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# ARE SOME NIGERIAN CUSTOMARY LAWS REALLY REPUGNANT?

By:

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## Introduction

When the British Government formally established its administration in Nigeria in 1861, it was not its intention at that time to confer on the judiciary, jurisdiction on matters relating to customary land law, family law and succession.[2] These jurisdictions were vested absolutely in the customary courts. One of the reasons for this was the general lack of manpower, and in particular, lack of judicial personnel who could administer customary law in the so called English courts.[3]

However, the general policy of the Colonial Government not to meddle into these jurisdictions was retracted in 1914. Section 19 of the Supreme Court Ordinance of that year provided that

> "Nothing in this Ordinance 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 said Colony and Territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience..."

The purpose of this section was to integrate the customary legal system into the imported English legal system which was administered by English judges in the English style courts. The consequence of this was that it gave the English judges the opportunity to be involved in direct application of customary law. By this enactment, customary law and its application ceased to be an exclusive preserve of Nigerian customary court judges. Of all the consequences of this Ordinance, the most important thus far, was that it gave the Colonial administrators the opportunity to scrutinize and judge

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[2] Section 14, Supreme Court Ordinance, 1914; Also see the case of Alaka vs. Alaka (1904) N.L.R. 45.

[3] Owing to lack of judicial personnel, the Royal Niger Company was granted a Charter to administer laws in so far as it ensured its operation in the Colony.

on the suitability or otherwise of the application of customary law. This leverage which the Colonial administrators had, had to some great extent, an enormous impact on the past, present and future survival of customary law.

The purpose of this article is to critically examine the Repugnancy Clause and its application to some customs with the view to finding out, if some of the customs which have been declared repugnant are really so. If after the analysis of these customs they don't deserve this disgraceful qualification, to recommend what is to be done.

## The Meaning and Some Jurisprudential Conceptions of Customary Law

"It is at least certain," said Allen, "that in many societies of which we have evidence, before any clearly articulated system of law-making and law dispensing has developed, the conduct of men in society is governed by customary rules."[4] The question that follows is: what is a custom?

According to John Salmond, "custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public utility."[5] In another breath he says, "custom is an expression and realization of the principles of right and justice."[6]

The first definition can be classified as abstract custom while the second can be categorized as real. Abstract custom means a custom expressed not by way of conduct of the people, but as an abstract thing capable of being perceived by senses, conscience, will, conviction or by people's spirit. In the second definition, John Salmond considered custom in a concrete term, i.e., custom manifesting itself in real and overt

conduct.

Therefore, the problem here is, whether customs established themselves because they correspond with any notion of conviction, consciousness and popular will, or because they are conduct of the people which over the years have received the force of law?

According to the Historical School of Jurisprudence of which Professor Savigny and Vinogradoff were ardent pioneers, the origin of custom is to be found in the popular will, consciousness and

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[4] Allen, C.K., Law in the Making, 69 (1963)

[5] Salmond, J., On Jurisprudence, 143 (1920).

[6] Ibid. page 144.

conviction of the people and not conducts alone. To this effect, Vinogradoff says,

> "The true basis of customary law[7] has its existence, its reality, in the common consciousness of the people. This existence is an invisible thing, by what means can we recognize it? We do so when it reveals itself in an external act, when it steps forth in usage, manners, custom; in the uniformity of a continuing and therefore lasting manner of action we recognize the belief of the people as its common root and one diametrically opposite to bare chance ..."[8]

From the foregoing, there is no doubt that the origin of custom lies not in the imitative and repetitive conduct of man. Its origin lies in those invisible, internally assimilated and deeply seated beliefs which propel man to act in the way he does. Custom is a human conduct or action which conforms with the principles of right and justice. But, beneath it is the conviction and consciousness which infuse it with life. Custom is just like a tree with luxurious leaves and colourful flowers. What nourishes and sustains the leaves and the flowers is the root. If the root is severed, the colors of the leaves and the flowers will whither and eventually die. This is how belief, conviction and consciousness are related to custom. In other words, the soul of custom is the popular will and conviction of the people. For example, the principle of collective responsibility or liability[9] which was abolished by the Penal and Criminal Code Laws of Northern and Southern Nigeria[10] respectively, was a well established custom of many communities in Nigeria. According to this ancient customary law, if a member of a family had committed an offence, any member of his family could be held responsible. For instance, if a father had committed an offence, his child could be imprisoned. Or if one member of the family was indebted, the creditor could walk into the compound of the debtor and capture any animal, e.g. goat, fowl or cattle. Or he could take any movable item belonging to any of the relatives of the debtor in detention, or satisfaction of his credit. The reason for which this custom was tolerated in the past was because of the belief, consciousness and conviction of the people that whatever happened to any one of them,

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[7] The underlined is mine.

[8] Vinogradoff, Historical Jurisprudence, i. ch. vi, quoted by Allen, C.K., ibid., 87.

[9] Inasa vs. Oshodi 11 N.L.R. 10 (1904)

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happened to all of them.

Although the principle of collective responsibility or liability has been abolished, there is still a conviction that a whole family or community is a corporate entity. As the old adage goes: "a family of several members is like an individual, whatever happens to any of his limbs affects all other parts of his body." Likewise whatever happens to a member of a family affects all other members. Therefore, under the principle of collective liability, when a member paid his contribution toward a debt owed by another fellow member, or was serving a sentence as a result of a crime committed by his brother, or when he laboured for someone as a result of a debt owed by his father, uncle or aunt, he usually did so with the belief or conviction that he was performing his family responsibility. He acted as if he was the person who committed the crime or who owed the debt. The root of this selfless service lied in the conviction that he and the culprit or the debtor were one and inseparable individuals. His conduct, i.e. the serving of the sentence or the payment of the debt, was the outer manifestation or symbol of his inner consciousness. It was his will, his consent and acceptability of the custom that gave him the wherewithal and courage to behave in the way he did, to the extent that he had to forfeit his right and immunities and to undertake some responsibilities which were not traceable to him personally.

According to Professor Allen, on the other hand, "customs establish themselves not because they correspond with any, consciousness, wide-spread necessity, conviction, will, and belief[11]. He said, "customs established themselves because they fit the economic convenience of the most powerful caste."[12] Although one cannot reject absolutely this view of Professor Allen, however, it is our opinion that the existence of consciousness, will, conviction, belief and wide-spread necessity are fundamental to the practice of custom. Even the most powerful caste has to believe in these fundamental basis of custom. Let's take the example of slavery which Professor Allen made reference to. A powerful caste, for example, may believe that slavery should be practiced as a natural phenomenon because of its being a convention, a custom of immemorial antiquity and a wide-spread necessity. This is crucial because, without these fundamental elements of custom he wouldn't have indulged himself in the act of slavery. But to the weaker members of society upon whom slavery was irresistibly imposed, slavery was unjust and unfair because it offended their

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[11] The underlined are mine.

[12] Ibid page 92

consciousness. It was contrary to their conviction and will. Thus, looking from both angles, slavery, whether it was bad or good, evil or virtuous, it depended upon the context in which it was perceived by the two groups, i.e. the most powerful caste and the slave.

In the same vein, let us stretch this argument further to the Nigerian custom of polygamy, or to be more technically precise, the custom of polygamy.[13] Polygamy is the marriage of several women to one man. Can we say that it is the domination by the powerful caste, the males, over the 'weaker' class, the females? Let us examine the institution from the points of view of the males and females respectively.

The institution of polygamy is wrapped up with some socio-economic systems and politico-cultural objectives of the African families in general, as well as the people of this country who practice it. Politically, there is an inherent belief and conviction in the numerical strength of family members. Population counts in nearly everything a family does, ranging from war to labour, to burial ceremonies. After all, the numerical strength of any family is the property of that family to be reckoned with. Therefore child-bearing is an important factor in a man's achievement of political strength. For this reason, customary law provides that a man can marry as many wives as he has means, that is, his ability to pay their bride prices. Economically, there is the belief that the more wives and children a man has, the more he is able to cultivate large tracts of land. Consequently, there is the belief that he will produce more food crops for consumption and selling. The question is — what has sustained this custom. Is it because the men wanted it and therefore imposed it on the women, who were weak and have no irresistible power to overturn it? The answer lies not in the mere conduct of the polygamists, but the popular consciousness of the custom. The custom practicalizes itself in a form of overt conduct because it has the popular will and acceptability of the people. The custom has endured over many years because people who practice it do so with conviction and consciousness. It is these qualities that make a custom to endure. Once the popular will, conviction and consciousness begin to wither away, a custom will then begin to die and eventually cease to be in existence or to be practiced. Therefore, the soul, or the origin, of custom is the conviction and acceptability of the people it governs and not the outer conduct. Thus what enables women to tolerate the institution of polygamy is their conviction, assent and acceptability of the institution. They have

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[13] I am not saying that the practice of polygamy has been held to be repugnant to natural justice, equity and good conscience. I cite this example only to show how it has over the years been sustained because of conviction, consciousness and popular will of both males and females in this country.

beliefs in the customary rights of men to have as many wives as they can afford. This belief is abstract or conceptual. Without the abstract belief the institution would have been revolted against and abolished long ago. The women themselves have gone through the process of interiorization of polygamy and it has become an intrinsic part of their lives. It is a custom whose creation and institutionalization is due to their participation. They have faith in it. It is the faith, conviction, consciousness and will that have made Nigerian women to tolerate the institution. Therefore, custom is not an imposition of the most powerful caste but a free will, the basis of which is to be found in the collective will and consciousness of the people.

If the root of custom is the collective conviction, consciousness and the popular will of the people, the actual practice of custom is the outer part of it. Like a tree, its anchor is its roots. The roots together with the outer part of it, that is the stem, leaves and flowers, combine as one whole tree. They are interdependent. This is how custom real and custom abstract are. The actual practice of a custom is an expression and realization of the abstract motive. In fact, custom unfolds itself and expresses itself in concrete terms when we practice it.

The fact that people who practice a certain custom must have conviction and consciousness of the custom does not mean that a particular custom should be practiced unanimously throughout a community or country. The requirement of conviction and consciousness is the problem of the person or group of persons who seek to observe a particular custom. The reason is that it is difficult to find a custom that prevails over a whole region or country. In this country, although some customs are of general application, many of them are particular customs,[14] that is customs which apply only to a certain family, group of people, or community. They have no general application. For example, the Osu system of caste, was a custom which treated some Ibo members as subhumans and the property of idols[15]. This custom was only available among certain Ibos of a particular district or locality in Iboland. In contrast, the practice of slavery was, in the past,[16] generally applied. It was practiced in every community in this country. Among other examples of customs of general application are the payment of bride-price, polygamy, the principles of inalienability of property

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Blackstone defines a particular custom as one which, for the most part, affects only the inhabitants of particular districts Bk 1, page 72

[15] Kodich vs Affram (1930) 1 WACA 12 Effiong ou

and collective right to property

**Analysis of some Customs which have been declared Repugnant**

The full phrase for this test is, "repugnant to natural justice equity and good conscience." Its origin stems from two sources, namely the High Court Laws of all the states in Nigeria[17] and the Evidence Act of 1945. Interestingly, there is no statutory meaning of this phrase. Therefore, its meaning is relative or contextual. It is because of the imprecision of its meaning that the courts were able and are still able to manipulate it to suit their various notions of repugnancy.

In the case of Laoye vs. Oyetunde,[18] Lord Wright was of the opinion that "the effect of the phrase was to invalidate customs which were barbarous. According to A.E.W. Park, a custom will be declared repugnant to natural justice, equity and good conscience if it does not conform with the "most advanced notions of what is socially ideal in a particular situation."[19] What Mr. Park means here is that the test for determining repugnancy is objective rather than subjective. We absolutely concurred with him, that the test is objective. But the question is: whose objective values? Is it the English values which should be the yardstick or the Nigerians' from whom the customs in issue evolved?

According to Mr. Park, Nigerian customs must conform with outside values or standards of civilization and not the values from within. This could be gathered from the following statement:

> "It can therefore be stated with confidence that inconsistency with the principles of English law is not the standard applied in determining whether a particular rule is repugnant to natural justice, equity and good conscience. Equally it is obvious that conformity with local custom is not the test, for, of course, it is precisely local custom whose validity is being determined. Consequently it must be the case that some less specific factor which is not derived from any individual legal or social system, but rather from general notions of what is just and proper."[20]

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17 For example, Northern Nigeria High Court Laws, Section 34(1), 1963; Eastern Region of Nigeria High Court Laws, Section 26(1), 1963; High Court Laws of Lagos, Cap. 52 (1973); Western Region of Nigeria High Court Laws, Cap. 44, Section 12(1), 1959; and Mid-West State of Nigeria High Court Laws, No. 9, Section 13(1), 1964.

18 A.C. 170 (1931).

19 Park, A.E W , The Sources of Nigerian Law, 72 (1963)

20 Ibid, page 70

Earlier on, I defined customary law as a conduct which for over a long period of time has acquired the force of law or has become law. The life-wire of this conduct originated from the conviction, consciousness and popular will of the people. Thus, custom is the creature of the people it governs. It comes from within, not from without. If this is so, how can the test for determining a particular custom come from without? How just and fair is the outside general notion or custom going to fit into a particular inside custom? Since the outside custom or notion is that of a different group of people with different political, social, historical and cultural backgrounds, it is really difficult for the notions of the two groups to be congruent.

This was exactly what happened in the case of Laoye vs. Oyetunde.[21] In this case, the respondent alleged that, according to their native law and custom, only the son of a chief could become a chief. To their Lordships, who were all from England, and were accustomed to the Western notion of democracy, this custom sounded barbarous. To them, every person should have the right to govern. In other words, the right to govern should not be hereditary as it was alleged in this case. Hereditary right to rule like the one alleged in this case was not part of their culture. It was not a political system of government that was known to them. Because it was alien to them, their Lordships had no consciousness, conviction and popular will of it. But on the part of the respondent, this custom sounded reasonable, and it was based on a sound political philosophy on which we will endeavour to elaborate.

In an administratively centralized community, like the Yoruba's, from where this custom was alleged, the right to become a chief is normally vested in some families, called the royal families, or the royal houses. The position of chieftain in rotated among members of the royal houses. Although there is always the need to expand royal houses, members of royal houses, always resist attempt to proliferate them. In order to check this, there is a customary rule that only a member of a royal house should vie for the title of chief. Therefore, the contention of the respondent essentially boiled down to the defence of the goodwill of his royal title. This is a sound, valid property right argument known to all legal systems. This was his customary right conferred upon him by customary law which had received the cognizance of his community. We cannot see any aspect of this customary law which is repugnant to natural justice, equity and good conscience. The problem of repugnancy in this case arose because their Lordships who were entrusted with the responsibility of interpreting and validating customary law were not

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part of its creative process. Hence they had no regard, pride, nationalism, patriotism or sense of negritude for it.

Therefore, it is our view, that the test for invalidating a custom must come not from outside but from within. A custom is an expression and realization of the principles of right and justice of a particular group of people or locality which has acquired the force of law.[22] The task for deciding what custom is right and just at any particular time is solely the responsibility of those people who created it and whose conduct it is supposed to regulate. It is not the duty of the courts to paternalistically reject an application of customary law if that custom conforms with the values of the people from whom it evolves. It is for them to apply it once it is proved to be in existence. Should a court decide to reject a custom, it must give reason for doing so. This, therefore, called for the indepth knowledge of customary law. But unfortunately, the English judges were not equal to the task. They and the members of the bar were not trained in the application of customary law. To worsen the situation, since the early judges and the members of the bar were from a country with different political, historical, social and cultural backgrounds, it was difficult for them to critically evaluate and appreciate the philosophy and ideology upon which such customary rules were based. For this reason, most of the cases that come before the English courts were levelled as repugnant to natural justice, equity and good conscience even though a more thorough examination of them would have revealed that they were not.

In Edet vs. Essien,[23] it was alleged that under the Efik customary law, a refund of bride-price terminates a marriage. Therefore, children born by a deserted woman who had not refunded her bride-price belonged to the deserted husband and not the biological father. Without any ample exposition of the economic, social, cultural and political values of this rule, the court held that the alleged customary law was contrary to natural justice, equity and good conscience. A critical assessment of the ideology and philosophy upon which this custom is based, however, reveals the wisdom of the Efik community.

In Nigeria, both in the past and at present, bride-price, however small, is one of the most important properties a person can acquire. To get it was the most tedious and hectic part of man's life. From its inception until now, its payment is considered as the most accomplished ambition of one's life-time. It bestows its payer with a high social status. It is a sign of manhood and readiness to

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22 Salmond, J., On Jurisprudence, 143 (1920).

23 11 N L R 47 (1932).

shoulder family responsibilities. Under customary law marriage is not only a contract between a bride and a bridegroom. It is also a contract between a bride and bridegroom's families. It is a contract in which countless number of people have interests. This emphasizes the importance of marriage under customary law. In order to protect the interests of numerous members of both families involved and not to throw them into a melting pot of feuds and social inequilibrium, customary law stipulates that everyone should steer clear from any action which might disrupt the stability and deny the parties the benefits of marriage. To ensure this, stiff rules of conduct are imposed under customary law. Although many of the facts of this case were not disposed, nevertheless, desertion by a woman or enticement by a man was a serious offence; because it disrupts peaceful matrimonial relationship. To deter people from abating women to desert their husbands, an Efik customary law ordained that children born during the period of desertion belong to the deserted husband unless bride-price was refunded. As we have said earlier on, realizing how burdensome it was to pay for a bride-price of a woman in the past and the importance accorded to marriage as a fountain from which legal rights and duties of family members flow, stiff penalty like the one stipulated in this Efik customary law was in order. But the colonial judges who were ignorant of the purpose of this law held that it was repugnant to natural justice, equity and good conscience.[24]

Another case, which at first glance could be categorized under the repugnancy clause but which, a thorough understanding of customary jurisprudence would reveal otherwise is the one of Inasa vs. Oshodi.[25] The appellants in this case were descendants of a slave. The ancestors of the respondents had granted a portion of family property to the respondent's father. In the present case, the respondent alleged that under Yoruba customary law, a grantee holds his tenancy subject to good behaviour and if one member of the grantee's family does something which challenges the title of the grantor, he does so at the risk of all other member's holdings. It was alleged that a member of the appellant's family had attempted to alienate his holding. Consequently, it was argued that all other members had forfeited their holdings. It was argued on behalf of the appellant that the alleged customary law violated the principles of equity and, therefore, contrary to natural justice, equity and good conscience.

In customary jurisprudence, the law which was alleged in Inasa

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24 See also the case of Manya Okolo vs. Sikpu Gume, N.N.L.R. 231 (1977).

25 A.C 99 (1934).

vs. Oshodi can be characterized as a principle of collective liability, which we have already explained. Under this doctrine, since a family is considered to be a unit or corporate whole, anything which affects a member affects all members of the family. Invariably, if a member has committed an offence or is civilly liable, all other members are liable. For example, a father can be punished for the wrong committed by his child or vice versa. A father may be compelled to pay a debt incurred by his son. Or the latter may be liable for the act of his brother or sister. The early English judges, members of the bar and even Nigerian lawyers have levelled this custom as contrary to natural justice, equity and good conscience.[26] But a careful consideration of this case, like Edet vs. Essien would expose the wisdom of this custom. Its purpose was to exhort members to conduct their affairs in manners that do not injure any member of their family or other families; because if one member offends someone, not he alone, but other members of his family as well may be called to account for it. This customary law serves as a deterrent. It enables family members not only to live peacefully and harmoniously with each other but to do so with members of other families. These are ideologies, philosophies and values that are enshrined in the principle of collectivism which we cherish a lot in this country.

The case of Cole vs. Akinyele[27] further illustrates how the English judges misconceived customary law and took decisive step to abolish it by employing the repugnancy test. The facts of this case are similar to those of Re Adadevoh. In it, it was alleged that under a Yoruba custom, a child born out of wedlock could be legitimated if the father merely acknowledged his paternity. This claim was rejected because, according to the court, apart from being incompatible with the English Marriage Ordinance, it was also contrary to natural justice, equity and good conscience.

The rationale of this custom is to be equated with the modern idea of the "best interest of child."[28] It is to protect a child from being bastardized; that is, a child should not be made to suffer for the sins he himself has not committed. His reputation and character should be protected so that he is not made a scapegoat. This customary law is based on the social and political values of life of Nigerians. Nigerian societies are based on lineage systems. If paternity of an innocent child is disallowed, which lineage will he

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26 Uwani vs. Nwosu, 8 N.L.R. 19. (1928).

27 5 F.S.C. 84 (1960); Also see 15 WACA, 20 (1955); Re Adadevoh, 13 WACA, 304 (1951).

28 For example, see Section 402, Uniform Marriage and Divorce Act (U.S.), 1970.

belong to? This has a serious social and political consequences especially in a patrilineal society where benefits, immunity and privileges are acquired through the father's lineage. If a child has no legitimate father, his image in society will be very low. He may find it difficult to have a wife. He cannot contest for any political position in his community. He cannot become a family head. He cannot inherit. He is always referred to as a "tree without a root." In short, there are numerous political and social discrimination which an innocent child may suffer from if his legitimacy is denied. And to avoid this disastrous calamity, Yoruba customary law provides that his paternity should be acknowledged. This is a clear case of the interest of child, a principle which has just begun to be recognized in the Western statutes and legal discourses. In this way, this customary law was invoked to solve social and political problems in Yoruba society. Yet it was held that this custom was repugnant to natural justice, equity and good conscience because it might encourage promiscuity. Obviously, one may question: how valid are these conditions of validity?

Similarly, in the case of Maryamu vs. Sadiku Ejo,[29] the appellant after obtaining a divorce decree went straight to cohabit with a man she wanted to marry. Within three months of divorce she was found pregnant. The divorced husband alleged that under an Igbira customary law the child was his. The alleged custom was declared contrary to natural justice, equity and good conscience without proper exposition of it.

The raison d'etre behind this custom is similar to that one of Edet vs. Essien, which we have already considered. Under customary law, a divorced woman is to abstain from any sexual contact for three months. The purpose of this customary law is to determine with certainty the paternity of any subsequent issue by a divorcee. As a matter of general consensus found in many communities in Nigeria, the period is three months. If, before the expiration of three months a woman is pregnant, the child belongs to the ex-husband. If it is after three months, the child belongs to the new husband. The respondent in this case who was the complainant in the court below, claimed the custody of the child under this custom.

The aim of this custom is to prevent what has happened in this case; that is to prevent child disputes. It is to ensure that one does not reap where he has not sown. To achieve this objective, special restraint is placed on the woman to exhibit her chastity. On the part of the man, i.e., the would-be-husband, he, too, should retrain from her, or lest he invest in a worthless venture. The idea behind this

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29 N.R.N.L.R. 81 (1961). Although the parties were Muslims, the alleged custom applies in many non-Muslim communities in Nigeria.

law is to enable every member of the community to trace his descent without any doubt. The people whom this custom regulates do not see it as oppressive or unreasonable. Neither do they consider it barbarous or contrary to the ideal of a civilized society. They are the creators of it. It is their popular will and consciousness. They have their faith and conviction in it. They all conform to it very willingly, without compulsion. It is their judgment, their decision and their right to do so. Their judgment should be enforced, not overruled arbitrarily.

However, I should not be understood to be saying that all customs in Nigeria are good and valid. Surely, there are some objectionable customs, for example, the Osu custom, which in the past had recognized that some people were property of idols[30] or the one which recognized slavery.[31] These customs themselves could no longer command the popular will, conviction and consciousness of the people. They have, therefore, died a natural death. This is how customs should quit society. The people from whom they evolved should be people who should destroy them, not people who were not their makers and could not defend them covetously, not people who hated them and were all out to ruthlessly abolish them.

In fact, if the English judges had taken pain to study the Nigerian customary law, they would have discovered that each custom had evolved on the basis of rational judgments or practices. The customs are not sporadic or spontaneous acts of the people. Some of the customs have their roots based not only in social, economic, and cultural contexts, but in science. A case in point was that of Maryamu vs. Sadiku Ejo, which we have mentioned above. That was, long before the development of modern medical technology, customary law had evolved ways of ascertaining paternity of a child born after divorce. According to it, it was the responsibilities of a divorcee and a husband-to-be to exhibit high standards of sexual restraint so that they did not confuse the line of paternity. To accomplish this, customary law shifted the burden to them because they are the people who are claiming the advantage of the divorce. This custom is, in my view, not repugnant to natural justice, equity and good conscious because it exhorts people to be discreet. It was unfortunate that it was misconceived by English judges. Eventually, not all the customs that were declared repugnant to natural justice, equity and good conscience deserved to the condemned as such.

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30 Kodieh vs. Affram, 1 WACA, 12 (1930).

31 Effiong Okon Ata, 11 N.L.R. 47 (19

## SUGGESTION

Any suggestion for the future survival of customary law will be incomplete if it does not include the need for independence of customary law. This independence can only be achieved if we the people who created it take pains to interpret it in the light of the spirit in which it was created. Thus, if we entrust its interpretation in the hands of the people who did not participate in its making, we are bound to get contradictory results, because of the differences in values and ways of life. Consequently, we will deprive it the independence which is crucial to its future survival. In order to ensure this, the following suggestion, which is by no means exhaustive, should be vigorously pursued.

## THE COURTS

It need not be emphasized that the courts have a great role to play in ensuring the life of customary law. Because of the flexibility of customary law, they can invigorate it and widen its scope through scientific interpretation. By this we mean, the courts should adopt functional interpretation. They should investigate into rationale of the rationale of our customs. This is imperative, because customary law is not sporadic. It is a result of some systematic, carefully planned and designed pattern of behaviour. It is opposed to bare chance. It is for the courts to make enquiries in order to know what it stands for before they reject it and not to adopt parochial attitudes toward it.

There is no gainsaying that law is an important weapon or instrument which can be used to accomplish political, social and economic objectives. For example, the former British colonial government made use of law to acquire the hegemony over the colonized people. They used law to show that Nigerian culture is inferior to theirs. They used it to imposed their culture, government, law and economic systems. They did this by introducing the validity tests which placed English political, economic and social ways of life and culture over and above traditional Nigerian ways of life. As a colonial government its ambition was to internalized or inculcate into Nigerians the sentiments of English way of life which they claimed was superior to those of Nigeria. To this end both the former colonial administration and the former English judges concertedly joined hands to see that these objectives were achieved through the application of law. That is why our case laws and statutes are full of cultural, political and social ideologies that are not relevant to our indigenous ways of life and values.

Unfortunately, when Nigeria became independent and the majority

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of the courts were manned by Nigerians, the latter could not distinguish those judgments of their English predecessors which helped to foster political hegemony of the former British colonial administration. Through the doctrine of judicial precedent, they indiscriminately affirmed and applied previous decisions without filtering them. They could not decipher the ulterior political motives of the former colonial masters. Their inability in this regard resulted in continuity of judicial dependency, even after Nigeria had become politically independent.

My suggestion in this direction is that since Nigerian courts are now fully manned by Nigerians, it is important that when they come to construe previous cases decided by former colonial judges, they should be wary not to rubber stamp those decisions and apply them to cases before them. They should winnow those decisions to see if they contain political, cultural, and social elements that promoted the hegemony of the former colonial government. If so, those cases should be rejected outright.

Likewise, statutes which seek to abolish Nigeria's cultural, political and social institutions and values should be carefully interpreted. A good example of this are the repugnancy, incompatibility[32], and public policy clauses.

## CONCLUSION

We must conclude by saying that we need a critical legal study of the methods which the colonial judges interpreted and applied our customary law. This study will include the objectives of colonialism, the paternalistic motives of the judges and of course, their attitudes to our indigenous legal system. The more our courts understand these, the better they come to realize that some of our customs which were declared repugnant to natural justice, equity and good conscience did not really deserve to be humiliated as such. It is hoped that if they realized this they will de-emphasize slavish cleavage to the doctrine of judicial precedent does not mean perpetual judicial bondage or neocolonialism. The interpretation of Nigerian customary law should not be left at the whims and caprices of the people who did not create it but were rather out to abolish it.

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32 In Yunusa vs. Adesubokan (1971) N.N.L.R 71, the Supreme Court of Nigeria interpreted the phrase "any law for the time being in force" to include the common law, the statutes of general application, and the doctrine of equity. It, therefore, held that a will made by a muslim which did not conform with the Wills Act, 1837 was incompatible with it, hence invalid. It is my humble opinion, that this kind of interpretation is politically slavish and legally dependent on the English law. It deprives customary law of its identity and autonomy which it needs for survival. It ties customary law to a foreign law and prevents its development.