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WHY AFRICANIST JUDGES MUST TRASH REPUGNANCY TESTS

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ABSTRACT

The theme is that the doctrine of repugnancy via customary law is irrational and must be abandoned. The repugnancy doctrine was used as a hegemonic control of African laws. It lacks clear guidelines for the invalidation of customary law. This note argues that the repugnancy test has no doctrinal value and normative standards capable of articulation. Otherwise, the judges' power under Article 126 (2) (e) of the Ugandan Constitution to administer justice in accordance with the aspirations and values of the people need to be guided in respect to customary law. It concludes that the retention of the repugnancy principle is unconstitutional and should be replaced by judicial flexibility applying the National Objectives and Directive Principles of State policy under the 1995 constitution.

Life of the law is made up of the stories of a nation's development.[1]

1.0 INTRODUCTION

The logical basis for invalidating a custom using repugnancy leaves a lot to be desired.[2] In applying this repugnancy test, colonial powers claimed to be the custodians of general humanitarian notions of rights and wrong (Mamdani, pp.109), thus sought to eliminate customs that were opposed to these notions. In so doing, they claimed to promote the rights and statuses of individuals that

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1 Holmes's statement cited by SJ Burton, Judging in Good Faith (Cambridge University Press 1992) 15.

2 Customary laws that fail the repugnancy test are unenforceable and void

were oppressed by evil, immoral and unjust customs. The Constitution provides that the operation of existing law should be construed with such modification, adaptations, qualifications, and exceptions as might be necessary to bring it in conformity with the constitution.

In some African jurisdictions, the repugnancy test has been abolished, and this is evident in the fact that customary law is a tool for social development and unification of cultural heritage.[3] However, the formalistic judicial approach to repugnancy tests on customary law needs to be flexible, if not entirely abolished. It is important to remind ourselves that the Bill of Rights and the National Objective and Directive State Principles adequately establish ground to remove customary practices that are obnoxious or unconstitutional.[4]

Article 1 of the 1995 constitution confers power onto the people of Uganda. Article 126 also enjoins a judge to look for the values, community norms and aspirations of Ugandans.[5]However, the fact that every native custom challenged in court must pass the repugnancy test casts a shadow on the claim that the validity of customary law depends on popular assent (Asiedu-Akrofi, 1989, p. 586).

The flexibility adjudicatory theory advocates for extra-legal considerations policy; fairness; worthlessness; subjective judging, such as the use of personal intuitions; and preferences, or other forms of judicial flexibility (Faisal Mukasa PHD Thesis) such as public policy.[6] Part A focuses on the colonial era (1920-

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3 See The Chieftaincy Act, of 1961(Ghana) which provided for the assimilation of customary law to the common law of Ghana.

4 It is argued that the 'repugnancy doctrine' was routinely employed in a legal 'cleansing' mission, and was the engine for the imposition of hegemonic, foreign culture. See *The Harmonisation of the Common Law and the Indigenous Law: Conflicts of Law* (Discussion Paper 76, Project 90, April 1998) at 96-108

5 National Objectives and Directives of State Policy, No. XXIV and Article 126 (1). this particular provision embodies judicial activism which can be resourceful in protecting customary law.

6 Other public policy considerations as in illegality defences. *See* Kabazzi Maurice Lwanga (2021) "*The Illegality Defense: A Case for Reform in Uganda's Judicial System."* Volume 20, Issue 1, Makerere Law Journal pp 154-177

1962), Part B the pre-colonial period (1962-1986) and Part C the late post-colonial era (1986-to date).

Recognizing that public policy and the Bill of Rights have gained a level of normativity to adequately appraise customary law, it is our considered view that the test should be replaced by the National Objectives and Directive Principles of State Policy.

Customary law refers to customs[7] which are largely unwritten, and are handed down from generation to generation by oral tradition (Asiedu-Akrofi, 1989, pp. 571-593). According to Hoebel, customary law has regularity, defines relationships and promotes sanctions.[8] In this, the incompatibility retained in Uganda's law books confirms the view that the transplanted English oak[9] ranks higher than customary law.

The proclivity to reject customary law on the basis of the above mental attitude, i.e., for being contrary to natural justice, equity, and good conscience, was fostered by the elliptical nature of the triple formula that deprived it of any objective criterion and analysis (REMIGIUS, 1977)). Sylvia Tamale observed that the relationship between the law and African societies is still an unresolved mess (Tamale, 2020).

This has been attributed to the co-existence of contradictory normative legal systems and ideologies (Morris and Read), due to which Uganda's pluralistic legal system is still wanting.[10] To achieve harmony for living customary law, it has been argued that our justice systems should reflect the realities on the ground. If the reality indicates that living customary law and community justice dominate the lives of African people, our attention should focus on them.

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7 For this paper, custom, customary practice and customary law will be used interchangeably.

8 E.*P. Bruke* argued that a young civilization cannot adopt the law of an ancient society. Such young community must, if it desires to be alive, adjust its own law from age to age. See E.*P. Bruke, Historical Essay on the Laws of and the Government of Rome, Civil Law, Cambridge Press, London, 1827, (Reprint, W.M. W. Gaunt and Sons Inc. Florida 1994.)*

9 Nyali Ltd v Attorney-General: CA 1956

10 African law is used in the sense of customary practices and norms

It has been argued that customary law has the same advantage of English common law, namely its fluidity (Theirry, 1966, p. 99). Customary law has a great positive impact on the lives of the majority of Africans in the area of personal law in regard to matters such as marriage, inheritance, and traditional authority (Ndulo, Muna, 2011).

The normative force and legitimacy of customary law are derived from the idea that it is ancient, unchanging, and passed on from generation to generation, and that it is part and parcel of people's identity and culture (Ndulo, 2011, p.9). Some customs were critiqued and invalidated through the vehicle of repugnancy. It is, however, important to note that the customary legal systems are largely ethnic in origin, and they usually operate only within the area occupied by the ethnic group. They cover disputes in which at least one of the parties to the dispute is a member of the ethnic group.

In defense of customary law, Uche noted that the repugnancy principle could be removed entirely from the province of the judiciary (Ewerlukwa, 2008, p. 211), adding that this is not a call for complete immunity for customary laws and practices, as is the case in some countries in Africa where customary law is exempt from the reach of constitutional rights standards.

2.0 THE GENESIS OF THE REPUGNANCY PRINCIPLE IN UGANDA

The repugnancy test[11] was historically adopted as a repugnancy clause in the 1920 Order in Council[12]. Daniel E. Ruhweza argued that it was intended to remove those native laws and customs that were seen as backward in light of the foreign-imposed rules of morality. However, because it was a subjective test premised on the morals and standards of an ordinary English person, many native customs were rendered void (Ruhweza, 2021).

This first test demanded that customary law would only be applicable where it did not offend European notions of natural justice and morality.[13] The second

11 The test referred to natural justice, equity and good conscience.
12 1920 Order in Council
13 Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press, Ottawa 2020) 138

test was that custom should not be directly or indirectly incompatible with any law for the time being in force. Not only did the colonial administrators keep close supervision of the chiefs' courts, but they also maintained control over the courts' interpretation of customary law (Henry, 1972, pp. 144-8).

The repugnancy clause, in other jurisdictions also the concept of *ordre public et bonnes moeurs,* affords the judge a way to eradicate or restrict rules of customary law found inadequate. A correct observation of Sylvia Tamale found that the result was a "tamed" customary law that was subjected to a repugnancy test (Fombad, 2013, pp. 1-24). The Protectorate Law which imposed repugnancy was derogatory of African customs.[14]

However, some commentators have called the principle the 'trinity of legal virtues.' Granted that the repugnancy doctrine played an instrumental role in the substitution of the traditional notion of rights with the Eurocentric concept, perhaps the temporary benefits are far outnumbered by the costs of its application.

3.0 ASPECTS OF REPUGNANCY

When a custom is said to be repugnant to natural justice, equity, and good conscience, it may be interpreted to mean three things namely:

i) Repugnant in relation to substantive law
ii) Repugnant in relation to procedure, or
iii) Repugnant in relation to the degree of punishment (Lewin, 1938, pp,16-23)

i) Repugnancy in Relation to Substantive Law

[14] Section 20 of the 1902 O.I.C provided that in all cases, civil or criminal in which natives are party every court. a) Shall be guided by native law in so far as it is not repugnant to justice and morality or inconsistent with any order in council or ordinance" b) Section 12 empowered the Commissioner to make ordinances and other laws but in exercise of this legislative power he was to respect existing law and custom in so far as they favouring of the individual over the community.

The 1962 and 1967 Independence Constitutions in Articles 24(8) and 15(8) respectively did not provide for the customary law unless prescribed by written law (Ruhweza, 2021, p. 13). This doctrine has also been applied in relation to refund of bride price by a woman as a precondition to divorce,[15] disinheritance of illegitimate children,[16] disinheritance of the girl child etc.

The fact that most families were patrilineal means that wealth was limited to the disposal of men. In succession, the custom of disinheriting girls was found to be repugnant in substance. Customary land tenure was inconsistent with the mortgage law and civil customary law was subjected to the Limitation of Actions. Formerly, native courts enjoyed exclusive jurisdiction without time limitations.

ii) Repugnancy in Relation to Procedure

It is arguable that the statutory provisions directing the courts to apply local customs subject to their passing the repugnancy test also includes adherence to all the standards set by the English courts. Accordingly, in some cases, the courts have attempted to apply the two principles of natural justice recognized by English Law. They are the rule against bias (nemo judex in causa sua) and the rule requiring fair hearing (audi alteram partem).

In the decision of *Olowo*,[17] the conflict between procedure and customary law is reflected. The Court held:

> *"The Limitation Act does not apply to customary land tenure and customary law does not recognize prescription as a root of title. Disputes arising from customary land tenure are instituted in the Magistrates courts of Grade II and III which are the successors to the African courts. The Limitation Act by S.32 was specifically excluded from applying to any proceedings in an African court. This provision has not been repealed." (*Sekandi, 1983*)*

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15 *MIFUMI v Attorney General* [2015] UGSC 13 (06 August 2015)

16 *Kajuba v. Kabali* (1944) EACA 14

17 Civ. App. No. 108, slip op. (1970). Cited by Ssekandi, Francis M. (1983) "Autochthony: The Development of Law in Uganda," NYLS Journal of International and Comparative Law: Vol. 5: No. 1, Article 2. Available at:, <digitalcommons.nyls.edu>Accessed September 13 2021

While the meaning of "equity" may not be synonymous with "good conscience," the meaning of equity in its broad sense encompasses the concept of "good conscience"[18]. Consequently, the phrase "equity and good conscience" may at best be considered superfluous. It is also argued that the phrase has no precise meaning. The only credible approach to the legality of a custom lies in the second test.

3.1 The Test of Incompatibility

The second test, the test of incompatibility, enjoins the courts to enforce any custom which is not incompatible with any law for the time being in force. The meaning of the phrase "any law for the time being in force" is not clear. Should it be construed to include customary law or should it only be limited to the received English law? This paper posits that the scope of the phrase is wide enough to include both customary law and received English law.

4.0 JUDICIAL DECISIONS APPLYING REPUGNANCY TESTS

4.1 REPUGNANCY IN THE COLONIAL ERA (1920-1962)

The 1962 and 1967 Independence Constitutions in Articles 24(8) and 15(8) respectively did not provide for customary law, save for pre-colonial law (Ruhweza, 2021, p. 13). The precolonial law in most African states was essentially customary law in character, having its source in the practices, traditions, and customs of the people (Ndulo, 2011). The colonial administrations recognized customary law and its institutions, although its application was restricted to Africans and through subjected to the repugnancy test.

4.1.1 Application of repugnancy to marriages

The first application of repugnancy stems from the 1931 decision of *R* v *Amkeyo,*[19] where the issue was whether a woman married under customary law

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18 W. C. Ekow Daniels, "The Influence of Equity in West African Law,"" Vol. 11, No. 1 (*The International and Comparative Law Quarterly*, Jan 1962), pp. 31-58 Published By: Cambridge University Press <https://www.jstor.org/stable/756159> Accessed September 13, 2021

19 (1917) KLR 14

could properly be regarded as a wife for purposes of giving evidence against her husband. In the case, Amkeyo had been charged with possession of stolen property, and the main witness against him was a woman whom he claimed to have married according to native custom. On the basis of law of evidence, the testimony of this woman should not have been admitted given the desire to protect marital confidentiality.

The issue was whether a woman married under native custom was a wife in a strict sense of the word, and in effect that the relationship between her and Amkeyo could be construed as a marriage. Hamilton C.J held that she could not be regarded as a wife, condemned bride price as wife purchase, and discredited customary marriages because they were polygamous.

In this connection, Hamilton C.J.'s views on characterizing customary marriages were inept and served only as between the British notion of marriage with the African marriages. Unsurprisingly, a foreign judge construed bride price as a negative interference or nonessential to the 'marriage' of husband and wife. Second, the invalidation of African customary marriages basing on 'customary practice' was unjustified, and equating bride price to wife purchase was condescending on African laws.

Nwabueze argues that, to describe an African marriage ceremony as a "wife-purchase" is not only an abuse of language (Nwabueze, 2002), but smacks of the provincialism, bigotry and ignorance. He poses these questions in response to the ratio of *Rex v. Amkeyo*:

> *"Does the payment of bride wealth really convert an African marriage ceremony to a wife-purchase? Does it not signify the love and commitment of the husband just like the marriage vow, or even pre-nuptial contract, in an English marriage ceremony? Does the participation of the families of the bride and bridegroom not signify the bond the union creates and the seriousness it imports? Is there evidence that a husband or wife of an African marriage is less loving or devoted to his or her partner than the spouse of Christian marriage?"*

4.1.2 Application of repugnancy in land matters

In the case of *Mwenge v. Migadde,*[20] the plaintiff challenged the right of the defendant to sell his land, which the plaintiff claimed was part of Bataka land that was inalienable. Judge Grey in his judgment, considered provisions of the 1900 Buganda Agreement and legislation passed by the Buganda government (1908 Land law). He held that the practice showed that Butaka tenure no longer existed and the alleged custom was repugnant and that the custom be abrogated.

The repugnancy doctrine as applied to this case was not founded on any logic. Granted that alienation of native land to foreigners was repugnant, it was found inconsistent with set common laws which prized alienability through individual ownership of property. In the English law, alienation of land is one of the principles of property law. However, restrictions on alienation of land still exist among the Baganda in central Uganda where certain parcels of land which were designated as burial grounds[21] cannot be subject of sale.

In relation to the *Mwenge v. Migadde* case, the right to alienate land to non-natives was found repugnant to the colonial land laws which were inconsistent with the values and aspirations of the people. Faisal Mukasa (2019) observed that:

> *"In Mwenge v Migadde, the hierarchy of norms guided the court under colonial law, which placed flexible norms below and subject to formalistic ones. If this were still the principle to guide judges, it would mean that the validity and acceptability of flexibility was determinable by its conformity or consistency with formalism and legalism. However, Article 126 (1) and 126 (2) (e) of the constitution bind judges to be guided by the values, norms and aspirations of Ugandans, and to hold substantive justice superior to technicalities. This changes the colonial hierarchy of norms and makes the rule in Migadde's case unconstitutional and therefore void today."*

Therefore, the assent of the people was not considered in invalidating the Bataka tenure, thus the court resorted to statutory law in disregard of custom. In final retort, there was no harm caused by this custom to signify it as "barbarous". The

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20 (1933) ULR 97

21 See the case of *Sempa Mbabali v Kidza & 4 Ors* [1985] HCB 46

court failed to articulate the rights and obligations of the parties under customary land. There was opportunism in the way judges determined which customary law was applicable.

For instance, in *Nasanairi Kibuuka v A.E. Bertie Smith,*[22] the court held that the 1900 Uganda Agreement was a source of rights in law, and as such specific performance could not be ordered where under native law the Lukiiko had to give consent before a private transaction like the purchase of land could be made and where such consent was not given. This approach by the colonial judges upheld customary law, whereas in *Mwenge v Migadde*, the customary law which restricted alienation was found illegal.

4.1.3 Vicarious Liability and Repugnancy

In East Africa, there existed a custom that a father was vicariously responsible for the debts of his son. The controlling decision on personal responsibility was elucidated in the case of *Gwoa bin Kilimo V Kisunda Bin Ifuti.*[23] A judgment creditor in expedition of the decree had attached cattle belonging to the judgment debtor's father. It was argued that there was a custom by which debts could be satisfied by attaching property belonging to the debtor's family.

This brought into issue the notion of collective responsibility. Wilson J held, inter alia, that such custom was repugnant in terms of section 24 of the Tanganyika Order-in-Council (the equivalent of section 20 of the 1902 Ugandan O.I.C). This was because it was against good conscience that an individual should only bear responsibility for his own acts and wrongs. Unfortunately, the colonial judge's reasoning is not unassailable.

Collective responsibility was a concept of redistribution of resources to compensate a victim. There were other forms of punishment, such as ostracism and/or banishment which catered for individual responsibility. The customary rule caused communal responsibility for the liabilities of an individual. This is

22 (1908) ULR Vol. 1 41
23 (1938) 1 TLR 405

because indebtedness was intended to be a concern for the whole community, and slavery is more inhumane than collective responsibility for debts of one of their own.

It should also be noted that collective responsibility was limited to debts, and to no other civil liabilities such as defamation, adultery and so forth. Collective responsibility for torts and criminal acts was articulated in the Tanzanian decision of *Mariba Wanyangi vs Romara,*[24] where Maganda Ag. J. held that a father is not vicariously liable for the tortious acts of his child who is not a minor. In his words:

> *"I think if there was such a customary law as claimed by the appellant it is already obsolete. A grown-up son is answerable for all his deeds and a father of such a son cannot be held liable for torts committed by the son. It would be repugnant to reason and natural justice to hold a father responsible for the torts or criminal acts committed by his grown-up son."*

Collective responsibility for the debts was not intended to be responsibility for a tort or criminal acts of the son or daughter at customary law. Kakungulu-Mayambala argues that the Eurocentric concept of justice was individualized, as opposed to collective responsibility (Kakungulu-Mayamabala, 2006).

4.1.4 Disinheritance of Illegitimate Children and Repugnancy

Prior to the celebrated decision of *Marko Kajuba vs. Kullanima Kabali,*[25] illegitimate children mostly born under polygamous customary marriages were discriminated. In the above-mentioned case, Sir John Gray C.J. stated that:

> *"There can be nothing repugnant either to morality or injustice in a custom which allows an illegitimate child a share in his father's estate and confers upon a head of clan a more or less unfettered discretion as to the mode of distribution of an intestate estate."*

Chief Justice Gray in the East African Court of Appeal declared the rule which applied to stateless communities before colonialism as governing all modification or amendment of customary law in Uganda. The court thus held that

[24] [1977] LRT n.7
[25] [1944] EACA 34

traditionally, in Buganda, no individual or group of individuals could modify the original customs of a native community, not even the court, without the assent of the native community. This had the effect of modifying Buganda's customary law through judicial flexibility.[26]

Faisal Mukasa (2019) observed that:

> *"The removal of the Kabaka's jurisdiction by Kajubi's case to amend and modify law reduced the flexibility with which custom could be changed. The impracticality of obtaining the entire community's consent to amend or modify a law meant that the customary norms already in existence had become fixed, made determinate and more certain in line with the English ideals about law. By this fixation, customary law had also been robbed of its inherent mechanism for growth and ensuring that it kept relevant to changing circumstances in the way the common law did."*

It can be safely concluded from Faisal's remarks that repugnancy tests robbed customary law of its inherent mechanism for growth.

4.2 Repugnancy in the Early Post-Colonial Era (1962 to 1986)

The early post-colonial years were reformative of customary law. There were years of "Africanizing laws" (Byamugisha, 1971, p.81). This is mostly attributed to legal nationalism, in that judges interpreted customary law as capable of co-existing and complimenting statutory laws of the day.

However, there were some limitations, for instance the 1962 Independence Constitution and the subsequent 1967 Constitution which retained the supremacy clauses. The supremacy clause is a replica of the repugnancy test, in that it creates a hierarchy of laws. It achieved the same effect of repugnancy tests; hierarchizing laws and relegating customary law. FM Sekandi (Sekandi, 1983) observed that the Judicature Act of 1967[27] expressed customs in negative terms.

To this end, it is argued that repugnancy clause was devised to entrench imported law. Nonetheless, customary law will flourish, whether or not attempts

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26 Faisal Mukasa on the subject of flexibility.

27 Judicature Acts of September 1962 and 1967 (11/1967) s.14

are made to kill it, as was notoriously the view of some jurists at the time of independence (Sekandi).

4.2.1 The Tort of Seduction and Repugnancy

Under the common law, a person who has sexual relations with a female child is liable to the child's parent for damages. The tort action is based on the parent's lack of consent. Sinclair argued that if the ideal of gender equality is not permanent, then women once again could be subject to unequal restraints, and a return to social inferiority. She concluded that with such inequality, we could expect a return to viability of the tort of seduction.[28]

The tort of seduction has been found repugnant due to its nexus to bride price. The issue of bride price was considered in *Nsereko v. Gitta*, which involved the tort of seduction.[29] The court awarded damages to the parents of a girl who was impregnated and dropped out of school. The court noted that a higher bride price would have been paid if the young girl had finished school. Many other cases followed this decision at the time and it has not been overturned as bad law.

However, some commentators have criticized the view of equating the worth of educating a girl child with a higher bride price. This is because the decision recognized damages on speculation that the impregnated girl would fetch a high bride price if she finished school. Notwithstanding the contrarian views, bride price could have been found repugnant by the judges in view of the girl child, but there was no proper framework to vindicate customary law.

Therefore, even the repugnancy tests were not helpful to meet the justice of the case. It should be noted that the tort of seduction was intended for the benefit of the parents of a girl who had eloped with a man. To uphold this view would be contrary to gender equality and human rights, which is not the scope of this

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28 M. B. Sinclair, Seduction and the Myth of the Ideal Woman, 5(1) LAW & INEQ. 33 (1987). <scholarship.law.umn.edu> Accessed September 13 2021.

29 Civ. App. No. 63, slip. op (1973)

paper, but this was a period of 'Africanization' of laws in most independent African states.

4.2.2 Mortgages in Customary Land and Repugnancy

In the post-colonial years, customary land tenure was unknown to state laws. In fact, such customary land was incapable of security rights as enjoyed under state regulated land regimes such as mortgage laws. In *Mutambulire v. Kimera,*[30] the plaintiff borrowed two thousand Uganda shillings (equivalent to U.S. $200) from a wealthy neighbour, and entered into an agreement to repay the loan with interest in a year's time.

The sum mentioned in the agreement was 3,800 Ugandan shillings (equivalent to U.S. $380). The agreement stated that in default of payment, the plaintiff's kibanja (land) and house would be treated as sold to the defendant for the amount therein stated. The plaintiff defaulted and the defendant took possession of the kibanja. The trial magistrate had to determine whether land held under customary tenure could be mortgaged and whether customary law provided remedies to a mortgagor.

He applied the imported law. Since the formalities for executing a mortgage had not been fulfilled, the judge held that the transaction was an outright sale. The difficulty is that the imported law deals with registered land, but the kibanja was not registered. On appeal, the court considered the question and held:

> *"There are no provisions for a tenant to enter into agreements whereby the 'Kibanja' is used as security for a loan. But, the Kibanja owner, for all purposes, enjoys security of tenure, and his title is as good as that of an owner of land under customary tenure. He can sell his "Kibanja," pledge it or even mortgage it at will."*

FM Sekandi (1988) observed that:

> *"In a sense, the case recognizes the creation of a mortgage under customary law, and eliminates the introduction of the statutory limitations and restrictions on the recovery of land so secured. We held that the mortgagor can redeem his security by payment of the loan and*

30 Y. Mutambulire v. Yosefu Kimera HC C.A. No. 37 of 1972

> *before foreclosure the mortgagee must obtain a court order. Both these rules are for the protection of the secured property from unscrupulous money lenders, who might exploit the ignorance of the kibanja owner, the mortgagor, who all along understands the whole transaction as a debt with the property merely acting as security."*[31]

The author finds it interesting that the appellate judges had the opportunity to apply repugnancy doctrine and dismiss the case because a mortgage could not be properly created under customary land tenure.

4.2.3 Customary Bailment (*Empereka*) and the Repugnancy Doctrine

Empereka is a customary practice among the pastoral people, the Bahima of Ankole, whereby cattle take the place of land.[32] The Bahima know them as the *empereka* rules but, as the rules remain unwritten, complications arise in litigation.[33] Aware of the incompatibility tests, statutory law which regulated the land regime was distinct from moveable property such as cattle. The Court restated these rules in *Mugoha v. Rukoza.*[34]

In that case, the appellant had entrusted to the respondent thirty-five head of cattle in 1963. He demanded return of the cattle, and in 1965, instituted an action in default. The appellant recovered fifty-seven head of cattle which included the progeny, but there was a dispute as to the inclusion of two head of cattle, which were born between the court order and execution of the order.

Furthermore, the respondent claimed the traditional cow as compensation for looking after the cattle. The appellate court took the occasion to articulate the principles governing the customary law rule on *empereka*, holding:

> *"The customary law of Ankole regarding "empereka" is that the person entrusted with the cattle is under a duty to account to the owner for all*

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31 Ssekandi, Francis M. (1983) "Autochthony: The Development of Law in Uganda," NYLS Journal of International and Comparative Law: Vol. 5 : No. 1 , Article 2. Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol5/iss1/2 accessed 14 April 2022

32 Ssekandi, Francis M. (1983) ibid

33 Section 10 (5) of the Contracts Act 2010 A contract the subject matter of which exceeds twenty-five currency points shall be in writing, the implication of this is that emperaka or customary bailment may be unenforceable if the contract is unwritten.

34 Civ. App. No. 61, slip op. (1972).

> *the cattle and their progeny. The owner does not in any way surrender his right of title in the cattle and this right extends to the progeny. The person entrusted with the cattle assumes possession, such as using the milk and the milk products, but he cannot do anything with the cattle that would be inconsistent with the rights of the owner. When the owner demands the cattle back, he is entitled to the original cattle entrusted together with their progeny. The person entrusted with the cattle is entitled to receive consideration for his labour and reimbursements for any expenses incurred."*

If cattle take the place of land among the Bahima, it could have been found repugnant to statutory land law. For instance, in land law, fixtures and developments on land revert to the owner under certain circumstances. This principle does not apply to moveable property. In this sense, *emperaka* custom on increase of cattle would have been outlawed for repugnancy. However, the Court of Appeal held for the custom, noting that a bailee (entrusted person) must be reimbursed for the extra expenses.

4.2.4 Matrimonial Property of Customary Partners and Repugnancy

There was a gap in the divorce law of customary marriages, with respect to distribution of matrimonial property after separation of husband and wife, who procured a customary marriage. Given that no statutory law applied to customary marriages, the court was enjoined to decide the question of distribution of matrimonial property after divorce which regulated only state marriages.

It is to be noted that under custom, following the separation of parties, the woman would leave the house and return to her parents. This is because the husband might have in most cases built the house by himself. For instance, in *Nakiyingi v. Merekicadeki*,[35] where an ex-customary wife who had contributed to the family house sought to have her share after separation. The court held:

> *"This court is enjoined to apply customary law. But it is also a court of equity. In the present case it is the plaintiff who decided to terminate the marriage. He cannot in my view merely chase the defendant out of a*

[35] (1978) HCB 107

> *home to which she has substantially contributed to build and maintain for a period of 12 years."*

Recognizing the reformists' spirit and the judges' flexibility to embrace African laws as compatible with the state law, it is argued that this was a valid approach to meet the justice of the case. But the judges failed to overrule repugnancy as inapplicable to the instances. It is rather notable that their inherent jurisdiction to fill gaps in law where customary practices were inadequate was the pinnacle of legal nationalism.

4.3 Repugnancy Principle in the Late Post-Colonial Years (1986 to date)[36]

In line with Article 2 (2) of the constitution, any custom or other law which is inconsistent with the constitution, such custom or other law is null and void to that extent. Under section 14 of the Judicature Act,[37] customary law is noted among sources of law. Section 14(2) (b) (ii) of the Judicature Act provides "any established and current custom or usage" as one of the laws applicable by courts in Uganda.

Section 15 of this Act gives pride of place to customary law on the sole condition that it is not repugnant to natural justice, equity and good conscience. Similarly, section 10 (1) of the Magistrates Court Act, emphasizes the right to observe and enforce the observance, and not to deprive any person of the benefit of any civil customary law which may be applicable, that is not repugnant to justice, equity or good conscience.

Section 24 of the Local Council Court Act also indicates that in exercising their duty to see that justice prevails, they shall be guided by the rule of natural justice and apply the customary law. The Evidence Act under section 12 (acts relevant when custom is in question) provides for the explanation that custom shall be understood to comprehend customs recognized by law.

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36 As of the year (2021)

37 2009

In the context of decolonizing afro-feminism, Sylvia Tamale (2020) recommended that the ultimate goal should be to dismantle all colonial legal and institutional frameworks that reinforce hierarchies.[38] Sylvia Tamale argues that it is mindboggling to think that many "independent" African states still carry this racist test for assessing the validity of their customary norms and practices.

4.3.1 Parental Rights and Repugnancy

The custom of "children belong to the father" was reinforced in the case of *Nice Kasango v Rose Kabise,*[39] which denied burial rights to the mother in preference of the father's culture. The applicant widow sought to take over the burial of her husband in Kabarole district, whereas her mother-in-law (deceased's mother) wished to bury the deceased according to Jopadhola culture in Tororo district. The court held that customary parentage belongs to the father and that a mother cannot apply her culture to the deceased in preference to the father's standing.

There is no equality between partners in marriage with respect to parental authority under custom.[40] Although the Constitution provides for equality in marriage, it would be absurd to apply repugnancy to invalidate the custom which holds that children belong to the father. It lacks the articulation on whether children are property or not. The fact that in burial disputes, a man's culture is preferable to the woman's may be not harmful to the mother.

4.3.2 Customary Inheritance by the Widow of the King and Repugnancy

In the case of *Best Kemigisa v Mabel Komuntale,*[41] the custom which denied the widow of a king from obtaining letters of administration over the personal property of her deceased husband (king) was deemed unenforceable. The Court held that a custom that denies a person the benefit of written law is not

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38 The supremacy clause under Article 2 of the 1995 constitution, section 10 of the Magistrates Courts Act and the Judicature Act create hierarchies of laws

39 MISC CAUSE NO. 17 OF 2021

40 *Towards Equality In Parental Authority: Gender Discrimination After Death In The High Court Decision Concerning The Case Of Nice Kasango V Rose Kabise*, , Volume 27, Number 3 (East Africa Journal On Peace And Human Rights By HURIPEC December 23, 2021)

41 HCCS 5/1998 see pg. 813 [1999] KALR

enforceable. This decision was premised on notions of equality before the law clause given that even a woman could be enabled by statutory law to administer the estate of her husband.

However, the repugnancy aspect was rightly applicable to the extent of inconsistency with the written law. Even so, it is necessary to point out that the custom which vested personal property of the king would be challenged for violation of the right to property. For to divest the king of personal property to the kingdom would be an infringement of his property rights.

In relation to repugnancy, it needs to be pointed out that the custom would also deny the king the benefit of enjoying security of property rights under the 1995 constitution.

4.3.3 Church Marriage between Clan Mates and Repugnancy

The landmark decision on the validity of a church marriage between clan mates for being repugnant to custom was *Bruno Kiwuwa's* case. In total disregard of written law, the court in the decision of *Bruno Kiwuwa v Ivan Serunkuma & Juliet Namazzi,*[42] denied the intending couples the benefit of written law, that is, Church Marriage under the Marriage Act.

This case involved the issue of whether the defendants, being of the same Baganda tribe and belonging to the same clan of "Ndiga" could lawfully contract a church marriage under the Marriage Act. There is a custom among the Baganda that if clan mates marry each other, then such marriage is no marriage at all, and such union is prohibited. The plaintiff challenged the defendants' church marriage on grounds of customary law which prohibited clan mates from marrying each other.

The Court held that the intended marriage is illegal, null, and void by reason of the custom that being Baganda by tribe both belonging to the same "Ndiga" i.e., sheep clan, the defendants cannot lawfully contract marriage as between

[42] Civil Suit No. 52 of 2006 High Court of Uganda, Kampala

themselves. The decision suggests that repugnancy can also work in favor of customary law. Therefore, any practice that violates custom is capable of being against natural justice, equity and good conscience.

The venerable judges protected the custom from erosion against its incompatibility with written law.

4.3.4 Refund of Bride Price and the Repugnancy Principle

The most controversial aspect of repugnancy results from the decision of *MIFUMI versus Attorney General & Kenneth Kakuru*,[43] where the Constitutional Court had a chance to determine the constitutionality of bride price. The court held that the customary practice of refunding bride price as a condition precedent to divorce was found to be discriminatory and unfair to the notion of gender equality and women's rights.

With the aid of the Constitutional Bill of Rights, the decision settled the legality of refunding the bride price. Unfortunately, the repugnancy doctrine was still adopted, mostly because Art. 2 of the 1995 Constitution provides its supremacy, and is to the effect that any custom which is inconsistent with it is repugnant. However, as earlier stated, the repugnancy test has nothing to do with public morality or public health, or public safety.

Therefore, the protectors of our constitution should use it with caution. To invalidate a harmless custom for repugnancy is to abdicate the duty of protecting the will of the people.[44] The practice of refunding bride price being repugnant to natural justice, equity and good conscience is not sufficient of itself because of cultural relativism.[45] That is why the august judges correctly applied the Bill of Rights under articles 21 and 33 of the 1995 Constitution of Uganda.

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43 (Constitutional Appeal 2 of 2014) [2015] UGSC 13

44 Power belongs to the people See. Art. 1 of the 1995 constitution

45 Invalidating the custom through a term of art in the eyes of a sophisticated judge using the repugnance clause is not satisfactory. The better view is that the constitutional Bill of Rights may provide a clearer ground yet the constitution creates hierarchies of laws that trump customary laws.

4.3.5 Traditional Justice Mechanisms and Repugnancy

The positivist thinking that statutory law is higher than custom was unsurprising. In the High court decision of *Uganda versus Kanyamunyu,*[46] the repugnancy of traditional dispute settlement vis-à-vis the statutory law of the Penal Code Act gave way for the state's positivist thinking. The court rejected the adjournment to give way for the customary law of *mato oput,* which was not barbarous or harmful of its own.

It was still the repugnancy test in other elusive phrases such as inconsistency with statutory law. It was only because the Penal Code Act was silent on the subject matter of traditional dispute settlement that it would not of itself invalidate the parties' choice of the forum of dispute resolution.

In terms of the future, there is a need to create one legal system which takes into account both the received law and the customary law. In a unified system, the good values of customary law such as the simplicity of procedures and the preference for reconciliation rather than litigation, should be reflected in the integrated legal system. Unless customary law is integrated, it is bound to die or be relegated to the law of the poor.

Comparatively, the new Kenyan Constitution provides that traditional dispute resolution mechanisms shall not be used in a way that:

i. Contravenes the Bill of Rights[47]
ii. Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality[48]
iii. Is inconsistent with [the] Constitution or any written law.[49]

It makes clear that the Bill of Rights clauses trump customary law norms that conflict with constitutional provisions by stating that in the courts' attempt to mitigate the risk of injustice; they have adeptly extended the repugnancy test.

46 HCT-00-CR-SC-OO39-2017
47 Art 159 (3) of the Kenyan 2010 Constitution
48 Art 159 supra
49 Art 159 supra

Moreover; the law reformers have focused on the abuse of customs that are inconsistent with universal human rights.

4.3.6 Partial Payment of Bride Price and Repugnancy

Today, payment of bride price is non-essential for the validity of customary marriages. This position was made law in the decision of *Hellen Okello v. Akello Jenifer Ocan*[50] by Justice Stephen Mubiru, at the High Court. He overruled the long-standing *ratio decidendi* before the promulgation of the 1995 Constitution of Uganda, which demanded that there was no valid customary marriage unless dowry was fully paid, as in the decision of *Uganda v. Eduku John.*[51] In the latter case, the court held that for a valid customary marriage to exist, there must be payment in of dowry or bride price in full.[52] The learned judge reasoned that partial payment of bride price would be invalid for repugnancy if enforced to invalidate a customary marriage.

Hence, to hold that partial payment of bride price is a ground for nullification of a customary marriage would be repugnant to natural justice, equity, and good conscience, in that it would connote that marriage gifts are a price paid for the bride, in a purchase-and-sale transaction, thus reducing customary marriages to an arrangement of wife purchase.

This decision was inspired by the ruling in the Supreme Court decision of *MIFUMI v AG,*[53] as the basis for the interpretation of rendering bride price a non-essential for the validity of a customary marriage. Suffice it to say, currently, non-payment or partial payment of dowry or bride price in a customary marriage cannot invalidate or nullify such marriage.

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50 (Civil Appeal 84 of 2019) [2020] UGHC

51 [1975] HCB 372

52 *Eburu S. v. Mikairi Ekwamu* [1982] HCB 43; J*ennifer Musamali v. Stephen Musamali*, H. C. Civil Appeal No. 1 of 2001 and *Iyamuremye Samwiri v. Jovanis Nyirakamarande* [1994-95] HCB 67).

53 (Constitutional Appeal 2 of 2014) [2015] UGSC 13

The reasoning that partial payment of bride price would be repugnant reinstates the position in *Rex v. Amkeyo* in two ways. Firstly, it states that bride price would amount to wife purchase. Secondly, it states that it is repugnant to natural justice, equity, and good conscience.

To address the shortcomings of customary marriages, a look at church marriage is necessary. Celebration of a church marriage under an unlicensed place is invalid even where the celebrant couple do not profess the same religion. Also, under Islamic marriage, a celebration between non-Muslims invalidates an Islamic marriage,[54] just as a celebration without witnesses would invalidate such marriage. It is argued that bride price should not have been discarded as it could be the only check for validity and procedural propriety.

Denuding customary law of procedural validity based on payment of dowry or bride price reveals that customs on marriage to some extent are worthless. Yet, the law has been settled in the decision of *Hellen Okello v. Akello Jenifer Ocan,*[55] that nonpayment or partial payment of bride price does not render a customary marriage invalid. The learned judge further noted that customs are dynamic and evolving[56].

However, to maintain that customary requirement of bride price relegates marriage to a wife purchase is contradictory to the aspirations and values of the people. Apart from judges arrogating themselves the right to assent for the people, the judges have still adopted the repugnancy doctrine without basis.

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54 ALEX B. LEEMAN, Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions at 744, INDIANA LAW JOURNAL [Vol. 84:743 https://ilj.law.indiana.edu/articles/84/84_2_Leeman.pdf accessed 4/04/2022

55 (Civil Appeal 84 of 2019) [2020] UGHC 186 (28 September 2020) High Court of the Republic of Uganda

56 Customary law has since evolved. Applying the repugnance tests, the court defined repugnancy as highly distasteful or offensive or contrary to nature and concluded that nullification of marriage for partial payment of bride price is repugnant. The court was not addressed with the scope of repugnancy to natural justice, equity and good conscience. But it was successfully highlighted that customary law has evolved and that customs are dynamic and that the decisions do not represent the living customary law.

However, the judiciary should not be condemned for using the incompatibility test for social necessity, given that the Bill of Rights does not provide all the answers for the shortcomings of customary law. Therefore, where the Constitution falls short of answers to the inadequacy of rights contravened by any custom, resort can be had to the National Objectives and Directive Principles of State policy for guidelines.

Rendering bride price non-essential to customary marriages reinstates the earlier position of the ratio in *Rex v. Amkeyo,* which was the colonial approach to customary marriages. The new position is contradictory in itself. The very essence of customary marriage is payment of bride price. So, to override a custom can amount, firstly, to depriving customary marriage of any force or coercion as positivists would argue.

Secondly, there cannot be marriage without its essence. For instance, such essence distinguishes it from cohabitation. The contradiction of failing to recognize bride price as essential is to give validity to a custom by one hand and take away its essence (bride price) by the other. It is submitted that the protectors of our constitution need to do away with the repugnancy doctrine because it is contradictory and inconsistent with the aspirations of the people.

In this context, a public policy test would have been the better alternative to meet the justice of the case and limit its application to the facts before the judge. Otherwise, the ruling has become law in that it need only be challenged to show its limitations to customary law.

Public policy would have sufficed to protect the legitimate expectations of a widow who has lost a man she called a husband and celebrated a customary marriage, albeit the bride price was partially paid. Even equity would focus on the substance rather than the technicalities via Article 126 (2) (e) of the constitution. It would be inequitable to invalidate a widow's letters of administration for partial payment of bride price.

Yet, caution should have been given, that partial payment of bride price may affect the validity of customary marriage if there is no social necessity. For instance, where a husband is accused of murder and the wife is a competent witness, the debate would be what amounts to a social necessity.

5.0 GROUNDS FOR REJECTING REPUGNANCY PRINCIPLE

5.1 Clarity Has Never Been the Basis for Recognition of Customary Law

The continued application of the repugnancy principle does not take into account the unity of customary law. Most legal systems strive for certainty as a tenet of rule of law. Broadly speaking, the doctrine of *stare decisis* may not apply to customary law, given that most customs remain largely unwritten. In the earlier mentioned case of *Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi*, the plaintiff challenged the celebration of marriage between the first and second defendant, on the ground that they belong to the same clan-Ndiga.

He argued that according to the custom of Buganda, this type of marriage is prohibited, since it is an abomination, immoral and illegal. The issue was whether the defendants, being Buganda by tribe and of the same clan, could proceed with a Church contract against their custom. In the Court of Appeal holding, Kasule JA stated that the church marriage was repugnant to Kiganda customary law and to the Marriage Act.

In the colonial historical approach, repugnancy tests were used against a custom. However, in this case, customary law was used as a repugnancy test against the Marriage Act. It is important to note that a custom was never intended to contradict statutory laws, that is to say, customary law has never been the test of repugnancy against a written law, for instance, the Marriage Act.

There is some confusion about whether a custom can override a written law, or whether it is only a written law that may overtake a customary rule.

5.2 The Comparative Practice of Abolition of Repugnancy in African Jurisdictions

The repugnancy clause has been dropped in Tanzania and Ghana.[57] It was considered unfitting to the dignity of indigenous laws of the people of these countries. In Madagascar, the judges are required by statute to ensure respect for the general principles contained in the preamble of the Constitution. The author of this paper is of the opinion that National Objectives and Directive Principles of State Policy, rather than the preamble of the 1995 Constitution, could be applied successfully on customary law.

Ghana and Tanzania have enacted new rules for the ascertainment of customary law. They have done away with the former system, in which customary law was put on an inferior level among the sources of law, and where a rule of customary law was regarded as a matter of fact to be established by proof.[58] This proof is still required in Nigeria, where customary assessors advise the judge, who is not bound by their opinions.[59]

Tanzania has adopted a very similar approach to the problem of ascertainment of its customary law. Its High Court is directed not to refuse recognition of a rule of customary law on the ground that it has not been established by evidence.[60] Judicial notice may be taken of any rule resulting from some kind of statement worthy of belief.

5.3 Disruption of Society

Repugnancy tests are intended to kill customary practices. We should not ignore the structural limitations to adapt customary norms to changing circumstances imposed by the nature of the social-economic and political system that existed under colonial rule and contributed to the distortion of customary norms.

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57 The doctrine of repugnancy in Ghana has been abolished. See The Chieftaincy Act, of 1961(Ghana) which provided for the assimilation of customary law to the common law of Ghana.

58 *Angu v. Attah*, [19 15] Gold Coast Privy Council Judgments 43, 44

59 Only if the same rule of law has been acted upon by a superior court, or has frequently been before the same court, can the judge take judicial notice of it.

60 Magistrates' Courts Act §32. No. 55 (1963), and Local Courts (Amendment) Ordinance (1961), discussed in E. Cotran, supra note 30, at 112.

In 1939, Attorney General Hone conceded that the repugnancy clause was a limitation to the growth of customary law, although he argued that new customary law could be made.[61] The flexible and indeterminate standards of justice and morality were an imposition of traits of the non-instrumentalism of the natural law jurisprudence that again favored formalism over flexible instrumentalism, as used in pre-colonial days.

Africans played a very limited and negligible role in governance and the formulation of laws that governed them. It is important to evaluate customary norms in the context of the repugnancy doctrine, because the repugnancy axe tends to alienate cultural norms and community practices. The repugnancy doctrine leads either to the undermining of the authority of the law, or to the disruption of society (Theirry,1968).

5.4 Hierarchy of Laws and Subordination of Customary Law

Although the Judicature Act recognizes customs as applicable to the justice system,[62] there are typical hierarchies of laws that relegate customary law. Formerly, this relegation of custom was done by putting the local courts (the courts that dealt with customary law) at the bottom of the judicial structure.

Indeed, the application of the repugnancy clause has always been a source of controversy. It was observed that subjecting African customary law to a repugnancy clause, and the clause being applied to African customary law by English colonial judges meant two things:[63]

i) that customary law was inferior to the common law and

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61 Faisal Mukasa ,'Towards Legal Certainty In Uganda's Commercial Adjudication: Managing The Tension Between Formalism And Flexibility' (Phd Thesis, University Of Exter 2019) Vol. 1 Of 2

62 Section 15 establishes that nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.

63 Ndulo, Muna (2011) "*African Customary Law, Customs, and Women's Rights,*" Indiana Journal of Global Legal Studies: Vol. 18: Iss. 1, Article 5.

ii)that the standard by which the validity of African customary law was to be determined was inevitably to be that set up by English ideas of legal norms, justice, and morality.

And yet, the values of Western society are embedded in the common law, even as values of traditional African society are embedded in African customary law. These are two different systems of law developed in two different situations under different cultures and in response to different conditions.

5.5 Inconsistency and Ad Hoc Approach to Customs

The inconsistency created by an ad hoc approach to repugnancy clauses does not promote justice and reveals the need for sound principles as rules of guidance for the judges in the various departments of the substantive law, in order to achieve certainty and predictability and promote the course of justice.

As noted in the previous case of *Bruno Kiwuwa*, the court applied repugnancy to safeguard the Baganda custom which illegalizes marriage between clanmates. It was inconsistent with the Judicature Act, which places statutory law above custom. That was a contradiction in itself. Yet, the application of the National Objectives and Directive Principles of State Policy would have sufficed to incline towards the inspirations and aspirations of the Baganda people.

Ultimately, this incompatibility test is unsafe and prone to abuse in cases that involve customary law.

5.6 Divided Meaning and Approach to Customary Practice

The repugnancy clauses were meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual by the standards of the colonizers (Namwase & Adrian). There were various formulations of these clauses. Some stated that the rules should not be "repugnant to natural justice, equity and good conscience." Others read: "Not contrary to [religious] justice, morality or order."

Still, others read: "Not repugnant to morality, humanity or natural justice or injurious to the welfare of the natives." The repugnancy clauses were typically contained in a statutory definition of customary or native law. Natural justice is supposed to encompass such propositions like; “No man should be a judge in his own cause,” “no man is to be condemned unheard,” “[a] man is entitled to know the particulars of the charge or claim against him,” “decisions should be supported by reasons,” and “punishments and rewards should not be excessive, but should be proportionate to the circumstances of the offense.”

As used in this legislation, the term "equity" did not refer to technical equity, or to the body of rules formerly administered in the English Court of Chancery, but to equity in the sense of fairness. This would permit a judge to waive technicalities of either English or African law and to disregard contemporary rules of law which would produce manifestly unfair results.

However, it was not morality in any particularly English sense, because much of what the English might have been tempted to call immoral was not always declared repugnant by the colonial system of justice. It is also quite clear, that the standards of morality in different communities are by no means the same.

Similarly, the term "native law" fell into disfavor because of its colonial connotation as uncivilized. Thus, a new type of legislation emerged in countries like Ghana, Sierra Leone, and Botswana. Incompatibility with legislative enactments or of decisions of the highest court of the land became the main criteria for distinguishing between unacceptable and permissible customary rules within the legal system.

5.7 “Bastardization” of African Customary La Agbede maintains in his book Legal Pluralism[64], that the inconsistency created by an ad hoc approach to repugnancy clauses does not promote justice, and reveals the need for sound

[64] OLUWOLE AGBEDE, LEGAL PLURALISM 71 (1991) cited Ndulo, Muna (2011) "African Customary Law, Customs, and Women's Rights," Indiana Journal of Global Legal Studies: Vol. 18 : Iss. 1 , Article 5. Available at: https://www.repository.law.indiana.edu/ijgls/vol18/iss1/5 accessed 5th April 2022

principles as rules of guidance for the judges in the various departments of the substantive law. According to him, this will achieve certainty and predictability and promote the course of justice.

As Justice Langa noted in *Bhe v. Magistrate*,[65] Khayelitsha, this means that customary law "is protected by and subject to the Constitution in its own right." It is no longer dependent on rules of repugnancy for continued validity. Judge Van Der Westhuizen explained in *Shilubana v. Nwamitwa* that "customary law has a status that requires respect."[66]

As the South African Constitutional Court held in *Alexkor v. Richtersveld Community*, customary law must be recognized as an "integral part" of the law and "an independent source of norms within the legal system."[67] The new approach as reflected in the post democratization constitutions does not immunize customary law from human rights norms. The new Kenyan Constitution provides that [traditional dispute resolution mechanisms shall not be used in a way that:[68]

i) Contravenes the Bill of Rights

ii) Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality, or

iii) Is inconsistent with [the] Constitution or any written law. At least the Kenyan constitution recognizes traditional justice mechanisms whereas Uganda's constitution does not have traditional dispute settlement.

There are many aspects of customary law that are good and need to be preserved. For example, it has no institutionalized or complicated procedures, and the

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65 Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) https://www.saflii.org/za/cases/ZACC/2004/17.html accessed 4th April 2022

66 2008 (2) SA 66 (CC) 1 43 (S. Afr.)

67 2003 (5) SA 460 (CC) 51 (S. Afr.) cited by Ndulo, Muna (2011) "*African Customary Law, Customs, and Women's Rights,*" Indiana Journal of Global Legal Studies: Vol. 18: Iss. 1, Article 5.

68 Article 159 (30 of the Kenyan 2010 consitution http://www.kenyalaw.org/lex/actview.xql?actid=Const2010 accessed 14/04/2022

objective of dispute settlement is reconciliation. This underpins many of its procedures.

5.8 Limitation of Judicial Flexibility and Growth of Customary Law

The repugnancy principle enhances judicial absolutism. Faisal Mukasa (2019) in his thesis observed that:

> *"Flexibility was limited through the conditions imposed for its applicability under both the Colonizing Agreements and Article 20 of the Uganda Order in Council (the repugnancy clause). Customary and native law could only apply if it was not repugnant to justice, morality, any Order in Council or laws made under the Order in Council. The caveat embedded in the repugnant clause could however not help in managing the tension. The subjection of African law to the colonial English law meant imposing formalistic legislation as the fence over which flexibility would not help the law to cross, as demonstrated in Migadde's case."*

In 1939, Attorney General Hone conceded that the repugnancy clause was a limitation to the growth of customary law, although he argued that new customary law could be made. The flexible and indeterminate standards of justice and morality were an imposition of traits of the non-instrumentalism of the natural law jurisprudence that again favored formalism over flexible instrumentalism, as used in pre-colonial days.

The hierarchy of norms guided the court under colonial law, which placed flexible norms below and subject to formalistic ones. If this were still the principle to guide judges, it would mean that the validity and acceptability of flexibility were determinable by its conformity or consistency with formalism and legalism. However, Article 126 (1) and 126 (2) (e) of the constitution bind judges to be guided by the values, norms, and aspirations of Ugandans, and to hold substantive justice superior to technicalities.

This proposition ultimately accounts for the relevance of National objectives and State principles to customary law.

5.9 Neo-Colonialism and Its Dominance in Customary Law

It is important to highlight that the repugnancy doctrine has been a tool of imperialism to control African laws. It is observed here, that its continued application sheds some light on neocolonialism in Uganda. For instance, traditional marriages were subjected to the racist and illogical repugnancy test, which required all indigenous practices to conform to (colonial) "natural justice, equity and good conscience."[69]

It has been argued that such a test was only intended to subjugate native practices that were distasteful to the colonialists. This was clearly demonstrated in the case of the institution of bride wealth, which was described by a colonial British judge as "wife purchase." In the infamous case of *Rex v. Amkeyo*, Chief Justice Hamilton exposed his racist bias:

> *"In my opinion the use of the word marriage to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led to a considerable confusion of ideas. I know of no word that correctly describes it; 'wife purchase' is not altogether satisfactory but it comes much nearer to the idea than that of 'marriage' as generally understood among civilized peoples." (Nsereko, 1975, pp. 682-704)*[70]

The irony was that at that time, English common law in fact regarded wives as subservient chattels to their husbands.[71] Colonial law attempted to abolish and later standardize bride wealth, which led to the conceptualization of the practice as a purchase, in the process denigrating the institution with the concomitant deprecation of women's status.

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69 See Article 20(a) of the 1902 Order-in-Council

70 *Rex v Amkeyo* (1921) EACA 12 at p. 15. For a detailed discussion of the traditional social functions of the institution.

71 In the case of *Regina v. R* [1991]1 AC 599, which overturned the common law rule that a husband could not rape his wife, Lord Keith of Kinkel observed that "one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband." (p. 770).

The colonialists introduced a radically different type of marriage derived from the common law in the case of *Hyde v. Hyde,*[72] which defined a monogamous marriage as the voluntary "union for life of one man and one woman to the exclusion of all others."[73] While monogamous nuclear families were touted as signifiers of modernity and progress, polygyny was recreated as uncivilized, unchristian and immoral.

Missionaries denounced polygyny as harmful to women. For example, Archdeacon Walker imparted the notion to his followers that polygynous unions were substandard and offered women in such marriages instant dissolution if they wished to be married in church.

5.10 Absence of Judicial Guidelines

Today, the repugnancy test is based on much wider ground other than inconsistency with natural justice and morality. With the advent of human rights, some customs have not survived the day due to their violation of equal justice and women's rights. To compound matters, the current judicial approach to customary law has raised some doubts about repugnancy, since the tests may in some cases have nothing to do with human rights but rather expediency (Oba, pp. 817-850; Ayodele, 2014).

There is no regulatory standard for the repugnancy test, which is therefore subject to abuse by judges whose discretion is biased by cultural affiliation in form of clans, tribes and intermarriages.

5.11 Lack of Assent of the People in Modifying the Customs

Most of the customs found repugnant lack the opportunity of participation from the communities affected. In the celebrated case of Kajubi v Kabali,[74] Chief

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72 Maurice Okechukwu Izunwa Demonstrating the Christian-Canonical Jurisprudence Grounding the Definition of Marriage in the English Case of Hyde V. Hyde International Journal of Humanities Social Sciences and Education (IJHSSE) Volume 2, Issue 11, November 2015, PP 38-55 https://www.arcjournals.org/pdfs/ijhsse/v2-i11/4.pdf accessed 14/04/2022

73 (1866) LR 1 .

74 (1944) EACA 14

Justice Gray in the East African Court of Appeal declared the rule that applied to stateless communities before colonialism as governing all modification or amendment of customary law in Uganda.

The court thus held that traditionally, in Buganda, no individual or group of individuals could modify the original customs of a native community, not even the court, without the assent of the native community. This had the effect of modifying Buganda's customary law through judicial flexibility. The removal by Kajubi's case of the Kabaka's jurisdiction to amend and modify law reduced the flexibility with which custom could be changed.

The impracticality of obtaining the entire community's consent to amend or modify a law meant that the customary norms already in existence had become fixed, made determinate, and more certain in line with the English ideals about the law. By this fixation, customary law had also been robbed of its inherent mechanism for growth and ensuring that it kept relevant to changing circumstances in the way the common law did.

5.12 Imperial Legal Education and Insensitivity of Judges

Since most of the legal education is rooted in formalistic and procedural subjects, it leaves out customary law, which to-date has no mechanism of enforcement and practitioners trained in applying native law. It needs to be pointed out, that lawyers and judges in the country received British training that, according to Chief Justice (emeritus) Wako-Wambuzi, involved not only the British legal system but also its culture, such as etiquette, plus personal and community values.[75] This training and background check no doubt ensured that judges were equipped not only to understand the substance and philosophy behind common-law doctrine, but also to make judicial choices in a way that upheld the co-existence of formalism and flexibility due to the dualism of the common law at the time.

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75 The Role of an Advocate, Speech by the Honourable Chief Justice S.W.W Wambuzi on Friday, 5th July 1974 To the Law Society at the Law Development Center Uganda Law Focus. Law Development Center at pg 160

5.13 Absence of Clear Guidelines for Repugnancy Tests

It is difficult to point to any clear and succinct criteria by which the courts enforce or reject a custom on the grounds of repugnancy. This may not be unrelated to the fact that the repugnancy doctrine in itself has no precise parameters. Thus, it would appear that the standard used in assessing the customs is based on English standards of morality.

The late Right Honorable Sir Sidney Abrahams, at a lecture delivered at the London School of Economics in 1948, said:

> *"Morality and justice of course mean British and not African Conceptions of these. Were that not so British justice would be looking in two different directions at once. At this juncture, it is appropriate to ask why indigenous customs have to be looked at through the monocle of an Englishman. The answer to this is not far-fetched. It is part of a rather insular tradition that was exemplified in the attitude of the average English lawyer towards African law and its institutions. In the words of an administrative officer who once served in Northern Nigeria: The attitude of the English Lawyer towards African law and custom is not that of adaptation but contempt for a worthless thing, which should be abandoned and replaced by European law whole and undefiled."*[76]

It is this attitude that largely influenced the decisions handed down by the courts in respect of the validity of customs. As we have seen, there is no defined criteria for declaring customs as repugnant.

6.0 WAY FORWARD INSTEAD OF REPUGNANCY

Colonialists disregarded the dynamism integral in customary law and set out to find ways of pinning it down. This was done by establishing rules by which the judiciary could prove the customary laws and practices of a society. In so doing, they adopted Eurocentric evidentiary rules that require witnesses:

> *"As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until*

[76] Derek Asiedu-Akrofi (1989) Judicial Recognition and Adoption of Customary Law in Nigeria Vol 37 The American Journal of Comparative Law

> *the particular customs have, by frequent proof in the court, become so notorious that the courts will take judicial notice of them."*[77]

To-date, this evidentiary rule is still adhered to in many African countries, although it has been debunked in some, like Kenya (Oloka-Onyango, 2010, pp. 209-10). In the judgment of the South African Constitutional Court in *Shilubana v. Nwamitwa,*[78] Judge Van Der Westhuizen listed four useful guidelines for how to approach the reform of customary law. The case before the court was an appeal against a court of appeal judgment confirming a decision of the high court, in which "[a] woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender."

The Court was called on to decide whether the community had the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution. Judge Van Der Westhuizen stated four factors that ought to be considered in determining the content of a customary norm:

> *"(1) the traditions of the community concerned; (2) the possible distortion of records due to the colonial experience; (3) the need to allow communities to develop customary norms; and (4) the fact that customary law, like any other law, regulates the lives of people."*[79]

Customary norms have developed over a period of time, and an inquiry into a norm should involve "consideration of the past practice of the community." The court emphasizes that this should be done in customary law's "own setting rather than in terms of the common law paradigm." The lives and

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77 *Angu v. Attah* [1916] Privy Council Appeals [1874-1928], 43 (Gold Coast). Also see David A. Nii-Aponsah, "The Rule in *Angu v Attah* Revisited," Review of Ghana Law 16 (1987-1988): 281-292.

78 (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008)

79 Ndulo, Muna (2011) "African Customary Law, Customs, and Women's Rights," Indiana Journal of Global Legal Studies: Vol. 18 : Iss. 1 , Article 5. Available at: https://www.repository.law.indiana.edu/ijgls/vol18/iss1/5

conditions of the people are forever changing as they are embedded in new social and economic conditions.

This means that the "need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights." In place of repugnancy tests, the National Objectives and Directive Principles can be applied. The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail.

It was warned that there are obvious dangers in using common law concepts to analyze African customary law. Legal norms develop in different situations under different cultures and in response to different conditions. It is understandable that there is much nostalgia about African customary law among African people. Customary law is, after all, part of African identity.

Courts should be encouraged to examine the prevailing social and cultural conditions as well as the goals of the justice system as they decide cases. They should be encouraged to interrogate customary law and deconstruct it to see what values underpin particular norms. Customary law, like any other law, is not static and is always changing to reflect how people are living today.

7.0 CONCLUSION

In Uganda, less than 5 percent of dispute resolution takes place in a court of law.[80] The remaining 95 percent of the population use the informal "living

[80] *"The Hague Institute for Innovation of Law (HiiL), Justice Needs in Uganda, 2016: Legal Problems in Daily Life,"* at p. 6, available at: https://www.hiil.org/wp-content/uploads/2018/07/Uganda-Mini-Folder_2016-1.pdf [accessed June 3, 2019]. But even with such low utilization of formal courts, there was a case backlog of 21 percent in 2017/2018. See Government of Uganda, The Justice, Law and Order Sector (JLOS) Annual Report 2017/2018 at p.3, available at https://www.jlos.go.ug/ [accessed June3, 2019]. Also see Key Note Address by the Chief Justice at the 23rd Annual Joint Government of Uganda Development Partners Review (October 4, 2018), available at https://www.jlos.go.ug/index.php/document-centre/annual-review-conferences/23rd-annual-jlosreview-2018 [accessed July 22, 2019].

customary law" or community justice to manage conflicts, maintain social harmony and protect important resources[81]. Chuma Himonga predicts that "living customary law is likely to assume, if not maintain, a prominent position in African legal systems and to continue to regulate the lives of the majority of Africans on the African continent in the twenty-first century and beyond." (Chuma Himonga, 2011, p. 31-57)

The failure to take into account that customary law is dynamic has changed in the majority of jurisdictions. Judges are increasingly asserting the supremacy of human rights norms and declaring customary discriminatory norms unconstitutional or invalid and inapplicable in modern society. In several jurisdictions, courts are responding to the need for change and are showing an understanding of the existing social and economic condition (Ndulo, 2011).

In South Africa, a dual system of courts is established. For instance, there is the African native courts manned by chiefs and kings. On the other hand, the formal courts which are manned by judges trained in the common law and formal justice mechanisms. Given the top-down fashion in which colonial laws were imposed on Africa, their legitimacy and moral acceptance by the majority of African people is questionable, at best (Okoth Ogendo, 1993, pp. 65-80).

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