Supremacy and Primacy of Federal Law and Repugnancy in Nigeria and Ghana

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1.0. Abstract

The supremacy of the federal constitution in Nigeria establishes that the federal constitution and federal law generally, take precedence over state laws, and even state constitutions. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. Federal supremacy and pre-emption refers to the idea that all state and local laws must not conflict with federal law. The federal law is considered the supreme law and it always supersedes the state or local law. This paper evaluates the supremacy of the constitution over other laws and the general acceptability of these laws that are not repugnant to principle of natural justice, equity and good conscience viz-a-viz the repugnancy principle in Nigeria and Ghana. This paper finds out if there is a level playing ground in all jurisdictions in what is understood or taken as a non-repugnant law and it displays the fact that there is no single approach to it as what is considered to be repugnant in a jurisdiction might not be in another. A good example is the issue of same sex marriage.

2.0 INTRODUCTION

The importance of a constitution in any given society cannot be overemphasized. The constitution, in Nigeria's situation, is the supreme law of the land which all acts of individuals and of parliament must not contravene. It is the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, it defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties. It is trite that one of the sources of a constitution is other constitutions. In my presentation, I shall be looking at Nigeria and Ghana.Nigeria is a formation of

the Constitution. Nigeria developed into a globally perceived free country, in 1960,[1] after a time of expansionism under the British government which spread over about a century starting with the formal extension of Lagos in 1861. Nigeria's constitutional development history can be divided into two epochs: the colonial or pre-independence epoch –which covers six constitutional instruments (1914, 1922, 1946, 1951, 1954 and 1960) and the post-independence constitutional epochs encompasses three instruments (1963, 1979 and 1999).[2] While each successive pre-independence constitutional instrument was enacted through an order-in-council of the British monarch, their post-independence counterparts were enacted in two ways: an Act of parliament (1963 Constitution) and military decree (1979 and 1999).[3]

On 1st October 1960, Nigeria became independent. This was supposed to mean that Nigeria was a sovereign state independent of colonial influences. However, this was not fully the case.The Nigerian constitution provides for its supremacy. This was in contrast to the convention in a parliamentary system. In a parliamentary system what we have is parliamentary supremacy, not constitutional supremacy. However, due to the heterogeneous nature of Nigeria, the constitution had to be supreme in order to dissuade fears of domination of minority groups.[4]Ghana attained independence from colonial British rule on March 6, 1957. On July 1, 1960, it became a republic, the first of four civilian republics that were interspersed with periods of military rule. On January 7, 1993, the Fourth Republic was inaugurated, complete with a new Constitution. The law and legal system in Ghana is heavily marked by its history.[5]In 1876, the Gold Coast Supreme Court Ordinance (No. 4 of 1876), was passed. Section 14 of the said Ordinance stipulated that:

> *"The Common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court."*[6]

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[1]Centre for research on inequality, Human security and ethnicity, University of Oxford, assessed and retrieved online on 24/8/2020 via https://assets.publishing.service.gov.uk/media/57a08c97ed915d3cfd0014aa/wp18.pdf

[2]United Kingdom ethnic group factbook assessed and retrieved online on 24/08/2020 via https://www.indexmundi.com/united_kingdom/ethnic_groups.html#:~:text=Ethnic%20groups%3A,3.7%25%20(2011%20est.)

[3]History of the Nigerian people published by Wikipedia, assessed and retrieved online on 24/8/2020 via https://en.wikipedia.org/wiki/English_people#Nigeria

[4]Dennis Lloyd (1964) Idea of Law, Penguins books, p. 45

[5]Ibid p. 53

[6]Ibid p. 57

Section 19 of this Act also provided for the application of customary law. This was in conformity with the emerging British colonial policy of indirect rule. Section 19 reads, in part, as follows:

> *"Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial legislature".*[7]

The legal and law pluralism that was recognized under the 1876 Supreme Court Ordinance still persists today but it is moderated by elaborate choice of new law and rules emanating from the federal government of Nigeria and Unitary system of Ghana.

3.0 SUPREMACY OF THE CONSTITUTION IN NIGERIA AND GHANA

In every given human society, there is always a supreme entity whose provisions or dictates are final. This particular entity is the embodiment of sovereignty in that society. In the pre – colonial times, it was usually the Gods of the land in the South or the provisions of the Holy Quran in the North. In contemporary Nigeria, the constitution is regarded as supreme.

Supremacy can be defined as the position of having the superior or greatest power or authority.[8] The constitution can also be defined as the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.[9] From the foregoing, it can be seen that constitutional supremacy is the position of the constitution having the superior or greatest power or authority.The Constitution of Nigeria is the supreme law of the country. There are four distinct legal systems in Nigeria, which

[7]Ibid p.59
[8]EseMalemi, "The Nigerian Constitutional Law" (2017), 3rd edition, Princeton Publishing Company, Lagos, p. 57
[9]Ibid p. 62

include English law, Common law, customary law, and Sharia Law. English law in Nigeria is derived from the colonial Nigeria, while common law is a development from its post-colonial independence.[10]

The constitution shall be the supreme Law of the Land.[11] It means that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.

The first section of the 1999 constitution that deals with the supremacy of the constitution is Section 1(1). It provides thus:

> *"This constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal republic of Nigeria"*[12]

This section means that the provisions of the constitution are binding on all persons no matter how high or low. As such, any action by any government arm that does not follow the provisions of the constitution will be declared void. An example is seen in the case of *AG Lagos vs AG Federation*.[13] In this case, it was declared that the actions of the president in withholding the federal allocation to Lagos state was in contrast to section 162(5) of the constitution, therefore they were unconstitutional, null and void.

GHANA

Since the first republican Constitution in 1960, Ghana has had three other Constitutions. These are the 1969, 1979 and 1992 Constitutions and the current 1992 Constitution. Ghana is a unitary state with a unicameral legislature. The 1992 Constitution provides for one Parliament, which exercises all primary legislative functions.[14] There is a Council of State, which is an advisory body to the President. The President may refer bills or even laws to the Council of State for its comments. Parliament, however, is only required to consider or reconsider such comments, and is not bound by them.[15] According to Article 106(11) of the

[10]Ibid p. 64
[11]The constitution of Federal Republic of Nigeria
[12]The constitution of Federal Republic of Nigeria, section 1 (1)
[13]*AG Lagos vs AG Federation*
[14]History of the Ghana people published by Wikipedia, assessed and retrieved online on 24/8/2020 via https://en.wikipedia.org/wiki/English_people#Ghana
[15]History of the Ghana people published by Wikipedia, assessed and retrieved online on 24/8/2020 via https://en.wikipedia.org/wiki/English_people#Ghana

1992 Constitution, no bill becomes law unless it has been published in the official gazette. The Ghana Gazette is thus an obvious source for locating legislation in Ghana.[16]

Ghana has ten regions. All regions are under the central government and no regional institution possesses any legislative authority.[17] Legislation passed by the current Parliament, as well as that passed by Parliaments under the prior Constitutions, is labelled as "Acts". Legislation passed under the military regimes was labelled as "Decrees" except for that under the regime of the Provisional National Defence Council (P.N.D.C.), which was referred to as "Laws", e.g. the Intestate Succession Law, 1985. [18]

There is no jurisprudential basis for the differences in terminology. All laws continue to apply to the extent that they are not expressly repealed or abrogated. Under Article 106(1) of the 1992 Constitution, Parliament's legislative power is exercised by passing bills that are assented to by the President. A bill may be introduced by a Minister of State or by a private Member of Parliament. Whether it is a Government bill or a private Member's bill, no bill shall be introduced in Parliament unless it is accompanied by an explanatory memorandum setting out in detail the policy and principles of the bill, the defects of the existing law, the remedies proposed and the necessity for the introduction of the bill.[19] Ghana being sovereign must ensure that its actions are in accordance with the laws of the land which in specific is the Constitution. It is without doubt that Ghana Constitution reigns supreme and is not superseded by any other law be it domestic, or even international laws. Ghana courts have been highly instrumental in keeping with the constitutional supremacy of the land.

Any act of the legislature or any law that is repugnant to the constitution is deemed to be void. Article 1 of the 1992 constitution states that:

1) The sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner within the limits laid down in this constitution.

[16]EseMalemi, "The Nigerian Constitutional Law" (2017), 3rd edition, Princeton Publishing Company, Lagos, p. 43
[17]Ibid p.47
[18]Ibid p.57
[19]Dennis Lloyd (1964) Idea of Law, Penguins books, p. 49

2) This constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of the constitution shall, to the extent of the inconsistency be void.[20]

4.0 PRIMACY OF FEDERAL LAWS IN NIGERIA

Federal law is the body of *law* created by the *federal* government of a country.[21] A *federal* government is formed when a group of political units, such as states or provinces join together in a federation, delegating their individual sovereignty and many powers to the central government while retaining or reserving other limited powers. As a result, two or more levels of government exist within an established geographic territory. The body of law of the common central government is the federal law. Asides from Nigeria, we have a host of other countries that practices federal system of government and some of them includes Brazil, Canada, Germany, Malaysia, Pakistan, Republic of India, Russia, the former Soviet Union the United States and Australia.[22]

The Law of Nigeria consists of courts, offences, and various types of laws. Nigeria has its own constitution which was established on 29 May 1999. The Constitution of Nigeria is the supreme law of the country. There are four distinct legal systems in Nigeria, which include English law, Common law, customary law, and Sharia *(Islamic)* Law. English law in Nigeria is derived from the colonial Nigeria, while common law is a development from its post-colonial independence.[23]

Customary Law is derived from indigenous traditional norms and practices, including the dispute resolution meetings of pre-colonial Yoruba land secret societies and the Èkpè and Okónkò of Igboland and Ibibioland. Sharia Law *(also known as Islamic Law)* used to be used only in Northern Nigeria, where Islam is the predominant religion. It is also being used

[20]The 1992 Ghana Constitution, Article 1
[21]EseMalemi, "The Nigerian Constitutional Law" (2017), 3rd edition, Princeton Publishing Company, Lagos, p. 24
[22] Ibid p.35
[23]Dennis Lloyd (1964) Idea of Law, Penguins books

in Lagos state by Muslims. The country has a judicial branch, the highest court of which is the Supreme Court of Nigeria.[24]

Some laws are made at the federal level and some laws are made by the states. For example, laws on commerce, bankruptcy or taxation are made at the federal level. State and local governments pass laws about property, divorce, custody, and other matters that really don't affect anyone outside of that state. The U.S. Constitution limits the law making of the federal government to laws that stem from the "commerce clause" which gives the federal government the power to regulate anything having to do with "interstate" commerce or commerce across state lines. For example, federal laws can be made that:

- Regulate "interstate" commerce, which is commerce across state lines
- Regulate how financial transactions are made and how bankruptcy can be granted
- Protect consumers such as product safety
- Protect the civil rights such as Title VII of the Civil Rights Act of 1964
- Regulate income taxes, as allowed with the 16th Amendment[25]

Federal law can also be said to be a body of law at the highest or national level of a federal government, consisting of a constitution, enacted laws and the court decisions pertaining to them. The federal law of the United States consists of the United States Constitution, laws enacted by Congress, and decisions of the Supreme Court and other federal courts.Laws of the Federation of Nigeria are made by the National Assembly of Nigeria and signed by the President. The legislative powers of the Federal Republic of Nigeria is vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives. Legislation could either be Acts, Ordinances, Decrees, Edicts and laws. Acts are laws made by the central legislature during a democracy while Decrees and Edicts operate during the military era.[26]

The 1999 Constitution of the Federal Republic of Nigeria espouses the primacy of the rule of law but unfortunately, Nigeria's chequered history of democracy and military rule has been characterised by a culture of non adherence to the rule of law.The rule of law is a legal

[24]EseMalemi, "The Nigerian Constitutional Law" (2017), 3rd edition, Princeton Publishing Company, Lagos, p. 54

[25]Ibid p.65

[26]Stanford Encyclopedia of Philosophy assessed and retrieved online on 14/8/2020 via https://plato.stanford.edu/entries/hobbes-moral/

and political doctrine espousing that the government and the governed in a political state are subject to the law of the land. In essence, everyone is expected to act within the boundaries of what the laws allow and anyone who acts whether while exercising a legal power or asserting a legal right beyond the limits permitted by the law will be called to order.This principle has strong historical links with political governance, it was initially conceptualised for the protection of individual rights against arbitrary exercise of state power.[27]

In Ghana, the sources of laws includes the constitution, act of parliament, subsidiary legislations, existing laws i.e. those laws that existed before the 1992 constitution and the common law of Ghana which includes the English common laws, English doctrines of equity and customary law. In a bid towards the promotion of Rule of Law, judicial accountability and good governance in Ghana and Africa, Ghana Legal Information Institute (GhaLII) was formed which is an online repository of legal information.[28]

5.0 WHAT IS REPUGNANCY

In common law, repugnancy refers to a contradiction or inconsistency between clauses of the same document, deed, or contract, or between allegations of the same pleading. In english law, the court will resolve contradictions in a document based on the primary intention of the parties; if this cannot be established, the court treats the earlier statement as effective in the case of a deed and the later statement as effective in the case of a will.[29]

Legally, it is defined as:

1) The quality or fact of being inconsistent, irreconcilable, or in disagreement *specifically* : a contradiction or inconsistency between sections of a legal instrument (as a contract or statute) if two acts which cover the same subject matter are repugnant, the latter operates to the extent of the *repugnancy* as a repeal of the former.
2) An instance of contradiction or inconsistency[30]

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[27]EseMalemi, "The Nigerian Constitutional Law" (2017), 3rd edition, Princeton Publishing Company, Lagos, p. 54

[28] Articles on Ghana unitary page, retrieved online via https://www.unitary.ghana/about/how/sovereignty/ on 20/08/2020

[29]Dennis Lloyd (1964) Idea of Law, Penguins books p.87

[30]Black's Law Dictionary, 2009, ninth edition

The repugnancy doctrine was introduced into Nigeria in the 19th century through the received English laws. This doctrine prescribes that the courts shall not enforce any customary law rule if it is contrary to public policy or repugnant to natural justice, equity and good conscience. The repugnancy clause has been traced to identical provisions in India which might have served as precedent for the Nigerian provision. The philosophical basis of the test has been found in the legal theory which believed to have guided British Colonial policy. The policy was that only those laws of the savages that were not against the law of God or at variance with the established religions that will be allowed to exist. But the Nigerian courts, in applying the repugnancy test do not appear to have embarked on any such historical excursion. Their decisions have been direct and simple. The tone of their judicial attitude was set in the clear pronouncement of Speed, Ag. CJ, who since 1908 confessed to the difficulty he had in offering a strict and accurate definition of this term.[31]

The decisions from our courts all seem to suggest that the clause is not to be separated into its components so as to interpret each of the terms natural justice, equity and good conscience disjunctively. It has also been suggested that the standard intended to be applied to the repugnancy of a rule of an indigenous law cannot be the standard of the particular community to which the rule belongs, but has to be a standard external to it if the test is to have a any meaning at all. There are arguments that local standards are not totally irrelevant and that court must interpret the test by reference to local sentiments of what is right or wrong.[32] This view cannot be sustained. Furthermore, the standard of conformity with the English law or principles exclusively known to European societies have been rejected as the test of repugnancy in Nigeria. Due to divided and divergent opinions, it has not been easy to decide from the decisions of the courts any criterion of determining repugnancy. However, the courts, from their decisions, have arrived at a consensus on what amounts to repugnancy. They are as follows:

1). All indigenous laws which justify inhuman or degrading treatment such as customs supporting human sacrifices, infanticide and slavery.

2). Customary rules which could be relied upon to justify unreasonable or absurd claims or a claim which the enforcement will result in gross inconvenience.

[31]Blackshield and Williams (2010) Australian Constitutional Law and Theory, 5th ed, p. 102
[32]Blackshield and Williams (2010) Australian Constitutional Law and Theory, 5th ed, p.105

3). A customary rule of procedure which in incompatible with the principle of audi-altarem partem or nemo judex incausasua.

4). Any rule or indigenous law which robs a man of his inalienable Right.[33]

In the Nigeria Legal System, the most salutary influence of the application of the doctrine of repugnancy has been in the area of procedural law, the law of succession and marriage. Katsina Alu (JCA) as in then was has this to say: " Although the repugnancy doctrine was a British fashion which was introduced into Nigerian statute books the doctrine has to be interpreted in the context of our jurisprudence which includes the totality of our customary laws. In the application of the doctrine, a court of law should look at the total package of the customary law involved and not a watered down version of it or tutored version of it. In the application of the doctrine, a court of law is not allowed to pick and choose certain aspects of the customary law and leave other aspect". See Onwuchekwa v Onwuchekwa (1991) 5 NWLR pt 194 page 743 ratio 12.[34]

There are however numerous cases in which the repugnancy test has been applied to invalidate rules of customary law. On account of this, the application of the repugnancy test has become the object of scathing attacks. The celebrated Taslim Elias, retired CJN, found some of the decisions on repugnancy as confusing.

On the other hand, Prof. Nwabueze (S.A.N.) praised the repugnancy test as "a potent factor in the reformation of the customary law". While Abiola Ojo believes that in some instances, the test has been employed by the courts as a doctrine of progressive change in the body of customary law. It is not in doubt from cases in courts, that the repugnancy clause has played a positive role in the development of our legal system.

However, a close inspection of the conclusions reached by the above scholars revealed clearly another side of the argument. There is the argument that its full retention should be closely monitored for the following reasons: [35]

[33]Stanford Encyclopedia of Philosophy assessed and retrieved online on 14/8/2020 via https://plato.stanford.edu/entries/hobbes-moral/
[34]Onwuchekwa v Onwuchekwa (1991) 5 NWLR pt 194 page 743 ratio 12.
[35]Stanford Encyclopedia of Philosophy assessed and retrieved online on 14/8/2020 via https://plato.stanford.edu/entries/hobbes-moral/

1). Whatever conditions it has made in the past, the repugnancy test is bound to evoke controversy so long as it retains its current wording. There is the temptation to look at the doctrine as a relic of the colonial denigration of our customs.

2). It is difficult to say that the repugnancy test was not meant to impose English law standards on Customary Law. The question that could be asked is why is there no repugnancy test attached to the application of the English law leading inevitably to the presumption that the principles of justice by which customary law is to be judged are an integral part of the English law?

3). There is the need to re-examine the repugnancy clause and to assess whether the constitution and other laws have not taken care of the practices which the clause seeks to abolish.[36]

These are some of the controversies that the doctrine has generated. What is seen as repugnant is some divisions are acceptable in other divisions. Example of this is the Lesbian, gay, bisexual, and transgender (LGBT) persons in Nigeria face legal and social challenges not experienced by non-LGBT residents. The country does not allow or recognise LGBT rights. There is no legal protection against discrimination in Nigeria—a largely conservative country of more than 170 million people, split between a mainly Muslim north and a largely Christian south. Very few LGBT persons are open about their orientation, and violence against LGBT people is frequent. Edafe Okporo fled Nigeria to the United States seeking asylum based on his sexual orientation and was granted political asylum in 2017. LGBTQ Nigerians are fleeing to countries with progressive law to seek protection. Both male and female same-sex sexual activity is illegal in Nigeria. The maximum punishment in the twelve northern states that have adopted Shari'a law is death by stoning. That law applies to all Muslims and to those who have voluntarily consented to application of the Shari'a courts. In southern Nigeria and under the secular criminal laws of northern Nigeria, the maximum punishment for same-sex sexual activity is 14 years imprisonment. The Same-Sex Marriage

[36]Centre for research on inequality, Human security and ethnicity, University of Oxford, assessed and retrieved online on 24/8/2020 via
https://assets.publishing.service.gov.uk/media/57a08c97ed915d3cfd0014aa/wp18.pdf

Prohibition Act criminalises all forms of same-sex unions and same-sex marriage throughout the country.[37]

6.0 CONCLUSION

In conclusion, there have been arguments about the truth of the provision of S.14(2)(a) of the Constitution. It is contended in many quarters that this present constitution was foisted on us by the military government. It is said that in as much as the people did not choose their representatives to fashion out the constitution for them, therefore, it is not the people's constitution. However, on the other side of the divide are those that contend that since the present 1999 constitution is to a large extent in *parimateria* with the 1979 constitution, it can be called the people's constitution. This is because in the formation of the 1979 constitution, the representatives of the people sat down and fashioned it out. Whatever side of the divide one may be in, the truth remains that the present constitution has been in use from 1999 till date. It is the most successful democratic constitution in the history of Nigeria due to the fact that it is the longest lasting constitution. Thus, it is safe to conclude that 'one cannot bite the fingers that feeds him.'

The supremacy of the constitution is viewed as a check on governmental power. No matter who is elected, the constitution's principles must be enforced. This theory prevents a wide range of potential government abuses. In practice, governments may ignore aspects of their nation's constitution or interpret them in different ways.

With some aspects of the constitution which clearly are repugnant to the doctrine of equity and good conscience, of a truth can be amended, but the requirements for amending constitutions is quite cumbersome which makes doing so difficult.

We need to understand the fact that a constitution that can easily be changed lacks the protections of one that requires a broad consensus to change.

While constitutional supremacy is designed to be strong, upholding it can be challenging. In many cases, people have no means of enforcing it. If a court states that the government is in violation of part of the constitution, it likely has no means of enforcing its decision. In some cases, the government might simply ignore these rulings. In many nations, the military operates with some degree of independence. If the military chooses to allow violations to continue, revolt may be the only solution.

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[37]Centre for research on inequality, Human security and ethnicity, University of Oxford, assessed and retrieved online on 24/8/2020 via
https://assets.publishing.service.gov.uk/media/57a08c97ed915d3cfd0014aa/wp18.pdf

There is the need to have the existence of fixed principles of law which are not repugnant to principles of natural justice, equity and good conscience, as it avoids the dangers of arbitrary, biased and dishonest decisions. Law is certain and known. Therefore, a departure from a rule of law by a judge is visible to all. It is not enough that justice should be done, but it is also necessary that it should be seen, to be done. If the administration of justice is left completely to the individual discretion of a judge, improper motives and dishonest opinions could affect the distribution of justice.