

REASSESSING TRADITION: THE REPUGNANCY DOCTRINE AND THE COLONIAL SHAPING OF CUSTOMARY LAW IN NIGERIA

Jonas Eze*

Ubaka Cosmas Molokwu**

Matthias Chukwuma Nwande***

Ozioma Victoria Uchime****

Emmanuel T. Eyeh*****

ABSTRACT

In 1900, when the British Government assumed administrative control over Nigeria from the Royal Niger Company, Sir Frederick Lugard, implementing Indirect Rule, retained the Company's policy of applying indigenous laws and customs in the administration of justice. However, these native laws and customs were required to pass the repugnancy test, which served as a filter to eliminate aspects of Nigerian customary law deemed incompatible with British legal principles. Consequently, the system led to the modification, abolition, amendment, or outright

*Lecturer, Department of History and International Studies, University of Nigeria, Nsukka 410105, Nigeria. Email: olisaemeka.eze@unn.edu.ng.

**Lecturer, Department of History and International Studies, University of Nigeria, Nsukka 410105, Nigeria. Email: cosmas.molokwu@unn.edu.ng (Corresponding author)

***Lecturer, Department of Public Administration and Local Government, University of Nigeria, Nsukka 410105, Nigeria. Email: matthias.nwande@unn.edu.ng

****Lecturer, Department of History and International Studies, Chukwemeka Odumegwu Ojukwu University, PMB 6059 Igbariam, Anambra State, Nigeria. Email: ozioamauchime@gmail.com

*****Lecturer, Department of History and International Studies, University of Nigeria, Nsukka 410105, Nigeria. Email: Emmanuel.eyeh@unn.edu.ng

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revocation of numerous indigenous legal norms. This study examines the impact of the repugnancy test under Indirect Rule on Nigerian customary law. Employing qualitative research methodology, the research explores the extent to which this colonial policy altered, restricted, or transformed customary legal practices. The findings reveal that the test not only eroded many traditional legal customs but also introduced foreign legal principles and procedural changes.

Keywords: Customary Law, Repugnancy Test, Transformation, Colonialism, Legal Norms, Nigeria.

MENILAI SEMULA TRADISI: DOKTRIN PENOLAKAN DAN PEMBENTUKAN UNDANG-UNDANG ADAT OLEH PENJAJAH DI NIGERIA

ABSTRAK

Pada tahun 1900, apabila Kerajaan British mengambil alih pentadbiran Nigeria daripada Royal Niger Company, Sir Frederick Lugard, melalui pelaksanaan Pemerintahan Tidak Langsung (Indirect Rule), mengekalkan dasar Syarikat tersebut yang mengaplikasikan undang-undang dan adat tempatan dalam pentadbiran keadilan. Namun, undang-undang dan adat tempatan ini perlu melalui ujian penolakan (repugnancy test), iaitu satu mekanisme penapisan untuk menyingkirkan unsur-unsur dalam undang-undang adat Nigeria yang dianggap tidak selaras dengan prinsip undang-undang British. Akibatnya, sistem ini membawa kepada pindaan, pemansuhan, pengubahsuaian, atau pembatalan sepenuhnya pelbagai norma undang-undang tempatan. Kajian ini meneliti kesan pelaksanaan ujian penolakan di bawah Pemerintahan Tidak Langsung terhadap undang-undang adat Nigeria. Dengan menggunakan metodologi penyelidikan kualitatif, kajian ini meneroka sejauh mana dasar kolonial tersebut telah mengubah, mengehendkan, atau mentransformasikan amalan undang-undang adat tempatan. Dapatan kajian menunjukkan bahawa ujian penolakan bukan sahaja melemahkan banyak amalan undang-undang tradisional, malah turut memperkenalkan prinsip undang-undang asing serta perubahan dari segi prosedur perundangan.

Kata Kunci: Undang-undang Adat, Ujian Penolakan, Transformasi, Kolonialisme, Norma Undang-undang, Nigeria.

INTRODUCTION

The British government's assumption of administrative control over Nigeria from the Royal Niger Company in 1900 granted statutory recognition to the indigenous laws and customs of the colonised people.¹ This recognition aligned with the counsel of Sir James Marshal, the first Chief Justice of the Royal Niger Company. On 17 July 1886, the jurist delivered a plea—later published in *The London Times*—advocating for the adoption of indigenous laws and customs in the administration of Nigeria.² Long before 1886, Justice Marshal had observed native judges in Africa, presiding alongside them and admiring their judicial processes. He contended that African societies possessed their own legal traditions, which were better suited to their circumstances than the complexities of English jurisprudence. Sir James Marshal's assertions remain both insightful and instructive. His words:

“My own experience of the West Coast of Africa is that government has for the time succeeded best with natives which has treated them with consideration for their native laws habits and customs instead of ordering all these to be suppressed as nonsense and insisting on their adoption of our own idea of life and civilization. What I wish to say is that, the natives of Gold Coast and the West Coast of Africa have a system of laws and customs which it will be better to guide modify and amend rather than to destroy by ordnance and force.”³

Following the conquest and establishment of colonial rule in Nigeria in 1900, Sir Frederick Lugard implemented the British colonial policy of Indirect Rule, which mandated the recognition and enforcement of indigenous customary laws. Acknowledging the

¹Ubaka Cosmas Molokwu, Victoria O. Uchime, Femi J. Chukwudi, Chukwuka E. Nwose, Emmanuel Emenike Mpmugo, Esther O. Okezie, Chioma Rosemary Ayozie, Felista Chidi Akidid, Hero O. Obasuyi, Solomon Ososhepu Ebu, “Colonial, Migration and Inter-group Relations in Africa: The Igbo and their Southern Cameroon Neighbours, 1916-2014,” *Cogent Arts & Humanities* 10, no. 2 (2023):8

²M. O. Balonwu, “The Growth and Development of Nigerian Indigenous Laws,” in *African Indigenous Laws*, ed. Taslim Olawale Elias, S.N. Nwabara & Chukwuma O. Akpamgbo (Lagos: Government Printer, 1975), 158

³Balonwu, “The Growth and Development of Nigerian Indigenous Laws,” 180–181

judicial system as a crucial instrument and extension of Indirect Rule, he enacted the Supreme Court Proclamation and the Native/Provincial Courts Ordinances in 1900.⁴ The Supreme Court Proclamation of 1900 established the Supreme Court for the Protectorate of Southern Nigeria, while the Native Courts Ordinance of the same year created Native Courts for the Southern States. Similarly, the Northern States Proclamation of 1900 instituted Native Courts in Northern Nigeria.

Section 13 of the Supreme Court Proclamation of 1900 explicitly directed the Supreme Court to uphold and enforce the people's customary laws, provided such laws or customs were not repugnant to natural justice, equity, and good conscience. The enactment states:

“Nothing in this proclamation shall deprive the Supreme Court of the right to observe and enforce 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...”⁵

Section 20 of the same proclamation further enshrined and cautioned as follows:

"The court shall always apply [customary law] in all matters relating to marriage and family, land tenure, inheritance and succession to land, and, by necessary implication, chieftaincy disputes."⁶

Similarly, Section 10(1) (a) of the Native Courts Ordinance mandated Native Courts to administer the customary laws of their jurisdiction. It states:

"Subject to the provisions of this ordinance, a native court shall administer the native law and custom prevailing in the area of jurisdiction of the court, provided it is not repugnant to natural justice, equity, and good conscience or inconsistent with any other ordinance."⁷

⁴Taslim Olawale Elias, S.N. Nwabara & Chukwuma O. Akpamgbo eds., *African Indigenous Laws: Proceedings of Workshop, 7–9 August 1974* (Nsukka: Institute of African Studies, University of Nigeria, 1975).

⁵Taslim Olawale Elias, S.N. Nwabara & Chukwuma O. Akpamgbo ed., *African Indigenous Laws*, 71

⁶Balonwu, “The Growth and Development of Nigerian Indigenous Laws,” 62–63

⁷J. M. Onyechi, “Problem of Assimilation or Dominance in African Indigenous Laws,” in *African Indigenous Laws*, ed. Taslim Olawale Elias,

Before colonisation, customary law was administered by indigenous village authorities in both civil and criminal matters without any imposed restrictions. However, colonial rule introduced significant changes. Even after independence, Nigeria's post-independence courts retained the colonial repugnancy test as a legal legacy. Indeed, all major Nigerian statutes incorporate this doctrine. The Evidence Act (Section 18(3)), High Court laws across states, the Court of Appeal Act, and various customary and area court laws all enshrine this principle. Thus, despite independence, the repugnancy test remains a foundational legislative provision in Nigeria.

The relevance of this study lies in its contribution to understanding legal pluralism and the tensions inherent in reconciling customary laws with modern legal standards. For instance, the repugnancy doctrine led to the prohibition of polygamy, once widely practiced in Nigeria, along with certain customs related to marriage, divorce, and inheritance.⁸ This research further explores the intersection of legal systems, highlighting the challenges in balancing local traditions with human rights. Ultimately, the study aims to inform debates on preserving cultural rights while upholding universal human rights standards.

Two theories guide this study: Post-Colonialism, as articulated by Edward Said, and Cultural Anthropology, as advanced by Clifford Geertz. Edward Said's post-colonial theory, *Orientalism*, examines the relationship between colonisers and the colonised.⁹ In his work, he defines "Orientalism" as the Western framework for depicting colonised societies as backward, primitive, and uncivilised.¹⁰ According to this theory, the West deliberately constructed a dichotomy of inferiority and superiority to justify domination. Essentially, colonisers portrayed indigenous cultures as barbaric and stagnant to establish imperial hegemony. Said's theory informs this study because, through its concept of "Othering," it reveals how colonisers crafted narratives that devalued native cultural and legal systems as inferior and regressive. The theory elucidates how the

S.N. Nwabara & Chukwuma O. Akpamgbo (Lagos: Government Printer, 1975), 44.

⁸Osita Ogbu, *Modern Nigeria Legal System* (Enugu: CIDJAP Publishers, 2002).

⁹Edward Said, *Orientalism* (New York: Pantheon Books, 1978)

¹⁰Edward Said, *Orientalism*

repugnancy test doctrine reflects the dynamics of a supposedly superior culture being imposed as the standard for validating African customs. From this perspective, the repugnancy test can be understood as an instrument of cultural hegemony, enabling colonisers to control and subjugate the colonised. In sum, the theory provides critical insights into the concept, purpose, and function of the repugnancy doctrine within Nigeria's legal system.

Clifford Geertz's cultural anthropology theory also guides this study, as its notion of "Thick Description" facilitates a deeper investigation into the historical and political contexts surrounding the repugnancy test's imposition on indigenous legal systems.¹¹ By advocating for a historical and contextual understanding of cultural phenomena, "Thick Description" enables a richer analysis of the repugnancy test's impact on Nigerian customary law. The theory posits that every culture possesses its own inherent logic and meaning, which must be acknowledged and examined. Through this lens, one can discern how the repugnancy test disrupted customary legal practices and eroded the local meanings embedded within them.

CONCEPTUAL CLARIFICATION

It is essential to clarify the key concepts underpinning this study, beginning with the term "indirect rule."

Indirect Rule

Indirect rule, as defined by Elizabeth Isichei, refers to a system of British colonial administration in which indigenous leaders retained authority over their communities while operating under colonial oversight.¹² Falola et al. describe it as a theoretical framework for local governance in which British officials governed Nigeria and other colonies through indigenous rulers and institutions, with British advisers providing guidance.¹³ Elias, former Chief Justice of Nigeria,

¹¹Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973).

¹²Elizabeth Isichei, *History of West Africa since 1800* (London: Macmillan, 1977), 129.

¹³Toyin Falola, Abdulahi Mahadi, Martins Uhomoibhi & Ukachukwu Matins, *Nigeria in the 19th Century* (Lagos: Learn Africa, PLC, 1991), 10.

outlines indirect rule as a British colonial policy founded on three key principles:

1. Preservation and adaptation of traditional courts—Local laws and customs were maintained, with a District Officer (D.O.) overseeing the highest judicial levels to prevent abuses.
2. Central role of Emirs and chiefs—Indigenous rulers served as the focal point of local administration, supported by a British Resident who provided advisory oversight.
3. Fiscal reorganisation—Local treasuries were restructured and modernised, funded through taxation on cattle and landed property.¹⁴

Buah similarly defines indirect rule as a British administrative system that incorporated traditional rulers into local governance, provided their actions aligned with British legal and political standards.¹⁵ According to Buah, the foundational rationale for indirect rule is articulated in Lugard's seminal work, *The Dual Mandate in Tropical Africa*.¹⁶ The following excerpts encapsulate Lugard's doctrine of the colonial "dual mandate" in Africa (Nigeria). His words:

“Europe is in Africa for the mutual benefit of her own industrial classes, and of the native races, in their progress to a higher plane, the benefit could be made reciprocal, and it is the aim and desire of civilised administration to fulfil this dual mandate. On the other hand, the abounding wealth of the tropical region of the earth, must be developed and used for the benefit of mankind, on the other, an obligation rests on the controlling power not only to safeguard the material rights of the natives, but to promote their moral and educational progress.”¹⁷

From the foregoing, indirect rule could be said to have been adopted and used by the British for promoting the second aim of Lugard's dual mandate in Africa (Nigeria) as enshrined in his book. That is, the promotion of the principles of justice and equity in the

¹⁴Taslim Olawale Elias, S.N. Nwabara & Chukwuma O. Akpangbo ed, *African Indigenous Laws*, 77.

¹⁵Francis Kofi Buah, *West Africa since 1000 AD* (London: Macmillan, 1978), 130.

¹⁶Frederick John Dealtry Lugard, *The Dual Mandate in British Tropical Africa* (Edinburgh and London: William Blackwood and Sons, 1922)

¹⁷Buah, Francis Kofi, *West Africa since 1000 AD*, 128.

native races using the commandants and residents, the police, the courts, and other arms of the colonial bureaucracy.¹⁸

Customary Law and the Repugnancy Test

Customary law, in the words of Nwokedi JSC, refers to "a usage or practice of the people which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory and has acquired the force of law with respect to the place it governs."¹⁹ Obaseki JSC defines it more succinctly as "the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static; it is regulatory in that it controls the lives and transactions of the community subject to it."²⁰

Niki Tobi (JCA) distinguishes customary law from mere custom, stating: "The word 'custom' may only reflect the common usage and practice of the people in a particular matter without necessarily carrying the force of law."²¹ Thus, customary law consists of those customs whose observance has acquired legal force, with sanctions imposed for breaches. These are customs that communities regard as obligatory. The definitions reveal that customary law is evolutionary in origin rather than a product of deliberate human effort. Its source lies primarily in the recollections of elders and those whose traditional roles grant them specialised knowledge of their people's customs and traditions. Consequently, customary law varies across communities, with no uniform body governing all of Nigeria. Even within the same ethnic group or region, customs may differ significantly.

Regarding the repugnancy test, Niki Tobi, a former Justice of Nigeria's Court of Appeal, explains: "The phrase 'repugnant' means offensive, distasteful, inconsistent, or contrary."²² However, under the Native Authority Ordinance (1948) Laws of Nigeria (Cap 140), it

¹⁸ Ibekwe Chinweizu, *The West and the Rest of Us* (Lagos: Nok Publishers, 1978).

¹⁹ Osita Nnamani Ogbu, *Modern Nigerian Legal System* (Enugu: CIDJAP Publishers, 2002), 221.

²⁰ Ogbu, Osita Nnamani *Modern Nigerian Legal System*, 233–234.

²¹ Niki Tobi, *Sources of Nigerian Law* (Lagos: MU Professional Publishers, 1996), 53.

²² Niki Tobi, *Sources of Nigerian Law*, 42

specifically denotes ‘not repugnant to morality or natural justice.’²³ As Lord Wright, cited in T.O. Elias adds, the repugnancy test was designed to invalidate "barbarous" customs among African peoples.²⁴ That is to say, African customs seen as primitive and or uncivilised by the British

Equity and Natural Justice

To understand "equity" within the repugnancy doctrine, Story J's interpretation is instructive: "Equity here corresponds precisely to natural justice, arising *ex aequo et bono* as defined by Justinian in the Pandects."²⁵ Lord Mansfield CJ cited in T. O. Elias elaborates on the meaning of natural justice and equity in this context: "The term ‘natural justice’ was not used in its restricted modern sense but was synonymous with natural law. Similarly, ‘equity’ did not refer to technical equity—that is, the equity of the Chancery Court—but to natural justice."²⁶ According to Prof. G. Ezejiolor, the phrase "natural justice, equity, and good conscience" signifies fairness, justice, or conscionability.²⁷ Thus, any customary law rule that is unjust, unfair, or unconscionable is repugnant to natural justice, equity, and good conscience.

LITERATURE REVIEW

Derrett and Uweru, in their respective works, traced the origins of the repugnancy test doctrine. Derrett locates its roots in Roman canonical law, which was widely applied across medieval European states. As Derrett notes, by the medieval period, the Romans had established a sophisticated legal system that governed their vast empire, incorporating principles of natural justice to safeguard citizens' rights. He concludes that much of Rome's political legacy was codified in

²³Niki Tobi, *Sources of Nigerian Law*, 42.

²⁴Taslim Olawale Elias, S.N. Nwabara & Chukwuma O. Akpamgbo ed, *African Indigenous Laws*, 95.

²⁵Niki Tobi, *Sources of Nigerian Law*, 36.

²⁶Taslim Olawale Elias, S.N. Nwabara & Chukwuma O. Akpamgbo ed, *African Indigenous Laws*, 95.

²⁷Gaius Ezejiolor, "Sources of Nigerian Law," in *Introduction to Nigerian Law*, ed. O. Okonkwo (London: Sweet & Maxwell, 1980), 201–202.

these legal frameworks.²⁸ Similarly, Uweru, in his study *Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism*, traces the doctrine's origins to medieval Europe, particularly to the evolution of English equity. He argues that the British introduced the repugnancy test into Nigeria in the late nineteenth century through received English laws as a means of evaluating the acceptability of indigenous customary law.²⁹ Uweru highlights the challenges posed by Nigeria's diverse and often superstitious customs, contending that the doctrine positively influenced customary law by eliminating its harsher and irrational elements.

Emiola further examines the doctrine's introduction, asserting that it was implemented immediately after Britain assumed colonial control over Nigeria's Northern and Southern protectorates. According to Emiola, the British imposed their legal system as the territorial law, thereby subjecting indigenous customary law to the repugnancy test for validation.³⁰

Ezejiofor,³¹ Ogbu Osita,³² and Mikano³³ analyse the impact of the repugnancy test on Nigerian customary law. These scholars agree that, as a colonial legal imposition, the doctrine fragmented Nigeria's legal system with enduring consequences. They argue that it disrupted the traditional foundations of customary law by transferring judicial authority to courts, which then determined what customary law *should be* rather than what it *was*. Ezejiofor and Ogbu Osita observe that many customary laws were effectively reconstructed in courts and imposed on communities. Igwe and Ogolo expand on this, noting that the

²⁸John Ducan Martin Darret ed., *Justice, Equity and Good Conscience (Changing the Laws in Developing Countries)* (London: Kegan Paul, 1965).

²⁹Benson Chukwunweike Uweru, "Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism," *African Research Review* 2, no. 2 (2008): 286–295.

³⁰Sikiru Emiola, "Repugnancy Test in Modern Nigeria Law," *Journal of Law and Society* 5 (1997): 103–13.

³¹Ezejiofor, Gaius. "Sources of Nigerian Law," 201–202.

³²Ogbu, Osita Nnamani. *Modern Nigerian Legal System*,

³³Emmanuel Kiye Mikano, "Repugnancy and Incompatibility Test and Customary Law in Anglophone Cameroon," *African Studies Quarterly* 15, no. 2 (2015): 1–15.

doctrine created two distinct versions of customary law: the "lawyer's customary law" and the "sociologist's customary law" (the law sanctioned by usage).³⁴ Earlier, Balonwu observed that courts, invoking their residual powers under the repugnancy doctrine, actively formulated new customary laws. He explains:

*The repugnancy clause and the residual clause are complementary provisions in the law. While the repugnancy clause excludes harsh, barbarous, and unsuitable customs, the residual clause positively introduces principles of justice, equity, and good conscience to fill gaps in customary law. As the term suggests, courts employ the residual clause only where no express customary law rule applies to a dispute.*³⁵

Udensi and Okosa, in their study entitled *Contemporary Issues on Repugnancy Test Doctrine in Nigeria*, examined the origin and philosophical basis of the repugnancy test. According to the authors, the origin of the test doctrine is not very clear. In their opinion, the doctrine has little connection with English law in its origin. Like Derrett and Uweru, they traced the origins of the doctrine to the Roman-canonical law, which had been prevalent in most of the medieval European states. As they noted, the test became part of Nigerian jurisprudence in 1876 by virtue of Ordinance No. 4 of that year. In exploring the effect of the doctrine on the people's customary law, the authors averred that the test invalidates any customary or native law that is deemed to be repugnant to natural justice, equity, and good conscience. As such, it is the most controversial test to be passed before customary law is enforced in courts of justice. The authors, however, lamented that the existence of the doctrine has, in fact created more ambiguity in the administration of customary law as the doctrine has given the courts wide discretion in the interpretation and application of the customary laws of the people.³⁶

³⁴Onykachi N. Igwe and Wosu D. Ogolo, "Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-assessing Content and Relevance," *Donnish Journal of Law and Conflict Resolution* 3, no. 3 (2017): 37.

³⁵Balonwu, "The Growth and Development of Nigerian Indigenous Laws," 189–190

³⁶Benneth Udensi and Chike B. Okosa, "Contemporary Issues on Repugnancy Test Doctrine in Nigeria," *COOU Law Journal* 9, no. 1 (2024):116-126

Justice Ohimai Ovbiagele, in a paper entitled “Nigerian Legal System, Justice and the Doctrine of Repugnancy” presented during the Annual Conference of the Nigerian Bar Association, Benin City branch, traced the origins and philosophical bases for the repugnancy test. According to him, the repugnancy clause has been traced to identical provisions in India which might have served as a precedent for the Nigerian provision. The philosophical basis of the test has been found in the legal theory, which is believed to have guided British Colonial policy. The policy was that only those laws of the savages that were not against the law of God or at variance with the established religions would be allowed to exist. He lamented that Nigerian courts, in applying the repugnancy test, do not appear to have embarked on any such historical excursion. As pointed out by the Honourable Justice, opinions are divided and divergent on what constitutes repugnancy in customary law. However, he observed that the courts, through their decisions, seem to have arrived at a consensus on what amounts to repugnancy, as follows:

1. All indigenous laws, which justify inhuman or degrading treatment, such as customs supporting human sacrifices, infanticide, and slavery.
2. Customary rules, which could be relied upon to justify unreasonable or absurd claims or a claim which the enforcement will result in gross inconvenience.
3. A customary rule of procedure, which is incompatible with the principle of *audi alteram partem* or *nemo iudex in causa sua*.
4. Any rule or indigenous law, which robs a man of his inalienable Right.

The Honourable Justice acknowledged that there are numerous court cases in Nigeria in which the repugnancy test has been applied to invalidate rules of customary law. As he noted, the most salutary influence of the application of the doctrine of repugnancy has been in the area of procedural law, the law of succession, and marriage. He went on to point out that while the celebrated Taslim Elias, a retired Chief Justice of Nigeria, found some of the decisions on repugnancy confusing, Prof. Nwabueze (SAN) praised the repugnancy test as “a potent factor in the reformation of the Nigerian customary law.” Justice Ohimai Ovbiagele concluded that the repugnancy test is a relic of the colonial denigration of Nigerian customs and tradition, and that it is difficult to argue convincingly that the repugnancy test was not

intended to impose English law onto Nigerian customary law.³⁷

While the reviewed literature provides valuable insights into the origins, application, and consequences of the repugnancy test doctrine in Nigeria, several critical gaps remain. First, most of the scholarship, such as that by Derrett,³⁸ Uweru,³⁹ and Emiola,⁴⁰ focuses heavily on the colonial introduction and legal justification of the doctrine, with limited engagement with postcolonial transformations or local resistance to its application. Additionally, while Ezejiofor,⁴¹ Ogbu,⁴² and Igwe & Ogolo⁴³ explore the fragmentation of customary law and the emergence of dual legalities, they do not adequately analyse the doctrine's impact on indigenous dispute resolution mechanisms or community agency in shaping legal norms. The literature also lacks empirical, ethnographic studies on how affected communities perceive and negotiate customary law under the constraints of the repugnancy test. Furthermore, gender and generational dimensions of the doctrine's application remain largely unexamined, particularly how it affects women's customary rights in areas such as marriage, inheritance, and land. This leaves a critical gap in understanding the lived realities and socio-legal dynamics underlying the doctrine's continued relevance or obsolescence in contemporary Nigeria. This study seeks to address that lacuna.

METHODOLOGY

This study employed a qualitative research approach, using in-depth interviews as the primary method of data collection. The research was conducted in four of Nigeria's six geopolitical zones: North-Central, South-South, South-East, and South-West. To narrow the scope, a

³⁷Ohimai Ovbiagele, "The Nigerian Legal System, Justice and the Doctrine of Repugnancy" (paper presented at the Annual Conference of the Nigerian Bar Association, Benin City Branch, August 10–13, 2020).

³⁸Derrett, John Ducan Martin, Justice, *Equity and Good Conscience*.

³⁹Bethel Chuks Uweru, "Repugnancy Doctrine and Customary Law in Nigeria," 286–295.

⁴⁰Emiola, Sikiru. "Repugnancy Test in Modern Nigeria Law," 103–113.

⁴¹Ezejiofor, Gaius. "Sources of Nigerian Law," 45–60.

⁴²Ogbu, Osita Nnamani., *Modern Nigerian Legal System*.

⁴³Onykachi N. Igwe and Wosu D. Ogolo, "Repugnancy Test and Customary Criminal Law in Nigeria," 135–136.

simple random sampling technique was adopted to select three states from each zone based on the prevalence of customary law issues as documented in court records and judicial precedents. The selected states included Benue, Kogi, and Nasarawa (North-Central); Cross River, Delta, and Edo (South-South); Enugu, Anambra, and Ebonyi (South-East); and Ekiti, Oyo, and Ogun (South-West).

A pilot survey was conducted as a preliminary engagement to familiarise the researchers with key stakeholders, such as traditional rulers and chairmen of the Nigerian Bar Association in the respective zones, and to secure relevant permissions for the study. To achieve the study's objectives, interviews were conducted with traditional rulers, serving and retired judges, Senior Advocates of Nigeria (SANs), magistrates, and knowledgeable community leaders, who were selected using a purposive sampling technique. One of the lead researchers, a senior legal practitioner in Enugu State, facilitated formal approval, accessibility, and proper interviews across the four zones.

A total of 100 participants, comprising 70 men and 30 women, were engaged in the in-depth interviews, which spanned from March 2022 to February 2024. Secondary data was obtained through a review of existing literature, court records, and law reports. For clarity, respondent categories are represented with the following codes: Traditional Ruler (TR), Serving Judge (SJ), Senior Advocate (SA), Retired Judge (RJ), Private Practitioner (PP), and Community Leader (CL), as shown in Table 1.

To protect research respondents, ethical considerations included obtaining appropriate permission to engage informants and ensuring that identifying information was anonymised to guarantee confidentiality and privacy.

Table 1: Coded Details of some of the Key Informants

Consultative Interviews Respondents	Code	Date	Gender	Location
Traditional Ruler	TR1	07/08/2023	M	Nsuka
Traditional Ruler	TR 2	23/07/2023	M	Awka
Traditional Ruler	TR 3	10/02/2024	M	Idah
Traditional Ruler	TR 4	03/01/2023	M	Ikot Ekpee
Serving Judge	SJ1	08/06/2023	M	Oweri
Serving Judge	SJ2	10/09/2023	F	Ikene

Serving Judge	SJ3	12/11/2023	M	Sapele
Senior Advocate	SA1	06/09/2023	M	Abakiliki
Senior Advocate	SA2	04/12/2023	F	Otukpo
Senior Advocate	SA3	09/08/2023	M	Asaba
Senior Advocate	SA4	29/08/2023	M	Ijero
Retired Judge	RJ1	25/01/2024	M	Abeokuta
Retired Judge	RJ2	12/11/2024	F	Iddo
Retired Judge	RJ3	14/09/2023	M	Anyigba
Private Practitioner	PP1	29/01/2024	F	Onitsha
Private Practitioner	PP2	10/12/2023	M	Isoko
Private Practitioner	PP3	11/05/2023	M	Asaba
Community Leader	CL1	06/04/2023	M	Agatu
Community Leader	CL2	26/03/2023	M	Ohafia
Community Leader	CL3	09/02/2023	M	Enugu

Discussion and Presentation of Findings: The Indirect Rule System and the Customary Laws of the People of Nigeria

Historically, the 1901 Native Courts Proclamation, which took effect on January 10, 1902, sought to overturn, prune, reconstruct, transform, or modify many customary laws of the people. This proclamation granted local authorities the power to alter customary laws through declarations or resolutions, though such changes required the approval of the High Commissioner.⁴⁴ Exercising its authority under Section 36 of the Proclamation, the Native Authority of Old Calabar nullified, on December 2, 1902, the customary laws governing the selection of the Obong of Calabar.⁴⁵ The Obong of Calabar serves as the traditional ruler and cultural custodian of the Efik people in Southeastern Nigeria. Calabar, originally known as the Ata Akpa Kingdom, was renamed by the Portuguese. The Obongship stool of the Efik Kingdom predates both colonialism and the Nigerian state. The first Obong of Calabar, Eyamba V—referred to as "Jonny Young" by his Liverpool associates—ascended the throne in 1834 when the title was formally established. Subsequent Obongs included Archibong I (1849–1852), Edem-Odo Eden Ekpo (1854–1858), Orok Edem-Odo (1880–1896), and Adam Ephraim Adam I (1901–1906). The current Obong, Edidem Ekpo Okon Abasi Otu V, installed in February 2016, is the 26th monarch of the kingdom (TR4).

⁴⁴Balonwu, "The Growth and Development of Nigerian Indigenous Laws." 159

⁴⁵Ogbu, Osita Nnamani, *Modern Nigerian Legal System*, 115

Before 1902, customary law restricted certain segments of the kingdom from producing an Obong. However, the colonial Native Authority of Old Calabar invalidated this practice, decreeing that any affluent and influential Efik man could ascend the throne. The same authority also instituted new customary rules for selecting chiefs among the Efik people (TR4). According to the Native Council, the existing customary laws governing the selection of the Obong and chiefs violated principles of natural justice and were procedurally repugnant to equity and good conscience.

Furthermore, the Indirect Rule system, wielding the repugnancy doctrine, delivered a decisive blow in 1932 to the sociological patrilineal customary law of the Igbo and Cross River (Calabar) peoples (TR4, SJ3, PP1). Under this custom, if a man paid a dowry for a woman who later left him for another man, any children from the subsequent union belonged to the first husband. This principle was exemplified in *Edet v. Essien*,⁴⁶ where a man paid a dowry for a woman, married her, but she later left him for another man, bearing two children with him.

The plaintiff (the first husband) alleged in court that, under the customary law of his people, he was entitled to custody of the two children because his dowry for the woman had not been repaid. In essence, he claimed that until the dowry was refunded, all children from the subsequent union rightfully belonged to him. However, the court, applying the repugnancy test, ruled that such a customary law was repugnant to natural justice, equity, and good conscience. The court reasoned that upholding this custom would unjustly deprive the biological father of his parental rights while transferring custody to a sociological father (SA3, SJ2, TR3). As the court emphatically declared, any custom that denies a natural or biological father his rightful claim to his child is inherently repugnant to justice, equity, and good conscience and must therefore be invalidated. This judicial pronouncement subsequently became binding precedent across the country wherever such sociological father customary rules were practiced (RJ1, SA4, SJ3).

It is important to remember that courts operate on the principle of *stare decisis*. This term is an abbreviation of the Latin phrase *stare*

⁴⁶*Edet v. Essien*, (1932) 11 NLR 47, High Court of Nigeria, cited in Ogbu, Osita Nnamani, *Modern Nigerian Legal System*, 115

decisis et non quieta movere, which means "to stand by decisions and not to disturb settled matters." In practice, this obligates courts to abide by former rulings when the same legal points arise in subsequent litigation. Through this doctrine, earlier judicial decisions furnish a binding authority for later cases involving identical or similar questions of law. The consequence of this principle is that judicial pronouncements on the repugnancy of elements of Nigerian customary law have become established as binding precedents over time.

The repugnancy doctrine also deemed the Igbo customary practice of *Nrachi* objectionable and repugnant (SA1, SJ1, TR1).⁴⁷ In Igboland, it was customary for a man without a male heir to designate a daughter as a "female son." This female son was prohibited from marrying and instead remained in her father's household. Under this custom, a father would keep his daughter unmarried to ensure she bore children on his behalf. Following prescribed rituals, the daughter would undergo a symbolic transformation into a son, thereby perpetuating the paternal lineage. The justice of the Court of Appeal in declaring this custom repugnant to natural justice, equity, and good conscience had this to say:

*"I must express the point here by which I will continue to stand that human nature, in its most exuberant prime and infinite telepathy, cannot support the idea that a woman can take the place of a man and be procreating for her father via a mundane custom. She stays in her father's house and cannot marry for the rest of her life, even if she sees an honest man who loves her. I cannot and do not believe that society, as it is presently constituted, will for long acquiesce to a conclusion so ludicrous, ridiculous, unrealistic, and merciless, more especially as we march on into the new millennium. The polity, as presently constituted, cannot, in my view, contain what Nrachi custom stands for. It is not neat. It is an antithesis to that which is wholesome and forward-looking... The custom is perfidious, and the petrifying odour smells to high heavens... I have no hesitation in declaring that Nrachi custom is against the dictates of equity. It is no doubt repugnant and contrary to natural justice, equity, and good conscience."*⁴⁸

In the court's view, *Nrachi* also violates public policy as it promotes promiscuity and sanctions immorality (SJ2, RJ3, SA2).

⁴⁷Mojekwu v. Ejikeme, *Law Reports of the Commonwealth* [2001], 179

⁴⁸Mojekwu v. Mojekwu. *Nigeria Weekly Law Report* 7, pt. 512 (1997): 283.

Similarly, the repugnancy test invalidated the customary practice of woman-to-woman marriage, which was prevalent across Africa among various ethnic groups, including the Igbo and Yoruba, with minor variations in norms and practices. In African societies that practiced this institution, a woman could marry another woman while remaining wedded to a man, thereby assuming the dual roles of wife and husband. Among the Yoruba of Southern Nigeria, wealthy women—particularly those who had reached menopause and possessed financial means—often took wives for themselves. These affluent and influential women were socially recognised as men and accorded respect as such.⁴⁹ In Yoruba society, female husbands held high social status (RJ1).

The Igbo familial philosophy underpinning woman-to-woman marriage is encapsulated in the term "Obiechina," which ensures the continuation of a man's lineage if he lacks children or male heirs.⁵⁰ It can be argued that in Igbo society, where male progeny was paramount, the practice emerged from an obsession with securing a male successor (CL3).

In all societies where woman-to-woman marriage existed, greater sexual autonomy for the wives was evident. These women could engage with multiple male partners—anonymous men whose sole role was to provide sperm.⁵¹ While the wife married to a female husband had male companions, the female husband herself also maintained male "clients" who fulfilled her erotic needs. Essentially, both female husbands and their wives had male lovers attending to their sexual requirements.

Indeed, since the repugnancy doctrine's enforcement in Nigeria, no court has granted judicial recognition to woman-to-woman marriage. Under the repugnancy test doctrine, courts across the country have consistently invalidated woman-to-woman marriages, deeming them repugnant. Notable cases include *Meribe v. Egwu*, *Basil v. Fajebe*, *Salubi v. Benedicta Nwariaku*, and *Veronica Ugwu v. Patience*

⁴⁹*Attorney-General of Anambra State v. Attorney-General of the Federation, Nigeria Weekly Law Reports* 2001, pt. 723, 537.

⁵⁰George Nnamani, "The 'Obiechina' Customary Law in Southeast Nigeria," *Enugu Court of Appeal Law Report* (2023): 253.

⁵¹Robert Attah Nonso, *Repugnancy Test of Customary Law* (Lagos: Educational Resources Providers, (2015), 25

Nwabuisi, among others.⁵² In *Meribe v. Egwu*, the Supreme Court of Nigeria, in a decisive ruling, declared woman-to-woman marriage repugnant to natural justice, equity, and good conscience, emphatically stating:

In every system of jurisprudence known to us, one of the essential requirements of a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a woman-to-woman marriage, and where there is a proof that a custom permits such an association, the custom must be regarded as repugnant.⁵³

Justice J.C. Nnamani of the Customary Court of Appeal, Enugu who delivered a leading judgment in the case of *Veronica Ugwu v. Patience Nwabuisi* had this to say:

*"I now state as held by the lower court that Woman-to-woman marriage in whatever garb it might be adored or presented is repugnant to natural justice, equity and good conscience. It is unnatural, antithetical to the tenets of morality, repugnant to Biblical prescription and offensive to the dignity of womanhood. It is unnatural because two women, left alone cannot procreate. On the other hand, if the aim is to allow other men procreative access to her, it makes a whore of her or, worse still, one that does not even get paid. It is a repugnant marital practice which should be left in the bottomless pit into which judicial authorities have thrown it. If I will do anything it is to place unmovable slab over it."*⁵⁴

Similarly, the repugnancy test invalidated the Igbo people's customary practice of *Oli Ekpe*.⁵⁵ In *Mojekwu vs. Mojekwu* the matter before the Enugu Division of the Court of Appeal was the incidence of *Oli-Ekpe*.⁵⁶ Under this tradition, a deceased man's surviving brother inherits his property if the widow bears no male heir. Niki Tobi JCA,

⁵²*Supreme Court Report* (Nigeria), 3 (1976), 32-33

⁵³Akintunde Olusegun Obilade, *The Nigerian Legal System* (Ibadan: Spectrum Law Publishing, 1990), 204.

⁵⁴*Ugwu v. Nwabuisi* (2001), Customary Court of Appeal, Enugu, suit number ECC/3/2000, as cited in Nnamani, George. "The 'Obiechina' Customary Law in Southeast Nigeria." *Enugu Court of Appeal Law Report* 2023: 12-13

⁵⁵*Mojekwu v. Mojekwu*, *Nigeria Weekly Law Report* 7, pt. 512 (1997): 283.

⁵⁶*Mojekwu v. Mojekwu*, *Nigeria Weekly Law Report* 7, part 512 (1997): 283.

in declaring this piece of customary law repugnant, had this to say:

*“We need not travel all the way to Beijing to know that some of our customs, including the Nnewi-Igbo ‘Oli Ekpe’ custom... are not consistent with our civilised world in which we live today... I have no difficulty in holding that the ‘Oli Ekoe’ custom of Nnewi is repugnant to natural justice, equity, and good conscience.”*⁵⁷

In *Ukeje v. Ukeje*, the Nigerian Supreme Court, under the repugnancy doctrine, overturned the Igbo customary law which does not recognise female inheritance or excludes Igbo female children from inheriting the property of their deceased father. The fact of the case is that Lazarus Ukeje, father of the plaintiff, died intestate with real property in Lagos State. After the death, the daughter brought a suit in 2014 seeking a declaration from the court that as the daughter of the deceased, she was entitled to a share of her late father’s estate. In this matter, the Supreme Court of Nigeria upheld the findings by the lower courts that the Igbo customary law which disentitles female children from inheriting the property of their deceased father is repugnant to natural justice, equity and good conscience and is therefore void.⁵⁸

Indeed, there are numerous cases in which the Supreme Court has applied the repugnancy doctrine, resulting in many customary rules being either judicially abolished altogether or having their operations modified. In *Dawodu v. Danmole*, the popular idea of *Ori-oju-ori*, i.e., equality among the children, was rejected as the customary rule of succession among the Yoruba, 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.⁵⁹

In *Chawere v. Aihenu and Johnson*, the Supreme Court rejected and declared repugnant a customary rule that automatically made an adulterous wife the wife of the man with whom she committed adultery.⁶⁰ In *Nimota Sule & Ors v. M.A. Ajisegin*, the Court rejected the customary rule that a male descendant was entitled to a larger share than a female descendant in the distribution of the estate of their

⁵⁷*Mojekwu v. Mojekwu*, Nigeria Weekly Law Report 7, part 512 (1997): 283; Tobi, N., *Sources of Nigerian Law*, 52.

⁵⁸*Ukeje v. Ukeje*, *Supreme Court Law Report* 2 (2014): 261.

⁵⁹*Dawodu v. Danmole*, *Nigerian Monthly Law Reports* (1965): 245.

⁶⁰*Chawere v. Aihenu and Johnson*, *All Nigeria Law Reports* 1 (1962): 140.

ancestors.⁶¹ In *Abasi Ukot Akpa v. Elijah*, the court rejected the Calabar people's customary rule or notion that the former master of a free slave was entitled to the property of the slave on grounds of repugnancy.⁶²

The repugnancy test, a judicial standard introduced under indirect rule, was employed—and sometimes reinforced—to evaluate and regulate the procedural rules of indigenous courts in their administration of justice.⁶³ This test sought to ensure that customary legal procedures adhered to two foundational principles of natural justice: *nemo iudex in causa sua* (no one should be a judge in their own cause) and *audi alteram partem* (a person must be given proper notice and the opportunity to be heard) (SA3, RJ2, PP3). The principles of natural justice are made up of essentially these two rules: *Audi Alteram Partem and Nemo Iudex in Causa Sua*. "Audi Alteram Partem" which also means "let the other party be heard," is a natural justice principle that demands that all parties to a dispute should be heard and should be allowed to present their case before any judgment is delivered.⁶⁴

In other words, the principle asserts that no party should be condemned unheard. Each party has the right to a fair hearing in any dispute. This includes the right to be informed of the charges or allegations against them, to be given adequate notice of any hearing or proceeding, and to be allowed to call witnesses. In the case of *Ramnath Prasad v. Collector of Darbhanga*, MANU/BH/0085/1955, the Supreme Court put the principle succinctly: that an individual should be given an opportunity to present their version of the case before the adjudicatory authority has passed its decision. This is known as the pre-decisional hearing. In this case, the Court observed that the laws of procedure are deeply grounded on the principle of natural justice, which requires that no man should be condemned unheard and that decisions should not be reached behind their backs.⁶⁵

⁶¹*Nimota Sule & Others v. M.A. Ajisegin*, *Nigerian Law Report* 12 (1950): 518.

⁶²*Abasi Ukot Akpa v. Elijah*, *Eastern Nigeria Law Report* (1966): 235, 237.

⁶³Nonso, Robert Attah, *Repugnancy Test of Customary Law*, 19–20.

⁶⁴Surbhi Jindal and Anunay Pandey, "Audi Alteram Partem and Nemo Iudex in Causa Sua: The Two Pillars of Natural Justice," *International Journal of Law Management and Humanities* 6, no. 6 (2023): 783-792.

⁶⁵*Ramnath Prasad v. Collector of Darbhanga*, Manupatra/Bihar/0085/1955.

The principle of '*Nemo Judex In Causa Sua*', also known as 'Rule against Bias', on its part is a natural justice principle which insists that a judge must not be permitted to hear or adjudicate on a matter that he has personal interest in, and the same with administrators in administrative proceedings. In other words, for administrators to exercise adjudicatory powers should not have any personal or proprietary interest in the outcome of their proceedings, and or exhibit any likelihood of bias in their decisions.⁶⁶

These principles, entrenched as mandatory procedural norms by the colonial administration, were made obligatory across all legal systems in the country, including customary courts. Where these principles were already present in indigenous adjudicatory systems, the repugnancy test reinforced them; where they were absent; the test introduced and rigorously enforced their observance (SA4, RJ2, SJ1).

In Yorubaland, for example, where elements of these principles existed (as seen among the Ogboni cult), the repugnancy test served to bolster their application. Conversely, in Northern Nigeria, where such practices were largely nonexistent, they were introduced and stringently applied (SA2, SJ3). A notable example was the Adamawa Native Authority Council, presided over by the Lamido, which was compelled to adhere to these principles.⁶⁷ The Council's decision in the *Maddibo* case was overturned on the procedural ground of repugnancy to natural justice, particularly because the Council had adjudicated in its own cause (PP).

The facts of *Maddibo v. Adamawa Native Authority* reveal that the appellant was sentenced to twelve months' imprisonment by the Lamido of Adamawa for authoring an insulting letter addressed to the Council.⁶⁸ The Lamido, as president of the Council, along with other Council members, sat in judgment over the matter. The appellate court quashed the sentence based on the *nemo judex in causa sua* principle.

Similarly, the principle of *audi alteram partem* was judicially articulated and upheld in *Thomas and Others v. Oba A. Ademola II and*

⁶⁶*Ramnath Prasad v. Collector of Darbhanga*, Manupatra/Bihar/0085/1955.

⁶⁷J. A. Yakubu, "The Application of Repugnancy Doctrine to Paternity Cases in Nigeria," *African Society of International and Comparative Law* 7, no. 1 (1995): 129–42.

⁶⁸Yakubu, "The Application of Repugnancy Doctrine to Paternity Cases in Nigeria," 129–42.

Others.⁶⁹ This case involved the Yoruba customary practice whereby an Iwarefa chief could be expelled from the council by his peers through drumming, without prior notice or specification of his alleged wrongdoing. The court held this practice to be repugnant to natural justice due to its violation of *audi alteram partem*.⁷⁰ Justice Pollard established that the appellant had not been informed of any charges nor invited to present a defence before his expulsion. As the judge ruled, “The Chiefs had done so in violation of the elementary principles of natural justice enshrined in the legal maxim *audi alteram partem*.”⁷¹

In a further elucidation of the *audi alteram partem* doctrine, Justice Pollard invoked a theological analogy, remarking that even God, in His omniscience and omnipotence, afforded Adam an opportunity to defend himself. His words:

“Even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God), where art thou? Have thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?”⁷²

As the learned judge rightly held, the principle of *audi alteram partem*, a cardinal tenet of natural justice, must be observed in all judicial and quasi-judicial proceedings; its application is mandatory for all courts in Nigeria. Instances of customary legal procedures declared repugnant to natural justice are evident in the cases of *Malam Sadau of Kanya v. Abdul Kadir of Fagge* and *Dzakpe v. Tiv Native Authority*.⁷³ In the *Malam Sadau* case, a Northern Nigerian customary practice precluded the defendant’s witnesses from being heard prior to the court’s determination of the matter.

Similarly, in *Dzakpe*, a Tiv customary practice from the Middle Belt of Nigeria permitted the conviction or punishment of an individual for an offence despite the absence of a formal complaint or charge. It was ruled by Jibowu F.J. in *Malam Sadau’s* case thus:

⁶⁹*Thomas and Others v. Oba Adesoji Aderemi II and Others, Nigeria Law Report* 12(1948),18

⁷⁰Nonso, Robert Attah, *Repugnancy Test of Customary Law*, 19–20.

⁷¹*Thomas and Others v. Oba Adesoji Aderemi II and Others, Nigeria Law Report* 12(1948),18

⁷²*Eze v. Igiliegebe, Nigerian Law Reports (Northern Region)* 101 (1956).

⁷³*Malam Sadau of Kanya v. Abdul Kadir of Fagge and Dzakpe v. Tiv Native Authority, Federal Supreme Court*, 39, (1956) 49.

The legal maxim- *audi alteram partem* also applies to a person's witnesses in a trial. It is a fundamental principle of the administration of natural justice that a defendant and his witnesses be heard before the case against him is determined and it is in my view a denial of justice to refuse to hear a defendant's witnesses. Natural justice requires that an accused person be given the opportunity to put forward his defence fully and freely and that the Court should hear any witness whose evidence might help the defendant.⁷⁴

Also, in *Guri vs. Hadejiu Native Authority*, the Federal Supreme Court declared invalid a rule of Maliki law which debarred a person accused of highway robbery from testifying in his own defence on grounds of breaching the legal maxim- *audi alteram partem*.⁷⁵

Nigerian courts have consistently upheld and liberally applied the two fundamental rules of natural justice: *audi alteram partem* and *nemo iudex in causa sua*. This ongoing judicial commitment is exemplified in the 2019 case of *Daniel Chukwurah v. Nnamdi Azikiwe University*. The plaintiff, a lecturer at the university, brought an action before the National Industrial Court in Awka, alleging a breach of his right to a fair hearing (*audi alteram partem*). The facts of the case established that the plaintiff, upon returning to work after a one-week sick leave, was handed a letter of suspension from the university administration. This letter not only suspended him but also barred him from entering the university premises and placed him on half salary. In his suit, the plaintiff sought a declaration from the court that the university's action was void, as it violated his right to a fair hearing.

In its judgment, the court declared the university's action void. The presiding judge held that the university had breached the principle of natural justice, stating:

“The plaintiff was not given the opportunity to make his defence— for instance, by issuing him a query for his reaction before the suspension. In my view, the principle of fair hearing was shut out

⁷⁴D *Malam Sadau of Kanya v. Abdul Kadir of Fagge*, Northern Region of Nigeria Law Report 135 (1958): 137; Koyana, “The Indomitable Repugnancy Clause,” *Obiter* 23, no. 1 (2002): 126–27.

⁷⁵*Guri v. Hadejia Native Authority*, 4 Federal Supreme Court Reports 44 (1959)

*(audi alteram partem). The principle of natural justice was kept in abeyance. I so hold.*⁷⁶

The test also invalidated the indigenous family property system of indivisible land holdings. There is no denying that one of the institutions of indigenous jurisprudence preserved and enforced by indirect rule was the family property system of land holding. Nigerian communities share a common pattern of land holding (SA4, SA3, CL2). Generally, the pattern of land holding in all Nigerian societies is based on the family. Thus, one had to belong to a family, village, clan, or territorial community to own land. Such family or community land, jointly owned, was held and treated as indivisible among members.⁷⁷ The court's declaration in 1920 in *Abel's* case altered this general customary law position on land holding. As the court declared:

*"Each party so interested has the right to live on the property and the right to come to the court to ask for partition, and that is the whole extent of his or her individual interest..."*⁷⁸

The community principle of Nigerian indigenous land tenure, supported, strengthened, and modified by indirect rule, could be encapsulated thus:

*"The land belongs to a vast family, of which many are dead, few are living, and countless members are still unborn. Land belongs to the past, the present, and the generations to come. When the head of a family allots to any member of the family a portion of the family land, for him to live on, that member becomes entitled to own and enjoy that portion during good behaviour, but he does not become the owner of the land as against the family, and he cannot alienate it without the consent of the family. Further, family land cannot be attached in settlement of personal debt for the reason that the individual debtor has no separate and alienable interest in the family property held under local customary tenure."*⁷⁹

⁷⁶*Daniel Chukwurah v. Nnamdi Azikiwe University*, National Industrial Court Reports 304 (2019), 509.

⁷⁷Osita N. Ogbu, *Modern Nigerian Legal System* (Enugu: CIDJAP Publishers, 2002), 22

⁷⁸*Abel v. Abel*, Divisional Court, Full Court (Land Division), 16th March 1920 cited in Nonso, R. A. *Repugnancy Test of Customary Law*, 30.

⁷⁹Taslim Olawale Elias, S.N. Nwabara & Chukwuma O. Akpamgbo, *African Indigenous Laws*, 100–101.

Indirect Rule and the Creation of Applicable Customary Laws through the Residual Power Clause

Indirect rule itself contributed to the development of applicable customary laws under the Residual Power Clause, which was granted to the courts by the colonial administration (SA3, SA1, SJ2, RJ1).⁸⁰ While the Repugnancy Clause served to exclude harsh, barbaric, and unsuitable customs, the Residual Clause operated to fill existing gaps or lacunae within indigenous legal systems (PPR1, TR3).⁸¹ As the name suggests, the courts were to invoke the Residual Clause only in cases where no express rule of customary law was available or applicable to a matter in dispute. This judicial discretion was primarily exercised in the adjudication of administrative suits (PP3, SA4, SJ2). Consequently, contemporary customary laws in Nigeria—especially those relating to issues such as next-of-kin designations and the issuance of letters of administration—were judicially constructed by colonial courts under the Residual Power Clause. These courts acted under the guiding principles of justice, equity, and good conscience. Thus, under the authority conferred by this clause, new customary legal principles were established by statutory courts and subsequently incorporated into Nigeria's broader legal system (PP1, RJ3).⁸²

The Enduring Relevance of the Repugnancy Test in Post-Colonial Nigerian Jurisprudence

The assertion that the repugnancy test remains profoundly significant in Nigeria's legal landscape, acting as a catalyst for the reform and progressive development of customary law, is substantiated by a robust body of jurisprudence. This legal doctrine, which mandates that no custom is enforceable if it is "repugnant to natural justice, equity, and good conscience," has proven to be a dynamic and indispensable tool for judicial and legislative action, ensuring that indigenous laws evolve in harmony with contemporary ethical standards.

The statement correctly identifies the test's primary mechanism: a judicial declaration of repugnancy often precipitates legislative

⁸⁰Nigerian Law Reports 2, 100 (1913).100

⁸¹Nigerian Law Reports 2, 100 (1913).100; Elias, T. O., et al., *African Indigenous Laws*, 95

⁸²Taslim Olawale Elias, S.N. N.wabara & Chukwuma O. Akpamgbo, *African Indigenous Laws*, 95.

action. The landmark example of the abolition of the Osu caste system in Eastern Nigeria perfectly illustrates this synergy. Following judicial condemnation of the practice, the Eastern Region legislature enacted the Abolition of Osu System Law, which not only outlawed the system but also provided a comprehensive definition of its victims, thereby eradicating a deeply entrenched form of social and legal discrimination.⁸³ This process demonstrates how the repugnancy test serves as a diagnostic tool, identifying archaic and unjust customs for formal statutory abrogation.

A critical function of the test, as posited, is its role in preventing customary law from becoming anachronistic. Customary laws, rooted in pre-colonial societal structures, lack formal amendment procedures. The repugnancy test provides the necessary judicial oversight to adapt these laws to modern realities. This is evident in cases concerning inheritance and the rights of women. For instance, in the case of *Ukeje v. Ukeje*, the Court of Appeal vehemently struck down the "*Nrachi*" or "*Oli-ekpe*" custom in Igbo land, which prevented female children from inheriting their father's property. The court held the custom to be repugnant to natural justice, equity, and good conscience, championing the cause of gender equality.⁸⁴ This aligns directly with the statement's claim that the test has been instrumental in fostering gender equity.

Contrary to the notion that the repugnancy test was a mere colonial imposition of foreign morality, Nigerian courts have consistently grounded their application of the test in universal principles and the evolving values of Nigerian society itself. The Supreme Court, in the seminal case of *Cole v. Akinyele*, clarified that the standard of "good conscience" is not a static, foreign ideal but must be interpreted in light of the current societal context.⁸⁵ This nuanced application ensures the test's legitimacy and explains its continued endorsement in post-colonial Nigeria. It is not about superimposing Western values but about invoking a universal, humane standard that resonates with the nation's own constitutional commitments to human dignity and equality, as enshrined in Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

The test's contemporary relevance is further confirmed by its

⁸³*Abolition of Osu System Law*, Eastern Region of Nigeria, 1956, section 2

⁸⁴*Ukeje v. Ukeje*, *Supreme Court Law Report 2* (2014): 261.

⁸⁵*Cole v. Akinyele*, [1960] 5 F.S.C. 84 (Supreme Court of Nigeria).

application in recent cases, demonstrating that it is far from a relic of the colonial era. In the 2014 case of *Ukeje v. Ukeje and Anekwe v. Nweke*, Supreme Court of Nigeria revisited the issue of discriminatory inheritance customs. The court upheld the decision of the lower courts, which had nullified a custom that disinherited a deceased's daughter in favour of a male relative. In a powerful judgment, the court described such a custom as "an aspect of barbaric culture" and "grossly repugnant to natural justice, equity and good conscience."⁸⁶

Furthermore, the test continues to be invoked to address harmful practices. While not a recent case, the precedent in *Edet v. Essien* remains highly relevant, where the court rejected a custom that treated women as property to be inherited upon the death of a husband.⁸⁷ The principles established in such cases are routinely applied by lower courts today to shield vulnerable individuals from oppressive traditional practices, proving the test's ongoing utility as a shield for human dignity.

In conclusion, the repugnancy test remains a cornerstone of Nigerian jurisprudence because it provides a necessary and flexible judicial mechanism for harmonising the rich heritage of customary law with the imperative of a modern, rights-based society. Its relevance is not anchored in its colonial origins but in its adaptability and alignment with universal principles of justice and the express provisions of the Nigerian Constitution. Through a continuous line of cases, from the colonial period to recent Supreme Court judgments, the test has proven indispensable in refining customary law, promoting gender equality, and expunging barbaric and inhumane practices, thereby validating the assertion of its profound and transformative significance in post-colonial Nigeria.

CONCLUSION

This study has established that the doctrine of repugnancy was introduced by the British colonial administration in Nigeria as a legal

⁸⁶*Ukeje v. Ukeje, Supreme Court Law Report 2* (2014): 261.; *Anekwe v. Nweke* (2014) 9 Nigerian Weekly Law Report, Part 1412, page 393 (Supreme Court of Nigeria)

⁸⁷*Edet v. Essien* (1932) 11 NLR 47, High Court of Nigeria

mechanism to expunge customary practices deemed barbaric or inconsistent with the principles of natural justice, equity, good conscience, public policy, and morality. The repugnancy test significantly transformed the indigenous judicial landscape. It not only revoked, amended, or abolished numerous native laws and customs but also introduced novel legal doctrines and principles previously unknown within local jurisprudence. Through this test, the indigenous judicial system assimilated two cardinal principles of natural justice and civil procedure: *nemo iudex in causa sua* (no one should be a judge in their own cause) and *audi alteram partem* (the right to a fair hearing). Furthermore, the repugnancy doctrine, through its residual power clause, expanded the frontiers of customary law by formulating new legal norms in instances where pre-existing rules were absent. By compelling Nigeria's customary law to conform to evolving standards of civilisation and contemporary societal realities—markedly distinct from its original socio-cultural context—the repugnancy test has facilitated the law's adaptability and continuity. Ultimately, it has ensured the survival of customary law in Nigeria by invalidating retrogressive norms and eliminating practices antithetical to justice and human dignity.

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