

# CUSTOMARY LAWS, PRACTICE AND PROCEDURE IN THE AREA/CUSTOMARY COURT, AND THE CUSTOMARY COURT OF APPEAL

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## **Introduction**

Before I commence, I would like to mention that the National Judicial Institute (N.J.I) organized a similar course in 1996 for newly appointed judges in Nigeria where I was requested to present a paper. As the participants are not the same, I shall rely substantially on that paper except where it has become necessary to effect modifications probably due to additional information or further developments of the law. Until recently, the common law was only acceptable to most Nigerians. However, with some awareness, customary law is becoming more acceptable nationwide. It is necessary to mention that the common law evolved from the custom of the English people.

Some researchers have opined that customary law regulates the lives of about 80% of Nigerians. And this is why it is being argued that Nigerian courts should enforce customary laws. Area Courts are creation of the states in the northern part of Nigeria while Customary Courts are creation of the states in southern part of Nigeria. Customary Courts of Appeal are interspersed in the country. It has been established in Plateau, Edo, Delta, Imo, Federal Capital Territory, Abia, Benue and Taraba States. Some other states have commenced action towards the establishment of Customary Courts of Appeal.

Each area and customary court has its law and rules governing its practice and procedure. In case of the Customary Courts of Appeal, common rules of court to be applicable to the courts in the country were ratified in 1995 and states that operate the system were advised to adapt it *mutatis mutandis*. That of Edo State is referred to as Customary Court of Appeal Rules, 2000. When adopted by the various states that have established the Customary Courts of Appeal, it is expected to remedy the former situation where the rules varied from state to state.

The multiplicity and non-availability of the laws and rules governing the area and customary courts in the thirty-six states and F.C.T. make it somehow herculean trying to fully address the topic of this paper as far as the two inferior courts are concerned. The Customary Court Rules, 1978 promulgated for the then Bendel State Customary Court are currently applicable to both Edo and Delta States. The provisions are on all fours with those of the former Western Nigerian Customary Court Rules from where new states carved out of the former Western Nigeria must have derived their Customary Court Rules. I believe that although there could be isolated differences in the provisions of the rules from one state to the other, such differences

are not in my opinion, likely to be fundamental enough to bring about noticeable differences in the practice and procedure in the various states as most of the courts are courts of coordinate jurisdiction in customary law matters.

For the purpose of this paper, I will rely substantially on Bendel State Customary Court Rules, 1978 now applicable to Edo and Delta States.

## **Customary Law**

Academics and jurists have described customary law in various ways. Okany<sup>1</sup> described customary law of a community as a 'body of customs and traditions which regulate the various kinds of relationship between members of the community.' Customary law has also been described by Park<sup>2</sup> to be 'used rather as a blanket description covering very many different systems.' He went further to state that "These systems are largely tribal in origin, and usually operate only within the area occupied by the tribe.' Elias<sup>3</sup> defined it as 'the body of rules, which are recognized as obligatory by its members' Obaseki, *J.S.C.* (as he then was) in the case of *Oyewumi v. Ogunesan*<sup>4</sup> defined customary law as follows:

The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transaction of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.

## **Validity of Customary Law**

Judges of the aforementioned three types of courts can practice customary law if and only if such customary laws are valid. The proviso to section 14 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990 has the following:

Provided that in case of any custom relied upon in any judicial proceeding, it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

However by the provision of Section 1 of the Evidence (Amendment) Decree No 61 of 1991, the Evidence Act has been made inapplicable in civil **causes or matters** before Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court in Nigeria. The inapplicability of the Evidence Act in the courts under discussion has not changed the application of the repugnancy doctrine in Edo and Delta States. For example, Section 24(a) of the Bendel State Customary Courts Edict, 1984 applicable to Edo and Delta States provides.

Subject to the other provisions of this Edict, a customary court shall administer.

the appropriate customary law specified in section 25 of this Edict in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force.

Similar provisions have been made in section 45(1) (Part IX) of the Bendel State Customary Court of Appeal Edict, 1984 (as amended) applicable to Edo and Delta States as follows:

The Customary Court of Appeal, in the exercise of the jurisdiction vested in it by this Edict as regards both substantive law and practice and procedure, shall administer, observe and enforce the observance of the principles and provisions of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any written law for the time be in force and nothing in this Edict shall deprive any person of the benefit of any such law.

The above provisions clearly show that for any custom to be valid, it must pass the above tests, which have been statutorily provided.

I wish to quickly state here that care must be taken not to overstretch the provisions of the above enactments. It is pertinent to note that the mere fact that a particular custom is no more in vogue in other communities or that the custom has fallen short of modern trend in the technologically advanced parts of the world or that it is inconsistent with any aspect of the common law should not be the determining factors as to whether or not a particular custom is legally valid.

### **Practice and Procedure in the Area and Customary Courts**

Before proceeding to examine the customary law practice and procedure in the area and customary courts, it is necessary to consider their customary law jurisdiction and the customary law to be administered. Section 20(1) of the Customary Courts Edict, 1984 (applicable to Edo and Delta States provides: ‘The jurisdiction and power of a customary court in civil causes and matters shall be as set out in the First Schedule to this Edict.’

The said First Schedule is as follows:

### **Jurisdiction of District Customary Courts and Area Customary Courts in Civil Causes and Matters**

## Limit of Jurisdiction and Power

<i>Types of Causes of Matters</i>	<i>Area Customary Courts</i>	<i>District Customary Courts</i>
1. Land, when the value does not exceed amount specified in columns hereof.	Unlimited	Unlimited
2. Matrimonial causes or matters	Unlimited	Unlimited
3. Causes or matters under customary law, whether or not the value of the debt, demand including dowry or damages is liquidated.	Unlimited	Unlimited
4. Guardianship and custody of children under customary law.....	Unlimited	Unlimited
5. Inheritance upon intestacy under customary law and grant of power to administer the estate on an intestacy under customary law.....	Unlimited	Not exceeding ₦50,000.00
6. Causes or matters under any law (other than customary law ) including bye-laws where the amount of debt, demand or damages does not exceed the amount indicated in the columns hereof....	Not exceeding ₦600,000.00	Not exceeding ₦50,000.00

For item 1 of the Schedule, it must be emphasized that although not specifically mentioned, for any customary court to have jurisdiction to adjudicate on land matters, such land must be governed by customary right of occupancy. The land therefore must not be in an area designated to be an urban area. This is provided for in Section 41 of the Land Use Act 1978 as follows:

An area court or customary court or other court of equivalent jurisdiction in a state shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Decree, and for the purpose of this paragraph, proceedings include proceedings for a declaration of title to a customary right of occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be given to this section.

In the case of *Samson Erhabor v. Godwin Onaghise* Appeal No. CCA/20A/95 of 18<sup>th</sup> April, 1996 (unreported) a judgment of Edo State Customary Court of Appeal, the Court pronounced *inter alia* at page 10 as follows:

Item 1 of the First Schedule made pursuant to Section 20(1) of Bendel State Customary Court Edict 1984 applicable to Edo State gives unlimited jurisdiction to the area and district customary court in respect of land in rural areas. Consequently, we hold that the Ugboko-Niro District Customary Court had jurisdiction to adjudicate on the claim now subject of this appeal. This is because the land in dispute being at Evbueghine Village is governed by customary right of occupancy.

For item 2 of the schedule, it should as well be stressed that although not specifically mentioned, the matrimonial causes or matters over which customary court can adjudicate must be those governed by customary law.

Item 3, 4 and 5 specifically provide for causes or matters under customary law. Causes or matters under items 6 fall under other law other than customary law. Although customary courts have jurisdiction to entertain such other matters, I will desist from considering them for the purposes of this paper because the topic of this paper does not encompass such other matters.

From the contents of the First Schedule to the Customary Courts Edict, 1984, it becomes manifest that the customary law jurisdiction of the customary courts and hopefully the area courts is quite wide.

In deciding which customary law to be administered, it has been provided in section 25 of the Customary Court Edict, 1964 that in land matters, the appropriate customary law shall be the customary law of the place where the land is situated.

In matters of inheritance, the appropriate customary law shall be the one applying to the deceased<sup>5</sup> Where both parties are not natives of the area of jurisdiction of the court or the transaction, the subject of the matter was not entered into in the area of jurisdiction of the court or one of the parties is not a native of the area of jurisdiction of the court and the parties agreed that their obligations shall be regulated by the customary law applying to that party, the appropriate customary law shall be the customary law binding between the parties<sup>6</sup>

In all other civil causes and matters, the appropriate customary law shall be the one prevailing in the area of jurisdiction of the court. It is appreciated that none of the judges undergoing this course is adjudicating on the area and customary court bench to be sufficiently conversant and knowledgeable in the practice and procedure prevailing in such courts.

In the area and customary courts, every civil cause or matter shall be commenced by a summons.<sup>7</sup> Application for a summons may be made by a written compliant or orally in person.<sup>8</sup> In the case of oral complaint, it is the duty of the clerk to prepare the summons on behalf of the complainant and the complaints are duly reflected in the summons. After paying the necessary fees, the summons is filed and thereafter the process shall be served or executed upon the person to whom reference is made therein by such officers as are authorized by law in that behalf.<sup>9</sup>

At the completion of the registry formalities, the process or other document could be served by handing the process or other document to the person to whom it is addressed<sup>10</sup> or by substituted service where personal service is not convenient.<sup>11</sup> The court shall not proceed to adjudicate upon any cause or matter which depends upon any process or other document having been served unless service is admitted by the person concerned or proved or deemed to have been effected.<sup>12</sup>

If neither party to a cause or matter appears when it is called on the return day, the court, unless there is some good reason for keeping it on the list, shall strike out the cause or matter on the list, the reason shall be recorded and a hearing date fixed.<sup>13</sup> If the plaintiff or the complainant in a cause or matter does not appear when it is called on the return day, the court, unless there is some good reason for keeping the cause or matter on the list, shall strike it out.<sup>14</sup> It has, however, been decided in *Ceekay Traders Ltd v. General Motors Co. Ltd*<sup>15</sup> that once a plaintiff was represented by counsel, he is deemed to be present in court. (See also *Sanni Kehinde v. Ogunbunmi & Ors.*<sup>16</sup> There is however a possible limitation to this as opined by Aguda<sup>17</sup> when he said:

Difficulties may, however, occur where in order to succeed, the evidence of the plaintiff is necessary. For example, in a claim for assault where the defence is one of consent. In such a case, if counsel for the plaintiff is unable to proceed with the case, it may be taken that the plaintiff is absent and has not appeared.

If the defendant in a civil cause or matter does not appear on the return day, the court, unless there is some good reason for adjourning the hearing shall, on proof of service, proceed in the absence of the defendant to hear and determine the cause or matter on the evidence of the plaintiff and his witness if any.<sup>18</sup> Any judgment or order obtained against any party in the absence of such party may, upon reasonable cause being shown, be set aside by the court upon such terms as the court may deem fit.<sup>19</sup>

### **Interlocutory Application**

Interlocutory Applications may be made by way of motion at any stage of the proceedings in a cause.<sup>20</sup> Except where the court considers it desirable and not unjust that a motion should be taken in the absence of any person likely to be affected, a motion shall be taken only after due notice has been served on other persons likely to be affected.<sup>21</sup>

It is necessary to note that this provision has been subject of abuse by several courts in this country and this has tended to dent the image of the judiciary in recent years. It has therefore become necessary at different fora of this nature to urge that power to make orders based on *ex-parte* application **should be sparingly used**.

### **Proceedings at the Hearing**

The claim shall be read out by the clerk to the defendant who shall be asked how he pleads to it and his answer shall be recorded. Where the defendant admits the claim, the court shall hear the statements of the parties and give its judgment. Where the defendant does not admit the claim, the plaintiff shall adduce evidence in support of this case. At the conclusion of the evidence on both sides, the court shall consider the whole evidence and give its judgment thereon. In every matter in which there is a dispute with respect to the appropriate customary law, the court shall clearly state in its judgment the appropriate customary law applicable to the cause or matter.<sup>22</sup>

### **Practice and Procedure in the Customary Court of Appeal**

The jurisdiction of the Customary Court of Appeal has been spelt out in section 282(1) of the Constitution of the Federal Republic of Nigeria 1999 as follows: ‘A Customary Court of Appeal of a state shall exercise appellate and supervisory jurisdiction in civil proceedings involving question of customary law.’

The states that have so far availed themselves of the constitutional provisions by establishing the Customary Court of Appeal are Plateau, Edo, Delta Imo, Federal Capital Territory, Abia, Benue and lately Taraba. I am told that arrangement for its establishment in some other states of the federation has reached advanced stages.

The actual interpretation of the provisions as regards the jurisdiction of the court has continued to receive the attention of the apex court – the Supreme Court.

In the case of *Osaretin Aimuaenmwosa v. Madam Edowaye Joshua*<sup>23</sup> the Edo State Customary Court of Appeal was of the view that the determining factor as to whether or not it had jurisdiction to entertain any appeal brought before it was whether or not the claim before the trial customary (for the purposes of this paper, the trial area and customary court) raised any issue involving questions of customary law.

This approach was, however, aborted by the Supreme Court in the case of *Ahmadu Usman v. Sidi Umaru*.<sup>24</sup> At page 397 of the judgment the court said *inter alia*:

The unlimited jurisdiction conferred by the constitution on the High Court is curtailed by section 242 conferring jurisdiction on the other two courts in respect of their areas of specialty. The area court possesses jurisdiction to administer customary law (including Islamic Law) generally. It is from this court that appeals go to any of the three superior courts that is, High Court, Sharia Courts of Appeal and Customary Court of Appeal. In my humble view, the superior court

to which the appeal goes would be determined by the nature of the question raised by the appeal.

If the appeal raises issues of general law, it goes to the High Court. But if it raises questions involving customary law, the appeal goes to the Customary Court of Appeal. To decide otherwise, hardly will any appeal ever get to the High Court from the area court as the latter court is enjoined to administer invariable only native law and custom simpliciter or Islamic law. I can hardly however visualize a case where any two of those three courts will have concurrent jurisdiction to entertain an appeal.

I believe it is necessary to state here that sections 242 and 247 of the 1979 Constitution referred to above are *in pari materia* respectively with section 277 and 282 of the 1999 Constitution. From the above judgment, what determines whether or not an appeal is competent before the Customary Court of Appeal is the issue(s) raised in the grounds of appeal and not the subject matter of the claim at trial area or customary court.

From experience on the Customary Court of Appeal Bench, it is my humble view that the above pronouncement is fraught with problems. These problems were sufficiently highlighted by me in a paper delivered at the All Nigeria Judges' Conference held in Kano in November, 1995.<sup>25</sup> Time and space will not permit me to dwell extensively here as I tried to do in that paper: On page 8, I tried to reason thus:

Suppose a decision in a case based on purely customary law was appealed against from the customary or area court to the Customary Court of Appeal with five grounds of appeal – two raising questions of customary law and three raising questions of general law. Following the decision in Usman's case, the Customary Court of Appeal should strike out the three grounds raising questions of general law and decide the two grounds raising questions of customary law. Assuming, the grounds struck out are the potent grounds and two grounds argued fail for want of merit, the appellant would have suffered incalculable injustice because he cannot go to another court with competent jurisdiction to relitigate the three potent grounds already struck out.

In the case of *Alhaji Umaru Abba Tukur v. Government of Gongola State*<sup>26</sup> the Supreme Court said:

If there is a court with jurisdiction to determine all the issues raised in a matter including the principal issue, it is improper to approach a court that is competent to determine only some of the issues. The incompetence of the court to entertain and determine the principal question is enough to nullify the whole proceedings and judgment as there is no room for half judgment in a matter brought before the court.

Faced with these two Supreme Court decisions, a Customary Court of Appeal, for example, with five grounds of appeal- two raising questions of customary law and three



raising questions of general law-would be in immense difficulties. If it decides to strike out the grounds of appeal that raise questions of general law and determines those that raise questions of customary law, its judgment may be classified as half judgment. If it decides all the grounds of appeal, it may be deciding beyond its jurisdiction. If it decides to strike out the entire appeal, the problems would not have in any way been mitigated because the same problems would arise if the appeal is brought before the High Court. This is because, as has been decided by the Supreme Court in *Usman's* case (supra) the High Court is not competent to hear grounds of appeal from area or customary court in any state that has established a Customary Court of Appeal if such grounds of appeal raised questions of customary law. That is predicated on the fact that the two courts where they coexist do not have concurrent jurisdiction.

This is just one of the problems. There are others which time and space will not permit me to examine here. This is why most practitioners in the Customary Court of Appeal are anxiously looking forward to when this debilitating frustration would be extinguished. That is when probably the Supreme Court gives a more liberal and less restrictive interpretation to the provisions of section 282 of the Constitution with the aim of allowing the Customary Courts of Appeal entertain all issues arising from appeals on claims based on customary law without undue emphasis on how the grounds of appeal are formulated.

It became necessary for me to attempt to expound the problems associated with the interpretation given to section 282 of the Constitution because it deals with the jurisdiction of the Customary Court of Appeal. It has been held in *Materi & Ors v. Dangaladima & Anor*,<sup>27</sup> that '...if the court is shown to have no jurisdiction, the result will be that the proceedings, however well-conducted, are a nullity, and any decision reached by the court is void *ab initio* and of no effect.'

I stated earlier in the course of this paper that efforts have been made to ensure that Customary Court of Appeal Rules in the county are substantially the same. I shall therefore rely on the provisions of the Edo State Customary Court of Appeal Rules 2000 in the course of this paper.

CT Every appeal shall be brought by notice of appeal which shall be lodged in the lower court within thirty days where the appeal is against a final decision and fourteen where the appeal is against an interlocutory decision. It shall be served on all other parties affected by the appeal.<sup>28</sup> The trial court then gives the appellant conditions of appeal but where the appellant finds such conditions onerous, he may apply to the Customary Court of Appeal, hereinafter called "the court" to vary the conditions of appeal.

The compilation and transmission of records of proceedings together with the exhibits to the court is the responsibility of the trial court. On receipt of the above, the court shall fix a date for the hearing of the appeal. The court thereafter would cause hearing notices to be served on the parties who would be directly affected by the appeal of the place and date of hearing.

The court may in its discretion allow the appellant to amend the grounds of appeal where the appellant so desires.

The court may enlarge the time provided by the Rules for the doing of anything to which the Rules apply upon such terms as it deems fit.<sup>29</sup> If on the day of hearing or at any adjournment of the appeal, the appellant does not appear and has not filed any brief, the appeal shall be struck out.<sup>30</sup> When an appeal has been struck out owing to non-appearance of appellant, the court may, if it thinks fit, and on such terms as it may deem just, direct the appeal to be re-listed for hearing.<sup>31</sup>

When an appellant dies after a notice of appeal has been filed by him, or after an appeal has been entered, his heir apparent in an appropriate case may, with leave of court, proceed with the appeal.<sup>32</sup>

If on the day of hearing or at any adjournment date the appellant appears, the court shall, whether the respondent appears or not, proceed to the hearing or further hearing and determination of the appeal, and shall give judgment according to the merit of the case. Where such appeal has been heard in default of appearance of the respondent and any judgment has been given therein adverse to the respondent, he may apply to the court to set aside such judgment and to rehear the appeal provided such an application is made within thirty days from the date of the judgment sought to be set aside.

The respondent may cross-appeal against any part of the judgment of the lower court within fourteen days of service on him of the appellant's notice and grounds of appeal, and the notice and grounds of the cross-appeal shall be served on the appellant or his legal practitioner before the hearing.<sup>33</sup>

It should be noted that no objection on account of any defect in the form of setting forth any ground of appeal shall be allowed unless the court is of the opinion that the ground of appeal is so imperfectly or incorrectly stated as to be insufficient to enable the respondent to enquire into the subject matter thereof to prepare for the hearing. In any case, where the court is of the opinion that any objection to any ground of appeal ought to prevail, the court may, if it thinks fit, cause the ground of appeal forthwith to be amended upon such terms and conditions, if any, as the court may deem just.<sup>34</sup>

On any appeal from a decision of a lower court, no objection shall be taken or allowed to any proceedings in such court for any defect or error which might have been amended by that court, or to any complaint, summons, warrants, or other process to or of such court for any alleged defect therein in substance or in form or for any variance between any complaint or summons and the evidence adduced thereof in such court. Provided, however, that if any error, defect, or variance mentioned in this Rule appears to the court at the hearing of any appeal to be such that the appellant has been thereby deceived or misled, it shall be lawful for court either to remit the case back to the lower court with directions to rehear and determine the same or to reverse the decision appealed from, or to make such other order for disposing of the case as justice may require.<sup>35</sup> These provisions are in line with the decision in *Ajayi v. Aina*.<sup>36</sup> where Francis J. pronounced among others as follows:

It is perhaps true that in a British court where legal precedents and forms are adhered to, an action for trespass would not be a bar to later action between the same parties for a declaration of title but it must be obvious that in the case of proceedings in a native court...great latitude must be given to and a broad interpretation placed upon native court cases and one may add parties and the judgment must be examined in other to determine what the native or customary court case was all about. The whole conception and result of the proceedings will show what the parties were fighting for, the matter upon which issues were joined even if technically framed in an inappropriate language from the standpoint of legal technocrats, and decision of the native or customary court on those issues.

The main implication of the foregoing is that in considering appeal from Area or Customary Court, the Judges of the Customary Court of Appeal should decide all matters according to substantial justice without undue regard to technicalities.

The customary law to be administered in the Customary Court of Appeal are same as those earlier mentioned while I was considering the customary laws to be administered by the Area and Customary Courts.

### **Proof of Customary Law**

Section 1(2) of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 was amended by Evidence (Amendment) Decree No. 61 of 1991. The amended sub-section now provides:

“This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply-

- (a) to proceedings before an arbitrator, or
- (b) to a field general court martial, or
- (c) to judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless the President, Commander-in-Chief of the Armed Forces or the Military Governor or Military Administrator of a State, by order published in the Gazette, confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory, Abuja or a State, as the case may be, power to enforce any or all the provisions of this Act.

Flowing from the above, the law is now settled that the Evidence Act is not applicable in civil causes or matters in or before any Area or Customary Court as well

as Customary Court of Appeal except there are specific legislation by President, Commander-in-Chief of Armed Forces or the State's Military Governor or Military Administrator otherwise conferring upon any of these power to enforce any or all the provisions of the Act. Consequently, proofs of customary law under section 14 and other relevant sections of the Act which have been orchestrated by various grades of courts in this country over the years have therefore ceased to apply to the said courts.

I personally regard this piece of legislation which made the Evidence Act inapplicable in civil matters in the aforementioned courts as a very welcome development. By my reasoning, this is an attempt to free our indigenous laws i.e. customary laws from the 'straight jacket' made for them by our erstwhile colonial masters.

Under the Evidence Act, **customary laws** were reduced to the status of facts which must be proved by evidence. It is submitted that a law, if it exists, remains a law and needs no proof because the courts in the area where the law exists are presumed to be seised of the law. It is also submitted that just as the common law needs no proof in common law countries, the customary law prevailing within the area of jurisdiction of Area and Customary Courts together with Customary Court of Appeal needs no proof before the said courts, Order X Rule 6(3) of the Bendel State Customary Court Rules, 1978 (applicable to Edo and Delta States) provides:

- 6(3) Where in any cause or matter before a Customary Court, any party wishes to rely on the customary law of the area of jurisdiction of the court, there shall be no need to prove the customary law before the court.

Although the above provision appears to have been in conflict with Section 14 of the Evidence Act when it was applicable to Customary and Area Courts, it is now, in my considered view, a provision which is quite relevant as a result of the inapplicability of the courts in civil proceedings. The qualifications of the Judges of Area and Customary Courts as well as Customary Court of Appeal make it mandatory for them to be versed in the customary laws and usages prevailing in their area of jurisdiction. Section 6(b) of the Customary Courts Edict, 1984 applicable to Edo and Delta States provides:

...a person shall not be qualified to be appointed as a President of District Customary Court or a member of an Area or District Customary Court unless he is literate and versed in the customary laws and usages prevailing in the area of jurisdiction of the Customary Court of which he is a president or member and is of good character.

The Constitution of the Federal Republic of Nigeria 1999. Provides in section 281 (3) as follows:

... a person shall not be qualified to hold the office of a president or a judge of a Customary Court of Appeal of a State unless-

- (a) he is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and in the opinion of the National

Judicial Council he has considerable knowledge and experience in the practice of customary law.

It can therefore be seen from the foregoing that apart from the normal legal qualification prescribed for the Judges of Superior Courts, there is an additional qualification prescribed for the Judges of the Customary Court of Appeal i.e. considerable knowledge and experience in the practice of customary law.

If this present situation is allowed uninterrupted, I can visualize a situation where customary law would mature through judicial pronouncements and law reporting. There is also the likelihood that in the long run, there might be consensus on the applicability of some customary laws in many parts of the country. As soon as the commonly acceptable customary laws are found and harnessed by the superior courts, this country would then begin to see the dawn of the development of its own 'common law.'

The major setback that might be experienced is the result of the absence of Customary Court of Appeal in some states. The growth of customary law may stultified because on appeal to the various High Courts, the customary law in those states would again be subject to the whims of the Evidence Act which hindered their growth in the past. It is therefore hoped that the states that have not established the Customary Court of Appeal would endeavour to do so in not too distant future.

For the avoidance of doubt, it should be noted that the Evidence Acts has been made inapplicable in the courts mentioned in **civil causes or matters**. In other words, the Act is applicable in the courts in criminal causes or matters.

This development should not precipitate any anxiety or apprehension as is usually associated with most innovations. It should be noted that our legal system has in-built checks which are aimed at curbing the excesses of any erring court. The country's legal system recognizes the principle of *stare decisis* by which precedents are authoritative and binding. In addition, it appears that the laws establishing the Area and Customary Court as well as Customary Courts of Appeal nationwide made provision that for any customary law to be valid, it must pass the repugnancy test. These are some of the in-built checks.

Before I end this little piece of work, I wish to emphasize the need for academics and jurists to begin to think of how to drop the toga of crusader of the growth of English Common Law to the detriment of our customary law. Rather, they should be crusaders of the growth of our customary law. This is now the trend in most parts of the world.

The Chief Justice of Malaysia, Rt. Hon. Dato' Ben Chin in his speech of 13<sup>th</sup> September, 1999 at the opening ceremony of the 12<sup>th</sup> Commonwealth Law Conference held in Kuala Lumpur, Malaysia said *inter alia* at page 3 as follows:

In Malaysia, like other commonwealth countries, we apply the English Legal System. While the bulk of the laws are statutory, the court in Malaysia also applies the common law of England. But in applying the common law of England, we do not follow it blindly, because by law, we have also to consider the Malaysian circumstances, the culture, the customs

and religions of the various races in Malaysia. So, it is not surprising if, on a given subject, a Malaysian court may come to a different conclusion from an English court.

One is looking forward to the day the Nigerian courts would disagree with principles of the common law that are in conflict with aspects of our customary law. Another voice was lent to the need to promote our customary laws by Hon. Justice (Dr) G.W. Kanyeihamba of the Supreme Court of Uganda. In his paper titled 'Criminal Law Administration-Historical and Institutional Constraints' presented at the Commonwealth Magistrate and Judges Conference held at Edinburgh, Scotland from 10<sup>th</sup> – 15<sup>th</sup> September, 2000 stated on page 12-13 as follows:

The non-recognition of some of the finer points of African customary law was based partly on ignorance and partly on the incidents of imperialism and colonialism. However, the main reason for denying African customary law its sanctity and value was colonialism. The policy of colonial rule was based on the theory of the superiority of the imperial race and its culture and laws over the subjugated peoples and their own culture and laws...If the later were to be allowed to believe in their own culture and values and deem them to be equal with those of their masters, they could challenge the right of the imperialism to govern them.

The learned jurist gave example on page 14 of his paper where colonial masters forced African wives to give evidence in criminal cases against their husbands as unlike in their own countries of origin where wives are not compellable witness.

We cannot now blame the present low level of the development of our customary law on our colonial masters. Nigeria became independent of the colonialist forty-two years ago. The blame, in my view, should go to the practitioners at the Bar and on the Bench who still regard the laws as less prestigious and maybe primitive.

Finally, I must congratulate the National Judicial Institute (N.J.I) for organizing this course. I thank you all for listening.

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