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MAN-MADE LAWS AND GOD ORDAINED TRADITIONS: GREY AREAS OF THE REPUGNANCY DOCTRINE

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Abstract

The Repugnancy Doctrine emerged from the decision of the courts that when a custom is found to be barbaric, it is not for the law to soften or amend it, but to reject it in totality by deeming it repugnant to natural justice, equity and good conscience. It is the most popular part of the three-way validity test. But by what standard is repugnancy measured, and by what metrics is it applied? Nigeria is a multifaceted society with over 250 ethnic groups and diverse cultures and customs. The implications of sociocultural differences are far-reaching, as also was the adoption of other (foreign) sources of law, which became the lens through which the repugnancy test was carried out. This article examines the vague areas and obscurities in utilizing the doctrine, by which analysis it seeks to establish whether the workings of the doctrine or even its very existence are a fatal challenge to its legitimacy. The article appraises the struggle between cultural relativism and universal human rights. The dichotomy between 'newer' laws of men, and ancient laws given to the people by their gods/God speaks to the core of the topic as there remains a natural chasm, the boundaries of which will be prodded until the doctrine is either clarified, modified, amplified or if a better measure of the test is conceived, repealed. After all, it is termed 'a doctrine' which phrase places on it the deceptive toga of sacredness, yet it is far from that, largely due to the documented arbitrariness of its application, and its erratic standards, moniker notwithstanding.

Keywords: Repugnancy Test, Doctrine, Customary Law, Human Rights, Natural Justice, Traditions

Introduction

The word 'repugnant' was derives from the French *répugnant*, which means 'contrary, opposed, in opposition, resistant,' and ultimately from the Latin *repugnare*, 'to resist or fight back,' containing the root *pugnare* 'to fight.'[1] According to the Oxford English Dictionary[2],

[1] M. Demian, *On the Repugnance of Customary Law* Published online by Cambridge University Press: 09 April 2014 https://www.cambridge.org/core/journals/comparative-studies-in-society-and-history/article/on-the-repugnance-of-customary-law/C63987C0E056CD0CFF89F497BD588A26 accessed 17 October 2025

the legal sense of the term dates to at least the fifteenth century, whereas the moral-aesthetic sense does not begin to appear until the seventeenth century. It acquires a fully-fledged connotation of disgust or aversion only in the nineteenth century. The less common verbal form, 'to repugn,' appears to have retained the original sense of resistance or opposition in its modern usage.[3]

The Repugnancy doctrine can be traced to the Roman–canonical law, which had been applied in most of the medieval European states[4]. By the Medieval period, the Romans achieved greatness and learned to govern a large empire. The foundations for their imperial system were laid in the days of the Republic, when many sound and effective features of government were developed through the influence of the Greeks. Notable amongst Roman contributions to political organizations were its legal codes, which protected citizens from arbitrary rule. As the boundaries of the empire expanded, Romans took their laws and customs with them, subjecting barbarian states' laws and customs to tests, especially when they challenged Roman sovereignty. The Roman Empire included people of many races, religions, and cultural traditions. These diversities made governance challenging. Looking at the development of the repugnancy doctrine in the medieval European states and the historical evidence, it is glaring that the Romans applied the repugnancy doctrine to the states of the empire and beyond and introduced rules of equity to protect the rights of all citizens.[5]

The Repugnancy Doctrine: Legal Framework

The repugnancy doctrine in Nigeria arose in colonial times and is cemented by the classicus decision in *Eshugbaye Eleko v. Government of Nigeria*[6]. In that case, Lord Atkin submitted that "(T)he court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience. Against this background, the position of the law, which was retained post-colonization, is that every High Court in Nigeria is empowered to observe and enforce the observance of every customary law of the people in the area of its jurisdiction, provided:

(i) That the customary law is not repugnant to natural justice, equity and good conscience, and
(ii) That such customary law must not be incompatible either directly or by implication with any law for the time being in force.
(iii)The law must not be contrary to public policy.

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[2] Oxford English Dictionary (Online Edition Oxford University Press 2025) "Repugnancy" https://www.oed.com, accessed 19 October 2025
[3]Ibid
[4] J. D. M. Derrett, *Justice, Equity and Good Conscience (Changing Laws in Developing Countries)* (London: Kegan Paul, Trench, Trubner and Co. 1965) p. 197
[5] Ibid 199 32
[6] (1931) AC 662, at p. 693.

In Nigeria, customary law may be divided into two classes: ethnic or non-Muslim customary law and Muslim law. Muslim law is religious law based on the Muslim faith and applicable to members of the faith or those under the influence of Islamic Civilization. It is principally in written form and is comparatively rigid. Ethnic customary law, on the other hand, is unwritten and varies from one ethnic group to another. The diversity of customs is a major obstacle to the uniformity of customary law systems in Nigeria, especially in the Southern states. This multiplicity is complicated by superstitions, which make proof and judicial notice very difficult. It was against this background that the British subjected our customary law to test, to remove superstitious and harsh elements and to conform it to the universal standard of morality. This explains why Elias has argued that the doctrine of repugnancy has a positive effect on the development of our customary law by the elimination of gross injustice inherent in its application[7] . Uwais, J. S. C., also posited that equity in its broad sense, as used in the repugnancy doctrine, is equivalent to the meaning of 'natural justice' and embraces almost all, if not all, the concept of good conscience.[8] The logic here is that a good custom or law must conform to the universal concept of what is good, just and fair, and this is consistent with section 36(1) of the 1999 Constitution. There is no known repugnancy case that has been decided based on conflict with any other law. Rather, all repugnancy cases were decided by reference to the universal standard of morality, which in human transactions is founded on what is good, just and fair. They were, in fact, decided mostly on moral law. The operation of the repugnancy doctrine in determining the applicability of a customary law should be seen, therefore, only as an instrument used by the British to bring our customary law, as indeed any other law, within the acceptable objective standard of moral law currently recognized by all nations.

To facilitate smooth administration, the repugnancy doctrine was introduced into Nigeria by the end of the 19th century by Ordinance 3 of 1863, the Ordinance which received English Law into our legal system. The doctrine is found in both the early and modern statutes dealing with the administration of justice in Nigeria. Section 19 of the subsequent Ordinance, that is, the Supreme Court Ordinance of 1914, is one of the earliest provisions on the repugnancy doctrine and states as follows:

> 'Nothing in this Proclamation shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the Protectorate, such law or custom not being repugnant to natural justice, equity and good conscience'.

Upon the advent of colonization and the parochial amalgamation of Nigeria in 1914, different cultures, customs and even religions were forcibly fused, and laws distinct from the people were made to safeguard and keep in check these distinct entities. However, the British

[7] T. O Elias, *The Nature of African Customary Law* (England: Manchester University Press 1956) p.124
[8] *Okonkwo v. Okagbue and Ors* (1994) 9 NWLR Pt 301

colonial rulers did not totally do away with the customary laws of the people; the British subjected the recognition and validity of the customary laws to the permissible extent of English principles and concepts through the repugnancy clause.

The unfairness inherent in the customary laws of succession led to gradual judicial interference by the application of the repugnancy doctrine, as demonstrated in the case of *Nwanya v. Nwanya*[9] . The case of *Mojekwu v. Mojekwu*[10] , however, marked a turning point. The Court of Appeal in that case struck down, as repugnant to natural justice, equity, and good conscience, the *Oli-ekpe* custom in Ibo land, which bars women from inheriting land. It has therefore been held that the rule of primogeniture is plainly unfair to the younger children of the family, it is repugnant to natural justice, equity, and good conscience[11]. In the landmark case of *Ukeje v. Ukeje*[12], the Supreme Court of Nigeria voided this tradition and custom of the Ikwerre people prohibiting a girl child from inheriting the parent's estate because this custom is discriminatory and in conflict with the provision of section 41(2) of the Constitution of the Federal Republic of Nigeria[13], therefore it is repugnant to natural justice, equity and good conscience. Noticeable from the above exposition is the fact that, in view of the absence of a definition for the phrase, repugnancy doctrine, section 42 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) later became the main applicability criterion[14]. Section 42 of the 1999 Constitution forms the fundamental premise for the protection of Nigerians from discriminatory and repugnant customary rules of inheritance. The section provides that:

> 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 citizen of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject;

The doctrine is also legally recognized as its tenets in the Evidence Act 2011, which provides that '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'.[15]

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[9] (1987) 3 NWLR (pt. 62) 697.
[10] (1987) 3 NWLR (pt. 62) 697.
[11] That was the view of the court of first instance in *Ogiamen v. Ogiamen* (1967) NMLR p. 245 at p. 247.
[12] (2014) 11 NWLR (PT.1418) 384
[13] Cap C23 Laws of the Federation of Nigeria, as amended 2011
[14] Sec 42(1) prohibits discrimination on grounds of 'ethnic group, place of origin, sex, religion or political opinion'.
[15] Section 18 (3) Evidence Act, Cap. E14, LFN., 2004

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 with a view to its application in another case. However, the courts have adopted certain basic rules in the application of the doctrine.[16] 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.[17]

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[18] has noted, there is only one common idea which has been expressed in apparently three phrases and has 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 of the validity of customary law is never English law. Despite 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 have gone further to consider the effect of the application of a rule of customary law. [19]

It can therefore be acknowledged that with the total indigenization of the Nigerian 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, however formulate a broad and discernible guideline for the application of the doctrine has largely left the discretion of the courts on 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.

Theoretically, judges only enforce or recognize a rule of customary law in contradistinction to its validation. Customary law comes into existence by its pre-conflict and pre-judicial acceptance as obligatory by members of the community subject to it. This general acceptance constitutes its tree of validity or *grundnorm*, not judicial *imprimatur*. But when we factor constitutional considerations into the equation, a new realm of problems arises. Certain

[16] Enright Q. Okolie, *Need for Statutory Intervention in the Continued Operation of the Repugnancy Doctrine in Nigeria* (2018). Academic Scholarship 2018, Available at SSRN: https://ssrn.com/abstract=4083659 accessed 18 October 2025
[17] Ibid
[18] M.I. Jegede, *Principles of Equity*, Benin, Ethiope Publishing Corporation 1981 pp. 4-5.
[19] Ibid

interpretational ambiguity may be seen in the recent and frequent subjection of customary law to constitutional standards.[20]

Repugnance has become a powerful concept to apply to any item of law, customary or otherwise. There are concerns that the courts are not using repugnancy in its strictly legal sense, but instead in the morally freighted sense that it acquired in colonial law as it pertained to customary law[21]. In other words, these judges appeal to repugnance in the sense of disgust, distaste, or repellence, with only very attenuated echoes of its original Latin meaning of resistance.[22]

Its major limitation is that it is considered intrusive, a foreign interference that dismisses the peculiarities of a people, invariably subjugating the people to 'superior' thinking and guidelines. Thus, when frowned upon, it is because of this belief that the essence of customary laws is being tainted by the courts; after all, it is assent by the people that should give credence or validity to a custom, and not some meddlesome repugnancy test.

Select Pros and Cons of the Repugnancy Doctrine

Olawoye[23] 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, which is heavily supported by judicial opinion. It has been said[24] 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 to accord with the mood of the times. For instance, in *Agbai v. Okogbue* (supra), Nwokedi (JSC) said as follows:

> Customary Laws were formulated from time immemorial. As our society advances, 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 its applicability under the existing social environment.

[20] *Muojekwu v. Muojekwu*, [2000] 5 N.W.L.R. [Pt. 657] 402
[21] M. Demian, op.cit. at 1accessed 19th October 2025
[22] Ibid
[23] C.O. Olawoye, *Customary Law and the repugnancy provision* (1970) vol. 4. The Lawyer p. 24.
[24] *Agbai v. Okogbue* (1991) 7 NWLR (pt 204) 391

Secondly, the doctrine has also been seen to afford the courts the opportunity of invalidating uncivilized customs. Thus, in *Umaru Gargati v. Cham*[25] , Coker, JCA, 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 unsavoury aspects in accordance with the level of development in the society.[26]

The Repugnancy doctrine played an important role in watering down some of the harsh rules of procedure under customary law. In adjudication, courts are required to abide by the two fundamental principles of natural justice, namely, *nemo judex in causa sua* (no one shall be a judge in his own cause); and *audi alteram partem* (no one shall be condemned unheard).[27] It can be safely argued that the customary law adjudicatory system falls short of these basic principles of fair hearing, as the accuser(s), who are mostly the traditional chiefs and elders of the community, more often than not, participate in the native court as arbiters. Furthermore, modern concepts of presumption of innocence, burden of proof and proof beyond a reasonable doubt are not grounded in customary law administration of justice. Thus, most trials before native courts were ultimately found to violate most of these modern requirements of a fair trial.

Another area of affirmative impact of the repugnancy doctrine is on the abolition of jungle justice or trial by ordeal. Whenever there is doubt during a trial, customary law allows the use of trial by ordeal to resolve issues or ascertain the truth. The use of ordeal had its genesis in the belief in a supernatural form to secure confession. Under the system, parties are subjected to some form of ordeal, and whoever survives is regarded as innocent.[28]

Another impact of the repugnancy doctrine on customary law is apparent in the customary rules of succession and administration of estates. For instance, courts now hold the view that for a rule of customary law of succession to be held valid, the rule must be fair and non-discriminatory on account of sex or any other prohibited grounds. The concepts of equality and non-discrimination have been given recognition in national and international human rights instruments.[29]

Notwithstanding the positive impact of the repugnancy doctrine on customary law, there have been some criticisms against the application. One of such attacks is the argument that the application uses the colonial standard of fairness as a basis to determine the validity of

[25] (1982) C.A.I. 168 at 173.
[26] E. Okolie, op.cit.16.
[27] 316. 1999 Constitution
[28] J. Omotola, *Primogeniture and Illegitimacy in African Customary law: The battle for survival of culture* (2003) Speculum Juris 17(2):181-203.
[29]The Harmonisation of the Common Law and the Indigenous Law: Conflicts of Law (Discussion Paper 76, Project 90, April 1998) at 96-108

African morality. Moses and Sheka[30] argue 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. They concede, however, that 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[31]. Thus, in *Ejiamike v. Ejiamike*[32], 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 the Onitsha custom. The 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 was of the view that the onus was on the defendants to establish that the custom relied on by the plaintiff was repugnant to the good conscience of the average Onitsha man in 1972. Thus, the learned judge opted to favour the age-long tradition of male primogeniture attainable in many Nigerian customs. This sentiment was shortly repeated by the Supreme Court in *Meribe v. Egwu*[33] when it held that the custom of the Umuoha people of the old Eastern Region (now Imo State) whereby a woman unable to bear children could marry another woman in order to raise children in her name (also known as woman-to-woman marriage) was a valid customary practice and not repugnant to natural justice, equity and good conscience.

The critical argument that the repugnancy doctrine has somehow undermined or subverted customary laws can be disproved in certain instances. In *Dawodu v. Danmole*[34] the popular idea of *Ori-ojori* was rejected as the customary rule of succession among the Yorubas, and the principle of '*idi-igi*' per stirpes was upheld as the authentic customary law of distribution of estate among the children in cases of intestacy. Also, in *Ogiamien v. Ogiamien*[35] the doctrine of repugnancy was subordinated to custom. The custom of primogeniture of the Benin custom was upheld.

A further argument against the repugnancy doctrine is "subjectiveness". It has been argued that "natural justice, equity and good conscience" can be interpreted subjectively by judges,

[30] J. E. Moses & M. S. Sheka, *An Evaluation of the Concept of Enforceability of Customary Law and its Effect in Nigerian Administration of Justice* Madonna University Faculty-of-Law Law Journal MUNFOLLJ (4) 2021
[31] Ibid
[32] (1972) E.C.S. N.L.R. 130
[33] (1976) 1 NMLR 47
[34] (1967) N.M.L.R. page 245
[35] (1962) 1 ANLR Page 702

potentially leading to inconsistent and biased applications of the doctrine. So, while Judge A consider a certain custom to be repugnant, Judge B might think otherwise. This can breed uncertainty in the application of the doctrine.[36]

Another argument questions the relevance of the doctrine to modern society since the very meaning and context of public policy can and has evolved, and may not be an enduringly adequate basis for testing customary laws.

God(s)-Ordained Traditions and Man-made Laws in Nigeria; Exploring the Dissension

It is trite that the Nigerian legal system is an intricate mix of received English law, statutory enactments, customary and Islamic law, all existing within a plural legal framework. This complexity might often bring friction in such instances as when the repugnancy doctrine, a principle of colonial jurisprudence, is made an umpire between man-made laws (products of legislative and judicial authorities) and "God-ordained" traditions, which are legitimized by their longevity, their religious and moral pedigrees.

When such practices, such as succession rights, marital customs, etc., which are unique to a given people and fully believed to be God/gods-ordained, are voided by the repugnancy test, discord becomes inevitable. Precedents like *Ukeje v. Ukeje*, (supra), and *Mojekwu v. Mojekwu*, (supra), evidence the judiciary's struggle to reconcile faith-based morality with constitutional equality and human rights- a clear indication of the paradox between divine order and human legislation. Both are cases on disinheritance of female children and hold the custom to be antithetical to constitutional equality provisions, clear from times when the courts were less eager to declare repugnancy, like in *Meribe* (supra).

Curiously, while man-made laws boast supreme authority from the constitution, a large number of citizens in mostly religious Nigeria view traditions as transcending human authority, leaving questions about the source and even the legitimacy and supremacy of law itself when courts invalidate divinely sanctioned customs. This begs the question whether democratic enactment, moral intuition or divine revelation should be the foremost determinant of legality in this regard.

Instances of Law-Tradition dichotomies requiring the repugnancy test

The most salutary influence of the application of the doctrine of repugnancy has been in the area of the law of succession, marriage and procedural law.[37]

[36] This has been discussed more comprehensively under another subtopic, infra.

[37] Ovbiagele Ohimai, *The Nigerian Legal System Justice And The Repugnancy Doctrine* http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/THE%20NIGERIAN%20LEGAL%20SYSTEM%20,JUSTICE%20AND%20THE%20REPUGNANCY%20DOCTRINE.pdf accessed 23rd October 2025

Inheritance

Inheritance is perhaps the most keenly contested area in the conflict between customary laws and statutory/constitutional law. This is primarily due to the fact that many Nigerian cultures favour patriarchal succession, usually to the complete exclusion of widows and female children. *Mojekwu* invalidated the Oli-Okpe custom, which restricted inheritance to male relatives, and *Ukeje* struck down the custom restricting female children from inheriting their father's estate, deeming both scenarios unconstitutional and thus void.

Generally speaking, under customary law in Nigeria, a wife has no succession rights beyond that of actual abode in her late husband's house,[38] but English law gives her well-defined succession rights. Though a wife's non-succession right under customary law has been re-stated by the Nigerian Court of Appeal in the recent cases of *Akinnubi v. Akinnubi*[39] and *Obusez v. Obusez*,[40] it has a discriminatory effect, and it is thus doubtful whether a frontal challenge to the customary law will survive a constitutional test.

Notwithstanding, by testamentary documents, the husband can decide how his estate should be shared, provided such properties are not 'sacred' under customary law. In *Adesubokan v. Yunusa*,[41] the Supreme Court of Nigeria held that a Muslim subject to Muslim 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 Muslim law. 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, has 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.[42] One may also probe the viability of the Boki custom once it is subjected to the crucible of public policy, morality and fairness.

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. Under customary law, a husband's succession rights to the wife's estate are inferior to and subject to the succession rights of the children. However, English law gives a husband defined rights in his wife's estate.[43]

[38](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
[39] (1997) 2 NWLR (Pt. 486) 144
[40] (2001) 15 NWLR (Pt. 736) 37
[41] (1971) 1 ALL N.L.R. 225
[42] Editorial *Inheritance and Customary Laws in Nigeria* October 31 2018 https://www.leadwaycapital.com/inheritance-and-customary-laws-in-nigeria/ accessed 10 January 2024
[43] Ibid

Gender rights

The Nigerian Constitution in Sections 34, 42 and 43 guarantee right to dignity, freedom from discrimination and rights to own property. These provisions have helped ensure that democratic principles are directly applied in the issue of gender rights in major customary matters, as opposed to Western ethnocentrism. In *Anekwe v. Nweke*[44], the court invalidated a custom denying a widow the right to remain in her late husband's home, holding it to be repugnant to natural justice and inconsistent with human rights norms. According to Onuoha[45], the discriminatory aspects of property inheritance under customary law in Nigeria manifest in different forms and scope, ranging from primogeniture rules, right of spouses, rights of adopted children and rights of an illegitimate child. Nigerian courts have therefore affirmed gender equality beyond being a statutory right but also a test of social justice, harmonizing customary traditions with the Constitution's supremacy clause in its Section 1(3).

Interestingly, four sisters, Chinyere Abel, Perpetual Abel, Bethel Abel and Josephine Abel have dragged their three brothers to court for discriminating against them in the inheritance of their father's estate.[46] The claimants prayed the court to interpret some sections of the 1999 constitution as amended and the Rivers State Prohibition of the Curtailment of Women's Right to share in Family Property Law No.2 of 2022. In the judgment delivered by Hon. Justice Augusta Kingsley Chukwu in 2023, the court directed the defendants to pay the four women a total sum of N72million as damages and also render a public apology in a national newspaper and two local tabloids. The tradition and custom relied upon by the defendants were said to be discriminatory and in conflict with the provisions of the Constitution of the Federal Republic of Nigeria in Section 42(1) (a) and (2). This Judgment has voided the age-long tradition and customary law which forbade a female child from inheriting her father's estate; a practice which is described as anachronistic, primitive and unconscionable and not fit to exist in the 21st-century. The law relied on is the Rivers State Prohibition of the Curtailment of Women's Right to Share in Family Property Law No. 2 of 2022[47].

It must be noted that the disinheritance of women and other obnoxious cultural practices incidental thereto under criticism have been challenged through (positive) feminism, human rights activism and judicial activism.[48]. It must also be noted that Nigeria remains a signatory to the Convention on Elimination of Discrimination against Women, which emphasizes the

[44] (2014) 10 NWLR (Pt.1415) 1

[45] Reginald Akujobi Onuoha, Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the rescue, Volume 10, Issue 2, April 2008, *The International Journal of Not-for-Profit Law 201*

[46] *Abel & 3 ors. vs. Abel & 2 ors.* (unreported), judgment delivered by Augusta Kingsley Chukwu, J.on Wednesday 29 March 2023 at the Rivers State High Court, Port Harcourt. Available at https://nationalpointdaily.com/brothers-to-pay-3-sisters-n72m-for-denying-them-share-in-fathers-property/ accessed on the 26 October 2025

[47] Ibid

[48] S. O. Umeh, B. U. Odoh & J. T. Okoro *Females' Succession Rights under the Native Laws and Customs of Nigerian Societies: An Affront to Justice* 2021 Madonna University Faculty of Law Journal MUNFLJ (7) pp. 84 – 100 at 98.

universality of the principle of equality of rights between men and women and makes provisions for measures to ensure equality of rights for women throughout the world. The nation is therefore bound by the provisions of this Convention, although the Bill domesticating it has never been passed by the Nigerian National Assembly because certain provisions of the Convention violate certain religious tenets and principles.[49]

Cultural punishment

Traditional penalties may conflict with human rights standards such as the prohibition of culture and cruel, inhuman and degrading treatment by the Nigerian constitution (Section 34(1)a, the African Charter on Human and Peoples' Rights and such international treaties as the International Covenant on Civil and Political Rights (ICCPR).

Marriage and Other Rites

Traditional marriage rites and such issues as child marriage, widowhood rites, forced unions, degrading mourning rites, purification rites, maturity rites, people trading, markings and confinement have been deemed inconsistent with constitutional rights to dignity, free movement and choice, and averse to statutory requirements about factors such as consent and age. In *Mojekwu v. Ejikeme*[50], the Court of Appeal reiterated that customs which oppress women and treat them as chattels are void for repugnancy.

Section 21 of the Child Rights Act prohibits marriage of anyone under the age of 18. Thus, customs that allow marriages by persons under 18 are deemed child marriages and voidable. In Islamic law, marriage is permissible upon attainment of puberty, and many Muslims consider this divinely ordained and spiritually protective of chastity.

In *Edet v. Essien*[51], a customary law permitting the sale of persons was struck down as barbaric. This conflict continues to highlight the tension between traditional family law and state-driven legislation. On the other hand, in *Nekede Community v. Egbuochu*,[52] the Court of Appeal recognized that customary arbitration and oath-taking could be valid means of dispute resolution under Nigerian customary law, provided that both parties voluntarily agreed to the process and accepted its outcome. The court emphasized that such customs are part of Nigeria's indigenous justice system and not automatically invalid unless proven to be repugnant to natural justice or inconsistent with written law.

[49] E. A. Taiwo, *Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria*. 2010 Journal for Juridical Science. 34. 10.4314/jjs.v34i1.62091.
[50] (2000) 5 NWLR (Pt. 657) 402
[51] (1932) 11 NLR 47
[52] (1998) 3 NWLR (Pt. 540) 364 CA

Grey areas of the Repugnancy Doctrine

One of the grey areas of the doctrine is in its subjective terminology, as there is no guiding definition of the term. Osborne C.J. in *Lewis v. Bankole.*[53] 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 not be difficult to see 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. There are uncertainties due to this lack of a clear definition, the potential for imposing foreign standards on local customs, and the subjective nature of what constitutes "natural justice, equity, and good conscience". An evaluative approach raises questions. Whose conscience? Whose sense of equity? Whose justice? Due to the vagueness of the repugnancy doctrine, the court uses its discretion in the application of the test. This has an effect on rights, especially of vulnerable sets of individuals, for instance, as discriminatory customary laws of succession are applied based on the discretion of the court.[54] The phrase "natural justice" is also elastic; normative choices lead to inconsistent outcomes. The lack of an objective and culturally contextual yardstick, clear standards or guidelines, has led to inconsistencies and perceived judicial paternalism, making the test a subjective moral one rather than a principled legal standard, a clear case of the subjectivity factor in the cultural relativism versus universal human rights contradiction.

There is also an inconsistency in the application of the doctrine across regions and legal traditions. There is, at the very least, a duality of application as it seems the South seeks to utilize it to invalidate discriminatory or oppressive customs, while the north especially the Sharia states, apply religious principles viewed as beyond human intervention. Arising from this, certain customs upheld on one's part may be struck down on the other's part, illustrating the clear contextual inconsistency of the test.

Another grey area would be in the static nature of the doctrine in a dynamic society. What was considered repugnant in colonial times may well be fully acceptable in contemporary Nigeria and vice versa. For instance, practices like infant marking and widowhood rites, once widely accepted in most cultures, are now considered degrading and offensive in modern rights discourse. There is a marked absence of a framework for periodic reassessments and updates of moral standards, making it difficult to keep up with evolving social consciousness.

There is also the issue of the strain in the relationship between customary laws as a reflection of indigenous values and constitutional law as the supreme man-made law. Courts are often

[53] (1935) 12 N.L.R, 7
[54] Allisson D. Kent, *Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights Under Customary Law in Africa,* 28 MICH. J. INT'L L. 507 (2007). Available at: https://repository.law.umich.edu/mjil/vol28/iss2/6 accessed 26th October 2025

forced to play a balancing act between respecting cultural diversity and upholding constitutional rights, especially in more sensitive areas such as gender equality and human dignity. Critics have argued that the doctrine risks eroding genuine cultural identity by imposing Western notions of justice on indigenous systems. The relationship remains delicate as the lines between cultural autonomy and upholding universal rights remain blurred.

There is also no yardstick to measure acceptability, which is one of the bases on which a custom may be deemed repugnant. Though it is not the sole factor, acceptability is a highly considered one. Various factors might affect the acceptability factor, including modernization, religion, urbanization and diverse levels of awareness. However, there could be instances where a doctrine is widely accepted but deemed repugnant, or widely reviled yet ruled not repugnant. In *Oyewumi v. Ogunesan*[55] the court stressed that a custom must not only exist historically but must reflect current community values to avoid being repugnant. Yet, are there any templates by which various courts may unilaterally measure and accurately ascertain these "current community values"? The methods and threshold of proof are unsettled, customs evolve over time, and judicial and societal perspectives often diverge.

Tradition and religion are deeply intertwined, and the repugnancy test poses as a severe factor, rather a complementary one. Hence, the question arises, what level of deference should be given to the preference of a person or group for their own management? The consent query goes both ways. It is illegal if it is not given, and a contrary action still proceeds. But what about when the consent of the person or group is well received and perhaps even documented, would it not amount to a reverse encroachment on rights such as of choice and association? This is a variation of the acceptability challenge. Certain cultures have communal and individual consent and high cultural values for things like markings, genital cuttings and servitude, which brings the argument full circle back to the courts and the subjectivity problem.

There are also no uniform procedural limitations or a framework for testing the doctrine. This procedural uncertainty is visible in situations where various courts give different views on similar customary issues. In *Larinde v. Afiko*[56], the West African Court of Appeal held that courts must receive evidence of a custom's existence and operation before applying or rejecting it. Yet, later cases sometimes skipped this evidentiary step, relying instead on judicial notice. In its own turn, the wide judicial discretion given to judges to decide what is repugnant to natural justice, equity and good conscience, means judges will provide interpretations based on personal, cultural or foreign legal influence.[57]

There is a palpable problem of assent to the very doctrine, attributable to a lack of a unanimous reception of the doctrine due to the aforementioned grey areas and perhaps more. There are many concerns that the continued operation of the doctrine and the unfettered

[55] (1990) 3 NWLR (Pt. 137) 182
[56] (1940) 6 WACA 108
[57] This has been further espoused on earlier in this paper.

discretion which it confers on the courts may (therefore) create a social dislocation between the people.[58]

It has also been argued that customary law is validated by the assent of the people and not by courts, and that the tests contained in different statutes by which courts are permitted to intervene in the regime of customary law are tests of enforceability and not tests of validity.[59]

No great doctrine finds difficulty in incorporating into the society it seeks to guide. The pluralistic nature of the Nigerian society must be heavily considered in making all adjustments necessary to make the doctrine more satisfactory and welcome.

Recommendations

A nuanced and balanced approach is advocated, re-echoing similar sentiments expressed by Okpokwasili [60] , who opined rightly that rather than promoting a one-size-fits-all approach, it is important to engage in dialogue, promote cultural sensitivity, and work collaboratively with communities to challenge harmful practices within their own cultural frameworks. It is essential to find common ground that respects cultural identities and traditions while ensuring that the basic human rights and dignity of individuals, particularly women and girls, are protected.

The judiciary must ensure statutory clarity and codification of all important rules and laws. Where applicable, clear guidelines must be provided, made accessible and brought to the awareness of the public for their education and for legislative harmonization. There must also be regular legislative updates, as this is imperative for keeping up with the dynamics of a fast-changing, daily-evolving society.

Options for exploring Alternative Dispute Resolution mechanisms may also be put forward and explored while application of universal human rights laws and indeed the entire Nigerian jurisprudence must be tailored with full context of the customs of the people in mind, this will help in avoiding the loss of substance and a people's identity through unbridled erasure of their long-cherished traditions, and the courts must be accordingly sensitized. This will also help to avoid sacrificing cultural contexts on the altar of foreign legal philosophies and retain the spiritual and cultural identity of the people without jettisoning constitutional values.

It is also imperative to foster continuing dialogue between legal and traditional institutions, so that common grounds can be identified and explored, differences aligned, and mutual concessions made.

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[58] Okolie, Op. cit

[59] A. O. Enabulele and B. Bazuaye. *Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts.* Journal of African Law 63.1 (2019): 79-104

[60] Ogochukwu Agatha Okpokwasili (2024) *The Ethics Of Cultural Relativism Versus Universal Human Rights In Addressing Gender Issues In Nigeria* Journal of Applied Philosophy, ISSN: 1597 – 0779, Vol. 22, No. 4, 2024 Department of Philosophy, Imo State University, Owerri, Nigeria via https://acjol.org/index.php/ajap/article/view/5797/5622 accessed on 24 October, 2025.

Conclusion

The Repugnancy Doctrine can be said to be at a crossroads between law, religion and morality. It embodies the enduring effort to align justice with both universal human conscience and local divine traditions. No doubt, the doctrine has contributed to the development of the customary laws in Nigeria. It has refined and modified obnoxious rules of customary laws in terms of modern-day realities. No doubt, it remains controversial. The law must therefore find a middle point where it applies dexterity and perspective to achieve a working system that retains the best of both worlds: rich, long-revered customs, and equitable and just application of its conserved tenets.

Perhaps, one day, the grey fog will clear and customary law can enjoy legal clarity for the most part and rights protection in a black and white balance. After all, it would be ironic if the doctrine ends up doing the opposite of what it set out to do: destroying and disuniting, rather than protecting and preserving.