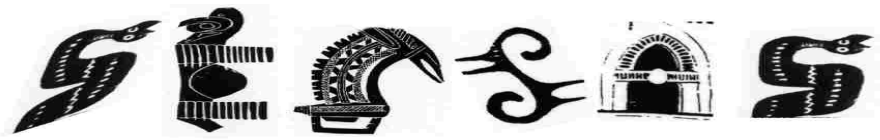

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Judging the Enforceability of Nigeria's Native Laws, Customs, and Traditions in the Face of Official Controls

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Summary

In 1900 the British imperialists established the so-called "repugnancy test" justice policy in Nigeria. In both colonial and post-colonial periods, Nigerian justice officials have used the policy to subjugate the country's native justice systems to the imposed English-style justice system. The Igbo experience in this regard illustrates the experiences of Nigeria's native justice systems. Based on sixty-two case studies in over two thousand pages of archives mainly from Nigeria's Igbo, this study addresses the following questions: How does the data reflect on the ability of the native Igbo justice system to regulate behavior among the Igbos in contrast to the English-style justice system? What policy statements should be highlighted for future consideration regarding the contemporary status of the Igbo justice system? The study involves an examination of the source of the policy, the policy's historical and contemporary circumstances, its role in the present Nigerian justice systems, and its consequences for the growth of the country's native justice systems. By a content analysis of the case studies, the researcher concludes that the justice policy hinders - more than it helps - the growth of the native justice systems. One of the most important negative consequences of the repugnancy test policy is that, as the data shows, some official appellate court judges view native laws and customs as inferior or subject to the official, English-style laws. The researcher offers suggestions for addressing the negative consequences of this policy to facilitate the growth of Nigeria's native justice systems.

Introduction to the Traditional Igbo Justice System

The key ingredients of the Igbo traditional justice system include consensus among the members of each Igbo community and their general acceptance of the law making, law application (case management), and enforcement procedures applied to them. The consensus and general acceptance are grounded on the Igbo faithfulness to their history, which is manifested by the fact that they continue to borrow norms, rules, regulations, and laws from previous generations. In Igbo, *ana*, *ani*, or *ala* (land) is an important factor in interpersonal and group relations. A person who is faithful to the land does not disrespect it by for example selling it. In traditional Igbo, as in traditional Yoruba[1], land is not sold. Land is greatly respected. Thus, a person who makes a claim and swears on land without suffering negative consequences is regarded as having told the truth. Other important elements of the Igbo traditional justice system are that case management organs are close to the native population since the members of these organs come from the relevant community, and the justice system has credibility with the locals. The system's credibility is derived partly from the characters of the individuals and groups that perform different functions to achieve justice. For instance, the Igbo generally respect and defer to the elderly. Thus, the Igbo usually rely on the elderly members of each community to manage grievances and settle disputes[2]. Yet another feature of the Igbo traditional justice system is that the mechanisms of justice are aimed primarily at peacemaking rather than the allocation of rights between disputants. Thus, the traditional courts' responsibilities are to redress wrongs, fine-tune claims, preserve norms, and prevent the break-up of interpersonal and group relationships[3].

Related Literature

The research is informed by previous studies that have examined the justice systems of some former British colonies in Africa, namely[4]: Zambia[5]; Ghana[6]; Malawi and Zambia[7]; Lagos, Nigeria[8]; Kano, Nigeria[9]; Sierra Leone[10]. The findings from these studies demonstrate the pervasive nature of the contradictions, disagreements, and conflicts between the native African societies and justice systems, and the imposed English system brought about by colonialism. In each situation, a mixed or plural justice is found. In most cases, the native judicial bodies are subject to the English-style courts. Whatever the arrangement, each study shows that there is a dual or multi justice system available to the native African population. Often, this leads to confusion as a result of uncertainty about the guiding rules of conduct[11]. However, the situation confuses the natives because their native modes of conduct, which they have accepted, differ from those imposed by the official laws.

The Repugnancy Test

The *repugnancy test* is the official government's legal requirement that a customary law or tradition, to be enforced, must be neither repugnant to natural justice, equity, and good conscience, nor contrary to any written (official) law[12]. The colonial *Proclamation No. 6 of 1900*, which the British enacted to consolidate their rule over Nigeria, remains a part of the Nigerian justice systems[13]. Today, all states in Nigeria continue to have equivalent provisions as parts of their laws. As an example, the Anambra State *Customary Courts* Law empowers a Customary Court to apply native laws and customs except where a native law or custom violates the repugnancy test. The *Law* states as follows:

> Subject to the provisions of the Constitution and of this Law, a Customary Court shall administer the customary law prevailing in the area of jurisdiction of the court or binding on the parties to a dispute, so far as that customary law is not repugnant to natural justice, equity and good conscience, and is not incompatible either directly or by necessary implication with any written law for the time being in force[14].

The *Law* further provides that a Customary Court is not empowered "to impose any penalty that is repugnant to natural justice or incompatible with human dignity"[15]. The repugnancy test in Nigeria subjugates the country's native laws, customs, and traditions to the official, English-style laws.

The word "repugnant" in the *Proclamation No. 6 of 1900* means highly distasteful or offensive, opposed or contrary to, as in nature. By virtue of the repugnancy test, a Nigerian native law, tradition, or custom is not to be enforced if it is distasteful, offensive, opposed to natural justice, or contrary to any written or official law.

An examination of the British colonial *Proclamation No. 6 of 1900* (and the equivalent provisions in various parts of Nigeria) reveals two implications of the repugnancy test. First, a customary law principle will be denied enforcement if it is contrary to any written (official) local, state, or federal law. Second, a customary law principle, which does not contravene a written law, may nevertheless be denied enforcement if an official court determines that the customary law opposes natural justice, equity, and good conscience.

Any interpretation of the concepts of natural justice, equity, and good conscience that defers to a foreign-imposed justice system such as the English-style justice system in Nigeria is bound to mask and subjugate the native laws, customs, and traditions.

Case Analysis and Discussion

The Igbos very often rely on their native, traditional methods of case management. This is consistent with the findings in previous studies[16]. However, the data also shows that the official courts adhere strongly to the colonially imposed, locally sustained repugnancy test. This remains the situation despite the fact that the native, traditional case management avenues play important roles in Igbo justice. This official adherence means that if the locals apply their native laws and customs (example, through an unofficial tribunal or through the Customary Court) to a given case, an official appellate court may declare the native laws and customs repugnant to natural justice, equity, and good conscience, and therefore void[17].

In *Okonkwo v. Okagbue* and 2 Others[18], the issue before the Supreme Court (Nigeria's highest official court) is whether or not the 1st and 2nd defendants (sisters of the plaintiff's late father) could marry a wife for the plaintiff's late father after the father's death. The 1st and 2nd defendants claim that their custom entitles them to do so. The Supreme Court declares the custom repugnant to natural justice and thus void. The Court further decides that the lower court is entitled to raise the issue of repugnancy on its own. According to the Supreme Court (at p. 101 of the Case Report):

> The question whether a custom is repugnant being a point of law can be raised by counsel in his address to court as was done by the plaintiff's counsel in the High Court. The court itself may raise the point *suo motu* since it is enjoined to take the law into consideration and apply it in determining whether a particular custom is applicable[19].

In view of *Okonkwo's Case*, the Supreme Court allows the official courts to bring up the issue of repugnancy, even if the parties to a case do not bring it up. However, the Supreme Court may strike down an attempt by a lower court to pronounce on the enforceability of a native law or custom without reference to the parties concerned. The Court may conclude that the lower court has followed a wrong procedure. Thus, it is safe to conclude that the Supreme Court would support official courts' evaluations of the country's native laws and customs if those evaluations were done on a case-by-case basis[20].

In *Ezeanya's* Case, the issue is whether or not a custom that operates to transform a redeemable pledge of land to an outright disposition of the land is repugnant to natural justice. The Court of Appeal, without reference to the parties to the case, decides that the custom is repugnant to natural justice and therefore void. On appeal to the Supreme Court, the Court holds that the procedure followed by the Court of Appeal (that is, deciding on the issue of repugnancy without reference to the parties) is "grossly erroneous" (at p. 89 of the Case Report). The Supreme Court then reverses the judgment of the Court of Appeal.

The repugnancy test is highlighted mainly in the Court of Appeal and the Supreme Court. However, this official justice policy affects the federal, state, official, and unofficial justice systems in the country. A Supreme Court decision on the repugnancy test influences cases before other case management bodies, including the lowest, unofficial tribunal. For example, a decision by the Supreme Court affects the judicial proceedings in all avenues

for case management among the Igbos, such as the *Ezi na Uno* (Family), *Umunna* (Patrilineage), *Ogbe* or *Onuma* (Village), *Obodo* (Town), Customary Court, Magistrate Court, High Court, Court of Appeal, and Supreme Court[21].

It is essential to continually review and evaluate the rules and regulations of Nigeria's native laws, customs, and traditions to determine what changes, if any, to effect consistently with the changing times. A positive aspect of the repugnancy test is that it provides for such review and evaluation by helping to monitor the operations of the native laws, customs, and traditions. However, the repugnancy test is open to the official governments and their justice personnel only. The official governments are thus legally empowered to police the native justice systems and bring them under the official system, even where a native law, custom, or tradition, or change to it is in accord with the aspirations of the locals. This situation discourages and stultifies the evolution of Nigeria's native justice systems without outside interference. The author prefers an arrangement that recognizes the need to protect individual and group rights at all levels in the country and still defer to the native laws, customs, and traditions, wherever proper.

It is vital to ensure that the principles of Nigeria's native laws, customs, and traditions are consistent with the citizens' human rights. Presently, the *Constitution of the Federal Republic of Nigeria, 1999* guarantees citizens' fundamental rights throughout the country. Thus, in so far as the Constitutionally guaranteed rights are concerned, it is essential to protect every Nigerian in native as well as English-style justice systems. Having taken this position, it must be pointed out however that the *Constitution of the Federal Republic of Nigeria, 1999* faces legitimacy problems with most Nigerians, hence the present efforts to *review*[22] it. The Constitution's legitimacy problems hinge on the fact that, contrary to its claim in the Preamble, the Constitution is imposed by the ruling military elite, rather than made, enacted, and given to Nigerians by Nigerians. General Abdulsalami Abubakar's cabal crafted and hid the Constitution from Nigerians until after the 1998/1999 elections, even though the Constitution should guide the elected persons. Moreover, many aspects of the Constitution are at variance with Nigeria's native laws, customs, and traditions. As an example, by the Constitutionally guaranteed *Land Use Act, 1978* (a military Decree), the official governments, rather than individuals and groups, own land. According to the supremacy clause of the Constitution and the repugnancy test, the provisions of the *Land Use Act* override those of any native law or custom. This runs counter to the pre-existing native principles of land ownership, use, and disposition in many parts of Nigeria. This is hardly justifiable, particularly in a professed democracy.

A set of laws is an embodiment of a people's history, experiences, and aspirations. Their history and experiences are couched as the people's customs and traditions. Changes to those customs and traditions represent the people's aspirations. Such changes should occur only as and when the people determine that changes are necessary and what changes need to be made. Ideally, therefore, a people's laws should emanate from a broad spectrum of the people, rather than from a few. This is the distinction between "customary law" imposed from the top and that developed from popular practices[23]. Laws that are imposed by a few cannot become an acceptable means of social control; *a priori* where the imposition is by a foreign power, such as imperialist Britain did in Nigeria. The origin, history, contemporary circumstances and application of the repugnancy test official justice policy in Nigeria show that the policy, formulated and promulgated by the British colonialists for Nigerians, is an obstacle to the growth of Nigeria's native justice systems. Measuring the quality of a native law or custom on the basis of foreign or alien considerations such as those brought about by British colonial laws or even local official laws made since Nigeria's independence does not augur well for the growth of the native justice systems.

How to Redress the Anomalous Repugnancy Test

One, the data shows that the official courts generally rely on the English-style laws even though there are Igbo native laws, customs, and traditions that could be applied to the cases before the official courts. Thus, judicial officers of the official case management avenues among the Igbos (Customary Court, Magistrate Court, High Court, Court of Appeal, and Supreme Court) should accord more recognition and deference to the Igbo native laws, customs, and traditions. This means that, wherever appropriate, the unofficial as well as official courts should apply the germane Igbo tradition, custom, or native law. The official court personnel especially should do

away with the present deference to the English-style laws, which deference occurs at the expense of the Igbo native laws, customs, and traditions.

Two, there is no streamlined arrangement for revising the Igbo customary laws and traditions. Even where such revision occurs, it is isolated from the rest of the world because it is not publicized for the general public's benefit. Therefore, in recognition of the dynamic nature of the Igbo society, Igbo customary laws and traditions that have become inconsistent with the contemporary Igbo ways of life should be revised to make the laws and traditions consistent with the changes in the society. Some of the pre-colonial Igbo native laws and customs may no longer be authentic, the reasons for their being no longer existing. The relevant communities should have the first opportunity and responsibility to revise such laws and traditions since the community members' behaviors are being regulated. Nigeria's official courts should not be too eager to discard a custom or tradition without proper evaluation.

Three, the continued application of the repugnancy test along the lines designed by the British imperialists is unacceptable. The sustained subjection of the native laws, customs, and traditions to the official, English-style laws results in inconsistency between the generally accepted rules of conduct in a community and the officially imposed government laws. Thus, the relevant official governments should repeal the repugnancy test statutes throughout Nigeria. More than the present form of the repugnancy test, a policy that allows the members of each community the first option of determining their native laws and customs would be preferred, even if the official governments would step in where for instance there is a violation of an individual's human right. The present repugnancy test policy has no place in an independent Nigeria, even if Nigerians now make the official laws to which the native laws and customs are subjected. The point remains that state and federal officials - who are far removed from the locals - make the official laws, and so these laws are rarely consistent with the local beliefs and identity.

Conclusion

A change of the repugnancy test justice policy would amplify the necessity to avoid official imposition of "customary law" from the top. Instead, the customs, traditions, and laws of each community would be allowed to develop from popular practices within the population[24]. The Igbos, like non-Igbo Nigerian communities, "face the ambiguity of operating traditional laws under the control of statutory laws"[25]. Repeal of the illogical repugnancy test would set the stage for needed changes to justice systems in Nigeria.

Endnotes

1. Samuel Johnson, *The History of the Yorubas: From the Earliest Times to the Beginning of the British Protectorate*, Westport, USA: Negro Universities Press, 1921/1970), 95.

2. See the Afikpo example in Simon Ottenberg, *Leadership and Authority in an African Society: The Afikpo Village-Group*, Seattle, USA: University of Washington Press, 1971), 246 - 269.

3. Ikenna Nzimiro, *Studies in Ibo Political Systems: Chieftaincy and Politics in Four Niger States*, Berkeley, USA: University of California Press, 1972), 118 - 119.

4. The author discusses the studies in some detail in the **Related Studies** subsection of the **Literature Review** section.

5. Richard S. Canter, "Dispute Settlement and Dispute Processing in Zambia: Individual Choice Versus Societal Constraints," in *The Disputing Process - Law in Ten Societies*, L. Nader and H. F. Todd, Jr., eds. New York, USA: Columbia University Press, 1978), Chapter Eight.

6. M. J. Lowy, "A Good Name is Worth More Than Money: Strategies of Court Use in Urban Ghana," in *The Disputing Process - Law in Ten Societies*, L. Nader and H. F. Todd, Jr., eds., 1978), Chapter 6.

7. M. Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*, New York: Cambridge University Press, 1985.

8. K. Mann, *Marrying Well: Marriage, Status, and Social Change Among the Educated Elite in Colonial Lagos*, New York: Cambridge University Press, 1985; "Law, Accumulation, and Mobility in Early Colonial Lagos," in *Law in Colonial Africa*, K. Mann and R. Roberts, eds., Heinemann, 1991), Chapter 3.

9. A. Christelow, "Theft, Homicide and Oath in Early Twentieth-Century Kano," in *Law in Colonial Africa*, K. Mann and R. Roberts, eds., 1991), Chapter 9.

10. R. B. Thompson, "Due Process and Legal Pluralism in Sierra Leone: The Challenge of Reconciling Contradictions in the Laws and Cultures of a Developing Nation," in *Comparative Criminal Justice: Traditional and Nontraditional Systems of Law and Control*, C. B. Fields and R. H. Moore, Jr., eds., Prospect Hills, USA: Waveland Press, Inc., 1996), Chapter 20.

11. See K. Mann, *Marrying Well: Marriage, Status, and Social Change Among the Educated Elite in Colonial Lagos*, New York: Cambridge University Press, 1985.

12. *Proclamation No. 6 of 1900*.

13. "Nigerian justice systems" is used here to describe the various justice structures in the country. The structures include those of the traditions, customs, and native laws of each of Nigeria's ethnic nations; they also include the *shari'a* (a Muslim-based justice system found mostly in the far north of the country).

14. Section 15 (1) (a) of the *Anambra State Customary Courts Law*, 1984.

15. Section 15 (4) (b) of the *Anambra State Customary Courts Law*, 1984.

16. See Sampson I. Oli, "A Dichotomization: Crime and Criminality Among Traditional and Christianized Igbo," in *African-American Perspectives On: Crime Causation, Criminal Justice Administration and Crime Prevention*, A. T. Sulton, ed., Englewood, USA: Sulton Books, 1994; Ernest E. Uwazie, "Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria," in *Journal of Legal Pluralism and Unofficial Law, No. 34*, Foundation for the Journal of Legal Pluralism, 1994), 87 - 103; Nonso Okereafoezeke, *The Relationship Between Informal and Formal Strategies of Social Control: An Analysis of the Contemporary Methods of Dispute Processing Among the Igbos of Nigeria*, UMI Number 9638581, Ann Arbor, USA: University Microfilms, Inc., 1996.

17. See for example, *Okonkwo v. Okagbue and 2 Others*, 1994, 12 Supreme Court of Nigeria Judgments (SCNJ), 89 ("Case Number 40").

18. 12 SCNJ 1994, 89 (Case Number 40).

19. Italics added.

20. *Ezeanya and Others v. Okeke and Others*, 4 SCNJ 1995, 60 (Case Number 41).

21. See Nonso Okereafoezeke, *The Relationship Between Informal and Formal Strategies of Social Control: An Analysis of the Contemporary Methods of Dispute Processing Among the Igbos of Nigeria*, 1996.

22. I personally reject the notion that a review of this illegitimate document will cure its fundamental defect - lack of grassroots support by Nigerians since they have played no part in its creation.

23. F. G. Snyder, "Colonialism and Legal Form: The Creation of Customary Law in Senegal," in *Crime, Justice and Underdevelopment*, C. Sumner, ed., London: Heinemann, 1982; L. P. Shaidi, "Traditional, Colonial and Present-Day Administration of Criminal Justice," in *Criminology in Africa*, Rome: United Nations Interregional Crime and Justice Research Institute (UNICRI), Publication No. 47, 1992.

24. F. G. Snyder, "Colonialism and Legal Form: The Creation of Customary Law in Senegal," in *Crime, Justice and Underdevelopment*, C. Sumner, ed., 1982; L. P. Shaidi, "Traditional, Colonial and Present-Day Administration of Criminal Justice," in *Criminology in Africa*, UNICRI Publication No. 47, 1992.

25. D. Uru Iyam, *The Broken Hoe: Cultural Reconfiguration in Biase Southeast Nigeria*, Chicago, USA: University of Chicago Press, 1995), 162.

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