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Revisiting the Effects of Colonialism on the Development of Customary Laws in Nigeria

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Abstract. Since the Common Law of England gained the force of law in Nigeria, customary laws have been described as archaic and barbaric. In order to be validly applied as a law, they have to undergo the repugnancy tests set out by the colonial masters. As a result, it is observed that the worth and application of customary laws seem to have diminished. The Common Law of England became applicable alongside statutory legislations and valid customary laws but the customary laws are only valid subject to passing the repugnancy tests set up by the colonial masters. The questions are: Why are customary laws inferior to English laws? Why customary laws are subjected to repugnancy tests for acceptability? This paper seeks to revisit the concept of colonialism and its sting on the development of customary laws and also examine the effects of the repugnancy tests on the development of these laws.

Keywords- Customary law, Colonialism, Repugnancy tests, Received english law, Common law, Volksgeist, Nigeria, Inferiority

1. Introduction

Customary laws are the organic or living laws of the indigenous people of Nigeria regulating their lives and transactions. Nigeria is made up of different territories each distinct with its cultural identity, administrative rules and governance. In the Pre Colonial era, customary laws were applicable in Nigeria in their undiluted form. Customary laws are mainly personal laws of the people it governs especially in matters related to marriage, divorce, death, inheritance. The advent of the British rule brought about the received English laws which fiddled with the existing customary laws. Owing to this, it is difficult to have a discourse on the development of customary laws in Nigeria without making reference to the transient colonial rule which played a significant role in the development of laws in Nigeria.

The existent laws are adoptions or replicas of British laws which only reflect recognition of Nigerian customary laws. The coexistence of customary law and the English law within the same State makes it difficult or untidy as to whom and when the laws should be applicable. It has been established that any law that does not relate to the society is no law at all and would definitely be inefficient or spell doom in its applicability. The ineffectiveness of most laws is however linked to this principle. The British laws that were imposed are a reflection of their own customs which is a total distinct from the African culture. It is against this background that this paper seeks to revisit the effects of colonialism on the development of Customary laws by examining the structure of customary laws, the advent of colonialism, the positive and negative effects of colonialism on the development of Customary laws in Nigeria and

also proffer solutions to the problematic state of customary laws in Nigeria.

2. Brief History of the Pre-Colonial Customary Rule

Nigeria is a multi cultural state, and has the Yoruba, Igbo and Hausa as its major ethnic groups. The Yorubas majorly occupied the Western part practiced a monarchical system of government which was centralized. The Oba was the King but he was not a dictator, he acted by consulting Chiefs. The Oba served as both administrative and spiritual head who ruled by consulting Chiefs.

The pre-colonial Igbo land consisted of numerous largely autonomous clans without any centralized political authority. Each clan or village was governed by a council of elders often constituted by the adult male members of the community concerned. They jointly exercised judicial control in the society though the adult members could settle minor disputes within the family. They believed strongly in gods and ancestors whose superior commands must be obeyed by the citizens in the society.

Prior to the Jihad or the Holy War of 1804, the Northern States were ruled by the Hausas with a monarch who ruled over a network of feudal Lords most of whom embraced Islam by the 14thcentury. Local Fulani leaders, motivated by both spiritual and local political concerns, received Dan Fodio's blessing to overthrow the Hausa rulers. Therefore the Fulanis' overthrew the Hausa rulers. A panel of jurists was set up for the Northern part of Nigeria especially, to reconcile both the legal and judicial systems in the whole sphere of crime and criminal procedure, recommended suitable rules of general application to solve conflicts between muslims and non-muslims.

In traditional societies, customary laws were largely unchallenged save by compelling innovations that re-channeled aspects of the practices of the people and subsequently altered its traditions. The British officials, following their emergence in the various parts, were not oblivious of these customary laws and institutions.

However, it has been repeatedly mentioned that the British legal system which was introduced to Nigeria by the colonial masters brought about a change in the pattern of the customary laws applicable in Nigeria. They subjected the application of the customary law to the repugnancy tests whilst their own laws were not subjected to any tests to be sure it fits into the culture and way of life of people.

The English laws and customary laws were also in conflict in relation to personal matters for example; child marriage, forced marriage, polygamous unions, particularly where a Nigerian contracts under statute law and, at the same time, under the customary law.

3. The Structure of Customary Law

It is expedient to understand the meaning of customary laws first in order to understand its structure. There are many definitions of customary law; these vary from one scholar to another. Customary law is the organic or living law of the indigenous people in Nigeria which regulates their rights and transactions. In Nigeria, it can be described simply as an amalgam of customs or habitual practices accepted by members of a particular community as having the force of law as a result of long established usage. It derives its assent from the people who accept it as law. One of the major characteristics of customary law is that it must be recognized, widely accepted and adhered to by the community.

The unwritten nature of customary law makes it difficult to ascribe a regular structure with it. It has been described as a mirror of accepted usage. The so called mirror is structured to reflect whatever is before it. Therefore, customary law is flexible and has the capacity to adapt to social and economic changes without losing its character.

Customary laws are usually enforced in customary courts, the courts at the lowest rung of the hierarchy of courts, which in most cases are presided over by non-legally trained personnel, though higher courts are equally permitted to observe and to enforce the observance of rules of customary law by their enabling laws. However, this enforceability of

customary laws in courts is based on conditions. These conditions do not affect the structure of customary laws except they are being fine-tuned and changed into some other laws.

In Nigeria, customary laws may be categorised in terms of nature into two classes, namely, ethnic or non-Moslem customary law and Moslem law. Ethnic customary law in Nigeria is indigenous; each system of such customary law applies to members of a particular ethnic group. Moslem law is religious law based on the Moslem faith and applicable to members of the faith. The other class of customary law; the Islamic law on the other hand is written with clearly defined and articulated principles. This class of law is however not the focus of this paper. This paper focuses more on the ethnic aspect of customary law than the non-ethnic aspect of customary law.

From all the above definitions, one would tritely conclude that customary law is structured to reflect the way of life of people and their attitude towards the laws governing a particular community. It emerges from the traditional usage and practice of people in a given community which by common adoption and acquiescence on their part , and by long and unvarying habit, has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable.

Therefore, the various ethnic regions had their customary laws particular to them and which have been in operation from time immemorial. As a matter of fact the British found a well-structured government which accounted for the success of their indirect rule system of government especially in the North; partial success in Western Nigeria because of their imposition of warrant chiefs in place of the institutionalized Obaship system and failed abysmally in the Eastern Nigerian as evidenced by the Aba Riot of 1929' Akassa Raid of 1895 and the Benin Massacre which led to the deposition of Oba Overami Nogbaisi of Benin Kingdom in 1899.

Today, for customary law to be enforceable and applicable, it must have been properly established and must have passed through the repugnancy tests. The tests emerged from the decision in *Eshugbayi Eleko v Government of Nigeria* where Lord Atkin held that:

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.

However, the heavy duty in determining which customary law is repugnant to natural justice, equity and good conscience lies on the judiciary. This, however, is beyond the true structure of customary laws.

4. The Advent of Colonialism

As stated earlier, it is difficult to have a discourse on the development of laws in Nigeria without mentioning the colonial rule because colonialism played a significant role in the development of laws in Nigeria. Colonialism is a system which the Europeans adopted in ruling the colonies of Africa to their own benefits. The word "ruling" in the above definition simply portrays the superiority of the Europeans and their laws over the African customary laws.

The presence of the British was gradual and perceived to be notable in the 1800s in the coastal areas which were the main hub for trade. In the midst of so many events, and with a need to regulate trade activities between the British and the indigenous merchants, consuls were appointed and states established. Thus, in 1861, Lagos became a British colony and the British inaugurated a system of indirect rule as the most effective way to manage their colonies. The consequences of the historical, constitutional and legal fraternization between Great Britain and Nigeria introduced the Received English Law consisting of common law, doctrines of equity, statutes and subsidiary legislation through colonialism.

Hence, the customary laws which were confidently applied in different regions of the country became inferior to the Common law of England introduced by the colonial masters. The real beginning of the British colonial conquest was in 1861 with the annexation of Lagos by the British colonial authorities. It continued with the

Supreme Court Ordinance of 1876 of the Colony of Lagos which reads:

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, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation.

This reception of English Laws into Nigeria was in two broad forms:

- those applicable and enforceable in Nigeria directly
- those which were received into the country by various local legislations.

The advent of colonialism also introduced tests to ascertain the validity of customary laws. The repugnancy tests determined the consistency and the applicability of customary laws. However, it is perceived that the application of customary laws diminished as a result of this

The meaning of the word repugnancy is one courts have been with for a long time. The efforts to explain clearly the meaning of repugnancy clause would be supported by a search for its origins or roots and the philosophical bases for the repugnancy tests. The first test is the repugnancy test. Customary law must not be repugnant to natural justice, equity and good conscience. This stipulates that courts should not enforce as law a custom which is repugnant to natural justice, equity and good conscience and also that no customary law should obstruct the rules of natural justice, equity and good conscience.

The second test is the incompatibility test. Customary law must not be incompatible either directly or by implication with any law for the time being in force. This test exposes the inferiority of customary laws to the written British rules. Both statutory enactments and customary laws are sources of law in Nigeria; the "incompatibility test" has undoubtedly ranked statutory enactments above customary law. This simply denotes that no customary law must be incompatible with any written law for the time being in force.

The last test is the public policy test which is to the effect that a custom shall not be enforced if it is contrary to public policy.

However, a declaration was made by the Court in Okonkwo v Okagbue that a customary law repugnant to natural justice, equity and good conscience does not necessarily imply that such customary law is illegal but such a law cannot be enforceable in the Court of law. The illegality or the unenforceability of customary laws buttresses the points in this paper. One of which is that the Colonial masters disrupted the development of customary laws with the introduction of the repugnancy tests which led to judges fine-tuning customary laws.

From the historical theory of law point of view, if law making follows the course of historical development of laws in a society; which also presumes in between, the development of customary laws, why do customary laws have to undergo the repugnancy tests which render some invalid? Although the repugnancy tests have their positive impacts on attaining justice in Nigeria, they render the unconscionable customs of the people invalid. Customary law would have evolved naturally without the influence of the colonial masters; its adaptability nature would have compelled the change.

The nature of customary law itself is what makes it what it is. The most salutary influence of the application of the doctrine of repugnancy has been in the area of procedural law, succession and marriage. In Edet v Essien, a customary law that gives the custody of a child fathered by a husband to another merely because the dowry paid by that other had not been returned was held to be repugnant to natural justice, equity and good conscience. These customary laws eventually reflect the discretion of the judges and not the spirit of the people. The courts fine-tune and modify customary laws.

All these started while Nigeria was still very much a colonial appendage; while most of the decisions of the courts were handed down by Judges who were British citizens. In *Eshugbayi Eleko v Officer Administering the Government of Nigeria,* Lord Atkins rather subtly exposed

the attitude of the British government to the effect that:
The Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience.

Courts have applied the repugnancy tests to customary laws as a method of progress and positive change. There is an evident change in the nature of customary law but this change was forced upon customary law by its application other than customary law thriving naturally.
The Nigerian legal system is based on the English common law tradition by virtue of colonization and the attendant incident of reception of English law through the process of legal transplant. It is also trite to mention that English law is a substantial part of Nigerian law thus English law has a tremendous influence on the Nigerian legal system.

5. The Effect of Colonialism on the Development of Customary Laws in Nigeria

Today, customary law is no law except it passes the repugnancy tests set for it by the statutes. The questions are; who wrote the statutes? Do they fall within the bracket of the people? Do these tests retain the true structure and nature of customary law? It is important to note that both the common laws of England and African customary law enjoy the same origin and history; none is superior to the other.
One of the effects of colonialism is that in the realms of government, the traditional authority of the indigenous rulers was whittled down; in the realms of law, the sacrificial lamb was required to enable the rest of the flock which survived the conflict to do so. Colonialism brought about new phases of law and justice and dealt greatly with the development of the customs and practices in Nigeria except in the North where Northerners practiced Islam and had Islamic law with slight modification in the application of its procedures.
The introduction of the repugnancy doctrine by the colonial masters carried out by Judges to ascertain the validity of customary laws before they could be enforced and applicable in Nigeria stunted the development of customary laws in Nigeria hence brought about legal pluralism in Nigeria.
As the "BriNigerian" law developed, legal pluralism developed and made people more confused as to which law to apply to their transactions. The genesis of this present state of our laws began with the adoption of the English laws of marriage which became applicable to Nigeria and thereby importing the English rule of legitimacy. According to the English laws of marriage, monogamy is recognized while customary laws allow a man to marry as many wives as he wishes especially in the Northern region of Nigeria where Islamic law is practiced.
The effect of the adoption of the English laws also extends to the administration of the estate of a deceased person who died intestate. The law to be applied to the distribution of the estate would depend on the type of marriage contracted by the deceased person during his lifetime. English laws have permeated into the Nigerian legal system to the extent that Nigerians have to fight rigorously in law courts for the customary laws to be applied. This has also resulted into confusion of citizens as to which law should be applied to their transactions.
These limitations imposed on the application of customary laws continued after independence; till date, Nigeria operates three different systems of law side by side. This could be couched as legal pluralism; the consequence of legal pluralism however is the complex interplay between Common Law, Statutes and Customary Law, which in some cases results in serious conflict of law especially with regard to legitimacy, legitimation and succession where it is difficult to determine which of the three systems of laws is to be applied in a certain situation.
However, as a result of colonialism also, Nigerians generally cannot boast of a pure growth or development of law. What we have as legislations now is not the true reflection of the spirit of the people but mostly the *volks* of the British.
As laws have become more complex in Nigeria, contact has been lost with customs or the *volksgeist*. The functions of law become more divided and the law becomes more technical.

For instance, in determining the devolution of the estates of a deceased person, it is technical to ascertain which law to be applied to the distribution amongst the heirs.

Colonialism left its sting on the development of customary laws till date. One would presume that a good understanding of the history of the people of a particular society should be well known prior to the introduction of new laws. The reception of English law disrupted the adaptation to the "*volks*" of Nigerians. According to the historical school of thought, "laws must be adapted to the spirit of each nation, for rules applied to one nation are not valid for another".

Therefore, the pre-colonial period in Nigeria may not have had the contemporary democratic theory of law but it had the acceptance and recognition of the generality of the populace for the simple fact that it was a natural ways of government.

The validity tests customary laws are being subject to do not out rightly give an English colouring but an inferiority colouring. This is so because the validity tests were brought up by the colonial masters to make their laws superior and customary laws inferior.

Nonetheless, an attempt to foist the received English legal system on the nation has been problematic given the high level of illiteracy among the general population.

The repugnancy tests are good to eliminate retrogressive, archaic and even primitive or otherwise unconscionable aspects of the law but hanging the fate of customary law on the validity tests alone is unproductive and cannot achieve the desired social progress urgently need in the country's legal system. . It will be nearly impossible to eradicate a system that has sustained the people for hundreds of years.

Another question that comes into play in this discourse is: **Why was the English legal system not uprooted after independence?** It is thus seen from the various laws applicable in Nigeria that the English laws are deeply rooted in them or rather the statute books are a mere duplicate or copy cat of the English laws. These laws have gained so much prominence and attention that they have been watered and despite slow changes, they are been updated and applied contrary to the customary laws. The customary laws on the other hand have been relegated and are still not applied beyond the introduced and established validity tests. Consequently, it is safe to conclude that customary law has always been a source of the Nigerian legal system in addition to the received English law.

6. Conclusion

The existence, development and reference to customary laws are very fundamental and critical for the survival of Nigeria's democracy. The international human rights law guarantees indigenous people the right to enjoy their own cultures; one aspect of this right is the right to use their own law. The disparity between cultural relativism and the Eurocentric belief is one of the notorious international human rights issues. It is interesting to observe that in recent years, countries around the world are interested in customary and indigenous laws by examining issues churning out of the use of customary laws in the international human rights law, intellectual property domain to mention a few.

Customary laws should be given their due recognition and respect in the development of law especially in regards to the indigenous people's right to lands, territories and resources. The value of historical theory of law should be kept by safeguarding the ethics of the best customary laws. Perhaps, customary law would thrive and fit in to the contemporary days in its pure form without the repugnancy tests doctrine.

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