

Original Research Article

A Legal Appraisal of the Status of Vicarious Liability in Customary Criminal Law in Nigeria

O.W. Igwe^{1*} and M.D. Ogolo²

¹Department of Jurisprudence and International Law, Faculty of Law, Rivers State University of Science and Technology, Port Harcourt, Rivers State, Nigeria.

²Solicitor and Advocate, Supreme Court of Nigeria.

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The complexities of determining the commission and culpability of a crime as provided under the Received English law constitutes a herculean task that in some cases may leave the victim without justice. This paper evaluates the concept of crime under Customary Criminal Law and Vicarious Liability under the Received English Criminal Law and finds that the customary approach affords effective means of not just identifying an offender but provides a veritable tool to deter the commission of a crime.

Keywords: Vicarious Liability, English Criminal law, Customary Criminal Law, Crime, Offences.

INTRODUCTION

This paper will briefly look at crime under customary law and the concept of vicarious liability under the Received English Criminal law. Vicarious liability under customary criminal will be expounded. The particular offence(s) which attract(s) vicarious liability under customary criminal law will be ex-rayed. That is to say, the rationale, logic and jurisprudential value of making a third party or person who did not actually commit the offence or crime himself to suffer for the act of another, will be appraised. The bindingness of vicarious liability decisions in our local communities and the enforcement thereof shall also be discussed. The jurisprudence behind the applicability of vicarious liability in customary criminal law is not merely to punish the offender, but rather to ensure communal harmony and continued co-existence.

CRIME UNDER CUSTOMARY LAW

Away from what constitutes crime under our Received English Law, crime under our customary criminal law are those norms, values and native standards, a breach of which affects the social and corporate existence of the people subject to the laws. As distinct from the object of crime, being punishment, under the Received English law, the object of crime under our customary law jurisprudence goes beyond punishment. Objects such as harmony, restitution, compensation and social equilibrium are more of the objects of crime under our customary criminal jurisprudence.¹ Acts or omissions which

constitute crime under our customary law mostly are not prescribed or written (as it is under the Received English legal jurisprudence). They are largely unwritten and in some cases crime under customary law are detected and discernable by divination, oath taking and trial-by-ordeal. Under customary law, identifying or the identity of an offender (most times) is not usually done through conventional procedure, but rather through sorcery by way of divination, oath taking and trial-by-ordeal.² This is unlike what we have under the English criminal law where the identity of an alleged offender is known through investigation by the police or other relevant agencies saddled with the responsibility of unraveling the identity of an alleged criminal by or through investigations as allowed and/or permitted by the relevant laws

The prominent place "punishment" occupies in the corpus juris of criminal justice in Nigeria compelled the very erudite and doyen of criminal law in Nigeria, to opine that "punishment" simpliciter is the object of crime under the English criminal law system.³ This is true for all purposes as the Constitution of the Federal Republic of Nigeria⁴ (which is the grundnorm of our laws) stipulates that one cannot be guilty of an offence unless the punishment is prescribed by a written law. Therefore, it becomes very safe and apt to say that any act which

² Akintunde Emola: op cit p. 30.

³ Uchendu Victor C. A Leal Reappraisal of Customary Adjudicatory System in Nigeria, Holt, Rinehart and Winston. New York, 1965, 4243..

⁴ Okonkwo C.O. Criminal Law in Nigeria Spectrum Books Ltd, Ibadan 2002, p. 28.

¹ Akintunde Emola, *Africa Customary Law*, 3rd p. 7.

punishment is not prescribed by a written law in Nigeria does not qualify as an offence under the Received English legal system. Not only that the punishment must be stipulated or prescribed by a law, the law must be written. Under the customary criminal law jurisprudence (eg; the Igbo society) the punishment for a crime or offence is known by the community and her members, since it is common knowledge, it dispenses with the need for codification and publication. There is no rule of customary law that makes punishment the entire object of crime under customary law. Much as punishment is one of the objects of crime under the customary criminal law system, restoring and restituting the victims of such crime is very frontal and fundamental generally in African societies.

What constitutes crime and offences under our customary law jurisprudence dates back to antiquity. They are as old as the localities or communities themselves. This is not so under the Nigerian Received English law system which makes an act (which ordinarily is criminal) a non-offence simply because it is not written under any law and its attendant punishment not prescribed under a written law as well.

It is pertinent to briefly look at how crime and the offenders are detected under the customary criminal law system; same will assist in appreciating the concept of crime under customary law. Under customary criminal law, three principal methods are adopted in crime detection: Divination, Oath swearing, and Trial-by-Ordeal. They shall be briefly discussed *seriatim*.

Divination

In our local communities, if the identity of an offender is not known, resort is usually had to sorcery, by way of divination. Diviners are a special class of practitioners who speak to and relay messages from the spirits world.⁵ For the Ikwerre people of Rivers State of Nigeria, it is common practice that when a person dies mysteriously (especially where the deceased was a young person and dies of an unknown ailment) resort is usually had to divination for the purposes of unraveling the reason for such death and more importantly the perpetrator of the act which caused the death.

This system of arriving at the identity of an offender under the customary law distinguishes it greatly from the procedure adopted in ascertaining who an offender is under the Received (English) criminal law justice system. Resort will never be had to deities, so that if the law enforcement agents or agencies are unable to ascertain who the offender is, through investigations conducted, the offender goes home a free man. That is not the case under customary law under which if a person perpetrates and commits a crime though, in secret, his identity must always be revealed. This is indeed one of the finest attributes and characteristics of crime and its control under our customary criminal jurisprudence.

Prof Bascom⁶ stated of Yoruba relevant custom thus:

A factor, probably operative in many other systems of divination but which is of special important area for the Yoruba Ifa, is that in spite of the numerous occasions when diviners are consulted, obvious decisions are made by the individuals themselves.

The last limb of the dictum above by Prof Bascom holds that the individual members of the community will decide on the act

of the offender upon the outcome of the divination carried out. In some cases, persons who committed crimes confess to such crimes before the divinations are carried out. When this is done or when people confess, it is believed that the oracles have exposed the offender or wrongdoer.⁷ This establishes the potency and immutable nature of crime under customary law jurisprudence and its control generally. Among the Yorubas, the Ifa oracle is often consulted to detect or unravel an offender through the sixteen *kerne* used by the diviners called Babalawo.

The process of divination among the Ikwerres is referred to Ogba-Ewha. Prof Mbiti⁸ comments on the use of diviners thus; through a medium who gets in touch with the spirit world, a person may be directed to find a lost article or to know who stole his goods. Divination is practiced all over the African societies, but more common among the Yorubas, Igbos, Edos and Urhobos of Nigeria.⁹

Oath-Taking

Oath-taking among the African natives is a common means of detecting who an offender is. According to T.O. Elias,¹⁰

The accused steps forward, and before the assembled elders who prescribed the particular form of phrasing of the oath he is to take, swears the principal oath touching the crime charged or the issue in dispute....

Among the Yorubas, Oath-taking as a means of controlling crime and other associated activities is common. It is called *aje*. It is sworn to when a crime is committed yet no one would confess to it. All the suspects are assembled before the practitioner who then gives them an admixture of substances to drink. It is believed that whoever succumbs to the effect of the product is the offender.¹¹

Trial-by-Ordeal

This means of fishing out crime and criminals under customary law is used or adopted in cases of serious crimes, such as murder. It is practiced by both cephalous and acephalous societies. It is a method which is directed at ascertaining the truth and it is for the purposes of discovering an unknown criminal. Amongst the Kalabirri people of Rivers State of Nigeria, in detecting a witch, the accused person will be asked to swim across a Creek full of Crocodiles. He is judged innocent if he comes out alive.¹² Before delving into the particular crimes which attract various liabilities, under customary law, there is need to briefly look at the concept of vicarious liability under criminal law in Nigeria.

THE CONCEPT OF VICARIOUS LIABILITY UNDER CRIMINAL LAW

The concept of vicarious liability under criminal law in Nigeria bears semblance with the concept as it applied under civil actions in Nigeria. The incidents are equally the same. Generally, the import of vicarious liability refers to one's legal responsibility for the actions of another. Arguments abound to the effect that vicarious liability is not known to Nigeria criminal

⁷ Prof. Bascom: Journal of Royal Anthropology Institute, p. 43-45 (194).

⁸ Uchendu Victor C. op cit

⁹ Akintunde Emiola: ibid p. 85

¹⁰ 10 Prof. Mbiti; African Religious and Philosophy London (1969).

¹¹ Uchendu Victor C., op cit.

¹² T.O. Elias; The Nature of African Customary Law Manchester Press, Manchester 1972, p. 17.

⁵ See S.36 (12) of the Constitution of the Federal Republic of Nigeria.

⁶ Uchendu Victor C. A Legal Reappraisal of Customary Adjudicatory System in Nigeria, ibid.

law. As a general rule, vicarious liability does not apply in criminal law. The reasoning or the jurisprudence behind such arguments is to the effect that such third party liability would normally contradict the basic principle that requires an *actus reus* and fault element (*mens rea*) for criminal responsibility. The argument that vicarious liability is inapplicable under criminal law stems from the cardinal stands of the law that there can be no liability without fault.

However, the Nigerian Criminal Code¹³ contemplates that the requirement of fault as basis for liability may be excluded by statute and where the legislature through a statute excludes fault as basis for criminal liability, then a party will ordinarily be criminally liable for the act of another. The law (statute) may impose criminal liability on an employer for the acts of his/her employee. This is pronounced in the context of regulatory crimes which are designated to regulate businesses and usually attract misdemeanor punishment only. An example of such statute is the Road Traffic Laws.¹⁴

In criminal law, vicarious liability or responsibility is also practiced in other jurisdictions,¹⁵ such as where the owner of a vehicle (even a company) is conclusively presumed to have been the driver at the time of the commission of the offence and accordingly the acts or omissions of the driver at the time, were his (the owner's) acts or omissions.

Indeed, in Nigeria and more particularly in the Lagos jurisdiction, the need for *mens rea* in criminal responsibility is obviated in such situations.¹⁶ In the area of insurance¹⁷ no person shall use or cause or permit any other person to use a motor vehicle on a road unless a liability which he may thereby incur in respect of damage to the property of third parties is insured with an insurer registered under the Insurance Act.

In the light of the above, suffice it to state that the doctrine of vicarious liability is applicable though as exceptions under Nigeria criminal law system.

VICARIOUS LIABILITY UNDER CUSTOMARY CRIMINAL LAW IN NIGERIA

Among the Yorubas¹⁸, kinship is practiced. For them (Yorubas) kinship is the bond of union. The need to provide social security and justice for their families often accounted for the institutional emphasis on the solidarity for a kinship group. Kinship among the Yorubas operates to the effect that the people (Kinsmen) accepted joint responsibility and obligations because individuals were seen primarily, as members of their particular families before they are understood as members of the society at large.

Among the Igbos,¹⁹ in discharging justice, Igbo system of adjudication sees beyond the individual member of the community who committed the offence to all the social groups to which the person is attached. So when a suspected criminal stands before the traditional Igbo seat of judgment, his family, his age grade, his kindred and his entire Community stand with him.²⁰ By the foregoing, one can say unequivocally that under Igbo customary justice system no one individual stands criminal trial. Among the Igbos, every criminal offence has a

social dimension. That is why at the conclusion of adjudication on criminal act among the Igbos more than the individual offender is convicted and blamed for the offence. In the Igbo criminal justice system, an alleged offender does appear with his people as stated above whether invited or not. And that is why once a pronouncement is made for the purposes of atonement or purification or appeasing of the land and gods the relatives of the offender must ensure that the appeasement or atonement is done.

Also among the Igbos, a father or head of a family may be required to answer or explain for the wrongful act of his son or a member of the family.²¹

OFFENCES WHICH ATTRACT VICARIOUS LIABILITY IN SOME LOCALITIES IN NIGERIA

Among the Igbos, if a slave (when the act of slavery was in practice) commits murder, his Master or the owner of such slave will be criminally responsible for the act of murder committed by his slave.²² Among the Igbos of the Niger Delta, the owner of such a slave would have to produce one freeman, perhaps any of his relatives, to be killed as well.²³

In the case of the Igbos, the social status and standing of the deceased killed by the said slave is usually a consideration in producing a person to be killed in return.²⁴ This practice among the Igbos is akin to the "tooth for tat" and "an eye for an eye" philosophy. Still amongst the Igbos, if the murderer was a man of high social standing, his inferior brother may volunteer to hang himself in place of his social standing brother.²⁵

Also among the Igbos, though a person kills unintentionally, he is required under the customary law to delegate a person to the service of a deity, as a substitute for the person killed unintentionally.²⁶ These practices have been de-emphasized and is virtually non-existent. The narrative here is to underscore the place of vicarious liability in the customary criminal law jurisprudence in the societies selected and to express its general content and context in Africa.

In many traditions, a woman is forced into marriage to the group or family which suffered criminal wrong by the act of a person who is a member of the woman's family.

Among the Ikwerees if a person commits murder the gods must be appeased and the land cleansed. If the gods are not appeased and the land cleansed, the family of the killer will be doomed. In the same vein, if a person commits murder among the Ikwere people, he will be banished alongside his family members. Similarly (still among the Ikwerees) if a person dies arising from acts that are considered a taboo that he (deceased) committed, his remains will never be buried at home. The remains is usually taken to an evil forest called Ohia Nkpa. Otherwise, if he is buried at home in defiance of the custom of taking him to the evil forest his entire family is doomed.

Also among the Ikwerees, a person who commits a sacrilegious act which led to his blindness, upon his death, his remains will also be taken to the Evil Forest Ohia Nkpa otherwise, if buried at home his family is also doomed. It is also worthy of note that before the remains is taken to the Evil Forest which is sometimes also called Ohia Izuh (meaning; forest for dead bodies) the gods must also be appeased and the land cleansed.

¹³ Akintunde Emiola, *op cit*, pp. 85-86

¹⁴ Adewoye O.B. "The Judicial System in Southern Nigeria" 1854-1954 London, Longman (1977) p. 8.

¹⁵ Section 24 and 25 of the Nigeria Criminal Code.

¹⁶ *Tesco Super Market V. Natrass* (1971) 2 All ER 129 See also R.W.L. Howell's "A Blow Against Enterprise Liability" (1971) 3.

¹⁷ Trade Description Act (1968) (U.K.). Sale of Goods Act 1893 (England).

¹⁸ Glazen Brook in : Reshaping the Criminal Law, p. 108

¹⁹ S. 68(1) of the Insurance Act No. 1 of 2003.

²⁰ Olabibi. Onabanjo, Yoruba Traditional Adjudicatory System, African Study Monographs, 2008.

²¹ Bona Christus Umeogu, "Igbo African Legal and Justice System", Open Journal of Philosophy, Vol. 12. No. 2, 2012, pp. 116-122.

²² Okogeri G.O. *op cit*.

²³ Nahbour, Customary Courts, the Relevance Today.

²⁴ See, Basben-Jetti, Nigerian Ibo: The Lifes and Customs of the People of Igbo Land, *ibid*.

²⁵ *Ibid*

²⁶ *Ibid*

Any attempt by the family to neglect the aforesaid, the family is also visited with some kind of calamities which usually leads to mysterious deaths.

Incest of any kind is a crime among the Ikwerre people. It also attracts vicarious liability especially in cases where the gods were not appeased or the land cleansed. The effect of not appeasing the gods or cleansing the land is visited by a recurring acts of incest among and between members of the family.

Witchcraft is also a crime under the customary law of the Kalabiri people of Rivers State of Nigeria. The crime also attracts vicarious liability as a witch is usually excommunicated alongside family members. Amongst the Etche people of Rivers State of Nigeria, if a person takes up a secret summons against a person before a juja shrine and infact invokes the said juju to kill the person summoned, if the person against whom the secret summon is taken dies and divination is carried out and the summoner detected and unraveled, he is usually banished out of the community alongside his family members. In most cases, the houses and other properties of the summoner are destroyed and set ablaze.

Generally under the custom, if an insane person commits any crime, his parents or relatives are made to pay for such acts. In the same vein, if a slave commits an offence, the owner of such slave is made to pay for the acts of his slave. But as noted, slavery and the practices are no longer common.

Amongst the Ndele people of Ikwerre ethnic nationality of Rivers State of Nigeria and indeed among other tribes of Ikwerre, if sexual intercourse is had on a bare floor between people of opposite sexes, the gods must be appeased and the land cleansed, otherwise not just the culprit will be doomed, his family is also doomed. Amongst the Ekpeye people of Rivers State of Nigeria, if a child commits a crime, his parents or adult relatives are made to pay for the crime of the said child.

THE JURISPRUDENTIAL VALUE OF THE APPLICATION OF THE DOCTRINE OF VICARIOUS LIABILITY UNDER CUSTOMARY CRIMINAL LAW

Contrary to what obtains in the Received English Law jurisprudence, wrongs and crimes do not go unrestituted and unrestituted. Under the Received English Law jurisprudence, crime or criminal responsibility or liability is personal (except a few cases some of which are shown in this work). The foregoing is the uniqueness of the customary criminal jurisprudence, in that the principle of personal liability in criminal law is not a bar, the well and time honoured principle of law "ibi jus ibi remedum" is the whole essence of criminalization under the customary law jurisprudence.

Crime, under the customary criminal law is viewed as a wrong against the corporate existence and social fabric of the society. Once a crime is committed under the custom there must be liability, restoration and restitution one way or the other. Even a child who may be said not to have the mental capacity to commit a crime, under customary law, such a child may in proper circumstances be made responsible. If the object of such crime is monetary compensation the parents or his/her adult relatives are made to pay such compensations.

Morality also has a role to play in the criminalization system under customary jurisprudence. Moral persuasions compel that someone injured or against whom crime is committed does not go unassuaged, restoration is never sacrificed on the altar of criminal personal liability. The foregoing is not to say that personal liability or responsibility for a crime committed is not recognized under customary criminal law, the point must be made that the principle of personal liability in criminal law is not

tenaciously, blindly, and slavishly applied, because under our customary criminal jurisprudence (as noted earlier) for every wrong there must be a remedy.

The operation of vicarious liability under customary criminal law may appear barbaric especially in cases involving murder where if the murderer is a person of high social standing and a person of less social standing is executed on his behalf (as seen earlier). But the point must be made that under customary law, recognition is had on life or the taking of life. The reasoning is that a life lost must be accounted for. So balance is achieved when a corresponding life is taken. African societies recognize social orders and peace as essential and sacred. Since these practices can only engender harmony and oneness of the community, the practice which operates to heal every wound inflicted is highly desirable and applauded.

This is practically what non-adherence to strict doctrine of personal responsibility, criminality strives to achieve in our localities. A person's character does not affect him alone, his family is also affected. Families under customary law are seen as corporate entities wherein any wrong done by an individual in such a corporate entity is seen (to a great and large extent) as a wrong done by the entirety of such corporate entity.

A practical scenario of the efficacy and beautiful nature of vicarious liability under the customary criminal jurisprudence is the case of the owner of a slave whose slave commits a crime. A slave under the customary law system creates property interest in favour of the owner of such slave. Usually, slaves are procured to render services to the owner, so the balancing process is sustained if the owner of such slave pays for the wrong committed by the person who renders services to him. Again, in the case of an insane man who commits an offence, customary law jurisprudence views the parents or relatives of such insane person as his beneficiaries, in that, if any wrong is done to this person or assuming he is killed, his parents or such relatives will be compensated.

Correspondingly, they are made to pay for the wrongs done by him. All these speak volumes of the jurisprudence and/or logic or rationale for the applicability of vicarious liability under customary criminal law.

THE BINDINGNESS OF VICARIOUS LIABILITY DECISION UNDER CUSTOMARY CRIMINAL LAW AND THE ENFORCEMENT MECHANISMS

One of the finest features and characteristics of customary law is that customs and native laws are binding on the community and her members. Native laws and customs are considered obligatory by the members of the community where they are applied.

Native law and customs are equally recognized and regarded as absolutely necessary for the common interest of the people.

On the binding nature of customary law, the court in the case of *Kharie Zaidam v. Fatima Khalil Mohssen*²⁷ stated thus: "Customary law is a system of law... which is enforceable and binding within Nigeria as between the parties subject to it."

Schapera, sees wrong under customary law as being based on the principle of absolute liability.²⁸

The enforcement or execution of judgment under customary law depends on the kind of Tribunal and society. Decisions and judgments and their effects being supernatural in nature, persons, subject of such decision are obliged to obey them as the implication for disobeying such decisions are clear

²⁷ (1973) ANLR 740, 753.

²⁸ Schapera, Handbook of Tswana Law, 1955, pp. 7 -18

to the people. In traditional societies, judgments are in some cases (especially where the vicarious nature of the decision affects culprit and his family) require that frantic efforts be made either to compel the culprit to carry out the order in the judgment or the orders are carried out by the family herself, bearing in mind the effect of neglecting such decision.

Among the Yorubas, the execution and enforcement arm of their traditional adjudicatory or legal system are the secret societies (e.g. Ogboni societies) which hold those found guilty of serious crimes in their own prisons. Persons found guilty of criminal offences like witchcraft, unlawful killing, rape, incest and similar offences that threaten the social fabric or corporate existence of the community are punished by execution by shooting or hanging. In some societies, such men will be thrown into the River and are forcibly drowned. In some cases, offenders were sold into slavery or exiled. Among the Igbos, the enforcement of judgment rests with the Age Grades, masquerades and chief priests.²⁹

CONCLUSION

This paper has attempted to show the uniqueness and the desirability for the retention of our customary law generally and particularly our customary criminal law and more particularly the concept of vicarious liability under customary criminal law. The retention should be subject to the current realities of contemporary standards. The desirability stems from the exposition herein that the object of crime and its jurisprudence are more harmonious in nature under our customary criminal jurisprudence than it is (if any) under our Received English Law system.

Under the Received English common law, the rules embodying the criminal code is not common to the natives. Rather, what constitutes common law to them are the norms of customary criminal law. They are conversant with its procedure and practice. Indeed, the Received English common law is entirely alien to them, the practice and procedure not only confusing but confounding. The procedure is not only technical but intimidating.

More importantly, this paper has also expounded the fact that crimes under our customary law do not go unrestored and unrestituted simply on the altar of personal criminal responsibility or on, perhaps, lack of mental capacity and intention to commit such crime. This paper has also added its voice on the true position that criminals under customary law do not go unpunished simply because their identity is not known as seen herein earlier. Crimes and criminals under customary law are detected and unraveled through the stated three methods; Divination, Oath-taking and Trial-by-Ordeal.

The paper has illuminated on the hidden or rather obscure fact that the concept of vicarious liability applies in criminal law, putting straight the rather wrong impression or notion that the concept is alien to the criminal justice system. That, of course dove-tailed to the truism that it also applies to our customary criminal law. It was also shown the particular offences in our localities which attracted the object of vicarious liability and of course the bindingness. The effect of refusal to obey vicarious liability related decisions and indeed the enforcement mechanisms were also highlighted.

Justice should be all-embracing: Justice for the victim, the offender and the community whose fabric is threatened. Our customary criminal jurisprudence satisfies all these shades of justice. It truly fulfils the expectation that justice should not only be done, but should be evident that it has been done. The

retention and preservation of these customary criminal practices, subject to minimal reasonable adjustments, should be well received. It expresses the history, a peoples past, their heritage.

²⁹ Akintunde Emiola, *ibid.*, p. 93.