

ACCESS TO JUSTICE AT THE GRASSROOTS:
EXAMINING THE CRIMINAL JURISDICTION
OF CUSTOMARY COURTS

I must begin by expressing profound thanks to the organizers of this conference, that is, the National Judicial Institute, for affording me the opportunity to present a paper on this topical issue. Unfettered access to justice in a law court is imperative in any modern democracy. It is therefore not surprising that Section 17(2) (e) of the Constitution of the Federal Republic of Nigeria, 1999 provides as follows:

“the independence, impartiality and integrity of courts of law
and easy accessibility thereto shall be secured and maintained.”

This ideal contained in Chapter II of the extant Constitution dealing with Fundamental Objectives and Directive Principles of State Policy was not the norm in primordial societies where might was right. During the Dark Ages, for instance, man had no clear notion of justice. The only means of redressing a wrong was by sheer brute force. Consequently, the innocent could be overpowered by his more powerful aggressor. However, in contemporary times, courts of law now exist as havens of refuge for those who are oppressed, victimized or wrongly deprived of their rights. It follows, therefore, that all categories of judges ought to fulfil the vision of judgeship envisioned by Aristotle when he described the judge as “living

justice” or “animate justice.”¹ No Court must shirk its responsibility to enforce the law for the benefit of the rich and poor alike. It is salutary to note that the court has taken the progressive view that it was unfair to predicate a person’s legal right on his financial ability or economic status.²

The court ought to provide a remedy whenever there is a violation of a public or private right. This is summed up in the Latin maxim “Ubi jus ibi remedium.” As Karibi Whyte J.S.C. aptly observed:

“I think it is erroneous to assume that the maxim ‘ubi jus ibi remedium’ is only an English common law principle. It is a principle of justice of universal validity couched in Latin and available to all legal systems involved in the impartial administration of justice.”³

In Longman’s Dictionary of Contemporary English (3rd Edition), a definition of “grassroots ” is given as “the ordinary people in an organization rather than the leaders.” In other words, grassroots refer to the poor and powerless members of the society – most of whom are to be found in the rural areas. Their access to justice must not be fettered. As the Customary Courts are the nearest to them, these grassroots’ courts must exercise civil and criminal jurisdictions.

¹ See Nichomachean Ethics 1132a

² See the U.S. Supreme Court judgment in Griffin v. Illinois (1956)

³ Aliu Bello & Ors. v. A.G. Oyo State (1986) 5 NWLR (Pt.45) 828

DEFINITION OF OTHER TERMS:

Having said a few words about “Access to Justice ” and proffered a brief definition of “grassroots,” I consider it appropriate to attempt brief definitions of the two other terms discernible in the topic assigned to me. These are “Criminal Jurisdiction” and “Customary Courts.”

Criminal Jurisdiction Defined:

Tersely put, “criminal jurisdiction” means the power conferred on a court by statute to try criminal cases. The question that arises therefore is what is a crime?

Smith and Hogan in their book on Criminal Law⁴ posited that because of the difficulty of defining the criminal quality of an act, most writers and the courts focus on the nature of proceedings which may follow from the commission of a crime. And as Lord Atkin observed in

Proprietary Articles Trade Assn. v. A.G. for Canada⁵:

“The criminal quality of an act cannot be discerned by intuition, nor can it be discovered by reference to any standard but one:
is the act prohibited with penal consequences? ”

It suffices to state that crimes are wrongs which are sufficiently injurious to the public and include heinous crimes like murder, arson, rape, armed

⁴ See Smith and Hogan Criminal Law (2nd Edition) at p.17.

⁵ (1931) A.C. 310 at p. 314.

robbery, incest, as well as less serious offences like assault, traffic offences and other breaches of statutory duties. The definition proffered by Professor Adeyemi⁶ is quite apposite notwithstanding its prolixity. According to him:

“A crime is an act or omission which amounts on the part of the doer or ommitter, to a disregard of the fundamental values of a society thereby threatening and/or affecting the life, limb, reputation and property of another or other citizen (s), or the safety, security, cohesion and order (be this political, economic or social) of the community at any given time to the extent that it justifies society’s effective interference through and by means of its appropriate legal machinery.”

CUSTOMARY COURTS DEFINED:

Customary Courts are grassroots’ courts established under appropriate statutes to administer customary law in the main. However, criminal jurisdiction could be conferred on them as is the case with virtually all Customary Courts in Southern Nigeria. Edo State, like Delta State, operates a tripartite system of Customary Courts with the Customary Court of Appeal at the apex. However, in the South-Western States of Oyo, Ogun, Oshun, Ekiti, Ondo and Lagos where there are no Customary Courts of Appeal, a one-tier system is discernible. In the Northern States, Area Courts deal with

6 See A.A. Adeyemi “The Criminal Process as a Selection Instrument for the Administration of Criminal Justice.” in Nigerian Criminal Process ed. A. A. Adeyemi.

customary law. Edo and Delta States have District and Area Customary Courts in addition to the Customary Court of Appeal. While the District and Area Customary Courts are inferior courts of record, the Customary Court of Appeal is a superior court of record.⁷

The distinction between a District and an Area Customary Court is that whereas a District Customary Court is manned by three laymen, the President of an Area Customary Court must be a legal practitioner of at least five years standing in Edo State while in Delta State, the legal practitioner President must be of at least seven years standing. Both District and Area Customary Courts exercise civil and criminal jurisdictions.

As stated earlier on, the Customary Court of Appeal is at the apex of the Customary Courts system. This apex court now exists in Edo, Delta, Abia, Ebonyi, Imo, Benue, Plateau, Nassarawa, Kaduna, Taraba and the Federal Capital Territory, Abuja. Plans are afoot to establish this court also in Ondo and Osun States.

However, in consonance with the extant Constitution of the Federal Republic of Nigeria, the Customary Court of Appeal has no criminal jurisdiction.⁸

⁷ See Section 6 (3) and (5) of the Constitution of the Federal Republic of Nigeria 1999 where the Customary Court of Appeal is classified as one of the six superior courts of record. Others are the Supreme Court, Court of Appeal, Federal High Court, and High Court of a State and the Sharia Court of Appeal of a State.

It will be argued subsequently in this paper that it is desirable for the Customary Court of Appeal to exercise criminal jurisdiction since the lower Customary Courts exercise same.

CRIMINAL JURISDICTION OF CUSTOMARY COURTS.

Although Sharia Courts like Area Courts in Northern Nigeria can in the broad sense be regarded as Customary Courts and also exercise criminal jurisdiction, Sharia Courts will not be considered in this paper. This is because their primary focus is islamic law which strictly speaking is not customary law.

A clear distinction between customary law and islamic law should be made here. While customary law is a body of indigenous binding customs or “a mirror of accepted usage,”⁹ islamic law is not indigenous to any ethnic group in our country, but an alien religious law derived from the provisions of the Holy Koran and practice of the Prophet (the Sunna).

Unwritten customary criminal law has been abolished throughout Nigeria. The case of Aoko v. Fagbemi¹⁰ is instructive here and is consistent with Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 which provides as follows:

⁸ See Section 282(1) of the 1999 Constitution which provides that “A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.”

⁹ Bairamian F.J. in Owonyin v. Omotosho (1961) 1 All N.L.R. 304 at 309.

¹⁰ (1961) 1 All N.L.R. 400

“Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a law of a state, any subsidiary legislation or instrument under the provisions of a law”

The facts of the case of Aoko v. Fagbemi may be briefly stated. The applicant, Taiwo Aoko, was convicted for committing adultery by living with another man without judicial separation. She was fined £1.10s or a month’s prison sentence in the alternative. She was also ordered to pay £5 as compensation and £1.7s as costs. She filed an application before the High Court to quash the conviction and to set aside the consequential order made by a Customary Court. It was held that the Customary Court erred in law as the conviction violated the applicant’s right as guaranteed by the Constitution. It must, however, be noted that although adultery is not a criminal offence in Southern Nigeria, it is a criminal offence in the North.

The question may then be asked as to why Customary Courts should continue to exercise criminal jurisdiction when customary criminal law has been abolished. The answer is to be found in the extant Nigerian Constitution itself. We have earlier noted that Customary Courts are the creation of statutes. Section 6(4) (a) of the 1999 Constitution of the Federal

Republic of Nigeria empowers the National Assembly or any House of Assembly of a State to establish other courts other than a superior court of record, with subordinate jurisdiction to that of a High Court, and to determine their jurisdiction.

Before the decision of the Court of Appeal in Patrick Okhae v. The Governor of Bendel State & 4 Others,¹¹ the Customary Court of Appeal of Bendel State (now Edo and Delta States) exercised appellate jurisdiction in criminal matters emanating from the lower Customary Courts. However, since the Patrick Okhae's case, the Customary Court of Appeal in Edo and Delta States no longer exercise appellate jurisdiction in criminal cases over the lower Customary Courts. The case is significant as it specified the basis for conferring criminal jurisdiction on the lower grades of Customary Courts in the then Bendel State. It is important to set out the facts of the case which originated from the Federal High Court, Benin where the applicant had filed an application pursuant to Section 42 of the 1979 Constitution for the enforcement of his fundamental right to fair hearing. The applicant had been charged with the offence of stealing under the Criminal Code Law of Bendel State before the Area Customary, Ekpoma where he was granted bail. The case was still pending when the aforesaid application was filed wherein the applicant contended as follows:

¹¹ (1990) 4 NWLR (Pt.144) 327

1. The Customary Court, Ekpoma, had no jurisdiction to hear and determine criminal causes and matters.
2. That the Customary Court of Appeal, Bendel State, also had no criminal jurisdiction in criminal cases and matters.
3. That in the event of his conviction by the Area Customary Court, Ekpoma, his right of appeal will be eroded by his inability to appeal therefrom to the Customary Court of Appeal.
4. That even if the said Customary Court of Appeal had appellate jurisdiction in criminal matters, the court would still not be validly constituted because, as of then only one judge constituted the court.

In the course of proceedings in the Federal High Court, it became necessary, to refer to the Court of Appeal under Section 259(2) of the 1979 Constitution, (which enjoined that any question as to the interpretation of the Constitution involving a substantial question of law, should be referred to the Court of Appeal) the following questions

inter alia:

- (i) Whether in view of sections 224 and 247(1) of the Constitution of the Federal Republic of Nigeria 1979 (as amended) the Customary Court of Appeal of a State was competent to

exercise appellate and supervisory jurisdiction in criminal causes and matters.

- (ii) Whether in view of Section 248 of the Constitution of the Federal Republic of Nigeria 1979 as amended and having regard to the provisions of Sections 214, 226, 232, 233 and 243 of the same Constitution, a Customary Court of Appeal of a State can be properly constituted by a single Judge sitting as Customary Court of Appeal of that State.

The Court of Appeal held that since the Customary Court of Appeal under Section 247(1) of the 1979 Constitution (now Section 282(1) of the 1999 Constitution) had only “appellate and supervisory jurisdiction in civil proceedings involving questions of customary law,” it had no jurisdiction whether original or appellate – in criminal causes or matters.

But the Court of Appeal clearly expounded the jurisdiction of the lower Customary Courts in criminal causes or matters per Ogundare J.C.A. (as he then was) at pages 353 – 364 as follows:

“.... I need to say a few words on the contention of the learned counsel for the applicant on the issue of jurisdiction in criminal causes or matters conferred on Customary Courts. Section 6(5) (h) empowers the House of Assembly of a State to establish ‘ such other courts as may be authorized by law to

exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.’ Such courts are of course subordinate to the High Court. ... {The House of Assembly} has power to confer on a court established by it pursuant to Section 6 (5) (H) jurisdiction, whether original or appellate, in criminal causes or matters. The only limitation there may be to this power is that where jurisdiction is conferred on such a court in criminal matters there must be given to any person charged before such a court the right to be represented by a legal practitioner of his choice so as to bring the law creating the Court in line with section 33 (6) (c) of the Constitution. We understand that Section 29(3) of the Customary Courts Edict No. 2 of 1984 has been amended to bring it in line with the Constitution. This is as it should be.”

On the composition of Customary Courts generally, the Court of Appeal had this to say:

“Customary Courts, like their precursors, the native courts, are essentially multi-member courts, especially when performing appellate functions, although such courts had in the past been manned by single judges who were legal practitioners and possessed both original and appellate jurisdiction.”

Okhae's Case has thus laid to rest whatever doubts there may be on the propriety of a State House of Assembly vesting criminal jurisdiction on a Customary Court in so far as such a court is not a Customary Court of Appeal.

OFFENCES COGNIZABLE IN CUSTOMARY COURTS

It has been stated earlier on that Customary Courts are the creation of statutes. Such statutes invariably specify the offences cognizable in these genre of courts. Rules which must be used as guides by these courts are also provided to checkmate arbitrariness. For example, the Bendel State Customary Courts Edict No. 2 of 1984 (applicable in Edo and Delta States) created both Area and District Customary Courts while the Customary Courts Rules, 1978 regulate both civil and criminal proceedings.

Apart from capital offences, Customary Courts in Edo State try virtually all the other offences contained in the Criminal Code subject only to specified limits in respect of powers to impose punishment as contained in the Second Schedule to the Customary Courts Edict, 1984. Indeed, Section 21(1) of the Edict provides as follows:

“A customary court shall have jurisdiction to try and determine criminal cases and to impose such punishment therefor as are prescribed in the second schedule to this Edict.”

The said second schedule as amended by the “Increased Jurisdiction of Area and District Customary Courts Order 2000 ” is set out as follows:

S/NO.	TYPE OF OFFENCES	AREA CUSTOMARY COURT	DISTRICT CUSTOMARY COURT
1.	Where any person is charged with doing any act or with omitting to do any act required under any written law.	Not exceeding seven years imprisonment or a fine not exceeding N100, 000.00	Not exceeding one year imprisonment or a fine not exceeding N5, 000.00
2.	Contempt of Court committed in the face of the Court	Not exceeding 14 days imprisonment or N20.00 fine	Not exceeding 7 days imprisonment or N10.00
3.	Statutory offences as may be provided in the bye-laws	As provided in the bye-law	As provided in the bye-law

In addition to the various offences contained in the Criminal Code and traffic offences, the Bendel State Customary Courts Edict, 1984 (applicable in Edo and Delta States) contains some offences which are cognizable in the Customary Courts. They are reproduced hereunder.

“56.(1) Any person who –

- (a) exercises or attempts to exercise judicial powers vested in a customary court, except in accordance with the provisions of any enactment or this Edict, or

- (b) sits as a member of such court without due authority shall be liable on conviction before an area customary court to a fine of two hundred naira or imprisonment for twelve months or to both such fine and imprisonment.
- (2) Any person, other than a member of a customary court, adjudicating as an arbitrator upon any civil matter in dispute (other than a petition for divorce) where the parties thereto have agreed to submit the dispute to his decision shall not be regarded as exercising judicial powers for the purposes of paragraph (a) of Subsection 1 of this Section.
- (3) No prosecution under this Section shall be instituted without the consent in writing of the Attorney –General.
57. Any person who -
- (a) assaults, obstructs, molests or resists, or
 - (b) aids or incites any other person to assault, obstruct, molest, or resist, any person acting or proceeding to act in the execution of his duties under the provisions of Section 38 of this Edict shall be guilty of an offence and shall be liable on conviction to a fine of one hundred naira or to imprisonment for six months or to both such fine and imprisonment.

58. (1) No fees or fine in excess of those authorized by or pursuant to this Edict or any other written law shall be demanded or exacted from any person in respect any cause or matter in customary court.
- (2) Any member, officer or servant of a customary court who contravens the provisions of subsection (1) of this section shall be guilty of an offence and shall be liable on conviction to a fine of one hundred naira or to imprisonment for six months or to both such fine and imprisonment.
- (3) The court may order any amount exacted in excess to be refunded to the person entitled thereto.
- (4) If default shall be made by any person against whom an order to refund has been made under subsection (3) of this section, the amount ordered to be refunded may levied by distress and, in default of sufficient distress the person defaulting may be committed to prison for any term not exceeding six months in addition to any sentence imposed under the provisions of subsection (2)
59. (1) Any member or officer or servant of any customary court who accepts, claims or obtains, for himself or for any other person, any gratification, advantage, bribe or reward whatsoever, whether in money or otherwise, for –

- (a) doing or forbearing to do any act which he is authorized or required to do in exercise of his jurisdiction, authority or function as a member, officer or servant of a customary court, as the case may be;
- or
- (b) corruptly showing favour or disfavour to any person; shall be guilty of an offence.
- (2) Whosoever -
- (a) gives or offers; or
- (b) accepts or obtains, or
- (c) agrees to give or offer or accepts, or obtain for any other person any gratification, advantage, bribe or reward whatsoever whether in money or otherwise, for inducing by any corrupt or illegal means or by corrupt personal influence any officer or any servant of any customary court –
- (i) to do or to forbear to do any act which the said member, officer or servant, as the case may be, is authorised to do in exercise of his jurisdiction, authority or function; or
- (ii) to show favour or disfavour to any person shall be guilty of an offence.

(3) Any person convicted of an offence under this section shall be liable to such penalty as may be prescribed for such offence under the Criminal Code Law of the State.

60. Any person who -

- (a) omits to produce or deliver up a document on the lawful order of a customary court; or
- (b) refuses to answer any question lawfully asked by a customary court; or
- (c) intentionally interrupts the proceedings of a customary court at any stage,

shall be guilty of an offence and shall be liable on conviction to a fine of fifty naira or imprisonment for three months or to both such fine and imprisonment.

61. Any person who, without reasonable cause or excuse, fails to obey any valid summons issued under the provisions of section 38 of this Edict shall be arrested and brought before the customary court issuing such summons or before such other court as may have jurisdiction over such person and shall be liable to a fine of ten naira or in default of payment of such fine to imprisonment for seven days.

62. Any person who without reasonable cause or excuse refuses to give evidence on being required so to do by a customary court under the

provisions of section 39 of this Edict shall be liable to a fine of ten naira or imprisonment for seven days.

63. Any person who in any proceedings before a customary court gives evidence, whether on oath or otherwise, which he knows to be false or believes to be false or does not believe to be true shall be liable on conviction to a fine of four hundred naira or to imprisonment for a period of two years or to both such fine and imprisonment.

64. Any person who, with intent to defeat, obstruct or pervert the course of justice in any cause or matter in a customary court -

- (a) causes any person to delay in giving or to refrain from giving evidence before the court; or
- (b) attempts wrongfully to interfere with or influences a witness whether before or after that witness has given evidence in connection with such evidence ; or
- (c) prevents any person from giving evidence before the court, shall be guilty of an offence and shall be liable on conviction to a fine of one hundred naira or to imprisonment for six months or to both such fine and imprisonment.

65. Any clerk or member of a customary court who shall knowingly render false returns of the case tried or the penalties imposed by such court shall be guilty of an offence and shall be liable on conviction to a fine of two

hundred naira or to imprisonment for twelve months or to both such fine and imprisonment.

66. Any person being charged in accordance with this Edict or rules made under section 68 of this Edict with the duty of recording the proceedings of a customary court who knowingly makes a false record of the proceedings of the court shall be guilty of an offence and shall be liable on conviction to a fine of two hundred naira or to imprisonment for twelve months or to both such fine and imprisonment.

A careful look at these offences which in the main deal with malfeasance or non-feasance of court officials, witnesses and litigants would show that they are intended to enhance the quality of criminal justice delivery in Customary Courts. It is, however, suggested that laughable or ridiculous monetary fines provided in lieu of imprisonment be jacked up to reflect contemporary inflation. Failure to reflect reasonable fines may be counter-productive as Customary Court judges might be tempted to impose custodial sentences in lieu of the ridiculously low fines.

CRIMINAL PROCEDURE IN CUSTOMARY COURTS

The machinery for criminal justice administration in Customary Courts embodies Laws and Rules which have been carefully fashioned out for bringing to justice persons who have committed an infraction of any provision of the Criminal Code subject to limits in respect of punishments

provided for by the relevant laws. These Laws and Rules also guide Customary Courts while trying offences contained in the Edict which have been set out in this paper or whenever there is a breach of any of the bye-laws of the various Local Government Councils.

Under the Bendel State Customary Courts Rules, 1978 (applicable in Edo and Delta States) and which are in pari materia with the Old Western Nigeria Customary Court Rules, every criminal cause or matter shall be commenced by a summons. Provisions are also made for bail, pleas, amendment of charges, joint-charges, presence of an accused person at a criminal trial etc. Indeed, criminal procedure in Customary Courts is similar to a trial in the Magistrates' Courts. Customary Courts adopt the adversary system like the Magistrates' Courts and do not investigate offences in Court. Their role is limited to trial. As Bates J. remarked in the case of Muhamadu Duriminia v. C.O.P.¹² "A trial is not an investigation and investigation is not the function of the court."

In Edo and Delta States, while the District Customary Courts try minor offences, the jurisdiction of an Area Customary Court is the same as that of a Chief Magistrate in criminal matters.

An important issue worth considering in connection with criminal procedure in Customary Courts is the extent to which these courts are bound

¹² (1962) N.N.L.R. 70

by provisions of the Evidence Act and the Criminal Procedure Act/Law.

Sub-section 2 paragraph © and sub-sections 3 and 4 of Section 1 of the Evidence Act, 1990 (as amended) are very relevant in this respect. They are accordingly set out hereunder:

“(2) 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: -

© 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.

(3) In judicial proceedings in any criminal cause or matter in or before an Area Court, the court shall be guided by the

provisions of this Act and in accordance with the provisions of the Criminal Procedure Code Law.

(4) Notwithstanding anything in this section, an Area Court shall, in judicial proceedings in any criminal cause or matter, be bound by the provisions of sections 138, 139, 140, 141, 142 and 143 of this Act.”

It is plausible to argue that by virtue of Section 1(2) © of the Evidence Act, Customary Courts are bound to apply the Act in criminal causes or matters as the exclusion provided therein merely relate to civil proceedings. Furthermore, sub-section 3 of Section 1 provides that an Area Court alone shall be guided by the provisions of the Evidence Act. No reference is made therein to a Customary Court. The better view, however, is that since Area Courts in Northern Nigeria are the equivalents of Customary Courts in Southern Nigeria, sub-sections (3) and (4) of Section 1 of the Evidence Act should apply mutatis mutandis to both the Area Courts and Customary Courts. My view is that the drafters of this sub-section were oblivious of the fact that Customary Courts in Southern Nigeria in addition to their civil jurisdiction also exercise criminal jurisdiction. Consequently, Customary Courts in Southern Nigeria like the Area Courts in the North are only bound by the provisions of sections 138, 139, 140, 141, 142 and 143 of the

Evidence Act. They are merely to be guided by the other provisions of the Act.

It is salutary to note that the Bendel State Customary Court Rules, 1978 made ample provisions for the applicability of important rules of evidence by providing for evidence to be on oath or affirmation, the evidence of a child not given on oath, best evidence, evidence of character, corroboration etc.

It is also my view that any Customary Court in Southern Nigeria trying a criminal cause or matter is to be guided by the provisions of the Criminal Procedure Law of the State. Access to justice in Customary Courts are better guaranteed when these courts are merely guided by and not bound by the provisions of the Evidence Act and the Criminal Procedure Law. Even the Supreme Court now deprecates rigid adherence to technicalities. In Gwanto v. The State¹³, the Supreme Court per Eso J.S.C. observed as follows:

“The court is more interested in substance than mere form. Justice can only be done if the substance of the matter is considered.

Reliance on technicalities leads to injustice.”

¹³ (1983) 1 S.C. N.L.R. 142 at p.160.

RIGHT TO FAIR HEARING:

This cannot be compromised by any Customary Court hearing either a criminal or civil case. It is in fact a constitutional requirement for adjudication. As regards criminal proceedings, Section 36 (4) of the Constitution of the Federal Republic of Nigeria provides as follows:

“Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal.”

Fair Hearing is predicated on the rules of natural justice which dictate that no man should be condemned unheard and that every judge must be free from bias. Its very essence is to ensure fairplay.

The Bendel State Customary Court Rules, 1978 (applicable in Edo and Delta States) have ample provisions facilitating fair hearing during criminal proceedings. For example, it is provided under Order IX Rule 1 that the subject of a charge shall be read out by the clerk to the accused person, who shall be asked how he pleads to it, and his answer shall be recorded. It is further provided under this rule that if an accused person cannot or will not answer directly when called upon to plead, the court shall cause to be entered a plea of not guilty on his behalf. Under Rule 9(1)

of the same Order, an accused person shall be present in court during the whole of his trial.

By Section 36(6) of the 1999 Constitution, an accused person is entitled to be informed promptly in the language that he understands and in detail of the nature of the offence. He must also be given adequate time and facilities for the preparation of his defence. The Section further provides that an accused person may either defend himself in person or by legal practitioners of his own choice. Under the same Section, an accused person is entitled to have without payment, the assistance of an interpreter if he cannot understand the language used at the trial. These are mandatory provisions, the breach of which would render the entire proceedings a nullity. Oputa J.S.C. in Josiah v. State¹⁴ emphasized the consequences of a breach of the fair hearing provisions in the 1979 Constitution in these words:

“Section 33 of our 1979 Constitution deals with fair hearing and then when it uses the expression ‘he had been tried’ this must necessitate, or imply that at the trial there was a fair hearing. Where, as in this case, there was no such fair hearing, the trial is vitiated or nullified.”

¹⁴ (1985) 1 N.W.L.R. (Pt.1) 125 at 141.

Some State Edicts/Laws have provisions barring legal practitioners from appearing in Customary Courts not presided over by legal practitioners.

Such provisions are null and void having regard to Section 36 (6) © of the 1999 Constitution which provides that an accused person has the right to be represented by a legal practitioner of his choice.

APPEALS FROM CUSTOMARY COURTS IN CRIMINAL MATTERS

The present position in Edo State (and other states which have Customary Courts of Appeal) whereby appeals from the lower Customary Courts go to the High Court is most unsatisfactory. As mentioned earlier on, the Edo State Customary Court of Appeal exercised appellate jurisdiction in criminal matters emanating from the lower Customary Courts until the decision in Patrick Okhae's case.¹⁵ The 1999 Constitution of the Federal Republic of Nigeria ought to be amended to provide appellate jurisdiction for the Customary Court of Appeal in criminal matters emanating from the lower Customary Courts. I cannot do better than quote the views of Hon. Justice J.I. Onuh in this regard when he stated as follows:

“Supporters of the extension of the jurisdiction of the Customary Court of Appeal, to cover minor offences and contravention cases being handled by the Customary Courts, argue that it is an anomaly

¹⁵ Supra. Note 11.

that while Customary Courts can be conferred with criminal jurisdiction over minor criminal cases, the Customary Court of Appeal, manned by three Judges trained as legal practitioners, cannot be trusted to hear such cases. There is need for a serious judicial control more than the one permitted by the Constitution (See Section 282 supra to be precise) by the Customary Court of Appeal over the Customary Courts. A situation whereby appeals from Customary Courts are sent to the Magistrate or the High Court does not enhance the development of the Customary Court System. The Constitution needs to be amended to allow the Customary Court of Appeal of a State hear appeals from Customary Courts in minor criminal cases or matters or contravention cases. This is a legitimate and reasonable demand ¹⁶,

I need only add that the qualifications for the appointment of a Judge of a Customary Court of Appeal and a High Court Judge are similar. Thus, Section 281(3) of the 1999 Constitution provides as follows:

“Apart from such other qualifications as may be prescribed by a law of the House of Assembly of the State, a person shall not be

¹⁶ See the views of Hon. Justice J.I. Onuh, President, Customary Court of Appeal, Abia State in his paper titled “Customary Laws: Practice and Procedure In Customary Courts” presented at the 2000 Conference of Judges of the Lower Bench at Asaba, Delta State.

qualified to hold the office of a President or of a Judge of a Customary Court of Appeal of a State unless –

- (a) He is a legal practitioner in Nigeria and he 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.”

This is the only arm of the provisions resorted to by most States where the Customary Court of Appeal has been established. The qualifications for the appointment of a High Court Judge under the extant Constitution of the Federal Republic of Nigeria are not more exacting.

PRESERVING THE CRIMINAL JURISDICTION OF CUSTOMARY COURTS:

There have been overt and covert moves by some persons and organizations to remove the criminal jurisdiction of Customary Courts. They have woefully failed and would continue to fail in view of the importance of Customary Courts in criminal justice delivery. Customary Courts facilitate access to justice and are renowned for speedy trial of cases. They are grassroots' courts.

Proponents of the abolition of criminal jurisdiction argue that the only reason for establishing Customary Courts is to ensure the gradual and

systematic development of our customary laws into a veritable source of law. They also argue that it is absurd for Customary Courts to exercise criminal jurisdiction when the Customary Court of Appeal has no appellate jurisdiction in criminal matters. They further contend that since most Customary Courts are composed of laymen without formal legal training, it is dangerous to vest them with powers of application of the technical rules of criminal law.

Most of these arguments are frail and porous. It has been pointed out in this paper that Customary Courts are created by statutes of relevant States Houses of Assembly. Section 6(4)(a) of the Constitution of the Federal Republic of Nigeria, to which reference has also been made in this paper, vests such powers on the various States Houses of Assembly. Present – day Customary Courts administer customary law but also common law, statute law and equity, not in the technical sense but in the sense of fairness. An eminent Chief Judge (M.B. Belgore of the Federal High Court) once eulogized the criminal procedure in Customary and Area courts in the following words:

“The procedures in our traditional courts (Customary and Area) are more akin to us and achieve justice, once the personnel are properly trained, made independent of interference and the odium of corruption

is removed from them. Innocence is innocence under whatever system, once the operators are honest”.¹⁷

Over the years, the quality of judges that man Customary and Area Courts has improved tremendously. Gone are the days when the judges of these courts were illiterates or would only boast of the First School Leaving Certificate. All Grade I *Area Courts* in Benue State, for instance, are now presided over by lawyers while other members of these courts have at least a Diploma in Law. All judges of the Upper Area Courts in Benue State are lawyers with at least seven years post call. It is true that in the case of Edo and Delta States, District Customary Courts are wholly manned by laymen while two of the three judges of Area Customary Courts are also laymen. However, all these judges have sound academic qualifications and high integrity. They include retired College Principals, retired Permanent Secretaries, retired Senior Court Registrars and retired top -ranking Police and Public Officers.

The fact that Customary Courts are manned by three members, who jointly consider criminal cases before judgment, is a safeguard against errors and impropriety. As for the Area Customary Courts in Edo and Delta States, the fact that the Presidents are legal practitioners is an added advantage as

17 See M.B. Belgore in his paper “Constraints in the Administration of Justice ” delivered at the All Nigeria Judges’ Conference in Abuja in 1988.

they guide the lay members on points of law. It is also worthy of note that the defunct Robbery and Firearms Tribunals and other Special Tribunals wielded considerable criminal jurisdiction and had lay members on their panel. Until recently, lay Magistrates were a feature of criminal justice in many States of the Federation (including the then Bendel State). Even under the 1999 Constitution, the Code of Conduct Tribunal and the National Industrial Court have lay members in addition to their Chairmen who are legal practitioners. More importantly both Britain and the United States with cherished legacies of justice and equity still operate the jury-system of criminal trials and jurors who are laymen are vested with the prerogative of determining the guilt or otherwise of an accused person even in capital offences.

In these days of chronic prison congestion occasioned by delayed criminal trials in the Magistrates and High Courts, vesting Customary Courts with criminal jurisdiction has prevented what would have otherwise been a crisis situation. There is no doubt that congestion of prisons will be compounded if Customary Courts are stripped of criminal jurisdiction. It is a notorious fact that about 80% of those awaiting trial in prison custody are on remand by the Magistrates and High Courts. In his article titled "Problem of delay in the Administration of Criminal Justice," Professor C.O.

Olawoye, former Dean of Law at the University of Lagos, encapsulated the scenario as follows:

“It is ironical that it is the magistrates courts, which are established for the quick and summary disposal of cases that delay is mainly encountered.”¹⁸

The overall picture for now is that of too many criminal cases in the Magistrates’ Court. Superior logic dictates that that the criminal jurisdiction of the Customary Courts should be enhanced and not whittled down.

CONCLUSION

This paper urges the adoption of a pragmatic approach to enhance the criminal jurisdiction of Customary Courts in view of the inadequacies of the English-type courts, that is, the Magistrates’ and High Courts. It emphasizes that Customary Courts are also guided by rules and the statutes establishing them. In particular, it advocates that we should free our criminal justice system from the shackles and manacles of the Evidence Act and both the Criminal Procedure Code Law as well as the Criminal Procedure Act/Law by recognizing that Customary Courts are merely to be guided and not bound by them. It stresses the continuing relevance of Customary Courts in

¹⁸ See Nigerian Criminal Process by A.A. Adeyemi wherein the article appears.

criminal justice delivery as such courts are not afflicted by the risk of growing remoteness from society. It also stresses the fact that Customary Courts must observe the principles of fair hearing in all criminal trials. As grassroots' courts, they accommodate the interests of a largely unsophisticated society.

Finally, this paper advocates a constitutional amendment in the appellate jurisdiction of the Customary Court of Appeal to accommodate appeals from the lower Customary Courts in criminal causes or matters.

I thank you for your patience and attention.

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