

A CRITICAL APPRAISAL OF THE REPUGNANCY TEST UNDER THE EVIDENCE ACT AND ITS CONTINUED APPLICATION AGAINST CUSTOMARY LAW RULES IN NIGERIA

Majebi Samuel Amune*

Abstract

*This article critically examines the continuing relevance of the repugnancy doctrine in Nigerian customary law and asks whether it remains a necessary safeguard for justice or an obsolete colonial inheritance. The doctrine, introduced with English law during colonial administration and reflected in instruments such as the Native Courts Proclamation of 1900 and section 18(3) of the Evidence Act 2011, empowers courts to invalidate customary rules considered repugnant to natural justice, equity and good conscience, or inconsistent with public policy and written law. The article addresses the tension between preserving indigenous legal systems and rejecting discriminatory or unjust customary practices. While critics view the doctrine as a vehicle for imposing European values on African customs, its defenders regard it as a mechanism for aligning customary law with contemporary justice and human rights standards. Adopting a doctrinal research method, the article analyses statutes, constitutional provisions and judicial decisions, including *Dawodu v Danmole*, *Edet v Essien*, *Okonkwo v Okagbue*, *Mojekwu v Mojekwu* and *Ukeje v Ukeje*. It shows that courts have applied the doctrine unevenly, especially in matters involving gender discrimination, inheritance and social status. The article argues that the 1999 Constitution, particularly its guarantees of human dignity and freedom from discrimination, has absorbed much of the doctrine's protective function, raising doubts about its continued statutory necessity. It concludes that the doctrine should neither be abolished nor retained unchanged, but reformed through clearer rights based criteria, coherent judicial application and an Afrocentric framework that balances cultural legitimacy with constitutional justice in Nigeria today.*

Keywords: Custom, Customary Law, Imperialism, Discrimination, Repugnancy Test.

1. Introduction

The customs of indigenous communities in Nigeria form the oldest sources of laws in the Nigerian legal system. These customs are attached with utmost regard, such that it becomes an abomination to act contrary to them.¹ With this, they not only serve as the customs of that particular community, they operate as both customs and the laws of that community which make them binding upon members of the community to which they apply.²

Notably about these customary laws is that their origination is not derived from an organised process of law-making, rather they grew through the conduct of the people, tracing their origination to times prior to the advent of colonialism in Nigeria.³ Viewed from this background, the migration of the British in Nigeria was accompanied by a direct affront to these customs, where the British made qualifications as to the application of customary laws in courts. It follows from this that before the widely accepted customs of an indigenous community is adopted in court, it

*LL.B. (University of Benin); LL.M., M.Phil., Ph.D (Obafemi Awolowo University), Senior Lecturer, College of Law, Joseph Ayo Babalola University, Ilesa, Osun State, Nigeria & Principal Partner, LawDigital Consult., Email: nobleheirs@yahoo.com. 08033724459

¹ Omotuyi Opeyemi Yetunde, 'Customary Practices and the Conflict with Law: Case Study of Marriage under Selected Native Laws and Customs in Nigeria' (2019) 7(1) *ABUAD Law Journal* 223.

² Ibid.

³ Ogugbuaja Ephraim Makuochukwu, 'The Pre-Colonial Traditional Governance Structures in Igboland: A Framework for Effecting Efficacy, Representation, and Accountability of Modern Public Administration in Nigeria' (2024) 10(4) *Journal of Humanities and Social Policy* 50.

must be subjected to the rest of repugnancy, to ensure that such customs does not operate contrary to what is pegged as the general standard of moral rights.⁴

Unsurprisingly, scholars have made arguments for and against repugnancy test. According to Uweru⁵ argues that, despite its colonial origin, the repugnancy doctrine had a positive influence on Nigerian customary law because it helped eliminate harsh, irrational, or oppressive customary practices. His position is that the doctrine operated as a corrective tool against customs that offended justice, fairness and good conscience. Similarly, Taiwo⁶ also takes a supportive but reformist position. He acknowledges that the doctrine is often criticized for using foreign standards to assess customary law, but contends that it played a positive role in the development of Nigerian customary law by removing its harsh aspects. While on the other hand, Ezejiofor⁷ criticizes the repugnancy doctrine as a colonial legal imposition that disrupted the organic development of Nigerian customary law. His argument is that the doctrine transferred power from indigenous communities to courts trained in English legal ideas, allowing judges to determine what customary law should be rather than what the people actually accepted as binding custom. The central question of the debate revolves around whether the introduction of the repugnancy doctrine serves as a tool of cultural subjugation aimed at epistemic violence by the colonialists, thus making the retention a relic of colonialism, or whether the retention of the doctrine has overwhelmingly impacted the elimination of barbarism within the African society. The light of the foregoing is clear, scholars who are against it argue that the doctrine should be out rightly abolished for undermining cultural sovereignty, while those in support of it argue for its retention but that it should in line with the changing social reality of the cultural standards of African community. Against this backdrop, this paper traces the origin of the doctrine, while surveying the application of the doctrine in judicial decisions. It furthers assesses the two sides of the argument, and ultimately concludes with notable findings and compelling recommendations.

2. Historical and Legislative Foundations of the Repugnancy Doctrine

It is no gainsaying the fact that it goes beyond all iota of doubt that Nigeria was once a colony of England. As such, the application of certain laws which were applicable in England during that period was extended to Nigeria either by the colonial masters directly or introduced through a local statute. Irrespective of whichever was, these English laws form and largely influenced the legal landscape in Nigeria.⁸ In furtherance, the incursion of these English laws into the Nigerian legal language was inherently primed to supplant and relegate the native customs, and traditions. Thus, prominence was given to the English laws.⁹

During the establishment of the Supreme Court in 1876, the jurisdiction and powers conferred on it were substantially similar to those of Her Majesty's High Court of Justice in England.¹⁰ It was

⁴ Be as it may, it is widely believed that by the virtue of being a human person, there is a moral order guiding a man as to what is right. This implies therefore that what is right is believed to be subject. The statement made by A Okunniga that "if ten men from different countries are put in separate rooms and each of them is asked in the language he understands, whether it is good to steal or not, majority will say no." buttress this point.

⁵ Uweru, B. C. (2008). Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism. *African Research Review*, 2(2), 286 to 295.

⁶ Taiwo, E. A. (2009). Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions, some lessons for Nigeria. *Journal for Juridical Science*, 34(1), 89 to 115.

⁷ Gaius Ezejiofor, "Sources of Nigerian Law" in C. O. Okonkwo (ed), *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) 45 to 60.

⁸ Babafemi Odunsi, 'Sources of Nigerian Law and the Relegation of Customary Law in Perspective' (2016) (1) *Crescent University Law Journal* 170, 171.

⁹ *ibid.*

¹⁰ Solomon Ukhuegbe, 'Jurisdictional Reform and the Role of the Supreme Court of Nigeria — The Path to a Policy Court' (2012) (*SSRN.com*, 2012) <https://ssrn.com/abstract=1933944> accessed 20 April, 2026.

within the powers and jurisdiction of the court to apply the Common Law, Equity and Statutes of General Applications. According to the Ordinance establishing the court, nothing would deprive any person the benefits of any law or custom provided that such laws or customs do not have elements of repugnancy to natural justice, equity and good conscience, and are not incompatible with any local statute.¹¹

Subsequently, the Ordinance was amended, even though same provisions were retained therein. Accordingly, the Supreme Court proclamation provides that "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 ..."¹²

Building on the preceding foundation, it can be gleaned that the British did not totally invalidate the application of customary laws.¹³ Nevertheless, they subjected their application to the standard English principles and norms through the introduction of the repugnancy doctrine.¹⁴ Crucially, before a custom is applied, it must be established to be one in existence, and one which is regarded as binding upon the members of the community over which it operates.¹⁵ In addition, the particular custom must be tested by the courts to ensure it does not go against natural justice, equity and good conscience before it is upheld as a valid custom.¹⁶ Thus, before a customary law would be applied, it has to go in line with the established English repugnancy test.

2.1. Codification under Section 18(3) of the Evidence Act 2011

In the contemporary legal era, the most prominent statutory enshrinement of the repugnancy test is distillable from the provision of the Evidence Act. The Act establishes that in any situation where a custom is to be relied upon, it shall not be enforced as a valid law if in any situation it is contrary to public policy or repugnant to natural justice, equity and good conscience.¹⁷

Flowing from the foregoing, it can be gleaned that even after the departure of the British, their established principles that customs must not be repugnant to natural justice equity and good conscience still remains a validly upheld principle in Nigeria. Be that as it may, it is imperative to note that the provision was derived from the repealed Evidence Act 2004 which contains the same provision that a custom relied upon as a law will not be upheld if it contrary to public policy or contrary to natural justice, equity and good conscience.¹⁸

Apart from the repugnancy test as a validity filter, the other two tests for determining the validity of a customary law are the incompatibility and public policy tests. The incompatibility test posits

¹¹ Supreme Court Ordinance, No 4 of 1876 cited in EA Taiwo, 'Repugnancy clause and its impact on Customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 90.

¹² Supreme Court Proclamation 1900, s 13 cited in EA Taiwo, 'Repugnancy clause and its impact on Customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 90.

¹³ EA Taiwo, 'Repugnancy clause and its impact on Customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 90.

¹⁴ *ibid.*

¹⁵ A O Obilade, *The Nigerian Legal System* (Rev edn, Spectrum Books Ltd 2018).

¹⁶ E.S. Nwauche, 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) (25) *Tulane European & Civil Law Forum* 37, 46.

¹⁷ Evidence Act 2011, s 18(3)

¹⁸ Evidence Act 2004, section 14(3) provides that Where a custom cannot be established as one judicially noticed, it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them:

Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

that the rules of customary law must not either directly or indirectly be incompatible with any existing law in force.¹⁹ The public policy tests on its part mandates that the rules of a customary law must not in any way be contrary to public policy.²⁰ Flowing from the foregoing, it is imperative to bear in mind that while these tests operate differently, they work conjunctively.²¹

The implication therefore is that while a test of customary law may not be repugnant to natural justice, it may be invalidated on the basis of either being incompatible with a written law or be contrary to public policy. In light of this, an unvarnished issue underlying this is that while the British established these tests, they failed to define the particular standard upon which these tests will be based on, creating a seemingly narrow scope for a customary law to validly operate.

3. Judicial Application of the Repugnancy Test

The courts, during the early colonial era have adopted the use of the repugnancy test to filter out the elements of barbarism inherent in certain African customary laws. The rationale for the establishment of the test as proposed by Lord Wright was to invalidate barbaric customs.²² Similarly, owing to the fact that there is no particular forum for the amendment or repealing of customary law practices, the doctrine of repugnancy will afford the court the opportunity to fine tune customary law practices to meet the changing socio-economic reality.²³

In addition, according to Lord Atkin in *Eshugbayi Eleko v Government of Nigeria*²⁴, The 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.'

In light of this, the case of *Edet v Essien*,²⁵ is notable. It borders on the issue of a customary law practice which entitled a man to the custody of a child fathered by another man because the dowry which he had paid had not been returned by the woman before getting married to another man was brought before the court. The court held the custom as repugnant to natural justice, equity and good conscience, and thereafter invalidated the custom. A similar situation occurred in *Amachree v Godhead*²⁶ where the court held that the customary law which stated that a child given birth to by a widow while still living with her deceased husband's family belonged to the man's family. The court held that the custom was in line with the rules of natural justice. As opposed to the case of *Edet v Essien*, the best way to explain this would be that the rival claimant was the mother's family whose argument was that the child was illegitimate rather than the natural Father himself.²⁷ Similarly, in *Re Effiong Okon Ata*,²⁸ the former owner of a slave had objected to the grant of letters of administration to the sister of the deceased. The court held that the custom being one which promotes slavery was repugnant to natural justice, equity and good conscience.

¹⁹ Mikano E Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon' (2015) 15(2) *African Studies Quarterly* 85, 85; Tasiki Desvarieux Ntobengwia & Tangwa Modestine Ginja, 'The Domination of the Repugnancy and Incompatibility Tests on Customary Law in Anglophone Cameroon' (2020) 3(2) *Journal of Constitutional Law and Jurisprudence* 32–37.

²⁰ Azeez Mujeeb, 'Customary Law; The Repugnancy and Public Policy Tests' (*academia.edu*, 2016) https://www.academia.edu/38332623/Customary_Law_The_Repugnancy_and_Public_Policy_Tests accessed 20 April, 2026.

²¹ Abiola Sanni (ed), *Nigerian Legal Method* (2nd edn, OAU Press) ISBN: 978-136-154-7.

²² *Laoye v Oyetunde* (1944) AC 170.

²³ In the words of Nwokedi JSC in *Agbai v Okogbue*, "the doctrine of repugnancy in my view affords the court the opportunity for fine-tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws".

²⁴ (1931) AC 662, at p. 693.

²⁵ (1932) 11 NLR 47.

²⁶ (1923) 4 NLR 101

²⁷ J O Asein, *Introduction to Nigerian Legal System* (2nd edn, Alaba Press Ltd, 2005).

²⁸ (1930) 10 NLR 65.

In *Dawodu v Danmole*²⁹, the trial court had rejected a Yoruba rule of inheritance known as *idi-igi*, which would amount to dividing the estate of deceased into equal parts, considering the number of wives. Being that there were four wives, and 9 children, the trial court felt it would not align with the modern principles of equality. However, the Supreme Court accepted otherwise, holding that there should be no reason to adopt that perspective by the trial court. Further to the decision by the Privy Council, and held that the rules guiding what will be fair in a monogamous system is entirely different to the rule in a polygamous system, and as such, the custom will not be repugnant. Even after the departure of the colonialists in Nigeria, the application of their established principle had already been entrenched into the principles regulating the application of customary law practices in Nigeria. The light of the foregoing demonstrates that even after the independence of Nigeria, the Nigerian courts have subsequently invalidated a number of customs on the ground of being repugnant to natural justice, equity and good conscience.

In the case of *Mojekwu v Mojekwu*³⁰, the Court of Appeal held that the Oli Ekpe custom which discriminated against women from participating in the inheritance of her deceased father, as opposed to the son of the brother of the deceased was not only unconstitutional, but repugnant to natural justice, equity and good conscience.

Also, in the case of *Ukeje v Ukeje*³¹, the Supreme Court declared a custom repugnant discriminatory and repugnant to natural justice for preventing a female child the entitlement to inheritance from her deceased father.

The Court of Appeal in *Agidigbi v Agidigbi*³² tilted its perspective towards the decision of the court in *Dawodu v Danmole*³³ by holding that the Bibi Custom of inheritance which allowed the eldest surviving son of a deceased person inherit the *igi igbe* is not repugnant to natural justice, equity, and good conscience.

3.1 Inconsistency Across Jurisdictions

While the repugnancy test is widely adopted across different jurisdictions, an assessment of these applications make it demonstrably evident that the test is devoid of a standard definition, as neither the British who introduced the principle, nor statutes wherein the test has been incorporated have given a standard definition of what will count as being repugnant or the perspective that the repugnancy will be determined through.

This particularly goes to the root of the operation of the test. It shows a clear and significant inconsistency, whereby what might count as being repugnant in a situation may be deemed to align with rules of natural justice in another. Therefore, the practice of this has proved difficult for judges whose backgrounds and understanding of the notion of what is right and wrong might be in conflict with the habits of communities which they preside on. For instance, in *Edet v Essien* a custom was invalidated by the court for granting the custody of a child to a man fathered by another man, thus declaring it repugnant to natural justice. While in *Mariyama v Sadiku Ejo*,³⁴ the court did not declare a similar rule of customary law as repugnant to natural justice. The differences in the outcome of these two court decisions, *inter alia*, indicate that the lack of a standard and general definition of what amounts to repugnancy instigates all sorts of inconsistencies in courts' decisions.

4. The Constitutional Dimension: Repugnancy, Human Rights, and the 1999 Constitution

²⁹ (1958) 3 FSC 46; (1962) 1 WLR 1053 (Privy Council).

³⁰ (1997) 7 NWLR (pt. 512) 283

³¹ (2014) 1 NWLR (pt. 1418) 384

³² (1996) 6 NWLR (pt. 454) 300

³³ (1962) 1 ALL NLR 702

³⁴ (1961) NRNL 81.

Among the fundamental rights guaranteed by the Constitution of the Federal Republic of Nigeria 1999 is the right to freedom given to a person from being discriminated against as provided for in section 42 of the Constitution. The provision seeks to prevent discrimination on the basis of being a member of a particular community, ethnic group, place of origin, sex, religion or holding a particular political opinion. Accordingly, the provision states that a person shall not be restricted or made subject to certain things which other citizens of Nigeria are not made subject to.³⁵ Similarly, no person shall be accorded any privileges which have not been accorded to other citizens of Nigeria.³⁶ In furtherance, the Constitution prohibits that a person is subjected to forms of disability or deprivation due to reasons occasioned by the circumstances surrounding his birth.³⁷ With recourse to the foregoing established analysis, it follows that the right is not devoid of an exception. The Constitution itself has provided certain actions that can be taken and will not amount to discrimination against any person. The section empowers the government to make laws that impose restrictions or qualifications as regards the appointment to an office under the State, as a member of the armed forces of the Federation or member of the Nigeria Police Force or any government established corporate body.³⁸ A clear demonstration of the foregoing provision is that a person cannot complain to have been discriminated against when the government specifies certain qualifications, requirements or quota for appointment into governmental bodies or the military with the intent of reflecting the federal character of Nigeria.

Significant recourse must also be given to the provision of section 34 which guarantees a person the right to dignity. Accordingly, the Constitution provides in that section that a person shall not be subjected to torture, or to inhumane or degrading treatment. In addition to that, it provides that a person shall not be held in slavery or servitude. Finally, a person shall not be required to perform forced or compulsory labour.

One pertinent thing about this provision is that the provision is intentionally broad and flexible. This implies that the Constitution does not necessarily give certain definitions to how these terms could be held to have manifested. Thus, a necessary implication of the section is that should there be any customs that confer the ownership of certain people in the hands of another who are believed to be superior, or any customs that promote the sexual or domestic abuse of a gender by the other, such customs will seemingly be invalidated on the basis of repugnancy.

4.1 The case of *Ukeje v Ukeje*³⁹

On the 27th day of December 1981, Lazarus Ogbonnaya Ukeje, a native of Umuahia in Imo State died intestate. He had real property in Lagos State and for most of his life was resident in Lagos State. The 1st appellant got married to the deceased on the 13th of December 1956. There are four children of the marriage. The respondent is one of the four. After Lazarus Ogbonnaya Ukeje died, the 1st and 2nd appellants' (mother and son) obtained letters of administration for and over the deceased's estate.

On being aware of this development, the plaintiff/respondent filed an action in court wherein she claimed to be a daughter of the deceased and by virtue of that fact had a right to partake in the sharing of her late father's estate. Her claims before a Lagos State High Court were for five (5) reliefs. Pleadings were filed and exchanged.

³⁵ Constitution of the Federal Republic of Nigeria 1999, s42(1)(a).

³⁶ *ibid*, 42(1)(b).

³⁷ *Ibid*, 42(2).

³⁸ *Ibid*, 43(3) provides that nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria.

³⁹ (2014) 11 NWLR (Pt. 1418).

The respondent as plaintiff testified and called her mother as a second witness. Thirteen witnesses gave evidence for the defence. Thirty-four documents were admitted as exhibits. These included the birth certificate of the respondent showing that she is a daughter of the deceased L. O. Ukeje, family photographs of the respondent and her deceased father and a guarantor form from the deceased L. O. Ukeje filled for the respondent acknowledging that he was the father of the respondent.

The trial court in its judgment found that the plaintiff/respondent is a daughter of L. O. Ukeje (deceased) and proceeded to grant reliefs 2, 3 and 4. As regards relief 5, the trial court ordered the 1st and 2nd appellants to hand over the administration of the estate to the Administrator-General pending when the deceased children would choose 3 or 4 of them to apply for fresh letters of administration. The appellants were aggrieved with the judgment of the trial court and appealed to the Court of Appeal which dismissed their appeal. The appellants again were dissatisfied with the judgment of the Court of Appeal and they appealed to the Supreme Court.

When tasked with determining the validity of the custom, the Supreme Court held that a female child, no matter the circumstances that surround her birth, is entitled to an inheritance from her late father's estate. Therefore, the custom is contrary to the provisions of the section 42(1) and (2) and was invalidated.

The decision of the Supreme Court in that case represents a departure from the colonial standard of merely invalidating a custom based on repugnancy to adopting a reasoning grounded on constitutional basis. This reasoning stands as an elevation of the repugnancy doctrine to the adoption of fundamental rights as a primary yardstick to determining the validity of a custom.

4.2 *Mojekwu v Mojekwu*⁴⁰

In the case, the father of the appellant, Charles Nwofor Mojekwu, died in 1963. Nwofor had an only brother, Okechukwu Mojekwu, who predeceased him. Okechukwu died in 1944. The property in dispute was owned by Okechukwu, who married two wives, Janet and Caroline, the respondent. Janet had two daughters while Caroline had a son. His name was Patrick Adina. He died during the Nigerian civil war. Patrick was neither married nor had a surviving issue. Okechukwu, the appellant's uncle, bought the property in dispute from the Mgbelekeke family of Onitsha under Kola tenancy land tenure system.

The appellant inherited the property under native law and custom of Nnewi. In addition, he paid the necessary "kola", being the consideration to the Mgbelekeke family who recognised him as a kola tenant; the appellant being the eldest surviving son of his father, Charles and the eldest male in the Mojekwu family. The respondent and other people accompanied the appellant to the Mgbelekeke family for recognition and the two daughters of his deceased uncle, Okechukwu, signed the docket of consent from the Mgbelekeke family as witnesses.

After the Nigerian civil war, the appellant went over to the Northern part of Nigeria, apparently to stay there. The first wife of Okechukwu, Janet, stayed at Nnewi. The appellant allowed Caroline, the respondent, to come down from Nnewi to live in the property in dispute and collect rents from all the rooms but one, and to feed and take care of herself. That was in or about January, 1970. One of the daughters of Janet lived in the remaining room. When she left, Janet put a rent paying tenant therein. The appellant exercised acts of ownership on the property and also performed the functions of a head of family. On 1st April, 1982, the respondent commenced moulding cement blocks on the property in dispute, without the consent of the appellant, in preparation for construction of a building. The appellant stopped the respondent. He made public announcements and newspaper publications to prospective lessees. He therefore filed this action.

The case of the respondent was that the appellant is not the head of Mojekwu family and did not inherit the property in dispute under Nnewi custom or any other custom. When the husband of the

⁴⁰ 1997) 7 NWLR (Pt. 512) 283.

respondent died; the appellant's uncle sought to take over the property even when Adina Mojekwu was still living. The respondent took the appellant to court. That was in Suit No. 399/59 at the District Court Grade 'A'. She obtained judgment. Esther Okakpu (DW1) the sister of the appellant gave evidence in favour of the respondent in Suit No. 399/59. One Clement Udezue, an agent of the appellant, illegally occupied one of the rooms in the property in dispute. By Suit No. MO/312/82, the respondent successfully evicted him. Esther Okakpu (DW 1) also gave evidence in favour of the respondent.

At the trial, the appellant gave evidence for himself and called four witnesses. The respondent did not give evidence. She however called two witnesses. After submissions of counsel for the parties, the learned trial Judge dismissed the claim of the appellant. Being dissatisfied with the judgment, the appellant appealed to the Court of Appeal.

The Court of Appeal, while boldly invalidating the custom held that Nigeria, being an egalitarian state, will not accommodate any custom, including the Oli-ekpe custom, which is discriminatory against women. Women should not be treated as inferior to men in our current civilised sociology. Consequently, the "Oli-ekpe" custom of Nnewi, is repugnant to natural justice, equity and good conscience."

The decision of the Court in the above case highlights that any customary law or practices which excludes a particular gender from being entitled to the same privileges as the other is antithesis to the rules of natural justice, equity and good conscience, and as a result of that will be invalidated.⁴¹

5. Critique: Relic of Colonialism or Necessary Safeguard?

Following the departure of the British, and the continuous invalidation of customs by the Courts, arguments have surfaced as regards the underlying intent behind the introduction of the repugnancy doctrine.

5.1. The Case for Abolition

A seeming perspective by critiques view that the introduction of the doctrine is particularly aimed at epistemic violence,⁴² which is to relegate and subject the customs of the indigenous people of Africa below the level of the English principles. The perspective of Lord Wright that the main purpose for which the repugnancy test was introduced was to invalidate barbarous customs among the Africans strengthens the claim that this was aimed at invalidating customs which appear to the British as uncivilised.⁴³ In this regard, it is argued that since they have failed to provide the definition of what is meant by repugnancy, then the basis upon which the repugnancy test standards were largely Eurocentric in nature, and merely aimed at promoting Eurocentric and western cultures.

A notable defining feature of customary law is that it has a long standing acceptability within the community where it is given recourse to.⁴⁴ In light of this, it may be appropriate to view that it

⁴¹ Celestine Ogbonnaya, 'Women's Inheritance Rights Under the Constitution: The Case of Ukeje V. Ukeje and Matters Arising' (Alliancelawfirm.ng 2025) <https://alliancelawfirm.ng/womens-inheritance-rights-under-the-constitution-the-case-of-ukeje-v-ukeje-and-matters-arising/> accessed 22 April, 2026.

⁴² Epistemic violence as articulated by Spivak arises in a situation where a harm is inflicted through systematic privileging of certain knowledge with the aim of making other groups inferior by modifying, silencing, marginalization or destroying them. See Bernardo Carvalho de Mello, 'Epistemic violence in the Inter-American human rights system: Indigenous cosmologies, legal pluralism and paths towards decolonial justice' (2026) *Third World Quarterly* <https://doi.org/10.1080/01436597.2026.2631046> accessed 22 April, 2026.

⁴³ *Laoye v Oyetunde* [1944] A. C. 170.

⁴⁴ In *Eleko v Government of Nigeria* (1931) A.C. 661, the court noted that the validity of a customary law is derived from the recognition and assent given to it by the indigenous people. Therefore, before a customary law is to be applied in a court of law, it has to be shown as acceptable. Subsequently in *Owoyin v Omotosho* (1961) 1 All NLR 304, at 309 the court defined customary law as a mirror of accepted usage".

stems out of the conducts of the people, rather than what is necessarily imposed on the people.⁴⁵ With regards to this, when the British introduced the repugnancy test as a legal mechanism to expunge these long standing practices which are deemed barbaric, it is viewed as a rather sudden imposition of novel culture and foreign principles which are previously unknown in the local jurisprudence.⁴⁶ Paramount to this analysis is that this eliminates the inherent features of flexibility, creating novelty and illegitimacy in the supposedly customs which ought to grow in line with the conduct of the people.

Another critical point is cultural relativism. According to it, no culture is to be interpreted based on universal principles, as each culture is uniquely understood based on its own principles. The result of this is that a culture cannot be translated using a universally available term.⁴⁷ An analysis of the relegation of customary law by the British demonstrates that this seems not to be a perspective supported by the British. Therefore, the application of British standard to determine the validity of another culture violates the very notion of cultural relativism, and the sovereignty of indigenous norms. Resultantly, when the doctrine is abolished, it will not subject the application to be determined by the court, rather on the consent of those it regulate.

5.2. The Case for Retention

Another side of the debate argues that the repugnancy test is necessary. This is predicated on the fact that, inherently, certain African customary laws have the tendency of barbarism,⁴⁸ and are underpinned by inhumane treatment.⁴⁹ As such, the introduction and preservation of the repugnancy doctrine will not result in an epistemic violence or displacement of customary practices, rather evolve the standards of these customs to align with modern civilisation and contemporary societal realities. This perspective further argues that the repugnancy doctrine has brought about positive effects on the development of customary law practices in Nigeria, as harsh practices have been invalidated through the application of the doctrine.⁵⁰

In addition, another perspective argues that never has it occurred in a repugnancy case where the customary law of a community has been invalidated on the basis of being contrary to any other law.⁵¹ Instead, cases involving the invalidation of customary law have been decided through the use of universal objective moral standards, which are in every human, inherently fair, good and just. What follows from the foregoing is that the introduction of the repugnancy doctrine by the British may only be seen as the way of the British ensuring the customary practices of Africa will align with the evolving moral standards acceptable in every nation.⁵²

⁴⁵ Matthew Enya Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) 7(4) *Beijing Law Review* 430 – 442.

⁴⁶ Jonas Eze and others, 'Reassessing Tradition: The Repugnancy Doctrine and the Colonial Shaping' (2025) 33(2) *IJUM Law Journal* 569 – 597.

⁴⁷ Andrew Arat, 'Cultural relativism types and its elements' (2022) 11(3) *Global Journal of Sociology and Anthropology* 1; David Hollinger, 'Cultural Relativism' in Theodore M. Porter and Dorothy Ross, (eds) *Social Science As Discourse And Practice In Public And Private Life* (Cambridge University Press, 2008); Tove Österman, 'Cultural relativism and understanding difference' (2021) 80 *Language & Communication* 124 – 135.

⁴⁸ Victoria Goldie, 'A History Of African Blood Rituals' (thebloodproject.com 2023) <<https://www.thebloodproject.com/a-history-of-african-blood-rituals/>> accessed 23 April, 2026; Reporter, 'Africa and its Barbaric Practices' (tribuneonlineng.com, 2017) <https://tribuneonlineng.com/africa-barbaric-practices/> accessed 24 April, 2026.

⁴⁹ Eberechukwu E Omezue-Nnali and Wisdom C. Egwu and Chinyere Ifeanyi-Aruogu, 'A Review of Human Rights Violation in African Cultural Practices' (2022) (2) *Awka Journal Of Linguistics And Languages*.

⁵⁰ EA Taiwo, 'Repugnancy clause and its impact on Customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 90.

⁵¹ Benneth Udensi & Chike B. Okosa, 'Contemporary Issues on Repugnancy Test Doctrine in Nigeria' (2024) 9(1) *Coou Law Journal* 115, 119.

⁵² *ibid*.

5.3. Towards a Reformed Standard

The foregoing analysis has revealed that the repugnancy test, as it currently is, is simultaneously too characterized by colonialism underlying its foundations and too valuable in its protective function to be either for it to be unqualifiedly preserved or out rightly abolished. The way forward lies in its reconstitution on an Afrocentric, rights-based foundation.

Firstly, the doctrine's conceptual dependence on English moral sensibilities should be revisited and severed. The phrase "natural justice, equity and good conscience" as used in section 18(3) of the Evidence Act lacks an authoritative definition, and its historical application has drawn overwhelmingly from Eurocentric benchmarks. Therefore, there should be a reform standard which will replace this with a framework rooted in indigenous African values, particularly with an ethics which affirms that human dignity is realised relationally and communally.

Additionally, that Afrocentric foundation must be reinforced constitutionally. The decisions in *Ukeje v Ukeje* and *Mojekwu v Mojekwu* demonstrate that sections 34 and 42 of the 1999 Constitution on their own can autonomously function and operate as repugnancy filters. There should therefore be a legislative amendment to section 18(3) which would make it explicit that Chapter IV rights constitute the primary measure of repugnancy, thereby grounding the doctrine in Nigeria's own democratic ordering rather than the principles laid down by the colonial heads.

Pertinently, such reform must equally address judicial inconsistency. Rather than an exhaustive definition, legislative guidance should establish principled criteria which will be drawn from Constitution and regional human rights instruments, to which courts must give recourse to: whether the particular custom in question violates bodily integrity or dignity, whether it discriminates on grounds of sex or birth, and whether it denies persons remedies to which they would otherwise be entitled.

Ultimately, the result would be a repugnancy doctrine which is neither colonial in character nor indifferent to rights, it suggests one that tests customary law against standards defined by the Nigerians upon which these customs operate.

6. Conclusion

This paper has traced the repugnancy doctrine from its colonial origins in the Supreme Court Ordinance of 1876 through its codification in section 18(3) of the Evidence Act 2011, while additionally surveying its judicial application and interrogating its constitutional dimensions. The question forming the paradigm of this discourse in this paper is whether the doctrine is a relic of colonialism or a necessary safeguard. This admits of no simple answer. Both positions contain genuine force. Undoubtedly, the British introduced the doctrine as an instrument of cultural subordination, which was applied through Eurocentric benchmarks that its architects never defined and never subjected to indigenous scrutiny. Nonetheless, its application has also produced outcomes of undeniable justice, striking down customs that denied women inheritance rights, reduced children to property, and perpetuated systems of social caste.

The resolution of this tension does not support an outright abolition, neither does it support uncritical preservation. The best answer is reform. As it has been argued, the doctrine must be revisited to one which is inherently an Afrocentric, rights-based foundation. This should be one that displaces the standard inherited from the British, with constitutional values that Nigerians have themselves affirmed, and that evaluates customary law by its effect on the dignity and rights of those it governs rather than its conformity with foreign moral sensibilities.

Consequently, this paper makes the following recommendations. First, section 18(3) of the Evidence Act should be amended to make it explicit that the fundamental rights guaranteed under Chapter IV of the 1999 Constitution constitute the primary measure of repugnancy, thereby grounding the doctrine in indigenous constitutional authority. Secondly, the amendment should

provide principled interpretive criteria to guide courts in applying the test consistently across jurisdictions, addressing the inconsistency evident in divergent decisions on materially similar facts. Further, there should be an establishment of indigenous law reform committees composed of community representatives, traditional institutions, and legal scholars. The main purpose will be to enable customary law to evolve from within, restoring to communities the primary authority over their own normative growth.