

ECONOMIC CRIMES AND CORRUPTION: THE CUSTOMARY LAW PERSPECTIVE

BY

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PREFATORY REMARKS

I must commend the Board of Governors of the National Judicial Institute for choosing the theme “Towards Effective Adjudication of Economic Crime and Corruption Cases” at this year’s Refresher Course for Judges and Kadis. It is a well chosen theme in view of its germaness and relevance.

My profound thanks go to Hon. Justice J.O. Olubor, President, Edo State Customary Court of Appeal, who afforded me the opportunity to present this paper with the title “Economic Crimes and Corruption – The Customary Law Perspective.”

I must, however, confess that this topic gave me some anxious moments. This is because the topic, strictly speaking, lies in the realm of criminal jurisprudence. It is now elementary that there is no customary criminal law in Nigeria.¹ Section 36(12) of the 1999 Constitution of the Federal Republic of Nigeria provides as follows:

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¹ This has been the position since the celebrated case of Aoko v. Fagbemi (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.”

Nonetheless, I took solace in the fact that nothing precludes a practitioner of customary law from commenting on the law as it is and proffering practical solutions for effective adjudication by recommending changes in the law. This is substantially the main thrust of this paper. In particular, it will be argued that customary law and its courts ought to have a role to play in the adjudication of economic crimes and corruption.

Moreover, as economic crimes and corruption are not necessarily synonymous or siamese twins, I have decided to adopt a disjunctive approach while not being oblivious of the fact that both are closely related. Before I embark on a full discourse of the subject matter, it is pertinent to say a few words on customary law in order to enhance our understanding of the topic. Indeed, I have been enjoined to consider the topic from the customary law perspective or standpoint.

THE RELEVANCE OF CUSTOMARY LAW

Customary law has been defined as a body of customs and traditions which regulate the various kinds of relations between members of a given community.² It has also been defined as “a mirror of accepted usage”³

The Supreme Court in Zaidan v. Mohssen⁴ defined customary law from the Nigerian perspective as:

“Any system of law, not being common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.”

In a similar vein, Obaseki J.S.C. in Oyewumi v. Ogunesan⁵ defined it as:

“The organic or living law of the indigenous people of Nigeria regulating their lives and transactions”

It suffices to state that the customary laws of a people form the substratum on which their socio-cultural superstructure rests. The matters with which customary law is principally concerned are simple cases of contract (mainly debt), torts, land, family law and succession.

² M.C. Okany: The Role of Customary Courts in Nigeria (1984) at page 39.

³ Bairamian F.J. in Owonyin v. Omotosho (1961) All NLR 304 at 309.
⁴ (1973) 11 S.C. 1

⁵ (1990) 3 N.W.L.R. (Pt.137) 182 at 207.

Professor A.O. Obilade rightly observed that customary law, in spite of its relegation as a source of Nigerian law, asserts its relevance to the needs of modern society primarily by virtue of the fact that most members of the community organize their affairs by reference to it. According to him:

“In modern Nigerian society, customary law holds its place as a force sustaining the legal order. An appeal to the underlying principles of customary law is an appeal to a reliable means of solving the problems of social order.... The relevance of customary law in modern Nigerian society hardly lies in its actual content. In this age of bureaucratic regulation, when other attempts at solving the problem of social order seem to fail, there is recourse to enduring values of customary law”⁶

It is indeed plausible to argue that since our various anti-graft laws dealing with economic crimes and corruption have failed to produce the desired results, an appeal to the enduring values of our customary laws may have more salutary effects. This is because corruption is more of a social problem.

ECONOMIC CRIMES

Our statute books are replete with legislation dealing with economic crimes.

The list includes the following:

1. Advance Fee Fraud and other Fraud Related Offences Act of 2006;

⁶ See Professor A.O. Obilade’s article titled “The Relevance of Customary Law to Modern Nigerian Society” in the book Towards A Restatement of Nigerian Customary Laws – a publication of the Federal Ministry of Justice, Lagos.

2. The Money Laundering Act of 2004;
3. The Economic and Financial Crimes Commission (Establishment etc.) Act of 2004;
4. Banks and other Financial Act 1991 (as amended);
5. Money laundering (Prohibition) Act, 2004;
6. Counterfeit Currency (Special Provision Act) 2004;
7. Dishonoured Cheques (Offences) Act, 2004;
8. Trade Malpractices (Miscellaneous Offences) Act, 2004.

The above list is not exhaustive. Indeed, before the promulgation of these legislations, our Criminal Code contained some economic crimes – the most popular even till today being that provided under Section 419 to wit: Obtaining goods by false pretences.

Section 5 (1) (b) of the Economic and Financial Crimes Commission (Establishment) Act (supra) provides that the Commission shall be responsible for “the investigation of all financial crimes including advance fee fraud , money laundering, counterfeiting, illegal charge transfers, future market fraud, fraudulent encashment of negotiable documents, computer credit card fraud, contract scam, etc.”

It is not intended in this paper to identify the numerous pitfalls in these legislations from the standpoint of customary law. It suffices to state that economic and financial crimes are escalating and not abating. In fact, the situation

has become so grave that some foreign countries are advising their nationals to avoid Nigeria. Prosecution under the anti-graft laws has not met the yearnings and expectations of our people. It is true that the Economic and Financial Crimes Commission (EFCC) succeeded in prosecuting some public officers in court on allegation of economic and financial crimes. Two erstwhile Governors namely Governors Alamiyeseigha of Bayelsa State and Chief Lucky Igbinedion of Edo State were convicted but got off with a light sentence via plea – bargaining whereby they forfeited only a small proportion of their loot. Very recently, Governor James Onanefe Ibori, a former Governor of Delta State had all the 170 – count charge of economic and financial crimes leveled against him and five co-accused persons quashed on the grounds that no *prima facie* case was disclosed.⁷

NEED FOR TRIAL OF SOME ECONOMIC CRIMES BY CUSTOMARY COURTS

It is conceded that substantial progress was made in the area of arrest of corrupt public officers when Mallam Nuhu Ribadu was the helmsman of the Economic and Financial Crimes Commission, not many convictions were recorded in courts. His successor Mrs. Farida Waziri, gleefully disclosed on 24th February, 2010 that eighty (80) convictions were recorded by the EFCC in the last fifteen months. It is

⁷ For a full reproduction of the judgment in *Ibori v. EFCC* (Unreported Charge No. FHC/ASB/1C/09 delivered by M.I. Awokulehin J. on 17/12/2009, see The Punch Newspaper of Wednesday, January 13th 2010.

our considered view that this is not significant having regard to the fact that in Nigeria, corruption stinks. Many accused persons are discharged on purely technical grounds.

Most of the anti-graft legislations specifically provide for the trial of offences by the High Courts (Federal and State) alone.⁸ In view of the fact that corruption is evidently Nigeria's greatest problem, it is suggested that customary courts be vested with jurisdiction to try offences under the anti-graft legislations. This will facilitate quick disposal of corruption cases.

It is to be emphasized that Customary Courts in Nigeria, apart from the Customary Court of Appeal, exercise criminal jurisdiction in minor cases. As a matter of fact, in Edo and Delta States, for instance, the jurisdiction of an Area Customary Court in criminal matters is the same as that of a Chief Magistrate⁹. Area Customary Courts in these two states are presided over by qualified legal practitioners of at least five years post-call. At present, these Customary Courts try offences relating to corruption and abuse of office under Sections 98-112 of the Criminal

⁸ See, for example, Section 19(1) of the Money Laundering (Prohibition) Act, 2004 which specifically provides that the Federal High Court shall have exclusive jurisdiction to try offences under the Act.

⁹ See e.g. the Second Schedule to the Customary Courts Law, 1984 of the defunct Bendel State now (applicable in Edo and Delta States).

Code. Vesting them with jurisdiction under the multifarious anti-graft legislations of post – 2000 will therefore not be a completely novel idea.

It is further suggested that Sections 267 and 282 (1)¹⁰ of the 1999 Constitution of the Federal Republic of Nigeria (dealing with the jurisdiction of the Customary Courts of Appeal in the Federal Capital Territory and the States respectively) be amended to vest them with criminal jurisdiction in corruption cases in view of the enormity of the problem. It is worthy of note that the Customary Court of Appeal in the former Bendel State (now Edo and Delta States) was exercising appellate jurisdiction in criminal proceedings until the case of Patrick Okhae v. Gov. of Bendel State¹¹ terminated the criminal jurisdiction in view of the clear provision of Section 247 (1) of the 1979 Constitution (now Sec. 281(1) of the 1999 Constitution).

The proposed amendment to the sections of the extant Constitution dealing with the jurisdiction of the Customary Court of Appeal will ensure that appeals from the lower Customary Courts flow to the

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

11. (1990) 3 NWLR (Pt. 144) at p.327

Customary Court of Appeal instead of the High Court. It is to be emphasized that virtually all the Customary Courts of Appeal in Nigeria are manned by legal practitioners of at least ten years standing which is the same qualification stipulated for appointment to the High Court Bench.¹²

CORRUPTION

In the introductory part of this paper, it was pointed out that economic crimes and corruption are not siamese twins. This is a correct proposition as economic crimes form only a part of corruption. The hydra-headed phenomenon called corruption is thus a broader concept than economic crimes.

The term, corruption, has been defined as:

“An act with intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully and wrongfully uses his station and character to procure some benefit for himself or

12. See Sections 266 (3) (a) and 281 (3) (a) of 1999 Constitution of the Federal Republic of Nigeria.

for another person, contrary to the duty and the rights of others.”¹³

The Corrupt Practices and other Related Offences Act ¹⁴ defines the term in an all-encompassing manner when it provides thus:

“Corruption includes bribery, fraud and other related offences.”

It is significant to note that the 1999 Constitution provides that the State shall abolish all corrupt practices and abuse of power.¹⁵ But corruption remains pervasive. It assumed a disturbing international dimension when in 2001, Transparency International, a Non-Governmental Organization identified Nigeria as the most corrupt country in the world. The rating of Nigeria on the corruption index has since improved slightly.

The enormity of the problem was captured by Taiwo Osipitan and Oyewo in a paper titled “Legal and Institutional Framework for Combating Corruption in Nigeria” as follows:

¹³ Black’s Law Dictionary, Abridged 6th Edition, Centennial Edition 1891 - 1991

¹⁴ Cap. C3 Laws of the Federation, 2004.

¹⁵ See Sec. 15(5) of the 1999 Constitution.

“Corruption is evidently Nigeria’s greatest problem. Since, the attainment of independence, corruption and abuse of office have enjoyed steady growth. They have consequently become cankerworms reaching the dimension of epidemic in our body politic. It suffices to state that a nation where corruption is an accepted norm is bound to suffer economic backwardness and isolation.”

In the case of A.G. Ondo State v. A.G. Federation,¹⁶ Uwais C.J.N. similarly observed as follows:

“Corruption is not a disease which afflicts public officers alone but society as a whole. If it is therefore to be eradicated effectively, the solution to it must be pervasive to cover every segment of the society.”

It is salutary to note that the Supreme Court in that case upheld the constitutionality of the Corrupt Practices and Other Related Offence Act, 2000, which is undoubtedly the most comprehensive anti-graft legislation in terms of its applicability to public and private citizens and the offences created therein. The Act established an Independent

¹⁶ (2002) 9 N.W.L.R. (Pt.772) 222 at 236

Corrupt Practices and Other Related Offences Commission vesting it with the responsibility for investigation and prosecution of offenders. Offences under the Act include accepting gratification, giving or accepting gratification through an agent, counseling offences relating to corruption, fraudulent acquisition of property, fraudulent receipt of property, committing an offence through the postal system, deliberate frustration of investigation by the Commission, making false statements or return, bribery of public officer, using office or position for gratification, bribery in relation to auctions, bribery for giving assistance in regard to contracts, dealing with property acquired through gratification and making false or misleading statements to the Commission. Attempts and conspiracy to commit any of the aforementioned offences are also punishable.

The responsibility for designating a court or judge for the trial of the offences stipulated under the Act is that of the Chief Judge of a State or the Federal Capital Territory, Abuja. Section 61(3) of the Act provides as follows:

“The Chief Judge of a State or the Federal Capital Territory, Abuja shall, by order under his hand, designate a court or judge or such number or courts or judges as he shall deem appropriate to hear and determine all cases of bribery, corruption, fraud or other related offences arising under this Act or any other laws prohibiting fraud, bribery or corruption; a court or judge so designated shall not, while being so designated, hear or determine any other cases provided that all cases of fraud, bribery or corruption pending in any court before the coming into effect of this Act shall continue to be heard and determined by that court.”

It is submitted that Section 61(3) quoted *in extenso* above does not restrict the hearing and determination of offences under the Act to the High Court. The Chief Judge could in consultation with a President of the Customary Court of Appeal (where one exists) designate a Customary Court to try cases under the Act. In States where there are no Customary Courts of Appeal, a Chief Judge can unilaterally designate a Customary Court to hear and determine cases under the Act.

It has been stated earlier on that Customary Courts, apart from the Customary Court of Appeal, have always exercised original Criminal jurisdiction. As regards corruption cases, vesting them with jurisdiction is even more imperative in view of the widespread nature of corruption. Since Customary Courts have always tried corruption cases under the Criminal Code,¹⁷ it is only reasonable to extend their criminal jurisdiction to offences set out in the Corrupt Practices and other Related Offences Act, 2000 to facilitate speedy disposal of such cases. In particular, one is advocating the need for customary courts to play an important role in this far-reaching anti-graft legislation because the offences stipulated under the Criminal Code in Sections 98-104 are limited to “public official” defined in Section 98D of the Code as “any person employed in the public service within the meaning of that expression as defined in Section 1(1) or any judicial officer within the meaning of Section 98C.” The Corrupt Practices and Other Related Offences Act is not so limited as private persons fall within its net. It must also be remembered that minor cases of corruption do arise from time to time. For instance, a clerk in a commercial bank or an accounts

¹⁷ See note 9 *supra*

clerk in a private school may ask for a bribe of ₦5,000 (five thousand naira) before performing a task. It would be outlandish to prosecute the offender in the High Court as this would be tantamount to killing a fly with a sledge hammer.

Customary Courts in the Northern States are referred to as Area Courts. They should similarly be vested with jurisdiction to try all minor offences under the ICPC Act and other post-2000 anti-graft legislation. It is futile to argue that Customary Courts should have no role to play in the post-2000 anti-graft legislation because of their threadbare knowledge of criminal law. Gone are the days when Customary Courts were manned by illiterates and politicians. Contemporary practice throughout the country is to appoint judicial personnel of high calibre, sound academic qualifications and impeccable integrity. In most parts of the country, lawyers now preside in Customary Courts. This is clearly the position in Edo, Delta and Plateau States where lawyers with at least five years experience are appointed to man the Customary Court bench. In these three states, lawyers with over twenty years experience at the Bar are sometimes appointed.

CORRUPTION IN THE JUDICIARY

It has become particularly worrisome that the judiciary, which should be the last bastion of hope for all and sundry has itself been infected with the virus of corruption. Allegations of corrupt practices in all genre of courts are widespread. One recalls with disdain the Justice Kayode Eso Panel's Report which indicted as many as forty seven (47) judges of superior courts for corrupt practices. Indeed, the Report observed that some judges "had a general and persistent reputation for corruption" while some "operated front companies to obtain contracts from the judiciary." One Chief Judge was alleged to have stolen court exhibits.

Hon. Justice S.O. Uwaifo, bemoaned the disturbing scenario as follows:

"Let us no longer pretend that the present state of our judiciary is not giving cause for worry. If we must be honest with ourselves, there is so much in the air about corruption in the courts by a large number of judges. The cynicism is that

it is the rule rather than the exception There is secrecy at the final point of giving, and some may naively believe that secrecy is sealed, or that there are no anterior and posterior facts to make that secrecy public knowledge. The bribe-giver may in some cases hurriedly look for money and will reveal the purpose in the hope of obtaining sympathetic help. At times a whole community may be alerted to contribute money for that purpose. If the man knows of another case before that same judge and is familiar with any of the parties, he will be quite eager to direct him what to do, citing his own experience. It goes on and on. In the meantime, the judge who has compromised himself believes he is feeding fat without anyone, other than his partners-in-crime, knowing about his breach of judicial oath. Some judges are said to lay down their conditions in advance through regular practice popularly known.”¹⁸

¹⁸ Being part of the remarks made in his keynote address at the Nigeria Bar Association, Benin Branch Law Week, May 2001 with the title. “The Sustenance of Democracy Through the Rule of Law.”

It is no longer a secret that some judges and magistrates appoint lawyers and court registrars as touts to collect bribes from litigants. Some collect bribes directly from litigants. In Edo State, there was the case of a Chief Magistrate who sat in a rural area and specialized in collecting goats as bribe.

Cases of collection of bribes and other malpractices are equally rife in Customary Courts. Not too long ago, a Chief Judge of Edo State was told in the course of his official visit to the prison, that a member of an Area Customary Court demanded money from an accused person to secure his release from prison custody. Allegations of corruption were rampant in the Native Courts, the precursors of the Customary Courts, some of whose members were prosecuted in Court. Two examples would suffice. In the case of R. v. Duruibe & Anor.¹⁹ the 1st appellant, a member of a Native Court, was found guilty of judicial corruption contrary to section 114 of the Criminal Code for accepting the sum of £3 (three pounds) from an accused person with a promise not to impose a sentence of imprisonment. His appeal failed.

¹⁹ (1938) 4 WACA 124

In *R. v. Solomon Oluwa*,²⁰ the appellant, a Native Court clerk, was charged with accepting a cow with the promise that he would influence the court members to obtain the donor's acquittal upon a criminal charge pending before the court.

It is, however, praise-worthy that some eminent customary law practitioners have held their heads high, thereby giving us a cause to be proud, by refusing to succumb to any untoward conduct. One of them is Hon. Justice Andrews Otutu Obaseki, who started his judicial career on the Customary Court bench in the defunct Bendel State (now Edo and Delta States) He was renowned for his integrity, courage and forthrightness all through his judicial career up to the Supreme Court of Nigeria. It was said of him *inter alia* that:

“In addition to his enormous legal ability, he had a strong sense of what was just and right and brought honour to Edo State Judiciary. He was a most honest Judge who had an impeccable sense of justice.”²¹

²⁰ (1943) 9 WACA 30

²¹ See Ogbobine (J.) in his tribute which appears at the end of his book titled: **The Iwere (Warri) Kingdom and The Olu's Overlordship Rights in Itsekiri Land.**

Another erudite customary law practitioner worth mentioning in this regard is Hon. Justice I.O. Aluyi, the pioneer President of the Edo State Customary Court of Appeal, who refused to succumb to undue pressure from the Executive. While contemplating the appointment of customary court members in January 1983, a prepared list of party loyalists was foisted on him by the Governor with a directive that the said party nominees should be appointed. Justice Aluyi resisted this unwarranted intrusion and insisted that the party loyalists should subject themselves to a literacy test along with other non-sponsored candidates.

In his paper titled “The Customary Courts in Our Judicial System” presented at the All-Nigeria Judges Conference at Abuja in 1988, Justice Aluyi stated that for daring to oppose what was considered to be a decision of the party in power, his Directorate was starved of infrastructural facilities until the military regime took over power in December, 1983. Other instances abound where Justice Aluyi displayed judicial courage and integrity throughout his career as the pioneer President of the Edo State Customary Court of Appeal.

ADMONITION

Customary Court judges of all grades must strive with vigour to replicate the fine qualities of Hon. Justices Obaseki and Aluyi by eschewing corruption in all its facets in consonance with their judicial oath. They must not see their appointments as a veritable avenue to enrich themselves. Rather, they should see their appointments as a call to duty. According to Hon. Justice (Dr.) Durobo Narebor:²²

“A system which has attracted university lecturers of high calibre, state counsel of standing and promising legal practitioner cannot be a bad or retrograde system. To maintain and improve on the standard already set, Customary Court Presidents and members must continue to be steadfastly above board, impartial, fearless, firm and fair.

A timid and corrupt Bench, even at the lowest echelons of the judiciary is not only a risk but a societal liability. Justice must be dispensed as far as the law and rules permit, speedily, cheaply and untrammelled by procedural

²² In his book titled: *Customary Courts: Their Relevance Today*. Although Hon. Justice Narebor's primary focus was Edo and Delta States, his admonition is of universal application.

technicalities. These are the hallmarks which must characterize justice in Customary Courts.”

CONCLUSION

Combating economic crimes and corruption is of great significance in all legal systems including customary law. The negative impact of corruption on economic development has become a global concern. Chinua Achebe, a consummate novelist, has noted that, of every naira accruing to this country, approximately 70 kobo ends up in private pockets and that this is a major reason why millions of Nigerians have remained poor.

The main thrust of this paper has been to show that customary law and its courts have a great role to play in curbing economic crimes and endemic corruption in Nigeria. This can best be facilitated if Customary Courts are enabled to exercise criminal jurisdiction in all anti-graft legislations and not merely confined to the provisions of the Criminal Code relating to corruption, that is, Sections 98 – 104 thereof: This is because Customary Courts dispense justice speedily, cheaply and without undue regard to technicalities.

This paper has also shown that Customary Courts like the English type courts are infected with the virus of corruption and has recommended measures for curbing same. Corruption is more of a social problem and any law which does not take cognizance of the local mores, customs and conduct of the people is bound to fail.

As Morris Ginsberg²³ appositely puts it:

“The law of a society, and particularly the criminal law should embody the moral attitudes prevalent in that society and cannot, in the long run, be made effective without appealing to those attitudes.”

I thank you for your patience.

²³ See Morris Ginsberg, On Justice in Society, 1965 at page 218. See also Professor A.A. Adeyemi in his article: “The Place of Customary Law in Criminal Justice Administration in Nigeria” in Towards A Restatement of Nigerian Customary Laws – a publication of the Federal Ministry of Justice, Lagos.