Customary Law as an Aspect of Legal Pluralism: With Particular Reference to British Colonial Africa

I. Prolegomena

Legal pluralism denotes the interaction of two or more systems of laws within a separate legal unit.[1] The study of legal pluralism is undertaken today as an aspect of the impact of colonialism upon Developing Nations of the Third World.[2] The departing colonial powers had left behind in their former Colonies and Dependencies, European Laws and European Legal Institutions to implement them. The permanency of these-foreign legal systems have been ensured by the introductions of a European legal culture. This legal culture with all its appurtenances had successfully, over the years of colonial rule, emasculated the customary law that was there in the territory, prior to the advent of colonialism. Within the newly independent states the enfeebled customary law and its legal culture was left to re-assert its past relevance in the face of overwhelming odds. These odds were those posed by the colonial legal systems and their supporting legal cultures. This scenario establishes two legal cultures in countervailing positions, one foreign and dominant, and the other, local and servient. Hooker, in this respect wrote:

> The legal systems which are administered by municipal systems as inferior or 'servient' laws are those which are generally described as

[1] Cheshire & North, *Private International Law*, (12th End., Butterworths, 1992), at p.3

[2] M.B. Hooker, *Legal Pluralism*, (Clarendon Press, Oxford, 1975), at p. 6

'Customary', they include also religious and ethical systems such as Hindu law, Islamic Law and Buddhist law.[3]

The presence of what have been referred to as 'Repugnancy Clauses'[4], in the post-Colonial legal system, have ensured the continued subservience of the indigenous laws to the laws of the departed colonial power. The former British colonies in Asia, on the other hand, have been spared of the ignominy of the 'Repugnancy Clause'. The indigenous laws and customary legal institutions both in Africa and in Asia are now advancing and expanding their areas of application in the newly independent territories. The location of indigenous laws functioning within a legal framework provided by the laws, and legal institutions, left behind by the departed colonial powers, makes the study of customary law an aspect of legal pluralism.

It is important to emphasize at the outset that 'customary law' is not, in the Austinian context, merely 'law' in the nature of a body of rules ordained by a political superior for the purposes of determining and regulating the activities of political subordinates.[5] Customary law in its essence is a reflection of the social, cultural and the religious

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[3] *Ibid.*, at p. 7

[4] These clauses are found in the former British Colonies in Africa. A. Allott, *New Essays in African Law*, (Butterworths, 1970), wrote "Customary law may be in principle the indicated law, but it will not be applied if it fails to satisfy repugnancy and incompatibility tests. The former test says that customary law is only applicable so far as it is 'not repugnant to natural justice, equity and good conscience', (Ghana up till 1960; Nigeria and Sierra Leone, *Local Courts Act*, 1965, s. 76: *Somalia Constitution* 1960.) Or 'conforms with natural justice and equity': (Sierra Leone *Local Courts Act* 1963, s.2); or not contrary to justice, morality or order', (Sudan *Native Courts Ordinances*. 9 (1)(a); or 'not repugnant to natural Justice or morality'; (Former northern Rhodesia *Order in Council* 1924, art.36; former Southern Rhodesia *African Law and Courts Act*, Cap. 104, s.2); or 'repugnant to morality, humanity or natural justice or injurious to the welfare of the natives' (old *African Courts Proclamation of Bechuanaland*, s. 1(2).

[5] J. Austin, *The Province of Jurisprudence Determined*, (Wiedenfeld and Nicholsan, London, 1965), at pages, 133-134.

'compact' of a group of people in effect their *Volksgeist*.[6] Viewed in this way, the customary law of a given society finds its legitimacy from the internalized social forces rather than being the product of some external impositions by conquerors. Studies conducted by some[7] have established the view that some customary laws in this sense have persisted despite the Colonial conquests. Kocouvrek and Wigmore, wrote:

> Law arose out of customs which grew up in a given race. If the race changed its place of abode, it carried its law with it. When isolated members of that race left their own realm, they continued to be governed by their own law. In other words, personality of law obtained at first. The conquered retained their laws, at least as between themselves, so long as they were not unfavourable to the conqueror. They did not adopt those of the conqueror. The foreigner, too, preserved his law. That of the land where he resided for the time being, as on a voyage, could not be used against him.[8]

Customary law primarily provides a given social group its cohesive elements. Based upon the religious, cultural and mythical underpinnings of a given society, customary law provides a given social group with a reason for convergence rather than a stimulus for divergence. The imposed law of a conqueror does not, as a rule, take into consideration the rituals, the folklore, the sacred tales, the myths, the moral deeds, the peculiar social organizations[9] or their peculiar attitudes to harm, injuries and losses[10] of a social group. To that extent, the dif-

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[6]F. K. Von Savigny, *System of Modern Roman Law*, translated by W. Hollaway, (London, 1840), at pages 12-17, and 29-30. See also, I. Pospisisl, *Anthropology of Law*, (Harper and Row, New York, 1971), at pages 139-143.

[7]A. Kocouvrek and J. H. Wigmore, *Evolution of Law: Formative Influences of Legal Development, Vol. III*, (reprinted by Rothman, 1979).

[8]*Ibid.*, at p. 644.

[9]B. Malinowski, *Magic, Science and Religion*, (Doubleday, New York, 1954), at pp 96-111.

[10]D. M. Engel, *Code and Custom in a Thai Provincial Court*, (University of Arizona Press, Tuscon, 1975), at page 65. This book portrays a particular attitude to crime and punishment which is based on the Karma theory of Theravada Buddhism.

ference between the law of the conqueror and its legal traditions, and the social group subject to their own laws, and its legal traditions, could constitute a very real hindrance to the effective administration of justice according to the norms of the conqueror. The tension that must necessarily arise out of such incongruencies prevailing between the laws of the conqueror and the laws personal to the conquered, may cause some considerable tension among members of the conquered society, thus destabilizing it. Any supposed or real threat to the stability to the political order of a conqueror, as a rule, could result in the enactment of laws of increasing severity to suppress those destabilizing forces. The history of colonization has been studded with numerous examples of such occurrences. And this is also an aspect of legal pluralism that require noting.

II. What is Customary Law?

Like the proverbial definition of an elephant, by the blind, the definition of customary law is no mean task. Like the proverbial elephant, customary law may be recognized when experienced. The initial difficulty that may arise in any attempt to define customary law is that there are two groups of definitions. There is first the definition provided by the empiricists. And second, there are the varying statutory definitions found in the colonial statutes. These two groups of definitions are not without differences. They respond to different needs and are drawn from very different sources.

Additionally, there is a difficulty of nomenclature. Customary law has been variously termed.[11] Customary law has been referred to as: 'Primitive law', 'Native law and Custom', 'Native law', 'Native customary law', and 'Local law'. Sometimes, nominate versions are used as 'Buganda law', 'Swazi Customary law' and 'Adat law'. What customary law in the fullest sense represents is both law and custom. It represents the customs of the people which may not have reached the non-native level for any discourse on law, 'properly so called', but

[11] Allott. *supra.*, at pages 155, 156.

is nonetheless regarded as binding and therefore sanctioned by the community. It also contains customary norms which have the effect of law. In terms of the ability to enforce both these categories of rules by courts, with powers to enforce them, such native law and custom display the characteristics of law. The term 'native law and custom' is preferred, as such an appellation should represent the two sources to which these may be traced.

The approach taken by the empiricists is based on a scientific approach, namely; by the observation of data, followed by deductions. The empiricists believe that customary law arises as a behavioural pattern among persons in a given society, and the regulation of such a pattern has been brought about initially, through peer pressure in the form of social pressure exerted by the community. By the passage of time such a pattern of behaviour become concretized into a norm, sanctioned by an institution having the ability to enforce obedience. Such an enforcing institution may take several forms, but the most common is the authority exercised by the elders of the community through a council or some kind of a *collegium* of representatives drawn from the community itself. The internalisation of this method of rule formation, and their enforcement, was as important characteristic of native law and custom (herein after referred to an NLC). It was Holmes's view[12] "that law was, in its essence, an Anthropological statement. He declared law to be a 'great Anthropological document'. However, it was indeed fashionable until the commencement of the twentieth century, for law to be considered within the confines of rigid and narrow hierachial system of norms, into whose confines no other considerations were permitted to permeate.[13] In laying out the heart of the problem experienced here, Lloyd wrote[14]

> Primitive peoples without formal legal codes, court, policemen or prisons were thought to lack anything that might be dignified by the

[12](1889) 12 *Havy* L R. 443. "If your subject was law, the roads are plain to anthropology, and it was perfectly proper to regard and study the law simply as a great Anthropological document." Holmes.

[13]D. Lloyd, *An Introduction to Jurisprudence*, (5th Edn., Stevens, London, 1985), at page 873.

[14]*Ibid.*, at pages 873-874.

> appellation 'law'. It was conceded that they had custom, which, it was assumed, was a characteristic of early or tribal society. And often custom was conceived of as absolutely rigid, complete conformity being enforced by the overwhelming power of group sentiment, amply fortified by religion and magic. Nor was it doubted that in some way 'custom' was inferior to law.

Against this backdrop, the early Anthropologists[15] following the positivists of the 19th century regarded customary law as lacking the instruments which in any system of law are the minimal requirements for enforcement. The absence of codes, constables and courts backed with a central authority upon which their legality and legitimacy may be founded, was considered to be a serious set back for the sanctioning of the miscreants who may violate the rules. The spector of the ever present Austinian sanction befuddled the minds of the early Anthropologists. Even into the twentieth century, Radcliffe-Brown[16] and his pupil Evans-Pritchard[17] (working largely with the Nuers of The Sudan) maintained that the absence of a centralised authority which could enforce rules in a system, was not a system of law but of custom. They thus distinguished law from custom. It is however important to point out that Evans-Pritchard did make amends in a later writing[18], where he concluded that the Nuer had machinery for settling disputes and a recognised moral obligation to obey such settlements. Despite this elevation of the Nuer to a society which observed, as Austin may characterise, a 'law properly so called', Evans-Pritchard did continue to maintain what Radcliffe-Brown and others before him had called for; the need for courts, constables, and codes backed by a centralised authority before the appellation of law was given to custom.

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[15] Bohannan, Durkheim Frazer and Hobhouse. Compare the terminology used by these writers who considered customary law as primitive, and therefore unworthy of being called law, with those of Maine, Malinowski, and Gluckman. The latter considered Native law and Custom, as law.

[16] See chapter 12, in *Structure and Function in Primitive Society*, where Radcliffe-Brown's work on Primitive Law was published.

[17] *The Nuer*, published in 1940, at p., 162.

[18] *The Nuer of Southern Sudan*, published in *African Political System*, edt., by Fortes and Evans-Pritchard, at page 278.

A radical change in this perspective came with the work of both Malinowski[19] and Gluckman.[20] Malinowski, who held the prestigious Chair of Anthroplogy in the University of London, at The London-School of Economics and Political Science, worked among the Trobrianders where he pointed out that in the so called 'primitive societies', which he called 'Tribal Societies', there were both the notion of obligations, and the means by which these may be enforced. The obligations he found were obligations to pay monetary compensations for wrongs done. The mechanism for enforcing payments, Malinowski found, was one that was rooted in the society in which the debtor lived. By a process of withdrawing all economic supports from the miscreant, and thus reducing him to the position of a helpless being, he is sanctioned for his failure to make the payment. The central authority encountered here was considered as one that sprang from the praxis of the society to which he belonged.

Along the same lines, under *Ibo* native law and custom[21] an incorrigible rogue, a wilful murderer, a coward in war, a traitor to the other members of his extended family, and persons guilty of incestuous relations have all been liable to expulsion from the extended family. A decision to expel is always considered to have grave implications, both for the person expelled and for the family from which he is being expelled. The decision, therefore, is taken either by the family council, or at a general meeting of as many members of the family as can be assembled for that purpose. Such a sanction is a product of a collective decision of the family and its implementation becomes the collective responsibility of the family.

Gluckman, working among the Lozi, a sub-tribe among the Barotses of the present day Zambia, found that there were Rules according to which the members of the society by and large behaved in relation to each other and their things (immovables and movables) including the protection or rights (choses-in-actions). Further Gluckman observed how these Rules influenced the behaviour of both judges and the public,

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[19] *Crime and Custom in Savage Society*, (1926)

[20] *Judicial Process Among the Barotse*, (2nd edn.,Manchester University Press, 1967).

[21] Obi, (C.N.), *Modern Family Law in Nigeria*, (Sweet and Maxwell, London, 1966), at p. 36.

among the Lozis. It may also be observed that the work done by Fallers[22] among the Basoga follows similar conclusions. *Gluckman*, wrote:

> For the Lozi *Mulao* is law and order wherever it occurs. It includes regularities in rainfall and seasons, movements of the sun and moon, night and day, growth of crops, the human physiology; and it also covers all regularities in human conduct, personal, tribal and general.[23]

It appears that native law and custom has all the attributes required by Austin so that it could be considered a 'law properly so called'.[24] *Hamnett*[25] wrote in his celebrated study on the legitimacy of Chieftainship[26], that 'customary law emerges from what people do, or - more accurately - from what people believe that they ought to do, rather than what a class of legal specialists consider that they should do or believe'. The confusion from the stand point of western jurisprudence, such as those who belong to the rather amorphous group called the positivists, may be traced to the fact that custom in their sense is subjected to a variety of tests such as reasonableness. *Hamnett*, commenting on this problem wrote:

> The first danger arises from the fact that, at least in the English doctrine, "custom", if it is to have the force of law, must have a series of attributes not all of which have any formal application to the kind of law now under discussion. Thus, it is said that a custom must be reasonable. But this is usually little more than an ethnocentrism.[27]

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[22] *Social Anthropology and the Law*, Edt, by Hamnett, 1977.

[23] *Judicial Process Among the Barotse*, (2 nd edn., Manchester Unversity Press, 1967), at p. 230

[24] Lloyd, *supra.*, n. 14, at page 296, provides Austin's analysis of law into 'laws properly so called' and 'laws improperly so called'.

[25] I. Hamnett, *Chieftanship and Legitimacy*, (Routledge & Kegan Paul, 1975).

[26] *Ibid.*, at pages 9-15.

[27] *Ibid.*

Yet another issue that the scholars in Western jurisprudence raise against the recognition of customary law as law, is in the allegation that native law and custom is devoid of a system. It is said that NLC lacks a logical order where a rule is derived from some other concept, such as a rule of law or a higher order. The fact that a rule of NLC is often times traced to some extra legal source such as 'Myths, Mythology or Superstition', and where its bindingness is a result of 'fear or faith', the emanating order, it is said, do not in any way resemble a legal order as known to Western jurisprudence. This argument appears to be somewhat unreal in the face of the assertion by the positivists (the arch opponents of those who support the NLC), that Law may not seek its ultimate validity in a legal source. Austin himself located his source of legitimacy in a sovereign determined by a purely non-legal concept of 'habitual obedience'[28] while Kelsen, founded the legitimacy of his *Grund norm*, upon a psychological concept of efficacy.[29] The positivists did not call for a purely legal basis to validate positive law. And therefore there is no reason why they should now prescribe a different standard or measure to determine whether NLC is 'law properly so called'.

As I have demonstrated[30] in my research among systems of native laws and customs in Northern Nigeria, the myths, mythology and superstition, are rolled in to one principle - the testing of the cogency of the evidence given before a Native Court. The same phenomena may be seen in non-native courts. What is meant by non-native courts

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[28]J. Austin, *Lectures on Jurisprudence of the Philosophy of Law*, (John Murray, London, 1929), Lecture iv. At page 234, Austin quotes with approval from Bentham the definition of Sovereignty in the following passage "Distinguishing political from natural society, Mr. Bentham in his Fragment on Government, thus defines the former: "When a number of persons (whom we may style subjects) are supposed are in the habit of paying obedience to a person, or an assemblage of persons, of a known and certain description (whom we may call governor or governors) such persons altogether (subjects or governors) are said to be in a state of political society".

[29]H. Kelsen, *The General Theory of Law and State*, (Russell & Russell, NY., 1961), at page 118.

[30]Marasinghe (M.L.), "The Relationship between the social 'Infra-structure and the Working of the Legal System: A case study on access to Justice in Northern Nigeria" in Volume 14, *Verfassung und Recht in Ubersee*, 1981, at page 3.

are those courts established by the colonial regimes; namely the British colonial courts. There too, the search was for the truth. In place of such objective assessments of the truth elicted through cross-examination, in the native courts, the same assessment is made through the taking of a customary oath. A customary oath is preceded by certain customary rituals which introduces its bindingness. This is achieved through 'fear or faith'. Fear that the lie will be punished and the faith that the truth would always prevail. A combination of these factors underpinned by superstition extracts the truth in a subjective sense. The difference between this traditional system and the colonial system is that while the approach adopted by the former is subjective, the method adopted by the latter is objective. Nonetheless, the process of gathering the truth evidences the functioning of a logical system in both. In the native courts, the 'oath' gives rise to a substantive rule of law. In the non-native courts, the oath, is a matter of procedure. Nonetheless, they are both considered as a part of a logical system for evaluating facts.

In the customary courts, there is a rule that determines as to who should take the oath first.[31] There is also a rule as to what deductions one may draw from the first rule.[32] Under the first rule, there are three customary law propositions. *First*, in disputes which do not involve moveables or immovables, the defendant to a dispute must take the oath first, denying the complaint. If he refuses to take the oath then according to the second rule judgement goes against him. In cases where the defendant takes the oath or where both parties take the oath the action is dismissed according to the second rule. Disputes falling under this category are those relating to allegations of adultery. Customary law punishes the adulterer and not the adulteress, by a fine. This category includes obligations arising out of torts[33] and contracts as well. *Second*, where the disputes involve interests in land the first rule requires that both parties take the customary oath. Where both

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[31] *Ibid.*, see Table 1 at p 17.

[32] *Ibid.*, Table 2 at p 18.

[33] *Eyidondegha of Akigbene v Egbe of Akugbene* [1961] Western Nigerian Law Reports 182.

parties take the oath, the second rule requires that the property be equally divided between the two parties. The traditional belief that is manifested here is that land belongs to the deity. Unless there is overwhelming proof that the disputed land does belong to one of the disputants, equity and justice, which is considered to be synonymous with the wishes of the deity, requires the division of the disputed land equally, among the disputants. The assumption here is-that both parties are labouring under some mistake or misapprehension as to their rights, and therefore "God only knows". For that reason man on earth could do God's bidding by doing equity; i.e. by dividing the land equally among the disputants. This leaves with the position where only one party to the dispute takes the oath. That party, be it the defendant or the plaintiff, succeeds in the action. This too is founded on the second rule. Situations have arisen where none of the parties had thought that it would be agreeable with their conscience to take the oath. That indicates that neither party was certain of his rights and there too equity is done by dividing the disputed land equally among the disputants. *Third*, in disputes raising interests in movables, the plaintiff must first take the customary oath. That is required by the first rule. If the defendant follows the plaintiff in taking the customary oath, the second rule leaves the defendent in undisturbed possession of the moveable. Equally where the defendant alone takes the oath (the plaintiff having altogether failed to take the oath), or where neither parties take the oath, in both situations the defendant is left in undisturbed possession. It is only where the plaintiff alone takes the oath that he succeeds in an action where movables are claimed.

Table 1
The Oath: Who takes it first?

	Dispute involves neither movables nor immovables	Dispute involves only immovables	Dispute involves movables only
Plaintiff			X
Defendant takes the oath	X		
Both parties must take the oath		X	

Table 2
The Oath: The Result

	Dispute involves neither movables nor immovables	Dispute involves only immovables	Dispute involves movables only
The result where plaintiff alone takes the oath	Plaintiff is suited	Plaintiff is suited	Plainfiff is suited
The result where defendent alone takes the oath	Defendant suited	Defendant suited	Defendant suited
The result where both parties take the oath	Action dismissed	Equal distribution of property in dispute	Defendant suited
Neither party takes the oath	Action dismissed	Equal distribution of property in dispute	Defendant suited

The difference between the two, movables and the immovables, has been explained. In so far as land was concerned where there is a doubt, and land being an important asset to a traditional society, believed to be God's own property the equitable recourse was thought to be, to divide the land among the several claimants, so that the benefit of the doubt could be given to all the parties. However, in the case of moveables what was thought important was to respect possession as a right, which should not be easily dislodged. In movables the customary law does not draw a distinction between ownership and possession. Possession is regarded as evidence of ownership and therefore that condition is not easily disturbed. One of the difficulties which the customary law faces is that there are no deeds of conveyances available for the Registration of titles. Coupled with this is the sanctimonious nature of the native title to land. Land is collectively held and is not subject to individual ownership. It is within these parameters that native law and custom apply.

What is important to show here is that despite the fact that these decisions were ultimately rested on 'myth, mythology and superstition', there is here a logical system of consistency that had been built surrounding them. This is not to say that all native laws and customs have the same level of logical consistency, as that displayed among the

Northern Nigerian NLCs discussed here. But it is to say that the mere use of non-legal desiderata, as the underpinnings of a native law and custom, should not, without more, be taken as indicative of the absence of law in that system.

It is therefore necessary to state some benchmarks that must invariably be found in a system of native law and custom, so that it could be called law. A NLC should have a system of law making, adjudication of that law and law enforcement. This does not mean that these three aspects should in any way resemble a western legal system. The system of law making calls for an identifiable source of law. And as such, a source of law in traditional societies may be found internalised and does not arise as a result of the wish of an external law giver, as Austin called for. The source of law is customary behaviour patterns laced with 'myths, mythology and superstition' founded on 'faith and fear'. All these sources may appear somewhat amorphous, but they in fact are sources from which customary laws regularly derive their shape and form. As for the adjudication of the customary laws, there are regular tribunals, some more concretized and located within the imposed colonial legal order, and others less so. The relevance of the customary oath to which reference was made earlier, provides a useful tool for the adjudication of the dispute. Each customary legal order has its own means for the enforcement of their findings. It may vary from the withdrawal of economic aid as Malinowski found among the Trobrianders, to enforcement through peer pressure and customary censure among the Hausa-Fulanis.[34] Straddling these two extremes there are several others that traditional societies have introduced into their system of law. From this research and other works of the empiricists[35] one may hazard a definition of customary law

> As a regular pattern of social behaviour which has been accepted by the bulk of a given society as binding upon its members, because such behaviour has been found to be beneficial not only as a means

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[34] *Ibid.*

[35] Radcliffe-Brown, *Structure and Function in Primitive Society*, (Free Press, 1965); B. Malinowski, *Magic Science and Religion*, (Doubleday, 1954).

> of encouraging inter-personal relations among them, but also as being beneficial for maintaining a cohesive society for their individual and collective betterment.

At first it is this social behaviour which through the afluxion of time that became concretized as law. Its social content become defined from internalised needs of the given society, and it takes different forms as these varying needs get more and more clearly defined. This process of law creation introduces a sense of uncertainty, and therefore the colonial powers had to a large measure codified the customary laws, both in Africa[36] and in Asia.[37] While codifying the colonial powers endeavoured to provide a statutory definition of customary law. The definition provided for The Gold Coast (Ghana) by the British Government was replaced, in 1958, after Independence, by a new definition which was found in the *Local Courts Act*.[38] It read:

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[36] Kenya: *Land Control Ordinance*, Cap. 150 (1948 Revision), *African Christian Marriage and Divorce Act*, Cap 151 (1962 Revision), which made all Christian marriages between Africans monogamous, thus altering the status of prior non-Christian marriages. Nigeria: *Epetedo Lands Ordinance* 1947, Cap. 61, see also *Amodu Tijani v Secretary, South Nigeria* [1921] 2 A C 3 99; *Native Courts Ordinance* 193 3, Cap. 142 (1948 Revision); Malawi: *Christian Native Marriage Ordinance* 1912, No. 15. There are many statutes in former British African territories where the native law and custom had been codified. Such codifications had always been preceded by Reports of Royal Commissions laying out the customary law and identifying the principles which are recommended for inclusion in the code. See, on this, some of the Reports viz; *Report on Land Tenure in* West Africa, 1898 which gave rise to the whole range of Land control statutes *(Nigeria Land and Native Rights Ordinance* 1916,, Act No: 1, Gold Coast (Ghana): *Land and Native Rights Ordinance*, Cap. 147, are only a few, that have resulted from the *Report on Land Tenure in West Africa).*

[37] Malaya: *Muhammadan Law and Malay Custom (Determination) Enactment*, 1930, and Hooker, *supra.*, at pages 64 and 65 provides a comprehensive list of statutes that have incorporated and therefore are relevant to Adat Law. Again at page 87, Hooker, op. cit., refers to the codification of the Sarawak Malay Adat by the former Rajahs of Sarawak. In this sense he refers to the *Undang-Undang Mahkamah Melayu Sarawak* as Subsidiary Legislation administered by the Courts in Sarawak, by authority derived from the *Native Customary Laws Ordinance*, C. 51 revised in 1958. Ceylon (Sri Lanka): *Marriage in Kandyan Provinces Act*, Ordinance No. 13 of 1859, *Kandayan Marriages Removal of Doubts* Act, Ordinance No. 14 of 1909, *Service Paraveni Lands Act*, Ordinance No. 3 of 1852.

[38] Act No: 23 of 1958. This Act amended *Native Administration Ordinance* of the Gold Coast, of 1927.

> Customary Law' means any uncodified rule or rules having the force of law and not repugnant to the laws of Ghana, whereby rights and correlative duties fortified by established usage have been acquired or imposed, and includes any declaration of customary law published from time to time in the gazette.[39]

In Bechuanaland (Botswana), a rather more obtuse definition of customary law was adopted in the *Native Courts Proclamation*.[40] It read:

> Native Law and Custom', 'Native Law or Custom', and 'Native Custom' mean in relation to a particular tribe or in relation to any native community outside any tribal area the general law or custom of such tribe or community except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction or repugnant to morality, humanity, or natural justice, or injurious to the welfare of the natives.[41]

The application in the colonial courts, of native law and custom, among the British Colonies in Africa, was subject to the repugnancy clause.[42] A limitation on the enforcement of native law and custom was introduced, into the British colonial law in Africa based upon the concept of repugnancy. Such a limitation was introduced so as to avoid the utilization of the colonial courts to enforce a customary law, which is repugnant to the principles of fairness and justice espoused by the English common law. The instrumentalities of the colonial courts were not made available for the enforcement of a customary law which ran counter to the principles upon which the English common law was

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[39] *Ibid.*, section 2.

[40] Act No. 13 of 1942.

[41] *Ibid.*, s. 1(2).

[42] See footnote 4 above. Additionally, see *Local Courts Act*, Act No; 20 of 1963, s.2 (Sierra Leone); *Interpretation Act*, chap. C.A. 4, s. 18 (Ghana); *Interpretation and General Clauses Ordinance*, (cap. 1, later included in Magistrates' Courts Act, 1963, Sixth Schedule), s.2(1) (Tanzania); Magistrates' Courts Act, cap 36 of 1964, s.37(1) (Uganda); *Evidence Act*, cap. 62 of 1958, s.2(1) (Nigerian Federal Territory); *The Customary Law (application and Ascertainment) Act*, Act No. 51 of 1969, s.2 Botswana); African Law Courts of 1969, s.2 Botswana); *African Law Courts* Act, cap 104, Revised, 1963, s.2 (Southern Rhodesia, now Zimbabwe) and *High Court Law*, cap. 61, Revised in 1963, s.2 (former Eastern Region of Nigeria).

founded. It is important to point out that, that clause, was a response to the belief in the minds of the colonial power that African native law and custom was fundamentally different and therefore should be the subject of a close scrutiny.

There was a similar approach taken by the colonial powers that ruled The Sudan. The Sudan was ruled as a condominium, sharing the power over that African colony between the King of England and the King of Egypt. With the Nilotic African tribes and Arabs almost equally inhabiting one of the largest land masses in the continent of Africa, the application of the non-colonial law (other than English Law) must be viewed from two stand points - African Native Law and Custom and Mohammedan law. The former applicable to the Nilotic tribes of Southern Sudan and the latter to the Arab North. Section 5 of the *Civil Justice Ordinance*[43] recognized this duality in the country's indigenous law and catered for both, in the following way:

> there in any suit or other proceedings in a civil court any question arises regarding successions, inheritance, wills, legacies, marriage, divorce, family relations, or the constitution of wakfs the rule of decision shall be:
> (a) any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience, and has not been by this or any other enactment altered or abolished and has not been declared void by decision of a competent court,
> (b) the Mohammedan law, in cases where the parties are Mohammedans, except in so far as that law has been modified by such custom as is above mentioned.

It is important to recognize that, in The Sudan too, the repugnancy clause applies, only to native law and custom, which is considered not to be a part of the Mohammedan law. In so far as the latter was concerned the Mohammedan law applied as it was, and the only condition to be satisfied for its application was that the parties to the dispute were Mohammedans.

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[43] Title XXVI, Laws of the Sudan,1929.

In Re Southern Rhodesia[44], the main question before the Privy Council was whether the British government was entitled to take over, as Crown land, those portions of 'unalienated land' possessed by the British South Africa Company, in what was then called Southern Rhodesia. The Company had acquired large tracts of land in that Crown colony, and some portions had been alienated to white settlers. There were some portions which had not been developed by the Company, and were occupied largely by both the Mashonas and Matabeles. The large areas of these lands were at the time of these proceedings occupied by the descendants of Chief Lobengula. It was these tracts of land which the British Administration desired to possess. The Privy Council, as a subsidiary matter made a comment, in a general way, about the tribal laws in Southern Rhodesia. In this regard, Lord Sumner wrote:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of rights known to our law... On the other hand there are indigenous peoples whose conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English Law. Between the two there is a wide tract of much ethnological interest, but the position of the natives... clearly...approximate rather to the lower than to the higher limit.[45]

This is merely to point out that the colonial regime viewed the native law and custom, as practiced by the natives in Africa, as generally inferior both in principle, and in substance, to the English Law. In order to deal with such a law, they introduced the 'repugnancy clause' and coupled it with the test of 'Equity, Justice and Good Conscience' as a pre-condition for its enforcement. The application of that combi-

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[44] (1919] AC 211 (Privy Council)

[45] *Ibid.*, at pages 233-234.

nation quite clearly excluded large areas of the native laws and customs, for the clause itself was exclusionary by nature. The British government introduced the same repugnancy clause with very little change, to all the British East and West Afican Colonies. The precussor to generations of 'repugnancy clauses' in British Colonies in Africa was the *Supreme Court Ordinance of* 1863[46], introduced to the territory then known as The Gold Coast, and now Ghana. It may be added that until the end of 1930s British West African Colonies were administered by a Colonial bureaucracy established in The Christianbourg Castle in Accra. It was then, as it is now, the capital of that country. Therefore The Gold Coast was always an early beneficiary of any new legal and political developments. The Gold Coast, accordingly was the first British African Colony, to gain independence.[47] That was on March 6th 1957. The 1863 ordinance underwent several changes[48] and was introduced into other British Colonies in Africa as well. The portion of the section which concerns us here may be found in the following passage:

> 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 laws and customs not being repugnant to natural justice, equity and good conscience...

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[46] Act No: 3 of 1863.

[47] [1957], 1 Stat Instr 1036 (No. 277). It was otherwise referred to as the *Ghana Constitution* of 1957.

[48] For the Gold Coast the 1863 Ordinance was re-enacted with minor modifications, see: 1864, Acts Nos: I & 9; 1865, Act No: 5; 1866, Acts Nos: 7 & 8; 1888, Act No: 1; 1900, Act No: 6 (as the *Supreme Court Amendment Ordinance*), 1914, Act No: 6; 193 3, Act No: 46 (as the *Supreme Court Amendment Ordinance*); 1943, Act No: 23.

For Nigeria: Northern Nigeria, *High Court Laws*, Cap. 49; s.34; Mid-Western, *High Court Laws*, 1964, Act No. 9, s. 3; Eastern Nigeria, *High Court Laws*, Cap. 61 s. 20; Western, *High Court Laws*, cap. 44, s. 12. During further sub-divisions of the Federation of Nigeria, now over 30 States, these *High Court Laws* were adopted in each of the States in which the sub-divisions took place.

Any later modifications of this section, however, retained the substance of this law regarding the linkage of the 'repugnancy clause' with the equity, justice and good conscience, formulation.[49]

III. An evaluation of the application of the repugnancy clause to African Customary Law

Central to the application of African native law and custom is the observance of 'equity, justice and good conscience'. It was through this clause that the colonial courts censored and thereby excluded the application of native law and custom. It is necessary therefore to first examine the history of that clause, and thereafter to examine through case law, as to how it had affected the administration of native law and custom in British colonial Africa. The precise ancestry of the 'equity, justice and good conscience' clause is somewhat in doubt.[50] Its ancestry has been variously detailed. It has been said that it arose from Roman Law sources and may have been influenced by the canon law.[51] *Mustafa*[52], commented:

> ...it may be safe to suggest that one or more of the component parts of this formula, as it now stands, first made its appearance in India in a number of royal Charters starting with the Charter of 9th August 1683 which provided that cases were to be adjudged according to Equity and good conscience and according to the Laws and Customs of Merchants.[53]

It is important to note that the use of the formula in India was initially meant for the exclusion of the English Law and not to include it.[54] The

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[49]For instance see the *High Court of Lagos Act*, Cap 4 (1876).

[50]Z. Mustafa, *The Common Law of the Sudan*, (Clarendon Press, Oxford, 1971), at page 2.

[51]J. N. D. Anderson, *Changing Law in Developing Countries*, (Allen and Unwin, London, 1965), at pages 116-125.

[52]Z. Mustafa, *supra*, at pages 2-3.

[53]*Ibid.*

[54]Anderson, *supra.*, at pages 140-141.

formula was not meant to refer to the English Law but was regarded as an all encompassing basis for the administration of justice.[55] In *Gopeekrist Gosain v Gongapersand*[56] the Privy Council held that it was more equitable to apply the Hindu Law concept of trust, the *Benami*, in preference to the English Trust. Again in *Sibnarian Ghose v R. Chunder Neoghy*[57] when a court was asked to decide whether a Bengali mortgage unaccompained by possession was a lien, it decided in accordance with the Hindu law, having first examined German, French and Dutch laws. *Grant J* observed that:

> [The courts] act not arbitrarily nor under the unsafe guide of uncontrolled discretion and private judgement of each presiding judge, but under the rules which confine the otherwise uncertain direction of proceeding according to the dictates of equity and good conscience...[58]

In a long line of early decisions[59], the pattern was set by the Privy Council, that the formula was not intended to introduce the English Law *per se*, to the exclusion of the local law, but to render justice under whatever law that was applicable to the fact situation. In *C. S. Guthrie v Abool Muzuffer*[60] the Privy Council held that the deed in question was not signed under duress. On the selection of the law their Lordships observed:

> whatever be the law applicable to such transactions, whether it be the law of England, which in this case was the law of the defendant or Mohammedan Law, which was the law of the plaintiff, or the general rule of equity and good conscience, which was the law of the forum...the plaintif could not insist that he was subjected to such

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[55] *Mayor of Lyons v East India Company*, (1836), 1 Moo Ind App. 175; *Advocate General v Ranni Surnomoyee*, (1836) 9 Moo Ind App. 387.

[56] (1854), 6 Moo Ind App. 53.

[57] (1842), 1 Indian Decisions (OS) 666.

[58] *Ibid.*, at page 683.

[59] *C. S. Guthrie v Abool Muzuffer*, (1871), 14 Moo Ind App 5 3, *Madras Railway v Zemindar of Carvatena Garum*, (1874), Ind A 364, *Gatha Ram v Moohita Kochin Atteah Domoone*, (1875), 23 W R 179 are some of the early cases.

[60] *Ibid.*,

> personal duress as destroyed his free agency, and entitled him to treat his deed as a mere nullity.[61]

However, this trend appears to have changed around 1865, in The Bombay High Court, in *Dada Honaji v Babaji Jugushet*[62] where it was held that:

> ... the judgement of the Privy Council in *Varden Seth Sam v Luckpathy*, is an authority of the highest court of appeal that although the English law is not obligatory upon the courts in the Mofussil, they ought in proceedings according to justice, equity and good conscience to be governed by principles of English Law applicable to a similar state of circumstances.[63]

This association of the formula with the principles of English law was the beginning of a concerted effort to limit the application of the local laws, a measure that the British government duplicated in Africa.[65] In several decisions[65] until the close of the nineteeth century, both the Indian courts, and the Privy Council when hearing appeals from India, continued to associate the formula with English notions of equity, justice and good conscience. Particularly, in *Juggut Mohinee Dossee v Dwarkanath*[66] Garth C. J. of the Calcutta Supreme Court observed:

> That the 'equity, justice, and good conscience' which was administered by the Supreme Court... was generally speaking the selfsame law of equity which was administered by our courts in England.[67]

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[61] *Ibid.*, at page 65.

[62] (1865), 2 Bombay High Court Reports 36.

[63] *Ibid.*, at pages 37-38.

[64] Act No. 3 of 1863 (Gold Coast).

[65] *Juggut Mohinee Dossee v Dwarkanth*, (1882) ILR. 8 Cal. 582; *Gogun Chunder v Dhuronidhur Mundul*, (1881), ILR. 7 cal 616; *Degumburee Dabee v Eshan Chunder Sein* (1883), 9 WR 230; *Waghela Rejsanji v Sheikh Masludin*, (1878), ILR 89 and *Ramratan Kapali v Aswini Kumar Dutt*, (1910), ILR. 37 cal. 559 are some of these decisions.

[66] *Ibid.*

[67] *Ibid.*, at page 590.

At this point it is propitious to examine the application of the formula in Africa, bearing in mind the two aspects that have emerged from this examination of the Indian law. Firstly, the courts have begun to interpret the formula giving it the meaning associated with it in the English law. Secondly, the courts have begun to select the English law in preference to the local law, where both may seem equally applicable. Such a selection was based on the criterion that the formula bears a meaning in the English law similar to that found in the judgements in the local courts.

...repugnant to natural justice, equity and good conscience...

All relevant native laws and customs were applicable to disputes in which the parties were natives, in so far as they are, among others, not 'repugnant to natural justice, equity, and good conscience...'. That limitation was written in the negative[68], and in this portion the repugnancy has been followed, without any alterations up to this day. Unless the native law and custom canvassed by the parties conform to the standards of natural justice, equity and good conscience recognized by the courts, the litigants shall be deprived of the benefit of such native law and custom. Stated in that way it is hardly necessary to point out that such a test is applied by the courts established for the enforcement of the English law. Such a court is bound to subject the native law and custom to a stringent test, the passing of which would be a necessary pre-condition to its enforcement. All these matters place a high premium on the ability of native law and custom to survive as a living body of law. There exists a large and impressive body of case law reflecting these sentiments.[69] There is a fundamental error which runs through the case law in this area which merits an early comment. The standards against which natural justice, equity and good conscience

[68] See footnote 40.

[69] In addition to those discussed in the body of the writing, see: *Koney v U.T.C.*, (1934) 2 West African Court of Appeal. 188 at page 195; *Akpan Awo v Cookey Gamm* (1911) 2 Nig L R. 100; *George v Fajore*, (1939) 15 Nig L R 1; *Branco v Johnson* (1943) 17 Nig L R 70.

were judged by the British courts in Africa were very different from those according to which the rules of native law and custom took root within the labyrinths of a tribal society. The error committed by the colonial courts was to subject the native law and custom to a standard which may well be different and therefore likely to produce the wrong result. This indeed was the case and the effect was to extinguish a large portion of the native law and custom. The case law that follows clearly establishes this fact.

In the West African case of *Loromeke v. Nekego and Ayo*[70] the Plaintiff was a Nigerian from the Urhobo tribe, living in Accra (Ghana). The first defendant was his deceased brother's widow - his sister - in - law. The second defendant was the widow's father. Under the Urhobo customary law the widow was required to marry a man chosen by her deceased husband's family. In this instance the person chosen was the plaintiff, the deceased's brother. The widow, under the Urhobo law, had an option. If she wished not to marry a man chosen by her deceased husband's family, that law required her to return half her dowry and the custody of the children of the marriage, and thereafter she was free to return to her family; her own 'household'. In this case she was willing to do neither. She returned to her family together with her dowry and the children. Thereupon the suitor chosen by her deceased husband's family brought this action claiming the custody of the children and a portion of the dowry paid by her deceased husband's household at the time of her marriage. At first instance the court allowed the plaintiff's claim and the defendant appealed to the West African Court of Appeal. That court conceded that the Urhobo native law and custom was the personal law of the parties, but that it was not applicable under the repugnancy clause. Simpson J. in the course of his judgment said:

> ...in the present case where in purported compliance with custom the custody of the widow's children has been given by the lower court to a man who she has refused to marry, the application of the custom is undoubtedly repugnant to natural justice, equity and good conscience.[71]

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[70] (1957), 3 West African Law Reports 306.

[71] *Ibid*, at page 308.

The decision resulted in the extinction of what was a settled custom among the Urhobo people. The custom itself was grounded upon a need to maintain social order. In a male dominated society the children of a marriage belonged not to the family of the mother, a step quite contrary to the customs of that society; where the children would stand to suffer a feeling of exclusion. They will not be entitled under the native law and custom to succeed to the property of their mother's 'household'. That property goes to her brothers and their children. In a decision of this nature it will be the children who would suffer from the slings and arrows of their misfortune. That was the rationale for the native law and custom, which the court refused to enforce.

In *Mariyama v Sadiku Ejo*[72] the personal law of the parties was the Igbirra native law and custom. By religion they were Muslims. The appellant in this appeal was the divorced wife of the respondent. Three hundred days after their divorce, Mariyama gave birth to a baby girl. According to Igbirra law, such a birth raises an irrebuttable presumption of legitimacy, that the issue was of a lawful marriage. There, however, was overwhelming evidence that the child in question had been fathered by the appellant's present husband and therefore was illegitimate. Under the English law, however, a presumption of paternity was rebuttable. But not under the Igbirra law. The court of appeal struck down the Igbirra law, holding it repugnant to equity, justice and good conscience, and therefore declared the child to be the child of the appellant's present husband. The irrebuttability of the Igbirra law where paternity was the issue was thought to be repugnant. Holden, J. said:

> We consider the child's benefit is of paramount importance. The native law and custom which respondent asks us to enforce would have this girl taken away, for life, from her natural parents, the appellant and her present husband, and given to a total stranger. We feel that to make such an order would be contrary to natural justice and good conscience, and we are therefore not prepared to do so.[73]

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[72](1961) Nig. L. R. 81.

[73]*Ibid*, page 83.

The court awarded the child to the appellant the child's mother, whom the court found was presently the wife of the child's natural father. In both the *Loromeke case* and in *Mariyama's case*, the Urhobo and the Igbirra native law and custom respectively, suffered amendments, within the ambit of the two decisions. The concept of the family plays an important part in traditional societies. The 'Family' within the context of native law and custom is founded upon blood ties. Blood ties will link a person to the father's family and not to the mother's family, these traditional societies being patriarchal. In *Loromeke* the repugnancy of the Urhobo law sent the child with the mother to a family with which under their law the child was not considered to have any blood ties. In *Mariyama* the repugnancy delivered the child into the family with which there were blood ties. It was the family of her natural father. Like the proverbial measurement of equity by the size of the Chancellor's foot the equity in the 'equity, justice and good conscience' clause appears to vary with each decision.

In *Amachree v Goodhead*,[74] a member of the Amachree 'household' (another appellation used in the decision for family) being a female, married into the Goodhead 'household'. After the death of her husband the widow went into concubinage into a third 'household'. During that period Olu was born. The mother and the minor Olu, returned to the Amachree 'household'. Before leaving, the Head of the Goodhead 'household' obtained a document from the head of the Amachree 'household' acknowledging the rights of the Head of the Goodhead 'household' over the minor Olu. By these proceedings the Head of the Goodhead 'household' is claiming to enforce that agreement. It was clear that Olu had no blood ties with either the Goodhead 'household' or with the Amachree 'household'. Her blood ties were with a third 'household', she having been born out of concubinage. Concubinage raises a blood tie, in native law and custom, which is no different to a blood tie that arises out of a birth in wedlock. The court awarded the minor to the Goodhead 'household', thus enforcing the agreement between the two 'households'. The court brushed aside the argument of repugnancy made by the counsel for the Amachree 'household'. Berkeley Actg. J. held:

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[74](1922-23) 4 Nig L. R. 101.

> Finally counsel submitted that it was repugnant to natural justice to leave the child in the custody of the house into which its mother had married, when the child's blood relations were anxious to have its custody... I cannot uphold the contention that the existing arrangement is repugnant either to natural justice or humanity.[75]

These cases portray the application of the repugnancy clause to family law matters. They appear to create an uncertainty about the way in which the clause was applied. That uncertainty was passed down to the native law and custom, which made that law and custom equally uncertain. In *Charles King Amachree v David Kallio & Others*[76], the application of the repugnancy clause was not so much based on subjectivity but upon arbitrary judicial behaviour. The issue in this case was as to which of the two contending parties had the exclusive right to fish in the new Calabar River, and in its creeks and ponds. It was held that in this dispute the English law and not the native law and custom applied. Ross J. explained in the following passage why he excluded the application of the native law and custom. He wrote:

> I have now to consider the point as to whether the plaintiffs are entitled to the benefit of any native law and custom under the provisions of section 19 of the Supreme Court Ordinance....which native law and custom, if consistent with the principles of natural justice, equity, and good conscience, might be held to prevail, even over the Common Law of England, which is now the ordinary law of the land. On that point, in the first place I am not satisfied that any native law or custom exists or ever existed which secures to the plaintiffs the rights which they demand, *and in the second place if such law or custom were clearly proved, I should be prepared to hold that it was contrary to the principles of natural justice and equity, and that it was accordingly not enforceable by this court.*[77]

The passage, particularly the part highlighted, is clear evidence of the fact that the only basis for declaring the native law and custom in case

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[75] *Ibid.*, at page 102.

[76] (1911-1912) 2 Nig L. R. 102.

[77] *Ibid.*, at page 112.

he found one, to be inapplicable, was not because it was found to be repugnant but because it conflicted with the English common law. It is quite evident from the Report that the court found no great interest in exploring the possibility of finding an applicable native law and custom, because it had made up its mind not to apply one. It is however clear that there must have been a native law and custom applicable to these kinds of situations regarding fishing rights.
For the court earlier observed:

> The New Calabar River is the great road...From time immemorial, this highway must have been the only route for all trade to and from the towns in the Delta....[78]

It must have been evident to the court that from time immemorial there could not have been no law applicable to disputes concerning this water way. There surely must have been some law and that law could not have been the English common law which the court proceeded to apply. The danger inherent in this type of thinking was that a legal system meaningful to the natives was being steadily eroded, and replaced by either laws similar to the English common law or by laws found in it.

In Rufai v Igbirra Native Authority[79] the appellant was forbidden by the authorities of a Mosque to enter it. This was a Mosque which he had been visiting for many years for the purposes of worship. The native Authority Police restrained him from entering. By these proceedings the appellant sued the Police in trespass to person. The respondents pleaded a rule of Mohammedan law in support of their right and power to restrain the appellant. The Court of Appeal while dismissing the appeal held that, 'an order which is lawful by native law and custom is not contrary to natural justice merely because it is contrary to the Common Law'.[80] In the following passage the court attempted to rationalize their decision:

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[78] *Ibid.*, at page 111.

[79] (1957) Northern Region Nigerian Law Reports 178.

[80] *Ibid.*, head note at page 178.

> Was the Chief's order prohibiting the appellant from exercising his right to use the Idoji Mosque for Friday Worship repugnant to natural justice? The only reason which was advanced for giving an affrimative answer to the question is that it deprives the appellant of a right which he has under the common law. Another way of putting it would be to say that anything which is not in accordance with the common law is repugnant to natural justice. Yet a third way of putting it would be to say that whenever there is a conflict between Moslem and the English law the latter must prevail.[81]

This shows that the courts do have the power to restrain themselves from declaring a native law and custom as repugnant even when there is a conflict with the common law. The lack of consistency in judicial thinking in this area has created a sense of uncertainty in the law. This in no way is peculiar to Nigeria. In *Gwo Bin Kilimo v Kisunda Bin Ifuti*[82] the High Court of Tanganyka (now Tanzania), was required to decide whether the rule that a father's property should be taken away so as to compensate for a wrong done by his son of full age, passed the repugnancy test. In a society where according to native law and custom, land, was held in common ownership by the members of the family (or household), a wrong committed by one member was considered as a wrong committed by the group as a whole identified as a family. In such a situation the common property became liable for wrongs committed by any member of that family. That is the basis of the native law and custom applicable in these cases. In such an approach, the impecuniosity of the wrongdoer did not deprive the victim from being compensated. Equally, it did not protect the wrongdoer from having to compensate. If he couldn't or if he wouldn't, the family would be required to pay. However the court decided that such a rule, despite its social underpinnings was repugnant. Mr. Justice Wilson who wrote the unanimous opinion for the court, said:

> But on the other question-as to whether the application of the 'law' in question to the present case would be 'repugnant to justice and morality'... and I hold more positive views, though I am far from

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[81] *Ibid.*, at page 181.

[82] (1939) 1. Tanganyka Law Reports (reprints) 403.

> being mindful of the difficulty of construing the meaning of that phrase. Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality. But unfortunately, the standards of different communities are by no means the same. To what standard, then does the Order-in-Council (i.e. the repugnancy clause) refer...the African standards of justice and morality or the British standard? *I have no doubt whatever, that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery.*[83]

A similar view was expressed in the Sudan High Court, in *Kirkor v Fawaz*.[84] In that case, Dunn, C.J. while applying the common law rule regarding the assessment of damages, in the English decision of *Hadley v Baxendale*[85] observed that:

> ...and as I do not consider that I am qualified to consider what would be the measure of damages under any other legal system of law, I intend to seek in the principles of English law for guidance to a conclusion agreeable with justice, equity and good conscience according to which the courts of the Sudan are directed to act in cases not otherwise provided for.[86]

There is a danger built into this approach, where English standards of justice and law are utilised for the determination whether a rule of native law and custom passes the required 'repugnancy test'. The danger is that native laws would over the years disappear as a living system of laws.[87] There is, however a belief among some[88] that the

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[83] *Ibid.*, at page 405.

[84] (1921) 1 Sudan Law Reports 194.

[85] (1854) 9 Exchequer Division 341.

[86] (1921) 1 Sudan Law Reports at page 197.

[87] Allott, *supra.*, at page 199. See also *The Future of Law in Africa...* proceedings of the London Conference, 1959/1960, published by Butterworths, pages 30-32 and : A. E.W. Park *The Sources of Nigerian Law*, (Sweet and Maxwell, London), at pages 69-75 and 80-81.

[88] Allott, *supra.*, at page 199.

Africanization of the bench could be the answer to the problem of preserving native law and custom. Indications are however present[89] that despite the Africanization of the bench, the training that lawyers receive in the English law has made them psychologically conditioned with a preconceived notion that standards of justice espoused by the English common law was in some way superior to that of native law and custom.

IV. Some further restrictions in the application of Native Law and Custom

The Supreme Court Ordinance which carried the repugnancy clause introduced two further limitations in the application of native law and custom. It said that native law and custom should not be '...incompat-

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[89]Park, *Op. cit.*, at pages 71-72 makes the following comment on the progress of *Dawodu v Danmole*, (1958) 3 F C S. 46 and on appeal, [19621 1 W.L.R. 1053 (P C), through the Nigerian Courts to the Judicial Committee of the Privy Council. It is clear from the following passage that it was not Foster Sutton C.J. in the Federal Supreme Court of Nigeria or Lord Evershed in the Privy Council, both British, who believed that the Customary Law in question was repugnant, but the judge at first instance - Jibowu, J., who was himself a member of the Yoruba tribe. Park writes:

> On the other hand, in *Dawodu v Danmole* neither the Federal Supreme Court nor the Judicial Committee of the Privy Council was prepared to uphold the decision of Jibowu J. rejecting on grounds of repugnancy the Yoruba custom known as Idi-Igi, whereby, in the particular case, the property of a man who died leaving four wives and nine children would have been divided into four parts and not into nine. Jibowu, J. had stated that Idi-Igi was based on the principle of equality of treatment between wives, but that did not agree with "the modern idea" that the basis of distribution should be equality between the deceased's children. (This was the basis of the alternative custom, Ori-Ojori). His view, however did not commend itself to the appellate courts. The evidence had established that whatever "the modern idea" might be, Idi-Igi was still in vigorous operation in Lagos, and consequently the Judicial Committee decided that it should be applied in the case, adding the observation that:
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> The principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule monogamy". [1962] 1 W L R, at 1060.

ible either directly or by necessary implication with any enactment of the colonial legislature or which may afterwards come into force'.[90] This formulation was abandoned in 1914.[91] In later adaptations these second and the third limitations (the first being the repugnancy clause), were amended to read 'nor incompatible either directly or by implication with any law for the time being in force...'[92] The question which follows is whether the present formulation has affected the old law. The word 'any law' is quite clearly capable of an interpretation that would include not only the statute law of the colonial legislature, but also the received English law. Such an interpretation would help to broaden the areas of incompatibility so as to further limit the application of the native law and custom.

Both *Park*[93] and *Allott*[94] are of the view that despite a change of language in the amended statute, using the words 'any law', the incompatibility should be limited to enactments of the colonial legislature. That may be the most reasonable interpretation one could give, bearing in mind the threat of extinction that a broadened interpretation may pose to customary law. It may, however, be suggested, that once it is recognized that there has been a conscious effort to change, the previous wording, in the new statute, it might be argued that, that was also evidence of a conscious effort to alter the effect of the previous statute. It could therefore be argued that such a deliberate alteration was made to broaden the basis for incompatibility by introducing into the statute the English common law which by implication included statutes of general application. There is, however, a paucity of case law, and the available case law is clearly ambivalent. The two following cases may be considered here.

The position of Mohammedan law is one of native law and custom. It is so considered because it remains one of the personal laws of the Muslims. It remains largely un-codified in British Africa, al-

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[90] Section 19, *Supreme Court Ordinance*, Act No: 3 of 1863.

[91] Supreme Court Ordinance, 1914, No. 6.

[92] High Court Law of Lagos Act, Cap. 80. See also High Court Law (of The Western Nigeria), Cap. 44, s. 12(1) uses the words 'any written law'.

[93] Park, *supra*, at pages 77-80

[94] Allott., *supra*, at pages 175-180.

though it is derived from a written source, The Koran. In *Adesubokan v Rasika Yinusa*[95] a part of the Mohammedan law applicable to succession which proved to be incompatible with the English *Wills Act* of 1837, was declared to be inapplicable in Nigeria. There the testator had made a devise which was incompatible with the Mohammedan law but was compatible with the *Wills Act*. This was due to the exclusion of the Koranic heirs from the shares decreed by the Koran. At first instance, the North Central State High Court, held per Bello, J. that:

> ...Moslem can make a will under the *Wills Act* 1837 but...he has no right to deprive his heirs, who are entitled to share his estate under the Moslem law, of their respective shares, to which they are entitled under the Moslem law.[96]

On appeal to The Federal Supreme Court, that court laid down that where any part of the Moslem Law proves incompatible with the *Wills Act* of 1837, that part of the Moslem law shall not be applicable in Nigeria. Ademola C.J. observed, that:

> As we stated earlier, a proper construction of sub-section 34(1) of the High Court Law[97] can only apply such Moslem Law which is not incompatible with the Wills Act.

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[95] Z/23/67 decided on the 30 th October 1968, and reversed by the Supreme Court, S.C. 25/70, on the 17 th June 1971.

[96] *Ibid*. The two main issues that Yinusa's case raised by implication were these:

a) The right of a Moslem to make a will so as to exclude the Koranic heirs, and

b) the power to abandon the Mohammedan faith, in which event he would be free to exclude the Koranic heirs. As for (a) the Will, will be valid but the bequests will be "cut down *pro rata*, unless the heirs *ab in testatio*, to whom the remaining two-thirds go, confirm the provisions of the deceased after his death" - *The Shorter Encyclopedia of Islam*, at page 632. As for (b) Apostasy would call for the imposition of a death penalty under the Koranic laws-*Shorter Encyclopedia of Islam*, at page 413. Also Zwemer, *The Law of Apostasy*, (London, 1924).

[97] High Court Law (of the North), 1955, Act No: 8, s. 34(1): "The High Court shall observe, and enforce the observance of, every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with *any law* for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom."

This sub-section is clear evidence of the fact that the courts were interpreting the words *'any law'* to include the English statutory law. In *Malomo v Olusola*[98] the court did not directly decide that point. There, it was asked to decide whether the native law and custom which admits, oral evidence so as to determine whether a gift of land which had been made, was admissible, in the light of the prohibition stated in the English Statute of Frauds. The Statue of Frauds prohibited the admission of oral evidence for the purposes establishing or denying an interest in land. Such interests were required to be evidenced by a writing. In this case the land transaction had taken place prior to the passage of the amending Act which amended the law to read *'any law for the time being in force'*. The court held, without deciding the point in question, that even if the amended meaning of the section were to include the English common law including the statutes of general application in the United Kingdom, the transaction in question predated the amending statue. And therefore the amendment could not apply retrospectively so as to bring in the English law. Therefore the question whether the words, *any law*, in the amendment, includes the English common law, together with the statutes of general application, remains unanswered.

Reverting to native law and custom, as it was mentioned earlier, customary law appeared to the early colonialists as a keen competitor for the hearts and minds of the natives.

To provide an uneven playing field for customary law the colonial administrations introduced the 'Repugnancy Clause'. This was discussed earlier. To further facilitate the use of the English common law in native litigation the colonial courts empowered the 'customary courts' to apply the English law in disputes where both the customary law and the English common law apply. In *Eiydondegha of Akugbene v Egbe of Akugbene*,[99] the plaintiff brought an action in defamation. The matter was heard before a customary court, which had the knowledge and the power to apply the native law and custom. However, defamation was, also known to the English common law. The remedies in the two laws were different, so were the defences. The fact that the plaintiff had

[98](1954) 21 Nig L R 1.

[99][1961] Western Nigerian Law Reports, 182.

brought the case before the customary court implied that he sought his relief under the customary law. The defendant who wished the English law to apply sought a writ from the High Court to order the customary court to apply the English law instead. That writ was issued. In that writ, the High court ordered the customary court to apply the native law and custom provided that, that law was not "Repugnant", as discussed above. If that law was found to be repugnant, the High Court ordered the customary court to apply the English law. The following passage states this point:

> ...a grade 'C' Customary Court has jurisdiction to hear a case of defamation if it is a wrong for which redress can be had under the customary law in its area of jurisdiction, and provided that the customary law is not repugnant to natural justice, equity and good conscience and is not incompatible either directly or by neccessary implication with any written law in force. It would be wrong to hold that in an area under the jurisdiction of a Grade "C" customary court which has a customary law of defamation that court cannot hear an action in the matter or course because there is in existence a written law on the same matter based on English law in which the judges are not experts.

It appears from this passage that although the judges in the customary courts are not experts in the English common law, they have the power to hear and determine causes to which the English law apply. This, notwithstanding the fact that the customary court judges may not have the expertise in that law. The passage sets out the extent to which the colonial law has titled the system against native law and custom. This is yet another device for the exclusion of native law and custom from an area to which it would otherwise have applied.

V. Some Reflections

One of the important bench marks of customary law is that it remains an unwritten body of law which is ever expanding, changing and contracting, in accordance with the dynamism manifested by society. Its flexibility as a living body of law helps to maintain a close relationship with the culture and the mores of the society from whose

praxis it had evolved. Unlike the common law, customary law has no procedures for its enactment nor for its repeal. As Puchta wrote of law, in general, customary law '...grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality'.[1] What Puchta wrote about law was from the standpoint of law as an unwritten document which represents the *Volksgeist*. Von Savigny, explained the *Volksgeist* as meaning that, 'law is in its essence, a reflection of the spirit of the people'. The English common law, too, historically, arose as the customary laws of the Anglo-Saxons, which later became interpenetrated by aspects of Roman Law and later by statute law.

The origins of all presently known systems of laws are rooted in custom. Their evolution had taken place through avenues provided by an evolving society. Their evolution in tune with an evolving society could have been halted, if at any time in its evolutionary history, the customs that it proclaims had been codified. Thereafter it would be the code that would be the law, and not the preceding custom. The Roman-Dutch Law as we know of it today, presents a classic example of this truism.

That law as it is practiced today in Southern Africa[2] and Sri Lanka[3] differs considerably from its codified ancestors[4], deriving their parentage from the codification of 1809, in Holland.[5] In Sri Lanka and in South Africa where Roman-Dutch Law was neither codified nor was derived from the 1809 Code in Holland, having facilitated its growth over the years. In contrast, while in Holland, and its other colonies, that have adopted the 1809 Code, the Roman-Dutch law remains frozen as of 1809. No new jurisprudence derived from Roman texts and works of jurists have been introduced into the expanding canvas of

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[1] Puchta, *Outlines of the Science of Jurisprudence*, (Translated by Hastie), quoted by Dias (R.W.M.), *Jurisprudence*, (5 th Edn., Butterworths, 1985), at page 378.

[2] H.R. Hahlo And E. Khan, *The South African Legal System*, (Juta, Cape Town 1968), Chapter XVII

[3] T. Nadaraja, *The Legal System of Ceylon*, (Brill, Leiden, 1972), Chapters 2, 3 & 4.

[4] Namely the former colonies of The Netherlands.

[5] R.W. Lee, *An Introduction to Roman-Dutch Law*, (5 th Edn., Oxford 1953) at page 6.

legal research as a result of the 1809 codification. This becomes evident from the case law.[6]

It was this spectre of codification of the law in Germany that compelled Van Savigny into writing his cause celebre against codification - *On The Vocation of Our Age for Legislation and Jurisprudence*[7] in which he pointed out that the nature of any system of laws was a manifestation of the spirit of the people who evolved it. This aspect was what he called the *Volksgeist*. All law, Von Savigny wrote, was a manisfestation of the common consciousness. This common consciousness was that of the nation that evolved their law. A nation, for Von Savigny meant only a community of people that remained linked 'by historical, geographical and cultural ties'. The boundaries of some nations may be clearly defined. In others, Von Savigny wrote, their boundaries may not be that clear. In the latter, their identities were maintained by the reflection of the unity of their respective laws. This is clear among the new immigrants from the developing world, now living as new immigrants in the developed countries. These immigrants have shown attachment and commitment, to their culture and customs, as they have to the laws of the host nations. They have found that such an attachment to their customs and cultures have helped them to remain cohesive and identified. 'Even where the unity of a people is clear,there may lie within it inner circles of variations, such as cities and guilds', Von Savigny wrote. He thereafter proceeded to elaborate his theory of the *Volksgeist*, by contending that it is the 'broad principles of the system that are to be found in the spirit of the people and which become manifested in customary rules'. These customary rules, Von Savigny wrote, are in fact results of unconscious growth, and should never be the subject of codification.

Any law making should follow the course of historical growth. For Von Savigny, custom is superior to legislation. And therefore, legislation should not be such, that it neither takes custom into considera-

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[6] Compare: *de Costa v Bank of Ceylon*, (1969) N L R. (Ceylon) 457 with *Nortje v Pool N. O. 966(3)* South African Law Reports (AD), 96, and *Gouws v Jester Pools Ltd.*, (1968)(3) South African Law Reports 563.

[7] Von Savigny, *supra*, 2 nd End., translated by A. Hayward, (Littlewood & Co., London) 1831.

tion, nor allows custom to manifest itself, despite the legislation. Legislation, if there is a need as such, 'should always conform to the popular consciousness'. The power of Von Savigny's essay, which spoke harshly against legislating the customary laws of Europe, delayed codification in Germany until 1900, a few years after Von Savigny's demise. Germany, therefore, was the last of the European nations to adopt a code.

The problem experienced by the courts today is the need to find and establish the rules of native law and custom in a dispute. This problem has been solved by the countries in Africa and Sri Lanka (concerning the Kandyan Law, Thesavalamai), by engaging in projects for the *Re-Statements of Customary Laws*. These re-statements have no legislative standing and are not regarded as an irrebuttable statement of the customary law. As the society evolves, these re-statements permit new discoveries and new evolutions, of the customary laws to be accommodated within the fabric of the law. These re-statements, unlike legislations or codes do not hinder the evolutionary progress of customary law through society. They merely provide additional aids for their discovery, understanding and precise application.

VI. Conclusions

The colonial expansionism in the 19th century resulted in the introduction of the English common law into the newly acquired British overseas territories. The introduction was as a right of conquest, the right of the conqueror to introduce his laws into the fabric of the conquered nation. Thereafter, the conqueror's right to expand his 'Imposed Law', to cause internalized expansionism, within the territory, was engineered through the use of the 'Repugnancy Clause'. This clause established a particular relationship between the 'Imposed Law' and indigenous laws. That relationship was one of a dominant 'Imposed Law' and servient indigenous laws. The 'Imposed Law' is considered as the dominant, because it is the law and its legal institutions that possessed the power and the authority to determine which rules of the indigenous laws should pass the test of repugnancy. The result of this twin process was the establishment of the paradigm of legal pluralism. Therefore

customary law appears in British colonial Africa, as an aspect of legal pluralism.

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