

THE STRUCTURE AND OPERATIONS OF ETCHE TRADITIONAL LAWS AND JUDICIAL INSTITUTIONS

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Abstract

Law is a major institution of society and, a cultural fact. As a property of culture, the assumption is that decades after the colonial imposed jurisprudence has taken root, traditional laws would have fizzled out. But in Etche and many other African traditional societies the system of law is still prevalent and functional. With the methods of ethnography and qualitative reporting, the essay systematically spotlighted the structure of the traditional legal system as ontologically skewed, with intrinsic enforcing qualities and alignment with natural law. Beyond normative outline, the traditional institutions and settings of justice dispensation are also common and functional, with cultural mechanisms of establishing truth, for maintenance of social order and ontological balance. However, against the backdrop of modern changes, it is worthwhile to harmonize the system with modern apparatus of law and justice.

Key words: Etche; Traditional law; Judicial system; Justice

1. Introduction

Law and justice are fundamental pre-requisites and building blocks of every society, dating back to the early time of the evolution of human culture and, the emerging and essential need to define relationships, protect legitimate interests and respect individual and group rights in human association and interactions. In spite of modern forces of change, the traditional laws and its praxis of ensuring justice are still prevalent in modern time. Observably, the traditional legal system was the only and functional means of ensuring social order, before colonialism. The traditional system was only weakened by the colonial political organization and institutions, but it did not fizzle out of the people's culture and value system. Legal luminaries like

Nweje (1975) had long noted the shortcomings of colonial imposed laws and advocated for indigenization of the modern jurisprudence to be in tandem with the different Nigerian cultures and life style.

From ethnographic data, blended in qualitative analysis, the paper brings to limelight the structural properties of the Etche laws and mechanisms of justice, substantially rooted on the fabric of customary principles and values. Etche is one of the main ethnic groups in the Niger Delta region of Nigeria. The culture area is predominantly composed of rural and agrarian communities. The essay finds some gleanings of alignment between Emile Durkheim's (1858-1917), theory of mechanical solidarity. The rest of the essay is host to the structural bifurcation and features of the legal system, as well as the corollaries – institutions and praxis of operational frames and mechanisms for justice.

3. Theoretical Framework

Against the backdrop of the structure and operational frame of Etche traditional laws and justice, it is worthwhile to relate the analysis to Emile Durkheim's theory of collective conscience. The pattern of Etche traditional laws and justice system operate within the fabrics of Durkheimian mechanical solidarity framework, (Durkheim 1964).

As obtainable in Etche, Durkheim conceives the society as a make-up of ritual patterns which are sustained by emotion driven repetition of human interactions. The impulse of collective conscience develop to the consciousness of solidarity, from the profundity of common emotional feelings shared by members. The commitment to sustain group belongingness and moral duty is the underlying principle of association and interaction in the community. Propriety or otherwise in life are determined by the feeling to belong to the community. Therefore, collective consciousness is different from individual consciousness, even though it is realizable through them, (Durkheim, in Ritzer 2008:79). Group size does not diminish the efficacy of collective conscience. It is an intrinsic feeling, not removable. The force of collective conscience of a group is understood by the outcry for penalties against violation of its rubrics, norms, substantive parts and essence.

The fabrics of collective conscience looms large in the traditional law and systems of justice. Although Durkheim discussed the concept as pattern in the 'old societies', but the modern configuration and embrace still looms large as dynamics and mechanism of mechanical solidarity underpinnings. The laws possess charactersitics which are alignable to Durkheim's variable of simple society held together by hemogenous cultural patterns and values, orally configured to include the supernatural. In other words, the traditional laws culminate into a conflation of religion and tradition. This also reinforce the role which Durkheim observed that religion play in moral consciousness and conformity to norms and order, (see Collins and Makowsky 2010:100-104).

3. Conceptual Bifurcation of Law and Social Order Rubrics

Definite and all acceptable definition of law is problematic because of Adamson (1979:18), described the situation as “the quest for the Holy Grail”. However, law is a normative science, which embrace all rubrics and rules of conduct in the social web, with its strands immersed into the fabrics of culture, (Kuper and Kuper 1965:4).

In the conception of this essay, law is conceived as the institution meant for the establishment and maintenance of social order and redress. Law defines relationships in the society. positing actions and activities permitted and, those at the contrary, as well as the consequences of flouting them. In other words, law is the delimitation of the interest of different persons, (Korkumor 1968:52). The underlying essence is to ensure the simultaneous and harmonious integration of the complex nature of the society. the above is the substance and essence of law – *Iwu* in Etche traditional society.

In the traditional epistemology, laws and norms are conceived to exist in two forms – divine and human laws. However, both law and morality are intertwined in the people’s prescriptive culture. Divine laws and norms are not traceable to any human legislative body or authority. They are conceived as supernatural decrees, possibly handed down to ancestors, in the pre-historic time. Divine laws include homicide, incest, adultery, stealing, violation of ancestral rites and duties to deities, violation of burial rites, sexual intercourse in the bush. The idea of divine content of these laws and normative prescriptions is underscored by Oputa (1975:5), as he notes the divine thrust of the Ten Commandments.

There are yet other restrictions founded on the people’s custom. These are taboos, (see, Awolalu J. and Dopamu, 1979:211-214; Quarcoopome 1987:169-172). The most outstanding among the people are violation and desecration of sacred days, violent destruction of cooking utensils (violating their sanctity), grievously running or throwing things into shrines and, angrily soliciting for the wrath of the deity against another person. Others are violating laws and norms concerning totemic animals, objects, secret destruction and removal of authentic farmland boundary marks and symbols, fighting in the farm, sorcery and poisoning, malicious killing of domestic animals and planted crops etc.

Flouting of divine law is believed to affect supernatural entities and consequently attract divine wrath. Such breach not only bring about divine punishment on the offender, but in some cases it is indiscriminately extended to the entire kin group of the deviant. Violation of divine law require expensive propitiation, restitution and appeasement sacrifices. Divine law is symbolic of the peoples’ ontology.

Human laws imply those norms, rules and regulations of life that are traceable to a particular traditional legislative body, authority, or group. This category of laws are enacted for the common good of the society. Sometimes, they are formulated as a result of rising social-ills, and for contingent

purposes. This is why they are easily mutable, unlike divine laws. Although, there is no demarcation between the religious, and the secular in the people's worldview, it would still be rightly said, at least for the interest of this study, that in the people's jurisprudence those types of law, ethical norms and, prescriptions relating to economic, social and political life of the people are under this group. Some of the statutory human laws and norms are against village and community betrayal, on inheritance and jural rights, marriage, public utility, on communal resources and, levies for project and contingencies, etc. Flouting of such laws in most cases do not bring about corporate punishment, unlike breaking divine laws. The bulk of the penalty for breaking the laws is borne by the culprit alone. Breach of human laws do not require sacrifice or ritual for appeasement or cleansing. Instead, they attract fines, apologies, dissociation, and discrimination. Human laws only aim at protecting group interest. They are not binding on non-members. But to some extent, subject to observance by non-members concerned or interested in the activities of the particular group.

There are also group laws, such as in association. In all cases, human laws must be devoid of contrary implications to the common good of the kindred, village or community of its existence. Nevertheless, group (association's law) form important basis for settling dispute between members. In some cases, group's law prove more effective than the general human laws, in conflict resolution. Association or group's law also complement the efficiency of its communal paradigm and categories in the maintenance of social order among the people.

4. Intrinsic and Operational Structure of Traditional Laws

4.1 Ontological Foundation

Etche jurisprudence is oriented in the people's ontology. The people believe that they exist in the context of many active and interacting forces in the world. Order, good life, felicity and fortune are proportionate to the degree of harmony with these forces, as well as the level of peace in the communal structure of life. There is the belief that the world is a whole, with the spiritual and human forces inseparably joined. This is the foundation of the people's epistemological law, norms and social order. In other words, the jurisprudence is metaphysically inclined. Breach of the laws and normative standards, especially those in the divine category disrupt the ontological stability, and *ipso facto*, the appeasement sacrifice that follow such violation is aimed at restoring the disorder and aberration. In sum, laws and norms function to maintain harmonious relationship, and peaceful interaction between the web of forces in the people's cosmology. As a result, the divine and human laws interact and complement each other. The religious content is a seemingly driving force in this system of jurisprudence, as noted in the Durkheimian analysis of the morphology of societies bonded by medieval solidarity. The

vital relationship between religion and jurisprudence in the annals of history, is further vivified by Lloyd (1991: 47-48).

4.2 *Interrelationship of Law and Morality*

There is no clear demarcation between law and morality amongst the people, as well as in some other traditional African societies. Every act, either covertly or overtly deemed unwholesome in the society is sanctioned. Both morality and religion, intersect and are inseparable. Any irreligious act is conceived immoral, and vice-versa. Therefore, any ordinance, be it divine or human, inimical to the normal functioning of religion will definitely lose the backing of the ancestors and other members of the community, hence it is contrary to tradition. Human legislations are therefore, carefully examined, and certified to be free from any contrary interpretation or implication on morality and religion before their acceptance and enforcement. Any rule or legislation contrary to religion and traditional moral standards is unacceptable – laws and norms must be seen as morally adequate (Okafor, 1988:50). This character of Etche jurisprudence is underscored, and as also operative in other societies by Lloyd (1991:53-64)

4.3 *Oral Traditions*

Law and ethical norms are transmitted by oral tradition. This is from ancestors, and handed down from one generation to another. They are not documented (see Okere, 1988). Rather, they operate on the people's fixed beliefs and tradition. The fundamental conviction of the people facilitate the knowledge of what is legal or illegal, moral or immoral. In the traditional jurisprudence, an illegal act is perceived as 'stinking', profoundly felt, and abhorred. The wisdom of the elders and other religious functionaries serve as 'reference resources', where there is doubt or confusion in the legal system and interpretative epistemology, especially, for cases at hand.

4.4 *Non-Institutionalized Sanctions*

There is no organized, and defined sanctions. The nature of sanction applicable in a given situation varies from one community to another. Some parts of sanctions to a law are defined, but not with institutionalized penal codes. For instance, in the breach of any of the divine laws, the propitiatory and restitutionary sacrifices and rituals of cleansing requirements are sacrosanct in any given situation and place, but other associated punishment and fines are not defined.

4.5 *Latent Mechanism of Enforcement*

The idea of law enforcement agents is virtually unknown in Etche traditional society. It is more of the fear of reproach from fellow humans (kins), and divine disfavour; ostracism, misfortune, sickness and death, which make people observe laws and ethical prescriptions. Numerous traditional religious observances and festivities colour the entire life of the people. Consequently, there is frequent collective participation in the episodes and cyclical observances. This, in turn aligns peoples' conduct to vivaciousness

toward social order and stability of the ontological balance, at all time. This latent force of enforcement equates with the mechanical solidarity framework of Emile Durkheim, (see Ritzer 2008: 96-98). It is the thrust of homogenous association and inter personal relations which Durkheim identifies as a somewhat buffer against deviance. The credence of this intrinsic property is seeming in Husserl's idea of the *Lebenswelt* – world of commonsense (see Nworuka 2009: 32-34, Ritzer 2008: 218).

The individual is believed to be in a wheel of interacting forces. The most important thing in ones action is not as it effects his person, but the spiritual republic and ontological balance, outside of which he is nothing better than a planet of its orbit, hence meaningless (Onyewuenyi 1978:252). Since the normative principles and values of the traditional society are inseparable from religion, it sustains conformity to the whole tradition of the ancestors. The promotion of legality and ethical standard is seriously emphasized. Conversely, flouting of laws, and act of immorality are conscientiously discouraged. The individual belong to his group (community) in very practical sense, and profound self fulfillment endeavours are found in co-operation with the group. To be cut adrift from ones group, such as in the sanction of ostracism is like a living death that is reminiscence of outlawry in feudal England, (Onyewuenyi, 1978:252). The people also believe in the conformity enforcement potency of supernatural entities, believed to be guardians of morality and social order. Deities function as intermediaries between God and humans. They detect and punish deviants accordingly, especially on matters relating to divine laws., (see Owete and Iheanacho,2009).

4.6 Alignment with Natural Law

Etche jurisprudence and ethical codes are in accord with the underlying principles of natural law, but opposed by legal positivism. Natural law is conceived by its proponents as essentially man's own (ethical), participation in the universal order. Natural law thought, *ipso facto*, Etche jurisprudence considers ethical values as essential for social order and justice. No positive law could be morally binding if it contradicts the natural law, (Iwe 1979:15-159).

Conversely, legal positivism emphasizes the idea and attitude of mind which conceives, as valid laws, only such enforceable codes formally enacted by the appropriate official authority or body. Here, only statute laws are real laws, hence they have been formally posited by the authority. For legal positivism, any law that do not pass through this legislative process is not a real law. Thus, the ideas and focus of legal positivism are in contradistinction with the people's traditional jurisprudence. Apparently, Etche traditional jurisprudence is bereft of this feature – positivism is one major feature of the colonial imposed legal system, which distorted the traditional system (Ihediwa 2009). This deficiency always bring the traditional

laws and judicial procedures into conflict with modern legal and judicial apparatus.

5. The Concept and Institutions of Justice

Justice is an ancient concept which seems to have received adequate thought and discussion. Yet, it is modern and topical, continually drawing inevitable attention in the ever-changing society (Graveson 1977:55). Justice is a social necessity for harmony and order. The rubric through which every citizen is assured, and given the things that are, and supposed to be his. To borrow the words of Hon. Justice Oputa, “the main element of discipline in any society is justice and equity”, (Oputa, 1986:1).

Justice is an ethical virtue which manifest one’s level of integrity, sincerity and fairness in life. It is aimed at establishing righteous and impartial deal for all and sundry, in every endeavour. Although, there is no clear demarcation between types of justice in traditional society, we however, try to focus at justice in the judicial systems of the people.

5.1 The Role of the Family in Dispensing Justice

The family is the basic unit of the society, with fundamental socialization and integration functions for the individual and the group. In line with this, the institution also constitute the prime judicial institution and setting. The dispute resolution ingenuity and efficacy of the family is founded on the fabrics and spirit of brotherhood and the network of lineage ties. The dispute resolution setting include all members of the extended family. The family’s dispute resolution strategies are founded on and, driven by the jural right and responsibilities of members. Other resolutions take premise from the jural rights. The family use persuasion and sanction to ensure conformity of disputants to their verdict.

5.2 The Kin Group in the Dispense of Justice and Maintenance of Social Order

The judicial setting of the kin group is normally at the kindred’s ancestral shrine – *Ndiche*, located at the ancestral hall of the eldest of the group. This body is convoked through a complainant’s distribution of tender-palm fronds – *inye omu*, to other kinsmen. Distribution of tender palm-fronds, *omu* is a symbol of peace among the people. The assembly can also be summoned by the eldest member of the kindred, on receipt of serious report of aberration, especially on divine laws and, for propitiatory rituals. Of course, he must be in such assembly for its acceptability in the ontological balance. The elder also presides over the judicial sitting and the privy council that decides the verdict of the adjudication. There is also strong and profound emphasis on kin ship blood tie and solidarity, as rallying point for judicial decisions and dispute resolution. Persuasion is also high, in the kin group’s judicial process and arbitration.

5.3 Community Council and Judicial Assembly

The judicial setting is an assembly of indigenes and legitimate members of a community. There are two ways of convoking the judicial assembly. The first is through the beating of a special drum, *ekwe-ukwu*. The beating of this drum signals call for a crucial meeting. The drum-signal is only used in a state of emergency. Summon through drum-signal supersedes every other activity, within the community. The emergency cases that require this type of swift response are bad omen, heinous and evil act, breaking of totemic norm, kidnap, homicide, incest and war, to mention but a few. Secondly, one can also summon the community council for private wrong and breach of right by another or group of peoples. The individual interest summons is through the distribution of tender- palm fronds – *omu* to the people. The *omu* serves as an official symbol of summons, both to the accused and the community.

The community judicial assemble is presided over by the chiefs, elders, revered priests, diviners and illustrious sons of the community. The council is the highest human law making body and dispute resolution in all Etche communities. It is the last arbitration and judicial institution, except intervention comes from outside the community. The community council has the authority for approval or disapproval of capital punishments, banishment or exile, ostracism or outlawry, ridiculous humiliation and divorce. The council also serve as appellant arbitration body – it reviews decisions taken at the family and kindred settings.

5.4 The *Umu-nwa-nwa* in Judicial Roles

The *Umu-nwa-nwa* is a formation of grandchildren – children of daughters married outside the kin and community groups. The body is another group of people whose judicial role is not only essential but religiously underpinned. They travel to their maternal homes to dispense justice and make peace. This judicial forum is only convened during protracted conflict and disputes, which have proved all other internal judicial settings and arbitration efforts ineffective.

The *Umu-nwa-nwa* call for an inviolable state of calmness and truce. This is through the pinning of tender palm fronds (*ruma omu*), in the affected compound, family or kindred of the disputing parties. It is a very effective and immediate peace-making group. From the date of the declaration of a truce in conflict, calmness usually prevail. Unless the verdict of their arbitration sitting is unacceptable. In other words, all hostilities are temporarily halted to allow the *Umu-nwa-nwa* investigate and adjudicate. They explore their mothers' 'brain store of their maternal kins' traditional knowledge and wisdom to probe into the issues at stake, to establish the truth, justice and peace.

6. Common Mechanism in Judicial Settings

6.1 Invocation of ancestors

The ancestors are still heads and active living-dead members of their families, kindreds and communities. They show continued interest in the

affairs of the people, with profound interest. They are invoked to inflict punishment on recalcitrant members, especially culprits of heinous and divine law violation. This is done through libation – pouring out the dreg of wine from a cup by the ancestral priest, with the accompanying petitions. This ritual is most implored in mysterious crimes or to ensure honesty in adjudication of cases. As spiritual arbiters, the ancestors reveal concealed wrongs through abnormal signs - *eshi-shi* and *iwa-aja*. Such punishments as misfortune, illness, mysterious experiences and death are used by the ancestors in varying degrees and cases to punish culprits. All the groups and judicial formations invoke and solicit the intervention and guidance of ancestors in effort to ensure justice and peace. They are believed to be custodians of morality and order (Mbiti, 1969). Women and the *Umu-nwa-nwa* do not have traditional authority to invoke the ancestors, hence the elders help them to invoke the ancestors for their justice and social order course.

6.2 *Divination*: This is the art of obtaining information about an unknown or mysterious event, or to seek clarity on obscure situation and aberrations, from supernatural forces. Divination is spiritual manipulation, normally by aid of symbols and occult techniques. It is founded on the people's cosmic view that the world is made up of forces vested with powers. One of which is power of probing into and, knowing the meaning and essence of mysteries, especially in concealed human acts of heinous crime and sacrilege. The medium of divination can unfold both spiritual and human action and plans.

In other words, divination oracle is believed to possess the potency of providing answers to mysterious actions that are beyond people's knowledge and, to conflicting claims that are knotty to the people's wisdom to decipher the truth. The Jewish *Urim* and *Thummin* ... (Exodus 28:30, Leviticus 8:8) underscore this device – the Divine can speak and does speak through what he has created, (Isokun 1990:186). Among the people divination is a good medium to identify culprits of abomination or to prove accidental homicide. Art of divination is a popular mechanism for validating and authenticating claims in all dispute resolution formations. If agreement yet, elude the parties, oath taking is the last resort.

6.3 *Oath-Taking*: Oath is a statement or assertion made under penalty of divine retribution for intentional falsity. Oath, *idu ishi* is the solicitation of divine power to discern truth from wrong, by infliction of punishment. It is “a solemn declaration of the truth involving the pledging of one's conscience or life to the cause of the truth so affirmed”, (Isokun 1990:85). This is because divinities are believed to be fore-seeing and impartial.

The conception about oath is that death will befall any one who swears falsely. The invocation of divine entities to probe into human affairs is used to prove the veracity of one's claim. A culprit or criminal who tell lies to cheat and claim what is not his/hers is in oath, made to face death penalty.

However, the oath petition must only last within the agreed time frame, normally a year.

Among the powerful deities preferred for taking of oath in Etche are; the *Ala-orwu* and *Ogbuowowo* of *Orwu*, the *Ebede – Nwaokwa* of Umuaturu, *Amadioha* of Ozuzu, *Ushi* of Akpoku, to mention but a few. Onunwa (1991), underscore the potency of oath taking in dispute resolution, with the example of *Amadioha Ozuzu* as example of chief justice.

However, there is the minimal oath which is not before a deity. This is with objects. The objects are determined by the plaintiff or the judicial body. In most cases they are made to reflect the oath taker's profession. For instance, hunters are made to swear by matchet and gun, women by kitchen utensils, traders by cross-roads, elders by the ancestral shrine, etc. Oath is still a very popular and potent device for justice and maintenance of social order in modern Etche.

6.4 Privy Council and Ritual of Honesty

The traditional judicial formations and settings use privy council. The council decide the verdict of a case, based on remote and immediate facts, reports, investigations and divine revelation where applicable. There is also the performance of rituals of honesty before trying a case. This may take the form of invoking the gods and ancestors through libation, to bind the judicial assembly in honesty. Such ritual is also taken at privy councils. The ritual may even be used in the form of oath of secrecy, to protect those who will reveal the truth of the matter from being known by the disputants. Conversely, those who would betray the privy council are also ritually deceived to face the wrath of ancestors and the gods. These mechanisms, mediums and devices form the building block mechanism of Etche judicial procedure for dispensing justice, promoting peace and social order. They are used by all the judicial institutions and formations at varying stages and degrees, depending on the magnitude and intricacy of the case at stake.

7. Conclusion

In spite of the predominance and influence of modern institutions of jurisprudence the traditional paradigm still looms large and thrive in African cultures. From analysis of the Etche example, traditional jurisprudence and means of social order are functional. This is underscored by the prevalence of traditional laws and resort to the system of justice. The system fundamentally express cultural values and traditional religious fabrics. In the main, it is meaningful, effective and acceptable as veritable alternative to the modern orthodox systems of justice.

However, social change and complex nature of the society make it important for the articulation of policy and operation framework for the procedures to be streamlined. Such framework will harmonize the areas of

conflict with the modern system and law enforcement apparatus of government. In all, people want ‘real justice’, profound peace and order.

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