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## CUSTOMARY COURTS: OF CUSTOM, JUSTICE AND EQUITY

BY

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### 1. Introduction

For a proper balance, it is necessary that one makes some prefatory remarks by way of introduction. In Chapter 39, Volume 2 of the Laws of Akwa Ibom State, 2000, the preamble explains that provision is made for the administration and constitution of Customary Courts. However though Section 69 clarifies that the law is to be cited as the Customary Courts Law, the court itself is called District Court.<sup>1</sup> This is a bit curious because one would have thought that the law establishing District Courts would be called District Courts Law, rather than Customary Courts Law. The reason for this may perhaps be explained from either of two perspectives. The first could be that the draftsman of the Law was simply falling back on the Customary Courts Law of the then Cross River State,<sup>2</sup> as applicable in Akwa Ibom State, Akwa Ibom State having been part of Cross River State until it became a separate State in 1987. The second (or alternative) reason could be that the draftsman deliberately chose the title, "Customary Courts Law" because functionally, District Courts are to administer customary law. This latter reason may probably explain why "District Courts" and "Customary Courts" are used interchangeably and indiscriminately in the law itself. In this paper therefore, when we mention "Customary Courts" we functionally have in mind the District Courts even where we use the two terms interchangeably.

### 2. Brief history/origin

Customary Courts are successors of the statutory native courts established in various parts of Nigeria during the colonial days. Native Courts were converted to customary courts in the former Eastern and Western Regions in 1956 and 1957 respectively.<sup>3</sup> In the former Northern Region and the States carved out of it, they survived until April 1968, when they were replaced by Area Courts.<sup>4</sup> When Nigeria became independent in 1960, the Eastern Region was first broken up into four States. The Customary Courts Law (Cap.32) of the former Eastern Region was inherited by South-Eastern (later Cross River) State. The Customary Courts Edict 1969 of Cross River State repealed and replaced the Customary Courts Law of the former Eastern Region and set up a new system of customary courts in the State, under the

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1 Section 1 of Customary Courts Law

2 Sections 1 and 3, Cap.34, volume II Laws of Cross River State, 1975.

3 See: Customary Courts Law 1956 of the former Eastern Region (Cap.32) and Customary Courts Law 1957 of the former Western Region (Cap.31).

4 E.g., Area Courts Edict 1967 of the Central-West (now Kwara) State.



Customary Courts Law which took effect from 20th September, 1969.<sup>5</sup> Upon the creation of Akwa Ibom State out of Cross River State in 1987, the Customary Courts Law of Cross River State applied in Akwa Ibom State until the Customary Courts Law of Akwa Ibom State was “enacted”. We have put “enacted” in quote because it is not clear if the Customary Courts Law of Akwa Ibom State was enacted or if it was just printed from that of Cross River State. This doubt arises because of the fact that, that of Cross River State starts with “Short title and Commencement”, and puts the commencement date as 20th September, 1969; but the one of Akwa Ibom State has nothing on “commencement” and yet has the same 20th September, 1969, at the head of the statute, presumably as commencement date. Be that as it may, that much is the brief history and origin of the customary court system in Akwa Ibom State.

### 3. **Raison d'ête of Customary Courts**

The reason for the creation of customary courts is to provide easy access to justice to the local communities, in accordance with customary law. Justice as provided by customary courts thus meets the ethos, values, customs and usages of the people. To this extent, customary courts are meant to replace, and in fact do replace, the pre-colonial justice delivery system, under which the system of adjudication was very casual, mostly secretive, frequently unpredictable and extremely capricious. The traditional, pre-colonial adjudicatory system lacked formal courts, regularity and also lacked both openness of proceedings, and adherence to established principles of justice. In many cases, secret societies (e.g. Ekpe and Ekpo) played apex appellate roles, with its proceedings shadowed in secrecy. It was to retain the virtues of customary law, bereft of all its vices, that customary courts are established. The judicial officers of these courts, whether as presidents or members, must therefore ensure that the reasons for setting up customary courts are met, by ensuring that their proceedings are open, predictable, regular, during official hours, in accordance with both the established principles of justice and applicable customary law.

However, in order for customary law to warrant retention, Customary Courts must ensure that the customs they uphold, or the customary laws they apply, meet certain criteria as are detailed below under “Applicable Law”.

### 4. **Who qualifies for membership?**

The Customary Courts Law does not stipulate any qualification for eligibility: it does not require even a First School Leaving Certificate, or literacy in English language, nor knowledge of the applicable customary law of the area, nor that the appointee should be a native of the area of jurisdiction of the Court. Section 2(b) of the Law provides that “the (Judicial Service) Commission may appoint any member of a District Court who is literate in English language to be President of the District Court”. Section 4(3) further provides that in the absence of the President at any court sitting, “the members present may choose one of their number who is literate in the English language to preside over such sitting of the District Court”. These provisions, on the one hand, obliquely suggest that the president alone should be literate in English language, but on the other hand, they buttress the point that, at least in theory, literacy in English language is not a precondition for appointment of the members. It

5. See: Cap.34, Vol. II Laws of Cross River State 1975



may well be that in practice these conditions (i.e. minimal educational qualification, literacy in English language, knowledge of the customary law of the area, and nativity) are considered. In that case, the law needs to be amended to accord with reality. Until that is done, it is arguable that a candidate who is disqualified on any of these grounds may have legitimate complaint that the goal post is shifted only after he had taken the kick.

### 5. The applicable law

Customary Courts are to apply customary law. By Section 10 of the Customary Courts Law, a customary court shall administer:

- (a) the *customary law prevailing in the area* of the jurisdiction of the Court or binding between the parties, so far as it is *not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law* for the time being in force in the State (emphasis mine)
- (b) the provisions of any written law (including in that expression subsidiary legislation) which the court may be authorized to enforce by an order under section 9.

By this provision, customary courts are to apply customary law which:

- (i) prevails in the area of jurisdiction of the court or
- (ii) is binding between the parties.

It is significant that these requirements are disjunctive, because a customary law which prevails in the area of jurisdiction of the court may not necessarily be the customary law which is binding between the parties. This is particularly so in view of section 6 of the Customary Courts Law which gives customary courts jurisdiction over all Nigerians and even over non-Nigerians. The section provides:

6. The following persons or classes of persons shall be subject to the jurisdiction of customary courts

- (a) all Nigerians
- (b) persons or classes of persons, other than Nigerians, whom or which the Governor shall direct to be subject to the jurisdiction of any particular customary court, or to be subject to such jurisdiction in certain causes or matters, or classes of causes or matters only;
- (c) persons, other than Nigerians, who have at any time instituted proceedings in any customary court or have by their conduct submitted to the jurisdiction of a customary court.

This means that the customary court must in each case find out what customary law prevails at that moment within its area of jurisdiction or, where the parties are not from that jurisdiction, what customary law is binding between the parties. This calls for ascertainment of the applicable customary law.

### 6 Ascertainment of Customary Law

It is the duty of the customary court to know what the customary law is at that point in time, and to know also if that particular customary law is applicable to the case in hand. This is important because customary law varies from place to place, from locality to locality, which means that even within one local government area, let alone one ethnic



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group, customs may vary at least in matters of detail. Even in one locality, custom may have changed in the course of time. Thus, what was the custom in a particular place at some point in time may no longer be the custom today. We may recollect that customary laws were formulated from time immemorial. As our societies advance, they are removed from their pristine social ecology. They meet situations which were inconceivable at the time they took root.<sup>6</sup> The twin facts of dynamism of customary law to meet present day challenges, and its variation from place to place, demand that the Customary Court knows for sure and applies the current customary law, which is truly a “mirror of accepted usage”<sup>7</sup> rather than those of “by-gone days”. How does the court get to know the current applicable customary law?

It has been held by the Supreme Court that customary courts have the duty to declare customary law and that they are not required to adopt any particular procedure in doing so.<sup>8</sup> This is particularly true where the President and members of the court hail from the same place where the court is situated, so that they can be regarded as pundits of the customary laws of the area. This view was accepted in *Ababio v. Nsemfoo*<sup>9</sup> as a qualification to the rule in *Angu v. Attah*.<sup>10</sup> In *Ababio's case* the native court was presided by a paramount chief and persons familiar with the native custom, and therefore proof of the custom was unnecessary.

However, it is arguable that even where the members are indigenes of the area of the court's location their knowledge of the customary law is a rebuttable presumption. In the words of Bate, J. in *Gyang v. Gyang*,<sup>11</sup> a customary court “is presumed to know... the native law and custom prevailing in its area of jurisdiction unless and until the customary is proved”. This recognizes that the customary court members may still not know all the applicable customary laws in all the cases. In such case they should not hesitate to call for proof of the alleged custom. Chiefs and all other persons that may have special knowledge of the customary law may be called to give evidence on it. Some of the problems inherent in the use of witnesses to prove a custom include the likelihood of bias, interest and dishonesty. Customary courts are generally more inclined to believe the evidence on customary law when such evidence is given by chiefs and elderly people. They are not alone in that inclination, as even the Supreme Court was ready to vouch, in *Nwabuba v. Enemuo*,<sup>12</sup> that “it is a matter of common knowledge that old and traditional rulers are by their position not only in a position to know the facts in land disputes but also find it difficult to twist the truth”. However, it was the self-same Supreme Court that castigated the Ooni of Ife, who is generally considered to be the custodian of Yoruba custom and tradition, for asserting a particular rule of customary law only selfish reasons.<sup>13</sup> What all these amount to is that the evidence of the local “experts” on customary law is not absolutely binding. The customary court in each case has discretion on the respective weight to attach to it. In this regard, factors to consider include the credibility of the witness, his knowledge of the customary law concerned, and other supporting evidence. In this way, the customary court determines the applicable customary law.

<sup>6</sup> *Agbai v. Okogbue* (1991) 7 NWLR 391, per Nwokedi, JSC at 417

<sup>7</sup> per Bairamian, FJ in *Omonyin v. Omosho* (1961) All NLR 304 at 309, endorsed by the Supreme Court in *Kindey*

*v. Military Government of Gongola State* (1988) 2 NWLR 445.

<sup>8</sup> *Odifuye v. Fatoke* [1977] 4 SC II

<sup>9</sup> (1947) 12 WACA 127

<sup>10</sup> (1921) PC 1874 1928, 43 adopted in Nigeria in *Buraimo v. Gbangoye* (1940) 15 NLR 139

<sup>11</sup> [1969] NMLR 99 at 100

<sup>12</sup> (1988) 2 NWLR 581, per Nnaemeka-Agu, JSC at 595

<sup>13</sup> *Adewoyin v. Adeyeye* (1963) 1 All NLR 52 at 60



Other components of Section 10 of the Customary Courts law are that the applicable customary law must not be:

- (i) repugnant to natural justice, equity and good conscience, or
- (ii) incompatible, either directly or by necessary implication, with any written law for the time being in force in the State.

For brevity, we refer to the first condition as “repugnancy test”, and to the second as “incompatibility test”.

### ***Repugnancy test***

The phrase “natural justice, equity and good conscience” is normally interpreted conjunctively rather than disjunctively. Conjunctively, it simply means fair and just or conscionable. That way, any rule customary law which is unjust, unfair or unconscionable is against (i.e, “repugnant to”) natural justice, equity and good conscience and therefore void. It can be said, generally, that the repugnancy doctrine affords the customary court the opportunity for fine-tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws.<sup>14</sup>

There is no general rule for testing all customary laws for repugnancy, and so each case is dealt with as it comes. An example of a repugnant customary law may be found in the early case of *Edet v. Essien*.<sup>15</sup> Here the court held that a rule of customary law which gave the custody of a child fathered by a husband to another man, merely because the dowry paid by that other man had not been returned, was repugnant to natural justice, equity and good conscience. The appellant in this case had “married” one Inyang while she was still a child. Much later, when Inyang had become mature, the respondent paid dowry and did the marriage ceremonies and subsequently had the two children in dispute. The appellant argued that by customary law, so long as his dowry had not been refunded to him, he was the one entitled to any child she might bear to whomever. The court held that the alleged rule of customary law had not been proved, and that even if it had been proved, it would be repugnant to natural justice, equity and good conscience. The case of *Mariyama v. Sadiku Ejo*,<sup>16</sup> where the court had to consider a rule of customary law under which a child born within ten months after divorce belonged to the former husband of its mother, the court rejected this custom. Similarly, a customary rule which allows members of a panel of judges who did not hear all the evidence to participate in handing down a judgment has been invalidated for repugnancy.<sup>17</sup> This is of especial significance to customary courts, which sit in panels of three or two;<sup>18</sup> a member who did not participate in hearing should not participate in writing or delivery of the judgment.<sup>19</sup>

<sup>14</sup> per Nwokedi, JSC in *Agbai v. Okogbue* [1991] 7 NWLR 391 at 417

<sup>15</sup> (1932) NLR 47

<sup>16</sup> (1961) NRNLR 81. See also: *Re White* (1946) 18 NLR 70

<sup>17</sup> *Egba N. A. v. Adeyanju* (1936) 13 NLR 77. Also: *Chime v. Elikwu* (1965) NMLR 71

<sup>18</sup> Section 4 of Customary Courts Law, Akwa Ibom State.

<sup>19</sup> *Ubwa v. Tiv Area Traditional Council & Ors* (2004) 11 NWLR (Pt. 884) 427 held 2. This case was relied upon, on the same point, by the Supreme Court, in the later case of *Sokoto State Government of Nigeria v. Kamdex Nigeria Ltd* (2007) 7 NWLR (Pt. 1034) 466, held 5.



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A complete list of repugnant customary rules cannot be given. Customary courts are therefore to subject each alleged rule to the litmus test of repugnancy before applying it. It is only by so doing that the rugged ends and jagged edges of customary laws can be filed out in the interest of justice.

### *Incompatibility test*

The second question to ask, and answer, before enforcing customary law, is whether it is incompatible either directly or by necessary implication with any written law for the time being in force in the State. The intention of this provision is to ensure that customary law is below any written law in the hierarchy of laws, with the result that any customary law which is contrary to or incompatible with any written law, is *pro tanto* void. There is, for our present purpose, no point in going into the argument about the ambit of the phrase, "any written law".<sup>20</sup> It suffices simply to say that "any written law" refers to local enactments which limit or modify or make contrary provisions to rules of customary law.

The incompatibility may be direct, in the sense that it expressly and absolutely prohibits a customary law rule. An example is the Abolition of Osu System Law which expressly abolished the osu cast system under the Igbo custom. Or it may be incompatible by necessary implication. For instance, the provisions of section 36(12) of the 1999 Constitution has impliedly abolished all customary law offences not contained in a written enactment. The section provides that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law. In the case of *Agbai v. Okogbue* earlier cited, the respondent declined membership of an age group association and refused to pay the levy. The appellants argued that the respondent was by their local custom bound to join an age group and could not opt out of paying the development levy. The Supreme Court held that the alleged custom compelling the respondent to join the age group association was subject to the provisions of the Constitution relating to freedom of association and therefore null and void.

Similarly, in *Ukeje v. Ukeje*<sup>21</sup> the question arose whether the Igbo native law and custom which disentitled a daughter from sharing in the estate of her deceased father was unconstitutional. Following *Agbai v. Okogbue*, the Court of Appeal held that the customary law was incompatible with section 39(1) and 39(2) of the 1979 Constitution which<sup>22</sup> guarantee freedom from discrimination on the basis of sex. For the same reason of incompatibility with the constitutionally guaranteed equality and equal right of both sexes, the Court of Appeal held, in *Uke v. Iro*,<sup>23</sup> that the Nneato Nnewi custom which precluded women from giving evidence in cases of title to land was null, void and unenforceable. These cases all call for caution in enforcing rules of customary law by the customary courts. It is noteworthy that there are no customary law offences. Though Section 7 of the Customary Courts Law gives criminal jurisdiction to customary courts, paragraph (b) of Section 10 and

<sup>20</sup>The 1999 Constitution Section 36 (12) however explains any written law, to refer to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

<sup>21</sup>(2001) 27 WRN 142

<sup>22</sup>Now Section 42 (1) (a) and (b) of the 1999 Constitution.

<sup>23</sup>(2001) 17 WRN 172



the First Schedule thereto jointly emphasize that the offence must be such as is prescribed in a written law. This is in tandem with the constitutional provisions cited above.

## 6. Custom, justice and Equity

The sole reason for the existence of the court system all over the world, is the administration of justice. No wonder that in *Webster's Universal Dictionary & Thesaurus*,<sup>24</sup> a court is defined simply as “a hall of justice”. According to Lenny Bruce, “they call it the Halls of Justice because the only place you get justice is in the halls”.<sup>25</sup> In many court premises you would see a sculpture of Lady Justice equipped with three instructive symbols: a sword symbolizing the coercive power of the court; a human scale weighing competing claims, and a blindfold indicating impartiality.

It is important that these three symbols, particularly the second and third, be constantly borne in the judicial mind. Judicial officers have to receive the evidence, evaluate them, weigh them in the imaginary scale and ensure that judgment is given to the party whose evidence weighs more. It must always be remembered that like Lady Justice, the judge must be blind and know nobody: he (which includes she) must be impartial, not allowing his judgment to be affected by a litigant's social status, material wealth or lack of it, nor by his personal bias or prejudices, or by any extraneous consideration. The judge must not ration justice or give it to the stronger, the highest bidder or to his relative. Since justice must not only be done but must clearly be seen to have been done, if the judge's relative or his other close person has a case before him, he should step down or advise the litigant to apply to a magistrate's court for transfer of the case to another customary court. This is because in such case it may be difficult for the judge to do justice due to his interest in the case. Indeed, even if he does justice in such circumstance, such justice may be difficult to be seen. Like the Caesar's wife, the judge, in whatever rank of court, must all be above suspicion, because justice is rooted in confidence.

Other indicators of partiality, which hinder justice being done, or seen to be done, include:

a. descending into the arena of dispute, such as by asking too many probing questions meant to elicit answers favourable to one party in the case. A court can be branded as descending into the arena or playing the role of a prosecutor if in the course of the proceedings he takes over the case by cross-examining the witness with a view to finding for a particular party;<sup>26</sup>

*suo motu* calling a witness to favour one party this is different from calling a witness to clarify, e.g., a point of customary law. Indeed, in proceedings in District, Customary or Native Courts, it is not unusual for the court, on its own, to call a witness it considers would help to resolve a disputed fact vital for deciding an issue.<sup>27</sup> However, a District Court, nay any court, must not call a witness in a manner which appears to assist a party establish his case or to use it as an engine to take over the conduct of the case. This is so even in the superior courts which, by virtue of section 200 of the Criminal Procedure Act, can call and

<sup>24</sup> 2003 edn., p.127

<sup>25</sup> Lenny Bruce, 1926-1966, Kenneth Redden, *Modern Legal Glossary*, 1983, in David Shrager and Elizabeth Frost (eds), *The Quotable Lawyer*, 1986, p. 159

<sup>26</sup> *Onyia v. State* (2008) 18 NWLR (Pt. 1118) 142 held 10.

<sup>27</sup> *Onwuama v. Ezeokoli* (2002) 9 NSCQR 233, held 2.



- a. examine any person as a witness or recall and re-examine any person already examined if his evidence appears to be essential to the just decision of the case;<sup>28</sup>
- b. not hearing or giving both parties equal hearing opportunity;
- c. obliging one party adjournment while denying the other in the same or similar circumstances;
- d. showing undue closeness with or paying regular visits to a party in the case;
- e. making uncomplimentary, disparaging remarks on a party. Such remarks give out the judge as ill-disposed to a particular party to the suit before him and causes genuine fear of impending injustice;
- f. showing hostility towards a party to the case, etc.

As to “equity”, it simply means fairness. It is a system of natural justice which allows for a fair judgment in a situation where the existing customary law may be unsatisfactory. Like justice, equity is the concept of moral rightness based on ethics, rationality and fairness. Equity would apply where customary law has left a lacuna or *casus omissus*, or where the applicable customary law rule is either repugnant to natural justice, equity and good conscience, or is incompatible directly or by necessary implication with a written law. Equity is therefore a matter of conscience and since different people have varying degrees of conscience, equity therefore has no uniform measure. This is what prompted John Selden to say:<sup>29</sup>

Equity is a roughish thing. For Law we have to measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a “foot” a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

Without equity it would be impossible to do justice, and so equity and justice go together. Equity in the sense of fairness has always been part and parcel of justice administration in our traditional settings and in the customary courts. Its more formal development was due to the desire to temper the rigidity and ameliorate the hardship which (common) law often caused. If justice is to be done, a sense of equity in the wide and popular meaning of fairness is indispensable in the administration of customary law by the customary courts. Herein lies the convergence of custom, justice and equity in the customary courts. In the administration of justice in accordance local custom, customary courts must ensure that they call in aid both justice and equity in the wide and popular sense of what is just and fair in each case.

<sup>28</sup> *Imhanria v. Nigerian Army* (2007) 14 NWLR (Pt. 1053) 76, held 6, 7.

<sup>29</sup> John Selden, 1584-1654, “Equity”, *Table-Talk*, 1689.