champions of this school of thought are Prof Amechi Uchegbu of the blessed memory, Adigun, and Musa Yakubu.

Accordingly, the relevance of the doctrine in Nigeria does not enjoy unanimity of opinion among academic writers and there is no doubt that these differences in opinion in the role of the doctrine in the system of our administration of justice has also permeated the courts. It is therefore not surprising that in spite of the long existence of the test in our status books, the courts have not been able to establish a single fundamental principle that should guide them in the application of the doctrine. The courts have rather adopted an ad-hoc approach to the application of the doctrine under which the courts at times apply the test based on the facts of each case without really laying down or examining the philosophical basis or policy issues behind or guiding the

application of the doctrine in the Nigeria Legal system. How this has affected the judicial attitude to the doctrine in Nigeria will shortly be examined.

Judicial Attitude to the Doctrine

As previously noted, the practical application of the test by the courts has not followed any discernible pattern. The courts rather adopt an ad-hoc approach under which they consider each rule on its own, the ruling in each particular case is not made a view that it should apply in another case. However, the courts have adopted certain basic rules in the application of the doctrine.

In the first place, the courts have taken the view that the doctrine is an absolute one. In other words when the doctrine is applied to a rule of customary law, the rule must either be wholly upheld or rejected. The courts therefore have emphatically rejected the notion that it can eliminate objectionable features of a customary law rule with a view to enforcing it. Thus in *Eshugbayi Eleko v Government of Nigeria* (1991). Lord Atkin expressed the proposition as follows: *"The court cannot itself transform a barbarous custom into a milder one. If it remains in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience"*

This position was reiterated by the court of Appeal sitting in Enugu in the case of Onwuchekwa *vs Onwuchekwa* (1991) where Niki Tobi (J.C.A)as he then was) stated as follows:

In the application of the doctrine, a court of law should look at the total package of the customary law involved and not a watered version of it or tutored version of it. In the application of the doctrine, a court of law is not allowed to pick and choose certain aspects of the customary law and leave other aspects.

The second judicial attitude noticeable in the application of the doctrine by the court is that the doctrine is interpreted conjunctively and not disjunctively. In other words the phrase has only one meaning and not three separate meanings and as Jegede has noted, there is only one common idea which has been expressed in apparently, three phrases and had sometimes been used to achieve the same result-social justice in the administration of the law.

Thirdly, incompatibility with English law does not make a custom repugnant as the test or the validity of customary law is never English law. In spite of the above however, the fact remains that the superior courts have mostly refrained from laying down broad policy considerations that should be borne in mind by judges in applying the doctrine. This has therefore created discordant notes in the application of the doctrine by the courts.

The courts have often not only gone beyond the factual finding of the applicable customary law rule but has gone further to consider the effect of the application of a rule of customary law. Thus in Edet v. Essien (1932) there is no doubt that the court in holding the rule of Native law and custom which denied custody of children to their putative biological father on the ground that he had not refunded the dowry paid on their

mother by her former husband is repugnant to natural justice, equity and good conscience, was more influenced by the result of the application of the customary law than its existence or relevance to the native environment which it applies.

In a critique of this case, Adigun has rationalized this custom as follows:

The family is a precious unit to Africans and a man's house must not be invaded by strangers. Even when spouses are separated, Third parties should not interfere with the wife. If a third party is desirous of marrying another's wife, he must first of all encourage the woman to legally divorce the husband. It is the failure to seek the requisite divorce that is punished by taking away the fruits of the illicit association.... the penalty was a means of sustaining matrimonial relationship and protecting the security of the home. The penalty attached shows the great importance attached to the interest the law seeks to protect.

In the latter case *of Godfrey Nwaribe v Preisent and Registrar Eastern oru (Omma District) Court* (1964) the court earlier appreciated the issues and the interests at sake and which is designed to be protected by the customary law rule in question and therefore gave a different decision from THIS CASE, THE HUSBAND OF A WOMAN DIED AND SHE CONTINUED TO LIVE IN THE MATRIMONIAL home in the family of the applicants. In the case above, the legal issue was basically the same. In this case, the husband of a woman died and she continued to live in the matrimonial home in the family of the applicant. She became pregnant but before delivery. She got married to the applicant. The native court on dealing with the formal dissolution of her marriage awarded the child to the deceased husband. Decision was based on the local custom of Otulu and Uli people Under which, if a woman stays in her matrimonial family and for all practical purposes remains a member of the household of the deceased husband and become pregnant during such period, the child is regarded as a member of the household of the deceased husband because they are deemed to be the children of the dead husband.

The applicant however brought an application for certiorari in the High court arguing that the decision of the native court was wrong on the ground that it was against natural justice, equity and good conscience to have awarded the child to the deceased husband as against the new husband. The High court dismissed the application on the ground inter alia that if the applicant knew that this was the custom of the otulu people and conceived the woman whilst she was staying in the deceased husband's place as a member of that household, he cannot be heard to complain to the court that it is against natural justice.

The latter case was decided by a Nigerian judge (Egbuna J) and there is no doubt that this fact explains why he was able to appreciate the import of the custom and therefore refused to be swayed by the result of the application of the custom a fortiori that it denies custody of a child to the natural father. The English judge in Edet's case was no doubt influenced by his cultural back ground and therefore could not appreciate the interests and issues behind the custom he was called upon to apply in that case. It can

therefore be acknowledged that with the total indigenization of the Nigeria judiciary, the Nigerian judges have made some efforts to really articulate and protect some of the customary rules they have been called upon to apply by refusing to subject customary law to exotic or university standard of values.

The failure of the courts to however, formulate a broad and discernible guideline for the application of the doctrine has largely left the discretion of the courts in the issue largely unfettered. This has therefore led to the accusation that the courts have sometimes used the doctrine to strike down any customary rule (and perhaps even a particular litigant) of which they disapprove. Secondly, as previously pointed out by a writer, it has, shifted the basis for the validity of customary law from the consensus of the community to the opinion of the judge. This it has been said has affected the intrinsic nature of customary law because customary law as a formal source of law is now taking the form of a judge made law.

Statutory Intervention

The first issue to determine under this heading is to decide the nature of the legislative intervention. The modes of intervention compete for attention here. There are legislative abolition of the doctrine or legislative modification of the wide discretion conferred on the interpretation of the doctrine. These will be considered ad-seriatim.

Abolition of the Doctrine

Some writers have been trenchant in their demands that the repugnancy test be expunged from Nigerian statute books. Amechi Uchegbu is unequivocally of this opinion.

Olawoye, always is however totally opposed to this idea and contends that there can be no good sense in suggesting that customary law should enjoy special immunity from law reforms. He therefore argues that it is idle to agitate for its repeal. The last view has been influenced by two theoretical considerations bordering on the perceived role of the doctrine in the application of customary law and which is heavily supported by judicial opinion.

In the first place, it has been said that the doctrine makes for flexibility in the application of customary law. That is, by the use of the doctrine, the courts endeavour to ensure that customary law is made flexible so as to accord with the mood of the times. For instance in *Agbai Vs Okogbue,* (1991) Nwokedi (J.S.C.) said as follows:

Customary Laws were formulated from time immemorial. As our society advance, they are removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. The doctrine of repugnancy doctrine in my view affords the courts the opportunity for fine timing customary laws to meet changed social conditions where necessary, more especially as there is no form for repealing or amending customary laws. I do not intend to be understood as holding that the courts are there to enact customary laws. When however customary law is confronted by a

novel situation, the courts have to consider it's applicability under existing social environment.

Secondly, the doctrine has been said to afford the courts the opportunity of invaliditating uncivilized customs. Thus, in *Umaru Gargati Vs Cham*, (1982) Coker (J.C.A.) pointed out that the operation of the repugnancy clause has been used to exclude harsh, barbarous and unsuitable customs. This would therefore accord with the view of the school of thought which sees the rationale for the evolution of the repugnancy doctrine in the need to civilize customary law by sublimating some of its harsher and unsavory aspects in accordance with the level of development in the society.

The above views however miss one fundamental point and which is that the abolition of the doctrine does not insulate customary law from meeting certain level of conformity with societal values. Application of customary law will still be subject to the other two tests firstly that it is not to be contrary to public policy and secondly it is not contrary to any statue or the constitution of the Federal Republic of Nigeria or incompatible with an existing law in force. Though the phrase "incompatible with an existing law in force" is not used in the new amended Evidence Act. This shows that we have only one test of accessing the validity and applicability of customary law role in Nigeria.

It will therefore be then, an application of obnoxious or "uncivilized" custom that is below the current standards in the society, which will more or less if not checked by the public policy provision, will be caught by the incompatibility clause. The existence of the customary law rule therefore will still not attract automatic application by the courts.

Even though correct on principle is however self contradictory with the often stated true nature of customary law, as the "mirror" of accepted usage," a reflection of the social attitudes and habits of various ethnic groups and which derives its validity from the consent of the community which it governs. The abolition of the doctrine would therefore ensure that customary law conforms to its source as a legal norm and therefore remove the doubts being expressed as to the true nature and basis of the customary law rules being applied by the courts after being subjected to the repugnancy test. The abolition of the doctrine would therefore restore the authority and validity of customary law as its application would now be solely on its enjoying the consent of those, it is supposed to govern. Its position as an authoritative source of Nigerian law will also be enhanced.

Mode of Legislative Intervention Advocated

Any legislative intervention in the operations of the doctrine in Nigeria should be guided by the following considerations.

a. Simplification of the application of customary law either by the modification or complete abrogation of the repugnancy doctrine.
b. Creation of legal certainty in the application of customary law.

c. Need to enhance the role of customary law in the Nigerian legal system by freeing the application of customary law from idiosyncrasies and subjective notions of the judges.

d. Enhancing the role of customary law in the administration of justice in Nigeria by returning customary law back to its authoritative source as law, which is the consent of the people.

The existence of the repugnancy doctrine in its present form and its interpretation by the courts has not only led to the interpretation by the courts; has not only led to the unfortunate subordination of the role of customary law in Nigeria to an inferior status but it has also created vagueness and ambiguity in this area of the law. The failure of the courts to harmonise the rules on the interpretation of the doctrine has been largely due to the judicial approach to law making which depends on the accident of litigation and is tied up with the doctrine of a higher court is vague or contradicts its earlier judgement, the lower court might have the problem of determining the ratio of the judgement or which of the decisions to follow.

What the above therefore means is that the courts can never be a radical catalyst in harmonizing the application of the repugnancy doctrine in Nigeria by the formulation of a single guiding principle that will restrain the unbridled application of the doctrine. This is due to not only the fact that the time needed for such harmonization would be unnecessarily too long but also due to the fact that the conservativism of most Nigerian British trained judges would also effect this process. Such a harmonized scheme may therefore not reflect the true essence and characteristic of customary law.

The mode of legislative intervention therefore preferred by the present writer is the abolition of the repugnancy doctrine. That is what will meet the considerations earlier stated. This could be done either by enacting a federal Act abolishing the doctrine in all the State High Court laws in the country and any other enactment, or by abolishing the doctrine in the Evidence Act. The latter option would therefore have the effect of making state provisions to the contrary null and void to the extent of its inconsistency. The fear that the abolition of the doctrine would force the courts to apply obnoxious or "uncivilized" customary law rules is totally unfounded. The other two tests would still be there (i.e.) contrary to public policy and the incompatibility test) and would therefore ensure that the customary law that would be applied will be in consonance with the current level of the Nigeria society.

Most especially, the public tests would ensure that the courts actually examine the interests sought to be protected by the custom sought to be applied and balance this against the public policy considerations of a modern society and where there is a conflict, uphold the latter. This would therefore ensure that the courts would give reasons why a particular rule of customary law will not be applied and by this provide a more objective index on which the court's judgement can be analysed. The threats of the personal sensibility or idiosyncracy of the judge playing a role in the applicability of a customary law rule would therefore be minimized.

The incompatibility test in fact provides a more potent weapon of ensuring that the application of customary law does not run counter to the needs of a modern society. This is more so when it is considered that under this test, the enforceability or otherwise of a customary law rule is no longer an issue once it is provided that it is in any way incompatible either with the constitution of the Federal Republic of Nigeria or with any other status in force. In effect therefore once a customary law rule passes this test, that is a clear indication that the interest articulated by such a custom is in consonance with the need of a modern society as the constitution and statutes objectively articulated the interests of such a society. Furthermore, by this test, even though a custom may not be incompatible with the constitution per se but its mode of enforcement or an aspect of it may be contrary to constitutional provisions and would therefore be enforceable to that extent.

That was exactly what happened in the case of Agbai vs Okogbue (1991). In this case if it will be recalled, the supreme court through upholding the legality of age-grade association in Igboland however noted:

To this extent the custom which translates plaintiff a member of the age-grade automatically into membership of the Umunkalu Age-grade association, without his consent, and merely because he is a member of their age-grade, it is incompatible directly with the provisions of S. 26(1) of the constitution 1963. In my opinion, although the custom of age-grade cannot be described as repugnant to natural justice, equity and good conscience, and is not contrary to public policy, it is also not incompatible with any legislation in force, that part of the customary law which makes every member of the association is contrary to the constitution.

It is therefore a misconception to say that the abolition of the repugnancy doctrine would insulate customary law from the necessary modernizing influences in the society. The abolition of the doctrine would only enhance the status of the customary law in the Nigerian legal system since any customary law rule once proved to exist will now be entitled to automatic application. The only qualification this time would now be that such customary law rule should not be contrary to the public policy considerations of the State or incompatible with the constitution or any other status in force, both of which also articulates the objective criteria, outside the personal idiosyncracy of the presiding judge.

The continued existence of the doctrine only shows the cynicism and skepticism with which customary law is looked at in the country. There is no doubt that a lot of judges and policy makers may feel that increased urbanization and modernization of the country has diminished the need for the continued application of customary law. The continued existence of the doctrine may not therefore attract further attention since the continued existence of customary law is seen more as an indulgence and that any perception of customary law is a veritable instrument in the task of administering justice. This attitude is a fatal misconception to say the least. There is no gain saying the fact

that customary law may be inadequate in some areas to meet the needs of modern society.

Added to the above is the fact that the most of the activities connected with a modern society are clearly outside the contemplation of customary law. Most activities connected with modern technology, commerce and industry come within this area. This does not however derogate from the fact that there are still areas where customary law is still the dominant law. An example is in the area of marriage and succession. The continued operation of the doctrine and the unfettered discretion which it confers on the courts may therefore create a social dislocation between the people.

The abolition of the doctrine would therefore encourage the growth of customary law in these areas according to the expectation of citizens of the country.

Conclusion

Nigeria would not be the first country to have abolished the doctrine should she decide to do so today. The existence of the doctrine has in fact created more ambiguity in the law as some judges at times allow their personal idiosyncracy to come into their application of otherwise valid customary laws. Even though the British who created the provision may have done so because of their different cultural background and may have felt that they needed such omnibus provision to reject the application of customary laws which may run contrary to their notion of morality. Its continued existence in the statute books has not only questioned the nature of the authority of legal source of the customary laws to where it rightly belongs, the consent and will of the people.

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