AN EVALUATION OF THE CONCEPT OF ENFORCEABILITY OF CUSTOMARY LAW AND ITS EFFECT IN NIGERIAN ADMINISTRATION OF JUSTICE*

Abstract

Various statutes empowered the courts to apply and enforced customary laws in Nigeria and prescribed some criteria for determining the validity of any customary law sought to be applied and enforced. It goes further to prohibit courts from enforcing any customary law except the established criteria are met. It is against this background that the task of this paper is to appraise the concept of enforceability of customary law with a view to find its effects in Nigerian Administration of justice. A doctrinal method was adopted. Having appraised the concept it was found among other things that customary law is not law until it is so declared by the court after passing repugnancy tests and finally concluded by recommending among others that once customary law is judicially noticed or proven to exist by evidence it should not be subjected to any type of test before it can be considered as law.

Keywords: Custom, Customary law, Concept, Enforceability, Administration of Justice

1. 1Introduction

The question as to the enforceability of customary law is no doubt one that is vexed with jurisprudential contention. The origin of the contention in Nigeria perhaps dates back to the colonial era. With the colonization of Nigeria in 1900, the British Government did not abolish the customs and practices of Nigerians but introduced into the country some standards or doctrines upon which all customs and traditions of native Nigeria could be assessed before they are applied as law. One of such doctrines is the repugnancy and incompatibility test. The coexistence of customary law and the English law within the same State makes it difficult or untidy as to whom and when the laws should be applicable

It is against this background that this paper seeks to evaluate the enforceability of customary law and its effects in Nigerian administration of justice with a view to find outthe following objectives: Whether customary law is really a law, whether customary law stands-alone for its enforceability, whether the enforceability of customary law has any effect in the administration of justice in Nigeria

1.2 Meaning of Customary Law

To appreciate the meaning of customary law, one must first of all differentiate between a custom and a customary law. The jurisprudence of the Nigerian legal system is replete with judicial authorities as well as the views of legal jurists on the meaning of custom and customary

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law. In the case of *Dakur v. Dapal,*[1] the Nigerian Court of Appeal per Edozie JCA (as he then was) defined custom thus:

> *As defined in section 2(1) of the Evidence Act, custom is: "a rule which in particular district has for long usage obtained the force of law"*

The above definition of custom is more or less like the definition of a customary law other than custom. Generally, at law, custom refers to the established pattern of behavior that can objectively be verified within a particular social setting[2].A custom has also been defined as a rule of conduct. When such a rule of conduct attains a binding or obligatory character it becomes a customary law. It is the assent of the community that gives a rule of conduct its obligatory nature and entails that it is supported by a sanction and enforceable. Sanction under customary law, however, does not have the same nature as the sanctions of a modern state, with its full machinery for the administration of justice. Customary sanction takes the form of ostracism, compensation, propitiation, restoration or apology. It is this element of sanction that distinguishes a custom from customary law[3].

A breach of custom does not occasion any injury to the infringer, because it is not backed by sanction, but a breach of customary law attracts the imposition of the appropriate traditional sanction. For instance, it is a custom in some parts of Igbo land in Nigeria like Enugu, Anambara and Imo States that a father obtains a wife for the first son. Every father ordinarily would like to do that, but no father suffers any legal injury or sanction for failure to get a wife for his first son. Likewise, no son may successfully compel his father under such custom to get a wife for him. It is a mere custom, the breach of which does not attract any sanction. Two examples of custom are the requirements of Yoruba custom that a person genuflect when greeting an elderly person, and that one wears facial tribal marks. Breach of the above attracts no sanction at all. An infringer may be denounced for being rude or modern, but that is the end of the matter. However, a breach of a rule of customary law, e.g., adultery, attracts the full weight of customary sanctions: there will be propitiation followed by ostracism.

Therefore, customary law refers to those customs generally accepted by a particular community as binding, the breach of which is supported by customary sanction[4]. This definition covers the distinction between custom and customary law based on the availability of sanction. It also emphasizes the general acceptance of a rule of conduct or custom by a community which gives it its binding and enforceable character. Customary law is also defined as the "custom and usages traditionally observed among the indigenous African peoples and which form part of the culture of those peoples.[5]

[1](1998)10 NWLR (Pt. 571) 573 at 583 Para. H

[2] Mojisola, E., and Edidiong, N. (2015) The Distinction Between Custom and Customary Law: Division without Partition. *International Journal of Law and Legal Jurisprudence Studies*, Vol. 2, P.13,

[3]Remigius, N. N. (2002) The Dynamics and Genius of Nigeria's Indigenous Legal Order. *Spring Indigenous Law Journal* Vol. 1, P. 153

[4] Ibid.

[5] Taiwo, E.A. (2009) Repugnancy Clause and Its Impact On Customary Law: Comparing the South African and Nigerian Positions- Some Lessons for Nigeria. *Journal for Juridical Science*, Vol.34 (1), P. 90.

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[6]. Customary law has also received definite judicial exposition as to it meaning. In *Nwaigwe v. Okere*[7], the Supreme Court per Tobi JSC (as he then was) defined customary law thus:

> And what is customary law? Customary law generally means relating to custom or usage of a given community. Customary law emerges from the tradition, custom and usage and practice of 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 which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable. Putting it in a more simplistic form, the custom, rules, traditions, ethos and cultures which concern the relationship of members of a community are generally regarded as the customary law of the people.

1.3 Nature of Customary Law

A major feature of customary law is that it is unwritten. Its rules are well known by members of the community whose conduct it regulates. It was handed down the ages, from generation to generation. Like a creed, it seems to live in the minds of people.

Another feature of customary law is that parties to a dispute subject to customary law are usually no strangers to each other. There is usually a tie, social, marital or tribal, binding them. For instance, land disputes are usually between people related by blood. This is in contradistinction to modern land adjudication, which may be between parties who are strangers to each other and may even be of different nationalities. Apparently for this reason, disputes in an African setting are considered to disrupt the societal or family equilibrium. The main aim of the adjudicators will be to restore that equilibrium and this might only be achieved by not deciding strictly on the rights of the parties. Legal rights are not emphasized as much as reconciliation. Thus, an African justice system is mainly reconciliatory.

Customary law is flexible and remains evolutionary, and capable of adaptation to changing circumstances. In *Lewis v. Bankole*[8], Osborne C.J. opined:

> one of the most striking features of West African Native custom … is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics.

Some cases further illustrate the changeability or evolutionary nature of customary law. For instance, it was the original position in customary law that land was totally inalienable. It

[6]Hilary, N. (2017) The Subjection of Customary Laws to Repugnancy Tests by Nigerian Courts: The Need to Broaden the Horizon. *International Journal of Law, Vol. 3, P. 70*

[7](2008) ALL FWLR (Pt. 431) 870

[8] (1909) 1 N.L.R. 100

belonged to either a family or the community. But through the process of evolution the concept of inalienability of land was discarded in favour of transferability by way of sale[9].Thus, Webber, J. in *Barimah Balogun and Scottish Nigerian Mortgage and Trust Co. Ltd. v. Saka Chief Oshodi*[10]stated:

> It seems to me that Native law existent during the last fifty years has recognized alienation of family land, even by a domestic, provided the permission of the family is obtained … The chief characteristic of Native law is its flexibility—one incident of land tenure after another disappears as the times change—but the most important incident of tenure which has crept in and become firmly established as a rule of Native law is alienation of land.

In the same vein, Graham Paul, C.J. opined in *Kadiri Balogun v. Tijani Balogun &Ors*.[11] that

> "…as a matter of historical fact and of judicial decision, it is now too late in the day to say that under (Lagos) Native law and custom family property is inalienable so as to give the grantee absolute ownership."

The adaptation of customary law to changing political, social and economic circumstances of the society was further evidenced in the case of *Ewa Ekeng Inyang v. Efana Ekeng Ita &Ors*[12].The issue in that 1929 case was the determination of the rights of two rival claimants to the headship of the Ewa Ekeng House at Calabar, Nigeria. The defendant holder of the headship held it by virtue of election, i.e., by voting at a family meeting. The plaintiff claimed the headship by right of primogeniture, as the eldest male member of the family. The plaintiff contended that any kind of popular election was contrary to customary law and therefore ultra vires. On this contention, Berkeley, J., commented:

> Before the Government came to Calabar and established law and order, it is certain that the headship of a house belonged as of right to the senior male member of that house. But he took it at his peril. If he failed to find support within the family only two courses were open to him. Either he went into exile or else he stayed and was put to death. In either case the succession to the vacancy devolved on the next senior male, if he chose to take it up. Human nature is much the same all over the world, and it is absolutely certain that there must have been occasions on which the next senior male, knowing that he had no chance of winning the support of the family, had sufficient intelligence to stand aside rather than risk such perilous promotion … [I]t is obvious that even before the advent of the Government, the theory of election, though in a very rudimentary form, was already inherent in the family system of the Efik people of Calabar. With the coming of the Government the rule of law was substituted for the rule of violence. It was no longer possible to put an unpopular head to death. Therefore, an unpopular head, being no longer in fear of his life, was

[9] Ibid.
[10][1931] 10 N.L.R. 36 at 51
[11][1943] 9 W.A.C.A. 73 at 82
[12][1929] 9 N.L.R. 84

> under no compulsion to seek security in exile. The family was saddled with the unpopular head and had no means of getting rid of him. The only remedy for such a state of affairs was to take steps to see that no man should become head of the house unless he had behind him the support of the family. No doubt in the majority of cases the senior man was sufficiently suitable, and became head without opposition. But when he was not suitable the family had no hesitation in selecting some other member in his stead. This was only common sense, and a natural adaptation of custom to make it conform to a change in condition. The plaintiff is asking this court to put the clock back. He wishes to deprive the family of any choice in the matter of their head. He ignores the changed circumstances of the times and wishes to revert to a custom the safeguards and checks upon which can no longer be applied[13].

If in 1929, when this decision was given, the original customary law on the promotion to the headship of the family had been reduced to writing, the court would have just applied that custom and there would have been no room for the flexibility shown in this case. The decision would have been different and would not have reflected the new custom, promotion based on election, which sought to make sure that a family was not saddled with an unpopular head. Reducing customary law to a permanent form, unless periodically reviewed, would destroy its characteristic of flexibility and adaptability to changing circumstances and needs of the society. A custom must also be in existence at the relevant time and must be recognized and adhered to by the people to make it binding. In *Olubodun v. Lawal*[14], the Supreme Court was explicit that a major characteristic of customary law or custom was that it must be in existence at the relevant time and must be recognized and adhered to by the people to make it binding. And secondly, that it is a well-established principle of law that documentary evidence is unknown to native law and custom.

Finally, changes in the customary law usually evolve from usage and are not declared, as in Western legal systems where a statute could repeal or amend a law by making declarations to that effect. The explanation seems to be that most traditional societies, like the Ibos, did not have a legislature or sovereign who could declare such changes in the customary law. Once a new customary law has evolved and is generally accepted, it becomes binding on all the members of the community and any member who resists its application does so at the risk of customary sanctions.

1.4 Proof of Customary Law

Before a court of law considers the enforceability of customary law, the alleged customary law, in order to provide the rule of decision, must be proved to exist by the party who relies on it. The law has established two methods of proving the existence of customary law:

a) by judicial notice; or

b) by proving it as a fact;

[13] Ibid. at 85-86

[14] (2008) 35 NSCQR 570

a) Proof by Judicial Notice

A party who wishes the court to recognize and enforce a particular customary law may request the court to take judicial notice of the law, instead of proving it as a fact. Section 16(1) and (2)[15]provides:

> ''A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence''.

Again, section 17[16] goes on to lay down the conditions that must be fulfilled before judicial notice is taken of a custom by stating that a custom is to be judicially noticed when it has been adjudicated upon once by a superior court of record. The above section was decided upon in *Ajikanle &Ors v. Yusuf*[17]the court held:

> Section 14 of the Evidence Act reads: A custom may be adopted as part of the law governing a particular set of circumstances if can be judicially noticed or can be proved to exist by evidence. (2) The burden of proving a custom shall be upon the person alleging its existence (2) a custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or class of persons concerned in relation to circumstances similar to those under consideration

Similarly, in *Onwuchekwa v Onwuchekwa*[18]the court states:

> It is not all customs or customary law that must be proved. Where a custom has received judicial notice by the court and has been acted upon by a court of superior or coordinate jurisdiction, proof of such custom is not necessary That is the essence of section 14(2) of the Evidence Act. Although the subsection has given rise in the past and will continue to give rise in the future to interpretational problems, unless amended, the courts have in the exercise of their interpretational jurisdiction, dealt with the apparently fluid, vague and generic provision.

b) **Proving Customary Law as a Fact**

Section 18(1)[19] provides that, where on the other hand, a custom cannot be established as one judicially noticed, it shall be proved as a fact. This position enjoys judicial support in *Ojiogu v. Ojiogu*[20], the Supreme Court held per Onnoghen JSC thus: ''It is trite law that customary law is a question of fact which must be proved or established by evidence''. Again, in *Ogene v Ogene*[21]the court affirms that:

[15]Evidence Act, Cap. E14, LFN., 2004
[16] Ibid.
[17](2008) 2 NWLR (Pt. 1071) 301
[18](1991) 5 NWLR (Pt. 194) 750 Paras. C-E
[19]Evidence Act, Cap. E14, LFN., 2004
[20](2010) LPELR-2377, P. 31, Para. G
[21] (2008) 2 NWLR (Pt. 1070) 29 at P. 48

> Customary law or native law and customs are questions of facts which must be proved by evidence if judicial notice is not available through decided cases of superior courts. In the instant case, the appellant should have taken the advantage of customary court to establish his case by evidence

In *Orlu v. Gogo Abite*[22] the Court also stated that:

> It is extremely important that custom should be strictly proved. Though such proof is not by the number of witnesses called, it is not enough that one who asserts the custom should be the only witness. Another witness who is versed in the alleged custom should also testify.

Like questions of fact in any judicial inquiry, customary law may be proved by calling witnesses who are versed in the customary law sought to be established or denied. They become expert witnesses as far as that customary law is concerned and are usually chiefs or traditional rulers of the community whose customary law is at issue. By virtue of their customary offices or positions, it is their duty to know the customary law of their people. They may be called as witnesses by either or both of the parties in a case.

The fact of customary law may also be proved by the use of authoritative textbooks. For such authoritative operation, *Larbi v. Cato*[23]suggests that the author of such a textbook must be dead at the time the book is cited in court, though the book remains of persuasive authority. But in *Amoo v. Adigun*[24], the court authoritatively relied on the book of a living person, Mr. T. O. Elias (later: professor of law, Chief Justice of Nigeria, and judge of the International Court of Justice at Hague), to hold that under an Indigenous mortgage transaction or pledge, the mortgagee owed a duty of account to the mortgagor in certain circumstances. Section 59 of the Evidence Act deals with the admission of a textbook on customary law: "… any book or manuscript recognized by the Natives as a legal authority is relevant." This was judicially interpreted in Adedibu v. Adewoyin[25], where the West African Court of appeal stated the two conditions that must be satisfied for the operation of the section:

(a) the book or manuscript must form part of the evidence in the case; and,
(b) it must be shown, as a fact, that such book or manuscript is recognized by members of the community concerned as a legal authority.

In this particular case, the litigants gave contradictory evidence on the applicable customary law to the headship of their family, i.e., Mogaji. The judge rejected both sides' versions, but relied on H. L. Ward-Price's book, Memorandum of Land Tenure in the Yoruba Provinces. This book was neither tendered in evidence nor referred to by counsel for the parties; yet the declaration sought by the plaintiff was granted on the strength of it. On appeal, the West African

[22] (2010) 41 NSCQR 458
[23] (1960) G.L.R. 146 at 153
[24] (1957) W.R. N.L.R. 55
[25] (1951) 13 W.A.C. A. 191

Court of Appeal held that Ward-Price's book was wrongly relied on by the judge, because it was in breach of Section 59 of the Evidence Act.

Another method of proof, which is not common in Nigeria, is the use of assessors who sit with the judge and advise him or her on customary law.

1.5 **The Enforceability of Customary Law**

Having proved a custom to exist, either as a fact or by means of judicial notice, the court proceeds to determine whether it should receive judicial recognition. It is instructive to separate the issue of validity of customary law from its judicial enforcement or recognition. Issues of validity of customary law will involve a disquisition on its existence, in contradistinction to enforcement questions, which require the court to determine the circumstances under which a valid or existing customary law would be accorded judicial recognition. Consequently, modern judicial process does not give a rule of customary law its validating force. These grounds are statutory.

Section 18(3)[26] which states:

> In any judicial proceeding where any custom is relied upon, it shall not be forced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.

Section 26[27] also provides:

> 26(1) The High Court shall observe and enforce the observance of 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 law for the time being in force, and nothing in this law shall deprive any person of the benefit of customary law.
>
> (3) No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or questions may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.

The above provision clearly stipulates the tests or situations for the enforceability of customary law, to wit;

a) If it passes the repugnancy test- that is not repugnant to natural justice, equity, and good conscience;
b) If it passes the incompatibility test – that is either directly or by implication with any law for the time being in force.
c) If it passes the public policy test.

[26]Evidence Act, Cap. E14, LFN., 2004
[27]High Court of Lagos State Law Cap. 60, Laws of Lagos State, 1994.

d) agreement by parties to exclude customary law; or
e) Transactions unknown to customary law.

Thus, virtually all our states have laws which enjoin the courts to enforce native law and customs but only subject to the tests or conditions mentioned above. This position has been upheld in a number of cases including Kopek v. Ekisola[28]. These tests are a clear demonstration that Nigerians themselves agree that they have certain customs and traditions which are objectionable and that they do not wish for such customs to continue.

a) Repugnancy Doctrine: Customs Repugnant to Natural Justice, Equity, and Good Conscience

What does this phrase mean? It has rightly been called, "the trinity of legal virtues''[29]. But then, what is the touchstone of natural justice, equity, and good conscience? Is it the British or African or Nigerian standard? Is there a universal standard of natural justice, equity and good conscience? Or should the test be subjective and related to the conscience and moral susceptibilities of a given community at a given period of development? What is equitable and of good conscience are imprecise and have no direct definition under the Nigerian legal system. In the circumstances, it is only the judge before whom such issue is raised that can determine, albeit most often arbitrarily, which facts or particular sets of circumstances were equitable or of good conscience. For instance, many people are likely to differ on what amounts to good conscience. The result has been a huge field of judicial discretion in which the judge's idea of civilization becomes the litmus test by which a customary law must be adjudged valid and acceptable.

The preponderance of judicial authority and utterances of judges, mainly foreign, who were confronted with the application of the repugnancy doctrine clearly show that it was English justice and social values that were used as the criteria for 'natural justice, equity, and good conscience. The point being made is that, in striking down customary law under the triple formula (natural justice, equity, and good conscience), an English sense of justice was used as the standard and the judges, especially the colonial judges, proceeded from a Western superiority complex and self- proclaimed cleansing mission.

However, with the independence of Nigeria in 1960 and the appointment of more Indigenous judges, a more Nigerian sense of justice and values has come to be the standard of natural justice, equity and good conscience. Thus, in *Ejiamike v. Ejiamike*,[30]the plaintiff was the Okpala (head) of his father's household at Onitsha and the defendants were members of the household. The plaintiff's case was that the defendants who were jointly managing the property of their late father, in disregard of his right as the Okpala, were letting out some of the houses to tenants and collecting rents. The plaintiff tendered evidence and called many witnesses to establish his right to manage the said property as the Okpala according to Onitsha custom. The

[28] (2010) 41 NSCQR 553
[29]Remigius, N. N. (2002) The Dynamics and Genius of Nigeria's Indigenous Legal Order. Op.Cit., at P. 175
[30] (1972) E.C.S. N.L.R. 130

defendants did not cross-examine the witnesses nor object to the customary law relied on. They claimed that the customary law relied on by the plaintiff was repugnant to natural justice, equity, and good conscience. The judge held that this was not sufficient for the defendants, because they had to show how it was so repugnant. The judge in this case is of the view that the onus is on the defendants to establish that the custom relied on by the plaintiff was repugnant to good conscience of the average Onitsha man in 1972.

Similarly, Justice Niki Tobi in the case of *Muojekwu v. Muojekwu*[31] observed:

> The point should however be made that in the determination of whether a customary law is repugnant to natural justice or incompatible with any written law, the standard is not the principles of English law. In other words, it is not fair to conclude that the Nrachi ceremony is repugnant to natural justice because it is inconsistent or contrary to English law, in the sense of the English common law or English statute. On the contrary, the courts must have an inward look, inward in the sense of Nigerian jurisprudence. Such an Indigenous approach, if I may use that expression vaguely, will certainly reduce the usual pet expression of the English judge, "barbaric," in the description of our jurisprudence, an expression, Speed, Ag. C.J. freely used in Bankole.

However, some Indigenous judges sometimes prove to be more foreign than pre-independent foreign judges. This is due to their readiness to condemn a rule of customary law as barbarous, at the slightest excuse. Their legal education in England and other countries of the West could be accountable for this.

The repugnancy doctrine has been the subject of judicial interpretation in a myriad of cases all of which are instructive on the doctrine. In *Edet v. Essien*,[32]the plaintiff had paid the dowry for a woman and married her. She later left him and entered into a new marriage with another man, by whom she subsequently had two children. The plaintiff then alleged that, under a rule of Native law and custom, he was entitled to the custody of these children, since his dowry had not been repaid to him. It was held that such a rule of customary law was not conclusively proved and, even if proved to exist, it was repugnant to natural justice, equity and good conscience.

But in the recent 2014 decision, the Court of Appeal in *Ojukwu v. Agupusi & Anor*[33] citing with approval the case of *Nwachimemelu Ikemefuna Okonkwo v. Mrs Lucy Egbunam Okagbue& 2 Ors*[34]held as follows:

> --- the institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of the 3rddefendant to him. To claim further that the children of the 3rd defendant had by other man or men are the children

[31] (2000) 5 NWLR (Pt. 657) 402 at 431
[32] (1932) 11 N.L.R. 47
[33] (2014) LPELR – 22683 (C.A.)
[34] (1994) 9 NWLR (Pt.308) 301

> of Okonkwo deceased is nothing but an encouragement of promiscuity. It cannot be contested that Okonkwo could not be the natural father of these children. Yet 1st and 2nd defendants would want to integrate them into the family a custom that permits of such a policy gives license to immorality and cannot be said to be in consonance with public policy and good conscience. I have no hesitation in finding that anything that offends against morality is contrary to public policy and repugnant to good conscience. It is in the interest of the children to let them who their real fathers are and not to allow them live for the rest of their lives under the myth that they are children of a man who had died many decades before they were born'…Ogundare alluded to the case of *Edet v. Essien* (1932) 11 NLR 47 per Cecil Carey, J. who held in a case where a man claimed the child of his former wife who had left and married another man who impregnated her, on the ground that the divorced wife had not returned his bride price, that such a custom is repugnant to natural justice, equity and good conscience, to be rightly decided.(Underlined ours)

Accordingly, the court declared that the custom of the Onitsha people that enabled a woman to marry another man for the purpose of raising children for her deceased brother as repugnant. The court took the view that such custom being repugnant to natural justice, equity or good conscience cannot be enforced as customary law. But the question is, will a custom that fails this test cease to be applicable to the people? Will the custom that has not been subjected to judicial determination loose force of law merely because it has not been adjudicated upon?

While it is conceded that a declaration by a competent court of jurisdiction that a custom is repugnant may serve as a foundation for the erection of opposition against the continuous adherence to the custom that custom so declared as repugnant may not necessarily cease to be applicable for the simple reason that it has failed the repugnancy test. This is especially true with regard to customs that have risen to 'peremptory status'. In fact, an outright legislation against them may attract little or no compliance.

Take for example the age of customary marriage among the Akwa Ibomites and the Hausa/Fulanis. It is no longer fashionable in Akwa Ibom state for a girl under the age of 16 to be married. The Age of Customary Marriage Law[35] prohibits any marriage or promise of marriage between or in respect of persons either of whom is under the age of sixteen. In the northern parts of Nigeria, particularly amongst the Hausa/Fulanis, the custom of marrying girls under the age of 16 is still a common practice. The Child's Right Act[36] which prohibits Child Marriage under the age of 18 years has not stopped this common practice not only among the Hausa/Fulanis but also in many parts of Nigeria.

Again, one of the commonest customary practices of the Akwa Ibom people, is the custom of masquerades. Some of these masquerades are violent while some others restrict the liberty of

[35] Cap. 8 Laws of Akwa Ibom State
[36] Section 21, Child's Right Act, 2003

movement of non-initiates. Among the people of Ibiono Ibom Local Government Area of the State, there is a masquerade society known as '*Ekoong*'. It has a special season in each year. During its season, when it comes to the public, all women, children and adult males who are non-initiates must be behind closed doors. They can only come out if led and protected by an initiate. Clearly, this customary practice is incompatible with existing Nigerian law in that it violates the freedom of movement and right to liberty guaranteed to every Nigerian under the Constitution of the Federal Republic of Nigeria, 1999. This has however not stopped the people from continuously observing the custom. Indeed, not even the *Masquerade Control law*[37]State has been helpful in this regard.

The *Ndiukwu Umuiyi Akabo* custom in some part of Imo State permits a father who has not had a male child to keep his daughter in the family to procreate out of wedlock. There is a similar custom among the Ndoki people of Rivers state. That custom has been declared repugnant to natural justice, equity and good conscience. In the case of *Anode v Mmeka.*[38]the court held per Saulawa JCA that:

> It is not in doubt, as alluded to above, that the custom applicable to Ndiukwu Umuiyi Akabo community, which permits a father to keep his daughter in the family to procreate out of wedlock, due to lack of a male child, is morally, religiously and culturally obnoxious. Such a custom is repugnant to natural justice, equity and good conscience. It is antithetic to the well cherished tenets of fundamental human rights. As enshrined under chapter IV of the 1999constitution. The custom in question no doubt promotes sexual promiscuity in the society and it is thus highly abominable.

This decision, notwithstanding the custom, is still being adhered to by its faithful. The same attitude befalls customs relating to discrimination against women in matters of inheritance. In *Mrs. Bridget Motoh v. Emmanuel Motoh*[39]per Aboki JCA thus:

> I will have no hesitation in declaring such customary law which discriminates against female children in terms of inheritance to be repugnant to natural justice, equity and good conscience. I find support in the case of Mojekwu v. Mojekwu (1997) 7 NWLR 284 PT., 512 PAGES 283 where Tobi JCA (as he then was) said: -We need not travel all way to Beijing to know that some of our customs including the Nnewi Oli-Ekpe custom relied on by the appellants are not consistent with our civilized world in which we all live in totally including the appellants…Accordingly, a custom or customary law to discriminate against a particular sex is to say the least an affront on Almighty God himself. Let no body to 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.

[37]Cap83 Laws of Akwa Ibom State
[38] (2008) 10 NWLR (1094) 1 at 19
[39] (2010) LPELR – 8643 (C.A.) 72-73, Para. G

b) Incompatibility Test

For customary law to be enforceable by the Nigerian court, 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). In the very recent 2014 case of *Mrs Lois Chiteru Ukeje & Anor v. Mrs Gladys Ada Ukeje*[40], *the* Supreme Court per Rhodes Vivour JSC held:

> L.O. Ukeje deceased, is subject to the Igbo customary law. Agreeing with the High Court, the Court of appeal correctly 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 section 39(1) (a) (2) of the 1979 constitution (as amended) ---. The finding remains inviolable. Section 39(1) (a) (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 not made subject; or(b) be accorded either expressly by, or in the 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, religion or political opinions.' No matter the circumstance 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.
>
> (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Conclusively, for a custom to conform to modernity it must see not to violate the provision of the Constitution of the Federal republic of Nigeria 1999 as amended or any other local law, if it does, it becomes incompatible with existing local legislation and so will not be enforced.

c) The Public Policy Test

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

[40] (2014) LPELR – 22724 (S.C.) P. 32

contrary to public policy. In the recent 2014 decision, the Court of Appeal in *Ojukwu v. Agupusi & Anor*[41] citing with approval the case of *Nwachimemelu Ikemefuna Okonkwo v. Mrs Lucy Egbunam Okagbue& 2 Ors*[42] held as follows:

> --- the institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of the 3rddefendant to him. To claim further that the children of the 3rd defendant had by other man or men are the children of Okonkwo deceased is nothing but an encouragement of promiscuity. It cannot be contested that Okonkwo could not be the natural father of these children. Yet 1st and 2nd defendants would want to integrate them into the family a custom that permits of such a policy gives license to immorality and cannot be said to be in consonance with public policy and good conscience. I have no hesitation in finding that anything that offends against morality is contrary to public policy and repugnant to good conscience. It is in the interest of the children to let them who their real fathers are and not to allow them live for the rest of their lives under the myth that they are children of a man who had died many decades before they were born'…Ogundare alluded to the case of Edet v. Essien (1932) 11 NLR 47 per Cecil Carey, J. who held in a case where a man claimed the child of his former wife who had left and married another man who impregnated her, on the ground that the divorced wife had not returned his bride price, that such a custom is repugnant to natural justice, equity and good conscience, to be rightly decided. (Underlined ours)

d) Agreement by Parties to Exclude Customary Law

Where enforceable customary law would have been applicable but the parties agreed, expressly or implicitly, that the transaction would be regulated by another system of law, the court will give effect to their intention. In *Griffin v. Talabi*,[43] a Native purchased the land in dispute from Chief Oloto in 1928 and was given a document couched in English law form: evidencing an agreement for sale, acknowledging receipt of the purchase money and containing an undertaking to execute a formal conveyance. Under English law, the document conferred only an equitable interest in respect of the land. It was contended that since both parties in the 1928 transaction were Natives and illiterates, customary law regulated the transaction and conferred an indefeasible title to the land on the purchaser. The West African Court of Appeal rejected this contention and held that the documents, "clearly evidence a transaction the nature of which is unknown to Native law and custom, which are concerned neither with covenants to convey nor with the execution of formal conveyances." It added that the documents and conduct of the parties show an intention that customary law should not govern the transaction. English law was therefore held to govern the case.

> Also, in *Okolie v. Ibo,*[44] there was a dispute between two Ibos residing in Jos regarding the supply of fuel. One of them was a transporter and the other

[41] (2014) LPELR – 22683 (C.A.)
[42] (1994) 9 NWLR (Pt.308) 301
[43] (1948) 12 W.A.C.A 371
[44] Ibid. at 372

operated a filling station. It was held that the nature of their respective occupations, the transaction between them and the commodity in which they dealt indicated that neither Islamic law, applicable in Jos, nor Ibo customary law should apply. The parties were therefore held to have intended the application of English law.

e) Transactions Unknown to Customary Law

This can occur where there is a conflict between customary and English laws of succession. The question here is whether a Native who went through a Christian marriage, that is, a monogamous marriage, and died intestate, had by that uncustomary marriage excluded the application of the customary law of succession to his or her estate. In other words, is a Christian marriage a transaction unknown to customary law? The importance of these questions, and the answers thereto, can only be fully appreciated when one understands the different effects of customary and English laws of succession. Some of them are:

i. Under customary law, a wife has no succession rights beyond that of actual abode in her late husband's house;[45]but English law gives her well-defined succession rights. Though a wife's non-succession right under customary has been re-stated by the Nigerian Court of Appeal in the recent cases of *Akinnubi v. Akinnubi*[46]and *Obusez v. Obusez*,[47]it has a discriminatory effect, and it is thus doubtful whether a frontal challenge of the customary law will survive a constitutional test.

ii. Under customary law, the children and wife of a deceased, in matrilineal societies, have no rights of succession to the deceased's estate; but English law gives them full rights of succession. However, the customary law position here, as in many other instances considered in this itemization, may be altered by the use of a testamentary instrument. In *Adesubokan v. Yunusa*,[48]the Supreme Court of Nigeria held that a Moslem subject to Moslem law, that is, customary law, could by means of a Will validly made under the applicable Wills Act 1837, deprive a son of that son's inheritance right under Moslem law.

iii. Under Boki (in eastern Nigeria) customary law, only the father, eldest brother or uncle of the deceased, to the exclusion of the children and wife, have rights of succession; but with application of the English law of succession, the children and wife of the deceased would be entitled to succession rights.

iv. Among the Kalabari and Nembe (in south-eastern Nigeria), children of an Igwa marriage belong to and have succession rights in their mother's family; but the application of the English law of succession entitles such children to succession rights in their father's estate.

v. Under customary law, a husband's succession rights to the wife's estate are inferior to and subjected to the succession rights of the children; however, English law gives a husband defined rights in his wife's estate.

[45] (1963) ALL N.L.R. 352
[46] (1997) 2 NWLR (Pt. 486) 144
[47] (2001) 15 NWLR (Pt. 736) 377
[48] (1971) 1 ALL N.L.R. 225

These differences show the importance and implication of a determination of the question: which law of succession, English or customary, governs the estate of a Nigerian Native who went through a Christian form of marriage and died intestate? The Nigerian courts have grappled with this problem over the years. The decisions show a cleavage of approaches. One view maintains that, since the incidents of a Christian marriage are unknown to customary law, it is the English law of succession that applies to the estate of persons who married thereunder and died intestate. In other words, a Christian marriage transaction is unknown to customary law, the application of which should therefore be excluded. The contrary view rejects any notion that Christian marriage has such a talismanic and automatic effect on the law of succession. It holds that the applicable law depends on the facts and circumstances of each case.

1.6 The Effects of Enforceability of Customary Law in the Administration of Justice in Nigeria

The concept of enforceability of customary law has a far reaching consequence in the administration of justice in Nigeria both positively and negatively. The validity tests earlier discussed serve as a catalyst for eliminating retrogressive, archaic and even primitive or otherwise unconscionable aspects of the law. Section 7(2)[49] of the Abolition of the Osu System Law bars any court from recognizing any custom or usage, which implies any disability on any person on the grounds of the Osu system. Similarly, Section 3[50] of the Abolition of Harmful Traditional Practices against Women and Children Law abolished and declared unlawful all customary traditional practices that were prejudicial to the legal rights and well-being of women and children. Such practices were enumerated to include those of a scandalous or disgraceful nature which amounted to a failure to observe the fundamental rights of a woman or any child; allowed for a female genital mutilation or circumcision; were harmful to a widow including any practice which required the confiscation of her husband's property; child labour; or encouraged child abuse and neglect, and forced and early marriage of girls before the age of eighteen. The abolition of these negative customary practices has not only made customary law more humane but has enabled it to deliver both legal and social justice which enhanced social development. Perhaps, this could be said to be the only positive impact.

Although the validity tests have its positive impact on attaining justice in Nigeria, the negative are more. The statutory and judicial authorities have shown that the legal status of our customary law in the contemporary Nigerian justice system is that customary law is no law except it is so declared by the courts to be law after passing the repugnancy tests set for it by the statutes. This is the contention of the realist which says that the law is what the courts say it is. For the realists therefore, if the courts say that a supposed law is not law then it is not law and if the courts say that a law is law, then it is law. In view of the above, the opinion of the realist will be that a custom becomes customary law when the court says it is.

[49]Cap. 3, Laws of Ebonyi State, 2009.
[50]Cap. 2, Laws of Ebonyi State, 2009.

There is also the total eradication and or non-recognition of our criminal customary law justice system hence the Repugnancy Test may be said to apply to both Civil and Criminal Customary Law[51]. This is in view of the provision in Section 36(12) of the 1999 Constitution of Nigeria (as amended) which provides thus;

> subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty, therefore, is prescribed in a Written Law; and in this subsection, a Written Law refers to an Act of the National Assembly or a Law of a State, and subsidiary legislation or instrument under the provision of a law.

This provision ordinarily has nothing to do with the Repugnancy Test but its implication and impact on the applicability of Repugnancy Doctrine to Customary Criminal Law is that any act that is not so declared a crime by a written law is not a crime and no one can be convicted of such an alleged crime. This provision is without exception and without regard to the state of our Customary Criminal Law which is largely unwritten. Hence, this provision can rightly be regarded as abolishing our Customary Criminal Laws which till date remain unwritten. The Constitution has turned away its eyes from those aspects of our laws and has by a single provision shot out such Customary Criminal Laws which had guided and helped to shape, regulate or curb anti-social behaviours of the people long before the colonial era simply because they are not written. Since the Constitution which is our *grundnorm* does not recognize our Customary Criminal Law, the stark reality is that, in so far as our Customary Criminal Laws are not written, they are not enforceable and no one can be convicted of them.

The picture of customary law in a traditional society is one in which the people are in harmony with the norms of their society. Norms that reward good conduct, punish abominations and misconduct and continuously guarantee stability in the society. This system for the administration of justice was in place and accessible to all that approached the temple of justice. In Igbo land this system was well regulated from the family level through the village level up to the clan or community level.

There were two vertical paradigms for accessing justice. The one lane approximated what today is referred to in the Afikpo areas of Ebonyi State, Nigeria as the Ekpuke Eto, Ekpuke Essa and Nde Ichie Traditional Councils in ascending order whereas the other lane captured the family, village, community and clan levels in ascending order as well. Every judgment presented an opportunity for appeal up to the peak of the lane chosen by the aggrieved party. But there was no rivalry between the two lanes for where a matter was tried for instance in the village or community assembly all the actors on the other lane where participants in the panel and vice versa. If there is any distinction, it is only in the area of age set or age grade for members of Ekpuke Eto up to Nde Ichie belonged to different classes of age grades whereas the village or community assembly accommodated all adults. Apart from the availability of the structure for adjudication, NdeIchie the apex point of appeal was versed in the culture and tradition of the

[51]Igwe, O.W., and Ogolo, M.D. (2017) Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-assessing Content and Relevance. *Donnish Journal of Law and Conflict Resolution,* Vol 3(3) P. 035.

people and were forthright and spoke the truth in honour of, but above all for fear of, the gods and the ancestors.[52]

But this picture has been blurred for the right and wrong reasons. From the colonial times, the value system of traditional African societies became increasingly invaded, adulterated and dislocated to the end that respect for wealth and the rich replaced the value for truth and honesty and the fear of the gods that invariably punished evil and abominable behaviour. Adherents of the new Christian religion knew that their God was forgiving and longsuffering and can forgive any offence unlike the gods of the traditional society who struck any offender instantly. Experience has shown that when such people chose to swear by the thunder gun or machete they are overwhelmed by superstition and become more cautious about lying on oath. The corruption of the value system has direct impact on the dispensation of justice in contemporary times even under traditional as against statutory arrangements. People now think more of what they can gain in a particular circumstance than what society can gain by a fair dispensation of justice.

Also, most of the vices that inherent under the received English adjudicatory process such as prolonged delays in litigation, corruption resulting in flawed judgments and high cost of litigation are minimized or nearly absent under the customary system of adjudication. There is a general perception that the customary adjudicatory system is more trustworthy and reliable than the received English system and people are much more willing to imbibe it.

The repugnancy tests determined the consistency and the applicability of customary laws. However, itis perceived that the application of customary laws diminished as a result of this. This test exposes the inferiority of customary laws to the written British rules. Both statutory enactments and customary laws are sources of law in Nigeria; the "incompatibility test" has undoubtedly ranked statutory enactments above customary law[53].

The selective application of English law to customary law has resulted in a fundamental duality of laws applied by different courts; customary law in customary courts and English law in English type courts[54]. These sometimes give rise to conflicts of law in the administration of justice in English type courts. This happens when both English law and customary law govern a particular situation. For example, section 1(2) of the Property and Conveyancing Law[55] (PCL) of Bendel, Ondo, Ogun and Oyo States exempt customary law transactions from the ambit of PCL. Thus, customary land law in these states is not incompatible with the PCL. However, the problem may arise when it comes to determining whether a particular land transaction is

[52]Nwocha, M. E. (2016). Customary Law, Social Development and Administration of Justice in Nigeria. Beijing Law Review, Vol. 7, P.430.
[53]Oluwabusayo, T.W., and Hameenat, B.O., *et al.* (2018) Revisiting the Effects of Colonialism on the Development of Customary Laws in Nigeria. *Kampala International University (KIU)Journal of Humanities,* Vol.3(1), P. 105
[54]Akrofi, D.A. (1989) Judicial Recognition and Adoption of Customary Law in Nigeria. *The American Journal of Comparative Law*, Vol. 37, P. 571.
[55] Western Region of Nigeria Laws, 1959, Cap. 100

governed by the PCL or customary land law. Here an obvious example is provided by questions of land tenure, where the English law favors full rights of individual ownership and customary law favors a communal or family title, coupled, as it may be, with individual rights of user.[56]

1.7 Conclusion

This paper analysed the enforceability of customary law and its effects in the administration of justice in Nigeria. In view of the foregoing, the following findings are made:

a) The statutory and judicial authorities have shown that the legal status of our customary law in the contemporary Nigerian justice system is that customary law is no law except it is so declared by the courts to be law after passing the repugnancy tests set for it by the statutes.
b) Customary law does not stand alone for its enforceability. The repugnancy tests determined the application and the enforceability of customary law which exposes the inferiority of customary laws to the written British rules.
c) Good and efficient aspect of our criminal customary justice system have totally undermined or eradication.

Based on the foregoing findings, it is hereby recommended as follows;

a) that the legal status of our customary law once judicially noticed or proven to exist by evidence should not be subjected to any type of test before it can be considered as law.
b) That the retention of the colonial clause of repugnancy tests in Nigerian statute books should be removed hence it has outlived its purpose. This can make Customary law does not stand alone for its enforceability.
c) Good and efficient aspect of our criminal customary justice system that works better and more efficiently than the British type system should be codified and made as written law. This will bring our criminal customary justice system in line with section 36(12) of the 1999 Constitution of Nigeria (as amended).

[56]Anderson, J.N.D. (1960) Colonial Law in Tropical Africa: The Conflict Between English, Islamic and Customary Law. *Indiana Law Journal*, Vol. 35, Issue. 4, Article 2, P. 432.